# EMPLOYMENT TRIBUNALS

**Claimant:** **Mrs Ranjit Panesar**

**Respondent:** **DX Network Services Limited**

**Heard at:** **Watford Hearing Centre (by cloud video platform)**

**On:** **8, 9, 12, 13, 14, 15 & 16 July 2021 (7 days reduced from 8 days)**

**Before:** **Employment Judge G Tobin**
**Mrs H Edwards**
**Mr P Hough**

**Representation**
Claimant: In person
Respondent: Mr J England (counsel)

# JUDGMENT

**The unanimous Judgment of the Employment Tribunal is that: -**

**1 The claimant was not unfairly dismissed in breach of s94 Employment Rights Act 1996**

**2 At all material times, the claimant was a disabled person within the definition of s6 Equality Act 2010.**

**3 The claimant was not directly discriminated against in breach of s13 Equality Act 2010.**

**4 The claimant was not subjected to discrimination arising from her disability, in breach of s15 Equality Act 2010.**

**5 The respondent did not fail in its duty to make reasonable adjustments, pursuant to ss20 & 21 Equality Act 2010.**

**6 The claimant was harassed by the respondent, in respect of 4 comments made about her working from home, in breach of s26 Equality Act 2010.**

# REASONS

## The case

1 The claimant made claims of unfair dismissal and disability discrimination in respect of all 5 possible discriminatory prohibited conduct. The claimant's claims were summarised by Employment Judge Gumbiti-Zimuto following the hearing of 17 April 2020.

2 The length of hearing had been reduced because of judicial unavailability and the parties were keen to press on within the revised allocation. This was a remote hearing which had been consented to by the claimant and the respondent. The form of remote hearing was a video or HM Courts & Tribunal Service Cloud Video Platform hearing, and all participants, save as the hearing Judge, were not physically present at the hearing centre. A face-to-face hearing was not held because it was not practical in the light of the coronavirus pandemic and the governments restrictions. The Tribunal (and the parties) were satisfied that all of the issues could be resolved through this video hearing and within the reallocated time available.

3 Prior to beginning the hearing, the Employment Judge reviewed the list of issues with the parties' representatives. Although the factual matrix was not difficult to understand, the claims were far-ranging and unclear. The claimant was self-representing (although she said she had the assistance of a solicitor in preparing her case). The Judge went into considerable detail in explaining the different types of discrimination alleged and he sought to assist the parties in narrowing the issues. This was in accordance with the overriding objective at rule 2 of the Employment Tribunal Rules of Procedure 2013.

4 The Judge, on behalf of the Tribunal, expressed concern that, during the discussion, the claimant did not appear understand fully the types or categorisation of claims she pursued and the relevant legal requirements or tests that she would need to establish. Mr England, on behalf of the respondent, said that he did not understand the basis of most of the claims pursued. This was explored in great detail, with examples given. The Judge said that he would help recast the list of issues to something more manageable and intelligible so that the parties, and the Tribunal, could focus on the dispute within a clear legal context, and the claimant said that she would speak to her solicitor. Following the preliminary discussions on the morning of day 1 the Tribunal retired to read the statements and the documents referred to therein and some additional documents identified by the parties. On the morning of day 2, the claimant said that she had obtained advice and that, subject to very minor modification, she was resolved to stick to the prearranged list of issues. The claimant said she was adamant the claims identified in the list of issues identified below were those she wanted to pursue, irrespective of any duplication of claims or doubts about

identification of elements of the legal tests.

The issues to be determined

5 Therefore, the list of issues relied upon was as follows:

**Unfair dismissal: s94 Employment Rights Act ("ERA")**

1. Was the principal reason for the claimant's dismissal redundancy and if not, for some other substantial reason, namely "a business reorganisation carried out in the interests of economy and efficiency"?

2. Did the respondent act reasonably in all the circumstances in treating the claimant's redundancy as sufficient reason for dismissal, in particular:

   2.1 Did the respondent consult with the claimant meaningfully prior to dismissing the claimant? The claimant contends that the consultation was not meaningful because she believes that the outcome was pre-determined for the following reasons:

      a. "Your health really hadn't helped you this year"- comment made by Daniel Seabrook on 12th March 2019

      b. "This restructure affects you personally"- comment made by Daniel Seabrook and Kerensa Leatherland on 12 March 2019

      c. Kerensa Leatherland calling Nicky Burns (claimant's previous line manager) on 12 March 2019 to see whether she could take on the claimant as an employee

      d. Being told by Kerensa Leatherland and Daniel Seabrook on 12 March 2019 that the reason they were telling the claimant about the restructure in March 2019 rather than May 2019 (i.e. stating she had one-month notice) was so she had plenty of time to look for other employment

      e. Being told by Daniel Seabrook on 12 March 2019 that his brother was in recruiting and could help her find another role. Stating that the claimant would have to cover the fees of the CIPD following her redundancy

      f. Having the claimants job distributed out to other members of the team and not returned to the claimant.

      g. Dave Emson suggesting that the claimant appeal the redundancy on 22 May 2019

      h. The Respondent did not look/offer the claimant any suitable alternative employment.

      i. The respondent refused to make any reasonable adjustments to the Marketing Executive role (see page 340 of the bundle and para 44 of the claimant's witness statement).

      j. The claimant was asked to push out the Marketing Executive role to external candidates but was not offered to apply for it herself (p287 of the bundle).

   2.2 Did the respondent undertake a fair selection process prior to dismissing the claimant? The claimant contends that the selection process was not fair because:

      a. The claimant was not pooled with anyone else – the claimant should have been pooled with other members of the HR team, specifically: Hannah Shelley, Jo Young, Nisha Arya & 2 x employees at Northampton in HR advisor roles.

b. The job role had only recently been created by the people who were now seeking to make her redundant – the claimant was only promoted into the new role on 11 June 2018

c. Other employees were being given pay-rises at a time they said they could not retain the claimant's role due to cost-saving specifically: Scott Aguis, bringing in Karen Chandler and 2 x project manager roles.

d. On 19 March 2019 the claimant asked to see how the pooling/selection process had been formulated and this was never explained or shown to her

2.3 Did the respondent offer the claimant suitable alternative employment prior to her dismissal? The claimant contends that the following suitable alternative employment was not offered:

1) Product and Marketing Executive

2) Payroll assistant/admin role (maternity cover).

3. Did the decision taken to dismiss the claimant fall within the band of reasonable responses available to a reasonable employer?

4. Depending upon the reason for the dismissal determined by the Employment Tribunal, did the respondent breach the ACAS Code of Practice and if so, is an uplift appropriate?
If a fair procedure was not followed thus rendering the dismissal unfair, what would the outcome have been had a fair procedure been followed?

**Direct disability discrimination: s13 Equality Act 2010 (EqA)**

5. The respondent accepts that at all material times the claimant had a disability (cancer) and they had knowledge of this disability. Specifically, knowledge is accepted from Summer 2017 with a probable start date on or around 28 July 2017.

6. Was there less favourable treatment as alleged by the claimant as follows [inserted from paragraphs 1-13 of the Particulars of Claim]:

6.1 On 9 January 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days" and having Mr Agius imply that on a day she was working from home, the only reason she was working at 9:30am was because she was on assignment

6.2 On 4 March 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days"

6.3 Being the only person in the respondent company pooled for redundancy on 12 March 2019

6.4 Being told on 12 March 2019 by Daniel Seabrook (line manager) that "your health really hasn't helped you this year" in the context of selection for redundancy.

6.5 Daniel Seabrook stating on 12 March 2019 "I've put Monday 18 March in the diary but I know your '*off, sorry working from home*', I'll change it to 19 March"

6.6 On 25 March 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days"

6.7 Making it a requirement of the marketing executive role that the claimant be in the office 5 days a week knowing that the claimant needs to work at home 2 days a week as a result of her illness – 22 May 2019 email from Jonathan Ramsay

6.8 Requiring the claimant to pay for the rest of her CIPD apprenticeship despite the fact it was initiated and funded by the respondent company prior to them proposing to make her redundant

6.9 [*Following discussion amended to*] Not properly considering the claimant for the position of product and marketing executive

6.10 Being offered no time off for her abdominal surgery so having to take 3 days annual leave

6.11 Having her workload taken off her when she was signed off sick on 22 March 2019 and not returned to her upon her return to work as she was already pooled for redundancy.

6.12 Karensa Leatherland would no longer acknowledge the claimant and when the claimant left early for appointments and she would seem annoyed

6.13 Dismissing the claimant in the manner documented above

7. Was the Claimant treated less favourably than a hypothetical comparator - namely a hypothetical person who does not share the same protected characteristic as the claimant but who is (or assumed to be) in not materially different circumstances from the claimant)?

8. Was the reason for the less favourable treatment because of the claimant's disability?

**Indirect discrimination: s19 EqA**

9. Did the respondent apply PCPs [provision, criteria or practices] that:

(1) home working should be reduced/ceased;

(2) that the work was required to be performed 5 days a week in the office rather than at home; and

(3) that sick leave could not be taken for hospital surgery and recovery?

10. If so, were the PCPs applied to the claimant?

11. If so, were the PCPs applied, or would they be applied, to persons who were not disabled?

12. If so, would the PCP put persons with the claimant's impairment at a particular disadvantage when compared with persons without it?

13. If so, did this put the claimant at that disadvantage?

14. If so, can the respondent show it was a proportionate means of achieving a legitimate aim?

**Failure to make reasonable adjustments: ~~s20~~ [s21] EqA**

15. Did the Respondent apply PCPs that:

(1) home working should be reduced/ceased;

(2) that work was required to be performed 5 days a week in the office rather than at home and

(3) that sick leave could not be taken for hospital surgery and recovery?

16. Did any such PCP put the claimant at a substantial disadvantage in comparison with non-disabled persons?

17. Did the respondent know, or could it be reasonably have been expected to know, that the claimant was likely to be placed at the substantial disadvantage relied on (per s20, sch8 EqA 2010)?

18. Did the respondent take or fail to take such steps as it is reasonable to have to take to avoid that disadvantage? In particular, did the Respondent:

(1) fail to allow the claimant to work at home;

(2) insist that the claimant perform her role at work and

(3) offer her paid sick leave rather than requiring her to take annual leave from 22 March onwards?

**Discrimination arising from disability: s15 EqA**

19. Did the respondent treat the claimant unfavourably by doing the acts set out as follows [paragraphs 1-11 of the Particulars of Claim under the heading "Discrimination arising from disability". *Save as to 1 deletion and changing the order, this is identical to the direct disability claims*]?

19.1 On 9 January 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days" and having Mr Agius imply that on a day she was working from home, the only reason she was working at 9:30am was because she was on assignment

19.2 On 4 March 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days"

19.3 Being told on 12 March 2019 by Daniel Seabrook (line manager) that "your health really hasn't helped you this year" in the context of selection for redundancy.

19.4 Being the only person in the respondent company pooled for redundancy on 12 March 2019

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19.6 Making it a requirement of the marketing executive role that the claimant be in the office 5 days a week knowing that the claimant needs to work at home 2 days a week as a result of her illness – 22 May 2019 email from Jonathan Ramsay

19.7 Daniel Seabrook stating on 12 March 2019 "I've put Monday 18 March in the diary but I know your '*off, sorry working from home*', I'll change it to 19 March"

19.8 Being offered no time off for her abdominal surgery so having to take 3 days annual leave

19.9 Having her workload taken off her when she was signed off sick on 22 March 2019 and not returned to her upon her return to work as she was already pooled for redundancy.

19.10 Karensa Leatherland would no longer acknowledge the claimant and when the claimant left early for appointments and she would seem annoyed

19.11 Dismissing the claimant in the manner documented above

20. If so, was that because of something arising in consequence of the claimant's disability? The 'something arising' relied upon by the claimant is 'time off for appointments and the need for reasonable adjustments i.e. being able to work from home'.

21. If so, was the less favourable treatment a proportionate means of achieving a legitimate aim?

**Victimisation: s27 EqA**

22. The Respondent accepts that the grievance submitted by the claimant on 13 May 2019 amounts to a protected act.

23. Did the respondent subject the claimant to the detriments set out as follows [paragraph 1-5 of the Particulars of Claim under the heading "Victimisation"]?

23.1 Having her grievance "parked" whilst the redundancy process took place despite the fact that a large part of the grievance was focused on her selection for redundancy.

23.2 Making the decision to dismiss the claimant

23.3 Not following a proper redundancy procedure

23.4 The predetermination of the claimant's redundancy

23.5 Dismissing the claimant in the manner documented above

24. If so, was that because of the Protected Act?

**Harassment: s26 EqA**

25. Did the respondent do the acts as follows [set out at paragraphs (a) – (i) of the Particulars of Claim under the heading "Harassment". *Again this is cut and pasted from the direct discrimination claims*]?

25.1 On 9 January 2019 been emailed by a colleague, Scott Agius, and having her work from home days being referred to as "cosy days" and having Mr Agius imply that on a day she was working from home, the only reason she was working at 9:30am was because she was on assignment

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25.7 Requiring the claimant to pay for the rest of her CIPD apprenticeship despite the fact it was initiated and funded by the respondent company prior to them proposing to make her redundant

25.8 [*Following discussion amended to*] Not properly considering the claimant for the position of product and marketing executive

25.9 Karensa Leatherland would no longer acknowledge the claimant and when the claimant left early for appointments and she would seem annoyed

26. If so, was this conduct related to the claimant's disability?

27. If so, did this have the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

**Jurisdiction**

28. Are any of the claims out of time such that the Tribunal does not have jurisdiction? The respondent's position is that claims relating to dismissal are in time but any act before 1 March 2019 is out of time, which includes a minority of the discrimination claims (depending partly on when the claimant alleges acts occurred).

29. If so, are any of those acts in time as part of continuing act or a series of acts?

30. Alternatively, does the Tribunal consider it just and equitable to extend the 3-month time limit to include any successful claims of discrimination?

**Costs**

24. Was it unreasonable for the Respondent in its ET3 to assert 1) that they knew she had cancer (page 35 of the bundle, para 3) but that she does not have a disability (page 47, para 56), 2) that they did not have knowledge of the Claimant's disability (p48, para 65)?

25. If so, should a costs award be made? The grounds for the Claimant's application are as further particularised in SDM's email to BL at p752-756 of the bundle.

## The law

Unfair Dismissal

4. The claimant claims that she was unfairly dismissed in contravention of s94 ERA. S98 ERA sets out how the Tribunal should approach the question of whether a dismissal is fair. First, the employer must show the reason for the dismissal and that this reason was one of the potentially fair reasons set out in s98(1) and s98(2) ERA.

5. The respondent said that it dismissed the claimant for redundancy, pursuant to s98(2)(c) ERA. The respondent contends, in the alternative, that the dismissal was for a reason related to some other substantial reason ("SOSR"), under s98(1)(b) ERA, if the definition of redundancy was not met. The claimant disputes that she was dismissed for either of these reasons and contends that the real reason for her dismissal was the disruption to the business that her disability had cause and the negative perception from her employer thereof, which reflected the respondent's discriminatory approach.

6. An employee is dismissed by reason of redundancy, within s139(1)(b) ERA if the reason for her dismissal is that the requirement for employees to do work of a particular kind has ceased or diminished. This will clearly cover the situation where the dismissed employee's own job has disappeared through lack of work; however, it will also cover certain reorganisations. In *Safeway Stores v Burrell [1997] IRLR 200* the Employment Appeal Tribunal ("EAT") held that the test to establish whether or not a redundancy situation existed under s139(1)(b) ERA, should be a 3-stage process:

1. Was the employee dismissed? If so,

2. Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? If so,

3. Was the dismissal of the employee caused wholly or mainly by that state of affairs?

7. In determining at stage 2 above, whether there was a true redundancy situation, the only question to be asked is whether there was a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such a diminution/cessation in the future. This was approved by the House of Lords in *Murray and Another v Foyle Meats Limited [1999] IRLR 562*. *Safeway* and *Murray* gave little emphasis to the words "work of a particular kind" as the focus was on causation, so a dismissal is by reason of redundancy if it is attributable to the respondent's diminished need for employees to do work of a particular kind.

8. If the employer is successful at that first stage, the Tribunal must then determine whether the dismissal was fair under s98(4):

> Where the employer has fulfilled the requirements of subsection (1), the determination of the question of 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.

9. The s98(4) ERA test can be broken down to 2 key questions:

1. Did the employer utilise a fair procedure?

2. Did the employer's decision to dismiss fall within the range of reasonable responses open to a reasonable employer?

10. Accordingly, so far as the unfair dismissal issue was concerned, the emphasis of the case at the hearing was whether the Tribunal could be satisfied that, in all the circumstances, the respondent was justified in dismissing the claimant for the reasons given, i.e. in relation to the redundancy situation or the business re-organisation.

11. In *West Midlands Cooperative Society Limited v Tipton [1986] ICR 192* the House of Lords determined that the appeal procedure was an integral part of deciding

the question of a fair process. Indeed, a properly conducted appeal can reinstate an unfairly dismissed employee or remedy some procedural deficiencies in the original hearing.

12. In judging the reasonableness of the employer's decision to dismiss, an Employment Tribunal must be careful to avoid substituting its decision as to what was the right course of action for the employer to adopt for that which the employer did in fact chose. Consequently, the question for the Tribunal to determine is whether the respondent's decision to dismiss the claimant fell within the band or range of reasonable responses open to a reasonable employer: see *Foley v Post Office; HSBC Bank plc v Madden 2000 ICR 1283*. The range of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision is reached: *J Sainsbury plc v Hitt 2003 ICR 111 CA* and *Whitbread plc (t/a Whitbread Medway Inns) v Hall 2001 ICR 669 CA.*

Disability

13. S4 EqA identifies "disability" as a protected characteristic. So an employee should not be discriminated against on the basis of their disability.

14. S6(1) EqA defines disability:

> A person (P) has a disability if—
> (a) P has a physical or mental impairment, and
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

15. Paragraph 6 of Schedule 1 of the EqA provides that certain specified medical conditions are to be treated as disabilities. These specifically include cancer. This means that individuals with cancer (even if "minor") are deemed to have a disability from the point of diagnosis without the need to satisfy the various elements of the statutory test.

16. The claimant contended that the respondent unnecessarily refused to accept and/or contested that she was a disabled person; although the respondent had accepted that the claimant was a disabled person by the commencement of the hearing. There are matters arising from this, and when the respondent knew about the claimant's condition, at issues 24 and 25, which we did not have time to hear evidence on and which will be dealt with at the same time as the remedy hearing.

Direct discrimination

17. S13(1) EqA precludes direct discrimination:

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

18. Under s4 EqA, a protected characteristic includes disability.

19. The examination of *less favourable treatment because of the protected characteristic* involves the search for a comparator and a causal link. When assessing

an appropriate comparator, "there must be no material difference between the circumstances relating to each case": s23(1) EqA.

20. S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

21. The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

i. Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

ii. If the claimant satisfies (i), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

The Court of Appeal in *Igen* emphasised the importance of *could* in (i). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prima facie evidence of a link between less favourable treatment and, say, the disability and not merely arising from unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

<u>Indirect discrimination</u>

22. S19 EqA defines 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 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, that person with whom B shares 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.

23. Some points stand out according to Baroness Hale in *Secretary of State for Trade and Industry v Rutherford and Another (2006) IRLR 551HL*:

(a) The concept is normally applied to a rule or requirement which *selects* people for a particular advantage or disadvantage;

(b) the rule is applied to a group of people who *want* something. The disparate impact complained of is that they cannot have what they want because of the rule, whereas others can.

24. To bring a claim of indirect discrimination, a claimant must first show that she belongs to a particular protected group. She must also show that she is put to a disadvantage to which the protected group to which she belongs is put. A *provision, criterion or practice* (PCP) must then be identified which is applied to the claimant and has, or would have, an adverse impact on the claimant. The PCP must be apparently neutral; if it is premised on a rule that is itself discriminatory the claim is likely to be one of another form of discrimination: see *James v Eastleigh Borough Council [1990] ICR 554*.

25. The meaning of *provision, criterion or practice* is not defined in the legislation but, whilst neutral, will cover informal and formal working practices and is also intended to allow for an examination of working practices that do not operate as absolute requirements for the job in question. So, it is essential to determine a PCP in order to assess whether something the employer does to its employees gives rise to a difference in outcome, or has an adverse disparate impact, depending on the characteristics of its employees. In indirect discrimination claims, the adverse disparate impact must be shown to affect one group – to which the claimant belongs – more than it does to another group. Defining the PCP is essential to finding whether there has been indirect discrimination: see *Environment Agency v Rowan [2008] IRLR 20, Newham Sixth Form College v Sanders [2014] EWCA Civ 734, Brangwyn v South Warwickshire NHS Foundation Trust [2018] EWCA Civ 2235* and *Unison v Lord Chancellor [2017] UKSC 51*.

Discrimination arising from disability

26. S15 EqA precludes discrimination arising from a 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 a disability.

27. S15 EqA is aimed at protecting against discrimination arising from or in consequence of the disability rather than the discrimination occurring *because of* the disability itself, which is covered under direct discrimination. The term *unfavourably* rather than the usual discrimination term of *less favourably* means that no comparator is required for this form of alleged discrimination. So, for example, where a disabled employee was viewed as a weak or unreliable employee because she had taken periods of disability-related absence and this had caused her dismissal, the person may not suffer a detriment because they were disabled as such, but because of the effect of that disability.

28. In *Hall v Chief Constable of West Yorkshire Police UKEAT/0057/15* the EAT emphasised that it was not necessary for the disability to be the cause of the unfavourable treatment. The burden on a claimant to establish causation in a claim for discrimination arising from disability is relatively low. It will be sufficient to show that

there is some causal link, and that the unfavourable treatment has been caused by an outcome or consequence of the disability. The employer's motivation is irrelevant. The EAT in *Charlesworth v Dransfields Engineering Services Limited UKEAT/0197/16* said that s15 EqA requires unfavourable treatment to be *because of something* arising in consequence of the disabled person's disability. If the *something* is an effective cause – and influence or cause that operated on the mind of the alleged discriminator to a sufficient extent (whether consciously or unconsciously) – the causal test is satisfied. However, even if a claimant succeeds in establishing discrimination arising from disability, the employer can defend such a claim by showing either that the treatment was objectively justified, or that it did not know or could not reasonably have known that the employee was disabled.

Failure to make reasonable adjustment

29. Under ss20-22 and schedule 8 EqA an employer has a duty to make reasonable adjustments in 3 situations:

i. where a provision, criteria or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled. This covers cases on *how* the job, process, etc is done;

ii. 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. This covers the situation of *where* the job is done;

iii. 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. This covers those cases where the provision of an *auxiliary aid* (e.g. special computer software for those with impaired sight) would prevent the employee being disadvantaged.

A failure to comply with any of these requirements renders that omission actionable as discrimination under s21 EqA. This claim is focused upon the first provision identified above.

30. It is important to note that the duty to make reasonable adjustments arises only where the disabled person in question is put at a "substantial disadvantage" in relation to a relevant matter in comparison with persons who are not disabled. In order to undertake the comparative exercise, the EAT held in *Environment Agency v Rowan 2008 ICR 218 EAT* that a Tribunal must identify the: (a) the provision criteria or practice (PCP) applied; (b) the identity of the non-disabled comparators (where appropriate); and (c) the nature and extent of the substantial disadvantage suffered by the claimant. We address the necessity for identifying properly the PCPs both above and below.

31. Possibly counter-intuitively, s212(1) EqA states that "substantial" means more than minor or trivial. Although substantial disadvantage represents a relatively low threshold, the Tribunal will not assume that merely because an employee is disabled,

the employer is obliged to make reasonable adjustments. The Tribunal is obliged to consider the nature and extent of the disadvantage in order to ascertain whether the duty applies and then what adjustments would be reasonable, see *Environment Agency v Rowan*. We should avoid making generalised assumptions about the nature of the disadvantage and failing to correlate the alleged disadvantage with the claimant's particular circumstances.

32. The duty to make adjustments arises only in respect of those steps that it is reasonable for the employer to take to avoid the disadvantage experienced by the disabled person. The reasonableness of the adjustment is an objective test: see *Smith v Churchills Stairlifts plc 2006 ICR 524 CA*.

33. The duty to make reasonable adjustments arises where a disabled person is placed at a substantial disadvantage "in comparison with persons who are not disabled": s20(3)-(5) EqA. There is a requirement to identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled persons: see *Fareham College Corporation v Walters 2009 IRLR 991, EAT*.

Victimisation

34. The victimisation provisions aim to give protection to workers who bring complaints of discrimination or other proceedings and that enforcing compliance with equal treatment principles. Victimisation under s27(1) EqA is defined as follows:

> *A person (A) victimises another person (B) if A subjects B to a detriment because –*
> *(a) B does a protected act, or*
> *(b) A believes that B has done, or may do, a protected act.*

35. A *protected act* includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters in establishing causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

Harassment

36. The test for harassment is set out in s26 of EqA:

> (1) A person (A) harasses another (B) if –
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…
>
> (4) In deciding whether contact has the effect referred to in subsection (1)(b), each of the following must be taken into account –
> (a) the perception of B;
> (b) the other circumstances of the case; and
> (c) whether it is reasonable for the conduct to have that effect.

37. For allegations of harassment, there is no necessity to look for a comparator. As described in *Rayment v MoD [2010] EWHC 218 (QB), [2010] IRLR* the standard for harassment is conduct that is "oppressive and unacceptable". The definition approaches the matter from the claimant's perspective. Therefore, if a victim had made it clear that she found the conduct unwelcome, the continuation of such conduct will

constitute harassment. Only if it would be unreasonable to regard the conduct as harassment at all will there be a defence here, but the test for connections between the conduct and the effect have been loosened so that unwanted conduct no longer has to be *on the ground of* the victims protected characteristic to fall within the definition, but only *related* to it.

38. We should adopt a 3-stage approach, according to *Richmond Pharmacology v Dhaliwal [2009] ICR 724* and *Bikkali v Greater Manchester Buses (South) Limited t/a Stagecoach Manchester UKEAT/0176/2017*:

- Did the respondent engage in unwanted conduct?
- Did the conduct in question either:
    - have the *purpose* or
    - have the *effect* of either (i) violating the claimant's dignity or (ii) re-creating an adverse environment for her?
- Was the unwanted conduct related to a relevant protected characteristic?

**The witnesses and documentary evidence**

39. We (i.e. the Tribunal) heard evidence from the claimant who had provided a written statement in advance of the hearing. The claimant has also provided a statement from her husband, Mr Randip Dhillon, which after reading we assessed as more relevant to remedy. Consequently, we did not hear "live evidence" from Mr Dhillon at the hearing. The claimant produced a witness statement from Mrs Nicola Burns, who was the respondent's previous Head of Recruitment and the claimant's former line manager and friend.

40. On behalf of the respondent, we heard evidence from the following, who also provided witness statements:

(1) Mr Daniel Seabrook, who at material times was the respondent's HR Business Partner and the claimant's former line manager.

(2) Mr Matt Wood, was the respondent's Payroll & Benefits Manager who, following Mr Seabrook's departure, concluded the claimant's redundancy consultation and dismissed her.

(3) Ms Karensa Leatherland, who was the respondent's Personnel Director.

(4) Mr David Empson was the Head of Management Services who chaired the claimant's grievance.

(5) Mr Jonathan Ramsay was the respondent's Product and Marketing manager. He was in charge of recruiting for a new Marketing Executive role, which the claimant expressed an interest in applying for.

(6) Mr Simon Harper was the respondent's Operations Director and chaired the claimant's redundancy appeal hearing.

6 We were initially provided with 2 hearing bundles which ran to 967 pages, although further documents were admitted on the application of both parties.

7 We found the claimant to be an honest and broadly reliable witness. We reject Mr England's submission that the claimant was an unreliable historian. She was mistrustful of her employers and particularly Ms Leatherland and Mr Seabrook. This is understandable when we look at the timing of remarks made to her about her work flexibility which was closely followed by the redundancy situation. Ms Leatherland and Mr Seabrook were untruthful about a meeting which they say the claimant gave Ms Leatherland permission to talk to Ms Burns regarding alternative work. It is understandable that Ms Leatherland might want to make these enquiries and in the particular circumstances of this exchange the Tribunal did not see anything untoward in Ms Leatherland's approach to Ms Burns. However, to give false account on a relevant point of the meeting of 12 March 2019 undermines her credibility and that of Mr Seabrook.

8 The claimant's distrust of her senior colleagues was easy to understand, particularly when Mr Seabrook in both the redundancy notification and his question-and-answer reply in the redundancy consultation raise questions of disciplining the claimant for a breach of confidentiality that Ms Leatherland so obviously committed. Perhaps if Ms Leatherland had admitted her error, then the claimant would not have been so sceptical of her motives (as well as her integrity).

9 This was a respondent reluctant to provide a clear and open account. This was demonstrated in the investigation into the claimant's complaints of the comments made to her. No-one was interviewed in respect of the wider context or who might possibly corroborate the claimant's allegations. We accept the claimant account that the reference to "cosy days" was not limited to the 4 instances which were supported by documentary corroboration.

10 Ms Leatherland said that there were no documents available to the respondent (and therefore the Tribunal) about the claimant diagnosis of cancer and her report of this. There was a surprising dearth of documents surrounding the claimant's working from home and other adjustments, which, frankly, we find just not credible or believable in the circumstances of this case, particularly when there were documents available to corroborate redundancy consultation meetings. Generally, the documents produced by the respondent only supported their assertions and countered the claimant case - unless the claimant already had such documents. Most of the respondent's witnesses demonstrated a pattern of denying anything that was not directly evidenced in the patchy documents provided and this left an impression of opportunism and absence of candor. Astonishingly for any large employer, there were insufficient clear contemporaneous sickness absence records for the claimant. The schedule produced by Mr England during the course of the hearing was not accurate according to the claimant (which we accept) and sought to distinguish, on every possible ground, absences as related to the claimant's disability. On most significant matters, we generally prefer the claimant's accounts as we find she was honest and reliable. In contrast, in general we accepted the evidence of the respondent's witnesses with care, but the evidence of Ms Leatherland and Mr Seabrook with notable caution. It is disappointing that even something as innocuous as the chronology (which

is not evidence) was not worded neutrally, it referred to more redundancy consultation meeting than there was and it failed to record all of the allegations of discrimination.

11 We found Ms Burns to be a straightforward witness and we accepted her account without reservation. Mr Harper was similarly a clear and straightforward witness. We were concerned about Ms Leatherland's involvement in the appeal process prior to the appeal against dismissal hearing. However, Mr Harper's lucid account and his thorough outcome letter demonstrated that he approached his task with diligence and candour.

**Our findings of fact**

12 We made findings in respect of the following facts. We did not resolve all of the disputes between the claimant and respondent merely those matters which we regarded as appropriate to determining the issues of this case. In determining the following facts, we placed particular reliance upon contemporaneous or near contemporaneous correspondence, emails and documents. We approached the witness statements with some care because this evidence was prepared sometime after the events in question and for the purposes of either advancing or defending the claims in question. Where we have made findings of fact, where this is appropriate, we have also set out the basis for making such findings.

13 The claimant commenced employment with the respondent on 24 January 2017 as a Recruitment Coordinator. The claimant was initially line managed by Ms Burns.

14 The claimant was unwell during spring 2017 and underwent tests for suspected thyroid cancer. On 1 June 2017 the claimant informed Ms Burns that she had received a diagnosis of cancer.

15 During January 2018 Ms Burns left the respondent's employment and the claimant was then briefly line managed by Mr Hugh Owens (HR Director) and Ms Caroline Morrissey (Vetting & Recruitment Manager). Mr Owens agreed with the claimant in February 2018 that she could work from home a few days a week due to her treatment, her medication and its ensuing side effects. This was to last until the claimant was signed off by her consultant in March 2018 [Hearing Bundle p189]. Mr Seabrook took over as the claimant's line manager on 10 May 2018.

16 At this time (May 2018) the respondent undertook a restructuring exercise and determined that the need for two Recruitment Coordinators was to be reduced to one. The claimant and her colleague, Ms Arshia Karim, were advised that an alternative role of HR Administrator was available and that either could apply for that role if they wanted to avoid a potential redundancy situation for the Recruitment Coordinators' role. On 15 May 2018 the claimant accepted the alternative role of HR Administrator on the same pay with this same flexible working arrangement [HB192, 193].

17 Following an external appointee not taking up the appointment, the claimant

then took up the role of HR MI Adviser[1], initially as a temporary appointment [HB199] and then this was made permanent on 11 June 2018 [HB201]. The claimant commenced a CIPD apprenticeship programme on 25 October 2018.

18 On 9 January 2019 during the course of a work-related email exchange, Mr Scott Agius (Payroll & Benefits Specialist) commented to the claimant "so you're having an extra cosy day at home this week? ☺" [HB217]. The claimant replied "Hahaha… not so cosy day in Northampton actually…"

19 On 24 January 2019 the claimant requested, and the respondent agreed, to put her CIPD course on hold because of her health.

20 On 4 March 2019 during the course of a friendly work-related email exchange Mr Agius emailed the claimant stating "… And I'm on holiday for the rest of the week, so you'll miss the pleasure of my company until next week when you're not on one of your cosy days ☺"

21 The claimant was put on notice that her role was at risk of redundancy on 12 March 2019. The claimant kept a record of this meeting [HB245-246], Mr Seabrook and Ms Leatherland said that they did not take notes, which is surprising. This was the second and unannounced item in a meeting between the claimant, Mr Seabrook and Ms Leatherland. The reason for the company restructuring was briefly discussed. This was because of the introduction of a new human resources and payroll system and financial difficulties affecting the respondent company. Ms Leatherland said that the restructure to be undertaken affected or impacted upon the claimant personally, which was obvious given that the claimant was placed on notice of possible dismissal. Mr Seabrook discussed scheduling a further meeting and he referred to the following Monday, but changed his mind to Tuesday 19 March 2019 with the comment recorded as follows "… I know your "off", sorry working from home" [HB246].

22 Mr Seabrook went on to say, "your health has not helped you this year".

23 The claimant did not give Ms Leatherland permission to discuss her role with Ms Burns or anyone else, we reject the account given by Ms Leatherland and Mr Seabrook to the Tribunal. This part of the exchange is not recorded in the contemporaneous notes. During the meeting Mr Seabrook gave the claimant a pre-prepared notification of redundancy letter, which emphasised that the process was to be kept confidential. Discussing the possibility of alternative available roles outside the business was not a matter that would easily fit into an "at risk meeting". Additional, because Mr Seabrook made such an issue of confidentiality (both for inside and outside the business) with threats of disciplinary action [HB244], it is not credible that any effort to discuss the claimant's redundancy outside the business would not have been agreed and documented. As we believe the claimant is an honest historian, if speaking to Ms Burns about the redundancy did come up then it would have been recorded. We prefer the claimant's account in resolving this conflict of evidence. Ms Leatherland account was unconvincing, in which she sought to justify talking about the claimant's impending redundancy with her former colleague, Ms Burns. Mr Seabrook

[1] Human Resources Management Information Adviser, although also referred to as HR Adviser & MI

was similarly unconvincing. One person might misremember, two people trying to tell the same uncredible story, in such circumstances, are lying; and this arose from a conspiracy to get their story straight.

24 Later that day Ms Leatherland texted [HB243] and then telephoned Ms Burns, the claimant's previous line manager, to enquire whether she might know of any external vacancies suitable for the claimant. To put this in context, the claimant was in a difficult predicament as changes were underway which were likely to see her job disappear. The person directing those changes sought to minimise the impact of the claimant losing her job by making enquiries with her predecessor to see if there were any alternative and possible suitable vacancies outside the respondent's business. We note that the claimant contends that this was a breach of confidentiality. It is outside The Employment Tribunal's jurisdiction to determine data protection issues but, so far as confidentiality, Ms Burns was the respondent's former manager and a friend of the claimant who had high regard for the claimant. Ms Leatherland gained no advantage from discussing the claimant's possible redundancy dismissal, other than possibly avoiding a potentially difficult dismissal somewhere down the line. Any opportunities arising from Ms Leatherland's discussion with Ms Burns would have accrued to the claimant and there could be no detriment to the claimant's rejection of any lead outside the company in respect of the redundancy payment.

25 The claimant attended her first redundancy consultation meeting on 19 March 2019 with Mr Seabrook. During this meeting the claimant complained that she felt that she was "looked down on" by members of her team and that she felt that she had to justify herself. She gave the example of a colleague Lynn Beaty (Shared Services Manager) calling her the day before at 4.15pm querying whether she was working and the claimant reported that she received comments referring to her "cosy days" on a regular basis [HB250]. We are not satisfied that this aspect of the claimant's complainant (i.e. the widespread reference to the claimant's working from home as being "cosy days" or similar demeaning and negative utterances) was properly investigated by various respondent officers as there is a notable absence of contemporaneous interviews or review of correspondence with colleagues. We accept the claimant evidence that, as a matter of fact, various colleagues referred to her working from home in a manner than she felt demeaning.

26 In response to a friendly greeting and a payroll request Mr Aguis responded on 25 March 2019: "Morning Ranjit. I hope you are feeling better ☺ I'm doing very well, had a great date on Saturday :D I can fill you in properly when you're not on one of your cosy days :P". The claimant did not respond to this comment and later that day went off ill, until the end of the month, with symptoms she attributed to stress.

27 A second redundancy consultation meeting was due to take place on 17 April 2019; however, the claimant objected to the presence of the proposed notetaker, and the consultation meeting was postponed. The second consultation meeting was rescheduled, and this took place on 26 April 2019 [HB274-279]. The respondent refers to this as the third redundancy consultation meeting in various documents which is inaccurate because the respondent agreed to cancel the previous consultation meeting, so that consultation meeting did not proceed.

28 At the second redundancy consultation meeting on 26 April 2019 the claimant queried why her role had been selected for redundancy and why she was the only member of the team to go through a redundancy consultation process. The claimant specifically identified Hannah Shelley as being in a comparable position and therefore a pool of potential redundant employees. The claimant produced copies of emails between herself and Mr Aegis where he referred to using the term "cosy days". Mr Seabrook addressed the issue of possible suitable roles and the claimant accepted that there were no suitable roles that she knew of. Nevertheless, Ms Seabrook said that he would share all roles available.

29 On 30 April 2019 the claimant approached Mr Jonathan Ramsay (Product & Marketing Manager) about a vacant Marketing Executive role and then sent him a copy of her CV [HB288].

30 On 2 May 2019 Mr Seabrook met with Mr Agius [HB289-290]. Mr Agius is recorded as saying that he regarded referring to the claimant's working from home as cosy days as being "banter". Mr Agius went on to say that he regarded the claimant as a close colleague and assumed that she was okay with her comment, he did not believe it had negative connotations but now he could see that the claimant may have been offended. Mr Agius accepted his comments were upsetting and offered to speak to the claimant and apologise.

31 Following the second redundancy consultation meeting of 26 April 2019, Mr Seabrook drew up a "questions and answers" document [HB280-283]. This specifically addressed the following:

1. Why was Nicky Burns told of my situation, I did not agree to this?
2. Feel like I have to justify situation in relation to days working from home. Emails was shown of Scott Agius calling them cosy days.
3. I am still not clear on the review that took place and why my role was singled out.
4. How did Hannah Shelley get the HR Adviser as we have the same skill set?

32 On 8 May 2019 Seabrook conducted the third redundancy consultation meeting. During this meeting Mr Seabrook provided the claimant with the questions and answers document identified above. The claimant objected to the redundancy situation but did not advance any additional arguments as to why. During the course of this meeting, Mr Seabrook advised claimant that Mr Agius was willing to apologise for any offence caused to the claimant over his "cosy days" references.

33 The claimant raised a formal grievance on 12 May 2019 [HB295]. The claimant made allegations of disability discrimination and alleged that she had been pre-selected for redundancy on the basis of her cancer. She contended that the redundancy was a sham. The claimant's grievance letter also requested that the redundancy consultation be postponed until the grievance process was concluded.

34 Ms Leatherland responded to the claimant's grievance the following day [HB296]. She advised the claimant that Mr David Emsen (Head of Management Services) would determine her grievance and that the redundancy consultation would

be put on hold until Mr Emsen concluded his investigations. On 22 May 2019 Mr Emson met the claimant in respect of her grievance and over 6 weeks later from her formal complaint (i.e. on 25 June 2019) he concluded that as the major strands of the claimant's grievance related to the claimant's redundancy, then those parts of the grievance should await the outcome of the redundancy process [HB368]. It took over a month more, which was 2½ months from the claimant's grievance, for Mr Emsen to determine the outstanding elements of the claimant grievance [HB419]. This rejected the claimant's formal complaints of bullying.

35 Mr Ramsey wrote to the claimant on 17 May 2019 in respect of an interview [HB433] and on the Monday (20 May 2019) the claimant said she would be available on the Wednesday [HB433]. Mr Ramsey saw the claimant in the office on the Wednesday and asked her what time she was free [HB432]. An exchange followed between the two:

On 22 May 2019:

- From the Claimant
  I just wanted to be honest from the outset and let you know that I am not signed off for my illness yet which means that I will need to work from home 1/2 days a week as I do at the moment. Also, if we can postpone our meeting today to next week that would be great as I have some urgent eAcru work that I need to complete as I'm on annual leave tomorrow and Friday.

- From Mr Ramsey
  This role is a Monday to Friday, 5 days in the office role – with time in London and other locations for events organisation – especially early mornings and evenings to make it all work.
  Happy to discuss next week,

On 29 May 2019 (i.e. 7 days later) the claimant wrote:

> Thanks for clarifying the below. I take it that working from home or shorter days while I'm continuing treatment would not be an option?

Which Mr Ramsay responded the next day:

> It wouldn't really, I need someone in the office Mon-Fri for a full day, plus when we are at events it is evening work etc. We are part of the exchange team so are logged into the phone and webchat q's too… Happy to talk through, and happy to share some contacts too to see if I can help with your search?

36 So, on 30 May 2019 Mr Ramsay confirmed to the claimant that he determined that the Marketing Executive role could not be done on a flexible basis as queried by the claimant.

37 Mr Seabrook left the respondent's employment during June 2019 and on 4 July 2019 Mr Matt Woods (Project Manager – Project STAR at that particular time) wrote to the claimant to resume the redundancy consultation. Mr Woods set a meeting for 10 July 2019 and advised the claimant that she could bring a colleague or trade union representative with her. He set out the reason for the proposed change in the HR Structure and informed the claimant again that she was at risk of being made redundant. He asked if the claimant had any questions to let him know in advance so that he could gather the appropriate responses.

38 The claimant attended the redundancy consultation meeting with Mr Woods on 10 July 2019 [HB377], which was in fact her fourth redundancy consultation meeting. The meeting was brief and business-like. The claimant confirmed that she had no new questions and Mr Woods confirmed her notice period. He confirmed that the claimant will be made redundant if no other suitable role arose within the 3-months' notice period. Mr Woods mooted garden leave which he said would give the claimant time off to look for alternative employment. The claimant indicated that she might be receptive to this option. Mr Woods referred to the claimant's CIPD course which he said the respondent would fund until October 2019. The claimant and Mr Woods discussed a handover and Mr Woods indicated that a vacancy bulletin would be available to the claimant each week.

39 On 11 July 2019 Mr Woods wrote confirm the claimant's dismissal by reason of redundancy [HB381-382]. He stated:

> As has been stated throughout this consultation process the introduction of the new HR/Payroll system alongside the move to a fully centralised Shared Services model negates the requirement for the MI Advisers role. Also delivering to continue close management of labour costs is an essential part of the DX Business turnaround programme. This is vital at a time the company is still in a recovery period with a lower than expected trading performance, especially within our DX Freight Division and now also magnified by the recent loss of the HMPO contract in DXE.
>
> As we have established there are no suitable alternative roles available your contract of employment with DX will be terminated by way of redundancy. Therefore we are providing you with your contractual three months' notice of this termination.

40 Mr Woods stated that the claimant would be required to work her 3-month notice period and her final date for employment would be 10 October 2019. He encouraged the claimant to apply for any other jobs and said that he would meet her regularly to discuss any alternative roles that she arranged to apply for. He said if the claimant secured another role during her notice period then her employment would continue. Mr Woods set out in claimant's redundancy payment and advised her of her right of appeal.

41 The claimant appealed against the dismissal on 15 July 2019. She repeated her grievance complaint that she had been directly discriminated against because of her cancer and subsequently pre-selected for redundancy on that basis. The claimant reiterated that she believed this was a sham redundancy with a flawed selection process and a pre-empted outcome. The claimant said that suitable alternative roles were not offered or considered and the suggestion she made were not considered satisfactory. The claimant complaint that her grievance had been "parked" and she also complained that she would have to bear the cost of her CIPD apprentice course personally.

42 Ms Leatherland met the claimant on 16 July 2019 [HB385-387]. This was after the claimant met with Mr Emsen to discuss her grievance. Ms Leatherland said that she met with the claimant to acknowledge receipt of her redundancy appeal and to confirm some points relating to her appeal. We were puzzled why the claimant might need a meeting to acknowledge her redundancy appeal and there was no satisfactory explanation forthcoming as to what needed clarifying in this appeal. Ms Leatherland informed the claimant that Mr Simon Harper would hear the appeal so the Tribunal

could not understand why, if such a meeting was required, Mr Harper did not conduct it. The notes of this meeting did not assist in identifying the purpose of the meeting. In any event, Ms Leartherland raised issue of the claimant's cancer and informed the claimant that she thought she was in remission. This upset the claimant because the claimant said, and we accept, there was no basis on which to come to such a conclusion. Ms Leatherland also broached the issue of garden leave and said that the claimant need not attend work for the rest of her employment.

43 Mr Harper (Operations Director – DX Express) met with the claimant on 22 July 2019 to determine the claimant's appeal against dismissal [HB397-417]. Mr Harper wrote to the claimant with her appeal outcome on 25 July 2019 [HB423-427]. He identified the main points of the claimant's appeal in the appeal hearing and he went through these in his appeal outcome letter. Mr Harper's response is relevant and important to the dismissal case in particular so we will go through this in detail. In respect of the main points of the appeal he said as follows:

1. He said that he reviewed the business case for the personnel team's restructure. He noted that there is always an element of predetermined possible outcomes and said the aim was to discuss the proposal, answer the claimant's queries or concerns and discuss whether or not there was any suitable alternative employment and review counterproposals seek to avoid redundancies were possible. He referred to the comment of 12 March 2019, "your health really hasn't helped you much this year" and said that Mr Seabrook was merely pointing out that the claimant had a tough year with her health and that he believed the comment was taken out of context. Mr Harper rejected the claim's contention that the redundancy was a sham considered the review had been comprehensive.

2. In respect of suitable alternative employment, Mr Harper said that in the meeting of 26 April 2019 Mr Seabrook was recorded saying he was looking for suitable alternative roles. A payroll position and the Team Leader role in Northampton were discussed which required a very specific skill sets, as well as the letter having a fixed location in Northampton. Mr Harper said that Mr Seabrook also asked claimant about alternative roles on the list of vacancies in the claimant responded by saying none of these could be considered as suitable alternatives. On 8 May 2019 the claimant pursued a role with Mr Ramsay's team. Mr Harper concluded that he did not believe the claimant was not considered for any suitable alternative role as at every opportunity, all current vacancies were shared with the claimant to allow her to consider suitable alternative employment.

3. Satisfactory consideration of the claimant's proposed new role of eArcu Specialist was not considered a viable proposal because the new system did not require this role and any eArcu queries will be handled elsewhere. Mr Harper emphasised that the point of the structure was to manage, or reduce, labour costs. Mr Harper referred to ongoing consideration of suitable alternative employment and we can contact Mr Woods and the claimant's access to the weekly vacancy bulletin.

4. Mr Harper acknowledged claimant felt isolated and discarded by the business but reassured her she was a valued member of the team and that they were losing in respect of colleagues.

5. Mr Harper dealt with whether Hannah Shelley should have been included in the act risk of redundancy pool. Mr Harper set out some relevant history.
    - In June 2018 consultation opened for the recruitment team due to financial constraints and the proposal was to reduce two Recruitment Coordinators to one. Ms Shelley was a Recruitment Adviser so was unaffected at this time. During the consultation, the claimant agreed with Arshia Karim, the other Recruitment Coordinator, that Ms Karim would stay in the Recruitment Coordinator's role and that the claimant would move to a vacant HR Administrator role with another team. Soon after, the claimant was promoted to a HR Adviser MI & Reporting role.
    - In September 2019 the board decided that recruitment would become the responsibility of General Managers at local level and a further redundancy programme ensued. The claimant was not included in this consultation because she was in the HR Advisor MI & Reporting position from June 2018.
    - During the consultation period, a HR Adviser's role became available and Ms Karim and Ms Shelley were given priority to apply for this role. Ms Shelley was appointed to the HR Advisers in October 2018 and returned to this role when she came back from her maternity leave in June 2019, although the roles confirmed to her in writing on 8 October 2018.

6. Mr Harper rejected it claimant's contention that she had been forced to pay for her CIPD course. The claimant's CIPD level 5 course was funded by the respondents through the apprenticeship levy funding. Mr Harper said the respondent looked into seeing if the business could continue this financial support but this did not happen so the claimant had an option to continue to fund because herself all transfer the funding to an employer through the apprenticeship levy.

44 As the claimant's appeal was not upheld, her employment came to an end on 10 October 2019 by reason of redundancy.

**Our determination**

Unfair dismissal

45 Following our findings of fact, we are satisfied that a redundancy situation arose in March 2019. The reason given was the combination of the introduction of a new HR & payroll system against the background of financial difficulties that the respondent company was experiencing. Indeed, the claimant accepted both circumstances in the contemporaneous documents and in cross-examination. We accept there was a genuine redundancy situation.

46 The claimant contended that the consultation was not meaningful because she believes that the outcome was pre-determined. Mr Harper stated the obvious in his outcome of the claimant's appeal: with any restructure, there is always an element of pre-determined possible outcomes; managers inevitably think through the implication of changes and restructuring of their business, and such ideas are translated into proposals. These proposals form the basis of consultation. If the outcome of a redundancy consultation matches the initial proposals, then this does not necessarily mean that the outcome was predetermined and that the consultation was a sham. Sometimes consultation alters the course of a redundancy situation, often it does not.

47 In respect of the specific points that the claimant raised. The comment at 2.1(a) of the list of issues was innocuous and we draw no inference from this. The claimant did not challenge it at the time or ask for clarification. In the contemporaneous documents, at the claimant's appeal, the claimant said that Mr Seabrook tried to console her [HB399] so we determine that this was a sympathetic and supportive remark to someone who had experienced a difficult time with her heath and was now facing the prospect of possibly losing her job.

48 Remarking that the "restructure affects you personally" is stating the obvious and indeed is the type of comment we would expect a manager to say to an employee at an *at risk meeting*. This is not an indication of a closed mind.

49 Re issue 2.1(c), we do not accept Ms Leatherland had the claimant's permission to contact the claimant's former manager to explore vacancies outside the business. Whether her motives were based on trying to assist a hard-working subordinate in a difficult situation with her health and her work situation or whether she was motivated by unloading an employee in a difficult redundancy situation is not relevant to the unfair dismissal. The salient question here is whether or not her approach to Ms Burns indicated that the claimant's dismissal was pre-determined and on this question were are not satisfied that it was. The respondent is obliged in any redundancy situation to consider alternatives to potential redundancy dismissal at the earliest opportunity. The Tribunal will not criticise such an approach, irrespective of whether this might be based on Ms Leatherland trying to avoid a difficult situation.

50 For substantially the same reason as set out above, we reject the contention in 2.1(d) and 2.1(e) that efforts to permit more time to look for alternative work and informing the claimant of possible additional assistance in her job search indicates some sort of conspiracy or a closed mind by the respondent's dismissing officer. These are measures consistent with the respondent properly discharging their responsibilities. The reference to the CIPD fees at point 2.1(e) in the list of issues is mistaken and irrelevant as we heard no evidence consistent with an allegation that the obligation to pay for the claimant's CIPD fees was part of the reason that the claimant was made redundant. Indeed, the contemporaneous correspondence makes clear that the respondent would not continue to pay for the CIPD course once the claimant left.

51 We attempted to explore the claimant's case on the redistribution of her work, as this would be a significant issue, particularly for identifying individuals who might

form part of a pool of potentially redundant employees, if their roles and skills were interchangeable. The claimant did not raise issues associated with 2.1(f) in the consultation meetings and at the hearing she did not refer to any contemporaneous complaint or documents that might support such a contention. The evidence from Mr Seabrook was that other staff were no overburdened and this was not challenged. Indeed, the fact that the claimant handed over work before her last day undermines this assertion.

52 Mr Emson met with the claimant on 22 May 2019 to discuss her grievance. We accept his evidence that he said to the claimant that some points she made during the grievance would be relevant to any redundancy appeal (if she was ultimately dismissed) as opposed to the matters that he was dealing with in his grievance. This was logical and sensible as the redundancy process had been paused pending the outcome of the claimant's grievance. The 22 May 2019 meeting was around 7 weeks before the claimant's fourth and last redundancy consultation meeting and Mr Emson did little more than advise the claimant that she could appeal against any redundancy dismissal if she remained dissatisfied with the redundancy outcome and/or the process. So, issue 2.1(g) is again unsustainable.

53 The respondent did not offer the claimant any suitable alternative employment because there was not any. Prior to the dismissal Mr Wood considered suitable alternative employment and determined there was not any. This was dealt with in detail by Mr Harper at the appeal and his determination was within the range of responses of a reasonable employer.

54 Issue 2.1(i) is an example of the overall confusing manner in which the claimant advanced her claims. We will deal with the reasonable adjustments argument below when we address the claimant's multiple, overlapping and repetitive claims of disability discrimination. So far as this issue is concerned, we limit ourselves to an unfair dismissal analysis. The respondent contended that the Marketing Executive role was not suitable alternative employment. Mr Ramsay's assessment was the work could not be done flexibly; specifically, the job required the Marketing Executive to be based in the office so the work could not be undertaken from home and that the role required regular travel to events and evening working. We deal with this below in greater detail, as at this stage we analyse this issue through the prism of unfair dismissal (and not disability discrimination).

55 The claimant contacted Mr Ramsay and, we judge, made half-hearted enquiries, in respect of the possibility of this role being undertaken from home. Notwithstanding the position was largely a support role, the claimant lacked experience in marketing and from the evidence presented to us we were not clear that she had the requisite skills to undertake such a role. However, the most crucial point is that, at the relevant time, the claimant accepted Mr Ramsay's assessment that this support role could not be done flexibility. She did not discuss the role in any detail, nor did she query aspects of the job description with might afford more flexibility. At the hearing other than assert that the role could be done from home, we were in the dark about how the claimant thought this might work. We accept Mr England's submission that if this job could be adjusted to work from home, then the claimant should have explained at the time (or at least explain at the hearing) how these reasonable

adjustments might work.

56 Mr Seabrook was not directly involved in the claimant's enquiries with Mr Ramsay. We questioned him about this he said that he understood that the claimant chose not to pursue this vacancy, which is correct. Prior to making his final decision, Mr Woods raised suitable alternative employment and the claimant accepted that there were no suitable alternative roles.

57 Issue 2.1(j) was not set out in an intelligible form and at the outset we could not decipher what this meant. The claimant explained that she was asked to "push out" (which we think means activate or promulgate) the Marketing Executive vacancy. The claimant said that she accepted this was part of her recruitment job to do so, so that part of the allegation could not sustain any allegation of unfairness. As a matter of fact, the claimant was not precluded from applying from the Marketing Executive role – Mr Seabrook and others merely thought that it did not amount to suitable alternative employment, which is why they did not raise it with the claimant. When the claimant took this up directly with Mr Ramsay, initially at least, he seemed genuinely enthusiastic that she pursued it. The substance of the allegation is coved in 2.1(h) and 2.1(i) and this aspect does help a proper analysis of the situation, nor does it take matters further – and it merely amounts to a factually incorrect assertion.

58 Issue 2.2 deals with the selection process. The respondent complains that these allegations were introduced into the list of issues at the last moment and that it did not correspond to the case prepared by both parties. The claimant gave very little evidence in respect of potential pool members. Pooling in a redundancy situation was fully explained to the claimant at the hearing by the Judge. The claimant's witness evidence only referred to Hannah Shelley's circumstances. There was surprisingly little reference in the contemporaneous documents to pooling with other members of the human resources team. Issue 2.1(a) was not addressed in the claimant's witness statement nor was it addressed in the respondent witnesses' statements, both of which gives credence to their argument that this only became an issue in the case at the eleventh-hour. However, the key point here is that speculation, and even late speculation, is no substitute for evidence. The contemporary evidence does not give any indication as to why a pool should be established other than, at the highest point, others should be considered. The claimant did not raise any corroborating argument in any detail and made no reference to job descriptions, task assigned etc that might support such a contention. She did not explore this point in cross-examination with any respondent witness. The complaints about pooling Jo Young, Nisha Arya and 2 HR employees at Northampton must fail for lack of evidence. The respondent said that the roles of these 4 employees were fundamentally different to that of the claimant and a mere assertion that their jobs were sufficiently similar so that the respondent ought to have pooled these employees for redundancy selection does not progress the claimant's claim.

59 Hannah Shelley was the only person raised by the claimant at the time in connection with a pool of potentially redundant employees. On 19 March 2019 Mr Seabrook said to the claimant that Ms Shelley did a different role and was on maternity leave and therefore had protected rights [HB254]. At the 26 April 2019 redundancy consultation meeting, Mr Seabrook opined that Ms Shelley undertook a fundamentally

different role. He said that the claimant undertook a "stand alone" role, which was not challenged from claimant [HB275].

60 Importantly, Mr Seabrook set out the key features of the roles of each of the team member in the document entitled Questions and Answers from Consultation Meeting 26 April 2019 [HB280-281]. This document identified key responsibilities and the impact of the review/HRIS on the role. Of the 9 roles highlighted the claimant's role of HR Advisor MI & Reporting role [at HB282] is significantly different from that of Ms Shelley's HR Advisor's role [HB281].

61 We note that only a few months before (i.e. in September 2018) Ms Shelley was in the redundancy pool with Ms Arshia Karim but not claimant. The respondent contended that this was because claimant did a fundamentally different job, and we are persuaded by the consistency of this argument.

62 In respect of issue 2.2(b), the claimant and Ms Karim were both put at risk of redundancy in May 2018 and a formal individual process of consultation was commenced [HB177]. The claimant and Ms Karim were employed in recruitment at the same level as Recruitment Coordinators and only one position was retained. As an alternative to redundancy, a HR Administrator role had become available, and the job description was provided to the claimant [HB177].

63 The claimant agreed with Ms Karim that she would go for the HR Administrator role and that Ms Karim would stay in the Recruitment Coordinator position. The claimant had had cancer for some time at this stage and she said that she did not want the pressure of competing for the one recruitment role [HB187] and Ms Leatherland accept the claimant's reallocation as suitable alternative employment. This was reasonable in the circumstances.

64 The claimant directly benefitted when a new opportunity then came up in the HR Advisor MI & Reporting role because the person hired for that role obtained a different job. The claimant's move to the HR MI & Reporting role was a promotion with an increased salary and benefits [HB201]. It is wildly mistaken to allege that if the respondent wanted to get rid of the claimant, then where presented with a 2 into 1 redundancy situation in May 2018, Mr Seabrook or Ms Leatherland or someone else would transfer the claimant to another job thus avoiding the redundancy, then promote her, then make the claimant's original position redundant in September 2018, all to set up a different redundancy situation for the claimant in March 2019. If the respondent was determined to dismiss the claimant, then they could have done so in May 2018 or failing that, certainly, in September 2018. It would make no sense for the respondent to go through the mechanism of redundancy consultation, promote the claimant, pay her more money, yet consciously have planned to get rid of her within a year.

65 For the respondent's information, Ms Leatherland was not accused of abrogating her responsibilities in this redundancy situation, nor was a preliminary view arrived at. We take this opportunity to put Mr England right. The Tribunal was concerned that Ms Leatherland might not have managed the redundancy situation in a manner similar to our expectations of similar employers in such circumstances. Ms Leatherland explained, and we accept, that if the claimant and Ms Karim were able to

sort out between themselves who would undertake which role of 2 roles available then she was willing to accept their outcome. From Ms Leatherland's response, we are satisfied that this was appropriate – and within a range of reasonable responses.

66 Issue 2.2(c) has no relevance to the claimant's redundancy situation, nor was this raised at the time. The commercial reality is that, even at times of redundancies, other staff might be give pay rises to ensure retention. Our role is not to second guess the respondent's management of its business and an investment in a new HR system appeared to be obviously rational decision. The claimant queried the employment of Project Managers at the hearing but none of these Project Managers, and specifically Karen Chandler, undertook work previously undertaken by the claimant. Ms Chandler and the other Project Manager's work was in relation to the implementation of the new HR system.

67 The 19 March 2019 meeting was the first consultation meeting. The claimant's own notes of the meeting of 12 March 2019, in which she was put on notice that her role was at risk of redundancy, was that because of the new HR systems, her role and reporting & MI would be automated so her role would cease. This clearly earmarks the claimant role as potentially disappearing and does not reference other jobs. The claimant queried the selection process during the first consultation meeting, and this was discussed [HB247]. At the second redundancy consultation meeting the claimant queried why her role was selected and this was answered both in the meeting [HB274, 275] and in the Questions and Answers document [HB281-282].

68 We dealt with the Product and Marketing Executive role above (which is the same as Marketing Executive role). The claimant does not state in either the contemporaneous records or in her witness statement or evidence to the Tribunal how she believed that this role amounted to suitable alternative employment. There was no comparison of the job description, and the claimant did not compare or evaluate the roles. If the claimant had the right skillset and experience for this role then it might have amounted to suitable alternative employment if the roles were broadly the same. However, Mr Seabrook did not consider the marketing role as suitable alternative employment and Mr Ramsay's willingness to discuss the role with the claimant is not indicative that he regarded this as suitable alternative employment. We note Mr Ramsay's evidence that, if the claimant had pursued this option or lead then he did not think she would have progressed to a second interview. The fact is, the respondent did not regard this role as suitable alternative employment, and the claimant did not pursue it. Consequently, even if the role could be modified to accommodate the claimant's disability, there is no factual basis upon which we could determine that this was suitable alternative employment.

69 The payroll assistant/admin role for maternity cover was discussed between the claimant and Mr Seabrook at the second redundancy consultation meeting. Payroll is a specialist area for which the claimant had no experience. The Tribunal queried whether the claimant had the skill set to undertake such a role and the claimant did pursue this at the hearing. Ms Leatherland said as the vacancy arose for maternity cover the respondent required an experienced candidate who could "hit the ground running". This is logical and we accept Ms Leatherland's evidence on this. In additional as the post was temporary Ms Leatherland said that it was not appropriate for suitable

alternative employment, which we also accept in these circumstances.

70 The respondent followed a substantially fair process. The claimant was notified of a redundancy situation and Mr Seabrook and then Mr Woods formally consulted with the claimant over 4 following meetings. The claimant's redundancy process was paused whilst her grievance was investigated. This indicated a substantially fair approach to the claimant's redundancy situation. Mr Seabrook addressed all of the points raised in consultation. The claimant appealed against her dismissal and Mr Harper addressed her case which particular thoroughness. Given our findings above we determine that both the reason for the claimant's dismissal and the process followed was within the band of reasonable responses available to a reasonable employer.

71 The ACAS Code of Practice does not apply to the redundancy dismissal, so this contention is dismissed.

Disability discrimination

72 The claimant contended that all treatment that she perceived as negative somehow amounted to discrimination on multiple grounds. These claims were advanced on the basis of direct discrimination, indirect discrimination, failure to make reasonable adjustments, discrimination arising from disability, victimisation and harassment, so the full suite of all possible aspect of discriminatory conduct was claimed without much engagement and little analysis. At the outset of the hearing, the Judge expressed his concern that in an effort to shoot at every possible moving target the claimant might miss those claims that might have some evidential foundation. The Judge offered to help recast or refine the list of issues. The claimant said that the list of issues had been agreed (which was not accepted by Mr England) and that she did not want to depart from this. Before we started to hear evidence, the claimant insisted that she wanted to proceed with the list of issues as drafted.

73 As many of the same acts are relied upon under different heads of discrimination claims, to avoid repetition and for clarity, we will address this in order of the less favourable or unfavourable treatment contended.

Direct discrimination

74 If Mr Seabrook and/or Ms Leatherland and/or Mr Woods (whom all of the allegations are made against) took against the claimant because of her disability or because of her cancer, then they had easy opportunity to dismiss her when her role was originally made redundant in March 2018; or even in September 2018 when the current HR Administrator's role was eventually made redundant. However, during this period the claimant's request to move to another role was accepted by Ms Leatherland and shortly thereafter the claimant was promoted and paid more. That is action by the respondent wholly inconsistent with dismissal by reason of disability discrimination in general but with direct discrimination in particular.

75 Points 6.1, 6.2, 6.5, 6.6 will be addressed as harassment as this is more appropriate to the allegation made, particularly as there is not a direct comparator

identified.

76 The allegation made under 6.3 is substantially the same as 2.2(a) above. The claimant was not pool with anyone else because she was the only person who had undertaken the role of HR MI Advisor. We have addressed the issue of a redundancy pool extensive above. The restriction of the pool to the person who undertook the HR MI Adviser's role was objectively justified by the respondent for the reasons set out above. We heard about an employee called Molly from the Northampton office, who was made redundant around the same time. There was insufficient evidence available for us to conclude that her circumstances were sufficiently similar to the claimant so as to be an actual comparator; however, her example was, at least, of use in assessing how a hypothetical comparator might be treated. As Molly did not have either cancer or a disability, her case is an example of someone made redundant at the same time without the claimant's protected characteristic. Therefore, this complaint of direct discrimination is unsustainable.

77 The comment by Daniel Seabrook was innocuous. He attempted to empathise with the claimant and show some sensitivity to someone with a serious illness facing the distinct possibility of losing their job. Allegation 6.4 was not less favourable treatment; it was Mr Seabrook's effort to show some concern and understanding. This allegation has no merit.

78 In respect of allegation 6.7, as a matter of fact, Mr Ramsay did not make it a requirement of the Marketing Executive's role that the claimant be in the office for 5-days per week. Mr Ramsay explained the requirements of the role and said that he would discuss this. We agree with Mr England's submission that this is not making it a requirement. As the claimant cannot establish the factual basis of this allegation, we dismiss it.

79 We dismiss the allegation at 6.8 for similar reasons, as a matter of fact the respondent did not require the claimant to pay for the rest of her CIPD course. Again, the factual basis of the allegation 6.9 is not made out. The claimant approached Mr Ramsay about another role. Mr Ramsay said he would discuss it. The claimant did not like the way that she thought the discussion might go so she did not pursue the role. The claimant did not afford Mr Ramsay the opportunity to consider her for this role.

80 For allegation 6.10, the claimant said in answer to a question from the Tribunal that she took 3-days annual leave for surgery because she did not want to take further, or what she perceived to be excessive, sick leave absence. The claimant said in evidence that Mr Seabrook granted her all the time off she requested in respect of her health condition and that this was paid leave. It is somewhat unfair now for the claimant to raise that Mr Seabrook should have granted her this leave as sickness absence when she did not request it as such. The surgery occurred at the same time as the claimant's pre-booked holiday absence in late August 2019. Mr Seabrook said in evidence that he assumed that the claimant converted this to sickness absence, but she had not. Had she been denied this leave as sickness absence then that would clearly amount to less favourable treatment. However, in the circumstances of this case, with Mr Seabrook's supportive approach to paid sick leave absence, his assumption that the claimant would record this as sick leave if she wanted to preserve

her holidays does not amount to less favourable treatment. This allegation is rejected.

81 We reject the factual basis of allegation 6.11 because the claimant gave no evidence of work being taken from her in such circumstances. There was no contemporaneous reference to such, and Mr Seabrook denied that this happened when it was put to him.

82 Allegation 6.12 was denied by Ms Leatherland and there was no contemporaneous complaint of this. We detected no personal animosity towards the claimant from Ms Leatherland and Ms Leatherland was supportive in looking for other work and affording the claimant time off during her illness. We are not persuaded on the balance of probabilities that the claimant has made out this allegation sufficient for the burden of proof to transfer to the respondent.

83 Allegation 6.13 is confused and difficult to understand. If the claimant means that her dismissal by Mr Woods amounted to less favourable treatment because of her cancer, then we have considered that decision carefully above. There is nothing to suggest that Mr Wood dismissed the claimant in circumstances in which he would not have dismissed a non-disabled employee. We reject this allegation.

Indirect disability discrimination and failure to make reasonable adjustments

84 The claims of indirect discrimination and the allegations surrounding the failure to make reasonable adjustments are unfathomable. They make no sense. For the reasons quoted in Mr England's submission the provisions, criteria and practices (PCPs) quoted by the claimant, and essential for our analysis, do not relate to the facts of this case nor are they proper PCPs. They are alleged detriments. The Employment Judge expressed his concern at the outset of the claim that the PCPs were not correctly identified, and he offered to assist the claimant in framing the PCPs, particularly in respect of the failure to make reasonable adjustments allegations, which might have had some veracity had they been properly formulated. The claimant refused such assistance from the Tribunal. We could not assist further without undermining our need to remain impartial. Consequently, we are now left with PCPs which are assertions that do not support a meaningful or cogent analysis. The detriments asserted as PCPs are not accepted as can be read elsewhere in this decision. Accordingly, the complaints of indirect disability discrimination and failure to make reasonable adjustments fail.

Discrimination arising from disability

85 Allegations 19.1, 19.2, 19.5 and 19.7 have some merit but are appropriate dealt with as allegations of harassment.

86 The remaining allegations have been addressed under direct discrimination as these are cut and paste versions of the claimant's scattergun approach. Issue 19.3 is identical to issue 6.4. and does not amount to unfavourable treatment for the reason given above.

87 Issues 19.4 is identical to issue 6.3 and the something identified as arising

from the claimant's disability (i.e. the claimant's time off for appointments and her requirement to work from home) did not give rise to the claimant being pooled for redundancy. There was no causal link identified at issue 29 because the claimant was identified for redundancy (without a pool) because she was the only employee in her role of HR MI Adviser.

88 Allegation 19.6 does not amount to unfavourable treatment for the same reasons as relate to allegation as 6.7 and that issue does not match the facts alleged.

89 Allegation 19.8 is the same as allegation 6.10 and for the same reasons as this does not amount to less favourable treatment it does not amount to unfavourable treatment (i.e. a detriment with no comparator required).

90 For the reasons stated under issue 6.11 the allegation under 19.9 does not stack up so this is rejected likewise as it the case for allegations 19.10 and 6.12.

91 Dismissal is obviously unfavourable treatment, but for issue 19.11, as we state above there is a clear causal chain for the claimant's dismissal by reason of redundancy and this has nothing to do with something arising from her disability.

Victimisation

92 If the claimant's grievance was the protected act, then it is not logical that the grievance was "parked" because the claimant raised a protected act in her grievance. Nevertheless, causation is easily dealt with in this matter. In her grievance, Mr Emson ruled the claimant's complaints about her redundancy and the process followed should await the outcome of the redundancy process. This was sensible. If the claimant remained dissatisfied with any aspect of the process or decision-making then the appropriate mechanism to address any complaint or issue was an appeal. This was not victimisation; it was a practical and balanced response.

93 Issues 23.2 to 23.5 are merely widely (and badly) drawn allegations that undermine the claimant's other allegations of discrimination. If the grievance caused these detriments, then the other allegations have no foundation. Our examination of the redundancy process and the claimant's dismissal was thorough. For the reasons given above, the claimant's grievance had nothing to do with the claimant's dismissal.

Harassment

94 The claimant repeats 4 incidents of alleged offensive and degrading comments made to her between 9 January 2019 and 25 March 2019 by Mr Agius and Mr Seabrook. These are set out at issues 25.1, 25.2, 25.4 and 26.6. These allegations mirror those at 6.1, 6.2, 6.5, 6.6 and 19.1, 19.2, 19.5 and 19.7.

95 Our findings of fact establish what was recorded as written by Mr Agius and said by Mr Seabrook in connection with her working from home. The claimant case was that such comments were widespread and regularly made. She said that working from home was not valued by the respondent and there was a widespread perception in her workplace that her working from home amounted to idle or inactive days. We

note in our findings of fact that the claimant's complaints in this regard were not properly investigated. Respondent officials sought to limit the investigation to only those individuals for which there was an indelible record of making such comments and, we adjudge, shut down the claimant's allegations deliberately and unnecessarily. There was no wider investigation or attempt to interview others or set the claimant's complaint in its wider, and proper, context. The respondent's reaction is consistent with an employer that, in our perspective, sought to deny everything first and then, if it could not credibly be denied, grudgingly investigate. We drew inferences in this regard from the absence of the claimant's contemporaneous records, Ms Leatherland and Mr Seabrook's intention to mislead about the claimant giving permission to speak to Ms Burns and the respondent's general approach to candour as set out above.

96 Although the claimant limited her allegation of harassment to these that were documented, we accept her evidence – and reject the evidence of Mr Seabrook, Ms Leatherland and others – that there were only 4 utterances of "cosy days" and 1 other similar reference. Her contemporaneous complaint was consistent, and it is inconceivable to believe that those recorded comments were the only instances of such comments. It diminishes the credibility of all on the respondent's side to say that no other similar comments were made other that those where Mr Agius and Mr Seabrook have been caught out with an ineradicable record. That said, there are only 4 specific allegations before us, so our findings of discrimination relate to the context of those claims only.

97 Mr Agius' response to the claimant's complaint was that his remarks were "banter", was readily accepted by the respondent. "Banter" covers all sorts of exchanges from innocent innocuous words to include offensive putdowns. The advantage of attributing such comments to non-discriminatory motives it that the respondent evades liability, so it has an interest in underplaying these comments. To his credit, Mr Agius appeared in the note of the meeting of 2 May 2019 to show some genuinely contrition and he offered to apologise to the claimant. However, he did not attend at the hearing to explain himself.

98 If it was "banter", there was no evidence of reciprocal comments from the claimant. Her responses were defensive, and she appeared to attempt to laugh it off. This does not diminish the upset and vulnerability the claimant said she felt. A defence to "banter" might be that the claimant engaged and she "gave as good as she got" but that was not present here. There was no active participation in this so-called banter from the claimant, so we determine this was not banter. The claimant's responses were defensive and respectful. All but the most insensitive or deliberate should have understood that this was a sick employee who felt vulnerable and did not welcome these exchanges.

99 We view Mr Seabrook (and Ms Leatrherland) as largely unreliable historians that would say almost anything to evade blame. The claimant's record of the meeting was not a verbatim account, she tried to capture the exchange. She thought that it was significant at the time to record Mr Seabrook's comments and we accept that this is an accurate account. We also accept the claimant's point that this was indicative of Mr Seabrooks' attitude, and a wider culture, where working from home was not valued and perceived to be an idle or inactive day.

100 It is not always easy for an employee to make an immediate formal complaint about other colleagues, particular when they are vulnerable through the claimant's type of illness and particularly when the employee perceives of herself as vulnerable because of the support required to undertake their duties. We are mindful that the 3 individuals (including Ms Beaty) for which there are documents complaints and the 2 individuals who are the subject of these proceedings were established and senior members of staff. The claimant said, and we believe, that she made clear to Mr Agius that his comments were unwelcome at the outset. Mr Agius did not attend the hearing to dispute this. The Judge asked at the outset of the hearing why Mr Agius was not attending, and we did not receive a satisfactory explanation for his non-attendance.

101 The test for harassment has both subjective elements and objective elements. The subjective part involves the Tribunal looking at the effect that the conduct of the alleged harassers had on the claimant. The objective part requires that the Tribunal ask itself, taking into account all of the relevant circumstances, whether it was reasonable for the claimant to contend that the conduct of Mr Agius and Mr Seabrook had that effect.

102 We easily accept that the claimant genuinely believed that the comments identified above violated her dignity – at the time that these comments were made.

103 Had any of the comments made by Mr Agius and Mr Seabrook been a one-off remark then we would determine that these remarks were not sufficiently serious to amount to harassment. However, what constitutes harassment turns on context and degree. The multiplicity of the recorded incidents together with the claimant's evidence, which we accept, lead us to the conclusion that this was a degrading and offensive environment for the claimant.

104 The claimant maintained that the comments recorded on the dates above represented a persistent and unrelenting attitude by individuals in this workplace who felt sufficiently confident to demean an individual suffering from a major illness because she was unable to present at the office on a daily basis. It was never part of the respondent's case that when working from home the claimant could not undertake her full duties to a proficient or satisfactory level. So, the comments were undeserved as well as uncalled and we are satisfied were related to her reasonable adjustment. The burden of proof having shifted in respect of protected characteristics, we are in no way persuaded that these comments did not arise from, or were related to the claimant's protected characteristic, and the adjustments made to accommodate this.

105 The 4 acts of harassment complained of were, we determine, continuing acts in this case because they arose from the behaviours of a senior colleague and the claimant's line manager both of whom worked in close proximity to each other and to the claimant and reflected a negative workplace culture.

<u>The time limit/jurisdiction issues</u>

106 There is no contention that the unfair dismissal complaint is out of time. Claims of discrimination in the Employment Tribunal must be presented *within 3 months* (i.e.

3 months less a day) of the act complained of, pursuant to s123(1) EqA. Acts of discrimination often extend over a period of time, so s123(3)(a) EqA provides that that "conduct extending over a period is to be treated as done at the end of the period". In addition, Employment Tribunals have a discretion to extend the 3-month time limit period if they think it *just and equitable* to do so, under s123(1)(b) EqA. The Acas conciliation period will extend time limits for the parties to attempt to resolve their differences without the need for Employment Tribunal proceedings: see s18A and s18B Employment Tribunals Act 1996 and the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014.

107 *Continuing acts* under s123(3)(a) EqA are distinguishable from one-off act that have continuing consequences; time will run from the date of the one-off act complaint of; see *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, Aziz v FDA [2010] EWCA Civ 304* and *Okoro and another v Taylor Woodrow Construction Limited and others [2012] EWCA Civ 1590*. The 4 recorded acts of harassment complained of were, we determine, continuing acts in this case because they arose from the behaviours of a senior colleague and the claimant's line manager both of whom worked in close proximity to each other and to the claimant. The claimant maintained that the comments recorded on the dates above represented a persistent and unrelenting attitude by individuals in this workplace who felt sufficiently confident to demean an individual suffering from a major illness because she was unable to present at the office on a daily basis. It was never party of the respondent's case that when working from home the claimant could not undertake her full duties to a proficient or satisfactory level. The comments arose from or reflected a negative and discriminating culture that trivialised or marginalised someone working from home (and in this case because of her disability).

108 The last event in the continuous pattern or act of discrimination was Mr Agius comment of 25 March 2018. The first Claim Form referred to the harassment complaints and was received by the Employment Tribunal on 16 July 2019. ACAS conciliation took place between 31 May 2019 and 30 June 2019. As proceedings we issued 2-weeks after the ACAS conciliation period ended the stop-the-clock provision apply. 3-months before ACAS conciliation started was 1 March 2019 so the discrimination claims have been brought in time.

109 Even if this complain was out of time, we would have exercised out discretion on just and equitable principles to allow these claims to proceed to remedy. The complaints were significant, and it would be wholly unjust to deny the claimant a remedy, and likely fairly modest and proportional compensation, for this discrimination.

**Finally**

110 We anticipate that the parties may now be able to resolve all outstanding matters without the necessity of a further hearing. However, we will issue case management orders in due course to provide for remedy and the outstanding costs application should such resolution not be possible.

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Employment Judge Tobin
3 December 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
3 December 2021
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FOR THE TRIBUNAL OFFICE