EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs K Missen	**- V -**	IBM United Kingdom Ltd

Heard at: London Central

On: 22-24 & 29-30 September 2020

Before: Employment Judge Baty
Mr T Robinson
Mr D Clay

Representation:

For the Claimant: In person
For the Respondent: Ms R Azib (counsel)

JUDGMENT

1. The claimant's complaints of discrimination arising from disability (other than the complaint of discrimination arising from disability relating to her dismissal) and indirect disability discrimination were presented out of time. It was not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear these complaints and they are therefore struck out. If the tribunal had had jurisdiction to hear these complaints, they would have failed.

2. The claimant's complaint of unfair dismissal and her complaint of discrimination arising from disability relating to her dismissal both fail.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 24 May 2019, the claimant brought complaints of unfair dismissal, discrimination arising from

disability and indirect disability discrimination. The respondent defended the complaints.

The Issues

2. The issues were agreed between the parties and the tribunal at a preliminary hearing before EJ Grewal on 8 October 2019 and were annexed to EJ Grewal's note of that hearing. At the start of this hearing, I asked the parties if the issues remained agreed. Subject to the claimant's amendment application (the details of which are set out below and which was refused), the issues were agreed and remained as set out in EJ Grewal's note of her preliminary hearing, as set out in the paragraph below. EJ Grewal's note also made clear that, in addition to the issues set out below, there were jurisdictional issues for the tribunal to determine in relation to the discrimination arising from disability and indirect disability discrimination complaints, in other words, were they brought in time and, if not, was it just and equitable for the tribunal to extend time such that it had jurisdiction to hear these complaints; the judge also made this clear to the parties at the start of this hearing. As agreed at a further preliminary hearing on 13 January 2020 before REJ Wade, this hearing was to be on liability only, such that the issues in section D of the list below were not to be considered; the parties confirmed at the start of this hearing that this should remain the case.

3. Subject to the above, the agreed issues were as follows:

A: UNFAIR DISMISSAL

1. Was C dismissed by R for a potentially fair reason of a kind as defined by s.98 of the Employment Rights Act 1996 ("**ERA**")? Specifically was C dismissed on the grounds of:

   1.1. Redundancy as defined by s.139 of the ERA?; and/or

   1.2. Some other substantial reason as defined by s.98(1)(b) of the ERA?

2. Did R follow a fair procedure in dismissing C? Specifically:

   2.1. Did R engage in reasonable and appropriate consultation with C?

   2.2. Did R make reasonable efforts to ensure C was able to obtain any suitable alternative employment that was available?

   2.3. Did R set fair criteria for selection for redundancy that were capable of objective assessment and measurement?

   2.4. Were those criteria applied to C fairly?

   2.5. [C to confirm particulars of any other grounds she alleges rendered the selection process unfair.] [This issue duly fell away as none were provided]

2.6. In so far as there was any unfairness in the procedure adopted by R, was this "corrected" by C's appeal?

B: AUTOMATIC UNFAIR DISMISSAL

3. Was C's dismissal by R automatically unfair pursuant to Regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**"TUPE**")? Specifically:

3.1. Was the sole or principal reason for C's dismissal the transfer of her employment from Erste Financial Services GmbH ("**EFS**") to R pursuant to TUPE on 1 February 2018?

3.2. Was C dismissed for an economic, technical or organisational reason entailing changes in the workforce, namely that the work performed by the EFS transferred employees was being offshored by R?

C: DISABILITY DISCRIMINATION

4. Did C have a disability as defined by s.6(1) of the Equality Act 2010 ("**EA"**) at the relevant time? Specifically:

4.1. Was C suffering from back pain and if so, did this amount to a physical impairment that had a substantial and long-term adverse effect on C's ability to carry out normal day-to-day activities?

4.2. Was C suffering from fibromyalgia and if so, did this amount to a physical impairment that had a substantial and long-term adverse effect on C's ability to carry out normal day-to-day activities?

5. If so, did R know, or could R reasonably have been expected to know, that C had either of these disabilities?

Discrimination arising from disability

6. If so, did R discriminate against C contrary to s.15(1) of the EqA? Specifically:

6.1. Did R treat C unfavourably by:

a) Terminating her employment due to redundancy without allowing her the opportunity to find alternative employment?

b) Refusing to accept C was permanently disabled as defined in R's Disability Plan?

c) Determining C was not eligible for R's Disability Plan?

6.2. If so, did R treat C in any/all of these ways because of something arising in consequence of either of C's disabilities?

6.3. If so, was the redundancy action of which the C was a part a proportionate means of achieving the legitimate of managing R's organisational and economic needs?

6.4. Were the criteria for entry into R's Disability Plan a proportionate means of achieving the legitimate aim of managing eligibility to ensure it would benefit a certain category of employees?

Indirect Disability Discrimination

7. Did R indirectly discriminate against C on the grounds of disability contrary to s.19 of the EA by applying the eligibility criteria to R's Disability Plan ("**the PCP**") to her? Specifically:

7.1. Did the PCP put or would it put people with C's disabilities at a particular disadvantage when compared with people who do not have those disabilities?

7.2. If so, did the application of the PCP to C put her at that disadvantage?

7.3. If so, was the application of the PCP to C a proportionate means of achieving the legitimate aim of managing eligibility to ensure it would benefit a certain category of employees?

D: REMEDY

8. If C's complaint of unfair dismissal is well-founded what (if any) compensatory award should be made?

9. As to the calculation of any award of compensation the following issues will arise:

9.1. What loss has C suffered?

9.2. What would have happened had R acted lawfully? Was it likely C would have been dismissed or otherwise suffered loss in any event?

9.3. Should any award made in favour of C be reduced in respect of the tax free statutory redundancy payment of £9,144 made to C by R?

9.4. (Discrimination only) What injury to feelings (if any) has C suffered?

9.5. Has C taken all reasonable steps to mitigate her losses?

4. At the start of the hearing, Ms Azib made clear that the respondent conceded that the claimant was at all material times a disabled person by reason of back pain and fibromyalgia; issue 4 above therefore fell away.

5. However, Ms Azib made it clear that, in relation to issue 5, relating to the extent of the respondent's knowledge of the claimant's disabilities, the respondent conceded that the point from which it had knowledge of those disabilities was September 2018, when it became aware of the second occupational health report (produced by Medigold) in relation to the claimant; there was however an ongoing dispute as to whether or not the respondent had such knowledge, as the claimant submitted, prior to September 2018.

The Hearing

6. The case had been listed to be heard in January 2020. However, it was postponed to the current hearing dates.

7. Shortly in advance of the hearing, both parties applied for the hearing to take place remotely by way of a video hearing (using Cloud Video Platform ("CVP")). This request was granted by EJ Stout. The hearing duly took place by CVP, with all parties, witnesses and representatives attending remotely; only the tribunal panel itself was present in the tribunal. Paper bundles had been provided to the tribunal in advance and witnesses had copies of the bundle and witness statements to use. In terms of the technology, the hearing ran very smoothly.

8. At the start of the hearing, the judge discussed with the claimant any adjustments which may be necessary to enable her to participate properly in the hearing. The fact that she was able to conduct the hearing from home was of great assistance. In addition, she had with her her brother-in-law, Mr Jeffries, who was able to help her with bundles and turn up the relevant pages for her as necessary. Beyond that, the claimant said that, because of the effects of "fibro fog" and pain she suffered as a result of her physical disabilities, she would need additional breaks. We agreed that, on average, the tribunal day would start at 10.30 and end at 4.30, with an hour for lunch and with extended breaks of 20 minutes morning and mid-afternoon. However, the judge made it clear that, if the claimant needed to have further breaks, she should ask and they would be permitted. Occasionally, the claimant did ask for a further break and it was duly permitted. The claimant confirmed at the start of the hearing that no other adjustments by the tribunal would be necessary apart from these.

9. The claimant made clear at various points during the hearing and at the end of the hearing that she was grateful for the way that the tribunal had organised the hearing in this respect, as well as the way that Ms Azib had phrased her cross-examination questions, in a way which made it easier for the claimant.

10. The hearing was interrupted because the judge was unwell on the third and fourth days of the hearing; however, it was nevertheless still possible to complete the hearing within the seven day listing, even having lost two days.

Claimant's amendment application

11. Towards the start of the hearing, when the tribunal was discussing the issues with the parties, the claimant made reference to still having outstanding issues regarding her PHI cover and made reference to various other medical and insurance policies which were not contained within the list of issues. It was not initially clear whether or not the claimant was seeking to add additional issues to the issues for determination and the judge discussed this with the claimant. He explained that, if the claimant indeed wanted to add additional issues, there would need to be an application to amend the claim. Eventually, the claimant confirmed that she would like to apply to amend the claim.

12. Both parties made submissions and the tribunal adjourned briefly to consider its decision. We decided to refuse the application to amend for the reasons set out in the paragraph below, mindful of the principles in Selkent Bus Co Ltd v Moore [1996] ICR 836: in summary, in determining whether to grant an application to amend, an employment tribunal must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing the amendment (in other words the balance of prejudice to the parties); in Selkent, it was stated that relevant factors would include: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

13. This was an entirely new set of complaints, which were not brought in the existing claim form and which raised entirely new issues regarding health insurance and benefits; furthermore, we did not even have the clear text of a proposed amendment in order to work out exactly what the complaints were which were proposed to be brought; it was not even clear whether or not the respondent was the correct respondent to such complaints, as the claimant held insurance policies with various insurers and, to the extent that there may have been any complaints, it may well have been the case that such complaints should have been against the insurers and not the respondent; in order to address these new allegations, the respondent would need to give a great deal of consideration to the issues raised but the application was brought at the last minute on the first morning of the hearing, despite the issues having been agreed almost a year previously; the respondent could not fairly deal with all of these matters on the hoof; there would likely be a need for extra witnesses, potentially from external individuals from the insurance companies, so the inevitable result of granting the amendment would be that this hearing would have to be adjourned and that could not be in the interests of justice given the significant costs already incurred in preparing for this hearing; the claimant had had two previous opportunities to make a sensible application for amendment, firstly at the hearing before EJ Grewal in October 2019, when the list of issues was agreed, and secondly at or after the hearing in January 2020 before REJ Wade (and REJ Wade's order gave the claimant specific permission to serve further witness evidence had she wanted to); however neither opportunity was taken; with the application being made at this stage, as it was, such complaints were significantly out of time (the claimant's employment had terminated on 1 January

2019 and the date of the presentation of the claim had been 24 May 2019, and it was by this stage 22 September 2020); there was, for the above reasons, significant prejudice to the respondent; however, there was little prejudice to the claimant who had a significant number of complaints before the employment tribunal anyway under her existing claim.

14. Therefore, for these reasons, we refused the application to amend.

The Evidence

15. Witness evidence was heard from the following:

For the Respondent:

Mr Uwe Feifel, a senior manager at the respondent, based in Germany, who was part of the team at the respondent involved in the transaction which led to a large number of employees of the claimant's former employer, Erste Financial Services GmbH ("EFS") (including the claimant) transferring under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the respondent on 1 February 2018;

Ms Davida Parker, who at the times relevant to this claim was employed by the respondent as "People Transition Manager" in relation to those employees who had transferred to the respondent under TUPE and who was heavily involved in the subsequent collective and individual redundancy consultation processes relating to those employees;

Ms Philippa Batt, an HR Business Development Consultant at the respondent who led the HR aspects of the TUPE transfer and advised in relation to the subsequent consultation processes;

Ms Cindy Blood, who is employed by the respondent as Project Lead Corporate Health & Safety, has worked for the respondent for 18 years, has worked in occupational health services since 1991, is a trained occupational health nurse and qualified in 1993 as a registered nurse and specialist practitioner in occupational health nursing and who is the only person within the respondent who makes eligibility assessments for the purposes of the respondent's Disability Plan;

Ms Elizabeth Oriaro, who is employed by the respondent as an Immigration Partner, and who heard the claimant's grievance; and

Ms Karen McKenzie, an HR Partner at the respondent, who heard the claimant's appeal against that grievance outcome.

For the Claimant:

The Claimant herself; and

Ms Harriet Le Compte, the claimant's daughter.

16. An agreed bundle in four volumes numbered pages 1-3471 was produced to the hearing. At times during the hearing, some documents were added by consent. This included an additional 16 page document which the claimant asked towards the start of the hearing to submit and which the tribunal read.

17. The tribunal read in advance (on the first day of the hearing) the witness statements and any documents in the bundle to which they referred.

18. Whilst the respondent's witness statements were detailed, the tribunal noted at the start of the hearing that the claimant's witness statement and that of her daughter were only one page long each and covered only the issue of whether she was a disabled person (an issue which, as noted above, the respondent had conceded). On the first day of the hearing, and again at the start of the second day, there was discussion between the parties and the tribunal in relation to whether the claimant should give her evidence first or second. Ms Azib suggested that it would be better if the claimant gave her evidence first, partly because she would then have got the process of being cross-examined out of the way but mainly because, if the details of her case came out in cross-examination, they could then be put to the respondent's witnesses when they subsequently came to give their evidence; whereas, if the respondent's witnesses gave evidence first, the opportunity to put to them anything that came out of the claimant's cross-examination would have been lost. This seemed to the tribunal a very sensible proposal and one which was in the claimant's own best interests. However, the claimant was very keen not to give evidence first and said that, at the preliminary hearing before REJ Wade, she had been told by REJ Wade that, because the weekend came after the fourth day of the seven day hearing, she would be able to have the weekend as a break and to give her evidence after the weekend; she said this was important to her because of her medical conditions and the difficulties they caused her.

19. The tribunal took all this into account. It was of the firm view that it would be better for the claimant, in terms of presenting her case, to give her evidence first and it again suggested this to her at the start of the second day. However, the claimant was adamant that she wanted to give her evidence second. As this was what she wanted to do, and as she cited her health issues as a reason for this, the tribunal were content to accommodate that. The judge made clear that, on the basis of the time available in the seven day hearing, her evidence may have to start on Friday and go on to the Monday but that, if that were the case, she would at least have a long break between her evidence to recover (even though she would not be able to discuss the case with anyone over the weekend because she would still be on oath); the claimant said that she was fine with that. As it turned out, because of the judge's illness, the claimant's evidence did not begin on the Friday but took place on the following Tuesday.

20. A timetable for cross-examination and submissions was agreed between the parties and the tribunal at the start of the hearing and was adhered to. The evidence of the respondent's witnesses was completed on days two and three of the hearing. Even though two days were lost in the middle of the hearing due to

the judge's illness, Ms Azib tailored her cross-examination so that it was in fact completed in one day rather than, as estimated in the timetable, two days. She did not have any cross-examination questions for Ms Le Compte. This therefore meant that submissions could be done at the start of the last morning of the hearing. Both parties produced written submissions which the tribunal read before they each made brief oral submissions.

21. Once that was done, and in discussion with the tribunal, the parties stated that, if it was possible, they would be keen for the tribunal to give an oral decision later that day. There was enough time for the tribunal to deliberate and it duly gave an oral decision later that afternoon.

22. The judge then asked whether the parties wanted written reasons for the decision. The claimant said that she did want written reasons. The judge said that she was of course completely entitled to these but wanted to make sure that she was fully aware that any written reasons would be published online and would be searchable. The claimant confirmed that she fully understood this but that she still wished to have the written reasons for the decision. These written reasons were then duly produced.

The Law

Unfair dismissal

23. The tribunal must decide whether the respondent had a reason for dismissal which was one of the potentially fair reasons for dismissal within s.98(1) and (2) of the Employment Rights Act 1996 ("ERA") and whether it dismissed the claimant for that reason. The burden of proof here rests on the respondent. Both redundancy and some other substantial reason would be such potentially fair reasons for dismissal.

24. In relation to redundancy s.139 of the ERA provides:

"139(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to-

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

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

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

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

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

25. The tribunal must then be satisfied, in all the circumstances of the case (including the size and administrative resources of the respondent) that the respondent acted reasonably in treating it as a sufficient reason to dismiss the claimant. The tribunal refers here to s.98(4) of the ERA and directs itself that the

burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. In this respect, in a redundancy case an employer will normally be expected to have consulted adequately in advance of any redundancy, to have carried out a fair selection process (if selection is applicable) and to have carried out a reasonable search for any suitable redeployment opportunities.

26. If the dismissal is unfair the tribunal must take account of the principles in the case of Polkey v A E Dayton Services Ltd [1987] IRLR 503 HL if it is satisfied that, but for a defect in the procedure adopted by the respondent which has rendered the dismissal unfair, the claimant would have been dismissed fairly anyway. If so, issues of when such fair dismissal would have happened and of consequent adjustments or limits to any ongoing financial losses of the claimant will arise.

TUPE

27. Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") provides as follows:

Dismissal of employee because of relevant transfer

7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

Discrimination arising out of disability

28. Section 15(1) of the Equality Act 2010 (the "Act") provides that 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.

29. However, A does not discriminate if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

30. The Employment Statutory Code of Practice states, in respect of knowledge of a disability, that:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

31. It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v TC Group [1998] IRLR 628; SoS for Work and Pensions v Alam [2010] ICR 665).

32. Objective justification under section 15(1)(b) requires (1) a legitimate aim and (2) an objective balance between the discriminatory effects of the condition and the reasonable needs of the party who applies the condition: see Balcombe LJ in Hampson v Department Education and Science [1989] ICR 179 CA. In Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15, Baroness Hale stated at paragraph 20 that:

"It is not enough that a reasonable employer might think the criterion justified. The tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement...Some measures may simply be inappropriate to the aim in question...A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate...".

33. When carrying out the assessment, the Tribunal *"must have regard to the business needs of the employer"* as per Singh J (as he then was), in Hensman v Ministry of Defence UKEAT/0067/14, paragraph 44.

Indirect Disability Discrimination

34. Under section 19(1) of the Act, a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is discriminatory to a relevant protected characteristic of B's. Disability is a relevant protected characteristic.

35. Section 19(2) provides that a PCP is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic;

(b) It puts, or would put, persons with who B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) It puts, or would put, B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

36. Accordingly, the disabled employee's treatment is to be compared with non-disabled persons.

37. In Essop and Others v Home Office [2017] ICR 640 SC, Baroness Hale explained how a claim of indirect discrimination is to be approached:

"33. ... In order to succeed in an indirect discrimination claim, it is not necessary to establish the reason for the particular disadvantage to which the group is put. The essential element is a causal connection between the PCP and the disadvantage suffered, not only by the group, but also by the individual. This may be easier to prove if the reason for the group disadvantage is known but that is a matter of fact, not law."

38. On the question of justification for the purposes of section 19, the Court of Appeal set out the approach in Hardy & Hansons plc v Lax [2005] ICR 1565:

"32. ... The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary…

The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. As this court has recognised in Allonby [2001] ICR 1189 and in Cadman [2005] ICR 1546, a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal."

Jurisdiction and time limits

39. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable. (That primary 3 month time limit can be varied by the application of the rules concerning ACAS Early Conciliation.)

40. It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

41. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked

to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

42. As to whether it is just and equitable to extend time, it is for the claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA. The tribunal takes into account anything which it judges to be relevant. This is the exercise of a wide, general discretion.

Findings of Fact

43. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

44. The respondent provides IT, technology, hardware, software, new business solutions and services.

45. The claimant was originally employed by EFS, from 2006 onwards. She performed the role of "Loan Administrator".

46. EFS outsourced its IT services to the respondent on 1 February 2018. As a result, the claimant's employment, and that of her 30 other colleagues in the UK, was transferred to the respondent on 1 February 2018 under TUPE. She remained an employee of the respondent until the respondent dismissed her with effect from 1 January 2019.

47. Whilst she was still an employee of EFS, the claimant went off sick, from September 2017 onwards. She never returned to work, either at EFS or at any point during her subsequent employment with the respondent.

The claimant's sickness absence

48. As noted, the claimant's sickness absence started in September 2017, whilst she was still an employee of EFS.

49. A "fit note" in respect of the claimant dated 16 October 2017 was submitted, stating the reason for absence from work as being "back pain".

50. A further fit note dated 27 November 2017 was submitted, stating the reason for absence as being "fibromyalgia, back pain". This was the only sick note which made reference to fibromyalgia, either from the period of the claimant's employment by EFS or from the period of her employment with the respondent.

51. A further fit note dated 28 December 2017 was submitted, stating the reason for absence as being "back pain with ridiculopathy". This fit note signed the claimant off sick until 4 March 2018.

52. A further fit note dated 14 February 2018 (after the transfer of the claimant's employment to the respondent) stated that the reason for her absence was "back pain".

53. A further fit note dated 16 April 2018 stated that the reason for the claimant's absence was "back pain". This signed the claimant off sick from 14 April until 15 October 2018.

54. None of these sick notes gave further details of the claimant's conditions.

TUPE transfer

55. In advance of the TUPE transfer, the respondent, in or around December 2017 and in accordance with its obligations under TUPE, attended a consultation meeting at EFS to present the respondent's statement of measures concerning the likely impact of the transfer on employees. This included the likelihood that redundancies would be made following the TUPE transfer because the respondent proposed to send the work that was being done by the UK EFS employees offshore (specifically to India and Germany). Indeed, part of the rationale of the respondent's successful bid to EFS and the price expectations that that contained included the fact that it was likely that this work would be outsourced.

56. We have seen the contemporaneous documentation and heard evidence from Mr Feifel and others in relation to this process. It evidences a thorough and legally compliant approach in terms of the TUPE transfer and the respondent's obligations to employees. None of this process has been challenged by the claimant.

Collective redundancy consultation

57. On 30 April 2018, Ms Parker announced to the former EFS employees that a redundancy programme would begin. The announcement explained that the respondent was proposing to consolidate the work into its delivery centres in India and Germany and that that meant that redundancies were being proposed as part of that transformation work.

58. All 31 of the former EFS employees in the UK were affected by this and their jobs were at risk of redundancy. There was, therefore, no issue of selection between employees, as all the jobs were at risk of redundancy.

59. Two of the 31 former EFS employees, including the claimant, were long-term sick. Ms Parker kept them informed of all announcements and the subsequent consultation as they were unable to attend the office. On the day of the announcement on 30 April 2018, Ms Parker called the claimant personally to notify her and sent her hard copies of the announcement.

60. From 1 May to 13 July 2018, a thorough collective consultation process took place to discuss the proposed redundancies. We have seen the evidence of the numerous consultation meetings which took place with employee representatives (one of whom was the claimant's manager Paula Renouf), and the detailed information which was given to employees as part of this. Again, Ms Parker sent all this information, including consultation minutes and PowerPoint presentations, to the claimant to keep her fully updated, as she was not able to attend the office and did not have access to the respondent's IT system.

61. We need not go into any further detail about the collective consultation process. The claimant has not suggested that the process of consultation was inadequate. Having seen the documentation and heard the evidence of the respondent's witnesses, we find that it was an extremely thorough and reasonable one.

62. On 3 May 2018, the respondent announced a voluntary redundancy programme which involved expressions of interest ("EOI") in relation to voluntary redundancy which, if an employee wished to take voluntary redundancy, needed to be submitted by 1 June 2018. Ms Parker called the claimant personally to notify her of this announcement. The terms of voluntary redundancy reflected the old EFS redundancy scheme (which was not contractual, such that no entitlement to it transferred under TUPE to employees when they transferred to the respondent). Had employees not taken voluntary redundancy, but were subsequently made redundant in due course, they would only have been entitled to statutory redundancy terms, which were far less generous. By way of example, in the claimant's case, her payment had she accepted voluntary redundancy would have been around £41,000, whereas the payment under the statutory terms was around £9,000. 30 of the 31 former EFS employees duly accepted the voluntary redundancy terms (and consequently received the enhanced voluntary redundancy payments); only the claimant did not.

63. As the claimant had been absent for several months when her employment transferred to the respondent, the respondent arranged for an occupational health report to be obtained in relation to her. A report was produced, by the respondent's then occupational health provider, Optima, on 25 May 2018.

64. The Optima report described the claimant as temporarily unfit for work, with the assessor unable to offer a date for her return at that moment. It referenced the back pain symptoms which the claimant was having and that the claimant had informed the doctor that her activities were severely reduced and that she experienced good days and bad days, but that sometimes immobility was so severe that she was unable to get out of bed and required assistance from her daughter. It did not mention fibromyalgia. The report stated that at that time the priority was to focus on pain control and mobility with a view to accessing physiotherapy as the next stage of treatment. The report recommended that as and when the claimant was fit to work, it ought to be on a phased basis. It also recommended an appointment to review her fitness to work should be undertaken in three months' time. It also stated that, in the doctor's

opinion, the claimant's medical condition would be covered by the Equality Act 2010 as it had a significant impact on her normal daily activities and had lasted more than one year (although, on the evidence we have seen, we cannot say that at that point it had indeed lasted more than one year as we do not know whether or the extent to which the claimant suffered from that physical impairment prior to September 2017).

65. The report also noted that the claimant had expressed the view that "management have been very supportive and accommodating in relation to her medical circumstances".

66. On 24 May 2018, Ms Parker sent the claimant a letter notifying her that the EOI window had been extended in her case to 15 June 2018 in consideration of her medical circumstances. This was to give her an extra opportunity to apply for the generous voluntary redundancy terms if she wished to do so.

67. In the same letter, Ms Parker confirmed that the respondent was prepared to allow the claimant to "work" her three-month notice period rather than her being paid in lieu of notice (which was the respondent's normal policy). The background to this is as follows. The claimant was classified as short-term sick until she had been sick for six months; at that point she was classified as long-term sick and her salary reduced under the respondent's terms to 75%. There had been discussions during the consultation process between Ms Parker and the claimant regarding the notice period. Allowing the claimant to "work" her notice period rather than being paid in lieu of notice had two benefits for the claimant: the first was that she could be paid her full salary during this period rather than 75%; the second was that she would during the notice period continue to have the benefit of various other insurances provided in connection with her employment with the respondent, including private medical insurance, which was in the light of her conditions something of great importance to her.

68. On 4 June 2018 the claimant emailed Ms Parker to express her interest in seeking alternative employment.

69. On 5 June 2018, Ms Parker called the claimant. However, at the start of the conversation, the claimant told her that she was placing her under too much pressure and that any further contact should be via email. Up until that point the claimant had never stated that she was feeling overwhelmed or pressured by any of Ms Parker's calls.

70. On 8 June 2018, Ms Parker sent the claimant a letter concerning, amongst other things, redeployment options and support provided by the respondent, and requested a copy of the claimant's CV (for redeployment purposes). The letter also confirmed that it was proposed that employee leaving dates would be staggered between 30 June 2018 and 1 November 2018, which in due course happened (with the exception of the claimant, who did not leave until 1 January 2019). In fact, notwithstanding that the claimant remained employed by the respondent for this length of time, the role that she had been undertaking prior to going off sick transferred offshore much earlier in the summer of 2018.

71. The claimant did not submit an EOI in relation to voluntary redundancy by 15 June 2018 (or indeed at any time thereafter).

72. On 18 June 2018 the claimant sent Ms Parker a letter from the Priory Hospital requesting that she should not be contacted by the respondent for four weeks. The respondent respected this wish and did not contact her during this period.

73. As noted, collective consultation finished on 13 July 2018.

Individual consultation

74. Thereafter, a period of individual consultation followed.

75. Again, the claimant has not suggested that the individual consultation she received was not reasonable or extensive enough. We have seen the contemporaneous documentation and heard Ms Parker's evidence and those of the other respondent's witnesses. Individual consultation was certainly thorough and detailed.

76. On 19 July 2018, Ms Parker sent the claimant a letter notifying her that it was necessary to hold an at-risk meeting and, in the light of the claimant's previous concerns regarding contact, proposed that it was conducted by letter.

77. During this period, there was a thorough search for alternative employment conducted by the respondent on behalf of the claimant. This was despite the fact that, although the claimant kept insisting that she was interested in alternative employment, she did not really engage greatly with Ms Parker and others to improve the chances of her obtaining alternative employment. For example, she sent an out of date CV and she did not engage with Ms Parker in any detail when Ms Parker was trying to ascertain from her what areas of potential redeployment she wanted to focus on.

78. On 30 July 2018, Ms Batt contacted the respondent's hiring manager on behalf of the claimant to see if there were any suitable roles advertised on the respondent's intranet.

79. On 10 August 2018, the claimant was placed at risk of redundancy and the individual consultation period commenced. A provisional dismissal date of 7 September 2018 was suggested.

80. On 15 August 2018, Ms Parker sent the claimant a letter describing the approach to redeployment searches and providing job search vacancies.

81. On 21 August 2018, Ms Parker sent the claimant a letter providing the outcome of further redeployment searches.

82. On 28 August 2018 Ms Parker sent the claimant a letter providing the outcome of further redeployment searches.

83. On 13 September 2018 Ms Parker sent the claimant a letter providing the outcome of further redeployment searches.

84. At no stage during her employment did the claimant suggest that she would be prepared to redeploy or be interested in redeploying to Germany. Furthermore, there was nothing on her CV which suggested that she might be interested in or capable of doing so; for example, there was nothing that indicated that she spoke German. In fact, the issue of employees potentially transferring to Germany or India or any other country never came up at any stage of the collective consultation either and it was never, in fact, suggested by any of the other employees or the employee representatives that any employee might be interested in transferring to Germany.

85. Essentially, Ms Parker made weekly/fortnightly job searches (at least 12 internal searches) on behalf of the claimant, adjusting the search criteria in accordance with any wishes the claimant expressed, and sending the claimant details of all the jobs found. She sent the claimant 18 letters referencing redeployment activity and processes, and shared a total of 24 role summaries with the claimant. She also sent the claimant's CV to several recruiting managers to consider for alternative positions and approach the respondent's talent acquisition manager in July 2018 for suitable vacancies.

86. The respondent also contacted "Right Management" on behalf of the claimant on 15 August 2018 to inform them that the claimant may wish to access their services (assistance with redeployment).

87. However, in the end, there was no alternative employment suitable to the claimant available.

88. In short, the process conducted by the respondent and by Ms Parker in particular was thorough, extensive, involved an enormous investment of time, and effectively involved Ms Parker carrying out the exercise of looking for alternative employment for the claimant on the claimant's behalf (rather, as some organisations might do, simply informing an employee of lists of vacancies and allowing that employee to make his/her own applications and enquiries). The claimant never put any complaints about the respondent's efforts to find alternative employment for her to Ms Parker or to any of the other witnesses for the respondent. Although, when subsequently invited by Ms Azib in the light of this to withdraw the allegation, she refused to do so, she did not criticise the respondent in relation to its efforts to find redeployment opportunities in her submissions either.

89. In July 2018, the claimant had indicated in an email to Ms Parker that, because of her health, the respondent should review matters following an updated occupational health report three months on from the Optima report. The provisional date of 7 September 2018 for the claimant potentially being made redundant was therefore extended.

90. A second occupational health report, dated 10 September 2018, was duly prepared by the respondent's new occupational health providers, Medigold, although it was only provided to the respondent on 17 September 2018.

91. The Medigold occupational health report referenced the claimant's back pain and fibromyalgia and described the impact on her day-to-day activities and the pain levels she had. It referenced the possibility of future treatment by spinal injections, as well as medication treatments she was undertaking. It stated that she was "currently unfit for work and is unlikely to be for the next 3 to 6 months". It stated that, in the doctor's opinion, the claimant was a disabled person for the purposes of the Equality Act 2010.

Disability Plan

92. Ms Parker sent a copy of the Medigold report to Ms Blood on 17 September 2018 to assess the claimant against the respondent's Disability Plan criteria. As noted, Ms Blood is the only person who makes these assessments in relation to the Disability Plan.

93. The Disability Plan is administered by the respondent and sits outside any pension or statutory requirements. It is not insured by any provider. Eligibility for benefits is subject to strict medical criteria that were developed by the respondent in consultation with an occupational health consultant physician.

94. The Disability Plan exists specifically to provide financial assistance to those who are "totally and permanently" disabled. The aim of its criteria is the management of eligibility, to ensure that it will financially benefit a certain category of employee, namely those who are unable to undertake any form of employment due to being totally and permanently disabled and would not qualify for ill-health retirement. Its provisions are very generous, providing 75% of an employee's basic salary for five years and 50% of their basic salary thereafter. It is financed directly by the respondent.

95. It is not necessary to go into the strict criteria in any great detail because the claimant admitted in cross-examination (and subsequently confirmed in her submissions) that Ms Blood had in fact correctly assessed her in accordance with the rules of the Disability Plan and that she did not at the time of the assessment qualify under the criteria of the Disability Plan. In short, however, the definitions under the Disability Plan are far stricter than the definition of a disabled person for the purposes of the Equality Act 2010. In particular, an employee must be considered "totally and permanently disabled", which means that, amongst other things, the work-related effects of the condition will remain with the individual throughout her lifetime or in all probability will continue indefinitely; they cannot be reasonably improved by medical and/or surgical treatment procedures used by the NHS in the UK at the time; all reasonable treatment options have been explored/evaluated; the employee is as a consequence unfit to work in their usual role with appropriate adjustments, unfit to work in an alternative role with appropriate adjustments and unfit to work in their usual or any other occupation for another employer or in a self-employed capacity.

96. The claimant simply did not meet these conditions at the time of the assessment carried out by Ms Blood in September 2018. In particular, as Ms Blood repeatedly said in her evidence to the tribunal, the claimant was very much at the start of her "treatment journey" and it was far too soon in respect of her conditions to determine a final prognosis. It certainly could not be said that, in accordance with the definitions of the Disability Plan, the claimant was "totally and permanently disabled".

97. On 17 September 2018, Ms Blood carried out her assessment. She responded in writing to Ms Parker explaining that the claimant was not eligible for the Disability Plan and why.

98. A letter of 11 October 2018 to the claimant confirmed that she was not eligible under the Disability Plan and clearly stated that that matter was now closed.

Termination of employment/grievance/appeal

99. On 2 October 2018, Ms Parker called the claimant and informed her that the individual consultation period was at an end and notified the claimant that she would be dismissed by reason of redundancy ("working" her notice period such that her employment would end on 1 January 2019). Ms Parker then sent the claimant a letter confirming this on the same day. The claimant was the last of the 31 former EFS employees who was made redundant.

100. On 16 October 2018, Ms Parker sent the claimant a letter asking if she would like to continue redeployment searches given that, by then, the claimant was in the process of applying for retirement on the grounds of ill-health with her pension provider. In this letter, even though the 15 June 2018 deadline for submitting an EOI had long since expired, Ms Parker stated that if the claimant would like a further opportunity to submit an EOI in relation to the (far more generous) voluntary redundancy package, she could do so at any stage up to 30 November 2018. The claimant never did so.

101. Ms Parker sent a further letter on 23 October 2018 asking if the claimant would like to continue redeployment searches.

102. On 24 October 2018, the claimant confirmed to Ms Parker that she should keep putting her forward for jobs.

103. On 7 November 2018, the claimant sent an email to Ms Parker. The respondent decided to treat that email within its grievance procedure and it was referred to the respondent's grievance coordinator.

104. On 4 December 2018 Ms Parker sent the claimant a letter providing the outcome of further redeployment searches.

105. On 10 December 2018, Ms Oriaro was appointed to investigate the claimant's grievance.

106. On 18 December 2018 Ms Parker sent the claimant a further letter providing the outcome of redeployment searches and informing her that her employment would terminate on 1 January 2019.

107. The claimant's employment duly terminated on 1 January 2019.

108. Ms Oriaro carried out a grievance investigation. Little was made of this by the claimant at this tribunal. Suffice it to say, Ms Oriaro conducted a thorough grievance investigation and spoke to the relevant people. On 19 February 2019, she issued her grievance outcome. The claimant's grievance was not upheld.

109. On 20 February 2019, the claimant appealed Ms Oriaro's finding. Ms McKenzie was appointed to investigate the claimant's grievance appeal. Again, little was made of this at this hearing. Suffice it to say that Ms McKenzie carried out a thorough investigation and interviewed the relevant people. The claimant was assisted by the Unite regional officer, Andrew Murray, at the grievance appeal.

110. On 3 May 2019, Ms McKenzie's grievance appeal outcome was issued. The claimant's grievance appeal was not upheld.

Conclusions on the issues

111. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Unfair dismissal

Reason for dismissal

112. The first question which we have to ask is whether the respondent had a potentially fair reason for dismissing the claimant, specifically redundancy or, in the alternative, some other substantial reason. The circumstances of the claimant's dismissal fall squarely within the definition of redundancy in section 139 ERA. All 31 jobs (the former EFS employees in the UK) were transferring to India or Germany. The definition of redundancy encompasses not only where a job ceases to exist but also where it transfers to a different location. As all these jobs were transferring to a different location, they were all redundant. There was a redundancy situation.

113. It has not been suggested that there was any ulterior motive for dismissing the claimant nor is there any evidence of any other reason for dismissal apart from redundancy. We are, therefore, entirely satisfied that the reason why the respondent dismissed the claimant was redundancy.

Consultation

114. We turn, therefore, to the reasonableness of the decision to dismiss and, first of all, the issue of consultation. As we have noted in our findings of fact, there was extensive collective consultation in relation to the 31 potential

dismissals, which was followed by extensive individual consultation with the claimant. The claimant did not challenge the reasonableness of this at any stage, including before this tribunal. We have seen all the documentation and heard the evidence of the respondent's witnesses. The consultation responded to any issues raised and dealt with concerns that were raised, whether by employee representatives in the collective consultation or by the claimant herself in individual consultation. Furthermore, the respondent made sure that the claimant got all of the material even though she was herself off sick. Ms Parker in particular went to considerable lengths to keep the claimant informed, sending her relevant material and telephoning her. She only held back from contacting the claimant when the claimant, through her letter from the Priory Hospital, specifically asked her to do so for a period of four weeks. We have no criticisms, therefore, of the respondent's consultation processes.

Alternative employment

115. We turn to the issue of whether the respondent made reasonable efforts to ensure that the claimant was able to obtain any suitable alternative employment that was available. As set out in our findings of fact, the respondent made considerable efforts, primarily through Ms Parker, to identify suitable alternative employment for the claimant. The claimant was not prejudiced by not having access to the respondent's computer system as she was off sick, because Ms Parker did the work for her. She sought to ascertain from the claimant what vacancies she was interested in and enquired accordingly. However, there was no suitable alternative employment. It is worth remembering that the respondent's duties in this respect in terms of reasonableness are limited to carrying out reasonable and appropriate searches for alternative employment; it is not required to create new jobs or roles.

116. The claimant seemed to think, in her evidence and submissions before the tribunal, that somehow the respondent ought to hold an alternative job open for her indefinitely until whatever time she was able to come back to it following her sickness absence. First, however, no alternative job was identified anyway, so this point falls away. Secondly, it would be wholly unreasonable to expect a respondent to hold an alternative job open indefinitely, even if one were identified, until such time as long-term sick employee might be fit again.

117. At no stage during the course of her employment did the claimant say that she was interested in a job in Germany. She only made this suggestion after her employment ended. However, there was nothing in the CV which she submitted to Ms Parker that suggested that she might be interested in or suitable for such a job. As we have noted, her CV did not indicate that she spoke German (which she does not) or that she had any prior experience of working in Germany. The issue never came up at any stage of collective consultation either and it was never, in fact, suggested by any of the other employees or the employee representatives that any employee might be interested in transferring to Germany. Furthermore, in the light of the limited information which the claimant gave to the respondent in the context of trying to find vacancies for her, there was nothing to indicate that she might be prepared to work abroad. It was not, therefore, unreasonable in the circumstances for the respondent not to look for

jobs for her in Germany (or indeed any other country in the world in which the respondent operates).

118. Overall, therefore, not only was the respondent's approach to alternative employment not unreasonable, but it went above and beyond in terms of its search for suitable alternative employment and made more than reasonable efforts in this respect, principally through the effort and commitment of Ms Parker.

Selection criteria

119. We turn to the issue of selection. The fact of the matter in this case is that there was no selection exercise because the jobs of all 31 of the former EFS employees in the UK were being moved from the UK to India/Germany. There was therefore no decision to make as to who should be made redundant; all of the UK employees were at risk of redundancy.

120. In this context, we address a particular point which the claimant raised in her cross-examination and submissions in relation to the consultation materials which the respondent provided. To be clear, in case there is any misunderstanding on the claimant's part, the section in those consultation materials which says that disability should not be taken into account in selection for redundancy (and nor should, for example, pregnancy, gender or a whole load of other things) applies only where there is a selection exercise. However, there was no selection exercise here. What that section does not say is that those who are disabled should not be made redundant at all. There is no legal requirement for that either. Furthermore, it would be completely unreasonable to expect employers not to make certain employees redundant, whose jobs are genuinely redundant, just because they are disabled (or pregnant, or of one particular gender etc) and, by extension, to employ them indefinitely even if there was no work for them to do.

121. As there were no selection criteria, the issue at issue 2.4 of the list of issues falls away and no longer applies.

122. We do not therefore, find that there was any procedural unfairness about the claimant's dismissal and we find that it was carried out reasonably. The claimant's complaint of unfair dismissal therefore fails.

Procedural unfairness

123. Issue 2.6 is about whether or not any unfairness in the procedure adopted by the respondent was "corrected" by appeal. As noted, we have found no procedural unfairness. This issue therefore falls away.

Long-term sick/disability procedure

124. At this point, however, we want to address what appears to be a submission of importance to the claimant (albeit it is not something contained within the list of issues), namely her allegation that "the respondent from January

2018 to January 2019 had no long-term sick/disability internal procedure under the Equality Act 2010 set in place with other departments which made things stressful for the claimant and others".

125. First, we weren't taken in any detail to any of the respondent's policies on long-term sickness/disability in the respondent's witness statements; that is not surprising as this was not an issue until the claimant raised it in her oral evidence and submissions. The claimant did not put any of this to the respondent's witnesses. So, through no fault of the respondent, we don't really know what its policies in this respect were. However, we also reiterate the points on this issue made in her submissions by Ms Azib.

126. First, at the time that she became an employee of the respondent on 1 February 2018, the claimant was not on long-term sick as she had been absent at that stage for only four months (under the respondent's policy, employees become deemed "long-term sick" after six months' sickness absence).

127. Secondly, once she did transfer to the respondent under TUPE, she became an employee of the respondent so all of the respondent's existing policies for employees applied to her equally, just as they apply to non-transferred employees.

128. Thirdly, and more significantly, the absence or otherwise of a policy makes no material difference to the conclusions in relation to the fairness of the claimant's dismissal which we have reached. The claimant was treated fairly; she was referred to occupational health where appropriate; a number of reasonable adjustments were made by the respondent in relation to the claimant during the process; and she had as much support as the respondent could reasonably give. (In summary, the reasonable adjustments made for the claimant included: regular phone calls during the redundancy process and sending documents via email and post to keep the claimant updated; extending the deadline for submitting an EOI in relation to the voluntary redundancy package to 15 June 2018 and subsequently reiterating the offer with a 30 November 2018 deadline; ensuring that the claimant was not contacted for four weeks in accordance with advice from the Priory Hospital; allowing the claimant to work her notice period rather than be paid in lieu of notice, to allow her to continue accessing medical benefits for a longer period and to be paid at full rate during her notice period; allowing a longer individual consultation period in relation to the claimant's redundancy; the extensive efforts on alternative employment carried out by Ms Parker; contacting Right Management; and extending the claimant's termination date to 1 January 2019, despite the fact that the duties of the claimant's job had already moved offshore much earlier in the summer of 2018.)

129. Fourthly, the claimant has not said what such an alternative policy would have stated or what it would have contained which is not already accounted for in the respondent's existing processes or, indeed, how it would have made any difference to the outcome of the redundancy process or, indeed, the decision in relation to the Disability Plan.

130. For all of these reasons, this point makes no difference to our conclusions in relation to the fairness of the claimant's dismissal; whether there was such a policy in place or not makes no difference to the fact that the dismissal was fair, for the reasons we've already set out.

Automatically unfair dismissal (TUPE)

131. The TUPE transfer from EFS to the respondent on 1 February 2018 was not the sole or principal reason for the claimant's dismissal (nor, indeed, was it any part of the reason for the claimant's dismissal). Rather, it was the respondent's decision to transfer the jobs of the EFS employees to India/Germany (in other words redundancy) which was the sole reason for dismissal. To be fair, the claimant did not challenge this during this hearing and at no stage submitted that the TUPE transfer was part of the reason for her dismissal. This complaint therefore fails.

132. For completeness' sake, even if the TUPE transfer had been the reason for dismissal, the respondent would have established that it had an economic, technical or organisational reason entailing changes in the workforce (such that the dismissal was not unfair). The moving of these roles to India/Germany was done on economic and organisational grounds. Furthermore, that decision clearly entailed changes in the workforce, with the roles moving to India/Germany. This complaint would therefore have failed for this reason too.

Disability

Claimant's disability

133. As noted, at the start of the hearing the respondent conceded that the claimant was at all material times a disabled person for the purposes of the Equality Act 2010 by reason of her back pain and fibromyalgia. In other words, it was accepted that she was disabled from September 2017 onwards. This therefore ceased to be an issue for us to determine.

134. However, we could see, not only from her witness statement but also from the emphasis which she placed on it during the hearing, that this was an issue of some importance to the claimant. We therefore reiterate here for the claimant's benefit, as we did when we gave our decision orally, that establishing that one is a disabled person is merely the first hurdle that a claimant has to overcome on the way to bringing successful disability discrimination complaints; it does not found a complaint in itself. In other words, one has to be disabled for the purposes of the Equality Act 2010 in order to bring disability discrimination complaints; however, just because the claimant was disabled is not enough in itself to win her disability discrimination complaints.

Knowledge of claimant's disability

135. The respondent's knowledge of the claimant's disability is a separate question. This is another issue which was obviously of great importance to the claimant during the hearing.

136. However, it is worth saying that in fact, in terms of the claimant's actual disability discrimination complaints, the issue of knowledge doesn't actually matter very much. This is because the things that the claimant has said amounted to disability discrimination (in summary the decision to dismiss her and the decision to turn her down for the Disability Plan) all took place after the point at which the respondent accepted that it had knowledge of the claimant's disability (in other words after September 2018). Therefore, whether the respondent had knowledge of the claimant's disabilities before that time doesn't make any difference in terms the complaints we have to determine.

137. Having said that, we do not accept that the respondent only had knowledge of the claimant's disabilities from September 2018 after the production of the Medigold occupational health report which it received on 17 September 2018. We consider that the respondent could reasonably be expected to know of the claimant's disabilities from the earlier Optima occupational health report on 21 May 2018.

138. In this respect we note the following:

1. Only one fit note prior to the TUPE transfer to the respondent's employment referred to fibromyalgia. Furthermore, the May 2018 Optima report did not refer to fibromyalgia (although it did refer extensively to the claimant's back pain and its effects on her).

2. Until the Medigold report in September 2018, the respondent had only the sick notes (which were undetailed) and the Optima report to go on. Other medical documents provided later by the claimant (and which were provided to us at this hearing) were produced only during the subsequent grievance process and were not in the respondent's possession prior to that.

3. The respondent can't have had knowledge of any disabilities of the claimant when it wasn't even the claimant's employer (in other words in the period from September 2017 to February 2018).

4. Even after that, notwithstanding that the length of the claimant's absence was becoming much more substantial, one cannot expect an employer to be fixed with knowledge of a condition that has a long-term substantial effect on the employee's ability to carry out normal day-to-day activities and to know that it is likely to last for more than 12 months, based only on a few undetailed fit notes.

5. However, whilst it does not mention fibromyalgia, the May 2018 occupational health report does go into detail about the claimant's back condition and its impact on the claimant's normal day-to-day activities. Furthermore, it concludes in terms that the doctor thinks that the "claimant's medical condition would be covered by the Act as it has a significant impact on her normal day-to-day activities and has lasted more than one year". Even if the doctor was wrong about it having lasted one

year (if indeed it started only in September 2017), it was at least eight months old by then and the fact that the doctor recommends reviews in three months' time is indicative that the doctor must clearly envisage that it is likely to last for a period of 12 months from September 2017.

6. We therefore accept that by 21 May 2018, the respondent could reasonably be expected to know that the claimant was disabled for the purposes of the Equality Act 2010.

139. However, as we have already made clear, and whilst we acknowledge that this was an important issue for the claimant during these proceedings, nothing turns on it for the purposes of her tribunal complaints.

Discrimination arising from disability

140. As we summarised for the benefit of the claimant in oral submissions, we essentially have to decide three things in the case of the discrimination arising from disability complaints: whether what the respondent did was unfavourable treatment; whether the treatment was in consequence of the claimant's disability; and whether the respondent was nonetheless justified in doing it.

Termination of employment/alternative employment

141. The first allegation was that the respondent terminated the claimant's employment due to redundancy without allowing her the opportunity to find alternative employment. However, as set out above, the respondent did give the claimant copious opportunities to find suitable alternative employment. It is simply the case that there was no such suitable alternative employment. Again, we reiterate that it is not reasonable to expect a respondent to hold jobs open indefinitely on the basis that an individual might at some point in the future get better such that they can work again. The alleged unfavourable treatment is not, therefore, even made out in this case; it did not happen. This complaint therefore fails for this reason. It is not, therefore, necessary to address the other questions in relation to this complaint.

Disability Plan

142. We take the other two allegations of unfavourable treatment together as they are so similar, namely: refusing to accept that the claimant was permanently disabled as defined in the respondent's Disability Plan; and determining that the claimant was not eligible for the respondent's Disability Plan.

143. The claimant accepted in her evidence and in her submissions that Ms Blood, in deciding that the claimant was not eligible under the Disability Plan, made the right decision in accordance with the terms of the Disability Plan. The requirements of the plan are strict and simply being disabled for the purposes of the Equality Act 2010 is not enough to qualify under them. Ms Blood was indeed correct in her assessment that the claimant did not qualify. The allegations of unfavourable treatment for the purposes of these complaints are expressed in terms of the respondent refusing to accept that the claimant was eligible for the

plan; in other words, they are not allegations that having those plan rules as they are amounts to unfavourable treatment; rather they are about how they were applied (by Ms Blood). As such, we accept, as Ms Azib has submitted, that simply correctly applying the rules of the plan can't be unfavourable treatment. Therefore, as the unfavourable treatment is not established, these complaints fail.

144. However, even if we were wrong about that and the decision was nonetheless unfavourable, we would then need to go on to ask whether the decision not to find that the claimant was eligible for the Disability Plan was something that arose in consequence of her disabilities. The answer to that question is no. In a way, the decision was made because, in layman's terms, at the time that it was made, the claimant wasn't disabled enough to qualify for the plan. It wasn't because of anything arising from her disabilities as they were at the time. These complaints therefore fell for this reason too.

145. In any event, we consider that the respondent was entirely justified in having the rules of the Disability Plan as they are (and applying them accordingly); in other words, they are a proportionate means of achieving a legitimate aim.

146. The legitimate aim of the Disability Plan criteria is the management of eligibility, to ensure that it would financially benefit a certain category of employee, namely those who were unable to undertake any form of employment due to being totally and permanently disabled, and who would not qualify for ill-health retirement.

147. In terms of proportionality, the plan sits outside any pension or statutory requirements; it is an additional benefit administered and paid for entirely by the respondent. The financial provisions of it are very generous, providing 75% of an employee's basic salary for five years and 50% of their salary thereafter. As it is financed directly by the respondent, it was entirely reasonable for the respondent to set strict medical criteria for eligibility, which would ensure fairness of assessment and that those employees for whom it was designed would qualify for its benefits. The criteria were developed by the respondent in consultation with an occupational health consultant physician. Furthermore, the assessment of eligibility is conducted by Ms Blood alone, who has worked for the respondent for 18 years, has worked in occupational health services since 1991, is a trained occupational health nurse and qualified in 1993 as a registered nurse and specialist practitioner in occupational health nursing; she was therefore highly experienced and qualified, particularly in the field of occupational health, and could make informed medical decisions about eligibility.

148. For these reasons, we consider that the rules of the Disability Plan were a proportionate means of achieving a legitimate aim. These complaints therefore fail for these reasons too.

Indirect discrimination

149. The respondent accepts that the application of the rules of the Disability Plan are a PCP. We turn, therefore, to the questions at issues 7.1-7.3.

150. As noted in our summary of the law, the issue of whether the PCP put or would put people with the claimant's disabilities at a particular disadvantage when compared with people who do not have those disabilities is a comparative exercise. The rules of the Disability Plan meant that the claimant did not qualify for it in September 2018. However, those rules also mean that someone without the claimant's disabilities would not qualify either. The rules do not therefore put the claimant at a disadvantage compared to those who do not have her disabilities; as neither would qualify. Again, in layman's terms, this is all about whether the Disability Plan works more harshly on the claimant than on those who don't have her disabilities; and in this respect, there is no difference, as neither qualify. The claimant's indirect discrimination complaint therefore fails.

151. As to issue 7.2, the rules did not put the claimant at the disadvantage alleged in comparison with people without her disabilities. The indirect discrimination complaint fails for this reason too.

152. Finally, in any case, we consider that the respondent has established the justification defence in relation to the rules of its Disability Plan, it being a proportionate means of achieving a legitimate aim. We reiterate here the conclusions on the issue of justification set out in the section on discrimination arising from disability above and do not repeat them here.

153. In summary, therefore, all of the claimant's complaints in her claim form are unsuccessful.

Jurisdiction/time limits

154. All of the claimant's complaints relating to the Disability Plan (both discrimination arising from disability and indirect disability discrimination) were presented out of time. This is because the decision in relation to the Disability Plan was sent to the claimant on 11 October 2018; she therefore had three months from that date to contact ACAS, in other words no later than 10 January 2019. However, she did so on 26 March 2019. Those complaints are therefore out of time. (For the avoidance of doubt, the unfair dismissal complaint and the discrimination arising from disability complaint in relation to the termination of her employment were presented in time.)

155. Furthermore, we should say that, as none of the other disability discrimination complaints have succeeded, the claimant cannot claim that the earlier complaints formed part of conduct extending over a period with any successful in time complaints such that the earlier complaints are deemed to be in time.

156. We would not, therefore, have jurisdiction to hear the out of time complaints (in other words we are not legally allowed to hear them) unless we

decide that it is just and equitable to extend that time limit. It is for the claimant to prove that it is just and equitable for us to extend the time limit.

157. The reason which the claimant gave for not putting in these complaints any earlier is that she wanted to resolve the matter internally. However, we do not consider that that reason is enough to warrant us extending the time limit on the basis that it is just and equitable to do so. In connection with this, we note the following:

1. The claimant was aware of the Equality Act 2010, which she referred to in an email to Ms Parker dated 4 May 2018. She ought therefore to have been able to ascertain the limitation periods within it as early as May 2018.

2. The claimant was able to search the Internet for information about the Equality Act 2010 and was therefore capable of searching for information on how to bring a claim and the applicable time limit.

3. The claimant had physical/mental capacity to bring such claims within time. The trial bundles we have seen contain numerous emails from the claimant, demonstrating her ability to articulate a position and communicate the same in writing. She was able to issue a grievance and grievance appeal, set out grounds, and adduce medical evidence in support (all around the time when she should have been putting her claim form in if these complaints were to be in time). Accordingly, she was able to issue an employment tribunal claim and to issue it on time.

4. The claimant was a member of the Unite trade union, and was assisted by the Unite regional officer, Andrew Murray, at the grievance appeal from 28 February 2019. She therefore had access to trade union assistance.

5. The claimant had the benefit of legal assistance in drafting her particulars of claim and has been assisted by solicitors during 2020. She could have accessed such assistance sooner for bringing an employment tribunal claim. She had access to DAS Law through her household insurance and was in contact with the Free Representation Unit and the Disability Law Service.

6. As far as the Disability Plan decision is concerned, it was clear that the matter was considered closed in October 2018 under the terms of the letter communicating the decision, so there was no real scope for sorting it out internally.

7. In terms of the merits of those out of time complaints, they were considerably weakened as the claimant admitted that Ms Blood applied the rules correctly in confirming that she was not eligible for the Disability Plan, so it is not as if the claimant would be being barred from bringing potentially strong employment tribunal complaints.

8. There is limited prejudice to the claimant in refusing an extension of time, as she was within the time limit for her unfair dismissal claim and claiming any damages arising out of the same.

158. For all these reasons, we do not consider that it would be just and equitable to extend time in relation to these complaints and they are struck out.

159. Had we not struck them out, however, they would of course have failed in any case for the reasons which we have already given above.

Concluding remarks

160. As the claimant has not been successful in any of her complaints, the provisional remedies hearing which was listed for 25 November 2020 is therefore vacated.

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Employment Judge Baty

Dated: 13 October 2020

Judgment and Reasons sent to the parties on:

13/10/2020.

For the Tribunal Office