EMPLOYMENT TRIBUNALS

Claimant: Ms M Payne

Respondent: Indigo Service Solutions Limited

Heard at: London South (by video)

On: 23 and 24 April 2024 (evidence), 15 July 2024 (submissions & deliberations), and 19 July 2024 (deliberations)

Before: Employment Judge Evans
Mr Hutchings
Mr Townsend

Representation
Claimant: Miss Robinson, counsel
Respondent: Mr Brown, counsel

RESERVED JUDGMENT

The Tribunal's unanimous judgment is that:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The complaint of direct disability discrimination is not well-founded and is dismissed.

3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

REASONS

Introduction

1. The claimant's employment with the respondent began on 10 April 2017 and ended on 19 November 2021.

2. Early conciliation began on 11 February 2022 and ended on 14 February 2022. The claimant presented their claim on 14 March 2022. It included complaints of unfair dismissal, disability discrimination, and of failures to pay a redundancy payment, notice pay and holiday pay.

3. The claim came before Tribunal on 23 April 2024. The parties had agreed a bundle of 294 pages prior to the Hearing. All references to page numbers are to the pagination of the bundle unless otherwise stated. The respondent provided an opening note. Both parties provided written closing submissions and the claimant provided a reply to the respondent's closing submissions.

4. The claimant gave evidence by reference to a witness statement. So too did Ms Gratton (the Chief Finance Officer of the respondent), Mr Jenkins (the Group Operations Director of the respondent) and Ms Gibson (an HR Consultant). Each of the witnesses was cross-examined.

5. The final hearing had been listed for three days, but that was reduced to two days shortly before it began because no judge was available for a three-day hearing. We therefore heard the evidence of the witnesses on 23 and 24 April 2024. The final hearing then resumed on 15 July 2024 to hear the parties' submissions, the respondent having declined to deal with submissions in writing, as was its right. The Tribunal deliberated for the remainder of 15 July 2024. It concluded its deliberations on 19 July 2024, and this is its reserved decision.

6. The claimant had a stroke in 2021. There was a discussion at the beginning of the final hearing about adjustments which might be necessary to enable her to participate fully in the hearing. She explained that she might need additional time to answer questions, that it might be necessary to rephrase questions, and that she might need assistance from her husband to go to specific pages in the bundle. She said that it would help if documents to which she was being referred when asked questions were read aloud, rather than her reading them to herself. She also requested breaks every 40 minutes when she was giving evidence. All these adjustments were made.

The issues

7. Prior to the final hearing the claimant had withdrawn her complaint in relation to holiday pay and that had been dismissed (page 293). At the beginning of the final hearing she withdrew her complaints of breach of contract and unauthorised deductions from wages, and a judgment dated 30 April 2024 dismissing these complaints has been sent to the parties previously. Further the issue of disability had been decided in the claimant's favour at a preliminary hearing.

8. The remaining issues arising in this case were set out as follows in the case management orders of 22 March 2023 (page 43). The parties confirmed at the beginning of the hearing that those were indeed the issues that we should decide.

9. Having heard representations from the parties, the Tribunal indicated on 23 April 2024 that it would deal with issues of Polkey (i.e. issue 3 below) at the same time as remedy (if that became relevant).

Unfair dismissal

1) What was the reason for dismissal? The company says that it was on grounds of redundancy.

2) If so, did the company act reasonably in all the circumstances? The Tribunal will usually decide, in particular, whether:

    a. The company adequately warned and consulted her;

    b. The company adopted a reasonable selection decision, including its approach to a selection pool; and

    c. The company took reasonable steps to find her suitable alternative employment.

    The burden of proof is neutral here but Mrs Payne says that her dismissal was unfair because the real reason was her disability/absence from work.

    In discussion at the beginning of the Hearing, Miss Robinson explained that the claimant would also argue that the dismissal was unfair because:

    a. The consultation period had been too short;

    b. The pool for selection had been unfair – other directors should have been within the pool and/or other members of the team to whom the work she did had gone;

    c. There had been no attempt to look for alternative employment for her.

3) If the procedure was unfair, what difference would a fair procedure have made to the outcome?

Disability discrimination

Direct discrimination on grounds of disability

4) Did the company, in dismissing her, treat her less favourably than it treated or would have treated someone else in the same circumstances apart from her disability. That includes someone with the same absence record and reasons for absence.

Discrimination arising from disability

5) This involves unfavourable treatment because of something arising in consequence of Mrs Payne's disability.

6) Firstly, can the company show that it did not know that Mrs Payne had a disability, and could not reasonably have been expected to know?

7) If not, what unfavourable treatment did she receive? She relies on her dismissal.

8) Can Mrs Payne prove that the company treated her unfavourably because of the "something arising" in consequence of her disability, namely her absence from work.

9) If so, the company do not seek to argue that the dismissal was justified, i.e. that this treatment was a proportionate means of achieving a legitimate aim. They deny that this was the reason for her dismissal.

Remedy

10) If Mrs Payne wins her claim for unfair dismissal she may be entitled to

    a. reinstatement or re-engagement;

    b. compensation for loss of earnings; and/or

    c. an uplift in respect of the company's alleged failure to follow the ACAS Code in relation to her dismissal or in relation to her grievance.

11) If she wins her discrimination claim she may also be entitled to

    a. compensation for injury to feelings;

    b. interest; and/or

    c. a declaration or recommendation.

The Law

Unfair dismissal

10. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

11. Section 98(1) of the 1996 Act provides that, when a Tribunal has to determine whether a dismissal is fair or unfair, it is for the employer to show the reason for the dismissal and that such reason is a potentially fair reason because it falls within section 98(1)(b) or section 98(2). The burden of proof to show the reason and that it was a potentially fair reason is on the employer. A reason for dismissal is a set of facts known to or beliefs held by the employer which cause it to dismiss the employee. Redundancy is a potentially fair reason.

12. Redundancy is defined in section 139 of the 1996 Act as follows:

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.

13. When the reason for dismissal is redundancy, the Tribunal should have regard to the standards of behaviour set out by the Employment Appeal Tribunal in Williams and others v Compair Maxam Ltd 1982 ICR 156 in deciding whether the dismissal is fair under section 98(4):

    13.1. Employees should be warned and consulted about the redundancy;

    13.2. The selection criteria should so far as possible be objectively chosen;

    13.3. The selection criteria should be fairly applied;

    13.4. If there is a union, its view should be sought;

    13.5. The employer should look to see if there is alternative work for the employees.

14. The extent to which any one or more of these principles applies depends on the circumstances of the particular case and a failure to adopt one or more of them will not necessarily lead to a finding of unfair dismissal. Further, the standards set out in Williams should not be treated as a statute or a checklist.

Consultation

15. LJ Glidewell provided guidance in relation to what constituted fair consultation in R v British Coal Corporation and Secretary of State for Trade and Industry ex part Price [1994] IRLR 72. Fair consultation means consultation when the proposals

are still at a formative stage, adequate information, adequate time in which to respond, and conscientious consideration by the employer of the response.

16. Where an employee has no representative, good industrial relations practice requires consultation with the employee except in special circumstances. Indeed, a dismissal may be unfair for a lack of consultation with individual employees even when their union has been consulted. When the consultation is with the individual employee rather than with collective representatives, the focus will be more on the circumstances affecting the individual's case and in particular the chances of alternative employment. However, employees should have the opportunity to contest their selection whether themselves or through their trade union.

Pool for selection

17. The Tribunal must decide whether the employer's choice of pool was within the range of reasonable responses. It should not substitute its own view as to what the pool should have been. The question is whether the pool adopted was one which a reasonable employer could have adopted.

18. Consequently, the question of the pool is primarily a matter for the employer, and it will be difficult (but not impossible) for the employee to challenge its choice of pool provided that the employer genuinely applies its mind to the issue. However, the Tribunal is entitled to consider with care and scrutinise carefully the reasoning of the employer to determine if it had genuinely applied its mind (Capita Hartshead Ltd v Byard [2012] ICR 1256).

19. If the employer fails to consider the applicable pool, that may make the dismissal unfair. This sometimes occurs when one job is redundant, and the employer simply assumes that it will make the current holder redundant (see Fulcrum Pharma (Europe) Ltd v Bonassera (UKEAT/0198/10/DM)(unreported).

20. In Fulcrum Pharma, the EAT referred to and agreed with guidance given by the EAT in Lionel Leventhal Ltd v North [2005] All ER (D) 82 on the factors which an employer should take into account when deciding whether more junior employees should be included in the pool. These include: (i) whether or not there is a vacancy; (ii) how different the two jobs are; (iii) the difference in remuneration between them; (iv) the relative length of service of the two employees; and (v) the qualifications of the employee in danger of redundancy. However, in Wrexham Golf Co Ltd v Ingham [2012] All ER(D) 209 the EAT observed that there will be cases where it was reasonable for the employer to focus upon a single employee without developing or even considering the development of a pool ([25] of the judgment).

21. Finally, in Valimulla v Al-Khair Foundation [2023] EAT 131, Tucker J concluded at [38] that the absence of meaningful consultation about the key issue of why the claimant was placed in a pool of one, despite other staff performing the same

role, albeit at different locations meant the dismissal was in that case procedurally unfair.

Search for alternative employment and bumping

22. An employer must look for alternative employment for an employee who is at risk of redundancy, but the obligation is to make reasonable efforts, not to make every possible effort. This will usually include given existing employees priority over external candidates if there is a vacancy which is suitable (Gwynedd Council v Barratt & others [2021] IRLR 1028). The potentially redundant employee may need to be offered an available vacancy even if it is at a lower salary or has lower status (Avonmouth Construction Co Ltd v Shipway [1979] IRLR 14).

23. It may be arguable that an employer should consider dismissing another employee, perhaps one with less service, so the employee at risk of redundancy may have their job (Thomas and Betts Manufacturing Ltd v Harding [1980] IRLR 255). This is "bumping", but the Court of Appeal has suggested that it is not compulsory for an employer to consider whether to "bump" another employee (Samuels v University of Creative Arts [2012] All ER(D) 213).

Timing etc

24. The fairness of a redundancy dismissal should be considered not just as of the date when notice is given but also taking into account events up to the date dismissal takes effect. A suitable vacancy arising during the noticed period should be offered to the otherwise redundant employee.

Disability discrimination

25. Section 39(2) of the Equality Act 2010 ("the Equality Act") provides that an employer must not discriminate against an employee by (amongst other things) dismissing them.

26. Section 6 of the Equality Act provides that a person ("P") has a disability if:

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

27. An effect is "substantial" if it is "more than minor or trivial" (section 212 of the Equality Act). There are supplementary provisions in part 1 of Schedule 1 to the Equality Act which deals with matters including the following:

2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

Direct disability discrimination

28. One of the forms of discrimination prohibited by the Equality Act is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1) of the Equality Act).

29. The question, therefore, is whether A treated B less favourably than A treated or would treat an actual or hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case disability . On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the Equality Act). In a claim of direct disability discrimination, the circumstances relating to a case include a person's abilities (section 23(2)(a) of the Equality Act).

30. Deciding whether there has been direct discrimination is a comparative exercise. In many cases the claimant does not rely on a comparison between their treatment and that of another person. Rather they rely on other types of evidence from which it is contended that an inference can be drawn. The comparison is with how the claimant would have been treated if they had had some other protected characteristic.

31. In other cases, the claimant compares their treatment with that of one or more other people. Such a comparison may be relevant in two ways. First, if there are no material differences between the circumstances of the claimant and the person with whom the comparison is made, this may provide significant evidence that there could have been discrimination. The person with whom the comparison is made in such cases is often referred to as an "actual comparator".

32. Secondly, where the circumstances of the person with whom the comparison is made are similar, but not sufficiently alike for the person to be an "actual comparator", the treatment of that person may provide evidence that supports the drawing of an inference of discrimination, sometimes by helping to consider how a hypothetical person whose circumstances did not materially differ from those of

the claimant would have been treated – such a hypothetical person usually being referred to as a "hypothetical comparator".

Discrimination arising from disability

33. Under section 15(1) of the Equality Act, a person (A) discriminates against a disabled person (B) if "A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim".

34. The question of whether something is "because of" something arising in consequence of the disability requires the Tribunal to consider whether the something arising had a "significant influence" on the outcome.

35. Mrs Justice Simler, then President of the EAT, considered this question in Charlesworth v Dransfields Engineering Services Ltd UKEAT/0197/16/JOJ. The facts of the case were not entirely dissimilar to those in this case. We set out her conclusions in relation to the question of causation for the purposes of the discrimination arising from disability claim as they illustrate the task that we must undertake in this case:

> *The Tribunal accepted that there was a link between the Claimant's absence through illness and the fact that he was dismissed, the link being that his absence afforded the Respondent an opportunity to observe the way in which the work was dealt with and threw into sharp relief their ability to manage without anybody fulfilling his role of Rotherham Branch Manager. Nevertheless, the Tribunal went on to say that was not the same as saying that the Claimant was dismissed because of his absence. This is a case where on the facts found by this Tribunal it felt able to draw a distinction between the context within which the events occurred and those matters that were causative. No doubt there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause. But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. Here, the Tribunal concluded that the Claimant's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the Respondent was able to identify something it may very well have identified in other ways and in other circumstances, namely that the particular post was capable of being deleted with its responsibilities absorbed by others. That conclusion led the Tribunal to hold that what caused the Claimant's dismissal on these particular facts was the view that the Respondent could manage without him and that the absence formed part of the context only and was not an operative cause. In my judgment, that was a conclusion open to the Tribunal, applying the statutory test, and reached without error of law.*

The question of knowledge

36. Section 15(2) provides that there will be no such discrimination if "A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

37. The words "could not reasonably be expected to know" leave scope for a finding that an employer had imputed or constructive knowledge of disability. Whether an employer had such knowledge is a question of fact for the Tribunal to decide. It does not matter if there is no formal diagnosis if there are other circumstances from which a long term and substantial adverse effect can be deduced.

38. The Employment Appeal Tribunal considered the question of knowledge in A Ltd v Z UKEAT/0273/18:

> *23. In determining whether the employer had requisite knowledge for section 15(2) purposes, the following principles are uncontroversial between the parties in this appeal:*
>
> *(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see York City Council v Grosset [2018] ICR 1492 CA at paragraph 39.*
>
> *(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of section 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd UKEAT/0297/14 at paragraph 5, per Langstaff P, and also see Pnaiser v NHS England & Anor [2016] IRLR 170 EAT at paragraph 69 per Simler J.*
>
> *(3) The question of reasonableness is one of fact and evaluation, see Donelien v Liberata UK Ltd [2018] IRLR 535 CA at paragraph 27; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.*
>
> *(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for Equality Act purposes (see Herry v Dudley Metropolitan Council [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more*

difficult to know whether it may well last for more than 12 months, if it is not [already done so]", per Langstaff P in Donelien EAT at paragraph 31.

(5) The approach adopted to answering the question thus posed by section 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

(7) Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code.

Burden of proof

39. Section 136 of the Equality Act provides for a shifting burden of proof:

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

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

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

40. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [201] ICR 1263.

41. There is therefore a two-stage process to the drawing of inferences of direct discrimination. In the first place, the claimant must prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of discrimination against the complainant. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question.

42. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

43. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

44. In deciding whether there is enough to shift the burden of proof to the respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different as those of the claimant having regard to section 23 of the Equality Act. Evidence of the treatment of a person whose circumstances materially differ to those of the claimant is inherently less persuasive than that of a person whose circumstances do not materially differ. If anything, more is required to shift the burden of proof when there is an actual comparator, it will be less than would be the case if a claimant compares their treatment with a person whose circumstances are similar, but materially different, so that there is not an actual comparator.

45. The way in which the shifting burden of proof provision will apply depends upon the provision concerned In a complaint of discrimination arising from disability, the claimant will need to establish that they have been treated unfavourably and will have to prove that the something upon which they rely arises in consequence of their disability. They will also need to adduce some evidence to suggest that the unfavourable treatment could be because of the something arising.

Submissions

46. The parties both provided written submissions (including, in the case of the claimant, a reply to the respondent's written submissions) for which we are grateful. Mr Brown also made oral submissions on Monday, 15 July 2024 but Miss Robinson chose not to do so. We do not set the parties' submissions out in any detail here. However, they may reasonably be summarised briefly as follows.

Respondent's submissions

47. The respondent did not have the necessary knowledge of the claimant's disability, given the limited medical evidence and what the claimant was saying to the respondent at the time.

48. The reason for the claimant's dismissal was clearly redundancy: she had agreed in cross examination that her main role was to deal with telephone complaints or issues and the need for such work had reduced significantly following the introduction of a new telephone system. It was clear that the respondent genuinely believed that there was a redundancy situation.

49. The respondent had followed a fair redundancy process and, if the consultation had been limited, this was because the claimant had refused to engage in it in a meaningful way. Her position had been that the respondent had already made the decision which had been wrong.

50. A selection pool of one was within the band of reasonable responses given that the claimant was the only Operations Director. It was clearly not the case that Mr Jenkins and or Mrs Gratton should have been included in the selection pool given the differences in their role and in their seniority. Equally, employees from the payroll and accounts team were paid significantly less than the claimant and operated at a more junior level. Further, Ms Ballard was paid significantly less than the claimant and performed duties that the claimant would have been unable to perform.

51. The Tribunal should accept the respondent's evidence that there were no suitable alternative roles. Overall, therefore, the decision to dismiss the claimant was fair and within the range of reasonable responses.

52. So far as the direct discrimination claim was concerned, the claimant would have to show actual knowledge of disability. However, the simple reality was that the claimant was dismissed because the respondent genuinely believed that she was redundant. So far as the discrimination arising from complaint was concerned, the disability-related absence was not the reason for her dismissal. Her case was analogous to that of Charlesworth.

The claimant's submissions

53. The respondent had the necessary knowledge of the claimant's disability in light of the length of her absence from work, the OH Report, the discussion of reasonable adjustments and of concerns about work pressure on her return to work, and other evidence, both documentary and witness.

54. The real reason for the claimant's dismissal was her disability and/or something arising from it. This was reflected in the timing of the redundancy, the behaviour

of the respondent and its conduct towards the claimant. It was clear that the respondent had concerns that the claimant could not do her job following a stroke and/or that returning to work might cause or contribute to another stroke. The respondent had obstructed the claimant's attempts to return to work between July and November 2021 and had constantly moved the goalposts in terms of what was required before she could return.

55. The real reason was also apparent from the respondent's emphasis that it had paid her in full throughout a period of absence, rather than paying her the more limited sick pay to which she was entitled. Clearly the cost of her absence was weighing on its mind.

56. The way the meeting on 24 October was conducted suggested that the respondent was looking at exit and not resolution. So too did the introduction of Ms Gibson as an adviser around that point in time, and the lack of notes of various meetings.

57. It was implausible that there was work available for the claimant in September 2021 but that the situation had changed by November 2021.

58. Alternatively, if the reason for dismissal was redundancy, the process had been conducted too quickly, with inadequate warning, consultation or consideration of alternatives to redundancy. The approach to the pool for selection was flawed. Other employees should have bee included in it.

Findings of fact

59. These findings of fact do not of necessity refer to all of the evidence that was before the Tribunal. The Tribunal made plain at the outset that it would not necessarily read pages contained in the bundle that were not referred to in the witness statements or during the course of the Hearing.

General background findings

60. The claimant's employment began on 10 April 2017. She was initially employed as Operations Manager but subsequently her job title changed to "Operations Director" in 2020.

61. On 14 April 2021 the claimant had a stroke. She spent two weeks in West Middlesex Hospital and was then transferred to the Hillingdon Hospital Rehabilitation Unit from which she was discharged on around 17 June 2021.

62. There were discussions about the claimant returning to work between July 2021 and November 2021 which we consider in detail below. The claimant did not in fact return to work and was dismissed following a redundancy consultation process (which we consider further below) with effect from 19 November 2021.

Knowledge of disability

63. We consider first documentary evidence of the claimant's ill-health (and so potentially disability) available to the respondent prior to her dismissal.

64. First of all, there were text messages sent by Mr David Payne, the claimant's husband, after she had had the stroke to Ms Gratton. These are undated but appear to have been sent in the period mid-April to early-July 2021, when the claimant was in hospital and in the rehabilitation unit. We find that at a result of these the respondent knew that the claimant's progress following her stroke had been described as follows by Mr Payne:

    64.1. In April, that the claimant had had a stroke which had resulted in the claimant having "trouble communicating" (page 109) which a speech therapist had labelled "Aphasia" but that the claimant might be "back to normal" once pressure and bruising in the brain had gone down;

    64.2. Then, probably in April or May (page 110) that the claimant was "recovering and that her communication skills were "coming back to her all the time. Thankfully her memory appears to have been untouched";

    64.3. Then, a little later (page 112) that her communication skills were continuing to improve;

    64.4. Then, again later but within the same period (page 114), that her cognitive skills were "excellent except her speech, language and communication" but that these areas were improving;

    64.5. Then, as a result of the updates at page 115 and 116, that there had been further improvements with the result that whilst her reading skills still were not back to normal, she had "complete control of her speech communication".

65. Secondly, there was the letter dated 21 April 2021 from Chelsea and Westminster Hospital NHS foundation trust (page 120) which stated:

> *This letter is to inform you that Miss Mandy Payne is an inpatient at the West Middlesex Hospital having been admitted seriously unwell as a medical emergency on 14th April 2021.*
>
> *Miss Payne is receiving acute medical, nursing and multidisciplinary treatment and assessments.*

66. Thirdly, there were the two sick notes provided to the respondent by the claimant (pages 141 and 168). Together they covered the period 10 August to 9 December 2021. They both describe the claimant's condition as "Stroke" but say that she might be fit for work if a "phased return to work" were possible.

67. Fourthly, there was the email she sent to Mr Jenkins on 26 August 2021 (pages 144 to 145) which included links to the website www.stroke.org.uk. The relevant web pages were not included in the bundle. Mr Jenkins replied to the email on 27 August 2021 (page 144) and accepted in his oral evidence that he had looked at the links. We find (because of the words included in the links) that they provided generic information about issues affecting those who have returned to work after having had a stroke. They did not contain advice or information specific to the claimant.

68. Fifthly, there was the occupational health report dated 8 September 2021 ("the OH Report") (page 149). We note that in her oral evidence the claimant accepted that the report gave a positive impression of her ability to return to work. Under the heading "In your opinion is the employee fit for their full duties" the OH Report stated:

> *In my clinical opinion the employee is safe to carry out their full duties with the recommendations outlined under the relevant section of my report on the understanding that the employee undergoes an individual stress risk assessment before their return to work and that they inform their manager if they feel that they are unable to perform their duties safely, preferably before they do so.*

69. In fact, the focus of the OH Report is very much on what the author regarded as the need to carry out an "individual stress risk assessment". This appears to be because the claimant had suggested that the stress she had been under at work prior to having the stroke had been at least a part of the cause of it. Under the heading "In your opinion is the employee likely to have further absences due to this illness", the OH Report stated:

> *Once the workplace stressors been resolved, I would expect the employee to achieve the attendance expected of any employee. The use of an Individual Stress Risk Assessment is recommended to manage the circumstances* ***which the employee feels*** *may have contributed to their current absence from work, details of which can be found here* [website address] [emphasis added].

70. Under the heading "Is this condition likely to be considered a disability as described in the Equality Act 2010", the OH Report stated:

> *The employee's physical condition of hypertension and type 2 diabetes mellitus are both likely to have a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities without treatment at this stage, although ultimately this would be a legal and not a medical decision.*

71. Under the heading "What is the likely return date to work", the OH Report stated:

> *In my clinical opinion, the employee will be fit to resume a phased return to work programme once they have undergone an individual stress risk*

assessment with management, and while I fully accept that the availability of a phased return to work programme is a matter for an individual's employer, my advice is that they work the following hours: …

72. The section goes on to set out a phased return to work with the percentage of work increasing from 25% of contractual hours in week one to 100% in week eight.

73. The claimant also contended that the respondent was also provided with the medical records which were between pages 121 and page 140 of the bundle. The respondent's witnesses denied that these records had been provided. We prefer the evidence of Mr Jenkins in this respect and find that those medical records were not provided to the respondent prior to the claimant's dismissal. We prefer the evidence of Mr Jenkins for the following reasons:

    73.1. The claimant's evidence in relation to when the records were provided is at best vague. She says that they were provided to the respondent by her husband by being delivered by hand. She has not dated such delivery nor called her husband to give evidence in relation to it.

    73.2. The medical records were precisely the kind of documents that the respondent was in effect seeking (and certainly suggesting it had not received) by its letter of 26 August 2021 (page 143). It is unlikely that it would have requested them at that point if it had already received them.

    73.3. If the claimant had already provided her medical records to the respondent, she would have been likely to have replied accordingly to the letter of 26 August 2021, but she did not do so.

74. Turning to other relevant witness evidence, the claimant contended in her oral evidence that she had told Mr Jenkins that she was "classed as disabled" as a result of the aphasia when she had spoken to him on 28 July 2021. She accepted that she had not mentioned this in her witness statement. It was also not mentioned in the relatively detailed chronology attached to her claim form (page 16). Mr Jenkins denied that the claimant had told him this. We preferred the evidence of Mr Jenkins in this respect for the following reasons:

    74.1. We find that in the period from July 2021 onwards the claimant was seeking to present herself as able to return to work with no significant adjustments being required. She was concerned about the future of her employment. We find that in the circumstances she was unlikely to have described herself as "classed as disabled".

    74.2. This point is reflected in the terms in which she wrote to the respondent on 22 October 2021 (page 287). The respondent does not accept that it received this letter but does not dispute that it was written by the claimant on

the date shown. It sets out her opinion that there were work stress factors that led up to her having a stroke, but she then goes on to state:

> *To assist, I can advise the following:*
> *My doctor has informed me the I am at less chance of having a second stroke than someone who has not had a stroke.*
>
> *I am fully functional at home I have no problem going out shopping or out for entertainment and socialising all on my own, I am allowed and fully capable of driving, using public transport is no problem at all. I use all electrical appliances, I do my personnel banking, reading and sending letter's and emails also texts.*
>
> *Finally, I would like to say I feel confident that I can now carry out most if not all of my duties was gradually being phased back to full time, just as long as I am not overloaded with extra work again…*

74.3. Writing to the respondent in these terms in October 2021 is, we find, at least arguably inconsistent with having described herself as "classed as disabled" just three months before.

74.4. Further and separately, we find that if she had described herself as "classed as disabled" this would have been likely to have been included either in the chronology attached to the claim form or in her witness statement.

75. There was also witness evidence (oral and written) in relation to the social and professional interactions between the claimant and Mr Jenkins and Ms Gratton between July and October 2021. The significance of such interactions is that they gave Mr Jenkins and Ms Gratton an opportunity to form their own personal impressions of the effects of the stroke on the claimant. Obviously, such personal impressions are relevant to the question of knowledge.

76. Both the claimant and Ms Gratton said that the claimant continued to show some communication difficulties in relation to speech in this period. However, the evidence of Ms Gratton was that she and the claimant had been able to "chat normally" when they had met on both 8 July and 28 September 2021. Ms Gratton's evidence in relation to this point was clear.

77. In her oral evidence the claimant did not accept that they had been able to speak without difficulties, complaining that she had had difficulties hearing what was being said as a result of background noise on both occasions. She did, however, accept that they had been able to engage in a "pleasant and normal social discussion" on 8 July 2021 after they had moved tables.

78. The evidence of exact impressions made during what were to a significant degree social as well as work occasions is difficult to assess. However, overall, we find that Mr Jenkins and Ms Gratton had the impression, which was

reasonable in light of how the claimant presented herself, that although some limited speech difficulties remained the claimant's communication skills were getting back to normal. We further find that the claimant did not say anything to them to contradict this impression.

79. Bringing all of this evidence together, we find that by the date of the dismissal the respondent knew that:

79.1. The claimant had had a stroke;

79.2. The claimant had as a result of that been either in hospital or in a rehabilitation unit from 14 April to 17 June 2021;

79.3. The significant communication difficulties she had suffered initially had largely disappeared by November 2021;

79.4. The only significant adjustment she and the OH Report suggested were necessary to facilitate a return to work was a phased return to work over an eight-week period;

79.5. The OH Report suggested she would be able to carry out her full duties but that a risk assessment should be carried out in light of what the claimant had said about pressure of work and possible causes of the stroke;

79.6. The claimant demonstrated limited ongoing speech difficulties in social interactions but, overall, the claimant's position was that she was getting back to normal.

The claimant's role and changes to it when she was off work between April and November 2021

The claimant's role before she had her stroke

80. There was no job description setting out the details of the claimant's role and this was also not a matter she dealt with in any detail in her witness statement. Paragraph 4 refers to her "overseeing the day-to-day operations of the company, managing of the staff, liaising with management, clients and suppliers".

81. In her oral evidence, the claimant explained that she would open up the office in Teddington each day and make sure that everyone was present. She said that she was responsible for about eight employees and two apprentices working either in Teddington or remotely in Registration, around six employees working in Payroll in Teddington and around four working in BDM/sales management, again all in Teddington. In cross-examination the claimant accepted that she had no line management responsibility for BDMs. In her cross-examination Ms Gratton confirmed that these numbers sounded about right. We find that these localised day-to-day management responsibilities were very limited.

82. The claimant explained that she would liaise with Mr Bennett in Cardiff, Ms Gratton, Mr Smith (a previous managing director) and Mr Jenkins about problems that had arisen and then try and sort them out with Payroll, Sales etc. So far as liaising with clients and suppliers was concerned, the claimant explained that she would liaise with the supplier from whom text messages were bought in bundles of 10,000, would deal with the building landlord who would visit once a month, and with customer-related issues which could be anything from an easy query to a difficult problem. She said that this work all related to clients of the respondent's Teddington office.

83. The claimant had originally been employed as Operations Manager. We find that she was subsequently given the title of Operations Director by Mr Jenkins in 2020 not because her role had changed significantly but rather because it was felt that it would assist her in dealing with clients who were complaining. When asked how her role had changed following the change in title the claimant provided little information, saying that she did "senior management things" such as going to Cardiff and having a coaching session every six weeks.

84. The claimant was reluctant to become involved in some of the work which directors might have been expected to participate in. For example, she attended just a few strategy meetings of the Senior Management Team between December 2020 and January 2021 before it was decided that this was not something to which she could usefully contribute.

85. Overall, we find that the reality of the claimant's role was that she was conducting a mixture of tasks, nearly all of them being at the level of Operations Manager (not Director). We find that the title of Operations Director had been given to her to assist her in her dealings with clients. We find that this was reflected in her reluctance to get involved in "Director" level tasks as set out in the previous paragraph.

86. Taking the evidence in the round, we find that although the claimant performed a variety of tasks in her role the most substantial and time consuming by far was dealing with disgruntled clients and contractors who had been unable to get through on the old phone system quickly enough. That this was the most substantial and time-consuming part of her role was reflected in the reason for giving her the title of "Operations Director". The old system allowed staff to avoid calls and this led to the claimant regularly having to intervene to instruct staff to answer the phone and/or deal with the client or contractor herself. The claimant also performed some day-to-day management tasks in the Teddington office, had been the first point of contact for insurance matters, and had dealt with the bank authorisations necessary for the processing of payrolls for clients.

Changes affecting the claimant's role

87. **The Phone System:** in January 2020 the respondent's group entered into a contract with Onecom to overhaul its telephone system. We find that the new

phone system was not fully implemented until May 2021 (that is to say during the claimant's absence following her stroke). The introduction of "Indigo Platform" (to which we turn below) was part of the same exercise. The overhaul of the telephone system resulted in calls being funnelled to the correct departments and staff in a way which they had not been previously. Further, as a result of the introduction of Indigo Platform, the information required to deal with phone calls was more readily available to staff. The claimant accepted that as a result of the new phone system the number of calls she had previously been required to answer reduced by the time she had had the stroke and continued to reduce after that. We find that the new phone system meant that fewer calls were missed, and that the claimant did not regularly have to intervene to require staff to deal with calls.

88. **Platform development**: the "Indigo Platform" was introduced in early 2020. We find that it introduced a more efficient registration and management process for clients and contractors with the result that there was a reduction over time in the number of issues relating to operational processes experienced by customers and, consequently, a reduced number of contacts with customers in relation to problems. The claimant accepted that the platform had improved (and by inference that the amount of work she had to do in relation to the registration process would have reduced).

89. Insurance claim handling: the claimant was unable to comment on how this had changed during her absence. We find that the respondent had found its insurance claim handling process laborious and had raised this with its insurance broker, Marsh Commercial, in December 2020 on renewal. This resulted in changes which improved the process and gave the respondent one point of contact at Marsh. The central filing system was created. Overall, the changes resulted in less involvement of the respondent and less work been required of its management in relation to insurance claims. Prior to these changes the claimant had been the first point of contact in relation to insurance matters. These changes reduced the work that there was for her to do in relation to insurance matters.

90. Bank authorisations: the claimant was unable to comment on how the bank authorisations process had changed during her absence. The respondent has to process payments to thousands of contractors each week. Historically, only a few members of staff were permitted to do this, and the claimant had been the main person. In January 2021 a new authorisation process was introduced so that Team Leaders within the operational department could either input or authorise payment runs. This resulted in the bank authorisation process being dealt with by far more employees.

Who covered the claimant's work whilst she was off work sick

91. We find that as a result of the changes referred to above the volume of work that needed to be dealt with during her absence from April 2021 was far less than it

would have been if, for example, her absence had begun a year earlier. In particular, the amount of work involving deal with phone calls from clients and contractors had reduced to a very significant extent.

92. We find that what remained of the claimant's work was, in effect, shared out between different employees or groups of employees. The payroll managers and "Ashley" in accounts covered the bank authorisations to make payroll payments (this reflected the change referred to in [90] above). Marsh the insurance broker dealt with most of the insurance queries (this reflected the change in [89] above). So far as dealing with phone calls and day-to-day management tasks in Teddington, we find that Mr Jenkins dealt with these but accept his evidence that as a result of the changes referred to at [87] and [88] above there were not many phone calls to deal with at all. We also accept his evidence that overall picking up what remained of the claimant's work did not take up much of his time.

93. We therefore find that by November 2021 the work that would have been required of the claimant as the Operations Director had substantially reduced. This was principally due to the reduction in the number of phone calls she needed to deal with but was also due in part to internal (for example, the way banking authorisations were dealt with) and external (for example, the way insurance claims were dealt with) changes.

July to October 2021: discussions around a phased return to work

94. From around early July 2021 the claimant wanted to re-engage with the world of work because she believed this would assist her recovery. She met Ms Gratton in a bistro close to her place of work on 8 July 2021 for a general catch up.

95. The claimant spoke to Mr Jenkins on around 12 July 2021. She says that she told him that she would be able to undertake her previous role but would need a phased return to work and would not be able to work the long hours she said she had worked prior to a stroke. The claimant subsequently met with Mr Jenkins and Ms Gratton at the office on 28 July 2021. Mr Jenkins told her she would need a fitness for work certificate before returning. We find that Mr Jenkins was insistent on the need for a fitness for work certificate in particular because the claimant had suggested that her stroke had been caused by her having too much work. The claimant's GP subsequently issued a fitness note on 10 August 2021 in terms described at [66] above. We find that at this meeting Mr Jenkins asked the claimant to sign the document at page 142, but she declined. We return to this below.

96. The claimant contended that Mr Jenkins had not from some point in the summer wanted her to return to the business. She gave as an example of this a text message which she had received from a member of staff on around 16 August 2021 (page 268). The message stated:

> *Hey, glad they were perfect. I've just finished a call with Rhys about this new payroll software. He said you shouldn't be in tomorrow as did a few hours today. Not sure what you want to do. Xxx*

97. The claimant characterised this text message in her witness statement as follows: "Mr Jenkins has said I was not to be at work". We find that that characterisation is inaccurate: rather the text message refers to Mr Jenkins believing that the claimant should not be in *on the day after* the text message was sent because she had attended work on the day of the text message. We find that Mr Jenkins' attitude towards the claimant coming into the office from late July onwards did not suggest that he did not want her to return to the business. Rather we find that it reflected his concern that she should return to work in a structured way rather than simply drifting back as and when she felt able to. The origins of this concern, we find, were her suggestion that overwork had caused the stroke. We find, generally, that contrary to the claimant's case, the respondent was not seeking to place obstacles to her return to work.

98. The respondent referred the claimant to its occupational health advisers, which again reflected this concern. We reject the suggestion that the respondent was "moving the goalposts". We find that, to the extent that there was a delay in referring the claimant to its occupational health advisers, this reflected a failure by the claimant to provide her authority for the respondent to apply to her own GP for a medical report. We find that Mr Jenkins did ask the claimant to sign the form at page 142 when he met her on 28 July 2021, but she declined to do so. We prefer the evidence of Mr Jenkins to that of the claimant in relation to this point. This is because we find that he was keen to obtain further information in relation to the claimant's state of health in light of her assertion on 28 July 2021 that stress at work had contributed to her stroke. Further, his evidence is consistent with the letter of 26 August 2021 to which we now turn.

99. Mr Jenkins wrote to the claimant about this on 26 August 2021 (page 143). The occupational health assessment took place on 8 September 2021 and the OH Report was produced on that same day (page 149). We have set out parts of the OH Report at [68] to [71] above. Under the heading "In your opinion are there any work-related issues that may be a contributory factor", the OH Report stated:

> *… I would advise that the employee meets with their manager at the earliest opportunity to conduct an Individual Stress Risk assessment before their phased return to work if they have not already done so. This will formally identify the work stressors as the employee perceives them.… Measures should then be put in place to eliminate or reduce the stresses to the lowest possible level. This will ensure that the employee does not return to the same situation that has contributed to their illness in the first place.*

100. One of the significant consequences of the OH Report was, therefore, that the respondent was advised to conduct an individual stress risk assessment of the claimant <u>before</u> she returned to work. The claimant met Mr Jenkins and Ms

Gratton on 28 September 2021. They had lunch together and then spoke about a phased return to work. We find that the need for a stress risk assessment was discussed. On 29 September 2021, Mr Jenkins emailed the claimant asking her to create two lists (page 162). These would cover tasks associated with her role and internal/external interactions. She was asked to mark in bold any task believed to be a "stressor". Mr Jenkins stated:

> *Once we have this list, we can then assess which could potentially be stressors, which tasks could be included in the phased return, and which parts of the role we may potentially require to look to see if we can reasonably adjust. This will help mould the phased return plan and tasks you undertake.*

101. We find that the fact that Mr Jenkins emailed the claimant in this way means that he did not regard the question of stress triggers as having been resolved at lunch on the previous day. The claimant did not engage properly with the request contained in the email of 29 September 2021. She eventually replied on 11 October 2021 (page 165) noting that sicknote had expired on 8 October 2021 and asking what was required so she could return to work on the phased return basis outlined in the OH Report. She then said:

> *[The author of the OH Report] says that in his Clinical Opinion I am safe to resume my normal working duties without any restrictions, my GP is in agreement with my returning to work. So that seems like a good starting place for my return to work, that way I can slowly get back to my normal working days starting with i.e. email's, insurance claims, confirmation of bank payments, phone calls, etc. to see what could be a struggle for me at first, this way should I encounter any difficulties or anything stressful. As discussed at the Risk Assessment meeting there is the proviso that I will be forwarding all my outbound correspondence to be checked over by yourself before sending.*

102. Mr Jenkins emailed the claimant again on 14 October 2021 (page 164). He referred back to the section of the OH Report quoted at [99] above and then stated:

> *We were advised to conduct a stress risk assessment, which we started with you and although we are still hopeful for your input it is considered that, given the seniority of your role, much of the responsibilities and the position overall has a significant element of stress attached to it.*
>
> *It is down to the business to decide the practicality of the phased return and the suggested adjustments and, as a small business, we need to consider the wider impact of these on the team, but most importantly how we can effectively support you to ensure your health is not compromised*

103. The email went on to invite the claimant to attend a further meeting on 22 October 2021. The claimant then obtained another fit note from her GP (page 168) which is considered at [66] The fit note covered the period 10 October 2021 to 9 December 2021.

The meeting of 22 October 2021

104. The meeting on 22 October 2021 was attended by the claimant, Mr Jenkins, and Ms Gibson. Their respective accounts of the meeting differ in their emphases. The claimant says that the emphasis was around "what I could not do and why I could not return". By contrast, Mr Jenkins said that the intention had been to discuss possible adjustments and the stress risk assessment recommendation but that the claimant had become agitated when he had delved into detail around the everyday tasks she performed in her role and her communications with other departments within the business. We find that this difference in recollections is easily reconciled: Mr Jenkins' wanted to discuss stressors in light of the stress risk assessment recommendation and the claimant's failure to respond clearly to his emails about this. The claimant, by contrast, believed that this had been dealt with previously to the extent necessary and did not wish to discuss the details of her role. We find that the issue had not been dealt with previously because the claimant had not replied properly to the emails sent by Mr Jenkins'. We find that it was entirely unsurprising that he wanted a proper reply in light of the contents of the OH Report.

105. The meeting on 22 October 2021 was Ms Gibson's first involvement with the claimant. She had only been very recently retained by the respondent. The recollection of Ms Gibson was that the claimant did not provide further details of the stressors related to her role, and that she was unhappy and then angry with the respondent in the meeting. So far as the role is concerned, Ms Gibson says that the claimant "continued to say that nothing needed to change". We accept this evidence of Ms Gibson because it is also easily reconciled with that of the claimant. It is also consistent with the letter at page 278. In this letter the claimant still does not provide the two lists requested by Mr Jenkins on 29 September 2021 (page 162) described at [102] above (which would have exhaustively described her role) but instead provides a list of what she describes as "stress factors" which all related not to specific tasks but to the volume of work and what she regarded as a lack of assistance.

106. It was at this meeting that Ms Gibson offered to have a protected conversation with the claimant. The claimant contends that this reflected a desire on the part of the respondent to exit her rather than arrange for her to return to work. However, we find that it was in fact a response to the claimant's angry demeanour and her ongoing failure to provide the information requested by Mr Jenkins on 29 September 2021.

107. Following that meeting, Ms Gibson emailed the claimant (page 171) on 24 October 2021. We find that this letter refers to the failure of the claimant to complete the task set for her by Mr Jenkins on 29 September 2021 (i.e. to exhaustively set out her role and its effect on her), saying that the consequent "absence of more specific detail" meant that the respondent might need to make a further reference to occupational health. That is to say, the respondent took the

view that it had been unable to conduct the necessary stress risk assessment because the claimant had not provided the information it needed. The provision of such information was important in light of the fact that the claimant's role was not well defined because of the lack of a job description or other similar document and in light of her expressed view in relation to the cause of the stroke.

108. The claimant replied to Ms Gibson's email on 2 November 2021 (page 172 – 173). The claimant expressed her frustration in relation to the fact that she had not yet returned to work. At this point she made some attempt to provide the information requested by Mr Jenkins on 29 September 2021. She identified the following as things which had made her job stressful: working beyond her contracted hours; the phones constantly ringing; clients complaining and shouting; the way all interviews were crammed into one day. She did not, however, produce the list of all the tasks related to her role that she had been requested to prepare. She did not provide any sensible overall description of her role.

109. Ms Gibson replied to the claimant on 3 November 2021 (page 172). She noted in her brief email that:

> *… I hope we have been clear that we do want to support you, and this has not been easy with minimal information we have regarding your current/future capabilities and the adjustments recommended.…*
>
> *… Whilst the team operate very efficiently, we are a small office and there is little resource for us to spare individual's time. This is also a problem we face when looking to plan and allocate a workload that can be managed on a part-time basis. However, please be assured that a thorough review of your role is now underway, and we will look to communicate with you, over the next week or so, the suggested next steps.*

Why the respondent suddenly realised it no longer needed the claimant's role

110. A striking issue in this case is that the respondent was dealing with the claimant on the basis that she would return to work until late October 2021. Then, suddenly, she was told that she was at risk of redundancy. This apparent about turn clearly requires an explanation.

111. The explanation of Mr Jenkins in his oral evidence was essentially this. When he had looked more deeply into the claimant's role as a result of the discussion concerning the tasks and interactions that were potential stressors he had, by focusing on her role, realised that there was not much for her to do. Previous to that, his mindset had been that she would be returning to work. Mr Jenkins explained that the redundancy exercise beginning on 15 November had resulted from a 2 to 3-week review of the claimant's role.

112. Ms Gibson believed that there was a realisation that the claimant was redundant shortly after the meeting on 22 October 2021. Ms Gratton and Mr

Jenkins had considered the role after that meeting for themselves and had realised that there was not enough of it left. She said that was when the discussions about redundancy had begun. She said that people had not noticed that the claimant's role no longer existed because she had not been in the business for a number of months, and nobody had been considering the issue.

113. We accept the evidence of Mr Jenkins and Ms Gibson in relation to these matters. We accept it because we find it reflects the failed attempts of the respondent to get the claimant to engage with the provision of information requested by Mr Jenkins on 29 September 2021 in order to carry out the stress risk assessment. We find that as a result of the failure of the claimant to provide the requested lists (and so information about her role), Mr Jenkins and Ms Gibson conducted their own review of what the role of the claimant involved and came to the conclusion that, following the changes set out above, not much of it remained. This was in fact reflected in the letter that Mr Jenkins sent to the claimant on 15 November 2021 (page 175) to which we now turn.

The redundancy process

114. On 15 November 2021 Mr Jenkins wrote to the claimant (page 175) to warn her that she was at risk of redundancy. He referred to a Telephone conversation he had had with her on that day and noted:

> *It was explained to you that whilst the Company has been actively seeking to summarise your role to enable you to return to work, we have found it increasingly difficult to determine what responsibilities remain within the business since you were last at work full-time.*
>
> *Our initial review was intended to identify stress triggers in the role, but we have struggled with identifying what key tasks of the Operations Director role are still required to be undertaken. As you also highlighted, we have made considerable changes since the beginning of the year to become more efficient and reduce the workload arising from incoming calls. Given the new phone system, many of the problems regarding coordinating the teams and managing the customer calls have significantly reduced.*

115. He then went on to identify recent changes in relation to the new phone system; platform development; insurance claim handling; and how bank authorisations were dealt with.

116. The letter went on to state:

> *… It is proposed that going forward we operate without the Operations Director in the business. As such, your role has been placed at risk of redundancy and we will be entering into a consultation period that we anticipate will continue for a period of no more than two weeks.*

117. The letter concluded by inviting the claimant to a consultation meeting on 17 November 2021. A script prepared for the consultation meeting on 17 November 2021 is at page 179 of the bundle. Mr Jenkins and Ms Gibson went through the proposal set out in its letter of 15 November 2021. The claimant did not comment on the justification for the proposed redundancy or put forward suggestions for how the redundancy might be avoided. We find that this was because she believed the respondent had already made up its mind that she would be selected for redundancy. This is reflected in what she is recorded as having said at page 181:

> *There will be no questions, I just want this to be done the decision has been made.*

118. However, in her oral evidence the claimant said that she had in fact asked just one question: who else was being considered for redundancy? She said that she was told that no one else was being considered. It was this that had caused her to say that the decision had already been made. We accept the evidence of the claimant that she asked this question. To the extent that this requires us to prefer her evidence to that of the respondent we do so because we found her evidence clearer than that of the respondent's witnesses in relation to the redundancy exercise.

119. The claimant was invited to a second consultation meeting to take place on Friday, 19 November 2021 (page 182). Notes of that meeting are at page 183. The claimant said little at the meeting and was asked if she would like the consultation process to be concluded on that date. She is recorded as having said (page 105):

> *MP says yes, there's no point in going on as she has nothing else to say and she feels the decision was made weeks ago.*

120. The respondent wrote to the claimant later on 19 November 2021 (page 187). In that letter the respondent stated that it had "confirmed your role as Operations Director redundant". The letter went on to state that the claimant's termination date was 19 November 2021 and that she would be paid in lieu of her 12 week notice period. The letter explained that the claimant had a right of appeal. The claimant did not in fact appeal.

The selection pool

121. Mr Jenkins did not provide any real information in his witness statement about how a pool of one had been identified. He simply states at its paragraph 29:

> *The claimant was the only role of that nature within the business and during the process there was not a selection pool as her role was the only one affected and diminished.*

122. When asked about this in cross examination he said that nobody else was in the pool "because of the salary, the role itself and its level". When asked further about this by the Tribunal, he said that the decision to have a pool of one had been taken by the CEO, the chief strategy officer, Ms Gratton and himself. He said that he did not know the date of the SMT meeting when the decision had been taken, that there were no minutes of the meeting and that ultimately the decision to decide that the claimant's role was redundant had been signed off by the CEO in the week of 15 November 2021.

123. When Ms Gibson was asked about possible alternatives to redundancy, she stated that there were no vacancies and that the role of the claimant had been a stand-alone role. Consequently, she said that there had been nothing to document and so nothing to say other than what was contained in the consultation document. There was only the claimant in the pool for selection because she was the only person holding the role. She had not considered the possibility of someone more junior being made redundant.

124. We found Mr Jenkins' evidence in relation to these matters to be unpersuasive and that of Ms Gibson added little to it. None of Mr Jenkins' evidence in relation to these matters had been set out in any detail in his witness statement and he was unable to elaborate on the decision to use a selection pool of one to any significant extent when questioned about this. Given these evidential shortcomings, we find that the respondent did not genuinely apply its mind to the question of whether there should be a pool of one. If it had done, then Mr Jenkins' would have been able to give a better account of the decision-making process and, indeed, it might have been recorded in a document (SMT minutes, for example).

Possible bumping

125. Mr Jenkins said that they had considered making someone more junior redundant and offering their role to the claimant when the Tribunal specifically put this question to him, but again this was not a matter dealt with by his witness statement.

126. Mr Jenkins did not agree that the role of the claimant was similar to that of Ms Ballard. Ms Ballard was "more of a doer" who had inside knowledge of every system used by the respondent. For example, she would run payrolls, do reports from the system, do inductions from the system and deal with a variety of tasks that the claimant would be unable to deal with. Although the claimant could authorise a payroll, she would not know how to run one through the Merritt software.

127. Equally, Mr Jenkins said that the payroll staff did not have comparable duties to those of the claimant. She would not be able to process a payroll from start to finish within the Merritt software as payroll staff did. This involved taking raw data from the client and putting it through the software. Mr Jenkins also did not accept

that the claimant could have been moved into the accounts department. The employees working there had specific accounts training, knowledge of Sage and ACCA qualifications.

128. We find that Mr Jenkins did not consider the possibility of bumping at the time in any real detail. However, we also accept in light of the careful and detailed answers he gave that it is unlikely that the claimant could have successfully carried out the role of Ms Ballard or the payroll staff.

Alternative employment

129. In his witness statement Mr Jenkins gave no information in relation to any attempts to find alternative employment for the claimant. The absence of any such roles is simply mentioned in its paragraph 31.

130. When cross-examined about this he said “there were searches” but provided no significant detail. He was also unable to add further detail of significance when, in effect, provided with another opportunity to do so by the questions asked to him by the Tribunal. His evidence really came down to there being no vacancies at her level or more generally. Ms Gibson did not provide any significant evidence about any search for alternative employment or, indeed, about any consideration of the issue.

131. We find that the respondent did not carry out a reasonable search for alternative employment or give any serious consideration to that issue. If it had done, Mr Jenkins would have been able to give a more detailed account in relation to the issue. We find that the respondent simply assumed that there were no alternative roles available for the claimant because of her seniority.

Conclusions

Unfair dismissal

What was the reason for dismissal? The company says that it was on grounds of redundancy.

132. We conclude that the reason for dismissal was redundancy. This is for the following reasons. First, we conclude in light of our findings of fact above, particularly those between [80] and [93], that there was a diminution in the needs of the respondent for employees to do work of a particular kind, work of a particular kind being dealing with phone queries (the most significant part of the claimant’s job).

133. Secondly, we conclude in light of our findings of fact above that the dismissal of the claimant was caused wholly or mainly by that diminution. This conclusion is reached taking full account of the fact that the need of the respondent for employees to carry out some of the other work undertaken by the claimant (for example, dealing with bank authorisations) did not diminish but rather such work was undertaken by a wider group of employees.

If so, did the company act reasonably in all the circumstances? The Tribunal will usually decide, in particular, whether:

133.1. The company adequately warned and consulted her;

133.2. The company adopted a reasonable selection decision, including its approach to a selection pool; and

133.3. The company took reasonable steps to find her suitable alternative employment.

134. In light of our findings of fact above, we conclude that the respondent did not act reasonably in all the circumstances and consequently we conclude that the claimant's dismissal was unfair. This is for the following reasons:

134.1. We conclude that the respondent did not adequately inform and consult with the claimant because of they way that it approached the question of the pool for selection. Given that including the claimant in a pool of one really determined the claimant's dismissal (subject to the questions of bumping and/or alternative employment), the respondent would on the facts of this case if it had acted reasonably consulted with the claimant in relation to the pool. However the script at page 174, and the notes of the meetings on 17 and 19 November 2021 at pages 179 and 183 reflect what we have found at [124] above: the respondent had not seriously applied its mind to the issue. Given in particular the lack of clarity at the time in relation to exactly what the claimant's role was, we conclude that this was not a case in which it was reasonable for the employer to focus upon a single employee without even considering the development of a pool.

134.2. In making this conclusion we emphasize that we are not substituting our own view as to what the pool should have been. Rather we are concluding that the respondent did not seriously apply its mind to the question with the result that it failed to consult with the claimant upon something in relation to which it should in the circumstances of this case have consulted. In addition, we do not deal in this decision with what the outcome of a fair consultation process in this respect might have been. We have concluded that that is a Polkey issue.

134.3. Further and separately, in light of our findings at [129] to [131] we conclude that the respondent did not take reasonable steps to find the claimant suitable alternative employment. Rather we conclude that the respondent simply assumed that the fact that there were no immediate vacancies at the level at which the claimant was employed was the end of the matter.

134.4. In reaching these conclusions we have taken full account of the fact that the claimant's engagement with the consultation process was limited to asking who else was being considered for redundancy. However, we

conclude that this response simply reflected that the respondent had not begun consultation with her at an early enough point in the process.

134.5. We do not, however, conclude that the respondent's approach to bumping as found above meant that it acted unreasonably. This is because we find that there was no obvious employee who the respondent should have considered "bumping" in order to retain the claimant at a lower level.

135. The question of what, if any, remedy the claimant is entitled to in light of these conclusions will be considered at a remedy hearing at which Polkey issues will also be considered.

Whether the respondent had actual or constructive knowledge of the claimant's disability

136. The question of knowledge is the first hurdle for the claimant in both the discrimination complaints. We conclude that the respondent did not as of the date of dismissal have either actual or constructive knowledge of the claimant's disability for the following reasons.

136.1. We conclude that as at the date of dismissal the respondent did know that the claimant suffered an impairment to her physical or mental health: that she was continuing to suffer some communication difficulties following the stroke that she had had around 7 months early in April 2021.

136.2. However, we conclude that it was unreasonable to expect the respondent to know that the impairment had a substantial (that is to say more than minor or trivial) and long-term effect for the following reasons:

136.2.1. The evidence available to the respondent as found at [60] to [79] above suggested that the significant communication difficulties she initially suffered after the stroke had largely disappeared.

136.2.2. To the extent that there were some ongoing difficulties, the claimant's position was that she was getting back to normal.

136.2.3. The only adjustment that either the claimant or the OH Report were really suggesting was a phased return to work over eight weeks.

136.2.4. The only real contemporaneous concern voiced by the claimant was that she should not be overworked.

136.2.5. The lack of cooperation with the claimant in relation to establishing the details of her role.

137. In a nutshell, we find that it was unreasonable to expect the respondent to know in light of what both the claimant and the OH Report said that, if the claimant still had an impairment the effects of which were more than minor or trivial, such effects were likely to last for at least another five months. We conclude that in considerable part this reflected the fact that the claimant was

downplaying the ongoing effects of her stroke in communications with the respondent because she wanted to return to work. We do not in any way criticise her for that. However, what best served her interests at the time does not serve her best interests when pursuing this claim several years later. We conclude that the respondent did all that it could reasonably be expected to have done to establish the nature and extent of the claimant's ill-health and the consequences of it.

138. This conclusion disposes of both the discrimination complaints which therefore fail and are dismissed.

Direct discrimination on grounds of disability

Did the company, in dismissing her, treat her less favourably than it treated or would have treated someone else in the same circumstances apart from her disability. That includes someone with the same absence record and reasons for absence.

139. We have considered this question in the alternative in case we are wrong in our conclusion that as at the date of dismissal the respondent did not have actual or constructive knowledge of the claimant's disability.

140. If it had been necessary for us to consider this question, we would have concluded that the respondent had not in dismissing the claimant treated her less favourably than it treated or would have treated someone else in the same circumstances apart from her disability. We would have reached this conclusion for the following reasons.

141. The claimant did not suggest that there was an actual comparator in this case. Nor did her representative identify the kind of comparator who may be used for evidential purposes as set out at [32] above. Consequently, the nature of the comparison was as framed in Issue 4 ("the same absence record and reasons for absence"). Realistically, the question for us must therefore be whether an employee without a disability, who had been away from work as a result of ill-health for the period the claimant had been away from work between April and November 2021, would have been treated better than the claimant was.

142. Taking the evidence in the round, we accept that the lack of consultation and other procedural deficiencies outlined above could be regarded as evidence which might support an inference of discrimination. So too might the sudden realisation by the respondent that it no longer needed the claimant's role. After reviewing all the evidence, the lack of consultation and other procedural deficiencies remain. However, when seen in its proper evidential context, the sudden realisation by the respondent that it no longer needed the claimant's role is in fact not suspicious (in particular in light of our findings of fact at [113] above). Further, we reject the suggestion that there is any significance in the respondent noting on several occasions that it had paid the claimant more during her absence than it was required to pay her under the terms of her contract. This is exactly the kind of point that any employer defending allegations of unlawful discrimination would make because it is evidence suggesting that the employer is

on occasion more generous than it has to be when employees have sickness absences. Overall, taking the evidence in the round, we conclude that the claimant has failed to prove facts from which a reasonable Tribunal could properly conclude in the absence of any other explanation that the respondent had committed an act of discrimination by dismissing the claimant. There is simply not enough evidence pointing in that direction.

143. However, even if we had concluded that the burden of proof had shifted to the respondent, we would have gone on to conclude that the respondent had shown a non-discriminatory reason for the treatment in question: the diminution in its need for employees to carry out work of a particular kind. Notwithstanding the procedural deficiencies, we conclude that this was the main reason for the claimant's dismissal and that the decision to dismiss was not in any way influenced by the fact that the claimant had a disability. We conclude that the respondent would have treated a non-disabled employee whose circumstances were not materially different in exactly the same way.

Discrimination arising from disability

This involves unfavourable treatment because of something arising in consequence of Mrs Payne's disability.

Firstly, can the company show that it did not know that Mrs Payne had a disability, and could not reasonably have been expected to know?

If not, what unfavourable treatment did she receive? She relies on her dismissal.

Can Mrs Payne prove that the company treated her unfavourably because of the "something arising" in consequence of her disability, namely her absence from work.

If so, the company do not seek to argue that the dismissal was justified, i.e. that this treatment was a proportionate means of achieving a legitimate aim. They deny that this was the reason for her dismissal.

144. We have considered this question in the alternative in case we are wrong in our conclusion that as at the date of dismissal the respondent did not have actual or constructive knowledge of the claimant's disability.

145. We would have concluded that there was a link between the Claimant's absence as a result of having had a stroke between April and November 2021 and her dismissal. We would have concluded that the link was that it was the analysis carried out by the respondent when considering the claimant's return to work after receipt of the OH Report containing a recommendation that a stress risk assessment be carried out that identified clearly to the respondent that her role was no longer needed. The burden of proof would therefore have shifted to the respondent.

146. However, the fact that her role was no longer needed did not stem from her absence. It was not the case that her role was no longer needed because her duties had during her absence been redistributed to other employees. Rather her role was no longer needed as a result of changes that had taken place over a period of time which had begun significantly before she had a stroke, particularly the reduction in work dealing with telephone calls, such changes being unrelated to her absence from work.

147. In these circumstances, we would have concluded that the claimant's absence was not the effective or operative cause of her dismissal. We would have concluded that the respondent would have made the same decision if she had not been absent from work, albeit it might have reached it sooner, later, or at the time it did in fact reach it.

148. We would have therefore concluded that the claim of discrimination arising from disability failed and would have dismissed it.

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Employment Judge Evans
Date: **19 July 2024**

JUDGMENT SENT TO THE PARTIES ON
Date : **30 July 2024**

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FOR THE TRIBUNAL OFFICE

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