EMPLOYMENT TRIBUNALS

Claimant: Ms J Nnaji

Respondent: Spar UK Ltd

Heard at: Watford Employment Tribunal (In public; In person)

On: **25 to 27 and 30 June 2025 and 1 to 4 July 2025**

Before: Employment Judge Quill (sitting alone)

Appearances
For the Claimant: In Person
For the Respondent: Mr P Wilson, counsel

WRITTEN REASONS

Introduction

1. Judgment with reasons was given orally. Written reasons were requested, and these are those reasons.

2. The Claimant was employed by the Respondent and was dismissed. The Respondent asserted (at the time and in the litigation) that the dismissal reason was redundancy. The Claimant brought complaints alleging disability discrimination and unfair dismissal. She also alleged underpayment of expenses.

The Claims and The Issues

3. There was an agreed list of issues which started at [Bundle 262] and continued for approximately 21 pages. The parties confirmed on Day 1 that is was accurate as far as they were each concerned. During the hearing, I raised some queries about the wording used in list of issues to set out the PCPs identified in the claim. Those queries were resolved by agreement. Subject to that, I decided the case based on the jointly agreed list. As per the bundle, the list was:

AGREED LIST OF ISSUES

Disability Status and knowledge

1. The Claimant claims that at the material time of her employment with the Respondent, she suffered from the following conditions, which she was undergoing treatment during her employment:

1.1. Menorrhagia secondary to uterine fibroids (causing recurrent iron deficiency); and

1.2. A recurrent supra-umbilical hernia

2. The Respondent concedes that the above conditions represented a disability within the meaning of section 6 Equality Act 2010 at the relevant time of the Claimant's employment.

3. The Respondent does not concede that it had knowledge (actual or constructive) of the Claimant's disability at the relevant time. The following therefore remains an issue in this case: Did the Respondent have knowledge (actual or constructive) of the Claimant's disability at the relevant time?

Direct Disability Discrimination

4. Did the Respondent treat the Claimant less favourably than it treats or would have treated others? (EqA 2010, s 13) (For this purpose, the Claimant cites Catherine Mcillwham as her comparator). The Claimant alleges that her disability had material influence on being selected for redundancy, and her dismissal with immediate effect was an act of unfavourable treatment because of her disability. The Claimant alleges that being in a pool of one and cancelling her healthcare covers were acts of unfavourable treatment. The Claimant also relies on being given a less favourable redundancy package than Catherine Mcillwham.

4.1 Did the Respondent select the Claimant in a pool of one for redundancy (19 January 2023) because she informed the Respondent on 16 January 2023 of her operation scheduled for 13 February 2023? Was this because of the Claimants disability or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

4.2 Did the Respondent expedite the reorganisation and dismiss the Claimant because she informed the Respondent on 16 January 2023 of her operation scheduled for 13 February 2023? Was this because of the Claimant's disability or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

4.3 Were there other employees who did a similar role to the Claimant? If so, should the Respondent have pooled the Claimant with that other employee (the Claimant alleges that she should have been pooled with other roles in Marketing and Trading)? If so, was the failure to do this because of the Claimant's disability, or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

4.4 Did the Respondent fail to 'genuinely' offer the Campaign Manager role that the Claimant could have accepted? The Claimant also alleges that on 1 February 2023 her line manager informed her that it would be a waste of time to be interviewed for Trade Controller role, after the HR Manager encouraged her to apply for this same role on 24 January 2023? If so, was this because of the Claimant's disability, or for some other reason? In this respect, the Claimant relies on the following:

4.4.1 The fact that the Respondent requested that the statutory trial begins on the 13 February during the anticipated sickness absence; and

4.4.2 The Claimant alleges that on 1 February 2023, her line manager informed her that she doesn't believe she wants the Campaign Manager role and only using it as a stop gap. It is alleged by the Claimant (not agreed by the Respondent) that the Claimant's line manager informed her that "/ don't want you to go into that job and we're immediately going to put you onto a PIP (performance improvement plan) and then at the end of that, things may not work out and you are going to end up walking away from the business with nothing". And the HR manager informed the Claimant that "what if you go into this role, you hate it and then because you hate it, that gets picked up, then they could performance manage you out?"

4.5 Did the Respondent fail to give the Claimant sufficient time to consider and trial the Campaign Manager role before signing a new contract on less favourable terms? If so, was this because of the Claimant's disability, or for some other reason? In this respect, the Claimant relies on the Respondent sending to the Claimant new employment terms and conditions on 8 February 2023 and insisting that the Claimant sign these by 10 am on 10 February 2023, before the statutory trial period could commence (during her anticipated sickness absence due to her disability).

4.6 How many consultation meetings did the Respondent have with the Claimant?

Did the Respondent refuse to hold the 'first consultation' meeting on a date on which the Claimant's union representative could accompany her, being 8 February 2023? If so, was this because of the Claimant's disability, or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following (not agreed by the Respondent):

4.6.1 The Claimant's request to be accompanied by a Union representative was because she was experiencing severe exhaustion arising from her disabilities;

4.6.2 The Claimant alleges that she had informed the HR manager nine times on 3 February 2023 that she was suffering from severe exhaustion;

4.6.3 The Respondent informing the Claimant that she can have Union Representative on two occasions (risk of redundancy letter and 24 January aborted meeting) and later refusing the union representative request, citing that "it would be unfair on all parties, to wait until 8 February 2023 or after this date"; and

4.6.4 The Respondent insisted on implementing the "restructure without delay" and that allowing union representation would cause delays.

4.7 Did the Respondent fail to hold meaningful consultation meetings with the Claimant? Did the Respondent only hold one "final consultation" meeting with the Claimant? If so, was this because of the Claimant's disability, or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following (not agreed by the Respondent):

4.7.1 The first meeting on 19 January 2023, when the Claimant alleges that the Respondent read a letter lasting 10 mins confirming that her role was at risk of redundancy;

4.7.2 The claimant alleges that the second meeting on 24 January 2023 was cancelled by agreement with the Respondent to allow the Claimant time to check

and confirm the union representative's availability to reschedule the 24 January 2023 meeting. The Claimant confirmed the union representative's availability as 8 February 2023 on 25 January 2023. The Respondent subsequently wrote to the Claimant on 26 January to reschedule the 24 January 2023 meeting on 1 February 2023, having received notice of the union representative's availability being 8 February 2023.

4.7.3 The 1 February meeting which (unbeknown by the Claimant) was then treated as a final consultation meeting;

4.7.4 The claimant requesting to be accompanied by a Union representative as she was experiencing severe exhaustion as a result of her disabilities;

4.7.5 The claimant alleges that she informed the Respondent 9 times on 3 February 2023 that she was suffering from severe exhaustion;

4.7.6 The claimant alleges that the Respondent refused to delay the consultation by seven days as "It would be unfair on all parties, to wait until 8 February or after this date";

4.7.7 The Respondent requested the implementation of "restructure without delay" and that allowing the Union representative would cause delays; and

4.7.8 The Claimant requested an occupational health assessment on 2 February 2023, which the Respondent did not action.

4.8 Did the Respondent cancel the Claimant's Simplyhealth health cash plan, 'with effect from 1 February 2023' when the Claimant was still an employee at the relevant time? If so, was this because of the Claimant's disability, or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

The Claimant relies on the following (not agreed by the Respondent): The Respondent cancelling the Claimant's Simply Health membership knowing that the Claimant was under medical care and relying on the cover for treatments for her disabilities.

4.9 Did the Respondent cancel the Claimant's Bupa Healthcare insurance and at the same time deducted the monthly insurance premium from the Claimant's wages?

If so, was this because of the Claimant's disability, or for some other reason?

4.10 Did the Respondent fail to consult at the formative stage of the redundancy? If so, was this because of the Claimant's disability, or for some other reason?

4.11 Did the Respondent prejudge the redundancy outcome before the end of the consultation on the 10 February 2023 and, therefore, was the consultation 'process' not genuine? If so, was this because of the Claimant's disability, or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following:

4.11.1 The meeting on 1 February 2023 and a letter dated 7 February 2023 giving notice that her role is redundant and effective on 10 February 2023, which said date coincided with the Claimant's anticipated sickness absence. The Claimant alleges that on 10 February 2023, the Respondent informed the Claimant that the consultation was still ongoing but this ended at 10 am on 10 February 2023. The Claimant relies on the Respondent having knowledge that the Claimant would be absent for at least 6 weeks, commencing 13 February 2023 because of her disability, and alleges that the Respondent did not go through a proper

consultation and selection process to speed up implementation. The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

4.12 Did the Respondent dismiss the Claimant because of her disability (thereby discriminating against her), or for some other reason? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

5. Was any less-favourable treatment accorded to the Claimant because of the Claimant's disability compared to an actual or hypothetical comparator? (EqA 2010, s13)

6. Who is the appropriate comparator? In this respect, the Claimant states that the comparator is Catherine McIlwham.

7. Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant because of her disability? (EqA 2010, s136(2))?

8. If so, has the Respondent provided any other explanation to show that the treatment was not discriminatory? (EqA 2010, s 136(3))?

Discrimination Arising from Disability

9. Did the Respondent subject the Claimant to unfavourable treatment because of something arising in consequence of her disability? (EqA 2010, s 15). In this respect, the Claimant relies on her selection and dismissal with immediate effect, as being an act of unfavourable treatment which she alleges was because of the Claimant's need to have her operation scheduled for 13 February 2023 and the expected recovery time of 6-weeks, which arose in consequence of her disability.

10. If the Respondent did treat the Claimant unfavourably because of something arising in consequence of her disability, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim? (EqA 2010, s 15).

11. Did the following occur:

11.1 Did the Respondent put the Claimant immediately (19 January 2023) at risk of redundancy when she informed the Respondent on 16 January 2023 of her operation scheduled for 13 February 2023? If so, was this unfavourable treatment because of something arising in consequence of her disability? In this respect, the Claimant relies on the Respondents knowledge of her anticipated absence having material influence, when the she was placed at risk of redundancy (19 January 2023).

11.2 Did the Respondent fail to consult at the formative stage of the redundancy? If so, was this unfavourable treatment because of something arising in consequence of her disability?

11.3 Did the Respondent expedite the reorganisation and dismiss the Claimant because she informed the Respondent on 16 January 2023 of her operation scheduled for 13 February 2023? Was this because of the Claimant's disability, or for some other reason? In this respect, the Claimant relies on the Respondent's knowledge of her anticipated absence due to her disability having material influence.

11.4 Was there another employee who did a similar role to the Claimant? If so, should the Respondent have pooled the Claimant with that other employees. The

Claimant alleges that she should have been pooled with other roles in Marketing and Trading)? If so, was the failure to do this unfavourable treatment because of something arising in consequence of her disability?

11.5 Did the Respondent fail 'genuinely' to offer the Claimant an alternative role that the she could have accepted? If so, was this unfavourable treatment because of something arising in consequence of her disability? In this respect, the Claimant relies on the following:

11.5.1 Respondent's knowledge of her anticipated absence due to her disability had material influence(her operation on 13 February 2023);

11.5.2 The fact that the Respondent requested that the statutory trial begins on the 13 February during the anticipated sickness absence; and

11.5.3 The Claimant alleges that on 1 February 2023, her line manager informed her that she doesn't believe she wants the Campaign Manager role and only using it as a stop gap.

It is alleged by the Claimant (not agreed by the Respondent) that the Claimant's line manager informed her that "I don't want you to go into that job and we're immediately going to put you onto a PIP (performance improvement plan) and then at the end of that, things may not work out and you are going to end up walking away from the business with nothing". And the HR manager informed the Claimant that "what if you go into this role, you hate it and then because you hate it, that gets picked up, then they could performance manage you out?"

11.6 Did the Respondent fail to give the Claimant sufficient time to consider and trial the Campaign Manager role before signing a new contract on less favourable terms? If so, was this unfavourable treatment because of something arising in consequence of her disability?

In this respect, the Claimant relies on the Respondent sending to the Claimant new employment terms and conditions on 8 February 2023 and insisting that the Claimant sign these by 10am on 10 February 2023, before the statutory trial period could commence (during her anticipated sickness absence due to her disability).

11.7 How many consultation meetings did the Respondent have with the Claimant?

Did the Respondent refuse to hold the 'first consultation' meeting on a date on which the Claimant's union representative could accompany her, being 8 February 2023? If so, was this unfavourable treatment because of something arising in consequence of her disability? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence.

In this respect, the Claimant relies on the following (not agreed by the Respondent):

11.7.1 The Claimant's request to be accompanied by a Union representative was because she was experiencing severe exhaustion arising from her disabilities;

11.7.2 The Claimant alleges that she had informed the HR manager nine times on 3 February 2023 that she was suffering from severe exhaustion;

11.7.3 The Respondent informing the Claimant that she can have Union Representative on two occasions (risk of redundancy letter and 24 January aborted meeting) and later refused the union representative request, citing that "it would be unfair on all parties, to wait until 8 February 2023 or after this date"; and

11.7.4 The Respondent insisted on implementing the "restructure without delay" and that allowing union representation would cause delays.

11.8 Did the Respondent fail to hold meaningful consultation meetings with the Claimant? Did the Respondent hold only one "final consultation" meeting with the Claimant? If so, was this unfavourable treatment because of something arising in consequence of her disability? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following (not agreed by the Respondent):

11.8.1 The first meeting on 19 January 2023, when the Claimant alleges that the Respondent read a letter confirming that her role was at risk of redundancy;

11.8.2 The claimant alleges that the second meeting on 24 January 2023 was cancelled by agreement with the Respondent to allow the Claimant time to check and confirm the union representative's availability to reschedule the 24 January 2023 meeting. The Claimant confirmed the union representative's availability as 8 February 2023 on 25 January 2023. Her line manager subsequently wrote to the Claimant on 26 January to reschedule the 24 January 2023 meeting on 1 February 2023 (and not the 8 February).

11.8.3 The claimant alleges that the Respondent refused to delay the consultation by seven days as "It would be unfair on all parties, to wait until 8 February or after this date";

11.8.4 The 1 February meeting which (unbeknown by the Claimant) was then treated as a final consultation meeting;

11.8.5 The claimant requested to be accompanied by a Union representative as she was experiencing severe exhaustion as a result of her disabilities;

11.8.6 The Claimant requested an occupational health assessment on 2 February 2023, which the Respondent did not action.

11.8.7 The claimant alleges that she informed the Respondent 9 times on 3 February 2023 that she was suffering from severe exhaustion; and

11.8.8 The Respondent requested the implementation of "restructure without delay" and that allowing the Union representative would cause delays.

12 Did the Respondent cancel the Claimant's Simplyhealth health cash plan, 'with effect from 1 February 2023/ whilst the Claimant was still an employee at the relevant time? If so, was this unfavourable treatment because of something arising in consequence of her disability? The Claimant alleges that the Respondent's knowledge that she was under medical care and was relying on the cover for treatments for her disabilities and knowledge of her anticipated absence due to her disability had material influence.

13 Did the Respondent cancel the Claimant's Bupa Healthcare insurance and at the same time deducted the monthly insurance premium from the Claimant's wages? If so, was this unfavourable treatment because of something arising in consequence of her disability?

14 Did the Respondent prejudge the redundancy outcome before the end of the consultation on the 10 February 2023 and, therefore, was the consultation 'process' not genuine? If so, was this unfavourable treatment because of something arising in consequence of her disability? The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following:

14.1 The meeting on 1 February 2023 and a letter dated 7 February 2023 giving notice that her role is would be redundant and effective on 10 February 2023, which said date coincided with the Claimant's anticipated sickness absence.

14.2 The Claimant alleges that on 10 February 2023, the Respondent informed the Claimant that the consultation was still ongoing but this ended at 10 am on 10 February 2023. The Claimant relies on the Respondent having knowledge that the Claimant would be absent for at least 6 weeks, week commencing 13 February 2023 because of her disability, and alleges that the Respondent did not go through a proper consultation and selection process to speed up implementation.

15 Was the Claimants dismissal unfavourable treatment because of something arising in consequence of her disability?

Indirect Discrimination

16 Did the Respondent apply the below provision, criterion or practice (PCP) to the Claimant? (EqA 2010, s 19)

PCP1: Respondent cancelled the Claimants Simplyhealth cash plan "to take effect" before their effective termination date (PCP1).

17 If so, was PCP1discriminatory in relation to the Claimants disability?

18 Did the Respondent apply, or would apply PCP1to persons with whom the Claimant does not share her disability?

19 Did PCP1 put, or would put, persons with whom the Claimant shares her disability at a particular disadvantage when compared to persons with whom the Claimant does not share her disability?

If so, what was that disadvantage?

20 Did PCP1put the Claimant at that disadvantage?

21 Can the Respondent show PCP1to be a proportionate means of achieving a legitimate aim? (EqA 2010, s19)

22 Did the Respondent apply the below provision, criterion or practice (PCP) to the Claimant? (EqA 2010, S19):

PCP2: Respondent has a PILON provision and cancels employee health benefits when terminating an employee's contract of employment (PCP2)

23 If so, was PCP2 discriminatory in relation to the Claimant's disability?

24 Did the Respondent apply, or would apply PCP2 to persons with whom the Claimant does not share her disability?

25 Did PCP2 put, or would put, persons with whom the Claimant shares her disability at a particular disadvantage when compared to persons with whom the Claimant does not share her disability?

If so, what was that disadvantage?

26 Did PCP2 put the Claimant at that disadvantage?

27 Can the Respondent show PCP2 to be a proportionate means of achieving a legitimate aim? (EqA 2010, sl9).

Failure to make reasonable adjustments

28 Did the Respondent fail to make reasonable adjustments? In this respect:

28.1 Did the Respondent apply the following provision, criteria or practices:

28.1.1 Cancelling employees' Simplyhealth cash plan prior to their effective date of termination ("PCP1")?

28.1.2 Cancelling employees' Bupa health insurance cover and deducting the full insurance premium from the employees' wages. ("PCP2")?

28.1.3 Being entitled to terminate the Claimant's employment and health benefits at any time and with immediate effect by notifying her that it was exercising its right to pay her in lieu of her notice period whether notice to terminate was given by the Claimant or by the Respondent ("PCP3")?

(together "the PCPs")

28.2 If so, did any or all of the PCPs put the Claimant at a substantial disadvantage because of her disability compared to persons who are not disabled?

28.3 Did the Claimant at any time make a request for reasonable adjustments? If so, what were those requests and when were they made?

28.4 Did the Respondent have knowledge (express or otherwise) that any or all of the PCPs were likely to place the Claimant at a substantial disadvantage?

28.5 If so, did the Respondent fail to make such adjustments as are reasonable so as to avoid any such disadvantage?

29 The Claimant avers that the Respondent could have taken the following steps to avoid the disadvantage:

29.1 maintaining her Simplyhealth cashplan and Bupa health insurance until the renewal date being 1 May 2023.

29.2 maintaining the her Simplyhealth cashplan and Bupa health insurance cover during February 2023, to cover the surgeries, given that the Respondent made policy premium deductions from her wages in February 2023 wages.

29.3 putting the Claimant on her contractual 3-month notice period.

29.4 paying for the private treatment.

29.5 referring the Claimant to Occupational Health in their duty of care and make reasonable adjustments.

Injury to health

30 Did any act of discrimination cause the Claimant injury to her mental health (being work-related stress). If so, What is the extent of that injury?

31 Did any act of discrimination exacerbate the pre-existing condition, being Menorrhagia secondary to uterine fibroids (causing recurrent iron deficiency)? If so, What is the extent of that injury?

32 Did any act of discrimination exacerbate the pre-existing condition, being the recurrent supra-umbilical hernia? If so, What is the extent of that injury?

Equality Act 2010 claims remedy

33 What declarations, if any, as to the rights of the Claimant and Respondent would be appropriate? (EqA2010, s 124)

34 What compensation, if any, should the Respondent be ordered to pay to the Claimant? (EqA 2010, s124). In particular:

34.1 What financial loss has the Claimant sustained and likely to sustain as a result of the dismissal?

34.2 What financial losses has the Claimant sustained as a result of any act of discrimination which the tribunal finds to be made out?

34.3 Has the Claimant made reasonable attempts to mitigate her losses?

34.4 What injury to feelings, if any, has the Claimant sustained?

34.4.1 Should the Claimant be awarded a sum for injury to feelings?

34.4.2 If so, in what amount? What are the start and end dates for determining any award for injury to feelings? What was the cause of any injury to feelings?

34.5 Should the Claimant be awarded damages for personal injury by reason of:

34.5.1 injury to her mental health, being work-related stress

34.5.2 Exacerbated pre-existing conditions being Menorrhagia secondary to uterine fibroids (causing recurrent iron deficiency)

34.5.3 Exacerbated pre-existing conditions being the recurrent supra-umbilical hernia?

34.6 If so, in what amount?

35 Should there be an award for aggravated damages? If so, in what amount?

36 Did the ACAS Code of Practice apply to the Claimant's dismissal? If so, did the Respondent unreasonably fail to comply with the Acas Code of Practice? If so, would it be just and equitable to increase the award of compensation? If so, by what percentage (up to a maximum of 25%)? (TULR(C)A 1992, s 207A(2))

37 To the extent that the ACAS Code of Practice did apply to the Claimant's dismissal, did the Claimant unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures? If so, would it be just and equitable to decrease the award of compensation? If so, by what percentage (up to a maximum of 25%)? (TULR(C)A 1992, s207A(3))

38 What interest, if any, should be added to the compensatory award?

39 Does the compensatory award need to be grossed up to take into account the impact of taxation?

40 What recommendations, if any, would be appropriate? (EqA 2010, s124)

Unfair Dismissal

Reason for dismissal

41 What was the reason or principal reason for the Claimant's dismissal? Was it a potentially fair reason? (ERA 1996, s 98) The Respondent asserts that the Claimant was dismissed by reason of redundancy, or alternatively some other substantial reason (SOSR).

Redundancy issues

42 Did the Respondent act reasonably in the circumstances, including its size and administrative resources, in treating redundancy (or, alternatively SOSR) as a sufficient reason for the Claimant's dismissal? (ERA 1996, s 98)? In particular:

42.1 Did the Respondent give reasonable warning about its proposal to make the Claimant redundant and undertake a reasonable consultation process with the Claimant about that proposal?

42.2 Did consultation take place at a formative stage?

42.3 Did the Respondent adopt and apply a fair basis for selecting the Claimant for redundancy (including pooling if appropriate)?

42.4 Were there other employees who did a similar role to the Claimant? If so, should the Respondent have pooled the Claimant with that other employee (the Claimant alleges that she should have been pooled with other roles in Marketing and Trading)?

42.5 Did the Respondent fail to 'genuinely' offer the Campaign Manager role that the Claimant could have accepted? The Claimant alleges that on 1 February 2023, her line manager informed her that she doesn't believe she wants the Campaign Manager role and only using it as a stop gap. It is alleged by the Claimant (not agreed by the Respondent) that the Claimant's line manager informed her that "I don't want you to go into that job and we're immediately going to put you onto a PIP (performance improvement plan) and then at the end of that, things may not work out and you are going to end up walking away from the business with nothing". And the HR manager informed the Claimant that "what if you go into this role, you hate it and then because you hate it, that gets picked up, then they could performance manage you out?". The Claimant also alleges that on 1 February 2023 her line manager informed her that it would be a waste of time to be interviewed for the Trade Controller role, after the HR Manager encouraged her to apply for this same role? In this respect, the Claimant relies on the following:

42.5.1 The fact that the Respondent requested that the statutory trial begins on the 13 February during the anticipated sickness absence; and

42.5.2 The Claimant alleges that on 1 February 2023, her line manager informed her that she doesn't believe she wants the Campaign Manager role and only using it as a stop gap.

It is alleged by the Claimant (not agreed by the Respondent) that the Claimant's line manager informed her that "I don't want you to go into that job and we're immediately going to put you onto a PIP (performance improvement plan) and then at the end of that, things may not work out and you are going to end up walking away from the business with nothing". And the HR manager informed the Claimant that "what if you go into this role, you hate it and then because you hate it, that gets picked up, then they could performance manage you out?"

42.6 Did the Respondent fail to give the Claimant sufficient time to consider and trial the Campaign Manager role before signing a new contract on less favourable terms? In this respect, the Claimant relies on the Respondent sending to the Claimant new employment terms and conditions on 8 February 2023 and insisting that the Claimant sign these by 10 am on 10 February 2023, before the statutory trial period could commence (during her anticipated sickness absence due to her disability).

42.7 How many consultation meetings did the Respondent have with the Claimant? Did the Respondent refuse to hold the 'first consultation' meeting on a date on which the Claimant's union representative could accompany her, being 8 February 2023?

The Claimant alleges that the Respondent's knowledge of her anticipated absence due to her disability had material influence. In this respect, the Claimant relies on the following (not agreed by the Respondent):

42.7.1 The Claimant's request to be accompanied by a Union representative was because she was experiencing severe exhaustion arising from her disabilities;

42.7.2 The Claimant alleges that she had informed the HR manager nine times on 3 February 2023 that she was suffering from severe exhaustion;

42.7.3 The Respondent informing the Claimant that she can have Union Representative on two occasions (risk of redundancy letter and 24 January aborted meeting) and later refusing the union representative request, citing that "it would be unfair on all parties, to wait until 8 February 2023 or after this date"; and

42.7.4 The Respondent insisted on implementing the "restructure without delay" and that allowing union representation would cause delays.

42.8 Did the Respondent fail to hold meaningful consultation meetings with the Claimant? Did the Respondent only hold one "final consultation" meeting with the Claimant? In this respect, the Claimant relies on the following (not agreed by the Respondent):

42.8.1 The first meeting on 19 January 2023, when the Claimant alleges that the Respondent read a letter lasting 10 mins confirming that her role was at risk of redundancy;

42.8.2 The claimant alleges that the second meeting on 24 January 2023 was cancelled by agreement with the Respondent to allow the Claimant time to check and confirm the union representative's availability to reschedule the 24 January 2023 meeting. The Claimant confirmed the union representative's availability as 8 February 2023 on 25 January 2023. The Respondent subsequently wrote to the Claimant on 26 January to reschedule the 24 January 2023 meeting on 1 February 2023, having received notice of the union representative’s availability being 8 February 2023.

42.8.3 The 1 February meeting which (unbeknown by the Claimant) was then treated as a final consultation meeting;

42.8.4 The claimant requesting to be accompanied by a Union representative as she was experiencing severe exhaustion as a result of her disabilities;

42.8.5 The claimant alleges that she informed the Respondent 9 times on 3 February 2023 that she was suffering from severe exhaustion;

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42.8.8 The Claimant requested an occupational health assessment on 2 February 2023, which the Respondent did not action.

42.9 Did the Respondent cancel the Claimant's Simplyhealth health cash plan, 'with effect from 1 February 2023/ when the Claimant was still an employee at the relevant time? The Claimant relies on the following (not agreed by the Respondent):

42.9.1 The Respondent cancelling the Claimant's Simply Health membership having knowledge that the Claimant was under medical care and was relying on the cover for treatments for her disabilities.

42.10 Did the Respondent cancel the Claimant's Bupa Healthcare insurance and at the same time deducted the monthly insurance premium from the Claimant's wages?

42.11 Did the Respondent fail to consult at the formative stage of the redundancy?

42.12 Did the Respondent prejudge the redundancy outcome before the end of the consultation on the 10 February 2023 and, therefore, was the consultation 'process' not genuine? In this respect, the Claimant relies on the following:

42.12.1 The meeting on 1 February 2023 and a letter dated 7 February 2023 giving notice that her role is redundant and effective on 10 February 2023, which said date coincided with the Claimant's anticipated sickness absence. The Claimant alleges that on 10 February 2023, the Respondent informed the Claimant that the consultation was still ongoing but this ended at 10 am on 10 February 2023.

42.12.2 Did the Respondent refuse the Claimant time-off to look for work or for training?

42.12.3 Was it unfair to include the Respondent's HR Controller in the initial redundancy consultation meetings (the Claimant avers that the relationship had irreparably deteriorated with the HR Controller from September 2020)? Did this create a hostile, biased and unfair process?

42.12.4 Did the Respondent apply a fair recruitment process in the alternative role, being the Trading Controller role and Campaign Manager roles?

Compensation - unfair dismissal

43 The Claimant has already received a statutory redundancy payment from the Respondent. In addition, in the event that she is found to have been unfairly dismissed, is she entitled to a basic award? If so what is the amount of the basic award?(ERA 1996, s 119)

44 Are there any grounds on which the basic award should be reduced, eg contributory fault or to take into account the fact that a statutory redundancy payment has already been received? If so, by how much? (ERA 1996, s 122)

45 What compensatory award should be made to the Claimant, taking into account what is just and equitable in all the circumstances having regard to the loss sustained and future losses by the Claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer? (ERA 1996, s 123) In particular:

45.1 What past losses has the Claimant sustained as a result of her dismissal?

45.2 What future losses is the Claimant likely to sustain as a result of her dismissal?

45.3 What amount should be awarded for loss of statutory rights?

45.4 To what extent, if any, did the Claimant contribute to her dismissal? (ERA 1996,5 123)

45.5 If the dismissal is found to be procedurally unfair, what is the percentage likelihood that the Claimant would have been dismissed fairly in any event, and when would such fair dismissal have taken place? (Polkey v Dayton [1987] IRLR 503)

45.6 If the dismissal is found to be substantively unfair, would the Claimant have been fairly dismissed by SOSR and by what date?

45.7 Can the Respondent show that the Claimant has not made reasonable attempts to mitigate her losses? If so, by what date and at what rate of pay and relevant benefits could the Claimant have been expected to have obtained in alternative employment if such reasonable attempts had been made?

45.8 Should any sums be deducted to reflect payments already received by the Claimant from the Respondent?

45.9 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply to the Claimant's dismissal? If so, did the Respondent unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures? If so, would it be just and equitable to increase any award of compensation? If so, by what percentage (up to a maximum of 25%)? (TULR(C)A 1992, s207 A(2))

45.10 To the extent that the ACAS Code applies, did the Claimant unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures? If so, would it be just and equitable to decrease the award of compensation? If so, by what percentage (up to a maximum of 25%)? (TULR(C)A 1992, s 207A(3))

46 What is the statutory cap on the maximum compensatory award in this case? (ERA 1996, s 124)

Breach of Contract

47 Did the Respondent terminate the Claimant's Simply Health cash plan "to take effect" on 1 February 2023 whilst the Claimant was still an employee? If so, did this amount to a breach of contract? If it did, what is the measure of damages?

48 Did the employer reimburse the Claimant all reasonable expenses properly, exclusively and necessarily incurred by her in the course of her employment, subject to the production of "such receipts or other appropriate evidence as the employer may require", and referable in her contract of employment? If so, what amount of expenses is owed to the Claimant?

49 Did the Claimant produce receipts or appropriate evidence for the travel expenses as the Respondent may require and in accordance with its procedures?

Other

50 What interest, if any, should be added to the compensatory award?

51 Does the compensatory award need to be grossed up to take into account the impact of taxation?

The Hearing and The Evidence

4. This was an in-person hearing. One of the witnesses, Mr Johnson, attended by video was no technical difficulties with that.

5. I had a bundle of 1692 pages and also a supplementary bundle.

6. I had written witness statements from the three witnesses and each of them attended and answered questions on oath.

7. The Claimant was the only witness on her side. The Respondent called Suzanne Dover and Lee Johnson.

8. The tribunal also received written submissions from the parties as well as a document including a chronology and cast list from the Respondent.

The Law

Equality Act 2010 ("EQA")

9. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

10. It is a two stage approach.

10.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the Claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

10.2 If the Claimant succeeds at the first stage then that means that the burden of proof is shifted to the Respondent and the claim is to be upheld unless the Respondent proves the contravention did not occur.

11. In Efobi v Royal Mail [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus, when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] EWCA Civ 142 and Madarassy v Nomura International [2007] EWCA Civ 33.

12. As per paragraph 57 of Madarassy, "could decide" in section 136(2) EQA is equivalent to: a reasonable tribunal could properly decide from all the evidence before it.

13. The burden of proof does not shift simply because, for example, the Claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different) and/or that there was unfavourable treatment. Those things only indicate the possibility of discrimination. They are not sufficient in themselves to shift the burden of proof; something more is needed.

14. It does not necessarily have to be a great deal more: Denman v Commission for Equality and Human Rights 2010 EWCA Civ 1279. For example - depending on the facts of the case - an evasive or untruthful answer from a respondent or an important witness, could be the "something more" that is required. In some circumstances, it may simply be the context of the act itself. In SRA v Mitchell EAT 0497/12, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation for the less favourable treatment. That being said, it is important to bear in mind that the mere fact alone that a tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services EAT 0074/19.

15. Recent EAT cases have re-emphasised the importance of actually adhering to the two stage approach set out in section 136. I have taken note of the comments in Field v Steve Pye and Co (KL) Limited [2022] EAT 68 and of the fact that several subsequent EAT decisions have cited those comments with approval.

16. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one.

    16.1 That does not mean that the Tribunal must ignore the rest of the evidence when considering one particular allegation.

    16.2 The opposite is true. When there are multiple allegations, and/or a lot of facts found as part of the background information, a Tribunal has to stand back and consider all of the evidence in the round to consider whether any inference of discrimination should be drawn: see Qureshi v Victoria University of Manchester. There must be no failure to consider 'the bigger picture', as it was described in Humby v Barts Health NHS Trust [2024] EAT 17.

    16.3 I assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which I have found.

Time Limits for EQA complaints

17. In EQA, time limits are covered in s123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it

18. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

19. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

20. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have

regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

21. The factors that may helpfully be considered include, but are not limited to:

21.1 the length of, and the reasons for, the delay on the part of the Claimant;

21.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

21.3 the conduct of the Respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

22. In particular, it will usually be important for the Tribunal to pay attention to (and, where necessary, make specific findings about) "whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)": Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

Definition of Direct Discrimination – section 13 EQA

23. Direct discrimination is defined in s.13 EQA.

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

24. There are two questions: whether the Respondent has treated the Claimant less favourably than it treated others ("the less favourable treatment question") and whether the Respondent has done so because of the protected characteristic ("the reason why question").

25. For the less favourable treatment question, the comparison between the treatment of the Claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. Paragraphs 54 to 65 of Martin v The Board Of Governors Of St Francis Xavier 6th Form College [2024] EAT 22 provide a recent and clear summary of the types of arguments about comparators (and the proper role of section 23 EQA) that might be presented to us, and we have taken it into account.

26. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the Respondent's various acts, omissions and decisions.

27. The mere fact alone that a respondent, or a particular individual, has behaved unreasonably and/or treated the Claimant badly or unfairly will not, in itself, be sufficient to cause the burden of proof to shift. For one thing, there may also need to be consideration of whether the "bad" treatment is comparable to the way in which others were treated. However:

    27.1 The greater the difference between the Claimant's treatment and that of another employee in similar circumstances, the more likely it is that the Tribunal will decide that an inference of discrimination could be drawn. Likewise, the more closely the circumstances of the Claimant and the alleged comparator match, and/or the greater the number of comparators who have had "better" treatment, the more likely it is that the burden of proof will shift.

    27.2 The more unreasonable the treatment, the more likely it is that the Tribunal will decide that it calls for an explanation and the more likely that the Tribunal might decide that it is possible to infer that a hypothetical comparator would have been treated differently.

    27.3 Where the Respondent offers an explanation for the Claimant's treatment (and/or the differences between the Claimant's treatment the alleged comparator's treatment), then the burden of proof might shift where the Tribunal decides that the explanation is dishonest, and/or if different explanations have been put forward which are contradictory to each other.

28. As noted by EAT in Alcedo Orange Limited V Mrs G Ferridge-Gunna [2023] EAT 78, tribunals must – especially in relation to allegedly discriminatory dismissals - remember the guidance given by Court of Appeal in Reynolds v CLFIS (UK) Ltd [2015] ICR 1010. That case still sets out the law and was not undermined by Supreme Court's decision in Royal Mail Group Ltd v Jhuti [2020] ICR 731.

29. The Tribunal must identify who took the decision (for example, to dismiss) that is the subject of the complaint. Commonly that will be a single individual, but there might sometimes be joint decisions made by several people, in which case it will be necessary to identify all of those persons.

30. It is not sufficient to simply note that the decision was made it on behalf of the employer, and then to move to considering whether the employer, or any of its employees, had any discriminatory tendencies.

31. Assuming that there is a single individual who actually took the decision to dismiss, then the dismissal itself is an act of direct discrimination if - and only if - the individual employee who made that decision was motivated by the protected characteristic.

    31.1 It is sufficient if it is only part of their motivation, and/or if it is subconscious.

31.2 However, for a tribunal to decide that a dismissal was discriminatory, it is not sufficient for the Tribunal to decide that some of the information that received by (and relied upon by) the decision-maker came from someone who was motivated by the protected characteristic.

32. For the less favourable treatment question, the comparison between the treatment of the Claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. However, the less favourable treatment question and the reason why question are intertwined.

33. When considering the "reason why question" for the treatment I have found to have occurred, I must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the Respondent's various acts, omissions and decisions.

34. For comparators for direct disability discrimination allegations the EHRC Code gives useful guidance at paragraphs 3.29 and 3.30 in particular with the example quoted therein.

35. If I find that the reason for particular treatment of the Claimant was - for example - the Claimant's absence from work, then the relevant comparator (for the direct discrimination allegations) would have to be someone who was also absent (or scheduled to be absent) from work for a similar amount of time, but, in the comparator's case, the absence would be for some other reason, not because they had the same disability as the Claimant.

<u>Discrimination arising from disability – s15 EQA</u>

36. Discrimination arising from disability is defined in s.15 EQA.

> **15 Discrimination arising from disability**
>
> (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.

37. The elements that must be made out in order for the Claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the Claimant's disability; the unfavourable treatment must be

because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the Claimant had the disability.

38. The word ”unfavourably” in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

39. Pnaiser v NHS England [2015] UKEAT 0137/15 makes clear that, if there was unfavourable treatment, the Tribunal must decide by whom. The Tribunal must then decide what caused that person or persons to subject the Claimant to the treatment in question. That includes making decisions about the conscious and unconscious thought processes of the alleged discriminator. There may be more than one reason or cause for the treatment and the “something arising in consequence of disability“ need not be the main or sole reason for the unfavourable treatment but must have a significant (ie more than trivial) influence so as to amount to an effective reason for or cause of it. Having made decisions about what caused the alleged discriminator to act as they did, the tribunal will then have to determine whether the reason or cause is “something arising in consequence of” the Claimant’s disability.

40. In Risby v London Borough of Waltham Forest EAT 0318/15, the EAT made clear that an indirect connection between the Claimant’s unfavourable treatment and the “something” that arises in consequence of the disability can be sufficient. The EAT decided that the employment tribunal had been wrong to reject the section 15 claim on the basis that an incident in which the employee lost his temper was unrelated to his disability. On the facts, an effective cause of the loss of temper had been the employer’s decision to hold an event at a venue that was inaccessible to him because of his disability, that loss of temper led to his dismissal, and there was therefore a sufficient connection between the unfavourable treatment (his dismissal) and his disability for the purposes of section 15

41. When considering what the Respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred. Thus, where there are different allegations, then the Respondent’s knowledge has to be assessed at the time of each alleged act or omission. For that reason, for example, what the Respondent knew (or could have been expected to know) at the time of a dismissal might be different than what it knew (or could have been expected to know) at the time of an appeal hearing.

42. The complaint will not succeed if the Respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

43. In relation to proportionality, the Respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

44. It is necessary for there to be a balancing exercise which takes into account the importance of the Respondent achieving its legitimate aim weighed against the discriminatory effect of the treatment. Regardless of whether the Respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

45. If a Respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be difficult for the Respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

46. The Tribunal must consider whether less severe measures might have been available and, if so, whether the Respondent has shown that the defence still succeeds despite the availability of such less severe measures.

47. Because it is a balancing exercise, and because a dismissal potentially has very severe consequences for a disabled employee, the factors necessary to persuade a tribunal that the defence succeeds in relation to a dismissal decision are likely to have to be more weighty than those which might be sufficient to justify some treatment that was short of dismissal (such as a warning, for example). See, for example, Gray v University of Portsmouth EA-2019-000891.

48. However, each case will turn on its own facts, and the Tribunal must take into account everything which is relevant, based on the evidence presented by the parties. The approach to the balancing exercise discussed by the Court of Appeal in Hardys & Hansons Plc v Lax [2005] EWCA Civ 84, a case dealing with section 19 EQA, is appropriate when considering section 15 EQA as well.

49. The Respondent invited me to take into account Department for Work and Pensions (appellant) v Boyers (respondent) [2022] EAT 76 and I have done so.

49.1 At paragraph 23 it is noted that

> The Supreme Court set out a structured, four-stage approach to that balancing exercise in Akerman-Livingstone v Aster Communities Ltd [2015] UKSC 15, [2015] 3 All ER 725, [2015] AC 1399, a case involving possession proceedings in the County Court. The enquiry should encompass the following steps: first, whether the aim is sufficiently important to justify the treatment; second, whether there is any rational connection between this aim and the less favourable treatment or disadvantage suffered; third, whether the means chosen are no more than is necessary to accomplish the aim (and whether proportionate alternative measures could have been taken without a discriminatory effect); and, fourth, whether the steps complained of strike a fair balance between the need to accomplish the aim and the detriment suffered.

49.2 At paragraph 40, there was a discussion about the fact that the Tribunal must carry out the balancing exercise for itself, rather than simply look at whether the Respondent did carry out the balancing exercise and/or review the process by which the Respondent carried out that exercise. It was noted that this did not mean that the Respondent's internal processes are completely irrelevant to the issue of whether proportionality has been established.

50. Section 136 EQA applies to alleged contraventions of section 15 EQA.

Failure to make reasonable adjustments,

51. Section.20 defines the duty. S.21 and schedule 8 also apply.

> **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.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 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.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

52. The expression “provision, criterion or practice” (usually shortened to “PCP”) is not expressly defined in the legislation. I have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

53. The Claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

54. An expectation that employees ought to behave in a certain way, and that doing otherwise would be frowned upon, can potentially be sufficient to show there is a PCP, even if the employer did not enforce the expectation by any formal sanction.

55. In Nottingham City Transport Ltd v Harvey UKEAT/0032/12, the EAT held that the word practice has something of the element of repetition about it, and if

related to a procedure, should be applicable to others as well as the complainant. As per Ishola v Transport for London [2020] EWCA Civ 112, one off decisions made for individual employees might demonstrate that there is a PCP, provided the Tribunal is satisfied that there is sufficient evidence that the employer would take a similar approach in the future.

56. In Onu v Akwiwu; Taiwo v Olaigbe [2016] UKSC 31, the Supreme Court pointed out that a PCP must apply to all employees, or all employees in a subset at least, and that a practice of mistreating workers specifically because of a protected characteristic, or something closely connected to the protected characteristic, would not fall within the definition of PCP because it would necessarily not be applied to others.

57. When considering whether there has been a breach of s.21, the Tribunal must precisely identify the nature and extent of each disadvantage to which the Claimant was allegedly subjected. Furthermore, I must consider whether there is a substantial disadvantage when the relevant alleged PCP is applied to the Claimant in comparison to when the same PCP is applied to persons who are not disabled.

58. The Claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If she does then I need to identify the step or steps (if any) which the Respondent could have taken to prevent the Claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the Respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

59. The Tribunal should take into account everything that is relevant when assessing reasonableness. The EHRC Code provides some guidance and examples. The type of factors that can be looked at include, but are not limited to:

59.1 the extent to which taking the step would prevent the effect in relation to which the duty was imposed (i.e. the effectiveness of the step)

59.2 the extent to which it was practicable for the employer to take the step

59.3 the financial and other costs that would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of its activities

59.4 the extent of the employer's financial and other resources

59.5 the availability to the employer of financial or other assistance in respect of taking the step

59.6 the nature of the employer's activities and the size of its undertaking

60. There is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the Claimant had the disability.

61. Furthermore, in relation to a particular disadvantage, there is no breach of s.21 if the employer did not know and could not reasonably have been expected to know, that the PCP would place the Claimant at that disadvantage.

Indirect discrimination

62. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

63. Disability is one of the protected characteristics listed in section 19(3).

64. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. The comments mentioned above in relation to section 20 also apply to the phrase "provision, criterion or practice" as used in section 19.

65. In James v Eastleigh BC [1990] HL/PO/JU/18/250, the policy was, at first sight, neutral between the sexes, but, on proper analysis the qualification criteria was so closely linked to sex that it amounted to direct, rather than indirect, discrimination.

66. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

66.1 that the PCP puts (or would put) persons who share the Claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. This is sometimes referred to as "group disadvantage".

66.2 that the Claimant must personally be placed at that same disadvantage.

67. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a particular disadvantage even if they have reluctantly complied with the PCP in order, for example, to avoid losing their job. The EAT in XC Trains Ltd v D UKEAT/0331/15/LA held that it was sufficient that the PCP (the employer's rostering arrangements, in that case) caused the Claimant "great difficulty" in meeting her obligations.

68. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the Claimant herself, at a particular disadvantage, the burden of proof switches to the Respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

69. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

70. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

71. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

72. In Homer v Chief Constable of West Yorkshire [2012] UKSC 15; at paras 22 - 23 of Baroness Hale's judgment:

> Although the regulation refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive which it implements. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question: thus, for example, the aim of rewarding experience is not achieved by age related pay scales which apply irrespective of experience (Hennigs v Eisenbahn-Bundesamt (Joined Cases C-297/10 and C-298/10) [2012] 1 CMLR 484); the aim of making it easier to recruit young people is not achieved by a measure which applies long after the employees have ceased to be young (Kücükdeveci v Swedex GmbH & Co KG (Case C-555/07) [2011] 2 CMLR 703)....
>
> 23 A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate.

73. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.

74. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the Respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

75. The tribunal must make an objective determination and not (for example) apply a range of reasonable employers test. Tribunals must actively assess the legitimacy of the employer's reasons for the refusal to see if the reasons can be objectively justified. Having an apparently sound business reason for the PCP is not sufficient in itself. The Tribunal has to decide whether the need for the PCP is weighty enough to overcome any indirectly discriminatory impact. In particular, the Tribunal has to consider whether there are any alternatives that would achieve the same aim without being as disadvantageous to an individual.

76. In Hardy & Hansons plc v Lax [2005] EWCA Civ 846, the Court of Appeal, discussing what is now section 19(2)(d), said:

> 32. [it] requires the employer to show that the proposal is justifiable irrespective of the sex of the person to whom it is applied. It must be objectively justifiable (Barry) and I accept that the word "necessary" used in Bilka is to be qualified by the word "reasonably". That qualification does not, however, permit the margin of discretion or range of reasonable responses for which the appellants contend. The presence of the word 'reasonably' reflects the presence and applicability of the principle of proportionality. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the proposal, in this case for a full-time appointment, is justified objectively notwithstanding its discriminatory effect. The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject the appellants' submission (apparently accepted by the EAT) that, when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances.
>
> 33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby and in Cadman, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind, as did this court in Allonby and in Cadman, the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question,

> so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.

77. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

Unfair dismissal

78. Part X of the Employment Rights Act 1996 ("ERA") contains provisions relating to an employee's right (specified in section 94) not to be unfairly dismissed.

79. Section 98 ERA states, in part:

> (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—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (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.

80. Provided the Respondent persuades the tribunal that it has met the requirements of subsection 98(1), then the dismissal is potentially fair, which means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

81. In considering this general reasonableness, taking into account the Respondent's size and administrative resources. Typically, the tribunal's analysis includes the question of whether the Respondent carried out a reasonable process prior to making its decisions. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached.

82. In carrying out the analysis, it is important for the tribunal to make sure that it does not substitute its own decisions for those of the employer. In particular, it is not relevant whether the tribunal would have followed a different process or reached a different decision, so long as the employer's decisions were not outside the band of reasonable responses.

"Redundancy" as alleged dismissal reason

83. Section 139 ERA states in part

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) 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.
>
> (2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).
>
> (6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

84. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation.

85. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence.

86. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "*wholly or mainly attributable to*" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

87. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the Abernethy sense must be determined. See, for example, *Kellog Brown and Root (UK) Ltd v Fitton & Ewer* UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that case, the reason was found to be not the closure of a work location (though that would have been a redundancy situation) but the employees' refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

88. Subject to the points just mentioned, for the tribunal to be persuaded that the reason for the dismissal was redundancy, the employer does not have to prove:

88.1 why the "redundancy situation" existed. [Of course, where the Claimant's argument is that the employer is simply giving a "sham" reason, the Claimant is entitled to ask the Tribunal to decide that the employer has lied about the state of affairs that is said to have led to the dismissal; that is an argument that the dismissal was not "attributable" to a redundancy situation (if any).]

88.2 or that there was nothing that the employer could have done to avoid it. [That might come into the unfair dismissal considerations as part of section 98(4), but is not relevant to section 98(1).]

89. I note Pillinger v Manchester Area Health Authority EAT/225/79. On the facts of the case, the tribunal had decided that the employee had been fairly dismissed by reason of redundancy, but, if they were wrong about that, he had been fairly dismissed for "some other substantial reason" [often shortened to "SOSR"] as now defined in section 98(1)(b) ERA. The employee's appeal was successful. For the redundancy issue, the EAT's reading of the facts was that the employee had been replaced by another employee doing exactly the same work, for lower pay. This did not meet the definition of redundancy. In reaching its decision, it noted:

> Now, if it were possible to say on the evidence that the kind of work which this newly appointed more junior Scientist did was in some way different and, or intended to be different, from that which would have been done by Dr. Pillinger, then it might be possible to say here that the requirement for Dr. Pillinger to do his particular branch of the research had ceased or diminished.

90. As noted by the EAT in Corus and Regal Hotels plc v Wilkinson UKEAT/0102/03, when a business reorganises the way in which it conducts its business, and/or reallocates work amongst its employees, that does not necessarily mean there is a "redundancy situation" or that the dismissal of employees would be by reason of redundancy. Each case must be decided on its own particular facts: "*The*

mere fact of reorganisation is not in itself conclusive of redundancy or, conversely, of an absence of redundancy."

91. In Mitie Olscot Ltd v Henderson UKEAT/0016/04 employees were dismissed for what the employer claimed was redundancy. The tribunal was not persuaded that there had been any diminution in the business's requirements for employees to carry out work of a particular kind. The employer's appeal failed. The EAT observed:

> 'the tribunal were more than entitled to conclude that the real reason behind the dismissal was economic problems and an attempt to renegotiate contracts, which, if it had been successful, would not have resulted in job losses to any material extent. That does not meet the definition of redundancy since the need for the employer was not lack of work but economic improvement.'

92. The words of the legislation are paramount, and clear findings of fact needed. The question under Section 139(b)(i) is not whether the need for "work of a particular kind" has diminished, but whether the requirement for employees (to carry out work of a particular kind) has diminished. Thus findings of fact about exactly which "work of a particular kind" the Respondent is relying on, and analysis of the Respondent's arguments for asserting it has a reduced requirement for employees to do *that* work will be required.

Fairness of alleged redundancy dismissal

93. As regards fairness of a redundancy dismissal, Williams v. Compair Maxam Ltd [1982] IRLR 83 set out guidance which is still relevant. Tribunals must remember that it is guidance, and does not replace the wording of section 98(4).

93.1 The employer should give as much warning as possible of impending redundancies so as to enable (the union and) employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment, either with the Respondent, with an associated employer, or elsewhere.

93.2 The employer should consult (with representatives, if any, or else directly with the employees) as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer should seek to agree the selection criteria (with the representatives, if any), and be willing to continue to engage about the processes for applying those selection criteria

93.3 The employer should seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

93.4 The employer should seek to ensure that the selection is made fairly in accordance with these criteria and consider any representations as to errors or unfairness in the selection.

93.5 The employer should consider whether it is possible to offer alternative employment instead of dismissing an employee

93.6 In Elkouil v Coney Island Ltd [2002] IRLR 174 at [14], it was noted:

> The warning, the giving notice of risk, that is spoken of there is an essential prerequisite of the consultation process, because without it the representatives of the employee will not be able to formulate a strategy or consider what suggestions they can put to the employer. In this case it is true that a single person was being made redundant and no union was involved, but the principles are exactly the same.

94. The nature of fair consultation was considered in R v. British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and others [1994] IRLR 72 at [24]:

> It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in R v Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p.19, when he said:
> Fair consultation means:
> (a) consultation when the proposals are still at a formative stage;
> (b) adequate information on which to respond;
> (c) adequate time in which to respond;
> (d) conscientious consideration by an authority of the response to consultation.

95. In Compair Maxam, it was emphasised that

> The purpose of having, so far as possible, objective criteria is to ensure that redundancy is not used as a pretext for getting rid of employees who some manager wishes to get rid of for quite other reasons, e.g. for union activities or by reason of personal dislike.

96. In Teixeira v Zaika Restaurant Limited [2022] EAT 171, the EAT pointed out that it was established by Capita Hartshead Ltd v Byard [2012] ICR 1256 that the tribunal must not substitute its own views, for that of the employer, on the issue of the appropriate pool from which the employee to be dismissed might be selected. That applies even if the pool consists of just a very small number.

97. When deciding on whether the dismissal was fair or unfair, the tribunal's analysis might include, as well as the size and resources of the employer; whether it has relevant policies and procedures, and if so have they been followed; has it followed the same method and processes as in previous similar exercises, and, if not, was there a reason for acting differently this time; was there an urgent

need to act quickly to save the business. There is no single uniform process for redundancies that must be followed by every single employer. It is the reasonableness of the employer's decisions (and specifically whether they were outside the band of reasonable responses) that is relevant.

98. Part XI of the employment rights act deals with the rights to redundancy payments. I mention Part XI because, even though no claims based on Part XI have been presented in this particular case (that is, there is no dispute about the entitlement or otherwise add to a redundancy payment), Part XI specifies, amongst other things, when an employee might lose entitlement to redundancy payment. Part XI describes suitable alternative employment, and the terms on which offers of suitable alternative employment have to be made if the employer is to argue that the has been unreasonably rejected so that the entitlement to statutory redundancy payment is forfeited. That is the context in which the rules about "trial periods" appear in ERA. "Trial periods" are not a direct feature of section 98 ERA, or of Part X at all.

Breach of contract

99. Subjection to certain requirements, exceptions and limitations, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives jurisdiction to consider breach of contract complaints and to award damages.

100. When doing so, the Tribunal take the same approach as other courts to questions of whether a contract has been formed, what the obligations are, whether there has been a breach of contract and, if so, how to quantify the damages.

Findings of Fact

101. The details of the events which occurred are largely not in dispute. The reasons for certain decisions is very much in dispute. I have taken the transcripts of conversations to be an accurate record of part of what was said in those conversations, while being aware that the transcript does not necessarily cover the entirety of the conversation in question.

102. The respondent company, SPAR (UK) Ltd, is owned by SPAR Food Distributors Limited. In turn, that is owned by 5 regional distribution companies. In effect, the Respondent operates as a central office, which is connected to the 5 regional distribution companies and those 5 separate companies trade under the SPAR brand in the UK. There are over 2000 UK stores in the aforementioned group. The Respondent itself employed about 90 people at the relevant times.

103. Suzanne Dover was Brand and Marketing Director at all relevant times. She began in that role in March 2020 (the same month that the Claimant started) and was the Claimant's line manager at all relevant times. She was responsible for

managing the Respondent's Marketing, Trade Planning and Quality Assurance team. Prior to the claimant's redundancy, the team was divided into (1) Brand and Digital Marketing; (2) Strategy and Planning; and (3) Quality, Assurance and Responsible Retailing. The team consisted of around 16 people.

104. The claimant became employed by the Respondent in March 2020. She was dismissed on 10 February 2023, with immediate effect and with a payment in lieu of notice. Ms Dover took that decision. She received advice from HR about it.

105. The Claimant was the Strategy & Planning Manager, which was responsible for research and insight, development and production of the seasonal national selling plan (including POS), and instore radio development and supply.

106. The Claimant's responsibilities included work on the SPAR national "Selling Plan", and reviewing it and making recommendations. The Selling Plan was a promotion plan created about 3 times per year. The Claimant's involvement included collaborating with the Research and Insight Manager and with the Retail Activation team to understand the previous period's performance in detail and to identify opportunities to improve performance for the upcoming period. Once the recommendations arising from the review were made and approved, the new Selling Plan was then handed over to the Retail Activation team.

107. The Claimant had a written contract of employment [Bundle 326 to 342]. Amongst other things, the contract contained provisions for the Respondent to terminate either by giving notice (of 3 months) or by making a payment in lieu of notice. That clause included:

> The Employer reserves the right to terminate your employment at any time and with immediate effect by notifying you that it is exercising its right to pay you in lieu of your notice period in accordance with this clause and will therefore make a payment in lieu of notice to you. whether notice to terminate this Agreement is given by you or by the Employer. Any such payment In lieu shall be on your basic salary only and shall not include any payment in respect of any contractual or non-contractual benefits or any holiday entitlement that might otherwise have been due during the period for which the payment In lieu is made. The payment will have PAYE, tax and appropriate National Insurance contributions deducted at source. You shall have no right to receive a payment in lieu unless the Employer has exercised its discretion set out in this clause.

108. The contract contained a garden leave provision. That clause included:

> The Employer may following service of notice to terminate your employment by either party require that you do not attend work and/or carry out any duties for the whole or any part of your notice period.
>
> During any period of garden leave the Employer may direct you to do any or all of the following:
>
> • require you not to attend the Employer's premises;

> • perform special projects and/or perform duties not within your normal duties or perform some or more of your normal duties, at such location (including your home) as the Employer may decide;
>
> • refrain from contacting or dealing with (or attempting to contact or deal with) any franchisees, wholesalers, customers, clients, advertisers, suppliers, agents, distributors, shareholders, professional advisers, officers, brokers, employees or other business contacts of the Employer and/or any Associated Employer;
>
> • immediately resign without claim for compensation from any other office held by you in the Employer, and/or any Associated Employer;
>
> • take all of your outstanding holiday entitlement; and/or
>
> • return to the Employer all documents and other materials belonging to the Employer and/or any Associated Employer save for any property provided to you as a contractual benefit for use during your employment unless and until the Employer requests the return of such property.
>
> During any period of garden leave, you will:
>
> • remain an employee of the Employer;
>
> • continue to be bound by the terms of this Agreement (Including your implied duties of good faith and fidelity);
>
> • must be available for work (but the Employer is not obliged to provide you with any work);
>
> • keep the Employer informed of your whereabouts so you can be contacted by the Employer;
>
> • continue to be paid in the usual way save that you will not be entitled to receive any bonus or commission during or in respect of such period.

109. The contract contained “sickness absence” provisions. That clause included:

> Following completion of your probationary period and subject to you complying with the Employer's sickness absence and certification procedures you will be entitled to receive sick pay under the Employer's Occupational Sickness Pay Scheme, as set out In the Employee Handbook (as may be amended from time to time) which currently provides for payment during sickness absence as follows:

For someone who had over two years’ service but less than three years’, the entitlement was to “*6 weeks' full pay in any rolling 12 month period*” and that would increase to 8 weeks, rather than 6, once the employee had more than three years’ service.

110. The contact included entitlement to pension and life assurance.

111. There was a clause for “medical insurance” which read in full:

> The Employer pays the cost of single cover membership of a Medical Insurance scheme for you, subject to the rules of the scheme In force from time to time and to your compliance with and satisfaction of the Insurer's requirements and the premium being at a rate we consider reasonable.
>
> Full details of the scheme currently in place will be notified to you separately.

> If the Insurance provider refuses for any reason to provide private medical insurance benefit to you the Employer shall not be liable to provide any replacement benefit of the same or similar kind or to pay any compensation in lieu of such benefit.
>
> The Employer reserves the right to discontinue, vary or amend the scheme (Including the level of your cover) at any time on reasonable notice to you.

112. For "travel and expenses", it stated:

> All journeys on the Employer's business must be authorised in advance by your line manager.
>
> The Employer shall reimburse all reasonable expenses properly, exclusively and necessarily Incurred by you In the performance of your duties In respect of such authorised travel, subject to the production of such receipts or appropriate evidence as the Employer may require and subject to the Employer's expenses policy (as amended from time to time).

113. There was a dispute about which posts reported to the Claimant initially. Having heard all the evidence, this is not a particularly important issue, as far as I am concerned. However, it was the subject of cross-examination because of a comment made in Ms Dover's witness statement, which the Claimant disputed, and because the Claimant suggested that that comment undermined Ms Dover's credibility.

113.1 The disagreement is simply about whether the Research and Insights Manager, David Bird, reported to the Claimant and from day one in March 2020 (the Claimant's position), or only from a few months later in November 2020 (Ms Dover's position).

113.2 It is certainly clear that the Claimant was told that he was reporting to her and was not told otherwise.

113.3 The fact that Ms Dover may have privately held a different view is not relevant to the complaints which I have to decide given that Ms Dover accepts that David Bird did report to the Claimant from November 2020 onwards. The details of which posts were reporting into the Claimant at the time that redundancy was being considered is potentially relevant to the complaints which I have to decide. Ms Dover accepts that the Research and Insights Manager had been reporting to the Claimant for at least two years' prior to the redundancy proposals; the organisational structure at the time that the requirement to commence redundancy consultation arose is what really matters, not the period March to November 2020.

113.4 I do not agree that the witnesses' different versions of events affect credibility one way or the other. I have no reason to decide that Ms Dover was deliberately lying when she claimed that she had privately agreed, with Mr Bird, without telling the Claimant, that Mr Bird did not have to report into the Claimant's post.

113.5 I do accept that, in November 2020, nothing changed from the Claimant's perspective. She had previously line managed Mr Bird, and she continued to do so afterwards.

114. There came a time when the Respondent decided that it would conduct a particular project and that it would engage an external consultant to assist with that project. The project was referred to as "Promotional reset". It was agreed, in around April 2022, that the Claimant was to work with the external consultant in connection with the project.

115. In an announcement made in around November 2022 [Bundle 503], the Respondent described the project as having Phase 1 and Phase 2, and that Phase 2 had commenced.

115.1 Phase 1 was to develop a promotional framework that the 5 regional distribution companies would be willing to adhere to.

115.2 Phase 2 was to embed the process.

116. The Claimant was aware from the early stages that the project might lead to the creation of new particular roles within at the employer's structure. It was the Claimant's belief - and Ms Dover knew that it was the Claimant's belief - that this would not place the Claimant at risk of redundancy and but rather, if anything, it might be a career advancement opportunity for the Claimant, because she expected that if a more senior role (than the Claimant's existing position) was created, then she would automatically move into it.

117. Another post which was potentially relevant to the work which the project was to undertake was held by Laura Webb. The role was known by slightly different titles from time to time. I will call it Marketing and Digital Controller. Laura Webb's post was seen as being at a higher place in the Respondent's organisational structure. She was not on the same pay grade as the Claimant, but on a higher grade.

118. In around November 2022, the Claimant formed the opinion that, since the Promotional Reset project was moving onto the next stage, firstly the role of the external consultant, STEMMA, would come to an end and secondly, that she, the Claimant, would take over and run the project from then on.

119. Unbeknownst to the Claimant, a report was made to the Respondent's board at their 15 November 2022 meeting.

119.1 The board gave the go-ahead to the recommendations in the report. It gave an instruction to Ms Dover to proceed with a restructure.

119.2 It was suggested that that the project so far had taken some time and questions were raised about how to move more quickly. The Respondent's chief executive, Louise Hoste, responded that the restructure would now be implemented, and agreed that Phase 1 could have been done more quickly.

119.3 The board instructed Ms Hoste and Ms Dover to:

> … move to execution asap and to carry out the necessary restructuring without delay subject to it being within budget.

120. Although that was the instruction given on 15 November 2022, the Claimant was not made aware of it at that time.

121. On 29 December 2022 two things happened.

121.1 Firstly, at 9:56, Ms Dover cancelled a planned objectives meeting with the Claimant. Ms Dover stated that she would prefer to read the Claimant's goals and come back to her

121.2 Secondly, at 7:15pm, Ms Dover sent the email appears at [Bundle 521] with the subject line: P&C: Next Gen V3.

122. The email said.

> Please find in an updated deck ahead of my holiday.
>
> Malcolm it would be good if you she will update with your calculations as a final record of financial impact

123. It was sent to amongst other people Lee Johnson and Nicola Gilmore-Gauci and to the chief executive.

123.1 Mr Johnson was Strategy and Operations Director. As part of his role, he was responsible for leading the Respondent's finance, governance, IT, HR, sales operations and supply chain teams. He later made decisions on the Claimant's appeal against dismissal and grievance.

123.2 Ms Gilmore-Gauci was the head of HR

124. I accept that the document attached to that email is the one at [Bundle 522 to 541].

124.1 It is a set of slides containing details of the implementation of Phase 2 of the Promotional Reset project, now being called "Project Next Gen".

124.2 The first slide matches the description in of the subject line in the email.

124.3 [Bundle 523] contained a summary of the changes since V2, which meant version 2. I have not seen version 2. However, based on the summary of

changes, I accept that Trade Planning Controller was something already in version 2 (since the changes were about the additional salary).

124.4 There was an a timescale set out on [Bundle 523]. It said the plan was to "*review the legal situation internally"* in the week commencing 9 January 2023 and to communicate to team during week commencing 16 January.

124.5 Thus the plan to make announcements in the week commencing 16 January 2023 was in place from no later than 29 December 2022 and was not something that was only decided in mid-January (whether as a reaction to any information supplied by the Claimant, or at all).

124.6 The existing structure is that shown on [Bundle 525]. It shows the individuals or groups reporting to the Claimant accurately. It shows 3 posts, including the Claimant's reporting into Ms Dover.

124.7 The proposed new structure is on [Bundle 526].

124.7.1 That did not include the Claimant's role.

124.7.2 It had the Research and Insights Manager reporting directly to Brand & Marketing Director (Ms Dover's post) rather than via the Claimant's (or any other) post.

124.7.3 It included one totally new role, being Trade Planning Controller ("TPC"), reporting to Ms Dover.

124.7.4 It included another totally new role, being Marketing Campaign Manager ("MCM"), reporting "Marketing Activation Controller". The Respondent was treating that as Laura Webb's post. That is, according to the proposal document, Ms Webb's post was to have a title change from Marketing and Digital Controller to "Marketing Activation Controller", but Ms Webb was not at risk of redundancy. .

124.7.5 A post of "Retail Marketing Executive", which had reported to the Claimant in the old structure, was to report to MCM.

124.7.6 The Respondent regarded TPC as at a higher place in the Respondent's organisational structure than the Claimant's old post, and the same level as Laura Webb's.

124.7.7 MCM was at a lower place in the structure than the Claimant's old post.

124.8 The slide pack made clear that the Strategy and Planning Manager role (the Claimant's) was to be deleted from the structure. [Bundle 528 to 529] was headed "Strategy & Planning Manager Redundancy Rationale" and [Bundle 527] discussed the costs implications.

124.9 [Bundle 530 to 531] contains an analysis of 15 particular matters that had been considered. They were responsibilities that either existed in the existing structure (in which case it was mentioned which role within the existing structure carried out those roles), or else were seen as being new.

124.9.1 Rows 3 and 4 were responsibilities identified as having previously been the Claimant's that were now going to the new TPC role.

124.9.2 Row 14 had been the Claimant's responsibility and was going to be performed by a post reporting into TPC.

124.9.3 Rows 2, 10, 11, 13 and 15 listed duties for the TPC post that were either new, or else currently performed, but not by the Claimant.

124.10 MCM role and duties were discussed at [Bundle 532], where it was stated that the costs of the creation of the new role would be covered by removal of the Strategy and Planning Manager post.

124.11 The Digital Marketing Manager post (which had been reporting to Laura Webb) was going to be removed from the structure and replaced by a lower graded posts. (There was no compulsory redundancy).

124.12 At [Bundle 541], it was noted that Ms Gilmore-Gauci had – as previously requested - advised on redundancy costs for existing Trading Head role and provided rationale for removal of the Claimant's role. In other words, the plan to remove the Claimant's role was not put forward for first time on 29 December 2022, but had already formed part of the earlier proposals.

125. The Claimant did not receive this document at the time (29 December 2022), and nor did she receive it during the remainder of her employment or during the appeal against dismissal. The first time the Claimant saw this particular document was after it was disclosed in the course of this litigation.

126. On Monday 16 January, after 7pm, the Claimant sent an email at to her line manager, Suzanne Dover, and also copied in to relevant HR officers, Nicola Gilmore-Gauci and Lucy Mills [Bundle 542].

126.1 The email stated that the Claimant was due for surgery on 13 February.

126.2 It said it was anticipated she would need approximately six weeks for recovery.

126.3 It set out the Claimant's plans for work arrangements, and so on.

127. The respondent had previously been aware - in particular, Ms Dover had been aware – that, during 2022, the Claimant had planned to have surgery but it had been cancelled.

128. Ms Dover was also aware that the Claimant had had transfusions for iron deficiency.

129. Ms Mills of HR followed up. She and the Claimant had a discussion. In her email prior to discussion, Ms Mills sent some things to the Claimant [Bundle 543]. In particular, she mentioned that she would need to check that the Claimant was not coming back to work too early or against medical advice.

130. On Thursday 19 January 2023 (so a few days after the email), the Claimant was called to a meeting. She did not know what it was about other than that she was told to make sure she attended and to cancel other appointments.

131. The Claimant has made several covert recordings and during the course of her employment. On the Claimant's case, some of the recordings happened automatically without her making conscious decisions, because it was recorded automatically by equipment she had set up at home for reasons not connected to her employment. On other occasions, she made a conscious decision to make a recording; she said that was for her own development purposes. It has not been explored in evidence which transcripts fall into which category.

132. However, the transcript and the recordings themselves have been provided to the Respondent. Neither side has disputed the accuracy of the transcripts in the bundle. I therefore do accept that the transcripts accurately represent what was said in the meetings.

133. I am, of course, aware - as in any situation of this nature - that the Claimant was aware that there was a recording and the other people did not. In addition, one side had the opportunity to select which recordings might be most helpful to them, and the other side and did not.

134. There is a transcript of the 19 January meeting. There is no particular dispute between the parties about what happened. The Claimant was notified that she was at risk of redundancy. The contents of a letter were read out. There was not much further discussion. The Claimant was offered the opportunity to ask questions and also given the opportunity to go home and rest.

135. After the meeting, Ms Gilmore-Gauci sent a letter to the Claimant and also gave her (amongst other things) the job descriptions for TPC and the MCM.

136. I note that MCM had been identified as £55,000 annual salary in the documents circulated in December. As per [Bundle 571], Ms Gilmore-Gauci's email, just after 3pm on 19 January, said that the salary would be £50,000, but might be £55,000. No explanation has been provided for when that change was made or why. Alternatively, if there was no change since the December documents, no explanation has been provided for why the Claimant was told the salary might go up from £50,000 to £55,000, rather than being told it was £55,000.

137. The letter on [Bundle 573] was sent to the Claimant. It is the one read out at the meeting. It says that the Respondent proposed that the consultation period would be 2 weeks.

138. No written redundancy policy has been provided to me and I accept and that the Respondent did not have one.

139. The assertion that it did not have one is consistent with, amongst other things:

139.1 The Claimant was not provided with one at the time

139.2 When commenting to the Claimant, Lucy Mills made reference to ACAS guidance on redundancies, rather than to any policies of the Respondent's

139.3 When the Claimant and Lucy Mills had conversations, which Ms Mills did not know were recorded, and before she was formally appointed – in place of Ms Gilmore-Gauci – to be the HR contact, Ms Mills expressed the opinion that the Respondent had the option of carrying out as many consultation meetings as it thought necessary in a particular case.

140. There were no written requirements that consultation would be at least two weeks or any other minimum period. There was no requirement, in any written policy, that the consultation could not take longer than two weeks. Similarly, there was no written policy about the minimum or maximum number of meetings during the consultation period and (therefore) no written policy about what would constitute a valid meeting for the purpose of counting as a consultation meeting.

141. The Respondent had what might be called a flexible approach to redundancies and the consultation period. I will discuss the Claimant's comparators in more detail below. However,:

141.1 As per [Bundle 1178], Catherine McIlwham seemingly had an "at risk letter" dated Monday 11 January 2021, a meeting that day, a further meeting on Thursday 14 January 2021 and a final meeting scheduled for Tuesday 19 January 2021. So the proposed period was not longer in that case.

141.2 By Ms Gilmore-Gauci's letter [Bundle 1178], Catherine McIlwham was informed that Ms Gilmore-Gauci's opinion was "*consultation period of two to three weeks is a standard period of time for this process*".

142. That being said, in the Claimant's case, it is factually accurate that the decision to propose a two-week consultation period was first notified to the Claimant after the Claimant's notification - on 16 January - that she was going to be absent for surgery for around 6 weeks starting from 13 February.

143. The letter discussed statutory redundancy payment and also said:

> Pay in Lieu of three months' notice (if no part of the notice period is worked) £16720.00 subject to normal deductions in respect of tax and national insurance.

144. I reject the argument that this letter showed that the Respondent had already decided (and/or already notified the Claimant) of an intention that she would not work her notice and would receive payment in lieu of notice instead. The letter is implying the opposite, namely that no decision between working all of notice period, part of notice period, or no part of notice period, has yet been made.

145. One of the Claimants proposed comparators did work at part of her notice period. According to her settlement agreement, Catherine McIlwham's notice period officially started on 30 January (so 19 days after being informed that she was at risk). She worked 30 January to 6 April 2021 (so slightly more than 2 months of a 6 month notice period) and was paid in lieu for the remainder.

146. Without wishing to labour the point, there is no written reorganisation policy, and so no written policy about when – in the case of redundancy – the Respondent will make payment in lieu of notice for the entire notice period, and when it will require the employee to work some or all of it.

147. However, on the evidence provided to me, it is not true that the Respondent always dismisses with payment in lieu of notice. My finding, therefore, is that it decides, on a case by case basis.

148. The 19 January letter stated:

> SPAR UK is currently in consultation with you and as such, you are invited to a further consultation meeting with Suzanne Dover and I on 24 January @10am in order to discuss our proposals with you further. Should you wish, you may be accompanied to this meeting by a work colleague or a trade union representative. If you would like to bring a companion to the meeting, please let me know the name of the person by no later than 10am on 23 January 2023 so an invitation can be sent to them.

149. Since the letter was read out at the meeting, the letter represented the second time that the Claimant had received the information that she could be accompanied.

150. Letters to Karl Geiser (11 January 2021) [Bundle 364] and to Catherine McIlwham (11 January 2021) [Bundle 366] contained the same wording about being accompanied.

151. My finding is that the paragraph in the Claimant's letter was not a mistake, as the Respondent has since tried to argue.

152. These paragraphs, in these 3 separate letters (albeit two of them sent on the same day) are because the Respondent had an unwritten policy that it allowed workplace companions or else trade union representatives at redundancy

consultation meetings. The argument that there was no statutory obligation to allow this is something that might be relevant fairness; however, the mere fact alone that there was no statutory obligation to allow this does not mean that the letter to the Claimant contained a mistake.

153. I am satisfied that the Respondent deliberately made the comment that the Claimant could be accompanied to the meeting by work colleague or trade union representative because that was consistent with what it had told other employees in the past. It is not true that they used the wrong template letter.

154. My finding is that the argument that the letter contained a "mistake" (in the sense of an incorrect template being used) is not consistent with the email on 26 January which said:

> We have taken some advice and you are only entitled to a representative if you are going through a disciplinary or grievance process, which this is not. There is no statutory right to be accompanied to a redundancy meeting with a trade union representative, or a companion
>
> The ACAS guidance on this states that the employer should consider to allow the employee a companion, as this is best practice. We have advised that you can be accompanied by a companion, and that companion can be a work colleague.

155. My finding is that after the Claimant sought to make use of the policy as set out in the letter to her (as well as in the letters two years' earlier to colleagues), the Respondent took advice and decided that its policy went further than the statutory requirements, and therefore decided that it did not want to adhere to what it had deliberately stated in the "at risk" letters to the Claimant and other employees.

156. The Claimant was notified that the next meeting would take place the following Tuesday, 24 January.

157. On 23 January, so within the timetable set out in the at risk letter, the Claimant responded to it [Bundle 576]. She mentioned that she did want to bring somebody and she said that the meeting on Tuesday was too short notice for the representative. She did not ask for postponement. She asked for it to take place by video rather than face to face.

158. Ms Gilmore-Gauci respondent quickly. She said:

> Im so sorry to hear about your accident - If you are feeling unwell don't forget that you can have a call with a Doctor at BUPA online - all the details are on the website.
>
> If you are to unwell to travel we can use TEAMS although it is not ideal especially if you would like a work colleague with you as that is best done in person.
>
> Can you tell me who you will be brining to the meeting so I can look at diaries to see if there is an alternative date/time.

159. The Claimant replied to say that she would attend without the representative. She said that he was not a SPAR employee, without stating that he was a union representative. Ms Gilmore-Gauci stated:

> Ok
>
> It does need to be a work colleague.

160. The meeting went ahead on 24 January and was covertly recorded by the Claimant [Bundle 577].

161. On the Claimant's case it was not a consultation meeting because, once there had a discussion about the fact that she attended without a representative, and that she wanted to have a representative, it was agreed that there would be another meeting. So, on the Claimant's case, the encounter on 24 January was nothing other than discussions about a future consultation meeting, rather than an actual consultation meeting.

161.1 While it is true that the Claimant asked, and respondent said it agreed, that the next meeting (which was on 1 February, though that date was not finalised on 24 January) would be a direct replacement for 24 January, the reality is there were some discussions on 24 January, that went beyond simply discussing a postponement.

161.2 The Claimant did have some information by the end of the meeting that she did not have at the start of it.

162. Within the meeting, Ms Gilmore-Gauci stated that the Claimant was entitled to bring a union representative. My finding is that Ms Gilmore-Gauci was seeking to say that she had only told the Claimant that the companion had to be a workplace colleague because she had not realised that the Claimant meant union representative. My finding is also that each of the Claimant and Ms Gilmore-Gauci sought to place blame on the other for any misunderstanding. Ms Gilmore-Gauci's position being that the Claimant already knew from the 19 January letter that she could bring a union representative, and so she, Ms Gilmore-Gauci, had not needed to repeat that on 23 January; the Claimant's position being that Ms Gilmore-Gauci's email had been unambiguous that the Claimant could not bring someone (union representative or otherwise) if they were not an employee of the Respondent's.

163. After the meeting, the Claimant notified the Respondent that she had arranged for a union representative to accompany her at the next meeting. She said that the representative and could not be available until Wednesday 8 February. Ultimately the Respondent refused:

163.1 to allow the Claimant to bring a union representative to future meetings

163.2 to defer the meeting until 8 February (or hold a further meeting on that day).

164. On 24 January, the Claimant had a discussion with Lucy Mills. Lucy Mills was regarded by the Claimant as a friend. The Claimant saw her as somebody she could confide in. I note the contents of Lucy Mills' statement prepared for one of the earlier hearings, but I do not need to decide if the contents are true.

165. The Claimant was secretly recording this meeting and Lucy Mills and was unaware of that.

166. My finding is that the Claimant's opinion was, during the conversation, Lucy Mills was not acting in the capacity of an HR officer or representative the of the employer, rather that Ms Mills was speaking freely as a knowledgeable colleague who was in a position to offer helpful advice and suggestions. Lucy Mills has not given evidence and so I cannot ask her what her intentions were. However, my finding is that it was reasonable for the Claimant to regard this as a discussion with a friend (albeit a friend that she was covertly recording) rather than a discussion with her employer.

167. The transcript commences at [Bundle 597]. On [Bundle 600], Ms Mills stated:

> Yeah. Well, let's say when I have had something like this similar happen to me, I took the job description that I had to written me, and then I added on every single thing that I did extra that I started to do. And I said, this is my original, this is what I do. Now you can quite clearly see the evidence of how much extra I'm doing, how much more senior things I'm doing, which actually equate to this level. So I'm actually working at that level already. Hypothetically, do you have that hypothetical job description?

168. The Claimant replied: "*Yeah, I can draw it up. Yeah. It's basically the cv, isn't it*".

169. Lucy Mills gave some comments to the Claimant about what she had done in the past when faced with a particular situation, and in particular explained that it was possible for someone to make an argument that they should be slotted into the new structure rather than made redundant (or made to compete for a vacancy). It is clear that the Claimant understood what Ms Mills meant, and that she, the Claimant, believed she had sufficient information about the jobs in the new structure to attempt to do what Ms Mills was suggesting (if she chose to).

170. Amongst other things, the Claimant and Ms Mills discussed the role of Laura Webb within the restructure. There was a discussion about whether there was any room for argument by the Claimant that she and Laura Webb should be put into a redundancy pool. Ms Mills stated [Bundle 604]

> So what we could say here is that your current role that you are doing right now is similar to what Laura does. Okay?

171. The Claimant said that that was her opinion. The exchange continued:

> Mills: Yeah, because you still have the same input and meetings, you still have direct reports. So yeah, I think it's worth mentioning, right? Imagine [if SPAR] knew that I was having this conversation.
>
> Claimant: By the way, you're not telling me anything. I didn't know, by the way, Lucy.

172. My finding is that Ms Mills was implying (and I do not need to decide whether it was her genuine belief or not) that the employer would not be happy about her sharing these tips with the Claimant. My finding is that the Claimant's reply was her genuine opinion. Namely that while she was glad to be able to pick Ms Mills' brains, the feedback she was receiving from Ms Mills was simply reiterating things that she already knew and/or had already learned since 19 January.

173. I note the comments between timestamps 24:38 and 28:32. They discussed that Laura Webb was currently on maternity leave and Ms Mills stated the opinion (and I do not need to decide whether it was her genuine belief or not) that the employer would probably make Laura Webb redundant at a later date.

174. The exact comments that Ms Mills during the entire conversation (much of which has been redacted in the transcript) are not the main significance of this conversation. My finding is that this conversation shows that the Claimant was aware that she had the option of suggesting to the employer that the redundancy pool should be widened and potentially include Laura Webb.

175. My finding is that the Claimant did not actually put that proposal / suggestion / request forward as part of the redundancy process. She discussed it informally with a friend, rather than with her employer. That is, based on what Ms Mills was expressly saying to the Claimant, the Claimant could not have regarded this as an "official" discussion with HR, or the employer, as part of the consultation process.

176. I do not need to make a decision about the specific reason that the Claimant did not, as part of the consultation process, formally suggest that Laura Webb should also be put at risk (and, therefore, that the Claimant should have the opportunity to be considered for the post which the Respondent was treating as Laura Webb's post). However, for whatever reason, the Claimant decided not to make that argument to the Respondent.

177. At around 12:53 on 26 January, the Claimant received a letter, in the name of Ms Dover [Bundle 624]. The letter included:

> … You have subsequently advised that you would like to bring a Mr. Bull to a consultation meeting on Wednesday 8 February 2023. However, that date is not convenient to us and we wish to hold the next consultation meeting on Wednesday 1 February at 9am.
>
> There is no statutory right to be accompanied to redundancy meetings by a trade union official, as this is not a disciplinary/grievance process. You may be accompanied to the meeting by a work colleague. Accordingly, the next consultation

meeting will be held on 1 February at 9am and you may be accompanied to this meeting by a work colleague. In this instance, if you do wish to be accompanied at the meeting on 1 February, please advise me of the name of your companion by no later than 1pm on Tuesday 31 January 2023.

At the consultation meeting on Tuesday 24 January 2023, you asked who else at Central Office was at risk of redundancy. As we explained, we cannot discuss individual employees' circumstances with you, as it would not be appropriate for us to do that. However, as we explained, we have looked at all of the rotes in the Marketing Team and it is only your role that is at risk of redundancy at this time.

There are however other roles within the business that are not being replaced on a like for like basis, changes in structure to certain teams, changes to reporting lines and responsibilities within roles and new roles that are being created as part of the overall restructure. We are discussing the new roles that are suitable for you as part of the consultation process.

You advised us at the meeting that you do wish to apply for the role of Trade Planning Controller and to have your suitability for that role assessed. I understand that you have a meeting with Simon Mitchell today at 2pm to discuss your suitability for the role.

You advised at the meeting that you might also apply for the position of Marketing Campaign Manager. As advised to you by email on 19 January 2023, sent by Nicola, all of the salaries for the current open roles have been outlined. This role would be a role that you are capable of undertaking. However, it would not be a suitable alternative role as it is a more junior role and the salary is below your current level and at a salary of £50,000 per annum. Notwithstanding this, please advise if you are considering this role.

It was felt that at that the consultation meeting on Tuesday 24 January 2023, you appeared to be very aggressive towards Nicola. I have therefore asked Nicola to step down from the process and she will not be attending the next consultation meeting on Wednesday 1 February 2023. Nicola's place will be taken by Lucy Mills. That said, it is important that these meetings are as collaborative and respectful as possible, notwithstanding the fact that I appreciate that this is a difficult situation for you.

Again, it is appreciated that this is a difficult situation, please refer to Bupa, Grocery Aid or WeCare for external support throughout this process if you wish.

178. By letter dated 26 January, sent in the name of Ms Dover, the Respondent acknowledged that the Claimant had said orally that she wished to apply for the role of TPC and asked if she wanted to apply for the role of MCM, and repeated the comment that the salary was £50,000. The letter said that - for that reason – it was not being claimed by the Respondent that MCM was a “suitable alternative role”. My finding is that the Respondent was not suggesting in this letter that the Respondent did not think the Claimant could do the job, but rather it was making the legal / procedural observation that it was not intending to argue that the new post met the statutory definition of suitability such that the Claimant was at risk of losing entitlement to redundancy payments if she was offered that job and refused it. My finding is also that the meaning which I have inferred (as per the last sentence) is not one expressly stated in the letter, and not one that a lay person would be likely to infer from the letter.

179. The Claimant replied at 13:32 repeating that she wanted to bring a union representative and that, therefore, she wanted the meeting to be on 8 February.

180. At 13:46, Ms Mills replied [Bundle 621]:

> We have taken some advice and you are only entitled to a representative if you are going through a disciplinary or grievance process, which this is not. There is no statutory right to be accompanied to a redundancy meeting with a trade union representative, or a companion
>
> The ACAS guidance on this states that the employer should consider to allow the employee a companion, as this is best practice. We have advised that you can be accompanied by a companion, and that companion can be a work colleague.

181. At 15:34, the Claimant wrote (to Mills and Dover):

> As you can imagine this redundancy process has been very stressful for me and I wish to be accompanied my … union representative to help me in the process. If you are now saying that I cannot have this, then I have no choice. I would like to have this meeting on the 8th or after this date, so that I can confer with my representative who is unavailable until the 8th.

182. At: 16:06, the reply from Ms Mills stated:

> I am really sorry you feel this way and I appreciate that this is stressful for you, Unfortunately, this is a stressful process for everyone Involved and I am happy to have a conversation with you. It might be helpful if you read the ACAS guidelines around the redundancy process.
>
> I am not sure if you are aware, but the role of a union representative, or work colleague, is very limited and they are there to only 'accompany' you.
>
> It would be unfair on all parties, to wait until 8 February or after this date. Please note, that it is not a statutory right to have a companion with you at a redundancy meeting, but we are allowing this, providing it is a work colleague.

183. At 17:54, the Claimant wrote, attaching her CV

> Hi Suzanne, Lucy
>
> I would like to be consider for both the Trade Planning Controller and Campaign Manager roles. I have attached a copy of my CV for your consideration.

184. This was all on Thursday, 26 January, so seven days after the process started. In a later conversation between Ms Mills and the Claimant (covertly recorded by the Claimant without Ms Mills' knowledge), Ms Mills stated:

184.1 The Respondent would have permitted the Claimant to attend the meeting with a trade union representative had the representative been available to attend on 1 February.

184.2 The reason for the urgency was the need to conduct interviews for positions in the new structure.

185. My finding is that the there were no other parties / employees who were depending on the outcome. It is not a case, for example, that other employees who were at risk could not have decisions in their cases (whether voluntary redundancy, compulsory redundancy, or post in the new structure, as the case may be) confirmed until after decisions had been made in the Claimant's case. TPC and MCM were each new roles. On 24 January, the Claimant was told:

> we're still arranging what the first interviews will look like. We haven't got to that stage yet, but we'll do that [Bundle 591: time stamp 37:29)
>
> But it's an interview process. That's how we assess and that makes it fair for everybody. We dunno if we've got internal people who might be interested as well other than yourself. [Bundle 392: time stamp 39:39]
>
> We don't know when the interview is going to take place, Jody, so we have to put those to one side for the moment. We only advertise the role yesterday and we don't know how many people are going to apply. We didn't know whether you wanted to apply as well. So we haven't got any dates in yet for that internal candidates. So you have to put that to one side. [Bundle 593: time stamp 41:59]

186. Lucy Mills has not attended and given evidence and so there has been no opportunity for me or the Claimant to ask what she meant by the comment "unfair on all parties". That is, she has not testified about which parties, or about what unfairness to them there would have been by postponing the next meeting with the Claimant until 8 February (or, indeed, meeting with the Claimant on 1 February, but scheduling a further meeting for 8 February).

187. In terms of the email stating that the Claimant wanted to be considered for both the TPC and MCM, which attached a copy of her CV for consideration, I am satisfied that that was the correct process for applying for those posts. In this tribunal hearing, Ms Dover was asked what else the Claimant was supposed to do, other than that, and she had no answer. At the time, the Claimant was not told that there was something different or additional that she had to do in order to apply for those roles.

188. The Respondent ultimately insisted on the meeting going ahead on 1 February. Again there was a covert recording by the Claimant, and I have a transcript.

189. During the meeting, it was confirmed that the Respondent had decided to go ahead with implementing the reorganisation as it had been notified to the Claimant on 19 January. (My finding is that the decision was to implement the new structure as per the slide pack circulated by Ms Dover on 29 December 2022, but that is not a document that the Claimant was shown at the time.) In other words, the Claimant's existing role would be deleted (which is my word, not the one that was used at the time) and the Claimant was told that that was the decision on 1 February.

190. The decision was also that the two proposed new rules (TPC and MCM) would be would be created.

191. On 2 February, the Claimant notified and the Respondent, and that she would wanted to be referred to occupational health. She wrote:

> In light of the conversations over the past 2 weeks, following my giving notice to SPAR of a medical procedure, I would like a referral to occupational health urgently

192. She sent this to an HR inbox and to Ms Dover. It came to Ms Mills' attention who sent a reply the same day, which stated, in full:

> Hi Jody
>
> Thank you for your email.
>
> I am a little confused by your email, as we have advised that you have access to Grocery Aid, WeCare and Bupa. Do you need the contact details?
>
> Just so you are aware, we do not have Occupational Health as a benefit that employees can access, and you cannot 'self refer' to Occupational Health. Occupational Health is used by the Employer to refer an Employee, should it be necessary.
>
> Many Thanks
>
> Lucy

193. Notably, there was a reference to BUPA (as there has been in Ms Gilmore-Gauci's email of 23 January).

194. The words used in the email make clear that Ms Mills was asserting, on behalf of the employer, that it was not necessary for the employer to refer the Claimant to occupational health in response to what the Claimant had written, or said, in the previous two weeks. As noted above, the Claimant's comments had included comments about stress, and Ms Mills had written back to the Claimant in response to some of those comments.

195. After the Claimant's email (sent at 13:05) and before Ms Mills reply (at 14:50), the Claimant and Ms Dover had a text exchange which included the Claimant notifying Ms Dover:

> I'm really sorry I quite stressed by the past couple of weeks, especially giving
>
> the impending procedure. I'm going home to work from home for the rest of the day. Thanks

196. Ms Mills and Ms Dover each knew what the Claimant meant by her reference to "medical procedure" in the email of 2 February. In any event, the following day, 3 February, the Claimant supplied a copy of the notification letter, regarding the surgery, as had been requested by Ms Mills. My finding is that it was clear to the Respondent throughout that the Claimant was going to use BUPA for the surgery. Private healthcare, via BUPA, was a benefit of her contract. It would not have

been logical for the Respondent to think that the Claimant had that benefit, but was not intending to use it. At the very least, no reasonable employer would have assumed that the surgery was on the NHS, and made decisions based on that assumption, without checking with the employee. However, based on the evidence presented to me, including the correspondence sent to the Respondent by the Claimant, and also based the various references to BUPA within the correspondence sent by the Respondent to the Claimant, my finding is that the Respondent knew, or believed, that the Claimant's intention was to use the medical insurance, as provided by her contract of employment, for the surgery that she was due to have on 13 February.

197. My finding is that they would have been consciously aware of that prior to 3 February had they given that matter any thought and that, prior to 3 February, they must have been at least unconsciously aware of it, because there had been no discussion that the Claimant was having any treatment other than that covered by her medical insurance. My finding is that Ms Dover and Ms Mills regarded usage of the medical insurance to be the default position, rather than the exception, if an employee – whose contract gave them medical insurance – was due to have medical treatment.

198. In any event, the letter that Ms Mills received on 3 February was sufficiently clear to convey to an HR professional that the Claimant's treatment was not via NHS, and my finding is that Ms Mills did not believe that it was via NHS.

199. For what it is worth, since it was a point of contention between the parties, my findings are that:

199.1 BUPA would not supply specific details to the employer about which specific treatment it was paying for in relation to specific employees.

199.2 Conceivably, it might supply some information to the employer about which employees had made claims on the policy, and / or about overall expenditure. However, even assuming that to be true, I am not persuaded that that would be in advance of particular treatment.

199.3 In any event, regardless of any information that the Respondent did or did not receive from BUPA, prior to the termination of the Claimant's employment, neither Ms Dover or Ms Mills had formed the opinion that the Claimant was intending to do anything other than use BUPA for the procedure.

200. The email which the Claimant sent at 17:25 on 3 February [Bundle 657] attaching the documents about the surgery came after she had emailed, at 13:28, that she wished to accept the MCM post. In that email, she had stated that she intended to first work out the 3 month notice period in her existing post. She said that she

believed that she would be entitled to a 4 week trial in the new job and asked for that to start at the end of the 3 month notice period. Ms Mills response to that had been to say:

> Thank you for your email, we will come back to you on Monday.
>
> In the meantime, please could you send me a copy of the letter confirming your surgery and how long you will be out of the business for?

201. There was a conversation between the Claimant and Ms Mills on 3 February and the Claimant covertly recorded it. On balance of probabilities, it occurred prior to the Claimant's email at 13:28.

202. During the conversation, the Claimant's comments included:

- I didn't quite, I'm trying to connect, sorry, I'm just feeling exhausted
- Honestly, I'm just feeling so exhausted today. I just need to, I'm drained.
- Exhausted. I'm exhausted
- I'm drained. [SPAR] has sucked every energy out of me with this whole thing. It's fine.

203. Ms Mills comments included:

- … However, with the marketing campaign manager one, because it is an absolute suitable alternative and it is the same level. If you wanted that role, you wouldn't even have to do an interview for it. You would just get the role because it's a suitable alternative. But obviously you do have a three month notice period. So that would need to be sorted. What are your thoughts?
- So although we would be able to give you role and let you do the role, it may not be that that role would be effective from, say we gave you the role today, you wouldn't be able to just start the role tomorrow because there'll be a few things that you would need to kind of mark off or whatever handover or do before you go onto the other role. But because you have a three month notice period, we have up to three months to do that is what I'm trying to say
- No. So you wouldn't have to work your entire notice. It just means that we have up to three months where there might be a period where you're moving into the other role. So you're not just going to one day drop that and run. Not that you would do that anyway, but it just gives us a little bit of time to do that. What's the word I'm looking for? {***the Claimant****: Transition?*} The transition, yeah. So for example, when [named employee] was in grocery and moved over to BWs, I know it's still trading, but it's pretty much the same thing. He had a three month notice period, but he didn't work that full three months in grocery and then move over to BWs. He had a little bit of a transitional period, so he worked a month of his notice and then did half and half and then went fully into his role. So that is something that we would do to ease you in and to ease you out of your old role as well. Obviously it's quite a big change, life change.
- Well, [salary and post title] would be the same until you've officially moved over. Probably. Yeah, but I just … [comment interrupted by the Claimant receiving phone call]

204. During this conversation, each of them expressly made some reference to potentially keeping some parts of their discussions hidden from the Respondent. Whether either or both of them was insincere about that is not a point that I need to decide. What is true is that the Claimant made unambiguously clear that she was treating at least some parts of the discussion as being "official". My finding is that what Ms Mills said about the possibility of notice being worked was said in her capacity as the HR officer assisting with the process on the Respondent's behalf. The Respondent (by Ms Dover) had formally notified the Claimant of Ms Mills' role. The Claimant, by her requests for certain things that Ms Mills said to be put in writing, was clearly regarding this as a conversation that was part of the redundancy exercise being carried out by her employer, and not merely an informal chat between friends.

205. At 5.31pm on 3 February 2023 [Bundle 657], Ms Mills responded to the details which the Claimant had sent about the upcoming surgery.

> Thank you for sending this over, much appreciated.
>
> If you could obtain a sick note from either the hospital or your GP once you have had your surgery, they will be able to advise of the time you will need off for recovery. If you could then email this over to me please, that would be great.
>
> Once your GP/surgeon advises you are well enough to return to work, you would need to obtain a Fit Note (from either your hospital or GP). Please could you also kindly email this over to me once you have it.
>
> I hope your surgery goes well, and wishing you a speedy recovery.
>
> Hope you have a good weekend

206. That email was sent on the Friday, and there were further exchanges on Monday 6 February. At 2.30pm, Ms Mills wrote [Bundle 667]:

> I hope you are welt
>
> Regarding your new role, you have asked for a 4 week trial period and before we make a decision we need to know the following:
>
> 1. You've led us to believe via emails that you are having a minor operation which we assumed was your rescheduled hernia operation from W/C 18th July 2022. Can you please confirm this is the case?
>
> 2. That procedure, you said would be a couple of weeks out of the office, but you are now saying 6 weeks. Is this the case?
>
> 3. Are you saying that you will be unable to work (even working from home) in that 6 week period?
>
> Please could you respond by return email? We require this information today

207. In the ensuing exchange of various emails:

207.1 It was stated that the Claimant would need a fit note to cover the period of absence on 6 February itself.

207.2 The claimant specifically mentioned that the procedure was a fibroid procedure and she said that she would endeavour to return to work as quickly as possible, subject to the advice of the consultant.

208. In due course, the Claimant received a formal letter dated 7 February [Bundle 671], following up from the 1 February meeting. The summary of what was allegedly said on 1 February contents was not different to what had been discussed on 1 February

209. The letter referred to the fact that the Claimant had wanted, or, at least, had agreed to take, the MCM post which had been offered to. The letter said the contract of employment would be issued. The letter referred to the fact that the Claimant had said she would begin the role after a three month notice period. The letter continued:

> … That reorganisation will begin on Monday, 13 February and there will not be sufficient work for you to undertake a 3 month notice period. It is not necessary and not required. Furthermore and in any event, if you are accepting an alternative position then your employment will not be terminating by reason of redundancy, and therefore by law there is no requirement for us to give you notice of termination in such circumstances, instead, the alternative role will represent a permanent variation to your employment contract, subject to the trial period I reference below.
>
> You have asked for a trial period which we will agree to. Indeed, given that the alternative role is different from your current role, we must offer you a statutory trial period of at least 4 weeks. Given that you have indicated that you will commence pre-planned sickness absence on 13 February for approximately 6 weeks, I suggest that we agree a trial period of 10 weeks, to allow you to undertake the new role when you return from sickness absence. This trial period will therefore begin on Monday, 13 February 2023. At any time during the trial period either we or you may terminate your employment if we consider that the alternative role is not suitable for you. In that instance, and subject to there being no other alternatives available, your employment would then be terminated by reason of redundancy. In that set of circumstances, we would of course pay you your original notice entitlement (at your rate of pay existing before acceptance of the alternative role) together with any statutory redundancy pay entitlement. If however, neither of us terminate the trial period before the end of the 10 weeks, then the alternative role will become a permanent change to your terms and conditions of employment from that point.
>
> In your email, you have said, “I have reviewed the employment law surrounding redundancies and noticed a few discrepancies with the information provided by HR around working my notice and the redeployment in a redundancy." Having taken advice, we do not believe this to be the case for the reasons we have set out above.
>
> We believe the above to be fair and reasonable and please confirm by return your acceptance of the alternative role and confirm that you will commence duties under this role on 13 February accordingly. If we do not receive back from you the signed contract by Friday 10 February 2023, then we will seek to conclude the redundancy consultation with you, and at that point it is likely that we will notify you of the termination of your employment by reason of redundancy. In that circumstance, you would of course be entitled to receive notice or (at our election) payment in lieu of notice and any statutory redundancy payment you are entitled to.

210. To the extent that this letter is relied on to say that the Claimant was aware from receipt that she would not be given notice of dismissal, but would be given payment in lieu of notice instead, that is not true. That is not what the letter says. It does assert that the Respondent would have the option of giving payment in lieu of notice, but expresses no opinions on the comparative likelihoods of notice / payment in lieu of notice.

211. The letter made clear what the Respondent proposed for trial period. That is, on the assumption that the Claimant would be on sickness absence for six weeks starting from 13 February, and then returning, she would have (up to) four weeks actually doing the job and therefore the trial period would, aggregating both periods, end ten weeks after 13 February 2023. (So around 24 April, approximately, though the date was not stated in the letter.)

212. The letter said that if the trial period was unsuccessful, then the Claimant's employment would be terminated by reason of redundancy. It plainly says that she would receive original notice entitlement at the rate of pay existing before the acceptance of the alternative role.

213. The Claimant was required to accept by Friday, 10 February. So 3 days after the date stated within the letter. In actual fact, the letter was not sent on 7 February. It was sent at 16:05 on Wednesday 8 February 2025 [Bundle 717]. The Claimant had chased for these documents, pointing out, amongst other things, her upcoming surgery. Ms Mills stated in correspondence that the delay was (in part at least) because the Respondent was seeking legal advice.

214. On Wednesday 8 February, there were exchanges between the Claimant and Ms Dover in connection with the Claimant's proposal that she either take special time off for training or, alternatively, that she take holiday. Both options were refused and the Claimant's email of 1346 on 8 February, [Bundle 692] said:

> RE: Time off for training
>
> No problem Lucy and Suzanne. I will not attend my training since the time off is not [authorised]. I will work both Thurs and Fri. I have already confirmed that I'm working today all day.

215. As per that email, it was the Claimant's intention to work Wednesday / Thursday / Friday (8 / 9 / 10 February 2023).

216. During the consultation period, the Claimant had had a hospital appointment and she had also had some time off for an illness as certificated by a BUPA doctor and notified to the Respondent. Subject to that, my finding is that she was actually present at work on 8 February.

217. On 8 February at 12:14 (so before receiving the letter purportedly dated 7 February), the Claimant wrote to Ms Mills and Ms Dover [Bundle 695]:

> I am writing to make a formal complaint on how the redeployment role is being managed, following the notice that my role is at risk of redundancy. I am writing to inform you that I am not in agreement to any new contract until you have served notice of redundancy to end my current role. As per the law, I am required to serve my notice period before any deployment role can begin on a 4 week trial.
>
> I kindly request a response from you regarding this matter by the end of tomorrow.
>
> Thank you for your attention to this matter. I look forward to hearing back from you soon.

218. At 15:29, [Bundle 694], Lucy Mills replied:

> Thank you for the email below and I am now responding as requested.
>
> You will be receiving a letter from us today, which we had prepared yesterday, but were unable to send to you, prior to us receiving your email below. You should receive this letter by close of business today.
>
> You can raise a formal grievance if you wish, however once you have read the letter and this email, you may wish to reconsider. In any event, your below is incorrect as you are being offered a suitable alternative role which you have accepted, therefore we are not required to give you notice in your current role. However, if you do not accept the suitable alternative role, then we would have to give you notice as part of a redundancy process.
>
> To be clear, the information you have below is incorrect.
>
> I am assuming that you may have read somewhere, or been advised, about termination and then re-deployment in the same role. This is an entirely different situation as part of consultation, we have found you a suitable alternative role, which differs to your current role.
>
> If you are unable to accept the alternative role by 10am on Friday, 10 February 2023 then we will have to close the consultation, and your role will be redundant. It is up to you to accept the role, or the redundancy option.
>
> Please consider the above however, we can formalise your complaint, but we will still need to close off the consultation by this Friday, and formalising the complaint may affect our ability to provide a suitable alternative if you do not now accept the alternative role of Marketing Campaign Manager.

219. So, notably, this email refers to a 10am deadline, which is not mentioned in the letter (purportedly dated 7 February, and written on that date according to Ms Mills' email).

220. At 16:20 on 8 February, Ms Dover wrote to the Claimant telling her to free up her diary for the following day. Ms Dover confirmed that the plan was to tell the team about the restructure.

221. On 9 February, at 8:11am, the Claimant had notified Ms Dover that she had a severe migraine and would not work that day. She said she would attempt to work at the following day. The Claimant acknowledged in that email that she had received the contract sent shortly after 4pm the previous day.

222. At 8.09am on 10 February, the Claimant emailed to say that she had a severe migraine and would not be able to work that day.

223. On Friday 10 February 2023 [Bundle 716], the Claimant sent an email at 9.56am. So this was prior to Ms Mills' stated deadline of 10am. It was to Ms Mills and Ms Dover and it said:

> I wanted to touch base regarding the recent developments in my continued employment at SPAR. I understand that my current position will be redundant today, 10/02/23. and I appreciate the offer of the alternative role. I expressed my willingness to trial the alternative role on 03/02/23, for four weeks after serving my contractual three months' notice in my current role. During the meeting on 01/02/23, you confirmed that the pay bracket for the alternative role is £50K - £55K. I was only made aware of the actual salary in a contract which was sent to me on 08/02/23, asking for me to sign by 10am on 10/02/23. At this point, I was not made aware of any other changes to the terms of my employment contract. I noted material differences to my current employment terms and conditions which make it more important to trial the new role being proposed. As I wrote in my email 08/02/23, I am not in agreement to signing a new employment contract by 10am today. I am not in agreement to starting the [alternative] role on 13/02/23 until I have completed the trial, post working my notice.
>
> I also wanted to bring to your attention your letter dated 07/02/23 (received 08/02/23) specifying that the trial period would commence for the new role from the 13/02/23 for a ten-week period. As you are already aware from my letter dated the 17/01/23, I will be undergoing surgery on the 13/02/23. It is impossible and impractical to start a trial whilst in surgery and in recovery. I also made you aware in that letter that the consultant estimated 6 weeks recovery time.
>
> To ensure there's no misunderstanding, I am willing to trial the alternative role on the basis which I proposed in my letter dated 02/02/23, which is to work my three months notice as per my current contractual agreement, then trialling the new role for four weeks.
>
> Thank you for your understanding and consideration in this matter. I look forward to continuing my employment with SPAR and finding a mutually agreeable solution.

224. Thus amongst several other things, the Claimant stated that it was her preference to be given notice to terminate her contract in the existing post. She made very clear that she was not seeking (i) termination of employment and/or (ii) payment in lieu of notice. She also alluded to differences between the new written contract and the existing terms of employment, but did not specify them.

225. She repeated again, as she had done several times during the process, that (i) she was going to commence a sickness absence on Monday 13 February 2023 and (ii) that was because of surgery scheduled for 13 February. She commented accurately that she had made each of them aware that the consultant estimated as six weeks as recovery time.

226. Ms Mills are responded to that at 10.27am stating (my emphasis):

> Thank you for your email in which you have confirmed that you do not accept the alternative role as Marketing Campaign Manager on the terms and conditions we sent to you on 8 February.
>
> Unfortunately, the consultation process ended at 10am this morning and therefore if you do not wish to accept the alternative role of Marketing Campaign Manager, your role as Strategy and Planning Manager is redundant from today, Friday 10 February 2023.
>
> Accordingly, unless we receive you acceptance of the alternative role by 4pm today, **we will proceed to give you notice of termination of your employment on the grounds of redundancy**.
>
> We are no longer in consultation with you, and are not prepared to accept your offer below for the reasons stated in our previous letter..

227. Thus, the email did not say that the Claimant would be dismissed with immediate effect on 10 May 2023. It said she would be given notice.

228. At 10.40am, the Claimant asked for the reasons for the comments made in the last paragraph.

229. At 10.44am, Ms Mills stated that the reasons were those in her email of 15:29 on 8 February (quoted above) and the letter dated 7 February (sent 16:05 on 8 February).

230. At 11.17am, the Claimant wrote:

> Hi Lucy, Suzanne,
>
> Please can you specify the reason my proposal was rejected for clarity, as I am not clear on your reason. As you can imagine, I have been sent many emails from you. I would like to be clear on the reasons. Alternatively, please reattach the specific email that answers the question which I have asked 'why has my proposal of working my 3months notice before the 4 week trial rejected'?

231. At 12:05pm, Ms Mills replied:

> The offer of the alternative role was subject to the terms being accepted. You have not accepted them even though the role is subject to a trial.
>
> We have been very clear on the letter provided which has been sent to you via eversign, please refer back to this. I have also attached previous correspondence whereby I have clarified that we are not required to give you notice in your current role.
>
> The decision is yours as to whether you accept the alternative role on our terms or you choose redundancy.
>
> The deadline of 4pm today remains.

232. The correspondence did not say that the Claimant's termination would be with immediate effect. It did not say anything either to add to, or contradict, any information previously given by Ms Mills or Ms Dover, or say anything at all about notice period.

233. The Respondent stuck to its position and the Claimant was sent a letter dated 10 February [Bundle 723].

> **End of Contract Confirmation**
>
> Following our consultation process, I can confirm that your role as Strategy and Planning Manager is redundant as of 10 February 2023. You have not accepted the alternative role of Marketing Campaign Manager.
>
> Your final salary will be paid into your Bank Account in the normal way by 27 February 2023. A P45 and final payslip will be produced after 27 February 2023 and sent to you via your personal email address that we hold on file for you …. If you wish for this to be sent to an alternative email address, please confirm this prior to 27 February 2023.
>
> Your final salary will include the following:
>
> Statutory redundancy payment £1142.00 payable without deductions for tax and national insurance. As you've been here 2 years 10 months at the date of leaving, we will round this up to 3 years employment as a gesture of goodwill, which is £1713.00
>
> Pay in Lieu of three months' notice £16720.00 subject to normal deductions in respect of tax and national insurance.
>
> Accrued holiday pay of 9.5 days subject to normal deductions in respect of tax and national insurance.
>
> Please download all payslips from the Moorepay system today, as access will cease on 10 February 2023. All of your benefits will also cease on this date.
>
> Please liaise with a member of the IT Team today to return your laptop and any other company equipment you may have. Please be aware, failure to do so could result in up to £800 being withheld from your final salary payment (the value of a replacement laptop) until the equipment is returned.
>
> The money will be released to you once we have confirmation that all equipment has been returned and is in good order.
>
> I have attached a copy of your Employee Leaving Checklist for reference, also attached is a copy of the SPAR UK GDPR policy for leavers.

234. Both parties agree that the effect of this letter was that meant it ended the Claimant's employment with immediate effect.

235. It also includes the sentence "*All your benefits will also cease on this date*." My findings are:

235.1 The Respondent knew that this referred to, among other things, the medical insurance.

235.2 The Claimant had not been expecting her employment to end with immediate effect. The following Monday, she did, in fact, attend the hospital hoping for the surgery to take place. She was informed that, because her employment (and therefore medical insurance) had ended, she would have to pay for it herself.

236. The hearing bundle does not contain a copy of the Respondent's notification to BUPA to end the Claimant's insurance cover. At [Bundle 737], BUPA sent an email dated 15 February to acknowledge that, as a result of the information supplied to it by the Respondent, the Claimant's cover ended with effect from 10 February 2023. The BUPA policy was cancelled by the Respondent. For whatever reason, the exact date of all of the Respondent's communications to BUPA are not contained in the hearing bundle. However, it is true that the Claimant was told on 13 February 2023 that the fact that her employment had ended meant that she could not use the BUPA insurance for the surgery, and it is true that the contract stated that the benefits would end with immediate effect, and it is true that the termination letter said the same thing.

236.1 Ms Mills comment to Mr Johnson that the surgery that the Claimant was having was not covered by BUPA is inaccurate. I accept the Claimant's account that it was and, as stated above, my finding is that the Respondent did know she was using her BUPA cover to pay for the surgery (and the Respondent's closing submissions, at paragraph 68, accepted that it was "likely" that Ms Mills knew).

236.2 To the extent, if at all, that the Respondent suggests that the Claimant could have had the operation on 13 February by not telling the hospital that her employment had ended I do not necessarily accept that was possible. However, and in any event, it would not have been reasonable for the Respondent to expect her to do that.

237. The documents at [Bundle 743-745] show that, on 20 February 2023, the Respondent ended the Simply Health cover, with an end date effective from 1 February 2023. I am not satisfied on the evidence, including the answers that Ms Mills gave to Mr Johnson, that the cancellation date of 1 February was 2023 was chosen by Simply Health. Rather, the limited evidence available leads me to conclude that, on 20 February 2023, the Respondent (acting by Ms Mills) made inputs into a portal. The Respondent first sought to input a termination date of 1 March, but, when that was rejected, input a termination date of 1 February. {I note the emails [Bundle 1531 to 1533] and have taken them into account when making this finding of fact.}

238. Following receipt of the email containing the letter dated 10 February [Bundle 723], just after midnight, at 2:15am on 11 February, the Claimant sent an email headed "Appeal Against Redundancy". This was sent to Lee Johnson and to the CEO, Louise Hoste. [Bundle 734]

> I hope this email finds you well. I am writing to express my concern about my recent redundancy and to respectfully request that SPAR reconsiders its decision. I am writing to you directly because I would like the appeal to be reviewed by a senior member of staff who was not involved in (he redundancy selection process.

As I understand it, there was an alternative role available and I indicated my willingness to accept it on a trial basis. As per the ACAS code of practice and the Employment Rights Act 1996, I am entitled to a 4-wcek trial period in the new role, which must start after the completion of my 3 months notice period.

"You have the right to a 4-weck trial period in an alternative role. This should start after you've worked your notice period and your existing contract has ended. This avoids any confusion or disputes if the trial does not work out", (https://www.aeas.org.uk/your-rights-during-redundancy/taking-another-job-with-your-employer. Trial Period)

However, I was asked to sign a new contract to begin immediately, therefore forfeiting my PILON, which is unfair.

I am writing to request that you consider my appeal, as I strongly believe that the decision to terminate my employment is unfair. I am hopeful that we can find a mutually beneficial solution. I would appreciate your urgent attention in the matter and look forward to hearing your response.

239. On 14 February, the Claimant sent a more details [Bundle 735]. These included:

• The reason for the redundancy was not genuine. In one breath, I was told it was as a result of reorganisation. In another breath, I was told that my performance had slipped from Aug 2022.

• The decision to make me redundant on the 10th of Feb was as a result of requesting leave to undergo surgery. My condition is. covered under the Equality Act.

• SPAR's decision to end my contract and all benefit including my health insurance has been detrimental to my health.

• There was lack of meaningful consultation and transparency in the redundancy process and I was unfairly selected.

• Alternative roles were available, one of which I agreed to cake but was still made redundant. For the other, it was claimed that I did not possess the skill set despite being asked to manage the promo reset process from a Marketing perspective.

• I was subjected to discrimination and harassment; was bullied and victimised by the same persons making the final decision.

• SPAR's refusal to release me for training during the redundancy process was unfair.

• I was locked out of the system by 4.15pm during my working hours, and without sufficient warning on Fri 10th.

240. Mr Johnson was appointed to consider the appeal. He contacted her promptly to suggest that they meet and there was back and forth correspondence about the date. They met on 23 February.

241. Before formally giving the Claimant the decision on the appeal, on 16 March 2023 [Bundle 767], Mr Johnson, wrote to the Claimant and effectively repeated at the previous offer of a trial period. There was now a difference in circumstances compared to when the previous offer was made: the Claimant's employment had ended; and she had received a redundancy payment and other payments. Mr Johnson said that the offer to reinstate her and give a trial period was conditional

upon her agreeing at to repay all the payments that she had received on termination.

242. The deadline to agree to the terms. and to sign and return the contract of employment was 22 March. Also by 22 March she would have to repay the payment in lieu of notice and the redundancy payments.

243. The Claimant did not accept the offer by that deadline (or at all). As part of her reply sent on 22 March at 15:49 [Bundle 772], the Claimant made various comments about the offer [Bundle 778]. Although those specific comments did not expressly reject the offer, the response as a whole (and specifically the final paragraph on [Bundle 779]) showed that she was not willing to accept it.

244. As well as meeting the Claimant [Bundle 746], Mr Johnson also met Ms Mills on 7 March 2023 [Bundle 753] and Ms Dover on 7 March 2023 [Bundle 758] and Ms Gilmore-Gauci on 13 March 2023 [Bundle 763]. He also exchanged further emails with the Claimant, including receiving her comments on the meeting notes, and on his 16 March letter. The Claimant made clear to him that it was her suggestion (i) firstly that she had been exhausted during the redundancy process and (ii) secondly that she had informed the Respondent, at that time, that there was tiredness/exhaustion connected to her medical condition.

245. In due course, [Bundle 785], by letter dated 29 March, the Claimant was informed that the appeal was not successful and nor was the challenge to the expenses dispute. I have noted the questions Mr Johnson put to the Claimant, and then her replies to those questions (in yellow in the document commencing [Bundle 776) and then his further queries (in green at [Bundle 781]) and the Claimant's further replies (in red in that latter document).

246. The outcome letter included:

> As noted above, your contract ended because your role was made redundant, which I find was for genuine reasons. As a result of your contract with SPAR ending, all benefits associated with that contract also ended.
>
> You accepted the new Marketing Campaign Manager role in principle which would have resulted in your continued employment with SPAR UK, but you did not sign the employment contract that was subsequently sent to you to confirm the same and did not therefore accept it on the terms that it was offered.
>
> As noted above, your health insurance would have continued had you signed the employment contract in respect of the role of Marketing Campaign Manager on a trial basis. The trial period was extended to ten weeks to take account of your forthcoming minor procedure.

Then having commented on the queries he had raised and the Claimant's answers, it continued:

> As a result, it is difficult to establish what detriment you allege you have been caused as a result of your dismissal (if any). I do not therefore accept that there has been a detriment to you as a result of your health insurance ending. However, to the extent

that there has been (which is not accepted), I find that this is as a result of your employment contract ending by virtue of your genuine redundancy.

247. My findings of fact re the expenses dispute are as follows.

248. There is a document in the hearing bundle which dates the travel expenses policy at as 7 December 2022. [Bundle 319]. This is probably the replacement of an earlier version, rather than the first ever written version. (It says the version number is 1.2).

249. Any earlier written version may or may not have said something different. However, the Claimant was not challenged on her evidence that previously she had submitted expenses claims, and had them paid, on the basis that the full cost of travel from home to the temporary work location was paid. In other words, she had previously done the exact journey about which there was a dispute at the end of employment, and had it paid in full. The Respondent had not previously stated that it was going to work out the notional cost of her traveling from home to the normal workplace, and then deduct that, before paying the balance (only).

250. On 10 February, there was correspondence between the Claimant and Ms Dover about expenses which I will address in the analysis.

251. In relation to medical benefits, there is a letter at [Bundle 743] regarding the cancellation of Simply Health. The two pages behind that are said to be an audit trail about the cancellation. My finding is that the evidence of Ms Dover and Mr Johns about the interpretation of this document are only educated guesses, and I am in as good a position as they are to interpret it. For what it is worth:

251.1 the document which says that the policy is cancelled with effect from 1 March 2023 has a timestamp of 16.38.27 on 20 February 2023

251.2 the one that says it is cancelled with effect from 1 February has a timestamp of 16:39:21 on 20 February 2023.

251.3 the former showed that there had been an entry at 1638 and it was pending processing

251.4 My inference is that it was the rejection of that entry which led to a decision to input 1 March 2023 as the end date.

Analysis and conclusions

252. I now go through the list of issues. I will deal with them in the sequence that appears to be most sensible, rather than in the order in which they have been drafted.

First heading in list of issues

253. I will start with section 1 of the list of issues under the heading disability status and knowledge. Paragraphs 1 and 2 speak for themselves

254. In terms of paragraph 3, the knowledge question really needs to be linked into the alleged prohibited conduct rather than answered in the abstract.

255. For section 13 EQA, direct disability discrimination, it is not necessary for the Claimant to be disabled, because a perception of disability could potentially be sufficient. What is required for section 13 is analysis of what motivated the Respondent to act in the way it did. If the Claimant's actual or perceived medical conditions did not influence it at all, then it follows that it did not directly discriminate against the Claimant within the definition in section 13.

256. For section 15 EQA, the test is whether the Respondent knew about the disability or could be reasonably be expected to know.

257. For alleged failure to make reasonable adjustments, the test also includes whether the Respondent could reasonably have been expected to know about the disability. However, an additional requirement is that it could be reasonably be expected to know about the disadvantage

258. With those distinctions in mind, it is useful to consider the comments made in A Ltd v Z UKEAT/0273/18/BA. Paragraphs 38 to 40 of that decision stated:

> 38. A Respondent will avoid the liability that would have otherwise arise under section 15 EqA if it can show that it did not know, and could not reasonably have been expected to know, of the complainant's disability. A finding that the Respondent does not have actual knowledge of the disability is thus not the end of the ET's task; it must then go on to consider whether the Respondent had what (for shorthand) is commonly called "constructive knowledge"; that is, whether it could - applying a test of reasonableness - have been expected to know, not necessarily the Claimant's actual diagnosis, but of the facts that would demonstrate that she had a disability - that she was suffering a physical or mental impairment that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities.
>
> 39. As to what a Respondent could reasonably have been expected to know, that is a question for the ET to determine. The burden of proof is on the Respondent but the expectation is to be assessed in terms of what was reasonable; that, in turn, will depend on all the circumstances of the case.
>
> 40. In considering what might reasonably be expected of an employer for these purposes, I am wary of reading across from the approach adopted to test reasonableness in other statutory contexts. Save that the use of this term imports a common objective standard into the assessment, I consider that it is most helpful to see it in the context of the particular provision in question.

259. The EAT went on to point out that analysing the steps that an employer would reasonably be expected to take to investigate further is only part of the questions

that the Tribunal needs to ask itself. Even if there were steps that reasonably ought to have been taken, but which were not, the Tribunal has to decide whether – had it taken those steps – the employer would have learned about the disability (or, at least, discovered the information identified as per paragraph 38 of the decision).

260. Paragraphs 1.1 and 1.2 of the list of issues refer to different disabilities, each of which is conceded. Knowledge issues fall to be decided separately for each.

261. Regardless of knowing the specific name of the condition, the burden of proof is on the Respondent (for the purposes of the complaints alleging disability discrimination within the definitions is section 15 and section 21 EQA) to show that it did not know and could not reasonably be expected to know about the disability.

262. A reasonable employer is one which is aware of the existence of the Equality Act 2010 (at least in general terms) and aware that employer's have some duties under that act to "disabled" employees. It might not know – without research and/or without taking advice – specifically what the definition of "disability" is in EQA, or what specific acts/omissions might place it in breach of EQA. However, the reasonable employer would not be one which was placing its head in the sand so that it could later deny knowledge of particular facts. On the contrary, a reasonable employer would be one that did not intend to breach EQA deliberately, and was willing, in principle, to take some steps to try to avoid inadvertently breaching EQA.

263. In this case, the Respondent did have actual knowledge of several relevant pieces of information.

263.1 Ms Dover was aware in 2022 that the Claimant had had an iron transfusion

263.2 Ms Dover and HR did know about the planned surgery on 2022, and did know that it did not take place as scheduled. My finding of fact is that the Respondent had no reason to believe that the reason it did not take was that the surgery was no longer required. The correspondence made clear that it was delayed. In the alternative, even if this employer – contrary to my findings – did believe that the surgery was no longer required, my assessment is that a reasonable employer would not have assumed that surgery was no longer required. It is common knowledge that sometimes proposed surgery dates are cancelled for one reason or another (such as shortage of hospital resources, or because the patient required other treatment first) in circumstances such that the plan is to rearrange it for a later date.

263.3 The correspondence in January - on 16 January, in particular, but also subsequently – made clear that the Claimant anticipated a six week recovery time.

264. In terms of what an employer would be reasonably be expected to know, it is certainly true that it is common place that a person might have surgery without being a disabled person (and/or without the fact of their particular type of surgery indicating that they have a disability).

265. However, one possible reason for surgery is that it is to provide treatment for an impairment which does satisfy the definition in section 6 EQA. Or, to a lay person, it is plain and obvious that one possible reason for surgery is that it is to provide treatment for a condition, which was having a significant effect on the employee's day to day activities, such that the benefits of a potentially successful outcome outweighed the risks and inconvenience of surgery.

266. In the circumstances of this case, from the details which the Claimant gave to the Respondent about her condition, and the need for surgery, and from the fact that they had known in March 2022 about planned surgery, and from the fact that the were given a specific date for the surgery (February 2023) that was almost 11 months after the earlier notification about the need for surgery, my decision is that the Respondent could reasonably have been expected to know about both the disabilities. To the extent that the Respondent argues that the Claimant would have withheld relevant information had it made further enquiries, my decision is that that is not true. The Claimant did not withhold relevant information. On the contrary, not only did she fully comply with all requirements to provide information and documentation, she also requested an Occupational Health referral, and was refused.

267. Indeed, the Respondent was actually aware (as shown by Ms Mills' email refusing the Claimant's suggestion of an OH referral) of the possibility of making an OH referral for the Claimant. It decided not to do so in this case.

268. Even to the extent that the Respondent did not have actual knowledge of the exact name of any medical condition with which the Claimant had been diagnosed, I am not satisfied that it made reasonable enquiries to find out. Furthermore, even to the extent that the Respondent did not have actual knowledge of the full details of the effects on the Claimant's day to day activities, my decision is that it could reasonably have been expected to be aware of those effects. Had it made reasonable enquiries in 2022, it would have learned of the effects then. Had it made reasonable enquiries on or shortly after 16 January 2023, it would have learned of the full effects shortly after making those enquiries (either by the Claimant supplying that information directly, and/or by the Claimant supplying correspondence from her treating clinicians, and/or by the Claimant

attending, and co-operating with the Respondent's Occupational Health provider).

269. In particular, as of 16 January, the Respondent had access to some information that the Claimant did not have, namely that it was about to start redundancy consultation, on 19 January 2023. My decision is that, by no later than 19 January 2023, a reasonable employer would have conducted the necessary enquiries to help it decide whether the employee was disabled or not, and, that the Respondent – had it carried out those enquiries – would known that the Claimant was disabled.

Unfair dismissal

270. I bow move to the unfair dismissal section of the list of issues, see paragraph 41 of the list [Bundle 275].

271. In terms of the reason or principal reason for the Claimant's dismissal, I am satisfied that that was redundancy.

271.1 I am satisfied that the Respondent's proposals as outlined in the slide deck circulated in December 2022, and in Ms Dover's statement, were not a sham. They represented a genuine intention to reorganise the work which was performed by the Respondent's employee.

271.2 The implementation of those proposals did mean that the Respondent had a reduced requirement for employees to do the specific type work that the Claimant had been performing. She was the only employee doing that work, and her particular role was going to effectively disappear if the proposal was adopted. It was not the case that all the duties themselves would disappear; rather the proposal was that those duties would be redistributed.

271.3 It is not the case that all of the duties were going to a single new post that was purportedly created to replace the Claimant' post. That is, it was not true that a new employee was going to be doing the same job as the old employee, just on a different contract or different rate of pay.

271.4 Rather, the Claimant's actual job itself would no longer exist. The proposed new jobs in the new structure were different to the Claimant's role, not just in terms of pay, or position in hierarchy (though those were different too), but in terms of duties.

271.5 There was, therefore, a "redundancy situation". I will comment again about what led to the dismissal when discussing the EQA complaints and the burden of proof, but, for now, suffice it to say I am satisfied that the termination of the Claimant's employment was wholly or mainly attributable to the redundancy situation. [If I was wrong about that, then my assessment

is that there was a genuine reorganisation which would potentially mean that the dismissal was within the definition of "some other substantial reason".]

272. Under the heading "redundancy issues", paragraph 42 of list of issues sets out some questions. The introduction asks:

> Did the Respondent act reasonably in the circumstances, including its size and administrative resources, in treating redundancy (or, alternatively SOSR) as a sufficient reason for the Claimant's dismissal? (ERA 1996, s 98)? In particular

273. My ultimate conclusion in this case is that there has been an unfair dismissal.

274. I will go through the sub paragraphs of paragraph 42. The full wording of the questions is as set out above.

274.1 Point one asks whether the Respondent gave reasonable warning. My assessment is that, as things stood on 19 January 2023, the information given to the Claimant about the proposed redundancy was not so unreasonable that it was outside the band of reasonable responses. I say that without losing sight of the fact that it is the reasonableness of the process as a whole which needs to be assessed. It is slightly artificial (and could lead to error) to analyse each step in the process and purport to say, for each step, whether it was inside or outside the band of reasonable responses. However, my assessment is that, by giving the warning on 19 January 2023, that was not too late, provided the employer was willing to be flexible, and react to points raised during the consultation process, about the date on which the consultation would end and the final decisions made. It is certainly true that the proposals had been discussed without the Claimant's knowledge for quite some time prior to 19 January. Version 3 of the proposal was circulated amongst senior employees on 29 December 2022, and so versions 1 and 2 were prior to that. However, that is not unusual or unreasonable in itself. If an employer becomes aware that it will need to reduce staffing costs in the very near future, then fairness might require it to start consultation with employees even before a plan containing specific details of which jobs are proposed to be cut is formulated. However, in other circumstances, there might be many times when the directors or senior employees mull over possible reorganisation plans, not all of which become firm proposals. There can be good reasons for not worrying employees unnecessarily; in any event, on these facts, the employer's failure to warn the Claimant in November 2022, December 2022 or the first half of January 2023 was not, in itself, unreasonable. The most significant factor for reasonableness of the warning is whether, once the proposals are announced, there is sufficient time for adequate consultation before the proposals need to be implemented. Where there is a hard and fast implementation date, then the employer needs to bear that in mind when

selecting the date on which it will give the warning. Whereas if the implementation date is potentially flexible, there is nothing inherently unfair about proposing a fairly short period of time between the date of the warning and the date of implementation, so long as the employer is willing and able to extend the proposed consultation period where appropriate. Subject to what I have just said, it would not be outside the band of reasonable responses to initially propose a consultation period of two weeks.

274.2 Point 2 of paragraph 42 of list of issues asks whether Consultation took place at a formative stage. There was no variation by the Respondent between the proposal made to the Claimant on 19 January 2023, and the plan which was implemented. That, in itself, does not demonstrate that there was no consultation at a formative stage. The question is whether or not the Respondent was potentially willing to amend any of its proposals, or processes or proposed processes. I will comment on this below.

274.3 Point 3 asks if there was a fair basis for selecting at the Claimant for redundancy, including pooling. The only real suggestion put forward by the Claimant as part of this litigation is that there could have been a pool of 2 posts: hers and Laura's. I am not satisfied that the Respondent had a closed mind about that. Had it been the case that the Claimant had put forward that suggestion and it had been rejected and then the evidence to the Tribunal would include evidence about what reasons (if any) were given to the Claimant at the time, for refusing the Claimant's suggestion. I would then have to decide whether I accepted that the Respondent had genuinely considered what the Claimant had suggested before rejecting it. If the evidence showed that it was just going through the motions and it already decided that there was only ever going to be a pool of one regardless of what the Claimant said, then that might be unreasonable. However, the Claimant did not make the suggestion to the Respondent as part of the consultation. She was aware from her conversations with Lucy Mills that suggesting that other people should be placed at risk, either as well as, or instead of, the Claimant was something she could potentially put forward. At the time, the Claimant and Ms Mills treated the conversation as one between friends (and not part of the consultation process between employer and employee), but he evidence does not show that the Respondent would not have been willing to consider comments from the Claimant about the redundancy pool had she made any. It was not inherently unreasonable of the Respondent that it did not initially place Laura Webb at risk of redundancy. There was a rational reason for the Respondent – in the first instance at least – to regard Ms Webb's post as one which was not significantly affected by the reorganisation proposals in the sense that the duties of that post were not being divided up and either ceasing or being redistributed to other posts, whether existing or new.

274.4 In terms of paragraph 42.4 of list of issues, it is not my role to substitute my decision (about who should have been in the pool) for that of the employer. The question is whether or not the Respondent has acted reasonably or whether it acted in a way that outside the band of reasonable responses. Although the slide deck circulated by Ms Dover on 29 December 2022 was not sent to the Claimant at the time, the document does explain the process by which Ms Dover came to the view that the Claimant's existing post, as well as some others, should be deleted and that there should be new and different posts created. It was not unreasonable for Ms Dover to decide that existing posts other than those proposed for deletion were not being changed to the extent that the existing post holders should be placed at risk of redundancy, either in the same pool with the Claimant, or at all.

274.5 Paragraph 42.5 of list of issues discusses whether the Respondent failed to genuinely offer the MCM role. It then brings in various other matters in the paragraph and subparagraphs, including about TPC.

274.5.1 For TPC, it is abundantly clear that the Respondent – acting through Ms Dover - actively dissuaded the Claimant from going forwards, despite receiving her CV, and knowing the Claimant wanted to be considered. The Respondent could have, but did not, simply said that the Claimant would be interviewed and a decision made at the end of the process. It could have carried out a shortlisting exercise, and, if the Claimant did not make the cut following a fair shortlisting process, have told her so. Instead of doing either of those things, the Respondent specifically discouraged the Claimant from pursuing that post. The Claimant saw that the Respondent was saying that she would not be successful if she did seek to pursue the matter; that was an entirely reasonable inference for her to draw. (Indeed, Ms Dover does not seek to argue otherwise, but rather defends the alleged reasonableness of giving that information to the Claimant at that time.) Given the Respondent's stance, the Claimant did not push further for an interview / appointment to TPC.

274.5.2 The position is different in relation to MCM. As stated in the findings of fact, there was an offer made. So regardless of whether a different offer could have been made [different start date, different trial period, and so on] the actual offer that was made was an offer that was clear and was capable of acceptance. That is, the Claimant could have said, words to the effect of, "Yes. I will agree to your proposal. I will sign this contract and I will be campaign manager with effect from 11 or 13 February". She did not do so.

274.5.3 There is no evidence from which I could conclude that the offer was anything other than genuine. I am satisfied that, had the Claimant purported to accept it, unconditionally, on the terms offered, the

Respondent would have followed through with what was stated on the face of the offer (being change of job/contract with immediate effect, trial period, but redundancy payments at old rate of pay if the trial period was not successful).

274.5.4 I do not see anything unreasonable about the Respondent's pointing out to the Claimant that the role was more junior than the one she was doing and/or that the salary was less that than she was and currently on. It has not been explained to me why the role was supposed to be £55,000, according to the 29 December slide pack, but was £50,000 when it was offered to the Claimant. However, the Claimant did not see the December documents. The Respondent reiterating to the Claimant that its stance was that she would be paid £50,000 per year if she did accept the MCM post was not unreasonable; on the contrary, if those were the terms it was offering her, it would have been unreasonable to fail to be clear about it.

274.5.5 In terms of paragraph 42.5.1 of list of issues, the word "statutory" is used as part of the phrase, "the Respondent requested that the statutory trial began on 13 February". I quoted part of the letter dated 7 February (sent to the Claimant after 4pm on 8 February) [Bundle 671] in findings of fact. Immediately prior to that extract, the letter had stated:

> On Friday. 3 February 2023, you emailed myself and HR to confirm acceptance of the alternative role of Marketing Campaign Manager which was offered to you, as an alternative to redundancy during the course of our consultation with you. As a result of your confirmed acceptance of this alternative role, your new role will begin on Monday, 13 February 2023 and a new Contract of Employment will be issued to you.
>
> In your email of 3 February 2023, you asked if you could begin the role after a 3 month notice period. As explained to you during the consultation process, the reason the rote of Strategy and Planning Manager was at risk, was because of a reorganisation within the Marketing Team and the role was no longer required. …

The reference to "statutory trial period" has to be seen in that context.

274.5.6 Strictly speaking, the letter made inaccurate and misleading comments about "statutory trial period". Part XI ERA and Part X ERA are addressed at different matters. Part XI sets out the circumstances when an employee is entitled to a redundancy payment, and the circumstances in which they might lose that entitlement. An employee might lose entitlement if, after notice of dismissal – by reason of redundancy – has been given, they are offered suitable alternative employment in circumstances in which the offer meets statutory requirements. There is always a "statutory trial period" in those circumstances. However, read as a whole, the letter at [Bundle 671] was purporting to say that the Respondent would not be giving the Claimant notice of dismissal, but rather was proceeding on the

basis that the offer was of an agreed variation of contract. The letter may or may not have amounted to an offer of a contractual trial period (similar to that discussed in Inchcape Retail Limited v Large UKEAT/0500/03), but – given both its timing and its wording - would not have served as the type of offer that might have denied the Claimant the right – granted by Part XI ERA - to a redundancy payment. However, I am not tasked with considering the Claimant's right to a redundancy payment (the Respondent paid that), but rather her rights, as per Part X, that she not be unfairly dismissed.

274.5.7 My decision is that there was nothing confusing about the Respondent's actual proposal for trial period as set out in the letter. Regardless of whether or not the Claimant thought it was unreasonable that her salary would reduce for the period while she was off sick, the letter itself made clear that she would change to that new job's new pay and conditions immediately, but she would not be expected to start work in the "trial period" (as it was described in the letter) until the end of the six weeks anticipated absence. Further, it was clear that if the trial was unsuccessful, she would not lose out financially in terms of redundancy pay, because it would be calculated based on her old rate of pay in those circumstances.

274.5.8 There was an important point about which the letter was silent, which was about what would happen if the Claimant's recovery took longer than six weeks. (In express terms, it was also silent about what would happen if it took less than six weeks, though I think it is plain enough that the overall duration of ten weeks for the trial would not be shortened in those circumstances). In other words, if the recovery took eight weeks, would the trial then be extended to twelve weeks (sickness period plus four more weeks). Further, what if the sickness absence was more than ten weeks?

274.5.9 In my assessment of the overall reasonableness of the Respondent's consultation, I do not think that it was unreasonable that the Respondent's 7 February letter (supplied to the Claimant on 8 February) failed to expressly address the question about what would happen in the event that the absence lasted longer than six weeks. It certainly would have created a potential problem had the Claimant purported to accept the offer, and then the absence had lasted more than six weeks. However, that is a separate issue to whether it was unreasonable for the Respondent to fail to specify the point of its own accord. This is not a case where the Claimant asked the question and the Respondent refused to answer it. She did not ask for clarification of the issue mentioned in the previous paragraph when writing to the Respondent.

274.5.10 Paragraph 42.5.2 of list of issues contains a reference to what Ms Dover said on 1 February. The exact quote is [Bundle 642; timestamp at 2806]:

> Okay, well I'll check back. I suppose the issue for me here really is, Jody, is that you are wanting to go into a job that I'm not sure is the total sort of skillset for you. We're also, there's a performance issue. I'm feeling at the moment as well, and I don't want you to go into that job and we're immediately going to put you onto a PIP and then at the end of that, things may not work out and you are going to end up walking away from the business with nothing. I just want you to sort of think really carefully about that.

274.5.11 My interpretation is that Ms Dover was not saying that that it was automatic that if the Claimant went into the new role then she would be put on a performance improvement plan. She was saying that it was a possibility. She was saying that in the context of potentially encouraging the Claimant to think about the disadvantages of taking the new job. However, after the meeting, the Claimant received an offer of the MCM job.

274.5.12 The other reference in paragraph 42.5.2 of list of issues is to what Ms Mills said on 3 February, which was also prior to the 7 February letter. This was [Bundle 662; timestamp 7:31].

> Yeah, as a friend, what if you go into this role, you hate it and then because you hate it, that gets picked up on, then they could performance manage you out. That is my off the record friend concern.

274.5.13 Immediately prior to Ms Mills saying that, the Claimant had (by her comment timestamped at 7:16) consented to the fact that what Ms Mills was about to say was Ms Mills' own advice to the Claimant, and not part of what the Claimant's employer was formally saying to the Claimant (through Ms Mills). In any event, Ms Mills' remark could not be seen as supporting an intention by the employer to deal with (alleged) past performance issues (in the old job) by way of performance management in the new job..

275. In terms of paragraph 42.6 of list of issues, the Respondent has not satisfied me that there was an anything crucial about the date of 13 February that was independent of the fact that they were aware that that was be the first day of the Claimant's sickness absence. That is, the Respondent's argument in this litigation has been that the new structure had to take effect from 13 February 2023 and therefore, for that reason (i) the consultation could not last until after 13 February and (ii) the Claimant could not be given a notice period that was due to expire later than 13 February. However, beyond simple assertion that the Board had instructed that the restructure be carried out "asap" and "without delay", no particular facts have been proven to demonstrate the importance of 13 February. It is notable that, following that instruction on 15 November, there

was a 6 week time period until version 3 of the proposals was circulated on 29 December 2022, and also the 29 December document envisaged starting consultation in the week commencing 16 January 2023. So the CEO did not regard a 2 month gap between the 15 November 2022 instruction and the start of consultation as being contrary to the orders given. The 29 December document did not state that the new structure would be in place on 13 February 2023; my finding is that the recipients of that 29 December document would not have anticipated that an external recruit to the post of TPC could have started work by 13 February 2023. On the contrary, quite apart from the time needed to advertise and select such a person, anyone who was already in employment would be likely to have to serve out a notice period for their existing employer before starting to work for the Respondent.

275.1 One of the reasons given by the Respondent for not giving the Claimant a notice period (this was said at the time, and it has been said in this hearing) is that there was no work for the Claimant to do. However, when the Claimant asked for time off and in the week leading up to the dismissal date that she was told that she could not take time off because there were important things for her to do in terms of arranging a handover. I will deal with the comparator in more detail when discussing the EQA complaints; for now it suffices to say that Cath Mcllwham did work part of her notice period, because there was work for her to do, and Ms Mills' said to the Claimant that working part of a notice period would not be unusual. My assessment is that the reason that the Respondent wanted the Claimant to complete all handover work by Friday 10 February 2023 is that she was going to be on sick leave from Monday 13 February. There was no reason – other than her sick leave – that she could not otherwise have done handover work during a period after she had been given notice of dismissal, and was working that notice.

275.2 Furthermore, I have not been satisfied that - if it was not for the fact that the Claimant was due to be on sick from Monday 13 February (and that Friday 10 February was therefore scheduled to be her last working day before a six week planned absence) - there was any specific reason why the process could not have carried on past 10 February. There was no other reason that the Claimant could not have been given a bit longer to consider whether to take the MCM post.

275.3 It can be said against the Claimant at that she did not highlight the specific concerns that she had about the actual terms and conditions in the new contract. She did not expressly ask the Respondent for a discussion about whether specific terms could be changed.

275.4 However, likewise, it can be said against the Respondent that they also did not seek to explore that topic. They did not ask which specific terms she

objected to, or what specific amendment she was seeking before being willing to sign the contract. The Respondent knew that the Claimant had asked for postponement of the 1 February meeting, and knew that she had wanted to be accompanied to that meeting (and for it to take place on 8 February) by a trade union representative.

275.5 The Claimant could not have asked for any amendments to the written contract before she received it. In all the circumstances, it would not be reasonable for the Claimant to be criticised for not specifying, on 1 February, exactly what should be written in the MCM contract. Furthermore, any criticism that she was not clear enough about the exact questions that she wanted to have addressed once she received the proposed written contract have to take into account (i) the amount of time she was given to respond, which was initially stated to be 2 days later and (ii) the fact that the Claimant had made clear that she was at finding the process stressful and (iii) had asked for time to arrange union representation and (iv) she had suggested that she be referred to occupational health and received a firm "no" from the Respondent.

276. Given that the Respondent had said that there was such urgency for the 1 February meeting that a one week delay could not be accommodated, there is no satisfactory explanation for why the Respondent took until after 4pm on 8 February to actually provide the documents. The Respondent told the Claimant on 1 February that her own role been deleted and the Claimant made clear on 1 February that she was willing to move to the MCM role in the new structure, albeit the arrangements she proposed for that were not the same that the Respondent put forward.

277. Further, the day after the Claimant received the documents, the Claimant was off sick that day as the Respondent was aware.

278. Even the original requirement for the Claimant to reply to the offer (sent after 4pm on the Wednesday) by 10am on the Friday was a short one. It then turned out that the Claimant was off sick on 9 February and 10 February. The Respondent could not have known that on the Wednesday, when they set the deadline, but they did know it by the Friday when they made the decision to dismiss with immediate effect. Even for a non-disabled employee the timescale between receiving the written contract for the new job, and the effective date of termination, was outside the band of reasonable responses, in all the circumstances. It was unreasonable to require the Claimant's decision on the written contract by 10 February. Amongst other steps the Respondent could have taken to avoid the Claimant having such a short time to consider the documents, it could have:

278.1 Had the contract documents ready to hand/email to her during/immediately after the 1 February meeting.

278.2 Prepared the documents and sent them to her promptly after she agreed in principle to the MCM post.

278.3 Deferred a decision about whether to issue notice of dismissal to her (given that – as per their stated position in the 7 February letter - it was arguing that there was no reason to issue notice of dismissal to her if she agreed to take the MCM post) until after she had more time to consider and respond to the documents sent at 16:05 on 8 February.

278.4 Given her notice of dismissal, but on the basis that she could take some part of that notice period to decide whether she was willing to accept the terms on offer for the MCM post. This would not have had to effect the overall timescale because the ten week suggested "trial period" would have correspondingly been reduced – presumably – by whatever period, within the sickness absence, the Claimant was given to make up her mind.

279. My assessment is that it would have been outside the band of reasonable responses to have expressly and clearly stated (word to effect of) "*if you do not accept these terms – by returning the signed contract - by Friday 10 February then we will dismiss you with immediate effect, and with payment in lieu of notice, on 10 February*." However, the Respondent was not even clear that the effect of not agreeing would be that there would be dismissal without notice (and with payment in lieu of notice instead). I acknowledge that the Respondent extended the deadline from 10am on 10 February to 4pm on 10 February, but it was only after the deadline expired that it was revealed that the consequence was – as far as the Respondent was concerned – that there would be dismissal without her remaining as employee for any part of any notice period.

280. Paragraph 42.7 of list of issues asks how many consultation meetings were held. I think that is a misunderstanding of what I have to decide. The labels the parties gave to meetings do not necessarily matter. The substance of what was discussed during the process as a whole, not just in the meetings, but in the correspondence between meetings, is what matters. Certainly, where the employer has been clear to the employee that (i) it is consulting about redundancies and (ii) the meeting is an opportunity for the employee to ask questions, or to receive answers, or both, the label "consultation meeting" might be used. However, there is no legal definition of "consultation meeting" and there does not need to be.

280.1 It is not in dispute that there were three meetings between the Claimant and Ms Dover with HR in attendance: 19 and 24 January and 1 February 2023.

280.2 The 19 January meeting supplied a warning of the proposed redundancies.

280.3 On 24 January, some matters were discussed and it was planned to meet again.

280.4 On 1 February, the Respondent told the Claimant and that it was going to go ahead with the proposals to delete her role.

280.5 There were some discussions after 1 February. The Respondent made clear that, as far as it was concerned, the discussions about whether the Claimant's existing role should continue were over. The Claimant had agreed to accept the MCM post rather than leave the Respondent's employment, but the parties had not reached agreement about the date on which that new contract would begin, or about all the terms of that contract.

280.6 By 10 February, the Respondent was making clear that it was not willing to further "consult" about the terms on which it offered the alternative role. It did give her an extended deadline of 4pm to sign the contract, but there was no willingness n the Respondent's part to have any discussion or to answer any questions whatsoever that the Claimant had about the offer or the proposed new contract.

281. In terms of sub paragraphs 42.7:

281.1 It is was made clear by the Claimant that part of the reason for wanting a companion was that she was experiencing stress and exhaustion.

281.2 The Respondent did send an email stating that it would be unfair on all parties to wait until 8 February to hold the meeting that had been scheduled for 1 February. As already stated, the Respondent has not satisfied me that there was any other person whose employment situation was uncertain pending resolution of the Claimant's situation. Further, even if it wanted to press ahead with the 1 February meeting (which it did do), there was nothing preventing the Respondent agreeing to meet the Claimant and her union representative on 8 February.

282. In terms of paragraph 42.8 of list of issues, these questions are repetitive of matters already addressed.

282.1 I have the transcript of each meeting, so I know what was said.

282.2 The fact that the 19 January was fairly brief does not mean that it was unreasonable not to have a longer meeting. The Respondent did not terminate the meeting.

282.3 The Claimant was told she could have a union representative for future meetings. Later she was told that she could not.

282.4 The 24 January meeting was not "cancelled". I am aware that at one point in the meeting she was told that the next meeting (which turned out to be 1 February) would be a replacement for 24 January. However, there were some discussions on 24 January.

282.5 The Claimant was told in advance of the 24 January meeting that any companion had to be a work colleague. Unreasonably, during the meeting, she was told that she should have realised that the Respondent would have allowed her to bring a trade union representative who was not a work colleague. Subsequently, she was told in writing by Ms Mills, in a letter sent on behalf of the Respondent, that she could not bring a trade union representative to meetings; she was told that there was no right to be accompanied at all, but the Respondent would allow her to bring a work colleague. Later, in a conversation that was covertly recorded without Ms Mills' knowledge, Ms Mills claimed – unreasonably and falsely – that her letter had only meant that the Respondent would not defer the meeting until 8 February to allow union representative, and had not meant that she could not have brought a union representative to the 1 February meeting.

282.6 The 1 February meeting was "final" in the sense that the decision to implement the structure - meaning that the Claimant's existing job would disappear - was made. It did not finalise everything. Still to be resolved were: whether the Claimant would take the MCM role (something that she agreed to do in the meeting) and if so, from which date and on which terms; would the Claimant be dismissed by reason of redundancy and, if so, would that be with full notice, with part notice, or no notice (with payment in lieu being made for any notice not given) and what would be the date of termination of employment.

282.7 I have already said that I am not persuaded by the Claimant that the Respondent was not willing to consult about the pool; she did not make representations about it.

282.8 During the three meetings, the Respondent was not persuaded by any arguments the Claimant put forward and that her own role was already the same as TPC. That does not persuade me that the Respondent failed to consult about that particular issue.

282.9 I do think it was unreasonable for the Respondent to effectively tell the Claimant that she had no chance of been selected for TPC.

282.9.1 They were planning to interview candidates, but the comments made to the Claimant, by a person involved in the recruitment, made clear to the Claimant that there was no point in her having an interview, because the Respondent was not going to appoint her.

282.9.2 The background to the creation of the new structure was that the claimant had been led to believe by Ms Dover that she, the Claimant, would be appointed to a newly created senior role in due course, if changes affecting the Claimant's job arose from the project that she, the Claimant, had been involved with.

282.9.3 It was not necessarily unreasonable for the Respondent / Ms Dover to change her mind, and to decide that the new job was too different to the Claimant's existing post for the Claimant to simply be slotted into it. However, given the background, it was unreasonable for the Respondent to be unwilling to even offer her an interview.

282.9.4 The words in the transcript speak for themselves. I reject the Respondent's contention that it was the Claimant's choice not to go ahead with an interview. The Respondent's argument that the Claimant had the option of insisting on an interview is not realistic. There is a power imbalance in any consultation meetings, and, the message given to the Claimant was that she would not be successful in obtaining the TPC post; the Claimant did make clear that she wanted to be considered for TPC and the Respondent repeatedly made negative comments about that suggestion until she accepted the inevitable and did not push it any further. The Respondent did not consult, with an open mind, about whether the Claimant could become TPC.

282.10 It is true that the Claimant informed the Respondent that she was exhausted. It is also true that she requested an OH referral and this was refused.

283. In terms of paragraph 42.9 of list of issues, my decision is that this is not an issue that is relevant to whether the dismissal was unfair. Had the Claimant been given notice, then the cancellation date ought to have matched the expiry of the notice period. For a dismissal date of 10 February, the correct termination date of the Simply Health benefits, in accordance with the Claimant's contract of employment, was not any earlier than 10 February. However, the decision to cancel with effect from 1 February was not made on 1 February. Indeed, the decision was not made until 20 February, as discussed in findings of fact. The date of cancellation of Simply Health does not tell me anything useful about whether the redundancy consultation was meaningful and genuine.

284. In terms of 42.10 of list of issues, it is clear that, and that the Respondent knew that the cancellation the Claimant's BUPA health care insurance would mean that

she could no longer use it. I am satisfied that Ms Dover and Ms Mills did know (whether they consciously addressed their minds to it or not) that the Claimant's surgery, planned for 13 February, was to be paid for by the health care insurance that she had as part of her contract of employment. No reasonable employer would have failed to take account of whether a termination of employment, with immediate effect (no notice, but payment in lieu of notice instead) on 10 February would mean that the Claimant could not utilise the BUPA health care insurance the following Monday. I do not accept that they believed (incorrectly) that it could still be used. The argument put forward in this hearing is that they did not know, and could not reasonably have been expected to know, that the Claimant's operation was being paid for by BUPA health care insurance. I reject that, firstly because they did know (in the sense that it was an obvious point, and they had no reason to believe that she was either using NHS or paying out of her own pocket). In the alternative, no reasonable employer would have failed to ask the Claimant even if (contrary to my finding) there was any reason to doubt that she was intending to use the health insurance to pay for the procedure.

285. In this hearing, the Respondent sought to challenge the Claimant on her account that she was told, on the Monday, that she could not have the procedure (unless she paid for it herself). However, the Respondent has not produced any evidence that BUPA would have paid had the surgery taken place. It was entirely reasonable and honest of the Claimant to inform the hospital, when she attended, that her employment had been terminated. Not doing so, would have been a grave risk. She might later have been accused of withholding relevant information, and been given a bill for the surgery and/or accused of dishonesty. The express written terms of her contract of employment made clear to the Claimant that her BUPA cover ceased on termination of employment. To the extent that the Respondent seeks to argue, in this hearing, that the Claimant should have drawn that fact to the Respondent's attention during the consultation, I reject that. The Claimant did comply with all requests for evidence about the surgery, and she also argued that she should be given notice to terminate her existing post. She had discussions with Ms Mills about notice. She was not told, before receiving the termination letter, that if the Respondent decided that she had not agreed to accept the MCM post on the terms on which they were offering it, then the alternative was termination with immediate effect on 10 February. No reasonable employer would need to be told, by the employee, that the effects of immediate termination of employment would be immediate termination of the health insurance. Any reasonable employer would (i) firstly be aware of that fact and (ii) make decisions about termination date which took account of that fact.

286. As of 10 February 2023, the Respondent's choices included, amongst other things, deciding to dismiss the Claimant that day with a termination date of 10 February or deciding to dismiss the Claimant that day with a termination that

followed a three month notice period, so around 10 May 2023. [Other options included not making a decision to dismiss that day, but continuing the discussions, or else dismissing, but with less than three months notice (and paying in lieu for the balance); so the notice could have been given to expire shortly after the Claimant's surgery, for example after the six week anticipated recovery time}].

287. My assessment is that – for a redundancy dismissal – the part of the employer's decision that relates to whether the termination date is with immediate effect (and PILON) or else on expiry of a notice period is relevant to fairness. While the Respondent's reasons for the dismissal are judged as of the date it makes the decision, things that occur later (such as during appeal process) can also be relevant. Where the employer dismisses with notice, things that happen during the notice period can also be taken into consideration. For example, if an employee has been dismissed because of a downturn in business, and is serving the notice when a large amount of new business comes in, that fact might be relevant to the fairness of the dismissal if the Respondent was unwilling to offer to cancel the notice.

288. In terms of paragraph 42.11 of list of issues, the Claimant has not satisfied me that the Respondent was unwilling to change any aspect whatsoever of the redundancy proposals from 19 January onwards. I have already commented on the timetable.

289. In terms of both paragraph 42.11 and 42.12 of list of issues, as I will set out when dealing with the EQA complaints, I am satisfied that the Respondent was not willing to consider carrying on with the consultation process after 10 February.

290. The Respondent refused to allow the Claimant time off to look for work or training; other than the point made already – that this shows that there was work to be carried out for the Claimant's role as of the week commencing 6 February 2023 – I do not consider that the refusals of time off help me to decide the unfair dismissal issue.

291. I do not regard Ms Gilmore-Gauci's involvement as the HR attendee on 19 January or 24 January as something that was unreasonable or which makes the process unfair. There had been historic disagreement between them; however, there was no deliberate intention on the part of the employer to create any hostile / biased / unfair process by the presence of Ms Gilmore-Gauci.

292. In terms of recruitment for the two new roles, I have commented on this already.

292.1 It was not unreasonable for the Respondent to decide that it would not slot the Claimant into the TPC post, but it was outside the band of reasonableness to refuse to even interview the Claimant for the post.

292.2 For MCM, the issue is that the Claimant indicated willingness to accept the post, both at the 1 February meeting and in subsequent written correspondence. However, it was not until after 4pm on 8 February that the Respondent actually sent her a formal letter and written contract. It then told her she had to accept by 10am on the Friday which it extended to 4pm on the Friday (10 February). The Respondent decided she had not signed the contract quickly enough and dismissed her.

292.3 It would have been reasonable to carry on with the consultation process a bit longer. That is, long enough to interview the Claimant for the TPC post and/or - given that the documents were only sent to the Claimant on 8 February, and she was then too ill to work on 9 and 10 February – long enough for some further discussion about the contract terms on offer.

Direct discrimination

293. I now move to the discussion of direct disability discrimination which is paragraphs 4 to 8 of list of issues.

294. I will be comparatively reasonably brief on these. I have taken full account of everything listed in list of issues, of all the evidence presented, and of my findings of fact as a whole.

295. I have to consider whether the burden of proof shifts and that includes consideration of what happened with the suggested actual comparator, Catherine McIlwham.

296. My decision, applying section 23 EQA, is that Ms McIlwham's circumstances were materially different to the Claimant's. She was in a different role to the Claimant. It was a different time period. The reasons for a reorganisation of work were different.

297. For that reason, I have to decide whether the burden of proof shifts in relation to a hypothetical comparator. A hypothetical comparator would be somebody whose circumstances were the same as the Claimant's and that would include, for example, being stressed or suffering from exhaustion during the process and being due to go on sickness absence for six weeks, starting from 13 February. The hypothetical comparator, though, will be somebody who either had no disability at all, or else had a different disability. The only difference between the Claimant and the hypothetical comparator must be a difference in the relevant protected characteristic. So the hypothetical comparator would not have the disabilities identified at paragraph 1.1 and 1.2 of list of issues.

298. I have considered the allegations individually and they are similar to those I discuss in more detail when addressing the complaints of discrimination within

the definition in section 15 EQA. I have stood back and looked at the bigger picture.

298.1 My decision is that the burden of proof does not shift in relation to any of those allegations of direct discrimination.

298.2 There are no facts from which I could conclude that the hypothetical comparator (whose circumstances were the same as the Claimant other than the protected characteristic) would have been treated differently.

Discrimination arising from disability

299. I now move onto discrimination arising from disability which is paragraphs 9 to 15 of list of issues.

300. In paragraph 9 of the list of issues, the things said to arise from disability are:

300.1 the Claimant's need for surgery, scheduled for 13 February 2023 and

300.2 the expected recovery time of 6-weeks

301. Both of those things did arise from the Claimant's disability.

302. The unfavourable treatment alleged in that paragraph is “selection and dismissal with immediate effect”. “Selection” and “dismissal with immediate effect” are two different things.

303. Part of the selection took place earlier than 29 December 2022. That is earlier than the Respondent’s knowledge that the Claimant was going to be absent from 13 February for six weeks. The Respondent’s lack of knowledge of that absence would not be relevant under section 15(2) EQA, because that subsection would require the Respondent to prove lack of knowledge of disability, as opposed to the absence. However, the selection for possible redundancy (the proposed deletion of her role) was in no way motivated by either of the two things that were “something arising in consequence of” the Claimant’s disability.

304. For the other alleged unfavourable treatment (“dismissal with immediate effect”), I will return to that as the other paragraphs are discussed.

305. In paragraph 10 of list of issues, the suggestion is that the Respondent can justify its treatment as a proportionate means of legitimate achieving a legitimate aim. As made clear in the Respondent's submissions, the legitimate aim is the one referred to in the grounds of resistance: paragraph 65 of the Respondent's submissions refers to the a legitimate aim of ceasing employment related benefits on termination of employment, cross-referencing paragraph 51 of the grounds of resistance. That is stated to be an adjunct of the legitimate aim of running the business in an efficient way.

306. I will refer to refer back to the legitimate aim below.

307. Paragraph 11.1 asks if the Respondent put the Claimant "immediately" at risk on 19 January 2023 because of the something arising (or either of them). It is true that the Claimant informed the Respondent on 16 January of her operation. It is not true that the events of 19 January were a response to that. From at least 29 December 2022 (if not earlier) the plan had been to commence redundancy consultation in the week commencing 16 January. I accept that telling someone that they are potentially at risk of losing their job is treating them unfavourably. However, the Respondent was not motivated to do that (or to do it on 19 January) because of something arising in consequence of disability.

308. Paragraph 11.2 asks if the Respondent failed to consult at the formative stage of the process. I do not need to repeat everything I said already when I went through the unfair dismissal arguments. I take all the facts, and my decisions on unfair dismissal, into account when deciding whether the burden of proof shifts for this allegation. The Claimant has not persuaded me that the Respondent was completely unwilling to change its mind on any point whatsoever. However, there were some things that it had a closed mind about. Ultimately, my decision is that the Respondent decided that 10 February was to be a hard and fast deadline. As explained to the Claimant, if she wanted to become MCM then she had to agree to all their terms by that date (as not explained to the Claimant, failure to so would not simply have the consequence that they would withdraw the offer of that post, it would also mean dismissal with effect from 10 February, as opposed to after a period of notice). The Respondent was not willing to consult about the termination date (the first the Claimant knew about the termination date was the dismissal letter). Although willing to offer the MCM post, the Respondent was not willing to budge from the position that it needed the signed contract on 10 February 2023. These things both amounted to treating the Claimant "unfavourably". I have to decide whether the burden of proof has shifted as to whether the treatment was because of the "something arising". I set out my decision and reasons below, after addressing some of the other allegations.

309. Paragraph 11.3 of list of issues asks if the Respondent expedited the reorganisation, and if the dismissal was, because of her notification on 16 January. At the board meeting in November, the chief executive had been tasked with doing reorganisation as quickly as possible. I have already said that the start date of the consultation was not because of either of the "something arising". Dismissal is discussed below.

310. Paragraph 11.4 of list of issues asks if there was another employee who did a similar role to the Claimant, and about pooling. I commented on these points in detail when addressing unfair dismissal. There are no facts from which I could conclude that the Respondent would have pooled the Claimant at with one or

more employees but for the facts that the Claimant had been due to have a procedure on 13 February, and then a six week absence. The 29 December 2022 slide pack makes clear that the Respondent was not intending to do that even before knowing that the Claimant was supposed to have a procedure on 13 February, and then a six week absence.

311. Paragraph 11.5 of list of issues asks if the Respondent failed to genuinely offer the Claimant an alternative role. I have already commented in detail on the discussions about each of TPC (which was not offered) and MCM (which was offered). I will discuss the deadline for acceptance of MCM as a separate point. However:

311.1 There are no facts from which I could conclude that the Respondent's discussions with the Claimant about the TPC role would have been any different if she was not supposed to have a procedure on 13 February, and then a six week absence.

311.2 As far as the terms and conditions for the MCM role, there are no facts from which I could conclude that the proposed written contract offered by the Respondent, or the Respondent's discussions with the Claimant about the whether she was actually genuinely interested in performing the MCM role, would have been any different if she was not due to have a procedure on 13 February, and then a six week absence. There are no facts from which I could decide that a different contract would have been offered had she not notified them of the surgery. However, as discussed below, there are facts from which I could conclude that the deadlines might have been different.

312. In terms of paragraph 11.6 of list of issues, to the extent that the argument is that the Claimant should have been allowed to actually start the trial before signing the contract, I do not agree that it was unreasonable for the employer to say she had to sign the contract before starting work in the role (which would have been six weeks later if the recovery lasted no longer and no shorter than the anticipated period). More importantly, for this Equality Act complaint, there are no facts from which I could conclude that they would have allowed her to actually start working in the new job before, she had signed the new contract, but for the surgery and six weeks absence.

313. In terms of whether the Respondent failed to give the Claimant sufficient time between receipt of the document and the deadline for signature, as discussed in the unfair dismissal analysis my decision is that the Respondent did fail to give the Claimant a reasonable time period - after they send the documents to her at 4.05pm on 8 February – to explain which specific clause she sought to have amended, and to carefully consider whether she would accept the ultimatum that if she did not sign, by the deadline, the offer would be withdrawn. The Respondent also did not tell her that failure to sign by the deadline would not only

mean that she would be dismissed on the basis that there was no suitable alternative; it would also mean that her employment would end on 10 February. She had already accepted in principle, while making clear that some of the details that she had in mind were different to some of the things that the Respondent had in mind. The Respondent did agree to extend the 10am deadline to 4pm, but without the offer of consultation/discussion about the points raised by the Claimant. It remained "take it or leave it".

314. I have to ask myself whether that calls for an explanation. Is there something suspicious about the timescale? Are there facts from which I could conclude that the Claimant's planned surgery for 13 February influenced this decision that she could not have longer than 10 February to sign the MCM contract, and agree to all of the Respondent's proposal, including the start date in the MCM role?

315. My decision is that there are facts from which I could reasonably conclude that the surgery date and/or planned six week absence did influence the Respondent's stance.

315.1 There were email exchanges in which the Claimant was seeking time off (for training or job search). She was refused this. The Respondent's position was that she had to make sure everything was cleared and ready for the fact that she was going to be absent after 10 February because of surgery.

315.2 I accept that she would have been required to do a temporary handover to colleagues in the absence of the redundancy consultation and that time off in the first half of February might have been refused for that reason.

315.3 However, the tone and content of the correspondence with the Claimant shows a marked unwillingness on the Respondent's side to have any discussion about whether the consultation period could continue into the week(s) commencing 13 February 2023. The Respondent had finalised, by 1 February, its decision that the Claimant would not continue in her current role. However, the date for that role to end, and whether the Claimant would be dismissed, and, if so, the date on which the dismissal would take effect all remained matters about which there could be consultation. In particular, the Respondent made very clear that its position was that if the Claimant agreed to take the MCM role, then she would not be dismissed. There were two things that needed to be agreed if the Claimant was to become MCM; that is the start date in that new role and the terms of the written contract.

315.4 The Respondent has not proved any facts that make the week commencing 13 February significant for any reason other than that it was the start of the Claimant's six week absence. In particular, neither TPC nor MCM were in place. Nor was there anybody lined up to receive an offer letter for either such post.

315.5 The Respondent demonstrated unwillingness to either delay the 1 February meeting to, or to hold an additional meeting on, 8 February.

315.6 The Respondent demonstrated unwillingness to allow the Claimant to be accompanied by trade union representative, even though that was something that was offered to other employees.

316. In deciding whether the Respondent has discharged the burden of proof, and shown that its decision was not influenced by the fact that the Claimant was going to be absent from work for six weeks from 13 February, I do take into account that the board had said that the reorganisation should be implemented as quickly as possible, and that they said that on 15 November 2022. I am satisfied that the board's decision was in no way whatsoever influenced by anything arising from the Claimant's disability. However, to put "as soon as possible" into context, the CEO and Ms Dover clearly thought that it was in keeping with that instruction to take until 29 December 2022 to come up with Version 3 of the plans, and to wait until the week of 16 January to start consultation. The board did not specifically say that the new structure had to be in place by 13 February, or that dismissal notices had to be issued by 10 February, or any other specific date. The Respondent did not have a written redundancy policy that specified any standard timescales for the exercise. As per the findings of fact, I have noted that Ms McIlwham's consultation was fairly short and I have also noted that Ms Mills told the Claimant (when they were speaking as friends) that the duration of a consultation period was flexible, and sometimes there were lots of meetings, and sometimes there were few.

317. None of the Respondent's arguments persuade me that the unfavourable treatment (the short deadline by which the Claimant had to sign the contract for MCM or else have the offer withdrawn) was not significantly influenced by the knowledge that the Claimant (if still employed) was going to start sick leave for six weeks from 13 February.

317.1 The Respondent was not at risk of losing a second choice candidate for MCM if there was a delay in the Claimant's decision. No such second choice candidate had been identified.

317.2 There was nobody else at risk of redundancy who would have that risk lifted if the Claimant turned down the MCM post (or had the offer withdrawn).

318. Thus the Respondent's decision that it would only give the Claimant from 8 February until 10 February to read and sign the new contract amounted to treating her unfavourably because of something arising in consequence of disability. I will consider below whether the section 15(1)(b) defence succeeds.

319. In terms of paragraph 11.7 of list of issues, I am not going to repeat everything I said already about those topics when addressing unfair dismissal.

319.1 It is true that the Respondent refused to allow the Claimant to hold a meeting on 8 February, at which the Claimant was accompanied by a union representative. Instead, they did two things.

319.1.1 They insisted the meeting take place on 1 February.

319.1.2 They insisted that she could only be accompanied by a work colleague, and not by a union representative who was not a work colleague.

320. I have to ask myself if the burden of proof has shifted. Again, I take into account that it has not been shown that there was any imperative reason that the meeting had to go ahead on 1 February. Ms Mills has not attended to give evidence to explain why she thought that it would be "unfair to all parties" for the meeting to take place on 8 February, and rather than 1 February. I am not satisfied by the explanation, that the letter of 19 January contained a mistake. On the contrary, I find the purported explanation to be untrue and to be a cause for suspicion. Letters to other employees, years earlier, had referred to the right to be accompanied. Indeed even Ms Mills, when covertly recorded, purported to say that a union representative would have been permitted so long as they could attend on 1 February.

321. These things are potentially suspicious and are sufficient to shift the burden of proof. There are facts from which I could reasonably conclude that the Respondent was trying to rush things through because it knew the Claimant was going to be absent from 13 February.

322. The Respondent has failed to discharge the burden of proof. It has failed to demonstrate that the impending absence played no part whatsoever in the decision to refuse the Claimant the opportunity to be accompanied by trade union representative, or to have a meeting on 8 February, either as well as, or instead of, 1 February. Thus the Respondent's conduct amounted to treating her unfavourably because of something arising in consequence of disability. I will consider below whether the section 15(1)(b) defence succeeds.

323. In terms of paragraph 11.8 of list of issues, I do not agree with the characterisation that "*the Respondent held only one final consultation meeting*" for the reasons I have already made clear above. In brief, the labels attached to certain meetings are not crucial. What matters is the substance of what was discussed, on and after 19 January. There were discussions about various things. The Claimant had a reasonable opportunity to say, for example, that the pool should have been different and/or that she should be appointed as TPC. I

do not need to make any other comments in relation to paragraph 11.8, because everything relevant in that paragraph is dealt with elsewhere in these reasons.

324. In terms of paragraph 12 of list of issues, it is factually accurate that the Respondent cancelled the Claimant Simply Health plan with effect from 1 February.

325. There are no facts from which I could conclude that that was done because of either of the "something arising" identified in paragraph 9 of list of issues.

326. A cancellation with effect from 10 February was in accordance with the express terms of the contract. There is nothing to suggest that it was cancelled from 1 February, rather than 10 February, because the Claimant was due to go into hospital on 13 February. As per findings of fact, the cancellation instruction, via the portal, was 20 February 2023 [Bundle 744-745]. I do not ignore that the Respondent had the opportunity to call Lucy Mills to explain her actions and has not done so, but that is not sufficient in my view, to shift the burden of proof. Therefore this particular allegation fails. For avoidance of doubt, I am treating this allegation as being that the effective date for policy cancellation date predated the employment termination date. So, in this paragraph, I am not addressing the separate issue as to what the end date for Simply Health would have been had the Claimant been given notice of dismissal, rather than termination with payment in lieu of notice.

327. In terms of item 13, the opening sentence reads:

> Did the Respondent cancel the Claimant's Bupa Healthcare insurance and at the same time deducted the monthly insurance premium from the Claimant's wages

328. It is true that the Respondent cancelled it with effect from 10 February. The notification probably was not sent on 10 February, but it was sent in due course.

329. I do not think the point about deduction of monthly premium really adds much to anything that I need to decide. Ms Dover and Ms Mills did know that the Claimant had BUPA cover. They also did know that it would be cancelled with effect from the termination date of the Claimant's employment. At the risk of labouring the point, they knew that if employment was terminated with effect from 10 February, then BUPA cover would cease from 10 February, and they knew that if employment was terminated with effect from 10 May, then BUPA cover would cease from 10 May. Ms Dover may not have addressed her mind to the precise mechanism for that, but Ms Mills knew that the process was that she, or a colleague in HR, would send a notification to BUPA.

330. I will address the allegation of disability discrimination contained in paragraph 13 of list of issues when discussing paragraph 15.

331. Paragraph 14 of list of issues asks if the Respondent prejudged the redundancy outcome before the end of the consultation, and refers to the contents of the 7 February letter. This paragraph adds nothing new that I have not already covered when addressing unfair dismissal and paragraph 11 of list of issues.

332. In terms of paragraph 15 of list of issues, a dismissal is unfavourable treatment so I have to decide if it was because of something arising in consequence of disability.

333. The three options that any employer had on 10 February, on the assumption it was going to make a dismissal decision on that date, rather than consult further / defer decision, were:

333.1 Dismiss with notice and make no other arrangements. In the normal course of events, the employee would attend work during the notice period. In this case, the employee had a prescheduled sickness absence due to last six weeks, so would be away from work for six weeks, potentially returning for the second half of the notice period. The employment contract and the BUPA cover, would therefore last until around 10 May.

333.2 Dismiss the employee with notice, but exercise, the garden leave provisions. So the termination date would be around 10 May 2023, but the employee would not have to attend work, regardless of whether on sick leave or not.

333.3 Dismiss with a payment in lieu of notice and so therefore with immediate effect on 10 February. Thus the BUPA cover would cease on that date.

334. As mentioned, the other option was not to take the decision on 10 February, but have further consultation and/or defer the decision to a slightly later date.

335. Dismissal with immediate effect would put an end to the possibility of the Claimant taking the MCM post (subject to appeal, and/or subject to a successful application as an external candidate). [I do not ignore that Mr Johnson made an offer in March, but I am currently only addressing the situation as it was on 10 February.] The other options just mentioned would each require a separate decision to be made re MCM. That is, would the Respondent allow the existing offer to remain on the table, and/or negotiate further with the Claimant about her comments and queries, or would it state to the Claimant that the offer of being slotted into the MCM post was no longer available to her. Put another way, a dismissal with immediate effect was not the only method by which the Respondent could say that the MCM issue was now closed.

336. I have to decide whether the burden of proof is shifted. That is, I have to consider the actual decision which the Respondent did make on Friday 10 February and decide whether there are facts from which I could conclude that the decision was motivated (at least in part, and whether consciously or unconsciously) by the fact

that the Claimant was having surgery the following Monday, and was scheduled to be on sick leave for six weeks.

337. My decision is the burden of proof does shift. That is for similar reasons that I have have mentioned already, when discussing paragraphs 11.6 and 11.7 of list of issues.

337.1 I take into account that the Respondent and was insistent that the decision could not be made any later than 10 February.

337.2 I take into account that the Claimant made clear that she was feeling stressed.

337.3 I take into account that she asked for an occupational health referral and was told “no” in strong terms.

337.4 I take into account that dismissing the Claimant, without notice, on 10 February, did not enable the Respondent to move any more quickly in relation to having the new TPC or new MCM taking up their posts and nor did it allow the Respondent to relieve anyone else from the burden of being at risk of redundancy.

337.5 I take into account that the Claimant requested, and was refused, time off. I do not accept that there would have been no work for the Claimant to do in the week commencing 13 February if she was not scheduled to be off sick that week.

337.6 The question for me is not whether it was unreasonable for the Respondent to be unwilling to adjust the schedule to allow for short delays for the Claimant’s union representative and/or an occupational health report. But I do have to ask whether, in all the circumstances, looking at the bigger picture, these are things that call for explanation. In my opinion, they do. The Claimant was given contradictory information about the right to have a union representative and I find the tone of the response about Occupational Health to be unusual.

338. I do find that the burden of proof shifts. The Respondent has not discharged that burden. It has not shown that the upcoming absence played no part whatsoever in the decision to dismiss the Claimant with immediate effect on 10 February by exercising the payment in lieu of notice clause.

339. Furthermore and in any event, regardless of the burden of proof, my decision on the balance of probabilities, is that the main thing that was pushing the Respondent to notify the final decision (regardless of whether the decision was dismissal with notice, or confirmation as MCM, or otherwise) by 10 February was the fact that the Claimant was due to be absent from the following week.

340. In terms of the allegation in paragraph 13 of list of issues, I am not satisfied that the Respondent, acting through either Ms Dover or Ms Mills, or anyone else, consciously decided to terminate her employment on 10 February with the intention of choosing a termination date which made sure that she would not be able to have a surgical procedure, relying on the BUPA cover, on 13 February. They did, however, consciously decide to terminate her employment with effect from 10 February, and, as just discussed, that decision was influenced by the knowledge that she was due to have a six week absence.

341. In terms of legitimate aim, the Respondent's submissions were:

> 65. Turning to the issue of justification the Tribunal is referred to the summary of the relevant law by Judge Barry Clarke at paragraphs 21 to 27 in Department for Work and Pensions v Boyers [2022] IRLR 741. R relies on the claimed legitimate aim of ceasing employment related benefits on the termination of employment – see paragraph 51 of the grounds of resistance. That must be a legitimate aim for an employer. It is an adjunct of the legitimate aim of running the business in an efficient way and, in the absence of a specific contractual provision extending employment benefits beyond the date of termination of employment, it must be justified in the normal course of events.
>
> 66. Turning to the balancing exercise the Tribunal must carry out weighing R's needs against the impact of the treatment on JN, it is suggested that the 4 stage Akerman-Livingstone test is [satisfised] (see paragraph 23 in Boyers).
>
> 67. The most difficult point for R is the third consideration i.e. whether the means chosen were are no more than is necessary to achieve the aim – and in particular with reference the fact that JN could have been placed on garden leave so that her Bupa cover would have been maintained during the period when she needed the operation.
>
> 68. In this case, it has to be accepted that it is likely that Lucy Mills knew that JN intended to have her operation paid for by Bupa (following receipt of the Imperial Private Healthcare letter). Care should be taken not to equate this issue with the potential knowledge defence to the reasonable adjustments claim. The fact was that this consideration was not brought by JN into the "negotiations" after the meeting on 1st February which were to determine the terms upon which her employment would end. The Imperial Private Healthcare letter was only sought by Lucy Mills in the first place to obtain confirmation of JN's recovery period – see pg 658. The crucial factor in the balancing exercise to be carried out in determining whether R's actions were justified in this instance, is that JN accepts that she did not ask R to extend her Bupa cover or Simply Health plan beyond the date, in circumstances were SD has confirmed that had JN asked for it to be extended it would have been readily granted or that if JN had been asked to be put on garden leave, so that her cover would continued, that would have been facilitated. In the absence of any such request in those circumstances, and it must be incumbent on the employee to raise the issue, and JN failed to do so, then R's actions in terminating Bupa Cover and the Simply Health plan were justified.
>
> 69. Putting this point in other words JN's failure to raise the point in the pre-termination discussions (mainly conducted by e-mail of course) in effect puts R in the default position in terms of justification. In other words, the normal position when an employee's contract of employment ends, is that their entitlement to the benefits enjoyed under that contract cease unless there is some contractual provision which provides to the contrary. In that default position in pursuit of the legitimate aim of

> ceasing employment benefits upon the termination of employment, R's actions are justified. It is not obliged to provide those benefits, notwithstanding the potentially heavy impact of that treatment on the employee. In brute terms, by ceasing to be in an employment relationship with the employer, the employee drops out of the zone of responsibility that the employer has for the employee, and the employee's recourse is to their own resources or the resources of the state.

342. My starting point is not to decide if, given a termination date of 10 February 2023, a decision not to extend the Claimant's contractual benefits to a later date (maybe six weeks after 13 February; maybe 3 months after 10 February) was justified. Simply analysing whether the Respondent should have extended the Claimant's benefits after the end of employment skips a step in the thought process. The Respondent did not have to end her employment on 10 February 2023; it chose to do so. Even without counting the option of extending the consultation process / deferring dismissal decision past 10 February 2023, there were two other options that would have been less unfavourable for the Claimant: giving her normal notice, for her to work (subject to sick leave) during the notice period; giving her notice, but exercising the garden leave clause.

342.1 By exercising the garden leave clause, the Respondent would have achieved the same result that it would have achieved by terminating the Claimant with payment in lieu of notice, but the discriminatory effect on the Claimant would have been reduced. That is, she would have BUPA cover in the week commencing 13 February 2023 and could have had her surgery, and immediate after care, in reliance on that policy.

342.2 The Respondent's argument that it would have agreed to give her notice and put her on garden leave if she had requested it (with specific reference to medical insurance) undermines any attempt to argue that it would have been an unreasonable hardship for the Respondent to do that.

342.3 I reject the contention that the Claimant needed to do something different. She expressly stated several times that the Respondent should give her notice rather than have the MCM contract commence from 10 or 11 or 13 February. She expressly said that she wished to remain employed even after the expiry of notice, but that does not change the fact that she expressly stated that she wished to exercise the right (as she saw it) to receive notice.

342.4 The Respondent did not expressly tell the Claimant that failure to sign the MCM contract would mean that her dismissal date would be 10 February 2023. To the extent that the Respondent argues that that was implicit, I do not agree, but, in any event, the Claimant's failure to expressly say "*one reason that I am asking for notice rather than pilon is so that I can have my surgery on 13 February by making use of the BUPA cover that will cease on 10 February if you dismiss me with immediate effect*" does not lead me to

the conclusion that the Respondent has demonstrated that the balancing exercise should be resolved in the Respondent's favour.

343. Thus the section 15(1)(b) defence does not succeed in relation to dismissing the Claimant, without immediate effect (but payment in lieu of notice) on 10 February 2023.

344. Furthermore, the reliance on that defence also fails in relation to the Respondent's insistence that the Claimant sign the MCM contract by 10 February. Even not counting the option of extending the consultation process / deferring dismissal decision past 10 February 2023, there was nothing preventing the Claimant from giving notice of dismissal on 10 February (with or without exercise of the garden leave clause) and giving the Claimant a few more days to make up her mind. I do not need to specify an exact number of days that would be reasonable. It is true that the Claimant was due to have surgery, and so, perhaps, if giving the Claimant more time at all, it would probably have needed to give her at least a week. Even to the extent that the Respondent would have been inconvenienced to any extent by allowing the Claimant that extra time, I am not persuaded that it would have had any significant effect on the date on which (assuming the Claimant eventually turned it down) the new MCM could start in post. At most it might have led to a delay of a week or so in something that was already going to be several weeks later than 10 February (and several months after 15 November 2022).

345. Finally, the section 15(1)(b) defence does not succeed in relation to the failure to hold a meeting on 8 February at which the Claimant could be accompanied by her union representative. As part of the balancing exercise, I take account of the fact that the Claimant has been accused of failing to be clear about particular matters: which clauses of the MCM contract she objected to, and why; why a dismissal without notice would have an adverse effect. Had the Respondent agreed to meet the Claimant and her union representative on 8 February, there would have been the opportunity to thrash these things out. The Claimant had made clear to the Respondent that she was feeling exhausted (and had suggested an Occupational Health referral, which the Respondent said was not necessary) and having a union representative put her points across to the employer might have helped her. I also take into consideration that the Respondent's policy was to allow union representatives to take part in redundancy consultation. Not everything was tied up by 1 February; on the contrary, it was only at 4.05pm on 8 February that the contract was supplied. The other side of the balance is lacking. The Respondent has not persuaded me that there was anything in particular that prevented Ms Dover and Ms Mills (or one of them, at least) from meeting the Claimant and her union representative on 8 February.

Indirect discrimination

346. Turning now to indirect discrimination in terms of PCP1, as drafted it read:

> PCP1: Respondent cancelled the Claimants Simply health cash plan "to take effect" before their effective termination date (PCP1).

347. As drafted, at present, that would not amount to a PCP. It simply refers to a specific one off decision taken in the Claimant's case. It is not something that is alleged to have been applied to anyone else, and the wording does not allege that there is a PCP that would be applied to someone else in the future.

348. As we discussed in closing submissions, the Respondent helpfully and sensibly accepted it was more sensible to take the PCP referred to in paragraph 28.1.1 (under the heading for failure to make reasonable adjustments) and treat that as the alleged PCP1 for the indirect discrimination claim. Thus paragraph 16 of list of issues is amended so that the alleged PCP reads:

> Cancelling employees' Simply Health cash plan prior to their effective date of termination ("PCP1")

349. I am not satisfied that the Respondent had that PCP.

350. It is not clear from the witness evidence exactly why the Respondent cancelled the Claimant's plan with effect from 1 February, as opposed to from 10 February (or a date later than 10 February). Speculatively, maybe the portal only allowed Ms Mills to choose options that were the first day of a month. Either way, based on the documents, the only two options she attempted to input were 1 March and 1 February. As I said in the findings of fact, it appears that she first input a date of 1 March and later input a date of 1 February (within a minute or two of each other) on 20 February 2023. Apparently, the portal rejected 1 March for some reason. That would have been a future date. I do not know if it would have accepted 20 February, or 10 February, or whether she tried those. Regardless of that, on the balance of probabilities, and on the evidence available – even taking account of the Respondent's failure to call Ms Mills as a witness - I am not satisfied that the Respondent had a general policy of cancelling employees' Simply Health plan from an effective date prior to the employee's effective date of termination of employment.

351. Thus I do not need to comment on paragraphs 17 to 22. The indirect discrimination complaint based on PCP1 fails because the Respondent did not have PCP1 (as originally written, or as amended).

352. It did have a practice of cancelling with effect from (no later than) the date of termination of employment. However, it did not have the alleged PCP of cancelling from earlier than termination of employment.

353. At paragraph 22 of list of issues, the alleged PCP is:

> PCP2: Respondent has a PILON provision and cancels employee health benefits when terminating an employee's contract of employment (PCP2)

354. That is correct. The Respondent does have a PILON provision and the Respondent does end health benefits with effect from the termination date. Both these things are express written terms of the contract of employment.

355. As discussed in submissions, these two propositions can be examined separately. So

> PCP2A: Respondent has a PILON provision
>
> PCP2B: Respondent cancels employee health benefits when terminating an employee's contract of employment

356. PCP2, PCP2A and PCP2B are – as per paragraph 24 of list of issues – applied to all employees, disabled or not, and with the same disability/disabilities as the Claimant or not.

357. I do not have statistical evidence.

358. However I do feel able to make a finding, even in the absence of statistical evidence, that assuming all the employees had the same health benefits, the employees who have disabilities are more likely to need to make use of the contractual health benefits than employees who do not have disabilities.

359. If there were to be specific evidence available (and neither party has provided it) then that might show whether, in fact, all the employees had the same health benefits or whether disabled employees were less likely to be covered.

360. However, on the evidence available, and assuming that disabled employees were just as likely to have medical insurance as employees without disabilities, I am satisfied that, during their employment, employees with disabilities were more likely to need the private healthcare than those without. For the same reason, within any given fixed period (of 3 months, say, equivalent to a notice period), employees with disabilities were more likely to need the private healthcare in that specific period than those without

361. As drafted, the appropriate comparison would be between those of the Respondent's employees who had the private health benefits and who did **not** have the disabilities mentioned in paragraphs 1.1 and 1.2 of list of issues, and those of the Respondent's employees who had the private health benefits and who **did** have the disabilities mentioned in paragraphs 1.1 and 1.2 of list of issues. There is no evidence before me that having the two disabilities in question makes it less likely that the individual is less likely to suffer from other conditions, or less likely to need treatment for unrelated conditions. So, as

between these two groups, the only difference between them is that one has conditions mentioned in paragraph 1 of list of issues (conditions that do potentially require treatment) and the other does not. For any condition other than those mentioned in paragraph 1 of list of issues, each group is just as likely to have sufferers from that condition, and just as likely to have need of medical treatment. However, the group containing the Claimant has an additional percentage likelihood of needing treatment (that is, treatment for the disabilities in question).

362. The disadvantage in this case is (i) needing medical treatment (ii) needing that treatment in a period that would otherwise be given during a notice period, had notice been given, but (iii) being unable to have that treatment because PILON, rather than notice period, was used and the cover had ceased.

363. As per paragraph 25 of list of issues, I am satisfied that the group of "persons with whom the Claimant shares her disability" had a greater likelihood of suffering from that disadvantage than the group of "persons with whom the Claimant does not share her disability".

364. As per paragraph 26 of list of issues, the Claimant was at the disadvantage.

365. Paragraph 27 asks whether the Respondent can show that the PCP was a proportionate means of achieving a legitimate aim.

366. The balancing exercise for the claims based on the definition of discrimination in section 15 EQA required me to weigh up the effects of the discriminatory treatment on the Claimant as against the benefits to the Respondent of achievement of legitimate aim.

367. For section 19, I am weighing something different. On the Respondent's side, the legitimate aim, and the importance of achieving it, are the same. However, it is now being weighed against the discriminatory effect of the PCP.

368. The Respondent has satisfied me that having a PILON clause (PCP2A) is a proportionate means of achieving its legitimate aim to wish to have the flexibility for all employees, regardless of any protected characteristics.

368.1 The clause gives the Respondent the option of being able to terminate with immediate effect and make a payment in lieu of notice, without being in breach of contract. The clause – and the contract as a whole – do not specify that every termination will be without notice.

368.2 The PCP does not prevent individual decisions being made in individual cases, and that is something that satisfies me that the existence of the PCP and can be justified in that way.

369. In terms of PCP2B, it is not envisaged by the Respondent that it will make exceptions. That is, PCP2B – in itself – does not imply that cases will be taken on a case by case basis. Rather termination of benefits from the same date as the end of employment is the Respondent's standard practice. Generally speaking, all employers cancel all benefits at the point of termination of the contract.

370. In terms of the Respondent having a contractual clause which specified that the health care benefits did not continue after the end of the contract, I am satisfied that that was a proportionate means of a legitimate aim.

371. Taking PCP2 as a whole then (combining PCP2A and PCP2B), the Respondent has shown that, because of section 19(2)(d), the PCP did not amount to indirect discrimination. That is, the mere existence of the contractual right to terminate with no notice (just PILON) meaning that benefits would cease with no notice, is not indirect discrimination. Whether the exercise of that contractual right in a given case might amount to a different type of disability discrimination will be determined on a case-by-case, on consideration of the relevant section of EQA and of the specific facts.

372. However, all the indirect discrimination claims all fail

Failure to make reasonable adjustments

373. I next deal with paragraphs 28 and 29 of list of issues.

374. Complaints based on PCP1 (paragraph 28.1.1 of list of issues) fail. My decision is that the Respondent did not have such a PCP for the same reasons I already mentioned when deciding on the same alleged PCP for the purposes of the indirect discrimination claim.

375. PCP2 reads:

> Cancelling employees' Bupa health insurance cover and deducting the full insurance premium from the employees' wages. ("PCP2")

376. The short answer is that the Respondent did have that PCP, although the comments about deducting the full insurance premium do not really add anything relevant. As already discussed at length above, it was the Respondent's practice to terminate insurance cover with effect from the same date as termination of employment. That is true that regardless of whether the insurance premium had been deducted or not.

377. PCP3 reads:

> Being entitled to terminate the Claimant's employment and health benefits at any time and with immediate effect by notifying her that it was exercising its right to pay

her in lieu of her notice period whether notice to terminate was given by the Claimant or by the Respondent ("PCP3")?

378. The Respondent did have that PCP. That is, it was not a breach of contract for it to cease health benefits (and employment) with immediate effect by exercising the PILON clause in the contract.

379. Paragraph 28.2 asks if the PCPs placed the Claimant at a substantial in comparison with persons who are not disabled. For PCP3, the answer is "yes". She required surgery because of her disability. She had arranged for that surgery to take place on 13 February. If the Respondent had not had PCP3, then it would have been obliged to give her notice (if dismissing her) and that would have meant that she still had BUPA cover on 13 February and could still have had the operation in reliance on that cover. The existence of PCP3 meant that the Respondent was not contractually obliged to give her notice.

380. In terms of paragraph 28.3 of list of issues, I do not think that the question is particularly important to anything that I have to decide. The duty to make reasonable adjustments is not triggered by whether an individual asks for (i) adjustments in general terms and/or (ii) specific adjustments. Of course, evidence about what discussions (if any) took place can be relevant for various reasons. For one thing, it might be relevant to whether the Respondent knew about the disability and/or the disadvantage. For another, the things that each side said at the time might be of assistance to the Claimant when assessing what steps might have reduced the disadvantage and whether the steps were reasonable for the Respondent to have had to take. However, those are evidential matters.

381. As was discussed in the evidence and submissions phase of this hearing, it is abundantly clear that the Claimant said several times that she should be given notice to terminate her existing contract. The Respondent had not said that it was going to dismiss her without notice on 10 February. However, even it had said that, it would be no defence to a reasonable adjustments complaint that she did not specifically say "*I need you to give me notice of dismissal rather than cancelling my employment contract with effect from 10 February, because I'm due to go into hospital on 13 February and exercise my private healthcare benefits*". Nor did the Claimant need to say "*As a reasonable adjustment, please do not exercise the PILON clause*."

382. In terms of reasonableness of making adjustments, Lucy Mills had mentioned giving notice of dismissal, and so the Claimant was not on notice of the fact that she would be dismissed with immediate effect unless she specifically asked the employer to refrain from using the PILON clause. Secondly, the Claimant had made clear that she was stressed and that she wanted OH referral and a union representative to accompany her to meetings; had a meeting with union

representative been arranged then the union representative may well have suggested to the Claimant or directly to the Respondent that it was important to give the Claimant notice rather than dismiss with immediate effect because of the insurance position. So I do not accept the submission that the Claimant was in some way at fault for not pointing out to the Respondent what the consequences for the Claimant would be if it dismissed without notice. However, in any event, the Respondent knew (or ought reasonably to have known) about the disability and about the disadvantage.

383. In terms of paragraph 28.4 of list of issues, the employer knew the Claimant was going into hospital on 13 February and intending to exercise private healthcare benefits. Even if, contrary to my finding, they did not actually know that, at the very least, they ought reasonably to have been aware of that fact. The Respondent was actually aware that ending employment on 10 February would end her BUPA cover on 10 February. The Respondent knew, or ought to have known, that she could not use the BUPA cover for her surgery on 13 February if the Respondent ended that cover (by the act of ending her employment). So the answer to the question posted at 28.4 is “Yes”.

384. In terms of paragraph 28.5, my decision is:

384.1 One step that the Respondent could have taken on 10 February 2023 was to dismiss the Claimant with notice. That is, notify her employment would end around 10 May 2023.

384.2 In comparison, to dismissing her on 10 February 2023, with immediate effect, dismissing her with notice would reduce the disadvantage. That is, she would be able to use BUPA cover between 11 February and (approximately) 10 May 2023. In particular, she would have been able to have surgery on 13 February 2023 that clinicians had recommended that she have.

384.3 In terms of whether it would have been reasonable for the Respondent to have had to take the step of dismissing with notice, rather than without, I take into account that:

384.3.1 The Claimant paid the premiums and would have continued to do so (assuming she wanted the cover) during a notice period.

384.3.2 If the Respondent wanted to have the Claimant off its hands, so that it did not have to give her work to do, it could have exercised the garden leave clause.

384.3.3 The Respondent did not have a hard and fast policy that it would always dismiss using PILON. Sometimes employees worked for (at least part of) the notice period.

384.3.4 Dismissing the Claimant with notice would not have delayed the Respondent's plans for the restructure. No-one would have been in post quicker for TPC or MCM if the Claimant was dismissed with notice, compared to if she was dismissed without notice.

384.3.5 If there was to be a genuine and fair appeal process, the hypothetical possibility of the Claimant being reinstated on appeal had to exist. Obviously the Respondent could not know, on 10 February 2023, whether she would appeal or not. However, and appeal was not a far-fetched possibility, even though the letter at [Bundle 723] did not refer to the possibility of appeal.

384.3.6 The burden of proof has shifted, and the Respondent has not satisfied me that it would have been any more expensive (either because of extended healthcare benefits, or at all) for the Claimant to remain as an employee for a notice period.

384.3.7 In any event, each of Ms Dover and Mr Johnson said in the hearing that the Claimant could have remained an employee for a notice period had she only asked. Thus the Respondent did not think that there were any particular obstacles to it.

384.4 Therefore, dismissing the Claimant with notice (assuming they were dismissing her at all) on 10 February 2023 would have been a reasonable step for the Respondent to have had to take.

385. In terms of paragraph 29 of list of issues:

385.1 I have already said that paragraph 29.3 would have been a reasonable step for the Respondent to have had to take. Had it taken that step, it would not have needed to take steps 29.1 or 29.2 or 29.4.

385.2 Had I not decided in the Claimant's favour on step 29.3, then I might have decided in her favour on step 29.2. The burden of proof has shifted and so it would have been up to the Respondent to persuade me why that would not have been a reasonable step for it to have had to take. I do note that the July payslip [Bundle 885] appears to show one month's BUPA deduction was £84.66 and that the Respondent appears to have made an £84.66 deduction in February 2023 [Bundle 883]. I heard no detailed arguments from the parties about the feasibility of persuading BUPA the cover should continue until 28 February 2023 if employment terminated on 10 February, or about why the deduction was £84.66 when the Respondent informed BUPA that cover ceased with effect from 10 February. However, ultimately this is hypothetical because failing to take step 29.3 was a failure to make reasonable adjustments.

385.3 In terms of 29.1 and in terms of 29.4, again it is artificial to decide whether taking either of those steps would have been a reasonable adjustment if step 29.3 was not a step that it was reasonable for the Respondent to have had to take.

385.4 In terms of step 29.5, in itself, a referral to OH is not a step which would have alleviated or minimised the disadvantage that the Claimant was at. As per Tarbuck v Sainsbury Supermarkets Ltd UKEAT/0136/06, there is not a duty to investigate the need for reasonable adjustments that is separate and distinct from the duty to actually make reasonable adjustments.

Breach of Contract

386. I am satisfied based on the Claimant's evidence, which was not challenged in cross-examination that similar expenses claims had been paid in the past.

387. The Respondent has not produced the written policy that was in force at the time of those earlier claims.

388. My conclusion is that, in the past, the correct interpretation of the expenses clause in her contract was that she would be paid for travel to work locations other than her normal place of work. The Respondent was not, at the time, suggesting that the correct interpretation was that an artificial deduction should be made to the actual cost of that travel to take off a notional amount equivalent to what it would have cost the Claimant to travel from her home address to her standard work location.

389. A policy requiring a deduction of that type is not inherently unreasonable, and nor is uncommon for employer's to have policies which require such deduction.

390. However, the Respondent has not proven that it successfully varied the expenses clause in the Claimant's contract to match the wording and examples given in the 7 December 2022 policy [Bundle 319]. They have not shown that they drew this policy to her attention, and informed her that the old rules no longer applied.

391. Even if I had decided that the 7 December 2022 policy did successfully implement a variation in the Claimant's contract, for future expenses, I would not have found that it applied retrospectively to expenses already incurred.

392. In conclusion, for paragraphs 48 and 49 of list of issues, the Claimant did produce receipts for travel to London, and was entitled to be paid in full for that travel. If the parties fail to reach agreement on the amount, it will be decided at the remedy hearing.

393. For paragraph 47, this was a breach of contract, though it does not appear to be one which entitles the Claimant to any damages as it seems to have caused no loss to her.

Outcome and next steps

394. Paragraphs 30 to 40 of list of issues do not require separate discussion in these liability reasons. They relate to remedy issues.

395. There will be a remedy hearing. That hearing will make decisions which take into account, among other things, the likelihood of the Claimant's employment ending even in the absence of unfairness or discrimination, and makes decisions about the relevance of the Claimant's declining Mr Johnson's offer.

Approved by:

Employment Judge Quill

on Date: 6 September 2025

REASONS SENT TO THE PARTIES ON

.....8 September 2025

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FOR EMPLOYMENT TRIBUNALS