EMPLOYMENT TRIBUNALS

Claimant: Mrs. C. Spinks
Respondent: Circle Health Group

Heard at: Watford
On: 13, 14 and 15 November 2024 and 10 January 2025
Before: Employment Judge S. Matthews
Members: Mr. R. Jewell
Mrs. C. Grant

Representation
Claimant: In Person
Respondent: Mr. Ramsbottom (legal consultant)

JUDGMENT having been sent to the parties on 3 February 2025 and written reasons having been requested in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

1. The respondent is a private healthcare provider employing around 8,600 people in a wide range of medical and surgical services. It dismissed the claimant for the stated reason of redundancy. The claimant claims that she was refused her permanent flexible working request to work from home and that her dismissal was unfair. She further alleged that the respondent had failed to make reasonable adjustments for her with regard to working on site and attend individual consultations during the redundancy process. The respondent denied the claims.

2. The tribunal had a bundle of 341 pages of documents and heard evidence from:

    - The claimant;
    - Lisa Trybus, Executive Director;
    - Alison Moss, HR Business Partner; and
    - Lorraine Kelly, Director of Clinical Services.

    These individuals provided written statements in advance, and the tribunal took time to read them. Each witness was asked questions about the evidence contained in their statements.

3. References to pages in the bundle below are set out in brackets(x). References to paragraphs in the witness statements consist of the witness's initials and

number of the paragraph (AB-YZ).

4. The respondent also submitted statements submitted by Samantha Gallant (the claimant's former line manager) and Dominic Bath (Regional director), but did not bring those witnesses to the tribunal to give evidence. Although we read their statements we did not rely on their evidence in making our factual findings.

5. We agreed at the beginning of the hearing that we would hear evidence on liability first, including Polkey, and we would hear evidence on remedy on the final day if appropriate.

6. The issues that we had to decide were set out in the case management order of Employment Judge Bedeau dated 22 November 2022 and updated at the beginning of the hearing in respect of the liability issues as follows:

1. Unfair dismissal

1.1 If the claimant was dismissed, what was the reason or principal reason for dismissal?
1.2 Was it a potentially fair reason?
1.3 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?
1.4 What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.
1.5 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 whether:
1.5.1 The respondent had a genuine business reason for redundancy and followed a full consultation process with a fair selection criteria?
1.5.2 At the time the decision was being made, did the respondent consider all viable alternatives to avoid the need to make the claimant redundant?
1.5.3 Was redundancy within the range of reasonable responses?
1.5.4 Should the procedure be found to be unfair, are any reductions to be made in line with the Polkey principles?

2. Disability

The respondent accepts that the claimant had a disability of bile acid malabsorption and that they had knowledge of this disability at the relevant time.

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

3.1Did the respondent know, or could it reasonably have been expected to know that the claimant had the disability? From what date? The respondent accepts that the claimant had a disability of bile acid malabsorption at the relevant time and they had knowledge of this disability.
3.2 A "PCP" is a provision, criterion, or practice. Did the respondent have the following PCP, of:
3.2.1 requiring its staff to work on site rather than at home; and
3.2.2 requiring its staff to attend their place of work for individual

consultations during the redundancy process?
3.3 Did the PCP put the claimant at a substantial disadvantage compared with someone without her disability, or who is non-disabled, in that, she was unlikely to be close to toilet facilities, or the toilets may be occupied?
3.4 Did the respondent know, or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?
3.5 What steps could have been taken to avoid the disadvantage? The claimant suggests:
3.5.1 allowing her to work from home where she would be able to use the toilet without being inconvenienced.
3.6 Was it reasonable for the respondent to have to take those steps and when? The claimant will contend that it was reasonable as the respondent allowed her to work from home for a trial period of three months but then changed its mind.
3.7 Did the respondent fail to take those steps?

4. Flexible Working

4.1 Did the claimant make a valid request for flexible working pursuant to s80F Employment Rights Act 1996 and Flexible Working Regulations 2014?
4.2 Did the respondent fail to deal with the flexible working request in a timeous manner?
4.3 If so, what was the reason given by the respondent for the failure to deal with her request or for rejecting it?
4.4 Was this reason one of the specified reasons within s80G Employment Rights Act 1996?
4.5 Did the respondent deal with the claimant's application in a reasonable manner?
4.6 Was a fair procedure carried out when dealing with the request?

Findings of fact

7. This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider in order to decide if the claim succeeds or fails. If these reasons do not mention a particular point it does not mean that the tribunal has overlooked it, it is simply because it is not relevant to the issues we needed to decide.

8. The claimant commenced employment with the respondent on 22 May 2017, initially with the job title Customer Services Manager. At the time of her dismissal on 6 January 2022 her job title was Executive Assistant. She was one of three Executive Assistants in the Quality and Risk (Q & R) team at the Clementine Churchill Hospital (CCH).

9. In October 2017, Samantha Gallant was appointed as Quality and Risk Manager and became the claimant's line manager. The claimant's job title was changed at that time to Executive Assistant (C/9). The claimant only discovered the change in job title when she looked at the intranet around the end of 2017 and she was very unhappy about it. She later raised it with Lisa Trybus (paragraph 25 below).

10. In around April/May 2021 Lisa Trybus took over as new Executive Director for CCH. She put a freeze on recruitment (AM/19). In oral evidence she explained that she had previously worked at a direct competitor, and she had been headhunted to work for the respondent. Her previous employer had a very similar headcount overall but the people who worked in administration at CCH represented a much higher headcount. She was appointed to consider headcount and see where she could reduce it. She immediately put measures in place which included ceasing recruitment for new posts and ceasing recruitment to replace staff who left (LT/10). At the time of the claimant's dismissal the respondent had decided not to replace 6.5 leavers.

11. As a further measure to reduce headcount Lisa Trybus considered introducing a Patient Concierge role. This was a person who worked on the wards and who would talk to patients about their complaints as they arose. She discussed it in a meeting with one of the sister hospitals. The role was in place at her previous employer, and she had seen first-hand how it could reduce a number of complaints.

12. She was therefore expecting the number of complaints to come down and that would reduce the work carried out by the Q & R team. Alison Moss (HR Business Partner) recalled informal discussions with Lisa Trybus about the Q & R team prior to the commencement of formal redundancy procedures. These meetings were not minuted. In oral evidence she said that managers were required to refer everyday matters to their external HR advisors, Peninsula. She said "I would dip in and out, if on site I would be asked a question, I did not continually manage the whole process from an HR point of view".

13. When Lisa Trybus first arrived Alison Moss recalled the Executive Assistant role "being looked at" and she did "a piece of work" identifying who was in that team. Lisa Trybus was at that time very busy having only just come into the role, so they only tentatively looked at the possibility of reducing the size of the team. Lisa Trybus confirmed in her evidence that her meetings with Alison Moss were quite informal and would not have been minuted.

14. Although the claimant suspected that the decision to reduce headcount was only made in response to her raising concerns with Lisa Trybus (see paragraph 26 below) she accepted in cross examination that a plausible explanation was that by going to see Lisa Trybus she revived her memory about the plan to make savings in her department. The tribunal finds that a credible explanation for the close time connection between the events, having accepted the evidence of Alison Moss and Lisa Trybus that there were discussions about the possibility of reducing headcount in the Q & R team at this earlier stage. We found Lisa Trybus and Alison Moss were credible and consistent when giving evidence and under cross examination they corroborated each other.

15. On 7 June 2021, the claimant made a flexible working request to work from home (78-79). She filled in the respondent's request form. She ticked 'No' in response to the question, "Are you a disabled person whose request for flexible working is related to your disability?" but also stated:

> Although I have ticked 'no' above regarding disability, as that is not my primary reason for this request, it is worth noting that I have a condition — Bile Acid Malabsorption — which, when not medicated, results in my needing to use the toilet very urgently up to ten times a day.

> Whilst this is mostly under control with my medication, I still on occasion have an urgent need to use the toilet, and have had some near misses recently, due to the fact that the closest toilet facilities to the office are often out of order and/or occupied, and it can sometimes take several minutes to find an available toilet. Working in the comfort of my home with full access to a nearby toilet will relieve some of the anxiety experienced when I have a flare up of the condition.

16. The claimant stated that she would be prepared to attend the site for practical purposes including meetings which could not be conducted over Teams. We find that the overall content of the form did not communicate to the respondent that the claimant was put at a substantial disadvantage when she went in for meetings. Therefore, although they were aware of her condition, they were not aware that it put her at a substantial disadvantage when going in to attend meetings and nor could they be expected to be.

17. On 6 July 2021, 30 days after the flexible working request, the respondent wrote to the claimant to say that they agreed to a three month trial starting on 12 July 2021 (103). As it happened the trial started on 19 July 2021 due to another team member's annual leave. The claimant was agreeable to that and indeed suggested it.

18. Although the respondent's initial response to the flexible working request was slightly over the time limit in their own policy (63-72), being 30 days rather than 28 days, the policy provided that the 28 days was a time limit in which to accept the application in writing or commence the 'formal procedure'. The formal procedure involved a meeting in which the respondent could decide to implement a trial period. Therefore by agreeing to a trial period without holding a meeting the request was potentially dealt with in a more timely manner than if they had held a meeting first to discuss it.

19. The policy provides for a trial period "usually for a maximum of 3 months' (68). Further down the same page it also refers to a trial period being no longer than 12 weeks unless the parties agree otherwise. At the end of the trial period the policy provides that a formal flexible working review meeting must be arranged.

20. The respondent's policy states:

> All requests must be dealt with within a period of three months from first receipt of an application to notification of the decision of an appeal. These time limits may be extended when both parties are in agreement.

21. Thus the implementation of the trial period meant that the time limit of three months was extended while the trial period was in place, the claimant having agreed to the trial period.

22. Lisa Trybus and Samantha Gallant discussed the claimant's flexible working request (LT/6). They were supportive of the request. In oral evidence Lisa Trybus said, "I agreed we would give it a try and see how it works, I did want to be supportive". We were not taken to any evidence to suggest that she was opposed to the idea of homeworking in itself. The respondent has a homeworking policy that allows for working from home for roles which are suitable (86-102).

23. On 9 and 10 November 2021 there was an exchange of correspondence regarding Clinical Cabinet meetings which took place on Thursdays and were run by Lorraine Kelly (164-170). An email from Samantha Gallant to the claimant

and others said that Lorraine Kelly had asked for the meetings to be face to face and that she hoped this would work for everyone. The claimant responded that she did not understand why she could not attend by teams during the trial period. The claimant mentioned her disability but said that was not the main reason she was asking to attend by teams; she did not want to set a precedent of attending weekly meetings during her trial period because she suspected that may affect the outcome of the trial and she thought the meetings were largely irrelevant to her.

24. We heard evidence from Lorraine Kelly that she preferred attendance at the meetings, but it was not an absolute requirement. As it happened the meeting which took place on 9 November 2021 was the meeting where the claimant and the two other executive assistants were informed that they were at risk of redundancy.

25. During the flexible working trial the claimant had a period of sick leave which she alleges was triggered by her relationship with Samantha Gallant. In July 2021 she raised concerns about the relationship, and she emailed Lisa Trybus at the suggestion of the Freedom to Speak Up Guardian (104). She subsequently had a meeting with Lisa Trybus which, from the claimant's perspective, did not go as she expected (CS/19). The claimant discussed her concerns dating back to events in October 2017 about the change in her job title and about how the department was structured. At this stage, Lisa Trybus offered a 'without prejudice' conversation (LT/14) which the claimant declined. In evidence Alison Moss confirmed that she and Lisa Trybus had discussed the possibility of opening a 'without prejudice' discussion in advance of the meeting because the claimant did not appear to be happy at work.

26. The redundancy procedure started shortly after this meeting and the claimant suspected that it was linked to her having raised concerns. However, as set out above, we are satisfied that at the time of the meeting Lisa Trybus had already discussed reducing the headcount in the Q&R team with Alison Moss. Lisa Trybus went into the meeting knowing that there could be, potentially, some headcount reduction in that area (LT/10).

27. At the meeting Lisa Trybus also talked about the respondent's values. In evidence she explained her reasons which were that the claimant had been off sick leading up to the meeting and around that time the company had launched a new philosophy about values. She had done a number of staff forums which she assumed the claimant had not attended because she had been off sick. She felt the claimant was raising historical issues which, from her perspective, had been dealt with and she felt this was an opportunity to set expectations and make clear that there would not be a reversal of the 2017 changes. She was not prepared to change the claimant's job title or reporting lines (LT/19).

28. Lisa Trybus attempted to resolve some of the claimant's concerns. She agreed that the claimant should focus on the more complex complaints and asked Samantha Gallant to prepare an addendum to the job description to make it clearer (LT/19).

29. Following the meeting Lisa Trybus wrote a letter to the claimant dated 7 September 2021(114-116). The claimant had not expected a letter after the meeting and, indeed, Lisa Trybus said she was not initially going to send one.

She referred to HR before sending it. The claimant said she found the letter threatening (CS/121-122) but, objectively, the tribunal did not find it to be so. Lisa Trybus talked about the investigation she had made into the 2017 change of job title and confirmed that she was happy for Samantha Gallant to produce an addendum to the job description and to allocate the claimant more complex complaints. She then talked again about the values, and she wrote

"Claire you are very capable and I expect you to support, deliver and demonstrate the right attitude at all times within your role".

30. The following day, on 8 September 2021, Lisa Trybus emailed Alison Moss regarding the reduction in the Q&R team (AM/20)(124). :

> "Can we commence the EA review with a view to cost saving this year?
>
> How do we go about this? It appears the Q & R Team have higher than the norm number of people in their team."

31. As discussed above, both gave evidence that they had already talked about a reduction in the Q&R team. This was not a new idea. The wording of the email corroborates that because it refers to "the" EA review.

32. There were three executive assistants in the Q & R Team (124), but five people in the respondent's organisation had that job title. The other two executive assistants were in totally different roles. They were assistants to Lisa Trybus and Lorraine Kelly.

33. On 25 October 2021, Samantha Gallant wrote to the claimant inviting her to a formal review meeting regarding working from home following the end of the trial (121-122).

34. On 27 October 2021, a flexible working consultation meeting took place (154-156). The claimant was accompanied by her union representative. Samantha Gallant told the claimant she had concluded it would work better for the respondent if the claimant worked three days a week at home and two days a week in the office. She felt that communication with the Clinical Team would be more effective face to face rather than by email and it would help with the distribution of administrative tasks. The claimant did not agree, and the union representative suggested extending the trial because the claimant had been off sick for part of it. No firm decision was recorded in the minutes and the claimant continued to work from home.

35. On 9 November 2021 a meeting took place on site where the claimant and the two other executive assistants were advised that they were at risk of redundancy (173).

36. The first redundancy consultation meeting was on 11 November 2021 on site(171-172). The three executive assistants were told that the respondent was proposing to streamline the headcount; that there were currently three full-time staff, two dealing with complaints and one with governance and that the proposal was to reduce that by one full-time member of staff with two remaining working both across compliance and governance. The respondent was expecting to see a reduction in complaints, because "we are using a number of the team on the

ward to be patient advocates" (LT/32).

37. The respondent developed its ideas on how the patient advocate role would be resourced over time. In the end, in February or March 2022, one of the administration team, a housekeeper on a much lower salary than the claimant, was assigned to that role.

38. On 12 November 2021, a letter warning of redundancy was sent to the claimant (174-175).

39. With regard to the flexible working procedure, which was now running side by side, Samantha Gallant wrote to the claimant on 15 November 2021 stating that they did not agree to her working from home (177). The reason she gave was "planned structural changes", the redundancies. The claimant was informed she had the right to appeal to Lorraine Kelly.

40. The letter also dealt with the consultation for redundancy. The claimant could continue to work at home during the consultation period but must come on site for the consultation meetings. The claimant did not question the need to go in for those consultation meetings or ask for any adjustment.

41. The claimant submitted her appeal regarding flexible working to Lorraine Kelly (188-198) but, following discussion with her union representative, agreed to wait until after the redundancy consultation (199-202).

42. On 18 November 2021, a redundancy consultation meeting with Samantha Gallant took place on site (205-209). The claimant attended with her union representative. The meeting lasted about 50 minutes. Towards the end of the meeting they adjourned for a few minutes because the claimant was feeling unwell.

43. The claimant had the opportunity at this meeting to discuss the workload and why they thought there would be a reduction in the complaints. The claimant was unconvinced about the business case because, as far as she could see, the department was busy. She was told that patient advocates, people already in post, would reduce the complaint workload.

44. At the consultation meeting it was explained to the claimant that selection for the two remaining posts would be by competitive interview which would be competency based (207). There was a discussion about the opportunity to apply for alternative roles. Samantha Gallant agreed to print other roles off the intranet and, if there was something the claimant was interested in, she would contact the manager to explain that the claimant was at risk of redundancy, and she would have preference over external candidates (209).

45. The bundle contains a business case document (157-171) which refers to the patient concierge role in other hospitals and the reduction in complaints. The version in the bundle is undated and is not the final version because it refers to a selection criteria which does not involve interviews. The claimant would, presumably, have had the final document at the time. Unfortunately, it has now been lost but we do not consider anything significant arises from this. The tribunal found the decision to do interviews was reasonable in the circumstances because the other criteria they could have used including appraisal history and

absence records would not be as tailored to the role. The claimant did not suggest any other method at the time although she was given the opportunity to do so.

46. On 3 December 2021 the interview for the role of Executive Assistant took place (235-258). The claimant felt the interview focused on values rather than role competencies. She has been on a course about competency interviews and in her opinion the interview was not conducted properly. In addition the claimant feels she does not perform well at competency interviews. However, all candidates had the same interview. As well as Samantha Gallant there was another person not connected with the department, Amit Sharma, on the interview panel. We find that the interview was conducted fairly in that all candidates were treated in the same manner and asked the same questions.

47. The outcome of the interview was that the claimant did not perform as well as the other two candidates and she was informed of that in writing (267-268).

48. On 9 December 2021, the final consultation meeting took place on site with Samantha Gallant and Alison Moss. The claimant was accompanied by her union representative (271-273).

49. On 20 December 2021, a notice of redundancy letter was sent to the claimant. (276-277)

50. On 21 December 2021 the flexible working appeal outcome letter was sent to the claimant confirming that all roles in the new structure were to remain hospital based (278-279).

51. On 29 December 2021, the claimant submitted an appeal against the redundancy (284-288). The meeting took place on 20 January 2022 and the claimant was accompanied by her union representative (332-339). The appeal was heard by Dominic Bath, regional director.

52. The claimant raised concerns which included that there was not a genuine redundancy situation, she was not fully considered for alternative positions and concerns about the selection pool and the interview. She felt she had been targeted due to raising concerns with the freedom to speak up guardian. On 31 January 2022, the redundancy appeal outcome letter was sent. Dominic Bath addressed each of the concerns raised by the claimant. He did not uphold her appeal (292-296).

53. We have considered whether the patient advocate role should have been offered to the claimant (see paragraph 37 above). The claimant told the tribunal she may have been interested in the role. It did not occur to the respondent or to the claimant at the time of the consultation. There was a big pay differential, and it was not a role that could be done from home. The claimant would need to be in the hospital on the wards. In consultation the claimant said she wanted a corporate job where she could work from home (272). The respondent's aim was to reduce headcount which they achieved by changing the job title of an existing member of staff. We concluded for those reasons it was reasonable to appoint someone in another team to the role rather than offer it to the claimant. We do not accept that on a balance of probabilities the claimant would have accepted the role if it had been offered to her.

Law

Unfair Dismissal

54. Section 98 of the Employment Rights Act (ERA) 1996 provides:

"(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 subsection (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 subsection if it –

.....

(c)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 (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. "

55. Redundancy is defined in s.139 ERA 1996. Subsection (1)(b) provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —

(b) "the fact that the requirements of that business —

(i)for employees to carry out work of a particular kind, or

(ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

56. In Kingwell and ors v Elizabeth Bradley Designs Ltd EAT 0661/02 Mr Justice Burton clarified that reasons for redundancy do not only include financial difficulties.

'It appears to us that there is a fundamental misunderstanding about the question of redundancy. Redundancy does not only arise where there is a poor financial situation at the employer's… It does not only arise where there is a diminution of work in the hands of an employer… It can occur where there is a successful employer with plenty of work, but who, perfectly sensibly as far as commerce and economics is concerned, decides to reorganise his business because he concludes that he is overstaffed. Thus, even with the same amount of work and the same amount of income, the decision is taken that [a] lesser number of employees are required to perform the same functions. That too is a redundancy situation.'

57. For a dismissal to be by reason of redundancy, a redundancy situation must exist but it is not for tribunals to investigate the reasons behind such situations (Hollister v National Farmers' Union 1979 ICR 542, CA and James W Cook and Co (Wivenhoe) Ltd v Tipper and ors 1990 ICR 716, CA). Tribunals are not expected to investigate the commercial and economic reasons behind a decision but should question whether the decision to dismiss was genuinely on the ground of redundancy. That could require the tribunal to satisfy itself that the decision to make redundancies was based on proper information. In other words, a tribunal is entitled only to ask whether the decision to make redundancies was genuine, not whether it was prudent from a commercial point of view.

58. Under s.98(4) ERA 1996 the tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (Iceland Frozen Foods Limited v Jones [1983] ICR 17 (approved by the Court of Appeal in Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] IRLR 827)). The tribunal must not substitute its decision for that of the employer. With regard to redundancy dismissals, this means, in the words of Lord Bridge in Polkey v AE Dayton Services Ltd 1988 ICR 142,HL, that 'the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation'.

59. In Williams and ors v Compair Maxam Ltd 1982 ICR 156, EAT the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it had to ask whether 'the dismissal lay within the range of conduct which a reasonable employer could have adopted'.

60. The factors suggested by the EAT 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. A departure from these guidelines on the part of the employer does not mean that a dismissal is unfair. The overriding test is whether the employer's actions at each step of the redundancy process fell within the range of reasonable responses.

Reasonable Adjustments

61. Section 20 Equality Act (EA) 2010 so far as is relevant to the issues in this case states:

> "20 Duty to make adjustments
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A'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.

...."

62. Section 21 EA 2010 states:

"Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

...."

63. Section 212 EA 2010 defines "substantial" as meaning "more than minor or trivial". For a claim relating to the duty to make reasonable adjustments the employer needs to have knowledge of both the disability and the substantial disadvantage that the employee is subject to.

64. The EHRC Employment Code identifies the factors relevant to whether an adjustment is reasonable or not (para 6.28). These include the extent to which it is likely to be effective, the financial and other costs of making the adjustment, the extent of any disruption caused, the extent of the employer's financial resources, the availability of financial or other assistance (e.g. Access to Work), and the type and size of the employer.

65. An important consideration is the extent to which the step will prevent the disadvantage. The more effective the adjustment is likely to be the more likely it is to be a reasonable adjustment; the less effective it is likely to be, the less likely it is to be reasonable.

66. The claimant must prove facts relating to the application of a provision, criterion or practice (PCP), the substantial disadvantage, and the adjustment which might have avoided that disadvantage. PCP is broadly interpreted. The Code says (paragraph 6.10):

"[It] should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

67. The burden will then shift to the respondent. It might discharge that burden by proving there was no knowledge of the substantial disadvantage or by showing that the proposed adjustment was not in fact reasonable.

<u>Flexible Working requests</u>

68. Section 80G ERA 1996 provides that in respect of the right to request flexible working (including working from home) under 80F:

(1) An employer to whom an application under section 80F is made—

(a) shall deal with the application in a reasonable manner,

(aza) shall not refuse the application unless the employee has been consulted about the application,

(aa) shall notify the employee of the decision on the application within the decision period, and

(b) shall only refuse the application because he considers that one or more of the following grounds applies—

....

(viii)planned structural changes...

....

(1B) For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—

(a) the period of two months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

(1C) An agreement to extend the decision period in a particular case may be made—

(a) before it ends, or

(b) with retrospective effect, before the end of a period of three months beginning with the day after that on which the decision period that is being extended came to an end.

69. The words “three months” were substituted for “two months” at s. 80G(1B)(a) ERA 1996 Words with effect from 6 April 2024 by s.1(6) of the Employment Relations (Flexible Working) Act 2023.

70. Regulation 5 of the Flexible Working Regulations 2014 provides that a request is taken as made on the day it is received. Regulation 6 of the Regulations provides that the maximum amount of compensation is 8 weeks’ pay of the employee who presented the complaint under section 80H of the 1996 Act (complaints to employment tribunals).

Submissions

71. Both parties made final closing submissions which we have taken into account when reaching our conclusions.

Conclusions

Unfair Dismissal

72. We concluded that a redundancy situation existed at the relevant time. We found the evidence of Alison Moss and Lisa Trybus that there was a business case to reduce headcount in the administration team persuasive and credible. We

accepted their evidence that reducing headcount in the Q & R team was discussed before the claimant had her meeting with Lisa Trybus in which she raised concerns about Samantha Gallant.

73. We found that redundancy was the genuine reason for the claimant's dismissal and there was not a conspiracy to manage the claimant out. Lisa Trybus listened to the claimant's concerns about her role and agreed to her having more complex complaints and an addendum to her job description. Lisa Trybus was not unsupportive regarding the claimant's working from home request and a compromise was suggested that the claimant could come into the office for two days a week.

74. The tribunal is satisfied that the respondent acted reasonably in all circumstances in treating redundancy as a sufficient reason for dismissal. The procedure for redundancy was fair; the pool was fairly and rationally identified being the three executive assistants who were doing the role which was closest to the two jobs that would remain. The selection procedure applied equally to all; detailed consultation took place in which the claimant had the opportunity to raise all of her concerns and she was given the opportunity to appeal to an independent manager.

75. The respondent considered viable alternatives, giving the claimant the opportunity to apply for other roles, directing the claimant to roles on the intranet and offering to request she was given priority because of the redundancy situation. We carefully considered whether the role of patient advocate should have been directly offered to her but decided that was not a viable alternative because this was a role which could be absorbed by another team.

76. We conclude that the dismissal was within the range of reasonable responses. In doing that we are mindful that we must not substitute our own view. We are looking, as the law requires us, at the range of reasonable responses and we find the respondent's conduct was squarely within that range. There was a plan to reduce headcount, the pool was fair and rational and a fair procedure, including full consultation, was conducted.

77. Accordingly the claim for unfair dismissal does not succeed.

<u>Reasonable Adjustments</u>

78. The respondent's default position was that staff would work on site but it had a homeworking policy and was prepared to consider working from home if the role was suitable. The respondent offered the claimant a trial, followed by a suggestion that she work three days from home and two in the office. Therefore although there was a PCP that staff work on site this could be adjusted to suit individual circumstances.

79. The claimant was told that she must go in for the redundancy consultation meetings (including the initial meeting on 9 November 2021 when they were first told about the redundancy situation). That was understandable and reasonable in the circumstances because of the seriousness of the subject matter of the meetings. The claimant had indicated a willingness to go in for some meetings. There is no reason to think the respondent would not have adjusted the instruction if asked in relation to her disability, but they were not told, and could

not be expected to know, that it affected her to such a degree that she could not attend important meetings. Indeed the claimant had indicated that her disability was not the principal reason for her flexible working request. She did not ask to do the consultation meetings by teams. This suggests that the claimant herself did not feel that she was put at a substantial disadvantage. Accordingly we found the claimant was not put at a substantial disadvantage by having to go in for some meetings, or if she was, the respondent cannot be expected to have known.

80. Accordingly the claim for failure to make reasonable adjustments does not succeed.

Flexible Working

81. The claimant made a valid request for flexible working on 7 June 2021 and was informed of the decision on 15 November 2021. The respondent broadly followed its own policy save that it was two days late with the initial response, but gave a trial instantly without requiring a meeting. We find that this slight delay in providing an initial response was reasonable.

82. The respondent initially suggested two days working on site and three days at home but no agreement was reached. Subsequently the decision was made to reject the request, the reason given for rejection was one of the permitted reasons in s.80G ERA 1996, that is planned structural changes. That was reasonable because there was a redundancy situation, and it was reasonable to await the outcome of that before making a decision about flexible working.

83. Section 80G ERA 1996 permits a decision period of two months from the date of request to the date of decision (the permitted period was three months at the time of the claimant's request). It provides that the period can be extended by agreement.

84. The claimant agreed to delay receiving the final decision during the trial and while the redundancy consultation was ongoing. We therefore found the permitted period was extended by the trial and by the pause during the redundancy consultation. The trial lasted from 19 July 2021 to 15 November 2021 and therefore this time does not count in calculating the three month period allowed by the legislation at the time.

85. Accordingly the request was dealt with within the period permitted by statute and the respondent was not in breach of the regulations.

Approved by:

Employment Judge S Matthews
16 April 2025

JUDGMENT SENT TO THE PARTIES ON
22/4/2025

FOR THE TRIBUNAL OFFICE