EMPLOYMENT TRIBUNALS

Claimant: Ms J Campbell

Respondent: Scottish Power Energy Retail Limited

Heard at: Liverpool **On:** 7,10,11,12,13 & 14 February 2025

Before: Employment Judge Benson
Mr G Pennie
Mrs A Ramsden

REPRESENTATION:

Claimant: Mr N Egan-Ronayne (Lawyer)
Respondent: Mrs L Millar, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded. The claimant was not unfairly dismissed.

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

3. The complaint of victimisation is not well-founded and is dismissed.

4. The complaint of failure to make reasonable adjustments in that the respondent did not permit the claimant to be accompanied at the feedback meeting on 8 July 2023 for her disability of ASD is well-founded and succeeds.

5. All other complaints of a failure to make reasonable adjustments for disability are not well founded and are dismissed.

6. The respondent is ordered to pay to the claimant the sum of £3000 to compensate her for the injury to her feelings, together with £620 interest.

REASONS

Claims

1. The claims brought by the claimant are:-

   (i) Unfair Dismissal;

   (ii) Direct Disability Discrimination (Section 13 Equality Act 2010);

   (iii) Failure to make reasonable adjustments (Section 20 and 21 of the Equality Act 2010;

   (iv) Victimisation (Section 26 Equality Act 2010)

Summary

2. This is a claim brought by the claimant in respect of her redundancy. The claimant was employed by the respondent, a power company from 30 March 2009 to 31 October 2022 as a Band 5 Accounts Manager. She has the impairments of Anxiety, Depression, Autistic Spectrum Disorder ("ASD"), Obsessive Compulsive Disorder ("OCD") and/or Bipolar III Disorder/Cyclothymia (which is a milder form of Bipolar Disorder). The respondent concedes that the claimant was disabled by reasons of each condition within the meaning of Section 6 of the Equality Act 2010 at the relevant time.

3. The claimant alleges that she was selected for redundancy because of her disability and because she had raised an internal grievance about discriminatory treatment in the past. She further says that the redundancy consultation was inadequate and unfair and that reasonable adjustments were not made for her disabilities in respect of the redundancy procedure.

4. She relies upon a grievance which was raised on 12 April 2021 as a protected act. The respondent accepts that that grievance was protected within the meaning of section 27 of the Equality Act 2010.

5. She is challenging the decision to select her for redundancy and the basis for this decision and the procedure followed. Of particular concern was the pool in which she was placed. This included her and another employee, Jane Turner, who was also a Band 5 Account Manager, who was carrying out the same role as the claimant but had only been permanently appointed to that position in December 2021.

6. She states that because of her neurodiversity and anxiety she needed additional assistance during the redundancy process but that was not

available. For example, she said she did not understand why she had been selected for redundancy. She had asked the respondent to explain her selection by taking into account her neurodiversity and says this did not happen. She further says that she requested a colleague to attend a feedback session with her, but this was also denied. She believed that she was selected for redundancy and was not successful in obtaining alternative employment because of her disabilities and because she had raised complaints about disability discrimination in the past.

7. The respondent contends that the claimant was dismissed for the potentially fair reason of redundancy and/or some other substantial reason during a large-scale redundancy process. This was part of the Retail Transformation Programme. The claimant has not disputed that there was business justification for the redundancy of employees and accepts that the respondent did need to make redundancies. Further it denies all allegations of discrimination and victimisation and says that it made all reasonable adjustments for the claimant during the process as advised by Occupational Health.

Issues

8. The issues to be decided in the case had been discussed and agreed at a case management hearing before Employment Judge Poyton on 16 October 2013. These were available to the Tribunal and at the outset of the hearing a discussion took place between the parties and the Tribunal to see if those issues could be narrowed and further clarified.

9. That discussion was helpful, and an amended List of Issues was discussed and provided to the parties on the first day in order that they could consider it overnight. Both parties confirmed on the second day that it was agreed.

10. That List of Issues is now set out below.

11. <u>Unfair Dismissal</u>

    (i) Has the respondent shown the reason or principal reason for dismissal?

    (ii) Was it a potentially fair reason under section 98 Employment Rights Act 1996? The respondent relies on redundancy as a potentially fair reason. The claimant accepts that there was a redundancy situation.

    (iii) 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:

        i. The respondent adequately warned and consulted the claimant;

        ii. The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

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

iv. Dismissal was within the range of reasonable responses.

(iv) In the alternative, the respondent relies on the reason for dismissal being some other substantial reason capable of justifying dismissal, namely the restructuring and reorganisation of the respondent to align with remaining markets and workload in order to achieve necessary cost reductions.

(v) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

12. Disability

(i) Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about (the redundancy process up to and including 31 October 2022)? The respondent concedes that the claimant was disabled at the relevant time by reason of the mental impairments of anxiety, depression, ASD, bipolar III disorder, obsessive compulsive disorder (OCD) and/or cyclothymia.

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

(i) The claimant relies on the mental impairments of anxiety, depression, ASD, bipolar III disorder, obsessive compulsive disorder (OCD) and/or cyclothymia. She compares herself with people who do not have those mental impairments. She relies upon these disabilities collectively.

(ii) What are the facts in relation to the following allegations: Did the respondent:

i. Select the claimant for redundancy. This was accepted.
ii. Fail to follow a fair redundancy process. The claimant relies upon the selection process. This is denied.
iii. Fail to consider the claimant for redeployment as an alternative to redundancy. This is denied.
iv. Withdraw a role for which the claimant was the highest scoring candidate.

(iii) Did the claimant reasonably see the treatment as a detriment?

(iv) If so, has the claimant proven facts from which the Tribunal could conclude that in any of those respects the claimant was treated less favourably than someone in the same material circumstances without the mental impairments of anxiety, depression, (ASD), bipolar III disorder, obsessive compulsive disorder (OCD) and/or cyclothymia was or would have been treated? The claimant relies upon Jane Turner as a comparator in respect of 4.2.1 and 4.2.2 and on a hypothetical comparator.

(v) If so, has the claimant also proven facts from which the Tribunal could conclude that the less favourable treatment was because of disability?

(vi) If so, has the respondent shown that there was no less favourable treatment because of disability?

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

(i) The claimant relies upon the disabilities of ASD and anxiety. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? The respondent concedes that it had knowledge of the anxiety, but in the respect of the ASD, only to the extent set out in the Occupational Health report dated 29 June 2022.

(ii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

i. Using their standard manner and style of communication. This was originally drafted as "Communicating with employees in a manner that a Neurodiverse audience would not understand" however this was rephrased at the initial discussion by agreement for clarity.

(iii) Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that she did not fully understand the redundancy process?

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

(v) Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

i. Adjust the communications relating to the redundancy process so that neurodiverse employees would be able to understand; The claimant says that the respondent should have provided a clearer explanation of the process and impact it would have upon the claimant. She says this would have reduced her anxiety.

ii. Allow the claimant to be accompanied to feedback sessions following interviews for alternative roles. This related to the feedback meeting on 8 July 2023 when the respondent refused to allow her to be accompanied by Andy Jones.

(vi) By what date should the respondent reasonably have taken those steps?

15. Victimisation (Equality Act 2010 section 27)

(i) Did the claimant do a protected act as follows:

i. 12 April 2021 – raise a grievance about allegations of disability discrimination? The respondent accepts this was a protected act.

(ii) Did the respondent do the following things:

i. Select the claimant for redundancy in June 2022?

ii. Allow Lisa Cunningham to tell the claimant that she must *"be careful not to appear to be questioning the integrity of the process"*?

iii. Allow Carl McWaters to tell the claimant that she was overqualified for a role she was considering applying for as part of the redeployment process? This was withdrawn by the claimant.

iv. Use interviews rather than appraisal scores, experience and qualifications as the basis for selecting employees for redeployment?

v. Fail to provide the claimant with clarification on the feedback given by Lisa Cunningham and Gerald Till following the interview for her own role?

vi. Fail to consider the claimant for other roles as an alternative to redundancy?

vii. Withdraw a role for which the claimant was the highest scoring candidate?

(iii) By doing so, did it subject the claimant to detriment?

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

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

16. Remedy for discrimination or victimisation

(i) Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

(ii) What financial losses has the discrimination caused the claimant?

(iii) Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

(iv) If not, for what period of loss should the claimant be compensated?

(v) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

(vi) Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

(vii) Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

(viii) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(ix) Did the respondent or the claimant unreasonably fail to comply with it?

(x) If so is it just and equitable to increase or decrease any award payable to the claimant?

(xi) By what proportion, up to 25%?

(xii) Should interest be awarded? How much?

Adjustments for the claimant during the hearing

17. The claimant required adjustments to ensure she could fully participate in the hearing. At a previous case management hearing, adjustments had been agreed following the production of an intermediary report. At that stage the claimant had not been represented. She was legally represented at the final hearing and the adjustments recommended were discussed and agreed at the outset of the hearing, these were as follows.

(i) The claimant would alert the Employment Tribunal if at any point any participant in the hearing was speaking too fast for her to follow. It was agreed that this could be done by the claimant raising her hand or any other method the claimant preferred. As the claimant was now represented, this was actioned via Mr Egan-Ronayne other than when the claimant was giving evidence.

(ii) During the hearing the claimant would be given a break of fifteen minutes every hour and when giving evidence ten minutes every thirty minutes. The claimant would alert the Employment Tribunal if there

was a need for any breaks beyond those agreed by raising her hand or otherwise.

(iii) No adjustment to the format of evidence given by the claimant was needed. The claimant would answer questions in cross examination in the normal way, the respondent would seek to ensure that the recommendations regarding questioning style as set out in the intermediary's report would be followed when cross examining the claimant.

(iv) The claimant would read out the affirmation at the start of her evidence in the normal way, no adjustment to this process is needed.

(v) The claimant might have a panic attack during the hearing. No advance precautions were required, if it occurred the claimant would need a break to recover.

(vi) The Employment Tribunal ensured that a room that the claimant could use as a quiet space was available to her during the six days of the hearing.

18. During the hearing additional adjustments were made, including not proceedings with the case during the afternoon of the second day after the claimant had given evidence, and giving the claimant additional breaks with her representative during cross examination of the respondent's witnesses to discuss if any additional questions were required. Although Mr Egan-Ronayne asked that this be done after every question, this was something which was not practicable or proportionate to do and would impact upon the witness who was giving evidence and the time available for this hearing to be completed.

19. Other than the claimant becoming upset on a couple of occasions, she was able to participate effectively in the proceedings with these adjustments.

Evidence and Submissions

20. The Tribunal heard evidence from the claimant in the form of a written witness statement and oral evidence.

21. The respondent's witnesses also gave evidence in the same way.

22. Evidence was heard from Ms Diane O'Hare, Head of Customer Escalations and Complaints. She was responsible for reviewing the restructure in her team in the Retail Transformation Programme and she made the decision in the restructuring exercise to pool the claimant with Jane Turner. Samantha Jameson, HR Consultant at the time who was responsible for the design and implementation of the Retail Transformation Programme from the HR perspective, Lisa Cunningham, the External Relationship Manager and claimant's line manager and Mr Gerard Till, the Senior Operations Manager, both of whom conducted the interviews of the claimant and Ms Turner.

23. The parties had agreed a bundle of documents of some 387 pages and additional documents were requested and disclosed during the hearing. Time was given in order that that could be completed. The Tribunal did not sit on the afternoon of the third day in order that additional documents could be provided, and as an adjustment to the claimant and Mr Egan-Ronayne who requested more time to discuss his cross examination of Ms Cunningham with the claimant.

Findings of Fact

Retail Transformation Programme

24. The respondent is a legal entity within Scottish Power group of companies. The respondent was engaged in the sale of power supplies (electricity and gas) to the domestic, industrial and commercial market throughout the United Kingdom. Since 2019/2020 the profitability of the business had been eroded. It had significant losses in 2019, 2020 and 2021.

25. A review of the business took place between June and December 2021. In December 2021 the proposed Retail Transformation Programme was announced. The respondent considered how to cut costs in all of their areas of operation but concluded that in addition, significant numbers of redundancies would be required. In December 2021 the proposed redundancy was announced to the retail business forum and a communication was subsequently issued to all staff across the business. At that stage the Complaints team was not impacted.

26. The business review continued and in March 2022 there was a further announcement that the respondent would be withdrawing from the industrial and commercial sales market business. The review resulted in a proposal in which over 500 employees would be affected by the planned restructure and approximately 300 would exit the business by reason of redundancy. The respondent commenced collective consultation with the recognised trade unions and employee representatives on 1 June 2022 and an updated HR 1 form was lodged on that date.

27. During collective consultations the numbers potentially impacted/redundant were discussed and the areas proposed to be affected were clarified. This included the complaints department. The respondent also discussed with the recognised trade unions, pools for selection, method of selection, voluntary redundancies, consultation process, redeployment opportunities and how the redeployment process would work, support for employees, treatment of employees who were pregnant or on maternity leave and enhanced severance terms amongst others.

28. In particular there was discussion with trade unions and employee representations about pools for selection. It was explained that when creating the pools for selection the types of activities and tasks an employee carried out would be assessed rather than job title alone. This method was necessary due to the high number of generic job titles which did not reflect the duties carried out in the role. For instance, there were seven Band 5 Accounts

Managers in the complaints department but their roles and responsibilities were different.

29. Where selection from a pool was required, it was explained that this would be by assessment/interview against current role as the respondent did not hold sufficient and/or consistent data for all employees, such would allow selection against defined criteria to be applied. The Trade Union queried this approach but accepted the method and rational after discussing the reasons it was required.

Claimant's Grievance

30. The claimant had a successful career with the respondent achieving promotions and securing a position as a Band 5 Account Manager in 2014. This included a number of successful competency-based interviews. In her role as a Band 5 Account Manager, she was primarily responsible for developing training and training materials, including training of other managers to provide it. This included managing other staff, including three Band 4 Business Analysts and one Band 2 Administrator.

31. In November 2019 the claimant had several months off due to illness, her enthusiasm for her role began to diminish and following issues both in her personal life, and at work, she was absent between November 2019 and February 2020. She returned to work however was absent again from July 2020 to October 2020. When she returned to work in October 2020, she was assigned a new line manager. That manager sought to manage the claimant's hours and workload which caused stress to the claimant who was continuing to have personal issues.

32. On 12 April 2021 the claimant raised a grievance against the manager. She complained that she was been bullied and harassed by a misuse of power in the management of her hours, being given unachievable or meaningless tasks and having her work performance undervalued. In addition, she raised a complaint of direct disability discrimination on the basis that she alleged that stereotypical assumptions were being made about her ability and fitness to work and the removal of key objectives and responsibilities. That complaint was investigated by Diane O'Hare (who at the time the grievance was investigated had no line management responsibilities for the claimant) and was rejected. An appeal was raised by the claimant and that was also not upheld. Ms O'Hare and the appeal manager found no evidence of discrimination, or that the claimant had been bullied or harassed.

33. As part of the return to work in October 2020, the claimant's line manager responsibilities had been temporarily removed in order that she could focus on her recovery. She was also working primarily from home as an adjustment and continued to do so.

Changes to the Training team

34. In December 2020 one of the Band 5 managers within the complaints department went on parental leave and another member of the team, Jane Turner was seconded to his position as a Band 5 Account Manager until his

return in August or September 2021. Ms O'Hare, had by that time become the Head of the complaints department. The respondent had decided to undertake a significant focus on training within the complaints department (both internal and external) and one of Ms O'Hare's objectives was for her team to rewrite all of the training materials. She was required to report to a director, and the Chief Executive Officer at weekly meetings. As Ms Turner's secondment was coming to an end, she asked that Ms Turner be permitted to continue with her secondment in a Band 5 Account Manager role, this time focussing upon training. Ms Turner had previously worked in the department for the claimant and had been trained up in many aspects of the role and duties which the claimant herself did. Their objectives had a number of similarities. Ms Turner continued in that seconded role until December 2021 when Ms O'Hare had permission to appoint an additional Band 5 Account Manager as a permanent position, as the additional work was there, and she had also lost two Band 4 positions. Ms Turner had the skill set required to continue in the training role, and she was permanently appointed to that position.

35. The original restructuring announcements in December 2021 had not impacted upon the complaints department, but as the pressures on the business increased, in approximately February or March 2022 the size and the scope of the Retail Transformation Programme increased, and it became clear that significant job losses would be required. This was cascaded down to the Department Heads including Ms O'Hare in May 2021. Ms O'Hare did not know until May 2021 that there were to be any redundancies within the complaints team.

36. The claimant was not aware of Ms Turner's appointment to the permanent role, as effectively nothing changed for her. There was no reason for her to know as it did not impact upon her role, or workload or what she was doing on a day-to-day basis. During this period the claimant was primarily working remotely from home.

Announcement of Redundancies

37. On 1 June 2022 there was an announcement of proposed redundancies and the start of a collective consultation. The collective consultation took place with the union representatives and the claimant was aware of the progress of these consultations. She engaged with them via her union representative.

38. On 7 June the Operations Director presented to all the complaints staff and set out the reasons for the introduction of a new model for the functional areas and the impact upon the complaints team. This resulted in a reduction in existing headcount within the complaints department from 220 to 107 people. There were seven Band 5 Account Managers in the complaints department including the claimant and Ms Turner. It was identified that only one Band 5 Account Manager with training responsibilities would be required. As agreed with the unions, in order to retain the skills necessary, those whose roles were similar were to be pooled. Ms O'Hare identified that Ms Turner and the claimant should be pooled as they were doing similar work.

39. At the presentation, the claimant did not believe that she would be impacted as although she knew that Ms Turner was doing training work, she did not realise that Ms Turner was also a Band 5 Account Manager. The presentation went on to explain the redeployment approach if an employee was selected and the potential redundancy terms if they were made redundant. Further, it identified the employee support that was available including a dedicated section being set up for the transformation programme. That included the Employment Assistance Programme and OH Support, together with vacancies open to those people whose roles were redundant.

First Consultation Meeting

40. On 9 June 2021 the claimant had a first consultation meeting with her manager Lisa Cunningham. She had a very good relationship with Ms Cunningham. It came as a shock to the claimant that she was in a pool of two people and therefore had to be interviewed for her role. During that meeting she was asked if she had any suggestions or proposals to discuss or that she would like the respondent to consider in relation to her role or how it may have been impacted as part of a reduced or matched pool.

41. During that meeting the claimant asked a number of questions about the process, including why it was being dealt with by way of an interview and not based on past performance, she highlighted the stress that an interview process would cause her and was offered assistance through Occupational Health and the employee helpline. She asked what considerations had been made for staff who had known conditions and the impact that the process would have upon them, and she was concerned that this would be setting back her recovery. She indicated that she didn't want to be interviewed for the role but having discussed it with Ms Cunningham, was persuaded to give it some thought. She asked that if her health status meant she couldn't attend an interview, what adjustments would be made and if she was successful in a role at what point would the redundancy package no longer be available. Further questions included: how the Band 4 roles within the structure would be filled, could she apply for any role if that role was a reduced banding from the role being done, could a request be made for a face to face interview and she sought information in relation to the time scales. Although the claimant was clearly impacted by the news that her role was going to be impacted, she was able to give consideration to questions and further information that she required. All of these questions were answered in the formal and informal meetings which followed during the consultation process.

Occupational Health report

42. The claimant had a short period of absence following that meeting, and in a return-to-work interview, Ms Cunningham provided some of the answers to the questions she had raised. It was clear that the news had impacted upon the claimant's health, she was having trouble sleeping, nausea and panic attacks. Ms Cunningham referred the claimant for an occupational health assessment and a report was provided on 29 June 2022. This report followed an earlier report in April 2022 in which Occupational Health had been asked by the claimant's manager to comment upon adjustments for the claimant, particularly the flexibility of her working hours as it noted that the current

arrangement whereby the claimant worked her preferred working hours was not supported by operational requirements and further, there were concerns about the claimant's overall capacity to attain an acceptable attendance level at work as she had had eight absences.

43. The report dated 29 June 2022 gave a summary of what support might be required to allow the claimant to return to the office in a more structured way, to understand the diagnosis and required adjustments to allow the claimant to improve attendance and performance at work, and in relation to the Retail Transformation Programme and the reduce and match recruitment exercise, it set out what support or adjustments might ensure the claimant had support to progress through the process.

44. The Occupational Health report summarised the claimant's medical situation by saying that "she is someone who was at risk of suffering from anxiety and depression and that anxiety was more an issue than depression, she also may be somebody who had a neurodiverse condition such as ASD or ADHD and those who have neurodiversity are at risk of anxiety and depression."

45. In respect of the transformation programme, he reported that the claimant had some anxiety around the reduce and match process which the claimant attributed to previous experiences with the respondent, but that there was no adjustment the OH Practitioner could suggest regarding those perceptions. It suggested that the claimant should seek support from the employee assistance programme. In respect of her general anxiety about the reduce and match process, the OH Practitioner noted that in addition to the support offered by her manager they had discussed whether it might assist to arrange for somebody to be available to talk with the claimant after the interview, but the claimant didn't think that that was necessary.

46. In respect of the claimant's neurodiversity, the report recommended that the interview be conducted in a room with a window and good natural lighting, ideally in an upstairs room but it noted that was merely a preference not related to any disability. Further, that it would be helpful if the claimant had noted that she and colleagues could refer to that could be printed off and that some time was allowed in advance of the interview to ensure that the environment was suitable.

Interview for Band 5 role

47. It had been agreed with the Trade Unions during the collection consultation that as the respondent did not hold sufficient accurate objective data, the process of selection from pools would be by competency interview. Detailed packs were provided to all involved, which had sample questions and guidance on how to answer questions to provide the best evidence and how questions would be marked. It included the competencies which the interviewees would need to demonstrate. The claimant was very familiar with competency interviews and had been successful in such previous interviews.

48. On 5 July 2022 the claimant attended her interview with Mr Till and Ms Cunningham.

49. We do not accept that the claimant told Ms Cunningham that she had a police interview that week in respect of a complaint that she had made or that she asked for the interview to be delayed because of that. Although the claimant confided in her about her personal issues, Ms Cunningham was clear in her evidence that she did not know about the police interview, and we accept her evidence. It was a difficult and anxious time for the claimant, and we consider that it is more likely that Ms Cunningham's recollection is accurate.

50. The interview was conducted in the respondent's office. Arrangements had been made for a large room with natural light, which although not on the first floor, the claimant confirmed she was happy with.

51. It had been intended that both Mr Till and Mr Cunningham would be present in person, but Ms Cunningham had caught Covid and attended by Teams. The claimant raised no concerns about that at the time. Mr Till led the interview and Ms Cunningham kept typed notes. We were referred to these. Mr Till had not kept his handwritten notes but explained that Ms Cunningham had kept the more detailed notes and his additional comments had been added to hers after the interview. We draw no inferences from the lack of Mr Till's handwritten notes. We found both Mr Till and Ms Cunningham compelling and credible witnesses when explaining how they marked the claimant at the interview and in the justification of her scores and those of Ms Turner when she was interviewed earlier that day.

52. The claimant's interview lasted over 2 hours, which was twice as long as most interviews Mr Till and Ms Cunningham had carried out during the process. The claimant thought that she had performed well at the interview.

53. Mr Till had extensive experience in conducting competency interviews, as did Ms Cunningham. Mr Till identified that although the claimant had provided good examples to support the competencies, she did this on a general level and did not provide enough detail or evidence of what she did, rather than her team or others. We accept that she was prompted by Mr Till and Ms Cunningham to try to elicit the evidence or detail they needed but the claimant did not provide it.

54. Ms Turner did provide that level of detailed evidence and as such achieved higher scores. Following the interview both Mr Till and Ms Cunningham individually scored the two interviewees and then combined their scores for each candidate. Both Mr Till and Ms Cunningham had awarded the same scores. The claimant scored 14 (7 plus 7), Ms Turner scored 22 (11 plus 11).

Second Consultation Meeting

55. On 7 July Ms Cunningham held a second consultation meeting with the claimant during which she was told she had not been successful. The claimant was understandably upset, and the meeting was paused. When it resumed, she discussed the next steps with Ms Cunningham, and she asked for feedback upon her interview before she decided what she wished to do in respect of redeployment or redundancy. A feedback meeting was arranged for the following day with Mr Till and Ms Cunningham. The claimant was given

the rest of the day off. Ms Cunningham described this as one of the most difficult meetings she had been involved in.

Request to be accompanied by Andy Jones

56. By email on 8 July 2023, the claimant asked that a colleague Mr Andy Jones be permitted to accompany her at the feedback meeting that day as she thought it would help in case she needed things explaining afterwards. She was seeking to understand why she had not been successful, both because she considered that she was the more experienced and qualified candidate and further so that she could learn from that feedback when applying for other roles in the redeployment exercise.

57. Ms Cunningham took advice from HR who confirmed that it would not normally be permitted as it was not a formal meeting. Ms Cunningham discussed this with HR and they agreed that it would be better for the feedback to be explained by her and Mr Till and that as Andy did not attend the interview it would not be appropriate for him to be involved. The request was refused.

Feedback Meeting

58. The claimant attended the feedback meeting on 8 July 2023 and was provided with an explanation of why she had not been successful in demonstrating the competencies. At that stage the scores were not provided. The claimant was told by Ms Cunningham that if anything was unclear, she could discuss it with her again and would be happy to meet if she required further clarification and she would set time aside to go through any additional questions. The claimant found it difficult to assimilate the information she was given at that meeting.

59. We find on the balance of probabilities that Ms Cunningham did not tell the claimant that “she should be careful not to question the integrity of the process”. Mr Till confirmed that comment was not made, and we accept his and Ms Cunningham’s evidence.

Third Consultation Meeting

60. A further consultation meeting took place with Mr Till and another manager on 18 July. The claimant was accompanied by Andrew Jones. The claimant again sought an explanation of why she had been unsuccessful in the interview as she said she did not understand the feedback. She had spoken to HR and asked that someone who understood ASD assist. She was pointed towards Mr Till who agreed he would try to assist. He had worked with and managed the claimant previously and there had been no difficulties with communication in their relationship.

61. The redeployment process was explained, and the claimant was given the opportunity to highlight any adjustments or support needed and ask questions. The claimant raised further queries about the trial window, whether their would be salary protection if a role was obtained at a lower band and whether training would be provided. She was advised that Ms Cunningham

would address these questions and support her during the redeployment process.

Support during the redeployment exercise

62. Ms Cunningham was aware of the claimant's anxiety and her difficulties resulting from her ASD and other disabilities. Although the claimant had not formally had a diagnosis of ASD, Ms Cunningham made adjustments as though it had been confirmed. She had previously had a number of conversations with the claimant about her difficulties and wanted to ensure that she had any additional support she would need during the redeployment process. She therefore arranged to have weekly one-to-ones with the claimant. Often the arranged meetings would need to be moved and adjusted due to the claimant's absence or to suit the hours she was working that day. The claimant had a fully flexible agreement in place in terms of her hours and she often would work at later times in the evening. At times her medication or symptoms meant that she would sleep for extended times or require additional breaks. Ms Cunningham scheduled additional meetings before and after interviews during the redeployment process when she needed them.

63. These meetings were to ensure that she could assist the claimant in preparing for any interviews. She spent a considerable amount of time with the claimant during that period working on things such as her CVs, examples for interviews and at times she would discuss how she was feeling and about her personal life. Some weeks Ms Cunningham would spend between three and four hours with the claimant on this alone over and above any normal work interactions. During the second or third session that Ms Cunningham had with the claimant, she showed her a table setting out how Ms Cunningham would prepare for a competency interview. The claimant understood at that stage how she should have approached her competency interview and commented that she didn't know why she hadn't prepared like that before.

64. At this stage we find that the claimant understood why she had not been successful in her interview for the Band 5 Account Manager role.

Alternative Roles

65. The claimant applied for a number of roles during the redeployment process. She was unsuccessful. One of those roles was withdrawn after the interviews as none of the candidates had the coding expertise that the hiring manager was looking for. The claimant had been the highest scoring candidate in that exercise. She did not have coding expertise. The role was later filled during an external recruitment process.

Further consultation Meetings

66. Further formal consultation meetings took place between Ms Cunningham and the claimant on 7 September 2022 and 26 October 2022. During these meetings the claimant was accompanied, and she asked further questions in relation to the redeployment process. The present status of her outstanding applications was considered. Questions which she raised were answered. By 26 October 2022 there was only one outstanding redeployment application

where the claimant had not been provided with an outcome. It was agreed that Ms Cunningham's colleague would contact the recruiting manager to understand if the claimant would be progressing to the next stage in relation to that role. The information received by Ms Cunningham was that the claimant would not be considered for the role following the interview. As such there were no outstanding applications and under the terms of the redeployment policy the extended period of redeployment would come to an end.

67. Although a further meeting had been arranged for 27 October, the claimant was unable to attend, and the information about her final application was provided by email that day. As such it was confirmed by letter dated 28 October 2022 that the claimant's employment would terminate on 31 October 2022 by reason of redundancy. She was paid a redundancy payment of £40,186.50 in addition to 12 weeks payment in lieu of notice and accrued but untaken holiday entitlement.

68. The claimant appealed against her dismissal, but as the claimant had already launched ACAS early conciliation and the appeal was some three months after her dismissal, the respondent took the appeal process no further.

69. **The Law**

Unfair Dismissal

70. Section 98 of the Employment Rights Act 1996 states as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it …

(c) is that the employee was redundant …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

71. Section 139 of the Employment Rights Act 1996 states:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to …..

(a)…

(b) the fact that the requirements of that business for employees to carry out work of a particular kind –

(i) have ceased or diminished or are expected to cease or diminish.

(ii)….

72. In **Williams and ors v Compair Maxam Ltd [1982] IRLR 83 EAT**, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

73. The factors suggested by the EAT in the **Williams** that a reasonable employer might be expected to consider were: whether the selection criteria were objectively chosen and fairly applied; whether employees were warned and consulted about the redundancy; whether, if there was a union, the union's view was sought, and whether any alternative work was available.

74. It is important when assessing the employer's actions, the Tribunal does not substitute its own view, but rather considers whether the decisions made by the employer, including the decision to dismiss fell within a band of reasonable responses open to it.

<u>Direct Discrimination</u>

75. Section 13 of the Equality Act 2010 states so far as relevant to this complaint:

(1) 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.

(2) ……

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4)…

76. Section 23 of the Equality Act 2010 states:

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.

(2)The circumstances relating to a case include a person's abilities if—

(a) on a comparison for the purposes of section 13, the protected characteristic is disability;

(b) on a comparison for the purposes of section 14, one of the protected characteristics in the combination is disability.

(3)…

(4)…

Duty to make reasonable adjustments

77. By section 20 of Equality Act 2010 the duty to make adjustments comprises three requirements.

78. The first requirement, by section 20(3), incorporating the relevant provisions of Schedule 8, is a requirement, where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

79. The second and third requirements are not engaged in this case.

80. A disadvantage is substantial if it is more than minor or trivial: section 212(1) Equality Act 2010.

81. Paragraph 6.28 of the EHRC Code lists some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

82. Whether taking any particular steps would be effective in preventing

(i) The substantial disadvantage;

(ii) The practicability of the step;

(iii) The financial and other costs of making the adjustment and the extent of any disruption caused;

(iv) The extent of the employer's financial and other resources;

(v) The availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and

(vi) the type and size of employer.

83. Claimants bringing complaints of failure to make adjustments must provide sufficient facts from which the tribunal could infer not just that there was a duty to make adjustments, but also that the duty has been breached. By the time the case is heard before a tribunal, there must be some indication as to what adjustments it is alleged should have been made.

Victimisation

84. Section 27 Equality Act 2010 provides protection against victimisation.

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(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;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

85. It is clear from the case law that the tribunal must enquire whether the alleged victimisation arises in any of the prohibited circumstances covered by the Act, if so did the employer subject the claimant to a detriment and if so was that because the claimant had done a protected act. Knowledge of the protected act is required and without that the detriment cannot be because of a protected act.

86. Burden of proof

87. Section 136 of Equality Act 2010 applies to any proceedings relating to a contravention of the Equality Act 2010. Section 136(2) and (3) provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

88. We are reminded by the Supreme Court in **Hewage v. Grampian Health Board [2012] UKSC 37** not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Remedy

89. Awards of compensation in claims of discrimination are governed by section124 of the Equality Act 2010 which provides that:

…. **(2) The tribunal may—**

(a)make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;

(b)order the respondent to pay compensation to the complainant;

(c)make an appropriate recommendation.

90. The Tribunal has the same power to grant any remedy which could be granted in proceedings in tort before the civil courts. Compensation based on tortious principles aims to put the Claimant, so far as possible, into the position that he/she would have been in had the discrimination not occurred, essentially a "but for" test in causation when assessing damages flowing from discriminatory acts. **Ministry of Defence v Cannock [1994] ICR 918**

91. Awards may be made for injury to the claimant's feelings arising out of the detriments as found to be proven. The purpose of an award for injury to feelings is to compensate the Claimants for injuries suffered as a result of the discriminatory treatment, not to punish the wrongdoer. **Prison Service and others v Johnson [1997] ICR 275.**

92. In accordance with **Cannock** above, the aim is to award a sum that, in so far as money can do so, puts the claimants in the position he or she would have been had the discrimination not taken place.

93. Guidance was given in **Vento v Chief Constable of West Yorkshire 2003 ICR 318)** as to the appropriate level of injury to feelings awards. Reference was made to three bands of awards. Sums within the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory treatment. The middle band was to be used for serious cases which did not merit an award in the highest band. Awards in the lower band were appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence.

94. The bands originally set out in **Vento** have increased in their value. In respect of claims presented on or after 6 April 2022, which apply to this case, the Vento bands are: a lower band of £990 to £9900 (less serious cases); a middle band of £9900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300**.** (the most serious cases), with the most exceptional cases capable of exceeding £49,300.

Conclusions and Decision

Unfair dismissal

95. In a complaint of unfair dismissal, it is for the respondent to show the reason or principal reason for the dismissal and that it is one of the potentially fair

reasons set out in section 98(2) of the Employment Rights Act 1996 or some other substantial reason justifying a dismissal. The respondent says that the reason for the claimant's dismissal was redundancy, which is a potentially fair reason, in the alternative that it was a reorganisation amounting to some other substantial reason. The claimant says that the reason was her disabilities, taken collectively, or because she had raised a grievance in April 2021 alleging disability discrimination.

96. The claimant's dismissal was part of a mass redundancy exercise. The complaints team itself was reduced from over 220 to 107. In respect of the claimant's role in training, there was a need to reduce the Band 5 Account Managers from two to one. The other role was undertaken by Ms Turner. We do not accept that the appointment of Ms Turner was for anything other than a genuine need for additional support in that department from September 2021. Ms O'Hare explained why she appointed Ms Turner to the Band 5 Account Manager role in training, originally on a seconded basis and in December 2021 on a permanent basis. At that time there was a need for that additional resource and Ms O'Hare was unaware that the Retail Transformation Programme would impact her department in 2022. By June 2022, the need for the work carried out by the two Band 5s had diminished. The definition of a redundancy situation set out in section 139(1)(b)(i) of the Employment Rights Act 1996 was met. Further we find that the respondent has shown that that the reason or principal reason for the claimant dismissal was redundancy. The decision to select the claimant for redundancy and which led to her ultimate dismissal was that of Ms Cunningham, following a lengthy consultation and redeployment exercise. All of the evidence provided to us supports that conclusion.

97. There is nothing that the claimant has shown to us from which we could conclude that the reason or principal reason was her disabilities or because she had raised a grievance complaining of disability discrimination in April 2021. We explain our reasons for this view below.

98. We must go on to consider whether the respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. We must not substitute our own views about this but rather consider whether the actions of the respondent were within a band of reasonableness. The Tribunal is guided by the principles set out in **Williams** above which are, in summary, whether the respondent adequately warned and consulted the claimant, both collectively and individually; whether it adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool; whether it took reasonable steps to find the claimant suitable alternative employment; and finally, whether the decision to dismissal was within the range of reasonable responses.

99. Looking at each of these in turn.

100. There was significant collective consultation with the Trade Unions. This took place over a number of weeks and agreement was reached upon the methods of pooling staff and how the selection process was to operate. Opportunities were given to Trade Union representatives to question the process and raise issues of concern. This included an issue raised by the claimant in respect of

the alternative position which was withdrawn. A presentation was made to the impacted staff where questions were welcomed.

101. The individual consultation process took place primarily with Ms Cunningham during five formal meetings. Notes of those meetings were kept and they reflect an interactive process during which information was given to the claimant, questions were raised by her and answers were provided. In addition, Ms Cunningham recognised that the claimant needed additional support which she provided in one-to-one meetings over many hours each week.

102. We consider that the process of consultation, both collective and individual fell within the band of reasonableness.

103. We move on to consider the pool for selection. As we have said, we do not find that there was anything untoward or contrived in the appointment of Ms Turner to a Band 5 Account manager. As such, when it became necessary for Ms O'Hare to decide the pools for selection, there was a reasonable basis for her to conclude that Ms Turner and the claimant's roles were sufficiently similar to include them both. Although it came as a shock to the claimant when she was advised of this, we find from the evidence provide to us that both had very similar objectives and responsibilities. The claimant's absence from the office, working most of the time from home may have been the reason why she was unaware of Ms Turner's permanent appointment to Band 5 and knowledge of what work she was undertaking, but there was no obligation upon Ms Turner or the respondent to inform her of the change.

104. Agreement had been reached with the Trade Unions that it was not appropriate to use the generic Band 5 Account Manager positions as a pool as they were not undertaking the same roles and functions. In any event the suggestion that the claimant should have been pooled with all Band 5 Account Managers was not something which was actively pursued by the claimant in this hearing. Her focus was upon being pooled with Ms Turner. The use of this pool was within a reasonable band of options open to the respondent.

105. The respondent used a competency interview process to decide which of Ms Turner or the claimant should be appointed to the ongoing Band 5 Account Manager position. The guidance in **Williams** refers to an objective selection criterion being used, and indeed it is a more established process to agree objective criteria and then select using that method. During the collective consultation process the unions raised this as a concern. The respondent's reason for not using agreed objective selection criteria was that it did not hold accurate data for all employees to use during such an exercise. This was accepted by the union and a competency-based interview process was agreed. Although it would normally be preferable to use agreed objective criteria, in this case and in these circumstances, it was not outside the band of reasonableness for the respondent to adopt the competency-based interviews as the method of selection. Even though the claimant expressed concerns about that process, it was one which was adopted across the whole of the Retail Transformation Programme and it was within the band of reasonableness to require all employees impacted to be subject to the same process.

106. The respondent sought to make the interview process as fair and transparent as possible. It set out the competencies that would be assessed, published example questions, prompts that may elicit further examples and the marking scheme. Adjustments were made for the claimant having taken OH advice and the interview as set up as an in-person assessment at the claimant's request. Regrettably, Ms Cunningham had covid on the day of the interview and had to attend by Teams, but Mr Till was present with the claimant and led the interview. The claimant said she found the interview difficult because it was a hybrid situation and she could see herself on the screen, but she did not raise this issue at the time and had undertaken Teams meetings and interviews before without issue, and as there was a genuine reason why Ms Cunningham could not attend the Warrington office, it was within the band of reasonableness for the interview to proceed in a hybrid fashion. The claimant had previously performed well in such interviews and believed she had done so on this occasion. Mr Till reported that it was relaxed, and the claimant was given twice as long as other candidates to provide her evidence. Ultimately, she did not provide the same level of detailed evidence to demonstrate the competencies as Ms Turner did in her interview.

107. The final consideration is whether the respondent's efforts to find a suitable alternative position for the claimant was within the band of reasonableness. There was a formal redeployment process in which the claimant participated. There is no doubt that the claimant wished to remain with the respondent. She had been a long serving and valued employee, and we heard evidence about her contributions to the business. Ms Cunningham did all she could to support the claimant in her efforts to obtain an alternative role. The real difficulty was the number of employees who had lost their roles and were seeking alternative positions. Vacant roles were ring fenced for those employees to apply for, but across the business there were some 500 staff impacted and 300 or more leaving the business. 107 of those were in the complaints department. The claimant had several interviews but was unsuccessful. She performed well in many of the interviews but only in one did she achieve the highest score. She did not however have the coding expertise required for the role and nor did any of the redundant staff. The role was thereafter filled externally.

108. Having considered each of the factors set out in **Williams**, and against the backdrop of the mass redundancy exercise, we find that the decision to dismiss the claimant by reason of redundancy was within a band of options open to the respondent.

109. As such the claim of unfair dismissal fails and is dismissed.

Disability

110. The respondent has accepted that the claimant was disabled by reason of each of the impairments relied upon. It accepts that it had knowledge of each other than ASD. It says that it only had knowledge to the extent set out in the OH report of June 2022. The test within section 6 Equality Act 2010 is not just whether the respondent knew but further whether it ought to have known. That can include being put on notice to make further enquiries. Ms Cunningham in fact did that in her discussions with the claimant and we find

her discussions together with the information set out in the OH report was sufficient to find that the respondent also had knowledge of the claimant's ASD at the relevant times.

Direct Disability Discrimination.

111. In summary, the claimant's case is that because of her disabilities taken collectively, the respondent used the redundancy exercise to terminate her employment and remove her from the business. She says that it sought to do this at the various stages of the process, those being in selecting her for redundancy by creating a pool including Ms Turner, rather than her being the only Band 5 Account Manager in a training role; failing to follow a fair redundancy process by the use of an interview rather than making the assessment based upon experience, length of service and qualifications; having been selected, failing to provide the claimant with an alternative position in the redeployment process; and finally, withdrawing a role for which the claimant was the highest scoring candidate.

112. The claimant relies upon Ms Turner as a named comparator together with a hypothetical comparator.

113. Before the respondent is required to show a reason for any difference in treatment, it is incumbent upon the claimant to show some facts from which we could conclude that the treatment she complains about was because of or motivated by her disabilities. She needs something more than just a difference in treatment. We are however at this stage permitted to consider all the evidence we have heard including that presented by the respondent and ask ourselves what was "the reason why" the claimant was treated in the way she alleges. That involves considering why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?

114. We are satisfied that Ms O'Hare's reasons for including Ms Turner and the claimant in the pool were because they were carrying out similar roles. Pooling those who had similar roles rather than by job title had been agreed with the unions and there was sound reason for it; the interview process, rather than using selection criteria was one which had been agreed with the unions again for sound reasons. The claimant achieved lower scores than Ms Turner in her interview. That was the reason she was not successful. Both Mr Tills and Ms Cunningham independently came to the same scores for the claimant. That was also the position in their scoring of Ms Turner. The interview was competency based. As such both had the same opportunity to show evidence that they met the competencies. The claimant did not do so. Although the claimant may have been more experienced and better qualified, and had longer service, that is not what is measured in a competency exercise. We have considered the notes of the interviews which were available and heard the explanations provide by Mr Tills and Ms Cunningham in cross examination and having done so we accept that the scores awarded to each were justified. We draw no inferences from the lack of Mr Tills handwritten notes in the claimant's interview. His explanation that as Ms Cunningham had Covid and was not present in person, he led the interview and she took better notes. He added to them in their discussions later and did not retain his handwritten notes.

115. In the redeployment exercise, although she applied for and was unsuccessful in obtaining an alternative role, the numbers were against her. There were large numbers of employees who had lost their roles and were seeking alternative positions. Although on the face of it, it might be possible to draw adverse inferences in a case where a redundant employee applies for 9 or 10 alternative roles, as the claimant did and is unsuccessful, in this case and with these numbers of people looking for alternative roles, we do not consider that any inferences can be drawn. We are of the same view in respect of the withdrawal of the role in which the claimant had scored highest. There was a reason for it being withdrawn, that being that no candidate had the necessary coding skills. That was the reason why.

116. We conclude that the claimant has been unable to provide any evidence from which we could conclude or infer that that at any stage of the redundancy and redeployment process, her disabilities played a part or that the respondent was trying to remove her from the business because of her disabilities. Indeed, the evidence points the other way. Ms Cunningham, who made the decision to select Ms Turner to continue in the remaining Band 5 Account Manager training role, provided a level of support and assistance to the claimant which went well beyond that which might have amounted to an adjustment for her disabilities. The claimant herself recognised this in her letter of 29 January 2023 complaining about the redundancy policy when she said "Please note that my manager Lisa Cunningham has been incredibly supportive throughout this difficult process. I likely would have suffered further trauma was it not for her".

117. Even if the claimant was able to show something more than just a difference in treatment and the respondent was required to provide a non-discriminatory reason for its actions, we would find that it had done so. Our reasons are those we have identified above.

118. This claim fails and is dismissed.

Victimisation

119. The respondent accepts that the grievance dated 12 April 2021 amounts to a protected act within section 27(2) Equality Act 2010. The claimant says that she was subjected to detriments because or on the grounds that she had made that complaint. The detriments she relies upon are set out in the List of Issues and are:

i. Selecting the claimant for redundancy in June 2022?

ii. Allowing Lisa Cunningham to tell the claimant that she must *"be careful not to appear to be questioning the integrity of the process".*

iii. Using interviews rather than appraisal scores, experience and qualifications as the basis for selecting employees for redeployment.

iv. Failing to provide the claimant with clarification on the feedback given by Lisa Cunningham and Gerald Till following the interview for her own role.

v. Failing to consider the claimant for other roles as an alternative to redundancy.

vi. Withdrawing a role for which the claimant was the highest scoring candidate.

120. We have found as a fact that the comment which the claimant alleged Ms Cunningham to have said, did not on a balance of probabilities occur. Further we have found that Ms Till and Ms Cunningham did give the claimant feedback upon her interview. Although she might not have fully understood their explanation at the feedback meeting, we are satisfied that after the two or three further discussions with Ms Cunningham, the claimant did understand the reasons she had been unsuccessful, she just did not agree with them. The claimant has not shown on the facts that this alleged detriment happened.

121. In respect of the remaining detriments, again these relate primarily to the process which ultimately led the claimant to be selected for and made redundant. The claimant has to show some facts from which we say or could draw inferences that the reason that she suffered such detriments was because she had made the complaint about discrimination in April 2021.

122. In this case we find that there are no such facts or inferences, and the claimant has not discharged the burden. The grievance was brought over a year before the alleged detriments. There were a number of different people involved in the redundancy and redeployment processes. The only person whom the claimant can show was aware that she had brought complaints of discrimination was Ms O'Hare and we found her a credible and impressive witness. The claimant has not shown whether anyone who interviewed her for the alternative positions or who made any decisions about redeployment had any knowledge of the grievance. Ms Cunningham herself did not know that the claimant had complained about discrimination in her grievance.

123. Even if the claimant had discharged the burden and the respondent had to show a non-discriminatory reason, we would conclude that it had done so, for the reasons already identified.

124. This claim fails and is dismissed.

A Failure to make reasonable adjustments

125. Finally, we consider whether the respondent has failed in its duty to make reasonable adjustments for the claimant's disabilities. The claimant relies upon ASD and anxiety in respect of this complaint. The claimant says that the respondent had a practice of using their standard manner and style of communication. This was originally drafted as "Communicating with employees in a manner that a Neurodiverse audience would not understand" however this was rephrased at the initial discussion by agreement for clarity.

Essentially it was the respondent's communication styles during the process which the claimant says but her at a substantial disadvantage compared to someone without the claimant's disability, in that it meant that she did not fully understand the process and caused her anxiety. The claimant says that the parts of the process which were impacted were: in understanding why there were two people in her pool for selection, why she was unsuccessful in her interview and, as suggested during this hearing, that she did not understand what was needed by the respondent at the competency interview, and in not understanding the feedback given, she was unable to learn and make appropriate changes when applying for the other roles during the redeployment process.

126. We must consider whether the claimant's ASD or anxiety put her at a substantial disadvantage at those stages of the process compared to someone who did not have those disabilities.

127. At the outset of the process, Ms Cunningham knowing that it would cause the claimant anxiety, and being aware of the claimant's views that she may have ASD, sought OH advise upon the claimant's present condition and what adjustments could be made to the process to ensure she was appropriately supported. The claimant met with OH Practitioner and gave her views. These included that in relation to anxiety, the claimant was anxious but OH Practitioner did not feel there was any adaptation to the process which they could suggest, and the claimant did not feel it was necessary to adopt the OH Practitioner's suggestion for her to arrange to have someone to speak with her after the interview. In respect of her neurodiversity, some suggestions were made about natural light in the interview room, printing off physical notes before the interview to be able to refer to, and having time to ensure the physical environment was suitable. Each of these adjustments were made by the respondent. There was no suggestions, adaptations or concerns raised by the claimant or the OHP in respect of communication styles.

128. At no stage during the consultation meetings, did the claimant say she didn't understand the pool for section or how the interview process would be conducted, either for her own role or for the deployment exercise. The only occasion she told the respondent that she is having difficulty in her understanding was in relation to why she was unsuccessful in the interview.

129. The claimant was experienced in competency interviews. She had been successful in many previously. She knew that she had to provide evidence and indeed did so in her examples. The issue was that she did not provide as detailed and focussed examples as Ms Turner and as such she was not marked as highly.

130. Although she disagreed that Ms Turner and she should be put in the same pool, that was based upon a lack of knowledge of Ms Turner's promotion, rather than any lack of understanding.

131. Although it would take the claimant longer to process information and cause her anxiety, the process was by its very nature stressful for all involved. The claimant was assisted by Ms Cunningham in the one-to-one meetings to ensure she was clear upon any queries she had. The claimant during her

consultation meetings raised questions which evidenced that she did understand the process. The respondent through the regular meetings with Ms Cunningham sought to allay the claimant's anxiety with the process so far as she was able and based upon the OHP's advice.

132. At none of the stages above do we find that the claimant has shown facts from which we could conclude that the respondent's practice of using their standard manner and style of communication during the process put the claimant to a substantial disadvantage compared with people who did not have anxiety or ASD.

133. The only time at which we consider that the claimant has shown that she was at a substantial disadvantage was when she was provided with the feedback in the informal meeting with Mr Till and Ms Cunningham. The claimant relies upon her ASD in respect of this complaint. This meeting had been arranged at the claimant's request so that she could understand why she had been unsuccessful. It followed what Ms Cunningham has described as one of the most difficult meetings she had ever conducted. The claimant was clearly upset and confused as to why she had not been selected to remain and Ms Turner had. She considered that she was the more experienced and qualified candidate and had longer service and as such she should have been retained. She wanted to understand why. As someone with ASD, it took her longer to process what she was being told and we find that at that meeting she was at a more than minor or trivial disadvantage compared with someone without ASD. We find that Ms Cunningham would or ought to have knowledge of that substantial disadvantage in view of her previous management of her.

134. The duty to make an adjustment was therefore engaged.

135. The claimant requested that she be accompanied at the feedback session by a colleague Mr Jones. That was a reasonable request. She asked that he be there in her email "in case I need things explaining after". He would have been a second pair of ears who could discuss what Ms Cunningham and Mr Till had explained. Although both would have been able to give their reasons for the claimant's scoring and lack of success, that was not why the claimant asked for Mr Jones to be there. It would have assisted her processing the information if she could have discussed it with someone afterwards.

136. The respondent's reasons for not permitted the request, being that she had received HR advise that it was an informal meeting and so it would not be normal for someone to have a companion, and Ms Cunningham and Mr Till were best placed to provide the feedback, although well intentioned missed the point.

137. We consider that having Mr Jones present was a reasonable adjustment to have put in place and could have alleviated the substantial disadvantage suffered by the claimant.

138. We do however find that the disadvantage suffered by the claimant was short lived. Ms Cunningham provided further explanations during her lengthy one to one weekly meetings, and reported that after two or three such meetings, the claimant understood where she had gone wrong in her interview.

139. The complaint of a failure to make a reasonable adjustment in respect of having Andy Jones at the feedback meeting is successful.

Remedy

Issues

140. The agreed list of issues set out the matters which the Tribunal should consider if the claimant was successful in any part of her claim. It had been agreed that any cross examination in respect of remedy would await the liability findings of the Tribunal.

Evidence and Submissions

141. The claimant had provided evidence of the impact that failure to allow Andy Jones to accompany her at the feedback meeting had upon her feelings. That was contained within paragraphs 68 and 73 of her witness statement. She provided a detailed schedule of loss. She was called to confirm that evidence and Ms Millar confirmed that she had no cross examination.

142. Mr Egan-Ronayne sought financial loss for the claimant being the difference between the claimant's salary at the respondent and her present employment. He indicated that this was £14,000 per annum. He sought an injury to feeling award of £40,000 plus interest. The claimant also sought a number of recommendations.

143. Ms Millar argued that in view of the Tribunal's findings, there was no financial loss and proposed an injury to feelings award in the lower **Vento** band.

Findings of Fact

144. We make the additional findings of fact:

145. The claimant says in her witness statement, and we accept that she found that refusal to allow Mr Jones to accompany her deeply frustrating and upsetting. Her perception was that both interviewees seemed uncomfortable and at times visibly frustrated with her which left her feeling confused, distressed, deeply upset and as if her attempt to clarify the situation was not being received in a constructive manner and that is the way she felt after that meeting.

Decision

146. Although Mr Egan-Ronayne made an emotional plea in his submissions for a number of recommendations sought by the claimant, there are no recommendations we feel we can make in this claim. We are however sure that those from the respondent who have attended this hearing will learn from their experiences going forward.

147. In assessing whether any financial award should be made, we must seek to put the claimant in the same position as the act of discrimination had not taken place and Andy Jones had been able to accompany her to the feedback meeting. We find that the claimant has not shown there was any financial loss

which flows from him not being present. By the time of the redeployment interviews we found that the claimant was aware of why she hadn't been successful in the previous competency interview. This was because Mrs Cunningham had spent some considerable time explaining it to her. One of the reasons which allows us to come to that conclusion is because the claimant did perform well in subsequent redeployment interviews. We accept that as the claimant didn't have Mr Jones' attending at the previous meeting to discuss Ms Cunningham's and Mr Till's feedback after the meeting, it took longer for her to understand why she wasn't successful and therefore how she might improve at future interviews. There is a difference between not understanding because the claimant has ASD and not agreeing that her evidence wasn't as good as that of Mrs Turner. In any event, it was not the lack of feedback or understanding which caused the claimant to lose her role, that was down to her failure to perform as well as Mrs Turner in the interview and others in the redeployment exercises. As such the amounts claimed, being the difference between her salary at the respondent and what she is earning in her present role did not result from the act of discrimination.

148. Turning then to **Vento** and an injury to feeling award. This award is focussed upon the injury caused to the claimant by the respondent not permitting Mr Jones to be at the feedback meeting. The claimant has provided evidence in her witness statement as to the impact that had upon her. It is clear that it caused her upset, confusion, distress and frustration.

149. She has not however shown to us nor is there anything provided to us by way of evidence that supports her argument that she has suffered long term injury to her feelings or personal injury as a result of that act of discrimination. We are not in any way questioning that the claimant has many issues, and we are sympathetic, but we must assess what losses have been caused by that particular act.

150. We note the claimant's vulnerabilities and existing disabilities which we must also take into account in assessing the impact upon her feelings. Her reaction to the respondent's refusal was more impactful to someone with those disabilities than it would have been to somebody without, particularly already having anxiety. We have seen the medical reports in the bundle, and we have regard to those. We also note that this was a one-off act of discrimination and there are no aggravating features. Taking all of that into account we consider that an award of £3,000 plus interest is an appropriate level, a figure within the lower Vento band and taking into account any uplift we must apply.

151. We award interest on that sum. The date of discrimination was 8 July 2022, and we calculate that to be 24 months at 8% which is £240 per year and a further seven months at 8% which is we calculate at £140. The total figure for interest is £620 and it gives a total award of £3,620.

152. There is no award in relation to the failure to follow the ACAS code as this was a redundancy situation, such that the Code does not apply.

_____

Employment Judge Benson

27 February 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 March 2025

FOR THE TRIBUNAL OFFICE

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/

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990
ARTICLE 12

Case number: **2404406/2023**

Name of case: **Miss J Campbell** v **Scottish Power Energy Retail Limited**

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

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

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

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

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

the relevant decision day in this case is: 17 March 2025

the calculation day in this case is: 18 March 2025

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

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.