EMPLOYMENT TRIBUNALS

Claimant: Ms R Medany

Respondent: CPM United Kingdom Limited

Heard at: Reading (by CVP) **On:** 22-24 April, 29-31 July & (in chambers) 27 August 2024

Before: Employment Judge Anstis
Mrs C Tufts
Mr T Maclean

Representation
Claimant: In person
Respondent: Ms K Skeating (solicitor)

RESERVED JUDGMENT

The claimant's claims are dismissed.

REASONS

INTRODUCTION

1. The claimant was employed by the respondent as Head of Shared Services Group ("SSG") from 16 September 2019 until her dismissal, which took effect on 6 January 2023.

2. The claimant brings claims of disability discrimination (comprising direct disability discrimination, a failure to make reasonable adjustments and victimisation) and unfair dismissal.

3. A case management hearing before District Tribunal Judge Shields (sitting as an Employment Judge) on 27 September 2023 listed the case for a final hearing by CVP from 22-25 April 2024 and established the list of issues which is set out in the appendix to these reasons.

4. Elements in italics in that list of issues are additions by way of clarification during discussions with the parties at the start of the hearing. The strike-though of points 5.2.2 and 7.3.2 indicate the withdrawal of those points by the claimant in favour of focussing on the more obvious separate claim of a failure to make reasonable adjustments. We have added numbered designations in bold to the different allegations of discrimination. They start DD for direct disability discrimination, RA for a failure to make reasonable adjustments and V for victimisation. There is also PA1 & PA2 for the two alleged protected acts.

5. The detriments or less favourable treatment alleged in respect of direct disability discrimination and victimisation are identical, so that DD1-7 are the same as V1-7.

6. The list of issues record the respondent's acceptance that the claimant was at all relevant times a person with a disability, the disability in question being *"… related to her mobility, due to damage to her left foot, she cannot stand unaided or walk without a walking aid for any distance*."

THE HEARING

7. The tribunal could only sit on 22-24 April 2024 so the time available for the final hearing was shorter than intended. It was apparent that an additional three days would be needed to complete evidence and submissions, and so the case went part-heard to 29-31 July 2024. 22 April was taken up with initial reading by the tribunal, initial discussions with the parties and the claimant's evidence, which continued to lunch time on 23 April 2024. For the remainder of 23 April to the end of 24 April 2024 we heard evidence from Kelly Wiffin and Sarah Smith for the respondent. On resuming, the tribunal heard evidence from Fiona Mauger, Karon Karamavrou, Nick Jones, Richard Walker and Mark Ridler for the respondent from 29-30 July. The parties had prepared written submissions which were delivered to us on the morning of 31 July 2024, with brief oral replies from both parties. We reserved our judgment, which we agreed with the parties would be (at this stage) in relation to liability only.

INITIAL COMMENTS

8. There are some points that we feel we ought to address at an early stage in this decision. They relate to the claimant's disability discrimination claims.

Direct disability discrimination

9. We took time during the hearing to discuss with the claimant the nature of direct disability discrimination and the appropriate comparator in such claims.

10. Section 13(1) of the Equality Act 2010 describes direct discrimination:

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

11. The application of this to disability discrimination claims is described in the EHRC Code of Practice, which we are obliged to take into account in this decision. Para 3.29 of the Code of Practice reads:

> *"The comparator for direct disability discrimination is the same as for other types of direct discrimination. However, for disability, the relevant circumstances of the comparator and the disabled person, including their abilities, must not be materially different. An appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person (regardless of whether those abilities or skills arise from the disability itself)."*

12. Para 3.30 of the Code of Practice gives an example of this:

> *"A disabled man with arthritis who can type at 30 words per minute applies for an administrative job which includes typing, but is rejected on the grounds that his typing is too slow. The correct comparator in a claim for direct discrimination would be a person without arthritis who has the same typing speed with the same accuracy rate. In this case, the disabled man is unable to lift heavy weights, but this is not a requirement of the job he applied for. As it is not relevant to the circumstances, there is no need for him to identify a comparator who cannot lift heavy weights".*

13. So for the purposes of the claimant's direct disability discrimination claim her comparator must be someone with the same mobility difficulties that she has, but who is not disabled.

14. The problem for the claimant is not just that we have no actual comparator (an actual comparator is very unusual in such a situation) but that there is no evidence from either party that anyone who shared the claimant's mobility difficulties but was not disabled would have been treated any differently by the respondent. Mr Worker is identified as a comparator in the list of issues, but without a mobility impairment comparable to the claimant's he cannot be a comparator for the purposes of a direct disability discrimination claim.

15. For each of her discrimination complaints, the claimant has the benefit of the burden of proof provisions at section 136:

> *"(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."*

16. The difficulty is how the claimant can possibly succeed in direct discrimination claims when there is no direct evidence that the respondent has treated her less favourably because of the fact of her being a disabled person and there has been no evidence from which we could conclude that someone who shared the same mobility difficulties as the claimant would have been treated any differently to how she was treated.

17. The claimant's closing submissions emphasise a different aspect to her claim: "*My complaint* [is] *that I was discriminated against for asking for disability adjustments*". This emphasises the victimisation element of the claimant's claim, although as we shall see, only in respect of PA1, since PA2 concerns race discrimination not disability discrimination.

18. Perhaps that is where the claimant wishes us to focus our attention, but it is clear to us that in the absence of (i) any direct evidence suggesting that the reason for her treatment was the fact of her being a disabled person (ii) a comparator or (iii) any evidence as to how someone who had the same mobility impairment as the claimant but was not disabled would be treated, her direct disability discrimination claims are bound to fail and must be dismissed.

Reasonable adjustments

19. Issues in relation to the time limits for claims are the first thing raised in the list of issues. It appears to be agreed between the parties that taking into account any extension of time for early conciliation any matters prior to 4 January 2023 are brought outside the standard time limit for individual acts of discrimination. In fact the only relevant events that occurred on or after 4 January were the claimant's final email concerning adjustments on 4 January 2023 and her dismissal on 6 January 2023.

20. The time issues appear to be particularly pronounced in the case of the claim of a failure to make reasonable adjustments.

21. As we raised with the claimant, RA1-3 each appeared to have been outstanding since the start of her employment. She agreed that while her parking spot had varied over time (although seems to have been the same throughout the time period we were concerned with) it had (on her case) never been appropriate and had therefore always been subject to the duty to make reasonable adjustments. Similarly the non-automated front doors and heavy inner door seemed, to have been in place for as long as the claimant worked for the respondent – that is, since September 2019, and therefore subject to the duty to make reasonable adjustments from that time.

22. On the question of auxiliary aids, the provision of accessible power sockets (RA4) related to the time when the claimant moved from the third to first floor

of the respondent's offices. This was in October 2022, so is much more recent than her start date but still outside the standard time limit. The parties agreed that that had been fixed the day after the problem had arisen, and so there was no longer any outstanding failure to make a reasonable adjustment at the time the claimant presented her claim. RA5 and RA6 relate to the time the claimant was working on the third floor and were no longer applicable by the time of her claim, since at that point the claimant was working on the first floor and the third floor was either in the course of being refurbished or had been refurbished. *(Note: sometimes the floors in the office were described US-style as rising from the first to the third floors and sometimes UK-style as a ground floor rising to the second floor. We also have "bottom floor", "middle floor" and "top floor". The US-style, rising from first to third floor, seemed to predominate and it is that we shall use in this decision.)*

23. We asked the parties to address us on the question of time limits in the closing submissions, and in particular to address us on the question of when time started in respect of the duty to make reasonable adjustments.

24. The claimant's submissions were clear:

> *"The business moved at a glacial pace in addressing the disability adjustments and had not completed all the work on five of the seven requests made; some of these had been partially completed.*
>
> *I have disregarded the period of lockdown, as no work could be completed during this period and none was required.*
>
> *All the outstanding requests were reassessed during the building walk on 9 March 2022. From that point until the day I left, no progress had been made on the revised list. This list was not shared with me.*
>
> *The decision not to provide the requested adjustments was not communicated to me, neither was the list of adjustments drawn up by the site manager. I had no reason to believe they were not being acted on as part of the refurbishment plan and had received verbal assurances that they were included in the plan. My complaint was raised as soon as it became apparent that the adjustments were not going to be made.*
>
> *My complaint that I was discriminated against for asking for disability adjustments was made once it became apparent that the business had no intention of making the requested adjustments. This did not become apparent until Fiona Mauger failed to respond with an actual update on when or even if the powered door was going to be installed, following my request for an update on 25 November 2022, a full month after I had been relocated to the ground floor behind that door.*
>
> *On 4 January, during the consultation process, I asked Sarah Smith for a confirmation of the timeline and actions taken for each disability*

request I made to Fiona Mauger during the building walk on 9 March 2022. Sarah Smith was unable to obtain confirmation that any item had been completed."

25. The respondent relied on more general points in relation to time:

"As the Tribunal is aware R will argue that the majority of C's complaints of direct discrimination and victimisation are out of time. At page 39, it clearly states that any that happened prior to 4 January 2023 may not have been brought in time. Act 1 – 7 [these are the direct discrimination and victimisation detriments or less favourable treatment, excluding the dismissal which the respondent describes as Act 8] *inclusive all take place prior to 4 January 2023 and as such R submits that these are out of time.*

In terms of any argument that these are continuing acts, firstly we have not heard evidence in this regard from C to support such a contention. In our submissions these cannot be and are not continuing acts. Different people are involved in the alleged acts and they are stand-alone acts. For example, Act 8 was a decision taken by Richard Worker. Mr Worker had no involvement in Act 1, Act 2, Act 3 or Act 6.

In terms of any argument that time should be extended on a just and equitable basis, C has provided no evidence to support such a contention. There is no obvious basis for extending time. C was working throughout, raised a grievance and an appeal during the continuous period, actively took part in a recruitment process for the role of FD and as far as we can understand from her evidence and line of questioning was extremely competent in carrying out her duties (the duties of a senior leader in a demanding role) during this continuous period.

… regardless of the other arguments set out as to why the claims should fail, allegations regarding Acts 1 – 7 must fail on the basis that they have been brought out of time."

26. Arguments concerning continuing acts did not feature in the claimant's closing submissions, but it is clear from her submissions that she saw this as being one continuous series of unlawful acts against her as a disabled person, culminating in her dismissal. The respondent was, however, correct to say that "*C has provided no evidence to support* [a just and equitable extension of time]" and that "*there is no obvious basis for extending time*".

27. It was the claimant who came closest in her argument to what we were concerned with. If a reasonable adjustment should have been made from the start of employment, when does time run from?

28. The relevant provisions of the Equality Act 2010 are in section 123, which includes:

> *"(3) For the purposes of this section:*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something:*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

29. Whether consciously or not there are clear echoes of this in the claimant's closing submissions. On her case she waited to see if the respondent was going to do anything about the adjustments and brought her claim within time based on her understanding of the point at which it became clear that they were not going to make the adjustments (s123(4)(b)). On her case it is this point ("*on the expiry of the period in which P might reasonably be expected to do it*") that time limits started to run. That was, on her case, on 4 January 2023 following her final consultation meeting on 3 January 2023, so her claim was (just) in time.

30. The claimant has presented an attractive argument, but it is clear that there are some problems with it.

31. First, it does not address any of the auxiliary aid points. The accessible power sockets were dealt with almost immediately and were no longer an issue when she presented her claim. The points on the disabled toilet were no longer an issue when she was not based on the third floor.

32. The second is that on the question of the physical features it does not address the question that the problems have always been there. On the claimant's case, there has always, since the start of her employment, been a problem with her parking space, the non-automated front doors and the heavy inner door.

33. The claimant takes as her starting point the building walk on 9 March 2022. The nature of that walk and what occurred on it are disputed, but the claimant's position is that this is the point at which she raised the problems and thus triggered a duty to make reasonable adjustments, which she finally concluded was not going to be complied with on 4 January 2023, after a generous allowance of time for the respondent.

34. While this might (on the claimant's case) have been the first time she had specifically requested the adjustment, the duty to make reasonable adjustments applies irrespective of a particular request being made by an employee.

35. The significance of a specific request is, at most, that it diminishes or removes the employer's ability to rely on the exemption provided for reasonable adjustments at para 20(1)(b) of Schedule 8 to the Equality Act 2010: "[The employer] *is not subject to a duty to make reasonable adjustments if* [they do] *not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at the disadvantage*". In some cases there may be no duty to make reasonable adjustments until the employee had pointed the difficulty out, since until then the employer "*could not reasonably be expected to know that …* [the] *disabled person … is likely to be placed at a disadvantage*". That would most obviously apply in the case of so-called hidden disabilities. But in this case the respondent has never relied on this exemption, nor has the claimant suggested that her disability and its effects were not apparent to the respondent. It was her position that her disability had been declared at the point of recruitment, and that her difficulties with, for instance, the non-automated front doors, would have been obvious to anyone. If the respondent should have made those adjustments, they should have made them very much earlier than the building walk. The duty to make reasonable adjustments in respect of matters RA1-3 arose on the claimant's appointment to her role in 2019.

36. There are the complexities of Covid-19 lockdowns. The claimant started work around six months before the first lockdown. She is correct to say that no adjustments to the office premises could be expected during lockdown periods. Furlough has not been mentioned and it seems that during lockdowns the claimant worked from home, so there was no need for adjustments to the office. But what of those first six months? The claimant's difficulties in respect of the physical features of the office were no less than they were post-lockdown. If the respondent was obliged to make adjustments it was under as much obligation to make those adjustments prior to Covid-19 as it was after.

37. It seems to us that these difficulties are insurmountable for the claimant. Her arguments do not address the auxiliary aid time points. There has been no reason suggested for any extension of time. The parking space and non-automated front doors were (if at all) as much in need of adjustment from the start of her employment as they were later.

38. There are two points that we must reserve for later consideration on the question of reasonable adjustments. The first is the question of an overall continuing act. The second is the question of the heavy inner door (RA3) and what, if any, difference the claimant's move from the third to the first floor made in respect of this, but apart from this the claimant's complaints of a failure to make reasonable adjustments must be dismissed on the basis either that they are brought outside the relevant time limits and it is not just and equitable to extend time or that they were not outstanding at the time she brought her claim.

Victimisation

39. The claimant clarified in our initial discussions that the "protected acts" that she relied upon for the purposes of her disability discrimination claims were the building walk and her grievance (which means her email of 6 July 2022 to Mike Hughes).

40. During the course of closing submissions we asked the claimant what it was about the building walk that amounted to a protected act. The claimant said that this act of requesting the building walk that was a protected act, since in doing so she was "*highlighting the business's failure to complete adjustments previously requested*".

41. The idea that the adjustments had previously been requested somewhat conflicts with the claimant's position that the adjustments were suggested for the first time on the building walk (as to which, see our discussion of reasonable adjustments above) but the point remains that the alleged protected act was the claimant requesting the walk, rather than what may or may not have been said on the walk.

42. A "protected act" is (section 27(2) Equality Act 2010):

> *"(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;* [or]
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act."*

43. The only points that apply to the claimant's situations could be (c) and (d) which in these circumstances are essentially the same thing.

44. Tribunals have typically taken a generous approach to what might be a protected act, though as the respondent pointed out at the time of closing submissions it is difficult to read into what the claimant says about her approach to the building walk that it is of itself a "*allegation … that a person has contravened* [the Equality Act]".

45. The claimant says this in her witness statement:

> *"On 9 March 2022, when the business began to want people to return to the office, I invited the site manager … and the diversity champion … to a building walk so I could highlight the access challenges I was facing with the building and to share suggestions for improving accessibility for me and in general."*

46. The claimant's grievance as a protected act is a separate point, although this led to some difficult discussions during closing submissions given that if the claimant's grievance was a protected act it was a protected act in respect of race discrimination, rather than the disability discrimination that was the subject of the claimant's claim. Of course, a grievance in respect of race discrimination is equally effective as a protected act as a grievance in respect of disability discrimination, although it does in practice lead to some complexities given questions of causation raised by the claimant. When the claimant says "*my complaint* [is] *that I was discriminated against for asking for disability adjustments*", this can only apply in respect of PD1 (the building walk) since PD2, if a protected act at all, is a complaint of race discrimination.

47. We will consider later whether these actions amounted to protected acts, but we note at this point that if they were there appear to be very considerable difficulties for the claimant in setting out how they affected the various actions that she says were acts of victimisation, in circumstances where the relevant decision makers often seem to have been unaware of either the building walk or the terms of the grievance (as opposed to the fact that a grievance of some sort had been raised).

48. There are also considerable time limit issues with the victimisation claims that we will need to consider later, although they are not so acute as with the reasonable adjustment claims. The victimisation claims date from 2021 and 2022, as opposed to the reasonable adjustments claims, which date from the start of the claimant's employment in 2019.

Summary so far

49. There is nothing in the evidence from which we could conclude that the claimant has been subject to direct disability discrimination, and her claims of direct disability discrimination are dismissed.

50. The duty to make reasonable adjustments in respect of physical features (RA1-3), if it applied at all, applied from the start of the claimant's employment. Applying s123(4)(b), subject only to the two points set out below, the respondent should have made the adjustments within a few weeks or at most months of the start of the claimant's employment, and certainly before the start of Covid-19 lockdowns in March 2020.

51. Subject to any question of being a continuing act or the effect of the claimant's move to the first floor for RA3, the claims in respect of adjustment of physical features are brough several years out of time with no reason having been given for us to extend time on a just and equitable basis.

52. None of the auxiliary aid reasonable adjustment points (RA4-6) were outstanding at the time the claimant brought her claim. They are dismissed.

OUR FINDINGS

Introduction

53. Our "initial comments" will, we hope, explain our occasionally abbreviated findings on particular allegations in relation to disability discrimination.

54. Having set out much of the relevant law in that "initial comments" section, we feel able in elements of this section to move directly from our findings of fact to whether there has or has not been disability discrimination in respect of that allegation.

55. The claimant was employed by the respondent from 16 September 2019 as Head of the Shared Services Group. Given our initial comments we can pick up the facts of the case from early 2022.

56. A new managing director for the respondent's UK & Ireland business was appointed and due to take up her role in January 2022, but almost immediately on her appointment took up a period of family leave. Mark Ridler, presently the group CFO, says:

> *"The Executive Leadership Team (ELT) was comprised of myself as Group CFO, Mike Hughes as Group CEO and Nick Jones as Group COO. As an ELT we tried to share the running of the UK business, but it wasn't really working and one of us needed to take control of it. Nick was the most obvious choice, and he needed a business partner from the finance team."*

57. It is not in dispute that in the absence of the newly appointed managing director Nick Jones assumed responsibility for the UK & Ireland operations. Mr Jones says:

> *"It was a business decision that one person should run the UK business until* [the new managing director] *returned. By stepping into this role, I was taking on lots of additional responsibility - the line management of directors and senior managers of new business, 3 commercial directors, HR, IT, finance and operations."*

58. Up to February 2022 the claimant had reported to the respondent's UK Finance Director. Richard Worker and another colleague also reported to the UK Finance Director. They were "Heads of Commercial Finance". Mr Ridler, describes the position at the start of 2022 in the following way:

> *"… the Claimant and SSG would deal with payroll, compliance, governance, purchase ledger, invoicing, debt collecting etc - all very important activities that make sure the lights stay on. In terms of business commercial finance, 80% of our revenues were from UK field and tactical sales and Richard oversaw that. 20% of our revenues come from digital insights, development and shopper marketing and* [the other colleague] *oversaw that. Richard and* [the other colleague]*'s duties were*

> *similar involving forecasting, reforecasting, analytics, business performance and monthly and quarterly P&L's."*

59. We also heard in evidence that Mr Worker's work was focussed on the United Kingdom whereas the other colleague's work had international scope.

60. An important context to what occurred is the impact of Covid-19 and the worldwide lockdowns that followed. That is important not just in explaining the issues relating to a return to office-based work, but also important in that the respondent's primary business of field-based marketing was severely impacted by Covid-19 and lockdowns. Mr Ridler's evidence, which we accept, was that:

> "*Covid hit CPM badly as it is very much a people based business with field agents going into stores to sell and demonstrate products which was wiped out during the lockdowns, and the business lost a third of its forecasted revenues. Subsequently there was huge pressure to reduce our cost base, mainly human capital, in all areas of activity …*"

61. The UK Finance Director was made redundant in February 2022. Mr Ridler says:

> "*Subsequent to* [the] *redundancy it was agreed that the Claimant,* [the other colleague] *and Richard would report into me until a longer-term solution had been designed for the financial structure of CPM UK and Ireland.*"

The building walk

62. Fiona Mauger, at the time the Respondent's site manager for its Thame HQ, says "*From late 2021 into early 2022, the company were considering a full office refurbishment. It hadn't been renovated for many years at that point and it was starting to show its age. I was heavily involved in the planning and execution of the refurbishment and on a day-to-day basis it was essentially my project.*" This refurbishment project either was or became part of a broader push by the respondent to get people to work back in the office after extended periods of working at home during Covid-19. The project continued from 2022 to beyond the end of the claimant's employment in early 2023, eventually completing in summer 2023.

63. Fiona Mauger says:

> *"I wanted to take the opportunity to make accessibility improvements, ensuring that all members of staff and visitors had the opportunity to enjoy all areas of the site without difficulty. We had set aside a specific amount in the budget for these improvements. The Claimant was the only member of staff in head office with mobility issues which is why we decided to do a walk around the office in March 2022 to discuss accessibility."*

64. As previously mentioned, the claimant describes things differently:

> *"On 9 March 2022, when the business began to want people to return to the office, I invited the site manager … and the diversity champion … to a building walk so I could highlight the access challenges I was facing with the building and to share suggestions for improving accessibility for me and in general."*

65. The respondent says that the "building walk" was not specifically about any access difficulties the claimant was having, since so far as the respondent was concerned there were no practical difficulties. The respondent's position is that this was about seeking advice from the claimant, as the only person in the office known to have mobility issues, about how matters may be improved during the refurbishment so as to avoid not difficulties that the claimant was having but difficulties that may arise in the future if other members of staff with mobility issues were recruited, or existing members of staff developed mobility issues. Ms Mauger puts it this way:

> *"… this was not initiated by the Claimant. It was not a situation where she approached me about problems that she was having that needed addressing. I was having thoughts and ideas about what we may need to change during the refurbishment and wanted her guidance on that. I also wanted to ensure that we captured all improvements in our plans."*

66. The claimant's position is that she had taken the initiative of arranging the building walk to "*highlight the business's failure to complete adjustments previously requested*". The idea that the claimant took the initiative on this gains some support from Ms Wiffin saying in her witness statement that "*as a member of staff who had a medical condition, the Claimant offered to have a walk around so we could discuss and think about what changes might be needed for disabled colleagues, visitors or clients.*"

67. It is agreed between the parties that at least to some extent questions in relation to a disabled parking space, disabled toilets, access through the building's front doors and the internal door on the first floor were discussed. Mr Mauger says that following the walk:

> "*I debriefed with Kelly* [Wiffin] *about actions we would need going forward. The main three were to add disabled visitor parking spaces (which we did immediately), to automate front door and to automate inner door by reception. The automation of the doors would be built into the refurb plan. We did not feel there was a need to prioritise or expedite the work on them as the Claimant was not specifically requesting that. According to my walk around with her they were not items that were making her life difficult day to day ...*"

June change in reporting lines

68. Allegation V1 (and DD1) is that the respondent "*on 1 June 2022 … demote*[d] *the claimant*".

69. The broad facts of what occurred here are agreed between the parties, although not what those facts mean or whether they amount to a "demotion".

70. Mr Jones says:

> *"I was taking in responsibility to deliver the UK business plan so needed a close eye on Finance but, at the same time, could only cope with one direct report from that area given that these 7 reports were in addition to 3 existing reports which I retained plus the management of our global associates.*
>
> *My thought process as to who that should be was very simple. I only needed one person. Richard and* [the other colleague] *were both band 2 and the Claimant was a band 3. Richard was the most senior person. That is how the UK operation had always worked, less senior people report into more senior people. As part of his existing role, Richard would come in and present numbers to the UK board, he was responsible for the P&L accounts and would report on that. What the Claimant and SSG did was a vital function, but it was a back-office process. If I had appointed the Claimant to report into me rather than Richard, I would have had a more senior person reporting into a less senior person. I am sorry but that makes no practical or commercial sense. I would also have to take responsibilities off Richard and give them to the Claimant then have Richard teach her how to do those things. No reasonable business would conduct itself in that way."*

71. Mr Ridler says:

> "*I had a 121 meeting with the Claimant scheduled for 1 June 2022. At that point I broached the issue about the change in reporting lines. I explained to the Claimant about* [the managing director being on] *leave and the issues that that had created. I also explained that we were having some serious issues in other markets, and I needed to focus on those, and that the ELT had agreed a temporary new structure for the UK to facilitate the issues there.*
>
> *We discussed that I wouldn't have time to properly manage my reports and that as part of the interim solution the Claimant, a band 3, and* [the other colleague] *a band 2 would report into Richard Worker. The Claimant was clearly upset about this and said that she thought she was Richard's equal and would object to reporting into him …*"

72. It is not in dispute that the claimant was a band 3 and therefore at least in banding terms junior to the other colleague and Mr Worker who were band 2. It is also not in dispute that (i) prior to this reorganisation all three had reported to

the UK Finance Director and, on his redundancy, the Group CFO and (ii) after the reorganisation the other colleague and the claimant were to report to Mr Worker, with Mr Worker reporting to Mr Jones.

73. The claimant's position in this was straightforward. If three people are on the same reporting level, and then a reorganisation means that two of them report to the third, that inherently amounts to a demotion for those two (one of whom was her).

74. In her closing submissions, the claimant acknowledges a point made by Mr Jones that "*her job title, salary, responsibilities, banding and status were not affected by the decision*", but she says "*he is wrong about my status being unaffected by the change*", her point being that from the time of the change she no longer attended senior management meetings as she had before. Her witness statement emphasises "*demotion through change in reporting line*", which seems to be the main point.

75. On the facts of this case we do not consider that what happened can fairly be said to be a "demotion". An individual's position in the organisation is more than simply about who they report to. The claimant's essential duties remained the same. Her job title and terms and conditions of employment remained the same. She had the same people doing the same tasks reporting to her. In those circumstances we do not consider this to have been a demotion. Another way of looking at this is to consider the circumstances in February 2022 on the redundancy of the UK finance director, when the claimant and her colleagues started to report to Mr Ridler. No-one has suggested that that change in reporting line amounted to a promotion for the claimant.

76. For the purposes of her victimisation claim, the important further point is whether what occurred, if it was a demotion, related in any way to the building walk. The difficulty for the claimant is she has not established that either Nick Jones or Mark Ridler knew anything of the building walk or how it came about. Fiona Mauger had reported on the walk to Kelly Wiffin, but there has been no suggestion that Mr Jones or Mr Ridler knew about this. It appears to be agreed between the parties that the idea of the claimant reporting to Mr Worker originated with Mr Jones and was presented to the claimant by Mr Ridler. The claimant has not established that anyone involved in this decision knew anything about the building walk. Complaint V1 must be dismissed. This was not a demotion and it was not because of any protected act. Those who made the decision did not know anything about the building walk or possible reasons for it.

The claimant's complaint – July 2022

77. The claimant made her dissatisfaction with this reorganisation clear, and on 6 July 2022 sent an email to Mike Hughes with the subject "*Grievance regarding changes to my reporting line*". This is PD2. It reads as follows. Underlining has

been added by us to represent the sections said by the claimant to amount to a protected act (an allegation of race discrimination).

> *“I regret to inform you that I would like to raise a grievance with you regarding a change in my reporting line instigated by Nick Jones and Mark Ridler. I am addressing this grievance to you as my grievance relates to my current line manager, Mark Ridler, and I have already raised an informal grievance with the People Team, the outcome of which I was not satisfied with.*
>
> *As you will be aware, while Nick is covering* [the managing director’s] *role he has decided he does not want either* [the other colleague] *or I to report to him directly but for us to instead report into our colleague Richard Worker. I was informed by Mark Ridler that the reason for this decision was because "Nick requires a finance person to partner him during this period from whom he can get all the financial information about the performance of the consolidated UK business that he requires and which Richard is already providing to the UK board currently."*
>
> *Mark went on to say "Originally it was a role that I should have been doing until* [the managing director] *returns, however with her delayed return and the many markets I need to look after I have found I simply don't have enough time to dedicate what is required to the role. As I am stepping away from that role it feels appropriate for you and* [the other colleague] *to temporarily report into Richard until* [the managing director] *returns."*
>
> *Richard's partnering task is a function of his role and not a reason in itself to change my reporting line. I regard that change as a clear and distressingly casual demotion of my role; Richard is currently my peer and I feel it is highly inappropriate for me to have to report to him. When I took on this role, it was on the basis that the role reported into the CFO - that is what it says on my job description and I would not have accepted the role had it reported into a Head of Commercial Finance role.*
>
> *I have discussed this situation informally with Claire Wicks and she has obtained confirmation from Nick and Mark that, after considering the feedback I gave to Claire, they were not prepared to reconsider the change to my reporting line.*
>
> *Regretfully, I feel that I now need to raise a formal grievance regarding the demotion of my role. I firmly believe that this change to my reporting line amounts to a demotion and as such, I do not consent to it. I am also deeply disappointed and distressed at the casual way this demotion has taken place; it went from a "might be the case" during my 1:1 with Mark on Wednesday 1st June to a confirmed action without any formal notification to me.*

I am from a very different heritage background to almost everyone else at the head office, so perhaps this is why Nick's words in explaining his decision resonated so badly with me. I immediately felt very "othered" (and still do) and I had not expected my skills, experience and expertise to be disregarded so casually. This has been a bit of a wake-up call for me and has left me wondering what kind of company it is I am working for.

This feeling of being "othered" was not improved by receiving an invitation from HR to attend a "Break the Bias" training session, just as I was making an informal complaint on this matter to Claire Wicks. I'm pretty sure I'm not the one that requires that particular bit of training. Under the circumstances, the request to attend a DE&I-based training session felt very jarring and tone deaf.

This isn't a step I take lightly, I don't believe there are ever any winners from commencing a grievance process, but I feel very strongly that it is important both for my own career here at CPM and also for others that may follow after me to have clarity on whether there is a fair opportunity to succeed here at CPM ..."

78. Karon Karamavrou was appointed to consider the claimant's grievance by Claire Wicks, the respondent's People Director for UK & Ireland. The claimant was notified of that the following day by Mr Hughes, and Ms Karamavrou herself wrote to the claimant asking for suitable dates and times the following week for them to meet to discuss the grievance.

79. There was apparently a response from the claimant dated 13 July saying that she did not want to have a grievance meeting, although we have not seen that. The claimant does not address it in her witness statement. Ms Karamavrou points to a reply by her dated 13 July saying:

"I am still really keen to meet you Rita if you feel comfortable to allow me to hear your grievance as we planned, this would give you the opportunity to talk me through your grievance including why you see little point in discussing your grievance any further which you noted in your decline to attend our pre-arranged meeting on Thursday 14th July today to me, it also gives me the chance to both listen and ask you any questions related to your grievance allowing me to obtain more clarity . It will allow me to understand if I need to reach out to other colleagues within the business as part of your grievance investigation if needed too.

Of course Rita, I will respect your decision if you still feel you do not want to attend the grievance, I would then have no alternative but to use your email that you shared to raise your grievance for my investigation, based on my findings through this investigation I would then be in a position to share an outcome with you as part of the company grievance policy.

> *Rita if you can confirm to me by 10am Thursday 14th July following on from this email communication between us, if you plan to attend our meeting that would be great so we can plan accordingly, or if you wish me to proceed to review your grievance using your initial email sent to raise your grievance."*

80. The claimant replied to this saying:

> *"I remain certain that Nick's action in publicly announcing the demotion of my role in the head office huddle yesterday has pre-determined the outcome of my grievance and as such, I do not wish to waste any more of my time (or yours) on a futile exercise to change something that is now set in stone and has been communicated to the business.*
>
> *I am instead focussing my attention and resources on next steps for me and on redirecting the many queries relating to this matter from my team to someone who can answer them.*
>
> *Please go ahead and base your determination on my original email and above message."*

81. The reference to "*Nick's action in publicly announcing the demotion of my role in the head office huddle*" is a reference to a public announcement by Mr Jones of the new structure that the claimant objected to. Her position was that to attend a grievance meeting in those circumstances would be futile, as there was (in her view) no prospect of changing a reorganisation that had now been publicly announced.

82. Ms Karamavrou says:

> *"In terms of my investigation, I emailed a list of questions to Mark Ridler and shared this with Claire Wicks and Katie Lockwood, People Director. I also wanted to understand from Mark some of the thinking behind the decision. I also spoke to Claire Wicks specifically about the structures and bandings ...*
>
> *I also emailed a series of questions to Nick Jones on 22 July 2022. I asked him if he shared a structure at the head office huddle the previous week, what, if any, discussions took place about a finance restructure and his reasons for wanting Richard Worker to report into him directly. Nick provided his responses the following day ...*
>
> *On 29 July I emailed the Claimant to say that I was finalising my investigations and would respond to her early the following week."*

83. Ms Karamavrou goes on to explain why she did not uphold the claimant's grievance.

84. The failure to uphold the grievance is allegation V2.

85. An allegation that a grievance was not upheld because of the fact of it being a grievance about unlawful discrimination (and therefore a protected act) is often a difficult argument for a claimant to make good, or, to put it another way, at least a difficult argument for a claimant to show matters from which we could conclude that the reason why the grievance was not upheld was that it is a protected act.

86. Such an allegation suggests that a similar grievance that was not in relation to discrimination would have been upheld. That will often be a very difficult matter for a claimant, particularly where, as in this situation, there is no evidence of how Ms Karamavrou had treated any other grievance, nor is their any obvious flaw in her handling of this grievance, or anything suggesting that a grievance that was not a protected act would have been treated any differently. In her closing submissions on this point, the claimant refers back to her submissions in relation to direct disability discrimination, which simply identify that the grievance and subsequent appeal have been rejected. It has never been in dispute that the grievance and subsequent appeal were rejected, but what matters in this case is why the grievance and subsequent appeal were rejected, and whether it was anything to do with any protected act. There is no evidence in this case from which we could conclude that the grievance was rejected because of any protected act, and on this basis allegation V2 is dismissed.

87. The claimant submitted an appeal against this grievance outcome, which was heard by Sarah Smith. We do not need to address this in any detail. The appeal was unsuccessful but the allegation that this was itself an act of victimisation (V3) fails for the same reasons as with the original grievance decision, and is dismissed.

Office move – October 2022

88. V4 is "*on 11 October 2022, make changes to her role, including a re-location of your desk*".

89. The SSG was based in a separate area behind glass walls on the third floor of the office. During the refurbishment work, this area had been identified as the best place to put the contact centre (which was regarded as generating a lot of noise) which was to move from a separate building at the rear of the main office building into the main building. Therefore the SSG (and the claimant) had to leave its existing office area. It is not suggested that this decision to relocate the contact centre to what had been the SSG area was in any part a consequence of any protected act done by the claimant.

90. In any event, the third floor was being refurbished and everyone who worked on the third floor had to relocate temporarily elsewhere in the building while that refurbishment work went on.

91. This is how the claimant describes the situation in her witness statement:

> *"On 11 October 2022, a number of changes to my role were implemented following the grievance process. A decision was made to relocate my team to the same floor as the Commercial finance team (the building has three floors and my team were on the top floor while the Commercial team were located on the middle floor). I explained to my then line manager, Richard Worker, that I would not be able to work on the middle floor, as there were no disabled toilet facilities on that floor. After my meeting with him, I also informed the operations manager in charge of the relocation that I could not be relocated to the middle floor, as it did not have disabled toilet facilities. She said her plan was to move me instead to the ground floor, but that my team could not be relocated there too as other people had already been relocated into that space so my team would be relocated to the middle floor as directed by Richard Worker. The desk I was allocated on the ground floor was in an area that was physically separated from the rest of the building by a heavy non-automated door that I really struggled (mostly unsuccessfully) to open, effectively imprisoning me away from my team. I have frequently requested powered door access for this door (several meeting rooms are also behind this door) and the two front doors since I joined, but have always been told the doors will be adjusted "in due course".*

92. The idea that the claimant had "*frequently requested powered door access for this* [inner] *door*" is a matter we will return to when considering the outstanding question of time limits on this element of her claim.

93. Mr Worker gives a similar account from his point of view:

> *"In October 2022, we needed to move our contact centre colleagues out of a building at the back of the office into the main building. As a contact centre they are very noisy so the plan was to move them onto the top floor where the SSG team was based as they had glass partitions around them which would help contain the noise. This meant SSG would need to move. I thought it made sense to move them onto the middle floor to be around other finance colleagues and start to change that silo mentality. The Claimant objected to the move when I spoke to her about the relocation, noting the facilities were inadequate on the middle floor, therefore she would need to move elsewhere. This was a little disappointing as this was a temporary arrangement, especially given the Claimant had attended all day meetings on the middle floor which had not been highlighted to me as an issue previously and that she was rarely in the office. To move the entire SSG team to the ground floor would mean relocating existing teams already based there to create space. It would also add to the disruption. As a compromise, we agreed to ring fence four desks on the ground floor for the Claimant and her management team to sit at when the Claimant was in the office – they could co-ordinate days between them. We could then re-assess*

> *permanent seating plans and options as refurbishment plans developed."*

94. The parties essentially agree that the plan was that at least for the duration of the refurbishment work on the third floor (which lasted for the reminder of the claimant's employment), SSG would be co-located with the rest of the finance team on the second floor. While originally Mr Worker seems to have thought that the claimant could join her team on the second floor it was her position that she could not work on the second floor because there were no disabled toilet facilities on that floor. The alterative offered by Mr Worker was "*to ring fence four desks on the ground floor for the Claimant and her management team to sit at when the Claimant was in the office*", and the office rearrangement then proceeded on that basis.

95. V4 concerns "*changes to her role, including a re-location of your desk*". We did not hear evidence of any changes other than the re-location of the desk on 11 October 2022, so it is simply the relocation of the desk we will address. This did occur. There was a relocation of the claimant's desk from the third to the first floor.

96. As for whether this was anything to do with any protected act(s), the most obvious answer to that is that the relocation of the claimant's desk had nothing to do with any protected act. The whole of the SSG (including her) were relocated while the third floor was refurbished. The reason for the relocation of her desk was the need to move SSG from the third floor while it was refurbished with a view to the contact centre taking over their old space. That reason applied to the whole of SSG and was nothing to do with any protected act(s).

97. Possibly the more appropriate reading of this allegation is that the problem was not the relocation itself, but her being separated from the rest of her group. But was that decision influenced in any way by protected act(s) carried out by the claimant?

98. The claimant gives her answer to this in her closing submissions (and the same answer covers all the allegations of victimisation):

> *"These detrimental actions commenced after I made a request for disability adjustment during the building walk with Fiona Mauger on 9 March 2022. Prior to that, I was fully included in all meetings and activities relating to my role, and my position as a senior manager in the business. I was consulted by my fellow senior managers on a large number of challenges they faced and was seen as a positive contributor to helping resolve them."*

and

> *"… paragraph 17 of Mark Ridler's witness statements states that he realised from the email I sent to him on 8 June 2022 that he immediately*

> *realised that I would seek a grievance against him and sought advice from the HR director before responding. This highlights the respondent's reaction to my doing a protected act."*

99. Amongst other things, Ms Skeating says this in her closing submissions on the question of causation of any alleged acts of victimisation:

> *"It is helpful to remind ourselves of who knew about the alleged two protected acts. In respect of 9 March 2022 walkthrough, only Fiona Mauger and Kely Wiffin knew of what was discussed. Given Fiona only reported back. Those who were aware of the grievance were Karon Karamavrou when it was raised. Nick Jones when he was asked about it. Richard Worker had a general knowledge but only demotion. Mark Ridler had no knowledge."*

100. There are some difficulties with the claimant's first paragraph cited above. Even if it was the case that "*the detrimental actions commenced after I made a request for disability adjustment during the building walk*" that does not mean that the fact of the building walk or what went on around it caused the detrimental actions.

101. The respondent has established that it was Mr Worker who made the decision to relocate the claimant, and the claimant has not established that Mr Worker knew anything about the building walk, so we do not see in those circumstances how it can be said that he carried out this relocation because of the arranging of the building walk or anything that occurred on the building walk.

102. While Mr Worker knew about there having been a grievance raised, in cross-examination he said he thought that it was about reporting lines but he did not know the detail of his grievance. He said since it appeared to concern his position he wanted to stay out of it, leaving others to take steps to investigate it. In answer to questions from the tribunal he said that he was not aware of any element of the grievance that related to unlawful discrimination. The claimant has not established that the claimant knew of the substance of her grievance nor that he knew or thought any of it was about discrimination. He did not know of any protected act and so it cannot have been part of any decision he made.

Sidelining in compliance discussions – 22 November 2022

103. V5 is that on 22 November 2022 the claimant was "*side lined … in compliance discussions*".

104. This is the claimant's account of this:

> *"On 22 November 2022, one of my direct reports … forwarded me a message sent to him by the CFO that was a discussion between the CPM Group CFO and CPM's UK parent company, OSMG on how much the UK were overdoing SOX compliance (they were not, the business*

operated the bare minimum of primary controls only) and how CPM could reduce the volume of testing (it could not, it is prescriptive). Although one of my direct reports was copied into this discussion, I was not, despite being the official SPOC (single point of contact) for the UK business for SOX compliance …"

On 22 November 2022 the Group CFO Mark Ridler excluded me from an email discussion on the SOX controls that were being carried out by CPM UK, following a previous discussion he had with [named individual] *whose perception was that CPM UK were probably overdoing it by way of S-Ox controls and that if it aligned with the level required in the US, we could cut back quite a lot". In my capacity as the appointed compliance SPOC (single point of contact) for the CPM group of companies, it was my responsibility to ensure that each company in my remit was meeting the minimum mandatory levels of compliance. Despite* [named person's] *belief that we were overdoing it, the controls testing and sample selection and testing were issued and controlled by the US compliance team and there were no optional items included in the SOX process. The role of SPOC is central to managing the mandatory compliance requirements of the Omnicom SOX process and excluding the SPOC from any plans to reduce the level of compliance is an extremely serious and deeply concerning matter, with potential consequences to the reliance external shareholders are able to place on the process. It is a highly regulated regime that is mandatory for all US public companies. As the UK company results form a significant element of the US parents results (CPM UK and* [sister company] *Cosine are subject to Group audit) any attempts to dilute compliance with the SOX regime not only undermine me as the SPOC, but also potentially undermines Omnicom's compliance with SOX. I remain deeply concerned about the implications of this incidence."*

105. The fact that this incident happened is not disputed by the respondent, although it is disputed that this amounted to "side lining" or an act of unlawful discrimination.

106. The CFO who did this was Mark Ridler, and "OSMG" is Omnicom Specialty Marketing Group, the division of the respondent's parent organisation that it was accountable to.

107. Mr Ridler says:

"On 22 November 2022, I emailed [the] *CFO for OSMG, our direct reporting pillar, about our "S-Ox" controls. The email was cc'd to* [the] *head of Financial Accounting who was one of the Claimant's direct reports. "S-Ox" is shorthand for Sarbanes-Oxley which is a piece of American federal law which mandates certain practices in respect of*

financial record keeping and reporting for corporations. As our parent company was based in the US, we were covered by this.

As part of our annual audit by KPMG we are also tested on our documented internal control procedures for S-Ox compliance. As a business we identify what our internal controls are and document them, we set and adopt the internal controls and KPMG then test them.

Post the audit, our network OSMG, discussed with auditors the outcome of the testing and KPMG reported that we had easily passed them and noted that CPM had more controls than they were used to seeing elsewhere, particularly in the US. This led to a conversation with OSMG as to whether we in fact had too many controls and could they be re-designed to reduce the auditors time in testing them but still remain fully compliant. As mentioned, they are our controls not KPMG's so we can design and record them however we want to. They simply have to be sufficient to show adequate internal controls.

I got a phone call from my US boss discussing the above ... [the claimant's report] *was copied in* [to my reply] *as his role was the day-to-day design and management of the internal controls. The Claimant's role was managing the shared services department of CPM across a wider scope of activities. I simply wanted a top line thought response from* [the claimant's report] *to see if the matter was worth investigating in more detail. It was not a formal process so there was no need to set up a committee or group to review the matter if it wasn't going anywhere. There was certainly no intention to undermine any-one and CPM is an easily approachable amiable business and while there are formal hierarchies every management door is open to anyone who wants to walk in and discuss any issues.*

108. Mr Ridler says:

"I am aware that the Claimant submitted a grievance about the change in reporting line to Mike Hughes in early July. I was surprised to learn that she felt the decision was related to her heritage and background. That simply never registered with me. Karon Karamavrou was appointed to deal with that grievance and I recall that she spoke to me about the decision. I explained to Karon that the reasons for the decision and they are as I have set out in this statement …

I understand that the Claimant has alleged that [the email to her direct report] *amounted to her being sidelined in compliance discussions and this was because of her disability. That is simply untrue. The reasons for contacting* [the claimant's report] *directly are as I have set out and had nothing to do with the Claimant's disability …*

> *I would also like to say that at the time of change in reporting lines in June 2022 and when I sent the S-Ox email in November 2022, I was not aware of the Claimant having brought a claim for disability discrimination or raising any complaints or grievances about an alleged failure to make reasonable adjustments for her condition."*

109. What did Mr Ridler know of the claimant's alleged protected acts and what difference (if any) did they make to his decision?

110. Mr Ridler did not know of the building walk or any prompt for that. The only people who knew of that were Fiona Mauger and Kelly Wiffin.

111. As Mr Ridler accepts, he was contacted by Karon Karamavrou during her investigation of the claimant's grievance. She emailed him questions concerning it, although none of those questions address allegations of discrimination or suggest that such allegations have been raised by the claimant. As cited above, Mr Ridler says "*I was surprised to learn that she felt the decision was related to her heritage and background.*" although he does not say when he learned that. In her closing submissions the claimant notes Mr Ridler also said in his witness statement that he thought the claimant would raise a grievance, although there is nothing in that to suggest that it would be a grievance about discrimination and therefore a protected act.

112. The position is unclear, but we will assume in the claimant's favour that at the time he sent his email Mr Ridler was aware of the claimant having raised a grievance that included elements "*related to her heritage and background*" and which was therefore a protected act – but even with that assumption in the claimant's favour we do not see anything in what Mr Ridler did from which we could conclude that his copying this email to the claimant's report rather than the claimant amounted to an act of unlawful victimisation.

The appointment of a new finance director – late November 2022

113. There is no allegation of discrimination arising from the appointment of a new finance director but it gives context to some matters that follow. It is sufficient for us to say that both the claimant and Mr Worker were interviewed for the position of finance director and Mr Worker was appointed to the role. The interviews took place in late November. Mr Worker says he was "*confirmed in post at the end of the month*".

The selection of the claimant for redundancy

114. Mr Worker was the person who initiated the removal of the claimant's role.

115. Mr Worker describes the development of his idea in his witness statement:

> *"The interview process for the FD role included a presentation on how the candidates saw the future of the Finance team. For a few years by*

this point we had a project underway called Clarity which started prior to Covid and is still ongoing. It was all about driving efficiencies through the team, making savings where we could through things like automation, outsourcing and reducing headcount. There was a real push from our parent company, Omnicom, to keep going with that. The Claimant would have been aware of all of that and the constant drive for efficiencies. For example, there had been conversations in the past about possibly outsourcing payroll.

In addition, during my time working with Nick, I had become aware of how keen he was to reduce management layers where possible so that every team had a much flatter structure than we had in the past. This was all geared towards a leaner operation across all departments.

Another thing I was keen on was moving payroll out of finance and having it sit within HR. That was a long-term discussion and something that had been considered for quite a while. That made more sense to me as HR were responsible for processing employee admin (things like new starters, leavers, changes to employee details/T&C's, flexible benefits, logging sickness, maternity leave etc.) and data would be sent to payroll to then make pay / HMRC calculations. I would estimate that payroll took up about 35% of the Claimant's responsibilities and if it moved to HR, she would have lost 4 direct reports and would have been left with 12 people to manage.

All of the issues … above formed part of my pitch for the role of FD so when I was successful, I wanted to start consultation about the possibility of moving payroll and making the Claimant's role redundant. As a further efficiency saving, there would be no backfill of my position. I also hoped all this would bring the finance team closer together."

116. Pausing at that point, we accept that (i) this plan was part of Mr Worker's pitch for appointment to the finance director role, (ii) saving of cost was a priority for the business at the time, (iii) no-one was appointed to Mr Worker's former role and (iv) on his appointment Mr Worker sought to implement this plan.

117. Mr Worker describes presenting this proposal to the claimant and a colleague on 7 December 2022. He says:

"The proposed changes were:

a. The payroll team would transfer to HR operations. This was seen as a more natural fit given many key HR processes flow into payroll. Having them in the same team would allow for greater collaboration and for them to own those processes in full.

b. The SSG department would cease to exist. The previous SSG and commercial finance teams would come together as one

Finance Department. The idea here was to remove barriers, remove layers and move towards more of a business partnering model. This reflected some of the best practices we had seen from the operation over in Ireland.

c. *As a result of the above, some roles were potentially at risk of redundancy. My old role as Head of Commercial Finance would not be backfilled. The business partners in finance would report directly to me as FD. They were senior enough and experienced enough to handle that. … the Claimant's role as Head of SSG would have sat above the 3 … roles ... An additional senior manager level there between me and those three people did not make sense to me and seemed unnecessary.*

d. *As a result, Head of SSG, the Claimant's role, would potentially cease to exist.*

e. *The band 4 Senior Commercial Accounting Manager will change to band 3. At the time this was* [a colleague's] *role. She looked after management accounting and client liaison, but the new role would also take on planning and forecasting which, in my mind, justified upgrading it to a band 3 role. I felt this accorded to my plan of a flatter structure as even though this was a more senior post it would take on a greater breadth of responsibility reducing the need for layers. There would also be a Band 5 Manager and a Band 6 Accountant responsible for planning, internal overheads reporting into this new role. The role would also oversee planning and forecasting owning the actuals close process.*

Given the limited scope of the changes, the proposal was to only pool the two … roles across the existing SSG and Commercial Finance team - i.e. the Claimant's current role and the new band 3 Senior Commercial Accounting Manager role.

… this is just a small part of a much bigger piece. Project Clarity was a long journey with significant headcount reductions over time, most through natural attrition. Headcount was always under constant review. Indeed, over the past few years the finance department has reduced from 47 heads to 27 and, since January 2023, the area the Claimant used to be responsible for has further reduced in headcount from 12 to 9."

118. The claimant says:

"On 7 December 2022 I was informed that my role is one of two that are at risk of redundancy. I was told there was one other person who was also at risk of redundancy and there would be one role available for both us to compete over."

119. V6 is "*on 7 December 2022, selected her to be at risk of redundancy*".

120. Clearly this happened, but was it an act of victimisation?

121. The decision was made by Mr Worker, and as set out above he did not know anything of any protected act(s), so neither V6 nor V7 (which was also a decision by Mr Worker) were acts of victimisation. For the avoidance of doubt, we find that the decision to select the claimant for redundancy and dismiss her was a decision made by Mr Worker, and he was unaware of any protected act(s). Those decisions were therefore not acts of victimisation.

Redundancy scoring

122. It is clear that Mr Worker's original view was that the claimant should be considered in a pool of one for redundancy. One role was being made redundant, and that was the role of head of SSG, occupied by the claimant. However, as part of this reorganisation a Commercial Accounting Manager role was to be upgraded to band 3, and, apparently after HR or legal advice (and if legal advice, in respect of which privilege was not waived), he decided that the claimant and the existing band 4 Senior Commercial Accounting Manager should be considered against each other for the new band 3 Commercial Accounting Manager role, through a scoring exercise. The logic adopted by Mr Worker or those advising him was that the Head of SSG role and a band 4 Senior Commercial Accounting Manager role were being made redundant, with the existing occupants of that role having the opportunity to be considered for the new band 3 Commercial Accounting Manager role.

123. Mr Worker says:

> *"… it … cross*[ed] *my mind to treat the Claimant's role as unique and deal with this as a single role redundancy rather than a pooling and selection exercise.* [The existing Senior Commercial Manager]*'s role was more of a commercial one compared to the Claimant's operational role. However, the Claimant had insisted for a while that she had quite a commercial mindset and it felt like the right thing to do was to give her a chance to prove herself."*

124. The claimant summarises this and the resulting scoring exercise as follows:

> *"… the available role the two of us were supposed to compete over was almost a mirror of the other person's current role, but with my higher banding and the outcome was that the other person got a promotion and I lost my job. I have significantly more relevant finance experience than the other person, but was scored with the lowest possible mark on each of the criteria applied to the assessment."*

125. In principle she is correct to say that the new band 3 role was very closely aligned with the old band 4 role. The old band 4 role was a much closer match to the new role than her role of Head of SSG was.

126. The selection criteria chosen by Mr Worker and eventually implemented were the following, each of which were to be scored out of five:

- Individual KPIs
- Team KPIs
- Commercial delivery
- Efficiency savings delivered

127. Following the initial presentation of the plans, a consultation meeting with the claimant was arranged for 13 December 2022. Mr Worker says "*I asked the Claimant whether she had any comments or views on the proposals, but she didn't. She had very little to say at all …*". That is borne out by the notes of the meeting, which record that the claimant had "*no questions on proposed redundancy*" along with "*no comments made by employee*" and "*no questions raised*". The claimant did not at any point engage with the redundancy selection process, apparently seeing the outcome as a foregone or inevitable conclusion. On 14 December 2022 she wrote an email to the chair of the respondent's parent company complaining that "*the available role the two of us are supposed to compete over is almost a mirror of the person's current role, but with my higher banding and the outcome I am expecting is that the other person will get a promotion and I will lose my job.*" She received no response to that email.

128. Mr Worker proceeded to carry out the scoring he had originally proposed. As he puts it in his witness statement: "*The Claimant scored 1 across the board in all 4 categories. She had no individual KPIs set up in the system. There were no team KPIs in the system either. Once the Claimant knew she would be scored on KPIs she could have gone into the system and added some, but she didn't even do that. I sensed a complete failure to engage in the process.*"

129. It is correct to say that the claimant had no individual or team KPIs set up in the respondent's internal systems. While Mr Worker criticises the claimant for not taking the initiative on this when learning of the intended scoring criteria, we understand the respondent to accept that the reason why no individual KPIs had previously been recorded for the claimant was down to her previous manager's disinclination to follow the correct internal process for establishing and recording KPIs. The question of team KPIs was less clear, with Mr Worker suggesting that it followed previous difficulties the claimant had had in establishing such KPIs with her team.

130. The claimant's scores were offered to her in a second consultation meeting on 15 December 2022, the notes of which record "*RM said she wasn't surprised at the outcome as it was* [the other individual]*'s job.*" It seems they were actually provided a day later, on 16 December 2022. In an email accompanying this notification, Claire Wicks says:

> *"We shared your score with you and briefly discussed that unfortunately you did not score the highest points. You said that you weren't surprised as you felt this was* [the other individual]*'s role. The criteria has been set on what we expect this role to deliver after the restructure. We believe we have been fair to both parties with the criteria that has already been agreed."*

Dismissal

131. The third and final consultation meeting followed on 3 January 2023 and appears to have been as brief as the others. The claimant was subsequently notified of her dismissal, to take effect on 6 January 2023.

CONCLUSIONS

Disability discrimination (remaining matters)

132. It follows from our findings above that there was no continuing act of discrimination. Accordingly all the allegations of disability discrimination (including victimisation) prior to 4 January 2023 are out of time and must be dismissed.

133. We had reserved our position on the question of the "inner door" physical feature reasonable adjustment. As with the other physical feature reasonable adjustments, the requirement to make the adjustment arose from the start of the claimant's employment, but we had reserved the question of whether this could be said to have re-started as an obligation to make a reasonable adjustment on the claimant being redeployed to work on the first floor – the floor which had the heavy inner door. Previously the claimant would have had the same difficulties with the door but these may not have been quite so practically important at a time when she was not deployed to work on that floor.

134. The answer to this lies in the claimant's evidence that, prior to relocating to the first floor, she had "*frequently requested powered door access for this door*" as "*several meeting rooms are also behind this door*". The significance of this is not necessarily in what the claimant did or did not request, but in her identification that the door being unpowered caused her considerable difficulty prior to her relocation to the first floor as well as during her (somewhat limited) time located on the first floor. In some cases an unpowered door on a floor that an individual rarely if ever visited may be no more than an academic problem, becoming a real issue only when the person is obliged to relocate to that floor, but that is not what happened in this case. As with the other physical adjustments, this had caused the claimant material difficulty from the start of her employment, and her relocation to the first floor did not somehow reset the clock or set another time limit running for the adjustment. The adjustment sought was the same as the one that should have been made since the start of her employment, and as with the other physical feature reasonable adjustments claims the claim is substantially out of time with no basis having been given for

any extension. It, and the other disability discrimination (including victimisation) claims, are dismissed.

Unfair dismissal

135. Section 98 of the Employment Rights Act 1996 addresses how a tribunal is to assess whether or not a dismissal is unfair:

> *"(1) In determining … whether the dismissal of an employee is fair or unfair it is for the employer to show:*
>
> *(a) the reason … for the dismissal, and*
> *(b) that is it … a reason falling within subsection (2) …*
>
> *(2) A reason falls within this subsection if it … is that the employee was redundant …*
>
> *…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair …*
>
> *(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 dismissal, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

136. In accordance with our previous findings, we are satisfied that the respondent has shown that the reason for the claimant's dismissal was redundancy. The more difficult question is whether, on consideration of s98(4) that dismissal was fair or unfair.

137. For the purposes of considering the selection process, we have taken the following from the claimant's closing submissions, where they appear under the heading "*the respondent did not adopt a reasonable selection decision*". We have added numbering to them for reference purposes:

> *"(1) The selection criteria did not take account of my skills and experience in commercial finance.*
>
> *(2) The selection criteria assessment did not take into account my achievements in the business to date or the method of tracking and measuring these, which in his verbal testimony, Richard Worker acknowledges was different to the standard method used*

at CPM due to the way our [former] *mutual line manager … operated and the historical direction from the founder of the SSG department … to keep SSG entirely separate from the rest of the business.*

The normal method in place for monitoring progress was requested by Mark Ridler in [the 2022 Road Map] *I would like to draw the Tribunal's attention to* [part of the Road Map] *in particular, as this summarises at a very level that status of planned activity for 2022, which were on track. These are specifically those with a green border, so the left hand column and the bottom item on the next column.*

Richard Worker in his evidence stated that efficiency and cost savings were the key elements in the transformation plan ("Project Clarity"), and these were the tasks set for him and for the commercial finance department, but [a page of the Road Map] *shows you that the tasks set for me were different and focussed on efficiency of process, accuracy and risk reduction through standardisation.*

Commercial Finance and SSG were two very different departments, with two very different sets of goals, which were measured in different ways and over different time frames. In his email … Mark asked for an update to a document he was clearly familiar with. This document was the method that was used to track mine and the SSG Team's progress on the goals that had been set, not any CPM system, regardless of whether they were called KPIS, KRAs or goals. This is the document that held me to account.

(3) The other person in the pool had been promised a promotion as part of the pooling process.

(4) Two candidates were excluded from the pool; [names given].

(5) The respondent made no attempt to find me suitable alternative employment.

(6) They disregarded the opportunity to match me, a band 3 without a role, to the newly created band 3 role.

(7) They sent me a list of sales vacancies for the field services business and junior administration vacancies for the operations area.

(8) The reasonable response to my band 3 role in SSG being made redundant was to match me with the available band 3 role elsewhere in finance."

138. We will look at these in different thematic groups. Before doing so we note that although this has been described throughout as scoring a redundancy selection pool, in many ways the task that was be accomplished was more akin to selection for an offer of alternative employment. What we had was a band 4 Senior Commercial Manager role and Head of SSG (band 3) being abolished, with the opportunity for each of the people holding those roles being selected for appointment to the new band 3 Commercial Manager role.

139. The claimant's points (1) and (2) relate to the selection criteria decided upon and their implementation in her case. To the extent that the complaint is that the selection criteria were more relevant to a commercial manager's role than to the claimant's former role, we do not find that surprising or unfair. They were criteria for selection to take up a commercial manager's role which was recognised by all parties to be similar to the previous band 4 role (in the claimant's words, a "mirror" of it) so it is hardly surprising that the relevant selection criteria were aligned more with commercial management than with the head of SSG role.

140. A development of that is the claimant's position that reliance on the "KPIs" recorded in a particular way was not the appropriate way of measuring her skills. She points out in her witness statement and closing submissions that there were other, possibly equivalent, ways of measuring her skills. The difficulty for the claimant is that she did not make that point at the time. She did not engage with the consultation process at all, apparently on the basis that she considered the outcome a foregone conclusion. It goes without saying that the better time to make these points was when they may have made a difference to the outcome – that is, during the consultation process – rather than after the event at an employment tribunal hearing.

141. We accept that it is the employer's obligation to ensure a fair dismissal, and that not making a point during the consultation process does not limit the employee's ability to later argue that their dismissal was unfair, but in considering "*equity and all the circumstances of the case*" we are bound to consider what, if anything, was said about this by the claimant at the time. We consider that to be particularly the case where the person involved is in a position of seniority such as the claimant's. She did not raise any complaint about the KPI scoring at the time. The respondent had proposed apparently rational scoring designed around the new job, and offered consultation on this. If the claimant had complaints about that there was an onus on her to raise them at the time.

142. We do not recollect point (3) from the evidence in the case. It is true that on succeeding in the selection exercise the other individual would be promoted,

and that is something we can consider more generally against the claimant's points (6) and (8).

143. On point (4) it was the claimant's position that the pool for selection for redundancy should encompass an additional two employees: the other band 3 head of finance who she had been on a level with and the head of finance in Ireland. We do not accept that. The other heads of finances' roles were undisturbed in the reorganisation, and there was no need to pool them with the claimant. Given Mr Worker's intended reorganisation the correct pool was either (as originally intended) the claimant alone or (as implemented) the claimant and the band 4 Senior Commercial Manager.

144. In points (6) and (8) the claimant argues (by reference to the previous question of comparability of band 3 roles on the promotion of Mr Worker) that the new band 3 role was hers as of right (or at least she should have been preferred for it given that she was a band 3 as opposed to the person who was band 4). We do not accept this. Banding is likely to denote an overall assessment of job duties and responsibilities, but the fact that two jobs are in the same band does not mean that they are interchangeable.

145. Points (5) and (7) relate to the search for alternative employment and were at least to some extent new points raised for the first time in her closing submissions. Towards the end of the consultation process the respondent, in what we consider the usual way in such situations, provided the claimant with a list of available vacancies. No doubt many, most, possibly all of them would be unsuitable for her, but that does not relieve the respondent of the obligation to notify the claimant of them. It cannot be a proper criticism of a redundancy process that the list of available vacancies was too wide, nor can a claim that there was no attempt to find suitable alternative employment succeed in a case where the claimant has been selected against someone else for a possible alternative vacancy, a list of available vacancies has been offered and the claimant has not identified any role that she should have been offered (except for the band 3 Commercial Manager role we have already addressed).

146. In those circumstances, while we can see that the claimant may question the selection process for the band 3 Commercial Manager role, we do not consider the claimant's dismissal to be unfair.

147. In the light of our findings, the provisional remedy hearing set for 20 November 2024 is not necessary and will not proceed.

Employment Judge Anstis
Date: 27 August 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

…….....

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription
Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

APPENDIX – LIST OF ISSUES

1. Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 4 January 2023 may not have been brought in time.

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

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

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

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

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

2. **Unfair dismissal**

2.1 Was the claimant dismissed?

[The respondent accepts that the claimant was dismissed.]

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy or some other substantial reason.

2.3 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

2.3.1 The respondent adequately warned and consulted the claimant;

2.3.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool;

2.3.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

2.3.4 Dismissal was within the range of reasonable responses.

…

4. Disability

4.1 Did the claimant have a disability as defined in section 6 of the Equality Act 2010 <u>at the time of the events the claim is about</u>? The Respondent accepts the claimant is disabled at some point in time but has not specified a date on which the disability is accepted.

[The respondent accepts that the claimant was disabled throughout her employment with them.]

5. Direct disability discrimination (Equality Act 2010 section 13)

5.1 The claimant states she is disabled. Her disability is related to her mobility, due to damage to her left foot, she cannot stand unaided or walk without a walking aid for any distance.

5.2 Did the respondent do the following things:

5.2.1 On 1 June 2022, demote the claimant; **[DD1]**

~~5.2.2 On various dates, failed to implement the reasonable adjustments requested by the claimant;~~

5.2.3 On 3 August 2022, reject the claimant's grievance; **[DD2]**

5.2.4 On 19 August 2022, reject the claimant's grievance appeal; **[DD3]**

5.2.5 On 11 October 2022, make changes to her role, including a re-location of your desk; **[DD4]**

5.2.6 On 22 November 2022, side lined her in compliance discussions; **[DD5]**

5.2.7 On 7 December 2022, selected her to be at risk of redundancy; **[DD6]** and

5.2.8 On 6 January 2023, dismissed the claimant. **[DD7]**

5.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant says she was treated worse than Richard Worker.

[The claimant accepted that Mr Worker did not have the same mobility impairment that she had.]

5.4 If so, was it because of her disability?

6. **Reasonable Adjustments (Equality Act 2010 sections 20 & 21)**

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

6.2 Did a physical feature, namely,

6.2.1 A disabled parking space, with markings and a path, **[RA1]**

6.2.2 Non automated front doors, **[RA2]**

6.2.3 Heavy inner door, **[RA3]**

put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

6.3 Did the lack of an auxiliary aid, namely,

6.3.1 Accessible power sockets, **[RA4]**

6.3.2 Disabled lock on the disabled toilet door **[RA5]**, and

6.3.3 An emergency cord in the disabled toilet **[RA6]**.

put the claimant at a substantial disadvantage compared to someone without the claimant's disability?

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

6.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:

6.5.1 A safe disabled parking space, that includes all the appropriate markings and a safe path to the accessible path to the door,

6.5.2 Automation of the front doors,

6.5.3 Automation of the heavy inner door,

6.5.4 Accessible power sockets on her desk and on the meeting room desks,

6.5.5 A disabled facility lock on the disabled toilet door, and

6.5.6 A longer and better placed emergency cord in the disabled toilet.

6.6 Was it reasonable for the respondent to have to take those steps and when?

6.7 Did the respondent fail to take those steps?

7. Victimisation (Equality Act 2010 section 27)

7.1 Did the claimant do a protected act as follows:

7.1.1 On various dates, raise grievances and/or complaints about the respondent's failure to make reasonable adjustments for her?

[The claimant says this is:

- *her grievance,* **[PD2]** *and*

- *building walk speaking to Fiona 9/3/2022.* **[PD1]***]*

7.2 Did the respondent believe that the claimant had done or might do a protected act?

7.3 Did the respondent do the following things:

7.3.1 On 1 June 2022, demote the claimant; **[V1]**

~~7.3.2 On various dates, failed to implement the reasonable adjustments requested by the claimant;~~

7.3.3 On 3 August 2022, reject the claimant's grievance; **[V2]**

7.3.4 On 19 August 2022, reject the claimant's grievance appeal; **[V3]**

7.3.5 On 11 October 2022, make changes to her role, including a re-location of your desk; **[V4]**

7.3.6 On 22 November 2022, sidelined her in compliance discussions; **[V5]**

7.3.7 On 7 December 2022, selected her to be at risk of redundancy **[V6]**; and

7.3.8 On 6 January 2023, dismissed the claimant **[V7]**.

7.4 By doing so, did it subject the claimant to detriment?

7.5 If so, was it because the claimant did a protected act?

7.6 Was it because the respondent believed the claimant had done, or might do, a protected act?