EMPLOYMENT TRIBUNALS

Claimant: Miss Rutendo Mashiri

Respondent: Sainsbury's Supermarkets Ltd

On: 9, 10, 11 and 12 December 2024

Before: Employment Judge Ahmed

Members: Ms N Pratt
Mr C Bhogaita

At: Leicester (CVP hybrid for the Claimant's evidence)

Representation
Claimant: Mr Thomas Wood of counsel
Respondent: Mr Max Montgomery of counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant's complaints of direct disability discrimination, failure to comply with the duty to make reasonable adjustments, discrimination arising from disability and unfair dismissal are all dismissed;

2. The complaint of victimisation that the Respondent failed to investigate or progress the Claimant's grievance appeal is dismissed;

3. By consent, the Claimant was unlawfully victimised by the Respondent failing to provide outplacement support during the consultation period.

4. The issue in relation to remedy in respect of victimisation is adjourned.

REASONS

1. In these proceedings the Claimant brings complaints of disability discrimination and unfair dismissal. She has issued two sets of proceedings: the first claim under case number 2600689/2023 was presented on 30 March 2023. The second claim, 2210781/2023 was presented on 26 June 2023. It was initially allocated to Central London but transferred to the Midlands East Region to be heard together.

2. The complaints of disability discrimination are of direct discrimination, discrimination arising from disability and a failure to comply with the duty to make adjustments. There is also a stand-alone complaint of victimisation.

3. In coming to our decision we have taken into consideration the oral evidence of the witnesses, the documents in the agreed bundle and the submissions made by counsel on both sides to whom we are grateful.

4. The Claimant gave oral evidence on her own behalf. A reasonable adjustment was made to allow her to be cross-examined from home via CVP. The Claimant also relied on the testimony of two witnesses who did not attend to give evidence. We took their statements into account but attached appropriate weight. It has to be said that the contents of their statements were largely irrelevant in any event.

5. For the Respondent we heard evidence from Mr Tom Harrison, Head of Internal Audit and Risk who dealt with the Claimant's grievance and Ms Gill Wright who is employed as an Employment Relations Specialist. Ms Wright gave evidence about the procedures in relation to the Claimant's absence and the redundancy process. She prepared the consultation scripts for Ms Victoria Hill in relation to the redundancy and was the employment relations Manager assigned to support the part of the business that related to the Claimant.

6. The notable absence was that of Ms Victoria Hill, the Claimant's line manager and Head of Talent who conducted the consultation meetings with the Claimant. Ms Hill was made redundant by Sainsbury's on 1 June 2024. There was no application to compel her to attend by way of a witness order.

7. The bundle for the hearing contained a number of documents purporting to be transcripts of conversations held over MS Teams meetings between the Claimant and Ms Hill. Some of these related to what were intended to be protected conversations.

8. The transcripts were supplied by the Claimant. They are not agreed as an accurate record. The Respondent was not supplied with copies of the original recordings as part of the disclosure process and the transcripts are not independently certified as accurate even though the transcripts were apparently commissioned by solicitors. We read them but were rarely taken to them during evidence. There is nothing particularly contentious as to their contents. But where necessary we prefer to rely upon the Respondent's notes of the meetings. The Claimant had the opportunity to comment on those notes at the time and did so where she felt it appropriate to do so.

THE FACTS

9. The Claimant began working for the Respondent on 7 July 2013 as a Merchandise Administration Assistant at their Coventry Support Centre . In 2017 she transferred to the Trading Support Team following which she was promoted the role of Product Support Analyst. In 2021 she was appointed as a Project Analyst. On 7 April 2022 the Claimant was appointed to the final role that she performed at Sainsbury's namely that of a Talent Delivery Consultant. The Claimant's contract of employment stated that it was a hybrid role. When she was not working from home the Claimant's place of work was at Ansty Park, Coventry.

10. The Respondent accepts that the Claimant is and has been at all material times a disabled person by reason of asthma, various allergies, chronic migraines, endometriosis, joint hyper mobility, functional neurological disorder and inappropriate

tachycardia. It also accepts knowledge of the disabilities at all relevant times although it says that it did not know the full extent of her difficulties until the Claimant's GP letter received on 20 December 2022. Unfortunately, the agreed list of disabilities does not tell the whole story as the Claimant's health issues are much more complex.

11. The Claimant's functional neurological disorder has a negative effect on her cognitive function and as a result means it takes longer for her to process information. It can also affect her memory.

12. The Claimant suffers from multiple severe allergies. She has been prescribed four EpiPens by her GP (the norm is apparently two). She has a serious nut allergy and is affected when those around her eat them. These allergies proved particularly challenging when the Claimant attended work and colleagues snacked on nuts or peanut products. This became even more of an issue when hot desks were introduced The Claimant has a reaction to fish when it is being cooked. The Claimant was constantly afraid of having an allergic reaction. On Fridays when the canteen cooked fish this made life difficult as the vapours from the fish would make her eyes itch and water. Washing hands in the bathroom and kitchen area became problematic.

13. The Claimant cannot go outside before, during or just after a thunderstorm as she suffers from thunderstorm asthma. She also struggles with her breathing when it rains, when someone in the vicinity cuts grass or when the pollen count is high as she has a severe pollen allergy. The Claimant is a patient under the 'Difficult Asthma Team' at the local Hospital.

14. The Claimant has been prescribed medication which has the side effect of lowering her immunity. She suffers from fluctuating IGA levels and has been under the Immunology department at the local hospital. She is highly susceptible to infections and they can make her more ill than the average person. Each infection is taken seriously and medically assessed.

15. When the Covid-19 pandemic began the Claimant was put in the 'Extremely Clinically Vulnerable' group and began shielding. When she goes to hospital for her appointments, she is 'reversed barrier' nursed. This means the medics will wear a mask. Most of the Claimant's life is spent inside her home.

16. Following the pandemic, Sainsbury's sought to re-introduce staff back into the workplace. It created processes entitled: 'Ways of Working' and the 3C's – 'Collaboration', 'Coaching' and 'Community'. These were designed to assist colleagues to return safely where possible.

17. These processes were effectively guidance to assist colleagues to identify when it would be appropriate to have in-person days and meetings and what the benefits of those days were. For Talent Delivery Consultants, the job role set out those activities that could be done remotely and those that needed to be done in the office. The latter include organising, facilitating and evaluating learning and development and contributing to talent plan creation and delivery. We accept the Respondent's evidence that it would have been difficult for the Claimant to engage effectively in group settings when all other attendees were at meetings and training events in person and the Claimant was the only person joining remotely. Facilitating meetings when all were present physically but not the Talent Consultant would not in most cases be practicable. A significant amount of the role involved the provision of coaching and

training which could only be performed, or performed to a satisfactory level, on a face-to-face basis with all colleagues and stakeholders.

18. The Talent Delivery Consultant role ideally required between 40% to 50% of the post-holder's time to be spent in the office. We accept that whilst some of the role could be done from home the entirety of the role could not be done remotely.

19. In or around mid-April 2022, shortly after the Claimant was appointed, there were discussions about the Claimant's ability to undertake the role remotely. An occupational health referral was made for that purpose. The report of the occupational health practitioner was received on 12 May 2022. It stated:

"I recommend that you have discussions with your colleague about her [the Claimant's] clear concerns as to her safety in the workplace. Ultimately this is a managerial matter not a clinical one."

20. The OH report did not however appear to take into account that the role required a significant amount of time to be spent in the office. As a result, Ms Wright arranged for a further OH referral and report. We accept that this was genuinely to ensure the recommendations were accurate rather than an attempt to obtain a report more favourable to the Respondent.

21. The second OH report was produced on 13 June 2022. It set out its conclusions and recommendations as follows:

"Miss Mashiri is fit for work. In light of her current health issues, including her lowered immune system increasing the risk of severe disease if she contracted Covid-19, it would be ideal for her to continue working from home if this is operationally feasible. I understand however that the employer cannot sustain the adjustment any longer as the role is a customer facing role that cannot be adapted to non-customer facing. She has indicated that the role is not customer facing. The final decision on this matter is a management one."

22. In June 2022 the Claimant was absent from work following an operation. The operation itself was uneventful but there were severe complications in recovery. The Claimant was signed off sick as being unable to perform any work. She provided the Respondent with fit notes to that effect from June 2022 through to October 2022. None of the fit notes say that the Claimant was fit to work with any adjustments.

23. On 27 July 2022 Ms Hill sought the Claimant's permission to write to her GP to explore the risks of the Claimant working with the business stakeholders. The consent form was returned on 10 August 2022 and sent to the GP promptly. There was however considerable delay on the part of the Claimant's GP in completing the report. The Respondent's healthcare team repeatedly chased the GP surgery.

24. On 26 September 2022 the Claimant's GP sent their report. In it they wrote, inter alia,

"She has an active sickness certificate that runs till 10 October 2022. Given the nature of her symptoms and slow improvement, it is difficult to estimate when she's likely to feel well enough to return to work. I feel Rutendo still needs time to recover, and she is usually very sensible in assessing her symptoms therefore she is the best person to say what help she needs and when the time comes for her to return to work, adequate consideration needs to be given to her safety if covid-19 is persisting. A formal occupational health assessment may help to identify any adjustments or adaptations that might facilitate her safe return to work."

25. On 14 October 2022 Ms Wright received an email from Ms Hill regarding the Claimant's continued absence and specifically the Claimant informing Ms Hill that she

was hoping to be referred to a senior neurologist. She requested that a further OH referral ought to be arranged.

26. On 11 November 2022, the OH report for the October 2022 OH referral was provided to the Respondent. It had to be copied to the Claimant first who pointed out some factual inaccuracies. The Respondent saw the Report in December.

27. The October 2022 OH report stated that at the time it was drafted the Claimant remained unfit for work and that a further up to date assessment would be required at the time she was ready to return. The report confirmed that the Claimant's GP had not set a recovery timescale for her return. The Claimant continued to provide fit notes that stated she was not fit for work. These fit notes ran from November 2022 until February 2023.

28. In late 2022 and early 2023, the Talent Delivery teams were considering a reorganisation to align with changes to the senior management functions that they supported. As a result of an earlier restructure, the Transformation Leadership Team (TLT) who were the key players in the Claimant's role became entirely located at Sainsbury's location in Holborn, London. The business wanted to restructure the TLT to use its time and resources more efficiently . The result was that all stakeholders for the Talent Delivery teams would now be permanently based in Holborn.

29. The TLT is made up of a number of business functions including supply chain, communications and logistics. Within the TLT these functions are separated into 'General Merchandising' and 'Transformation'. We accept that at the time, despite her job title, the Claimant did not undertake any work with the General Merchandising part of the TLT and instead was entirely focused on Transformation. Another Talent Delivery Consultant, Ms Claire Lynch, solely supported General Merchandising. The Claimant had shadowed Ms Lynch on a couple of occasions at meetings but had not undertaken her role unassisted. A decision was made not to include Ms Lynch in the same pool as the Claimant for the purposes of redundancy selection.

30. The Respondent also decided to make the transformation facing Talent Delivery Consultant role a hybrid role based in Holborn and from home. This meant that travel to Holborn one day per week. On occasions further office attendance could be required.

31. On 6 and 20 December 2022 the Claimant underwent assessment by the Community Integrated Neuro and Stroke ("CINS") team following a referral by her GP. During a welfare call on 12 December 2022 the Claimant said to Ms Hill that she needed an OH assessment to get back to work.

32. On 13 January 2023, Ms Hill emailed the Claimant to say that the employment relations team was happy to set up the referral to occupational health but that the occupational health provider needed a return-to-work date in order to advise on the support needed.

33. On 17 January 2023, the Claimant said that she did not have a return-to-work date but that CINS had said that they could work with occupational health on the adjustments during that process then work out the return to work date.

34. On 20 January 2023 Ms Hill held a protected conversation with the Claimant. The Claimant did not know what a protected conversation was and it was explained

to her. We are satisfied there was no pressure put on the Claimant to accept any terms during the protected conversation which essentially involved an offer of an enhanced redundancy payment and a payment in lieu. The offer was not accepted.

35. Ms Hill went on to tell the Claimant that her role was at risk of redundancy because of the TLT restructure. The Claimant's current Talent Delivery Consultant position would cease to exist in the new structure and would be replaced with a hybrid role based in Holborn with at least one day a week being worked from the office that reported into another team.

36. On 28 March 2023, Ms Hill held the first redundancy consultation meeting with the Claimant. The rationale behind the decision to put her at risk was explained. The Claimant asked why the new role could not be performed at home exclusively and Ms Hill explained why. A letter confirming what was discussed was sent after the meeting.

37. On the same day the Claimant raised a grievance. The grievance raised two issues: the first was in relation to the delay in the October OH referral. The second was in respect of holiday pay. It is agreed that the grievance amounts to a protected act. The second protected act is the issue of tribunal proceedings under case number 2600689.

38. The grievance issue was allocated to Mr Harrison for decision. Following meetings on 21 April and 5 May 2023 Mr Hill upheld the grievance on the holiday pay issue and decided the Claimant should be paid £695.60. The grievance in relation to the delay was not upheld. Mr Harrison concluded that the Respondent had made a decision to wait for advice from CINS before taking matters further and the delay was largely down to CINS and the Claimant GP's neither of which was the fault of the Respondent.

39. On 31 March 2023, Ms Hill and the Claimant met for the second consultation meeting. There was a discussion as to whether the Claimant could perform the hybrid role that now sat in another team. However, there remained a disagreement as to the amount of time that was required to be spent in the office. A further consultation meeting was arranged.

40. On 5 April 2023, Ms Hill and the Claimant met for the third consultation meeting. The Claimant asked why Ms Lynch had not been selected for redundancy. Ms Hill explained that Ms Lynch's role did not support Transformation and it not appropriate to place her into the pool for selection.

41. On 12 April 2023, Ms Hill and the Claimant met for a fourth consultation meeting. The Claimant confirmed that she had not found any suitable roles to apply in the meantime. Following the meeting the Claimant was sent a letter confirming that a further meeting would be held in which a decision regarding redundancy and termination of employment would be made.

42. At the final consultation meeting on 14 April 2023, dismissal by reason of redundancy was confirmed. The Claimant was subsequently sent a letter confirming the last day of employment as 17 April 2023. The Claimant was paid 9 weeks' notice in lieu.

43. The Respondent has a system of offering outplacement support for those being made redundant. It is agreed that outplacement support was offered to the Claimant during the redundancy process. Unfortunately, it was not ultimately arranged during

and thereafter due to an administrative error it was never provided The Respondent accepts that this amounts to an act of victimisation.

THE ISSUES

44. The issues are agreed as follows:

Time limits

45. Are the complaints out of time and if so it is just and equitable to extend time?

Failure to comply with duty to make reasonable adjustments

46. Did the Respondent apply a provision, criterion or practice (‘PCP’) to the Claimant? The Respondent relies on the following:

46.1 The requirement for the Claimant to attend the office as part of her contractual role;

46.2 Delaying an OH referral in October 2022 and not allowing the Claimant to work from home and/ or the requirement for an updated OH assessment before allowing a return to work;

46.3 The restructure and subsequent requirement for the Claimant’s role to be hybrid and moved from the base location of Ansty to Holborn with a requirement to attend the office regularly;

46.4 The Talent Ways of Working Procedure and The 3c’s approach to hybrid working.

47. In respect of each PCP relied upon, did that PCP put the Claimant at a substantial disadvantage in comparison with persons who are not disabled, or would the Respondent have applied that PCP to those persons?

48. Did the Respondent know or ought it to have known that the Claimant was likely to be put at a substantial disadvantage by any of the PCPs?

49. Did the Respondent take such steps as were reasonable to avoid the identified disadvantages and did it fail to take those steps? (We have not set out the relevant disadvantage identified).

Discrimination because of something arising from disability

50. What was the ‘something’ that arose in consequence of the Claimant’s disability? The Claimant relies on being unable to work from the office due to the risk to her health

51. Did the Claimant suffer the following unfavourable treatment:

51.1 On 21 January 2023 being informed that if she did not wish to accept an exit package, her role alone would be put at risk of redundancy.

51.2 The Respondent delaying her OH referral in October 2022 and not responding to her when she followed this up.

51.3 Only the Claimant's role was changed/affected. Her base location was moved and she was put at risk of redundancy.

51.4 The Claimant's subsequent dismissal on 17th April 2023.

52. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

Direct discrimination

53. Did the Respondent treat the Claimant less favourably than it treats or would have treated others?

(The Claimant relies on the Respondent's decision to select her for redundancy as amounting to less favourable treatment)

54. Was any less-favourable treatment accorded to the Claimant because of the Claimant's disability?

55. What is the correct comparator?

(The Claimant relies on other Talent Delivery Consultants that do not share her disability, for example, Ms Lynch. In the alternative, the Claimant relies on a hypothetical comparator)

56. Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant?

57. If so, has the Respondent shown that it did not discriminate against the Claimant?

Victimisation

58. Did the Claimant do a protected act within the meaning of section 27(2) of the Equality Act 2010? The Claimant relies on the following:

58.1 Her complaints of disability discrimination on 28th March 2023;

58.2 Issuing a subsequent discrimination claim at the Employment Tribunal on 30th March 2023.

The Respondent now accepts that both of these amounted to protected acts.

59. Did the Respondent subject the Claimant to a detriment because the Claimant had done a protected act or the Respondent believed that the Claimant had done, or may do, a protected act? The Claimant relies on the following detriments:

59.1 The Respondent's failure to investigate or progress the Claimant's grievance appeal made on 24th May 2023, and.

59.2. The Respondent failing to provide outplacement support offered and accepted by the Claimant during the consultation period.

Unfair Dismissal

60. The Claimant avers the redundancy was a sham. Accordingly, has the Respondent shown that they had a fair reason to dismiss the Claimant? Is that fair reason 'redundancy'?

61. The Claimant contends that their termination from employment did not fall within the provisions of section 139 of the Employment Rights Act 1996 ("ERA 1996"), in particular:

61.1 the Respondent did not undertake such information and consultation with the Claimant as was reasonable;

61.2 the Respondent did not select the Claimant for redundancy from an appropriate pool;

61.3 the Respondent did not adopt a fair and objective selection criteria;

61.4 the criteria were not fairly and objectively applied;

61.5 the Respondent did not make reasonable efforts to redeploy the Claimant;

62. did the Respondent follow a fair procedure?

63. The Claimant avers that:

63.1 The Respondent failed to adopt a fair selection criteria or procedure when selecting candidates for redundancy or apply those procedures or criteria fairly.

63.2 The consultation period was short and rushed implying the decision to dismiss was predetermined.

63.3 The Claimant was in a pool of one and the pool should have included other colleagues such as Ms Lynch who shared the Claimant's job title. There were also 15-20 other Talent Delivery Consultants in different areas that could have been included in the pool.

63.4 Failed to allow the Claimant to move to the new role on a home working basis.

64. Did the Respondent act reasonably in the circumstances, including its size and administrative resources, in treating redundancy as a sufficient reason for the Claimant's dismissal?

65. Was the Claimant unfairly dismissed?

66. If the dismissal was unfair, would the Claimant have been dismissed by reason of redundancy in any event?

Wrongful Dismissal / Breach of Contract

67. Did the Respondent pay the Claimant the amount owed in accordance with her contract of employment?

68. Did the Respondent fail to pay the Claimant the correct benefits? The Claimant relies on the following:

68.1 a difference in pay for notice period following 6% pay rise.

68.2 accrued annual leave in 9 week notice period.

68.3 loss arising out of payment of holiday pay during employment.

<u>THE LAW</u>

69. The law in this case is not in dispute.

70. The relevant statutory provisions are as follows:

71. Section 13 of the Equality Act 2010 ("EA 2010") defines 'direct discrimination' and states:

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

72. Section 15 of EA 2010 defines discrimination arising from disability as follows:

"(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

73. Sections 20 and 21 EA 2010 deal with the duty to make reasonable adjustments. They are as follows.

Section 20

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

(2) The duty comprises the following three requirements.

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

Section 21:

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

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

74. Section 23 EA 2010 deals with comparators and states:

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

75. Section 27 EA 2010 deals with victimisation and states:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

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

76. Section 39 EA 2010 prohibits discrimination generally and, so far as is relevant, states:

"(1) An employer (A) must not discriminate against a person (B)—

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment."

77. Section 136 EA 2010 deals with the burden of proof and states:

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

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

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

78. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996") deals with unfair dismissal and states:

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

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

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

(2) A reason falls within this subsection if it—

[(a) – (b) not relevant

(c) is that the employee was redundant, or

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

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

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

79. Section 139 ERA 1996 sets out the definition of what is often referred to as a 'redundancy situation' and states:

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

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

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

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

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

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

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

80. Article 3 of the Employment Tribunal Extension of Jurisdiction Order (England and Wales) Order 1994 deals with breach of contract claims in the Employment Tribunals and states:

"Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

[(a) - (b) not relevant]

(c) the claim arises or is outstanding on the termination of the employee's employment."

81. In relation to the reversal of the burden of proof provisions found in section 136 EA 2010 we have considered the guidance in **Madarassy v Nomura International Plc** [2007] IRLR 246. In that case the Court of Appeal made it clear that the burden does not shift to the employer simply on the Claimant establishing the difference in status and a difference in treatment. Those 'bare facts' only indicate a possibility of discrimination, not that there was in fact discrimination. "Could conclude" in the wording of section 136 EA 2010 must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it.

82. Thus, the first stage of the two-stage process envisaged by section 136 EA 2010 is to consider whether the Tribunal could properly conclude from the facts (if proved by the Claimant) whether discrimination is a possible explanation for the treatment. At the second stage of the process, once the Tribunal is satisfied that the Claimant has proved facts from which an inference of discrimination can be drawn, the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, upon a balance of probabilities, the Respondent is not able to show that discrimination was not the reason for the treatment, the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists, then the claim must fail.

83. There is no statutory definition of what constitutes a PCP. In **Ishola v Transport for London** (2020) ICR 1204 the Court of Appeal gave the following guidance (at paragraphs 34 – 38):

"The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly

construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits….

The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a Claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

CONCLUSIONS

Time point

84. This is no longer an issue. The Respondent accepts that it would be appropriate for the tribunal to exercise its discretion to extend time where appropriate.

Failure to make reasonable adjustments

85. The Respondent accepts that the Claimant has established the existence of all of the PCPs relied upon with the exception of delaying the occupational health referral in October 2022 and not allowing the Claimant to work from home and/or the requirement for an updated OH assessment before allowing a return to work.

86. In deciding whether this is in fact a valid PCP we have had regard to the guidance set out in **Ishola** above. We conclude that this was not a valid PCP in principle nor has it been established on the facts. There is no evidence that there was a regular practice of delaying OH referrals or not allowing employees to work from home. Indeed until recently the Claimant did work from home. As to the delays these were largely down to the Claimant's own GP. There is nothing to suggest there was a practice of delaying such matters or that it was something done with regularity. The wording of the PCP also suggests that this was something relevant only to the Claimant rather than something that amounted to something done generally or likely to be done.

87. We accept Mr Montgomery's primary submission that the duty to make reasonable adjustments did not arise at the material times. The Claimant's GP fit notes made it clear that she was never fit to return to work at any stage. The standard fit note contains a tick box to indicate that a employee may be fit to return to work but with adjustments. No such stipulation was ever indicated.

88. In our judgment the duty to make reasonable adjustments was not nor can it be properly triggered in a situation where an employee remains unfit to work and has not at any point indicated they are fit to work subject to adjustments.

89. Following her surgery in June 2022 the Claimant remained unfit for work for the remainder of her employment. The Claimant confirmed in January 2023 that she did not have a return to work date despite her sick note expiring on 31st January 2023. In our judgment the Claimant did not suffer any disadvantage flowing from the PCPs as the requirement to attend work was never implemented.

90. In any event the proposed adjustments suggested by the Claimant were not reasonable adjustments. The role required at least some attendance in the office. Ideally it should have been 40-50% but it was possible to reduce this to one day a week (20%) at most. We do not think there is much mileage in submission that different percentage figures are mentioned at various stages of discussions. At the end of the day there was a need for *some* personal attendance and so far as the Claimant was concerned any requirement to attend physically rendered the role practically impossible.

91. For those reasons the complaint of failure to make reasonable adjustments must fail and is dismissed.

<u>Discrimination arising from disability</u>

92. We accept that the acts identified in the list of issues amount to unfavourable treatment although the last two allegations, being put at risk of redundancy and dismissal, amount to more or less the same thing.

93. We do not find that any unfavourable treatment was as a result of something arising from the Claimant's disabilities. The protected conversation was an attempt to agree an exit package for the Claimant. It was nothing to do with the Claimant's disabilities. When the Claimant did not show any interest it was not pursued. The Claimant did not make any link at the time. If it was the Claimant would no doubt have made some reference to it in her subsequent grievance.

94. There is similarly no connection with the Claimant's disabilities as to the delay in referring for an OH report. The delay was largely down to the Claimant's own GP. Somewhat confusingly the Claimant has also referred to a further occupational health referral that never was in the sense that she says she there were conversations between her and Ms Hill where she was pressing for an OH report to get back to work but this was never actioned. There is nothing to suggest that any decision not to instruct such a report until the Claimant was back at work was influenced in any way by the Claimant's disabilities. Had the Claimant desired a return to work it would have been a simple matter for her to tell her GP that this is what she wanted and the fit notes would no doubt have reflected that.

95. The decision to move the Claimant's base to Holborn was made in the wider context of a reorganisation. It was not in any way related to the Claimant's disabilities.

96. In any event we are satisfied that acts of unfavourable treatment were a proportionate means of achieving a legitimate aim. The legitimate aim was to maximise

the available resources available to the Respondent. They were proportionate because there were no lesser options available. The Claimant did not suggest any alternative roles nor did they exist.

Direct discrimination

97. There is nothing to suggest that the Claimant was selected for redundancy *because* she was disabled. The allegation is to some extent linked to the suggestion that the redundancy was a mere sham and not the real reason and so we will deal with them both here.

98. We do not find that the redundancy process was a sham or somehow contrived in order to dismiss the Claimant. We arrive at that conclusion for the following reasons:

98.1 The restructure was not solely a decision of Ms Hill. It was part of a wider re-organisation. Ms Hill would not have had the relevant authority or power to implement organisational changes at that level. It is not plausible that more senior management would have permitted a re-organisation merely to avoid a junior member of staff being allowed to work from home.

98.2 There is no evidential basis for concluding that the redundancy exercise was a sham. The Claimant suggests that the timing in December/January is somehow suspicious in that it was at a time when the Claimant could have returned to work and it was when she was pressing for an OH report to allow her to do so. It seems to us implausible that within a few days of the Claimant having a conversation about wishing to return to work that Ms Hill was able to engineer a sham redundancy scenario when it is something she could have done much earlier if she was hostile to the idea of the Claimant working from home. There is no adverse inference that can properly be drawn with respect to the timing of the at risk discussions. The Claimant was still off work at the end of December 2022/January 2023 and there was no imminent prospect of her return.

98.3 The Respondent was not in principle opposed to employees working from home where it was practicable and feasible. However any hybrid role which involved some attendance in the office was simply not viable for the Claimant.

99. We do not accept that Ms Lynch is a suitable comparator. Her circumstances are not materially the same. We consider that a hypothetical comparator is likely to have been treated the same in similar circumstances and dismissed. The Claimant has failed to adduce any evidence as to the other 15 -20 Talent Consultants relied on. Their circumstances are not known. We do not find there is evidence of less favourable treatment.

100. We do not consider that the Claimant has adduced sufficient evidence or proved facts from which an inference of direct discrimination can be drawn. The burden does not therefore pass to the Respondent to establish a non-discriminatory reason for the decision to select the Claimant for redundancy. The complaint of direct discrimination is dismissed.

Unfair dismissal

101. We are satisfied that there was a genuine redundancy situation within the meaning of section 139 ERA 1996. The requirement for employees to carry out work of a particular kind had diminished or were expected to diminish.

102. We are satisfied that the Respondent engaged in meaningful consultation with the Claimant. There were five consultation meetings. They were not rushed not was there any suggestion at the time that the process was being rushed. The Claimant had the fullest opportunity to make representations and did so.

103. The Claimant's argument that Ms Lynch should have been in the pool is misconceived. Ms Lynch was actually undertaking the role. The Claimant had not even completed her induction period. In fact the Claimant had only gone so far as to shadow Ms Lynch at some meetings. Moreover, Ms Lynch was supporting a team that was not moving to Holborn as part of the restructure. As a matter of logic there was no reason to artificially create a pool to include Ms Lynch.

104. As the Claimant was the only person in the pool the issue of fair selection criteria is irrelevant.

105. As for redeployment there is no evidence of any suitable alternative role that the Claimant could have performed. She did not suggest any possible alternative role or apply for any alternative role. Put simply there was no role that the Claimant could do if it did not allow working from home entirely. There is no evidence that any such suitable role was available.

<u>Breach of contract/Wrongful dismissal</u>

106. The loss claimed in respect of holiday pay is now agreed and paid.

107. Although there is no right to make a payment in lieu in the employment contract there is such a right in the Respondent's redundancy policy. Although the latter is non-contractual that does not prevent the Respondent from relying on it.

108. The Claimant cannot claim a loss of a 6% pay rise as a result of any breach. That is far too speculative. There is no contractual right to a 6% pay increase.

109. Any right to accrued annual leave in the notice period did not arise or was outstanding on the termination of the contract.

110. The complaint of breach of contract is therefore dismissed.

<u>Victimisation</u>

111. The grievance appeal was initially processed. At the time of the amended Grounds of Resistance it was still a live issue. It was not actioned as a result of an administrative error. There is no causal link with the protected act and that complaint is therefore dismissed.

112. The Respondent concedes victimisation in relation to the failure to provide outplacement support.

<u>Remedy on victimisation</u>

113. The issue on remedy is adjourned to another date. The parties should seek to agree remedy on the one complaint of victimisation which is agreed as unlawful, if possible. If they are not able to do so they should write to the Tribunal as soon as possible and seek a date providing a suitable time estimate.

114. The parties should also agree a short bundle (if necessary) for the remedy hearing and exchange any witness statements to be relied on at least 14 days before that hearing.

____

Employment Judge Ahmed

Date: 19 December 2024

JUDGMENT SENT TO THE PARTIES ON

..........24 December 2024..........................

....

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

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