Case Number: 2402173/2024

EMPLOYMENT TRIBUNALS

Claimant: **Mrs F Ukwuomah**

Respondent: **THG Nutrition Limited**

Heard at: Manchester **On:** 16-20 June 2025

Before: Employment Judge Serr

Representation
Claimant: Mr Street, Solicitor
Respondent: Mr Carter, Counsel

JUDGMENT

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

2. There is a 33% chance that the Claimant would have been fairly dismissed in any event.

3. The complaint of direct age discrimination is well-founded and succeeds.

4. The complaints of disability discrimination in relation to acts and omissions in 2020 and 2022 were not presented within the applicable time limit. It is not just and equitable to extend the time limit. Those claims are therefore dismissed.

5. All other complaints are not well founded and are dismissed.

REASONS

The Claimant's Claim

1. By a claim form presented on 9 April 2024 the Claimant, Mrs Faustina Ukwuomah, brings claims for disability and age discrimination. In summary the Claimant, who it is accepted was disabled by reason of a spinal condition, claims that she was subjected to acts of disability discrimination in 2020 and 2022 and then unfairly dismissed in 2023, her dismissal being both unfair and discriminatory on grounds of age and/or disability and an act of victimisation.

The Issues

2. The issues were initially identified by the parties at a case management hearing conducted by EJ Dunlop in December 2024 and subsequently perfected thereafter. They are as follows (using the original numbering):

Time Limits

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

    a) Was the claim made to the Tribunal within three months (plus early conciliation extensions under ss207B(3) and (4) of the Employment Rights Act 1996) of the act or omission to which the complaint relates? The Respondent denies this as the Claimant presented her claim on 9 April 2024 and has brought a number of discrete complaints dating back to 17 March 2020.

    b) If not, was there conduct extending over a period?

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

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

        i. Why were the complaints not made to the Tribunal in time?

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

Unfair Dismissal

Redundancy

2. Was the Claimant dismissed for a potentially fair reason pursuant to section 98(2)(c) of the Employment Rights Act 1996 (**ERA**), namely redundancy?

3. Was the Claimant's dismissal fair within the meaning of section 98(4) of the ERA? In particular, did the Respondent act reasonably in treating redundancy as sufficient for dismissing the Claimant?

   a) Was adequate warning given to the Claimant of their proposed redundancy?

   b) Did consultation take place with appropriate representatives?

   c) Was there a fair selection in accordance with fair criteria?

   d) Was there adequate consideration of alternative employment?

4. If the Respondent failed to follow a fair procedure, can the Respondent show that following a fair procedure would have made no difference to the decision to dismiss?

Remedy Unfair Dismissal

5. What financial loss, if any, has the Claimant suffered as a result of any unfair dismissal?

6. If the Claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances? In assessing this:

   a) Should any compensation awarded be reduced in terms of *Polkey v AE Dayton Services Ltd* [1987] ICR 142 and, if so, what reduction is appropriate?

Age Discrimination

Direct discrimination

7. The Claimant is relying upon Tomas Ho Yin Ng as the actual comparator. Alternatively, the Claimant relies on a hypothetical comparator.

8. Did the Respondent treat the Claimant less favourably than the comparator was or would have been treated? The acts of less favourable treatment alleged by the Claimant are that the Respondent:

   a) On 6 December 2023, the Claimant was unsuccessful in her application for the newly created role of Supply Planning Assistant.

   b) The Claimant's subsequent dismissed on 31 December 2023.

9. Did the above occur in the manner alleged by the Claimant and did it amount to less favourable treatment of the Claimant?

10. If so, was the less favourable treatment because of / on the grounds of the Claimant's age, contrary to the Equality Act 2010 or for another reason?

Disability Discrimination

Disability

11. The Respondent accepts that the Claimant was disabled at the relevant time within the meaning of section 6 of the EqA because of her prolapsed disc.

Direct discrimination (section 13 of the Equality Act 2010)

12. The Claimant relies on a hypothetical comparator - an individual in the administration team that did not share the Claimant’s protected characteristic of disability.

13. Did the Respondent treat the Claimant less favourably than the comparator was or would have been treated? The acts of less favourable treatment alleged by the Claimant are that the Respondent:

   a) The Respondent's decision to terminate her employment on 14 December 2023.

16. Did the above occur in the manner alleged by the Claimant and did it amount to less favourable treatment of the Claimant?

17. If so, was the less favourable treatment because of / on the ground of the Claimant's disability, contrary to the Equality Act 2010 or for another reason?

Discrimination arising from disability (section 15 of the Equality Act 2010)

18. Did the Respondent have actual or constructive knowledge of the constituent facts of the Claimant's relevant disability at the material time?

19. Was the Claimant treated unfavourably because of something arising as a consequence of their disability? The Claimant alleges that the following was the 'something arising' in consequence of his/her disability:

    a) the Claimant's inability to do physical tasks that require long standing/walking and manual heavy lifting such as labelling, inventory/delivery checks, product counts and brushing bays due to her mobility issues

b) Was that something arising from the Claimant's disability, or not?

20. The unfavourable treatment relied upon by the Claimant is:

    a. In January 2020 and March 2020, the Respondent assigned physical tasks to the Claimant that involved long standing.

    b. On 27 May 2020, Kevin Docherty emailed the Claimant about her return to work. "*Due to the period of time you have been unfit to carry out your role of Grade 2 Operative, we believe it is most likely that you will not be able to return to work for the foreseeable future. In addition to this, we discussed whether there had been any changes to your current health circumstance which you confirmed there has not been any changes. Depending on the medical information we have to hand upon this meeting, it will be that we are going to make a business decision regarding your employment which could include dismissal".*

c. On 17 February 2022 and 29 June 2022, the Claimant was suspended by Darren Gaskell for failing to comply with a new process that required a physical check of delivered products;

d. The Respondent's decision to terminate her employment on 14 December 2023.

21. What was the reason for that treatment – was it the "something" or another reason?

22. In treating the Claimant in that way, what aim was the Respondent seeking to achieve?

23. The legitimate aims relied upon by the Respondent are:

a. In respect of 20(a), (c) and (d): ensuring the efficient provision of its service and maintaining appropriate standards of delivery for its clients and customers

b. In respect of 20(b): ensuring that employees return to work to do their jobs in the interest of maintaining appropriate standards of delivery for its clients and customers.

24. Was the treatment a proportionate means of achieving that aim or was there a less discriminatory way of achieving it?

<u>Failure to make reasonable adjustments (sections 20 and 21 of the Equality Act 2010)</u>

25. Did the Respondent have actual or constructive knowledge of the constituent facts of the Claimant's relevant disability at the material time?

26. In respect of the Claimant's disability, did the Respondent fail to comply with its duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010? To determine this:

a) What is the provision, criterion or practice (**PCP**) relied upon? The Claimant relies upon:

i. The requirement to perform long standing/walking and manual handling duties as part of the Administrator role.

ii. Requirement to be marked against a redundancy selection and scoring assessment with no adjustments made to accommodate the C's disability as recommended by OH.

iii. Requirement to be marked against a Performance Capability Policy with no adjustments made to accommodate the C' disability as recommended by OH.

b) Was that PCP in fact imposed on the Claimant?

c) If so, did the PCP place the Claimant at a substantial disadvantage when compared with non-disabled employees?

27. The Claimant states the substantial disadvantage was:

a. On 27 May 2020, Kevin Docherty emailed the Claimant about her return to work. *"Due to the period of time you have been unfit to carry out your role of Grade 2 Operative, we believe it is most likely that you will not be able to return to work for the foreseeable future. In addition to this, we discussed whether there had been any changes to your current health circumstance which you confirmed there has not been any changes. Depending on the medical information we have to hand upon this meeting, it will be that we are going to make a business decision regarding your employment which could include dismissal".*

b. On 17 February 2022, the C was suspended by Darren Gaskell for allegedly refusing training (as per paragraph 15 of the Particulars of Claim).

c. On 29 June 2022, the Claimant was suspended by Darren Gaskell for failing to comply with a new process that required a physical check of delivered products (as per paragraph 17 of the Particulars of the Claim);

d. The C was notified of redundancy on 6 December 2023 in not being selected for the role of Supply Planning Assistant (as per paragraph 26 of the Particulars of the Claim.) and the subsequent dismissal on

31 December 2023 (as per paragraph 27 of the Particulars of the Claim).

28. Did the Respondent know or, if not, could it reasonably have been expected to know, that the PCP alleged placed the Claimant at the alleged substantial disadvantage?

29. If so, would it have been reasonable for the Respondent to have made the following adjustment(s)

    a. Adjust the redundancy selection criteria and discount and disability-related effects when assessing the C against the redundancy selection criteria which would have wholly removed the substantial disadvantage suffered because of her disability.

    b. Allocate manual/physical tasks to another person to allow fixed admin only duties as recommended by OH to accommodate her disability.

30. Did the Respondent make such adjustments?

<u>Harassment (section 26 of the Equality Act 2010)</u>

31. Did the Respondent engage in unwanted conduct related to disability for the purposes of the Equality Act 2010? The Claimant relies upon the following:

    a) On 27 May 2020, Kevin Docherty emailed the Claimant about her return to work. "*Due to the period of time you have been unfit to carry out your role of Grade 2 Operative, we believe it is most likely that you will not be able to return to work for the foreseeable future. In addition to this, we discussed whether there had been any changes to your current health circumstance which you confirmed there has not been any changes. Depending on the medical information we have to hand upon this meeting, it will be that we are going to make a business decision regarding your employment which could include dismissal*".

    b) On 17 February 2022, the Claimant was suspended by Darren Gaskell;

c) On 29 June 2022, the Claimant was suspended by Darren Gaskell;

32. Did the unwanted conduct occur in the manner alleged by the Claimant?

33. If so, was the unwanted conduct related to disability?

34. If so, did the unwanted conduct have the purpose or effect of:

a) violating the Claimant's dignity; or

b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

35. If so, having regard to all the circumstances of the case, was it reasonable for the conduct to have that effect on the Claimant?

Victimisation (section 27 of the Equality Act 2010)

36. The Respondent accepts that the Claimant did a protected act on or around 8 August 2022 when at a grievance meeting she raised concerns of discrimination based on her health.

37. Did the Claimant perform (or did the Respondent believe she had performed, or was likely to perform) a "protected act" when she raised her grievance on 2 June 2020?

38. Did the Respondent subject the Claimant to a detriment? The Claimant relies upon:

a. The Respondent's decision to terminate her employment on 14 December 2023

39. If so, did the Respondent do so because the Claimant did the protected acts as specified above – or for another reason?

3. At the outset of the hearing the list of issues was the subject of discussion with the parties. The Respondent agreed that knowledge of disability for the purposes of s.15 and s.20 EqA 2010 was not in dispute. No justification defence in respect of the direct age discrimination under EqA s.13 (2) was raised by the Respondent. All other issues remained live.

Procedure

4. The Tribunal was presented with a 369 page hearing file. It heard live evidence from the Claimant on her own behalf and from Christopher Lunn, head of supply chain and decision maker in respect to the redundancy selection exercise leading to the Claimant's dismissal, and Ian Richmond Head of Operations and appeal decision maker. At the outset it was agreed to address liability only, with remedy to be addressed if appropriate in due course. The Tribunal indicated it would be considering the issue of any Polkey deduction in the first part of the hearing, again if appropriate. While the issues could have been slightly more focussed the parties are generally to be commended for the economy with which they approached the case which allowed it to be concluded in the allotted time.

The Facts

5. The Tribunal made the following relevant findings of fact. The Respondent is a wholly owned subsidiary of THG plc. The THG group is a global e-commerce and technology business which operates in the beauty, health and fitness sectors. The THG group owns a number of brands, including the active wear and fitness nutrition brand Myprotein, which, among other things, produces its own brand protein powders and supplements.

6. The Respondent is a large employer. Although the Tribunal received no precise evidence on this point, it was estimated that it had 2000 employees by Mr Lunn. Mr Ricahrdson appears to have had 1000 staff somewhere in his line management chain under him.

7. THG's head office is called Icon 1 in Altringham. There is a warehouse called Omega based in Warrington where the Claimant worked. This is where powders and supplements are produced and is referred to as the operational side of the business. There is a second warehouse called Icon 2 also in Altringham adjacent to Icon 1.

8. The Claimant was born on 2/2/1964 and was therefore 59 at the date of her dismissal in December 2023. The Claimant joined the Respondent in 2014. In 2016 she was diagnosed with a prolapsed disc which caused chronic

back pain and limited her ability to undertake physical tasks at work. She was moved to a role that did not have prolonged standing or manual handling under the title warehouse administrator.

2020

9. In January 2020 the Claimant appears to have been told that her warehouse administrator role was no longer available and she was required to sweep the floor of the warehouse causing her pain and discomfort. She complained to the warehouse supervisor Kevin Docherty and was forced to go on sick leave. On 30 January 2020 an OH report stated that she had been moved to a role involving manual handling and prolonged standing causing pain. It recommended that she be deployed to a role where she does not have to stand for prolonged periods of time, as her back pain is triggered by prolonged standing and heavy manual handling.

10. The Claimant attended a capability meeting with Mr Docherty on 7 February 2020 where she confirmed her limitations in respect of standing and lifting which was 2-5kg.

11. In a later capability meeting with the Claimant and Mr Docherty in February 2020 there was a discussion about two potential new roles- data analyst and safety advisor. Both roles were discounted in a letter dated 10 March 2020.

12. At some point in February 2020 the Claimant commenced the role of senior goods in administrator initially as maternity cover. In a meeting on 11 March 2020 with Mr Docherty there was a discussion about the Claimants condition, how the goods in administrator role was progressing, the need for a training plan and the fact the role was temporary maternity cover.

13. A training plan was in fact provided on 13 March 2020.

14. On 18 March 2020 the Claimant sent an email of complaint to Mr Docherty. It stated:

Further to the meeting we had on 13/03/2020, where one of the things discussed was that, I will not be able to cross check any job that required long standing. However, yesterday (17/03/2020) there was a job given to me by Darren which required me to cross check 16 different products, 16 different batch numbers distributed in 3 pallets, which took me around 1 hour 20 minutes. I did inform him that the job will require me to stand for a long time, but he insisted that I should do it. I had no other choice so I did it. The long standing is increasing the back pain, and I will appreciate if you could help in this situation.

15. Mr Docherty replied that she should see him immediately if anything causes her discomfort.

16. A further meeting took place with the Claimant and Mr Docherty on 29 April 2020 to discuss the training plan. Following that meeting the Claimant was written to by Mr Docherty on 27 May as a follow up (the letter wrongly referred to the 29 May, but the Tribunal accepts it meant the 29 April). The letter indicated the Claimant had not met the training criteria and that she would be given a further 4 weeks in the role to improve. The letter noted that the Claimant complained about not being given feedback and was unaware of performance issues. The letter went on to state:

Due to the period of time you have been unfit to carry out your role of Grade 2 Operative, we believe it is most likely that you will not be able to return to work for the foreseeable future. In addition to this, we discussed whether there had been any changes to your current health circumstance which you confirmed there has not been any changes.

Depending on the medical information we have to hand upon this meeting, it will be that we are going to make a business decision regarding your employment which could include dismissal.

17. On 2 June the Claimant raised a grievance concerning the letter of 27 May 2020 as well as the meeting of 29/4/20. The grievance letter stated in the penultimate paragraph:
In the letter he insinuated that due to my health not changing it is likely that I will not be returning to work and that dismissal could be considered in our

next meeting. As far as I am concerned, my health does not affect my role as a goods in administrator, neither did it affect me in my prior role as a warehouse administrator. The company has been aware of my health since 2016, and so I don't know why Kevin is now trying to use my health against me. In the letter Kevin also said that I did not meet any of the training criteria based on a training feedback meeting on 13th of March 2020 which involved Kevin Chloe Wood and Michael Radley. However, what actually happened was that, I was marked green and had met several criteria, and we set out the ones I need to achieve.

18. The grievance was determined by a decision of 17/7/20 by David Maxfield, Senior Operations Manager. It upheld the grievance finding that the ill health capability process was being followed incorrectly, as the Claimant's health did not affect her performance within the temporary role. It concluded that Kevin Docherty did not follow a training plan and did not feedback appropriately on her performance during this time. The recommendations included a training plan and a role profiler. At that time the Goods in admin role was still being discussed as temporary for the Claimant but it seems that it subsequently became permanent.

19. For completeness the Tribunal notes there was an appeal against the original grievance outcome on the basis that the Claimant was unhappy with certain aspects of the decision. The grievance appeal was determined on the 1 October 2020 by a Nicholas Perriam, Senior Operations Manager and was effectively dismissed.

2022

20. On 21 February 2022 the Claimant was written to by her team leader Darren Gaskell suspending her on full pay due to an incident on 17 February. The letter invited her to an investigatory meeting the following day. Exactly what precipitated this suspension is not entirely clear to the Tribunal. Mr Gaskell no longer works for the business and the documentation around this incident is extremely limited. The Claimant says, and the Tribunal accepts, that broadly there had been discussion about additional duties that the Claimant was to undertake earlier in the month. The Claimant was concerned about her ability to undertake these duties and had arranged a

meeting with HR. On 17 February the Claimant was requested to undertake training. She asked to delay the training until the meeting with HR which was scheduled for the following day. Mr Gaskell took this as a refusal to train and suspended her.

21. The Claimant returned to work on 23 February without any further follow up to the suspension.

22. On 29 June 2022 the Claimant was suspended from work again by Mr Gaskell. Once again, the precise facts precipitating this suspension are unclear. The Tribunal has seen a document headed suspension statement setting out the Claimant's account. It has heard no other evidence about this incident, but as stated Mr Gaskell no longer works for the Respondent. On the day in question the Claimant states and the Tribunal accepts that she was asked to sign a piece of paper which she was concerned included agreement to undertake some manual handling tasks which she would find difficulty doing. She asked for the document to be modified. A conversation ensued between herself and Mr Gaskell about the document its contents and what it meant for her role and duties. She asked to leave the room to use the toilet but was told if she did so she would be suspended. She left anyway and was suspended.

23. On 10 July 2022 the Claimant raised a grievance in respect of the two suspensions. A grievance investigation meeting took place on 8 August 2022. It was chaired by Kevin Fenney manufacturing manager of the Respondent. The Tribunal has seen extensive notes related to this meeting. The Claimant made a number of references to harassment and discrimination in the meeting by Mr Gaskell whose actions were said to have been because of her spinal condition.

24. On 5 September 2022 the Claimant received an outcome to her grievance from Mr Fenney. Mr Fenney rejected the assertion that the suspensions were done with the intention of removing the Claimant from her role but were due to training/performance related issues. It was admitted that there was a failure on the part of Mr Gaskell to provide clear explanations for the suspensions. The grievance outcome does not grapple with whether the grievances were related to the Claimant's disability in some way (which it

seems they clearly were) and certainly does not provide a real justification for them.

25. For completeness it seems that the relationship between Mr Gaskell and the Claimant continued to sour. Mr Gaskell submitted a grievance against the Claimant on 3 November 2022 stating that the Claimant was insubordinate and uncooperative. By a decision dated 20 January 2023 Joseph Hook Site Engineering manager dismissed the grievance but did find there had been a breakdown in the working relationship between Mr Gaskell and the Claimant which subsequently led to a mediation process in February 2023.

2023

26. At the beginning of May 2023, the Respondent recruited another worker Ho Yin Ng (known as Thomas). Mr Ng was 26 at the material time. An email from 27 June 2023 from Sophie Regan of HR sent to the Claimant and Gaskell and Docherty following a catch-up meeting between all those included in the email states:

I was then updated, that a new team member has joined at the beginning of May (Thomas), to assist Faustina with the admin role

Due to the extra pair of hands and hours now on admin, Darren & Kev explained that some tasks have now been added back into this role, that were previously delegated elsewhere, to assist Faustina's workload. To aid this. Darren came prepared with a plan that he has for structuring this new working dynamic, introducing split shifts, with weekly and monthly task priorities for both Faustina & Thomas. Darren was very clear that he will not be asking or expecting Faustina to carry out the tasks that cause her any physical strain, and that these will sit with Thomas.

I asked Faustina if she was comfortable with Thomas understanding that he will be picking up the manual/physical tasks due to her having a medical reason that impairs her from this, to which Faustian agreed for the sake of team morale & understanding.

27. A previous OH report dated 1 June 2023 had confirmed that the Claimant was fit for work in an administrative role only without any manual handling activities or prolonged standing. This report was referred to by Ms Regan in her email.

28. At some point likely to have been very early August 2023 discussion took place between Mr Jonathan Coates, the Respondent's merchandising director and Ian Richmond then head of operations about a potential reorganisation. Mr Coates role sat within the central supply chain team based at Icon 1. Mr Coates team's role was to purchase the raw materials for the production that took place at Omega. His team needed to know whether there was space to store ingredients at omega. There was a requirement for regular communication between Mr Coates team and omega. Kevin Docherty had to check and manage stock levels. It was the job of the Claimant as the goods in administrator to communicate with omega and the external suppliers to schedule deliveries. There were problems with Mr Coates team getting the relevant information from Mr Docherty and Mr Richmond suggested to Mr Coates that these problems may be addressed if the goods in administrator duties were transferred into the central supply team. At this point there does not seem to have been a discussion about reduction of headcount.

29. There were verbal discussions between Mr Coates and Mr Lunn head of supply chain who reported into Mr Coates. The Respondent had a member of staff Krista Jansone who was performing a similar role to the Claimant and Mr Ng for the finished goods department. Her role sat within the central supply chain team. The proposal that was formulated was that the Goods In administrator role be brought into the supply chain function to be line managed by Krista Jansone. Due to the overlap in duties with Ms Jansone there would only be need for one Goods In Administrator in Mr Lunn's view.

30. This proposal is first documented in an email from Mr Coates dated 6 September to Alex Mountford of HR, where the role would still be based at omega but report into Krista Jansone. It would require one worker. Ms Jansone would get a salary increase and promotion which it seems was intended to be done anyway. There are a number of emails evidencing

discussions around the proposal. An email dated October 5 from Sophie Regan of HR to Jonathan Coates states:

Following conversations last week about the further context behind this team structure, I have picked up with Jess to discuss a plan of action.

Before we can create a concrete plan, there are just a few details that need ironing out, so that we can ensure the approach is the fairest and most practical.

For absolute clarity – our business case needs to be watertight in this instance, as the 2nd Goods In Admin (HYN) was introduced via agency in May 2023, and only just went permanent with THG on 2nd September 2023. We need to clearly establish what has changed within just the last 4 weeks, which has gone from making this a 2-person role, to now needing to make one redundant.

• What is the key business case proposal? Restructure, Changing entities?

• What is the reason behind the need for one person as opposed to the need for two in September? Is this due to the capacity of the team that they would be merging with?

• Would there be anybody else needed to be placed 'at risk' besides FU & HYN, that are already in place within the team that they would be joining?

• We will need a very clear Job Description for the Goods In Admin role for the sake of conducting a skills match – do we know if this is already in place or does one need writing asap? (To my understanding from speaking with FU and her line manager, this role has developed in several ways over the last couple of years, so I'm certain this will need to be looked at and confirmed)

• Due to the introduction of Krista to this team and the successful person reporting to her, will this be positioned as a new role in Supply chain? Are we rebranding the role?

• Is there any other role currently (or in the pipeline) that the individuals at risk could potentially be moved in to?

31. Mr Richamond was included in correspondence and discussions. An email dated 9 October 2023 from Ms Regan states:

Can we put some time in this week to discuss the case around the Goods In admins?

Keen to ensure this process is watertight as there is quite a high risk around it from a HR perspective..

32. It seems a meeting did take place as on 11 October Ms Regan wrote to Jonathan Coates, Mr Richmond and others stating:

Just keeping the others cc'd in so that we are all the loop and up to date.

Just caught up with Ian & Jess, and we feel confident that we can put forward a solid business case for the need of redundancy due to upcoming restructure, that can be clearly detailed and justified.

In terms of next steps, please could you put together a clear Job Description for the Goods-In Admin role that will go ahead following this restructure?

This will need to include the Purpose for the role, Who it will report in to (Name and Job Title), Role Responsibilities in bullet point format & Role Requirements in bullet point format.

With the job description, we can then look into a suitable selection matrix to go forward with.

Once we have all our ducks in a row, we can then plan a suitable announcement and consultation process.

33. An email of 17 October 2023 from Ms Regan confirms to Mr Coates and others the job description for what was now a role to be called supply planning assistant had been finalised with a timetable for the redundancy process. That email also discusses which manager should lead the process, suggesting a Ms Burkevica as "*the current line managers could potentially trigger a reaction that we don't want due to historic events..".* What historic events she is referring to is never articulated in writing.

34. The Tribunal was presented with two drafts of the Job Description (JD). They are identical save that the second draft had an extra responsibility: internal and external NCR reporting and corrective action including the support any manual rework required within the warehouse EG labelling re palletization. The second draft was the final version sent to the Claimant and Mr Ng although no explanation was given about how when or why this additional responsibility was added.

35. On 30 October Ms Regan sent a set of Power Point slides (PPP) to Mr Coates and Richmond meant to be given to the Claimant and Mr Ng. It included a business case, the old structure and a new proposed structure (that was blank and was said in the email to need to be finalised) and information on the consultation process. Under what happens next the Tribunal notes the slide stated:

During the consultation meeting we can

-Discuss and explore ways of avoiding a redundancy

− Consider the options available to you in this process including roles within Operations or within the wider organisation

− Consult on the criteria that will be used for selecting into the Goods-In Admin role in the new structure

− Identify your needs and provide you with any necessary support or assistance

− Give you the opportunity to make suggestions and ask any questions you may have.

36. The PPP was amended according to an email of Ms Regan dated 1 November 2023, although it seems not substantially. The Tribunal was not given sight of this final PPP.

37. On 7 November the Claimant was notified that she was to be placed at risk of redundancy in a meeting with Paul Bradbury Senior Operations manager who had been selected to manage the process. She was then given the

amended PPP, the JD for the new role and an invitation to a 1st consultation meeting for the 15 November 2023.

38. The Tribunal pauses at this stage to consider the decision to place the Claimant at risk of redundancy. The Claimant states that there was in fact no redundancy situation, that this was a sham orchestrated to remove the Claimant from employment. It points to the timing amongst other things, in that the decision to reduce headcount from 2 to 1 is only articulated in writing on 6 September just after Mr Ng is made a permanent member of staff. The concerns raised by the Claimant are wholly understandable and indeed reflected in the Respondent's own HR advisors emails.

39. The Tribunal has given this careful consideration but does not on balance conclude that the redundancy was a sham designed with the purpose of removing the Claimant from employment and retaining Thomas Ng. There are number of reasons for this. Firstly, Mr Richmond one of the architects of the proposal says and it is accepted that despite being based at omega he had no personal knowledge of the Claimant or Mr Ng and was responsible for a thousand staff. Mr Lunn, another architect of the proposal, worked in a different part of the business and also did not have personal knowledge of the Claimant or Mr Ng. While the Tribunal has not heard evidence from Mr Coates, an email from Adam Artus dated 3 August 2023 says "as discussed" and then lists the current goods in admin staff as the Claimant and Mr Ng, strongly indicating that prior to this Mr Coates did not know who they were and the email is in response to a request for their names. Finally, the business case explained above is rational and logical.

40. A consultation meeting took place on 15 November 2023 with the Claimant and Mr Bradbury. Despite what was indicated on the PPP there was no consultation in respect of the selection criteria and in relations to this issue the notes simply state Criteria: the interview will consist of competency-based questions. The Claimant was given no information in respect of the reduction in headcount despite asking, simply being told by Mr Bradbury according to the notes "I'll have to take that one away for you as that is a decision that has come from above in the supply chain team". No further information was ever forthcoming.

41. On 29 November 2023 the Claimant was interviewed for the supply planning assistant role by Mr Coates and Mr Lunn. It is unclear who decided they should be the interviewers, and no documentation was presented passing between them and HR in advance of these interviews such as giving any guidance as to the selection process. The Tribunal does accept the evidence of Mr Lunn that neither he nor Mr Coates was aware of the Claimant's work history in any way, in particular that she was disabled or the grievances she had submitted in 2020 and 2022.

42. The Tribunal was presented with a single set of typed notes said to be a record of the answers given by each candidate to a set of 7 identical questions. Mr Lunn in evidence said that he typed up the notes from handwritten notes taken by himself at the time. He could not recall if Mr Coates took any notes. Any handwritten notes have not been preserved. It is impossible to know from the typed-up notes to what extent they reflect the views and recording of Mr Lunn or Mr Coates.

43. Very surprisingly, the procedure adopted by the Respondent involved no scoring matrix of any kind. No particular value appears to have been ascribed to each of the answers, and obviously no overall score is given for each candidate.

44. It appears that Mr Lunn and Mr Coates concluded that Mr Ng was the better candidate and that he should be given the role of supply planning assistant. It is unclear how that decision was communicated to Mr Bradbury as the Tribunal has seen no communication from Mr Lunn and Coates to Mr Bradbury.

45. The evidence about why Mr Ng was selected over the Claimant is confusing and contradictory. In oral evidence Mr Lunn (the only one of the two interviewers who the Tribunal heard from) said that in respect of the 7 questions the candidates were equal and that the factors set out in his witness statement said to be demonstrated by Mr Ng- willingness to learn and improve, interest in the whole supply chain, commercial awareness and vision for the role, was all demonstrated in the 8th question by Mr Ng. However all the 8th question consisted of was "do you have any questions for us, regarding this position?" and Mr Lunn conceded that the Claimant

could not have known that this was an opportunity to provide further evidence to the decision makers to support her application for the role or that it was part of the assessment (the Claimant is recorded as asking in response to this simply “where will the team be based”).

46. In cross examination Mr Lunn was taken to the answers provided by each of the candidates and conceded that the Claimant gave more fuller answers with more examples to question 3- changes in the workplace, question 5- prioritising tasks and question 7 ability on Excel and Sage. Mr Lunn struggled to find a question from 1-7 that Mr Ng had answered better indicating that the other questions were equal. Given those concessions it was in the Tribunal’s view difficult to see how the Claimant could have been said to have performed ‘equally’ to Mr Ng over the 7 questions according to Mr Lunn. On the Tribunal’s own assessment of the answers recorded from both candidates, admittedly without the specialist knowledge of the role and its requirements possessed by Mr Lunn, this appeared correct.

47. On 12 December 2023 Mr Coates provided some feedback to the Claimant. Within that document he stated:

Firstly I would like to reiterate that you did not necessarily have a poor interview on this occasion, however we felt that the candidate that we have selected, gave more thorough and detailed answers to our questions and displayed a great knowledge towards the commercial aspect of the supply chain function, which will be of great benefit towards this new position.

48. The Tribunal views this as Mr Coates indicating to the Claimant that Mr Ng performed better across the 7 questions, not just the 8th.

49. The Claimant attended a second consultation meeting on 6 December 2023 with Mr Bradbury. She was told that she had been unsuccessful for the supply planning assistant role. It was said “from the feedback it would appear that you did give some good answers during your interview, however the candidate that they have selected demonstrated some solid examples

of the commercial aspects of the role which they felt could be very beneficial".

50. In terms of alternative roles, the Claimant was invited to look for alternative options on the Respondent's vacancies list. The Respondent did not demonstrate that it had actively sought out alternative roles but did say that it didn't think there were any available options.

51. On 14 December the Claimant was notified of her dismissal by reason of redundancy. Her EDT was confirmed as being 31 December 2023. There was a final meeting with Mr Bradbury. Mr Bradbury at this stage stated that there were no new suitable positions that had arisen within the week. The Tribunal accept that he had searched for options.

52. On 18 December 2023 the Claimant appealed her dismissal on the grounds that there was in fact not a redundancy situation as her duties still existed within the new role. She also said that she had been the victim of age discrimination, victimisation and disability discrimination.

53. The Claimant attended an appeal meeting with Mr Richmond on 4/1/24. By a decision dated 10/1/24 her appeal was dismissed. Mr Richmond found there was a genuine redundancy given the organisational changes with the role. There was nothing in the notes of the interview or statements that would attribute to age discrimination given that the process was conducted by 2 independent parties. So far as selection was concerned the letter stated that "I reviewed in detail the interview responses from both candidates and unfortunately in this instance, the other individual scored more favourably". This was despite the fact that no scoring system was in fact used. In oral evidence Mr Richmond stated that "his answers that he gave were more what the interviewers were looking for in the role" and "I would have expected the Claimant to have had ideas for improving the role. Thomas had better ideas for how to do things differently". This seems to have been taken from notes in respect of the question "do you have any questions for us about the role". No consideration was given to the criteria themselves by Mr Richmond or how the Claimant had performed comparatively in questions 1-7.

Submissions

54. The parties' representatives made oral submissions only. The Tribunal has considered them with care but does not set them out at length. Very briefly the Respondent submitted:

(i) The redundancy was genuine. None of the parties involved knew the Claimant and didn't know anything about Mr Ng situation.

(ii) Lunn and Coates did not know the Claimant was disabled or had done any protected act through submitting grievances.

(iii) It was unnecessary to have a scoring matrix given the very small pool of candidates.

(iv) The method chosen was within a band of reasonable responses open to the Respondent.

(v) It was for the Claimant to take the opportunity to give more examples and evidence in response to the question do you have any questions?

(vi) Some of the allegations in respect of matters in 2020 and 2022 are unrelated to disability or don't meet the threshold of seriousness to constitute harassment. In any event they are all out of time and no good reason has been given to extend time.

55. The Claimant submitted:

(i) The suspensions are related to disability.

(ii) Given the timing in relation to Mr Ng being taken on full time the redundancy is an obvious sham in order to recruit Mr Ng over the Claimant.

(iii) Failing to adopt a scored selection criteria was obviously unfair.

(iv) It was unfair to rely on answers given to question 8.

(v) The Claimant pointed to a number of factors that would reverse the burden of proof under s.136 EqA.

(vi) The claims are not out of time as there is a continuing act of discrimination and there should be no Polkey reduction.

The Law

Unfair Dismissal

56. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

57. The potentially fair reasons in Section 98(2) includes that the employee was redundant s.98 (2) (c). Redundancy is defined at s.139 ERA. This states

"139(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 attributable wholly or mainly to –

(a) the fact that his employer has ceased, or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

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

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

58. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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". the starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or out with that band.

59. The basic constituents of a fair redundancy dismissal are set out by Lord Bridge in Polkey v Dayton [1987] 3 All ER 974:

"' … in the case of redundancy, the employer will normally not 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 redeployment within his own organisation … It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with."

Direct age/disability discrimination

60. Protection against direct discrimination is provided for at s.13 of the Equality Act 2010:

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.

61. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator (the 'less favourable treatment' issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the 'reason why' issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the claimant. Thus, the less favourable treatment issue is treated as a threshold which the claimant must cross before the tribunal is called upon to decide why the claimant was afforded the treatment of which she is complaining.

62. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, it was said that the real question in direct discrimination cases was “what, consciously or unconsciously, was the [alleged discriminator's] reason”. Unlike causation, the Court considered, that question required a subjective test. Causation is a legal question whereas a respondent's reasons for action are a question of fact.

63. Direct evidence of discrimination is rare and a tribunal must consider the possibility of unconscious discrimination by carefully examining the surrounding circumstances and drawing inferences where appropriate.

Victimisation

64. In respect of victimisation EqA 2010, s 27(1) provides:

'“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.”'

“Protected act” is defined at EqA 2010, s 27(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".'

65. The employer must subject the employee to a detriment "because" the latter has performed a protected act. The language used in EqA 2010, s 27 matches that in the definition of direct discrimination at s.13. It follows, therefore, that, the protected act has to be an effective cause of the employer's detrimental actions but does not have to be the principal cause.

66. The threshold for what constitutes a detriment is a low one, the test being simply whether the treatment is of such a kind that a reasonable worker would or might take the view this is to their detriment- see *Warburton v The Chief Constable of Northamptonshire Police* (2022) EAT 22.

Discrimination arising from Disability

67. The Equality Act at s15 states: (1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

68. Unfavourable treatment is not defined in the Equality Act, however the Equality and Human Rights Commission's Code of Practice on Employment (2011) states that it means that the disabled person 'must have been put at a disadvantage'

Reasonable Adjustments

69. S.20 Equality Act states:

> (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. …
>
> 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.

Harassment relating to a relevant protected characteristic

70. EqA 2010, s 26(1) provides that:

> '"A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of –
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."'

71. Harassment, is a form of conduct. It must be unwanted; it must relate to a protected characteristic; and it must either have the purpose or the effect of creating what is referred to as an "adverse environment".

72. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — *Hartley v Foreign and Commonwealth Office Services 2016* ICR D17, EAT. The EHRC code of practice on employment at paragraph 7.10 states that protection from harassment also applies where a person is generally abusive to other

workers but, the form of the unwanted conduct is determined by that workers protected characteristic.

The Burden of Proof

73. Section 136 of the Equality Act 2010 provides:

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

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

74. S.136 creates a 2 stage process. In the first stage the employee must prove facts from which the employer could conclude, in the absence of an adequate explanation that the employer committed an unlawful act of discrimination. The Tribunal must ignore any explanation given by the Respondent at this stage. If there is a prima facie case of discrimination the burden then shifts to the employer to provide a non-discriminatory explanation for the difference in treatment. Unreasonable treatment alone is usually insufficient to draw an inference of discrimination.

75. The revised guidance provided in respect of s.136 within the case law is as follows (the reference is of course to predecessor legislation but the principles are still applicable)—

(1) Pursuant to SDA 1975, s 63A, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2 or which, by virtue of s 41 or s 42 of SDA 1975, is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will

not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in the SDA 1975, s 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with SDA 1975, s 74(2)(b) from an evasive or equivocal reply to a questionnaire or any other questions that fall within SDA 1975, s 74(2) (see Dattani v Chief Constable of West Mercia Police [2005] IRLR 327, EAT – RRA 1976, s 65 (the equivalent provision to SDA 1975, s 74(2)) also covers evasive or equivocal pleading in a response to a claim).

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to SDA 1975, s 56A(10) (now the EA 2006, s 15(4)). This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

(10) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or a code of practice

Time Limits

76. A claim must be presented to the tribunal 'not after the end' of the period of three months 'beginning when the act complained of was done': Equality Act 2010, s 123(1). There are specific provisions to deal with discrimination by omission, which is to be treated as occurring when the person in question decided upon it; and an act extending over a period is to be treated as done at the end of that period: see s 123(3). The latter provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct such as harassment.

77. The leading case on what it is necessary to show to establish an act continuing over a period is still Hendricks v Metropolitan Police Commissioner [2003] IRLR 96. In that case the Court of Appeal emphasised that whilst a policy or practice of discrimination will normally provide a basis for a claim that there was a discriminatory act continuing over a period, it is not a necessary precondition, as earlier cases had appeared to indicate. The correct test is whether the acts complained of are linked, and are evidence of a continuing discriminatory state of affairs.

78. A tribunal has discretion to extend time where it would be 'just and equitable' to do so: Equality Act 2010, s 123(3). there is no presumption in favour of the extension of time. The onus is on the claimant to convince the tribunal that it is just and equitable to extend time. While time limits in employment cases are intended to apply strictly that is not to undermine the Tribunal’s broad discretion which is a matter of fact and judgment in every case see- Jones v Secretary of State for Health and Social Care [2024] EAT 2

Conclusions

79. Applying the facts found to the law the Tribunal reaches the following conclusions.

Time Limits

80. The Tribunal firstly turns to time limits. Early conciliation was entered into on 21 February 2024, and the ACAS certificate was issued on 3 April 2024. The claim was presented on 9 April 2024. With the exception of all claims in respect of the redundancy and dismissal which are unarguably within the time limits provided by the Equality Act and the Employment Rights Act, the other claims identified in the list of issues are if not a continuing act of discrimination ending with the dismissal, considerably out of time. The last act complained of prior to this is the suspension by Mr Gaskell on 29 June 2022 almost two years before the presentation of the claim. This was accepted by Mr Street.

81. The Tribunal considered whether this was a continuing act of discrimination extending over a period ending with the dismissal of the Claimant. The Tribunal concluded it was not. As will be seen, the Tribunal has not concluded that the dismissal was an act of disability discrimination. That of itself would not automatically preclude it being a continuing act if the dismissal was discriminatory in some other way. The question is always whether some discriminatory state of affairs can be identified which may but is not always manifested in an identifiable rule or policy. The Tribunal concluded this was not a continuing act of discrimination ending with the redundancy process and dismissal. The Tribunal has found that the redundancy was not a sham in the sense of being orchestrated to remove the Claimant from her employment. None of the decision makers involved in the redundancy and dismissal were implicated in the acts and omissions in 2020 and 2022 which are essentially directed against two different managers, Mr Docherty and Gaskell. None of the individuals were involved in any of the grievances by the Claimant over this period.

82. The Tribunal considered whether it would be just and equitable to extend time to allow these claims to be considered. The Tribunal concluded that it would not be. The Claimant failed to address this issue in her evidence and in cross examination simply stated that the reason why she didn't bring claims earlier was that she was still employed. The Tribunal understands the reluctance of an employee to potentially upset an existing working relationship by bringing a claim to an employment tribunal, but the Claimant had brought several grievances in respect of the subject matter of these claims the outcome of which she appears to have been satisfied with. The Tribunal notes that Mr Gaskell no longer works for the Respondent and some of these allegations are poorly documented or rely on evidence about oral discussions that took place a considerable time ago.

83. Accordingly, the Tribunal does not have jurisdiction to consider any of the issues identified in the list of issues save for unfair dismissal, whether being unsuccessful in her application for the role of supply planning assistant and subsequently being dismissed (one essentially following on from the other) was an act of direct discrimination on the grounds of the Claimant's age and/or disability, whether the dismissal was an act of disability discrimination under s.15/s.20 and whether the dismissal was an act of victimisation.

Unfair Dismissal

84. The Tribunal accepts that the reason for dismissal under s.98 (2) (c) was redundancy. This was not a sham in order to orchestrate the exit of the Claimant from the business. There was a diminishment for the requirement of work of a particular kind being the work undertaken by the goods in administrator. The effect of the changes was that some of the duties in the new supply planning assistant role would be different, although it is accepted there was a considerable overlap. There would be no need for two workers given the organisational change and the role of Krista Jansone.

85. The Tribunal however concludes that, while it cannot substitute its own principles of selection for those of the employer, the Respondent did not act reasonably within the meaning of s.98 (4) and the Claimant's dismissal was unfair.

86. Firstly, the consultation with the claimant was inadequate in 2 material respects. (1) There was no consultation in respect of the selection criteria despite the Claimant being assured such consultation would happen and in fact the Claimant was given only the most limited information on the criteria to be applied.

87. (2) There was no consultation in respect of the possibility of avoiding redundancy altogether. When the Claimant asked why the role was being reduced from 2 to 1, she was given no satisfactory answer and therefore there could be no meaningful consultation. No reasonable employer would have failed to meaningfully consult on these matters.

88. Secondly there were serious failings in respect of the selection process. While it seems there were 7 identical questions asked of each candidate there was no transparent and objective way of assessing the value ascribed to each answer given by the two candidates. There was no real evidence of the respective views of each of the individual 2 assessors in respect of each candidate and no evidence of a moderation process afterwards to confirm how they had reached the final conclusion on preferring Mr Ng over the Claimant. So far as Mr Ng was selected because of the answers he gave to a final question "have you any other questions in respect of the role" this was not a competency based question. There was no real way of the Claimant appreciating that this was a (seemingly crucial) opportunity to present evidence that would support her candidacy and in fact seemed to contradict the limited information she had been given about the selection process consisting of competency based questions. The Respondent itself gave contradictory evidence about why it had preferred Mr Ng over the

Claimant. No reasonable employer would have adopted such a selection process.

89. The Tribunal also observes that the Respondent is a very large employer with a professional and well-staffed discrete HR team who had given advice during the process.

90. None of these failures identified were corrected through Mr Richmond's appeal. Mr Richmond's assertion that Mr Ng "scored more favourably" does not stand up to scrutiny and has no obvious evidential basis. It was not specifically argued in any event that the appeal corrected failings in the process or how it did so.

91. For the avoidance of doubt the Tribunal did consider whether a failure to seek alternative employment and the identification of Mr Richmond as the appeal officer given his previous involvement in the redundancy rendered the dismissal unfair as well as these were matters raised by Mr Street. The Respondent did as a fact seek alternatives although this could have been more thorough and better evidenced. Mr Richmond's involvement could arguably have precluded him from hearing the appeal and someone else chosen instead but it cannot be said that such a decision fell out with the band of reasonable responses open to it.

Dismissal Disability

92. The Tribunal now turns to whether the decision to dismiss the claimant was because of her disability under s.13 EqA.

93. Mr Lunn and Mr Coates did not know that the Claimant was a disabled person. They had not been provided a personnel file by HR and worked in a different part of this very large business. At no point was the Claimant's disability revealed during the interview process on 29 November 2023 and the decision to implement a redundancy process in the first place was

genuine. Accordingly, the decision to select Mr Ng was nothing whatsoever to do with the Claimant's disability. While in fact they did not make the decision to dismiss, which was technically that of Mr Bradbury, the decision was entirely predicated on the Claimant not succeeding in the redundancy selection process.

94. In respect of the s.15 claim dismissal is no doubt unfavourable treatment. However, as disability or something arising from her disability played no part in the decision to dismiss, the Tribunal cannot conclude that the dismissal arose because of her inability to undertake physical tasks. There is certainly nothing in the assessment notes that would suggest that the claimant was marked down in some way or Mr Ng marked up because she shouldn't do physical tasks and he could.

95. So far as the s.20 Reasonable Adjustment claim is concerned it is unclear whether this was actually in the final analysis pursued by Mr Street. While the Tribunal has been highly critical of the selection process there are no express questions that seem to weigh the ability to undertake physical tasks for either candidate. It was not explained how the selection criteria such as they were disadvantaged the claimant It appears this claim relies on the two assessors knowing about the claimant's disability and marking her down in some way but for the reasons already stated the Tribunal is not satisfied this happened. The claims for s.15/20 discrimination accordingly are not well founded and are dismissed.

Victimisation

96. This claim relies on the dismissal being because of 2 protected acts namely 2/6/20 grievance and the 8/8/22 grievance. It is accepted by the Respondent that the 8/8/22 grievance is a protected act.

97. Whether the 2/6/20 grievance is a protected act is debateable. There were no oral submissions from either side expressly addressing this point. The wording may come close to constituting an implied allegation (whether or not express) that Mr Docherty had contravened the Act. In any event the Tribunal is satisfied that Mr Lunn and Coates had no knowledge of these protected acts as they knew almost nothing about her work history and background and accordingly the dismissal was nothing whatsoever to do with these grievances. Accordingly, the claim for victimisation is not well founded and is dismissed.

Age Discrimination

98. Finally, the Tribunal turns to the claim for age discrimination. The Claimant was 59 and Mr Ng was 26 at the date of the interview on 29 November, notification of selection for redundancy on 6 December and subsequent dismissal on 31 December 2023. There was therefore a very visible and obvious age disparity between the Claimant and her comparator.

99. The Tribunal's findings of fact are such that it is appropriate to consider Equality Act s.136. Has the Claimant established facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has contravened the provision i.e. selected the claimant for redundancy at least in part because of her age? The Tribunal is satisfied that such facts have been established. The Tribunal reminds itself that the Claimant must establish more than a difference in status and a difference in treatment and it is not sufficient to shift the burden of proof that the conduct is simply unfair or unreasonable if it is unconnected to a protected characteristic. The following facts are relevant:

99.1 The failure of the Respondent to produce any evidence of individual notes taken by the assessors or any cogent evidence of a moderation process between the two selectors where the final decision to select was said to have been taken.

99.2 The different and contradictory reasons given by the Respondent's witnesses (including what was recorded as said by Mr Bradbury and Mr Coates email of December 2023) for selecting Mr Ng over the Claimant.

99.3 The opacity of the selection process including the absence of any direct evidence of the decision of the two selectors being communicated to Mr Bradbury.

99.4 The failure to call Mr Coates to give evidence despite there being no indication Mr Coates is not still employed with the Respondent.

99.5 The large disparity in length of service between the Claimant and Mr Ng.

100. Accordingly, the burden shits to the Respondent to satisfy the Tribunal that the Claimant's age did not have a more than trivial influence on the decision to select her for redundancy and consequently dismiss her. The explanation offered by the Respondent is that essentially Mr Ng performed better in the interview. The problem for the Respondent is that the evidence given is unsatisfactory.

101. Mr Coates indicated in a letter of 12/12/23 that the Claimant gave "more detailed and thorough answers to questions" although this was not the evidence of Mr Lunn certainly in respect of questions 1-7. Mr Coates in the same letter said he "displayed a great knowledge towards the commercial aspect of the supply chain function". Mr Lunn in his witness statement also referred to commercial awareness and Mr Bradbury said that Mr Ng had demonstrated solid examples of commercial aspects of the role.

102. Mr Lunn gave few examples of the 'commercial awareness' demonstrated by Mr Ng, all of which seem to have been given in the 8th question which was in fact, not on the face of it, part of the assessment at all. No consideration seems to have been given to what could have been characterised as "commercial awareness" examples given by the Claimant in what she reasonably believed to be the actual assessed questions at 1-

7. Mr Lunn said she performed equally to Mr Ng on these questions although on analysis seems to then have conceded she was superior to Mr Ng. Commercial awareness does not specifically appear as a criterion in the notes of 29 November 2023. While having commercial awareness maybe a useful general qualification and is not of itself age specific, there is a danger an employer can revert to stereotypes, assuming that a younger worker will necessarily be more “commercial” than an older one. For these reasons the Tribunal finds that the Respondent has not discharged the burden of proving that the Claimants age was a material factor in her selection and the claim for age discrimination is well founded and succeeds.

Polkey

103. The Tribunal has to determine whether there is a chance that the claimant would have been fairly dismissed in any event.- see Andrews v Software 2000 (2007) IRLR 568 This applies equally to the claim for age discrimination see- Abbey National v Chagger (2009) EWCA Civ. 1202.

104. The redundancy was genuine, and the claimant was in a pool of two.

105. No particular evidence has been adduced by the Respondent to address this point although the Tribunal is entitled to draw on all of the general evidence it has if relevant. Had the Respondent acted fairly and in a non-discriminatory way it would have produced transparent assessment criteria for assessing these two candidates, most likely in the form of a matrix. Age would have played no part in the assessment. The fact that Mr Ng did seemingly show an enthusiasm for the role would no doubt have assisted him when properly assessed but likewise the Claimant did give even on the Respondent’s own case good answers to questions 1-7 and arguably better answers that Mr Ng. Doing the best it can with the evidence it has the Tribunal is of the view that there is a 1/3 chance that the Claimant would have been dismissed in any event. Any pecuniary compensation award shall be therefore reduced by 33%.

Approved by:

Employment Judge SERR

23 June 2025

JUDGMENT SENT TO THE PARTIES ON

23 July 2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. 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:

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