EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms P Mwangi	**v**	**Quinn London Ltd**

Heard at: Reading **On**: 23 & 24 May 2022
In Chambers: 12 July 2022

Before: Employment Judge Milner-Moore
Ms C Baggs
Ms B Osborne

Appearances

For the Claimant: In person
For the Respondent: Mr C McDevitt (Counsel)

RESERVED JUDGMENT

1. The claimant was disabled within the meaning of the Equality Act 2010 by rheumatoid arthritis and partial hearing loss.

2. The claims that the claimant was subject to direct discrimination on grounds of race, sex or disability by:

   2.1. being allocated an excessive workload is not upheld;
   2.2. being reprimanded for arriving late;
   2.3. being placed under unreasonable pressure to meet deadlines;
   2.4. being subject to bullying on grounds of race, disability or sex;
   2.5. being given a written warning is not upheld;
   2.6. being placed on furlough without warning or consultation is not upheld;
   2.7. being given notice of redundancy without significant prior warning or consultation; and
   2.8. the rejection of her appeal against dismissal

   are not upheld and are dismissed.

3. The Employment Tribunal had no jurisdiction to hear the complaint of failure to make reasonable adjustments because such complaint was filed outside

the statutory time limit and it was not considered just and equitable to extend that time limit.

REASONS

This case was listed for a four-day hearing to consider the following claims and issues.

1. **Time limits**

1.1 Were all of the claimant's complaints presented within the time limits set out in s.123(1)(a) and (b) of the Equality Act 2010 and sub-section was there an act or conduct extending over a period or a series of similar acts or failures?

1.2 Should time be extended on a just and equitable basis?

2 **Disability**

2.1 Was the claimant a disabled person in accordance with the Equality Act 2010 at all relevant times because of the following conditions?

2.1.1 Partial hearing loss and/or rheumatoid arthritis.

3 **Direct discrimination because of sex, race disability (Equality Act s.13)**

3.1 Did the respondent subject the claimant to the following treatment?

3.1.1 On a number of occasions the claimant was allocated excessive workloads which required her to work long hours;

3.1.2 On a number of occasions and most recently in late February/early March 2020 the claimant was reprimanded by Gerry O'Connor for arriving late;

3.1.3 On a number of occasions the claimant was placed under unreasonable pressure to meet deadlines;

3.1.4 The claimant was subjected to bullying by "Scott" in that:

3.1.4.1 On 4 July 2019 he accused the claimant of refusing to complete a letter of intent when she had said that she would do it the next day;

3.1.4.2 On 15 July 2019 he refused the claimant's request to move a shelf and said that if she didn't like it she could leave and when the claimant replied that if he wished her to leave there were processes to be followed he replied that he was working on it;

3.1.4.3 On 11 November 2019 he said that the claimant had been unprofessional in copying a third party into an email;

3.1.4.4 In November 2019 he told the claimant off for sending a pricing enquiry to a contractor;

3.1.4.5 On 29 January 2020 Scott sent an email stating that the claimant had refused to help him and had an unhelpful attitude;

3.1.4.6 In February 2020 Scott said that he did not like the way that the claimant spoke to him and that he would have her transferred to head office and she should not speak to him again;

3.1.4.7 On several occasions Scott told the claimant not to talk to him or spoke to her in a demeaning way.

3.1.5 In February 2020, the claimant was given a written warning by Bob Gunyon.

3.1.6 On 1 April 2020, Bob Gunyon placed the claimant on furlough without any prior warning or consultation.

3.1.7 On 1 July 2020 Bob Gunyon issued the claimant with notice of redundancy without significant prior warning or consultation.

3.1.8 On 6 August 2020 Mr Khan rejected the claimant's appeal against dismissal.

3.2 Was that treatment less favourable treatment, ie did the respondent treat the claimant as alleged less favourably than it treated or would have treated others in not materially different circumstances?

3.3 If so, was this because of the claimant's race, sex or disability or was it because of the protected characteristics of race, sex or disability more generally?

4 **Reasonable adjustments (Equality Act s.20 and s.21)**

4.1 Did the respondent know and could it be reasonably be expected to have known that the claimant was a disabled person as a result of either rheumatoid arthritis or hearing impairment?

4.2 Did the respondent have the following provisions, criterions or practices?

4.2.1 The claimant was required to work in a Portakabin which was a cold working environment?

4.3 Did any such PCP put the claimant at substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time in that:

4.2.1 the claimant suffered from joint pain as a result of her arthritis and the cold working environment made this pain worse.

4.4 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

4.5 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The claimant alleges that the following steps should have been taken.

4.4.1 moving the claimant to a warmer workplace, for example its head office or heating the Portakabin adequately.

4.6 If so, would it have been reasonable for the respondent to have taken such steps and if so by when should these steps have been taken?

The hearing

5 We received a bundle of documents of approximately 170 pages and heard evidence from the claimant and from three witnesses for the respondent: Mr Gunyon, the claimant's line manager, Mr O'Connor, one of the respondent's directors and the person who dealt with the claimant's bullying complaint and Mr Karim, the respondent's finance director and the individual who heard the claimant's appeal against dismissal.

6 The case was originally listed for a four day hearing to include issues of liability and remedy, however the Tribunal was not in a position to accommodate a four day hearing and so the case was listed to be heard in two days. In the time available we were able to hear the evidence in relation to liability but not to reach our decision or to deal with issues of remedy. The panel met on 12 July 2022 to reach its decision on liability, having listed a remedy hearing in October on a precautionary basis, the panel's reasons for reaching its decision are detailed below. In light of the panel's conclusions a remedy hearing will no longer be required and steps will be taken to vacate that hearing date.

The facts

7 The claimant's employment began on 1 April 2019. The claimant was employed by the respondent as a quantity surveyor. The claimant describes herself as black and of African background. She is deaf in her left

ear and has rheumatoid arthritis and considers herself to be disabled by these conditions.

8 The respondent is a construction company employing about 115 people. The respondent's workforce includes employees of various nationalities. It is however a predominantly male workforce and most of the workforce describe themselves as white. There are a few individuals within the workforce who have disabilities.

9 During her employment, the claimant worked exclusively on a contract which the respondent held with the Royal Holloway University of London (RHUL) and was the sole quantity surveyor supporting that project. Initially the RHUL team fell within the "Heritage" division in the respondent's organisation but, in or around June 2019, there was a restructure following which the team fell under the responsibility of the "Property Services" division. At that point, the claimant's line management changed and Mr Gunyon took over her line management.

10 The claimant worked in a portacabin on the RHUL site which she shared with two colleagues, Scott Frith (a project manager) and Bob Lucas (the site manager), although they were often away from the portacabin on site visits. The portacabin had heaters. However, during the winter months (October to March) there were times when the claimant found the portacabin to be a cold environment and it caused her discomfort. The respondent was aware that the claimant was concerned about the temperature and that she wanted a warm temperature to be maintained. The claimant's colleagues, by contrast, felt that the portakabin was warm indeed they sometimes found it too hot and on occasions left the door open.

11 We made the following findings in relation to the claimant's disabilities. The claimant has rheumatoid arthritis and was diagnosed with that condition in February 2016. The GP letter makes clear that the symptoms of her condition are "quite debilitating and affect her mobility and fine motor function". A GP Letter dated 24 June 2021 explains that her condition caused significant pain in her shoulders in the small joints of her hands and feet. The claimant takes medication of various types for her condition and initially her condition was not well controlled by that medication so that she was regularly experiencing pain and morning stiffness. These difficulties were exacerbated by cold temperatures.

12 In relation to hearing loss, a letter from the claimant's GP confirms that the claimant has "longstanding left side ear congenital sensory neural hearing loss with deteriorating right sided problem" and this was described in the GP letter of 24 June 2021 as a "chronic disability" that impacted on the claimant. The claimant has a total hearing loss in her left ear. As a result of that she finds it difficult to hear when she is in noisy environments. So, for example, having a phone call in a noisy environment was difficult. The claimant sometimes had to ask colleagues to repeat themselves.

13 Although the respondent had initially denied being aware of the claimant's medical conditions Mr Gunyon accepted in evidence that he was aware of

both conditions. He knew that the claimant had a hearing impairment of some sort although he did not know the extent of the impairment and he did not observe the claimant to struggle hearing things, nor did the claimant report any difficulties to him. He was also aware that the claimant had arthritis and knew that she had attended a number of doctor's appointments for her arthritis. He was also aware that the claimant was concerned that the portacabin should be kept warm. He did not, however, take any steps to ask the claimant about her impairments or what impact they had on her. He commented that although he was aware that the claimant had arthritis he had not understood the claimant to be "registered disabled" as a result of it.

14 One of the claimant's complaints was that she had been subject to an excessive workload during her employment with the respondent. Mr Gunyon disputes this and his evidence was that the claimant's workload was comparable to those of other colleagues or, if anything, was somewhat lighter as there were occasions when colleagues were drafted in to assist the claimant. The claimant put forward no specific evidence as to excessive workload and it does not appear that she routinely worked long hours. She referred to a couple of occasions where she needed to stay late, or later than her colleagues, to finish a particular piece of work but we do not consider that this amounted to evidence of a generally excessive workload. The claimant also tended to begin work later than her colleagues and so it was perhaps unsurprising that they might finish earlier as a consequence. Some of the claimant's colleagues began work quite early in the morning and so would have completed a couple of hours work before the claimant arrived to begin her day.

15 The claimant also complains of being placed under unreasonable pressure to complete work to deadlines. Again, we do not consider that there was evidence of the claimant being placed under unreasonable pressure to meet deadlines. The claimant did refer to some occasions where she had, for example, being asked to drop the work that she had been engaged on to complete other work. For example, she pointed to an occasion where she had been asked to stop work on a matter in order to measure some toilets where refurbishment work was to take place. The claimant considered that this had been done at Scott Frith's request and that it had been unfair to place her under pressure by diverting her from her existing work to complete this measurement task. Mr Gunyon's account, which we accepted, was that there was an impending deadline relating to this work whereas the other work that the claimant was engaged on was less time sensitive and that after hearing from Mr Frith and the claimant he decided that the measurement task should take priority. There was nothing to suggest that this was not a normal and reasonable exercise of management judgment.

16 In January 2020, it became clear that the claimant was struggling with the completion of Cost Value Reconciliations (CVRs). This was not an aspect of work that she had much experience of when working within Heritage Division as she had never been asked to complete them on her own. After the restructuring, when she came under Mr Gunyon's management, she was expected to work on CVRs. Mr Gunyon's evidence was that the

completion of CVRs was fairly standard work for a quantity surveyor and the claimant did not dispute that. He also gave evidence that he worked with the claimant to complete the CVRs for several months to show her how to do them and again the claimant does not dispute this.

17 In February 2020, the claimant was required to submit CVRs to Mr Gunyon on her own for the first time. Mr Gunyon considered that the work that the claimant had done was not of a satisfactory standard. The CVRs were due for submission on 14 February and on 15 February Mr Gunyon had not received all of the CVRs for review that were required; three were missing and of the ones that had been submitted there were a number of errors. As a result, on 21 February 2020, Mr Gunyon convened a performance management meeting with the claimant to review the work that she had done. He explained to the claimant the issues that had arisen in relation to the CVRs and why the documents were not adequate. The claimant maintained that she did not understand how to complete a CVR and that she wanted things to be explained. Mr Gunyon agreed that he would arrange for training and that there would be monthly meetings to review how CVRs should be completed. During that meeting the claimant also suggested that she was experiencing problems with her relationship with Scott Frith and she made a number of complaints about his attitude towards her and stated that she felt bullied by him. Mr Gunyon asked the claimant if she wanted the allegation of bullying to be recorded and the claimant agreed to this. As a result of the meeting, Mr Gunyon identified various action points: that he would meet with the claimant twice weekly, that he would arrange training on the completion of CVRs and that he would escalate the claimant's concerns about bullying to Mr O'Connor.

18 On 1 March 2020, the claimant submitted a document in which she alleged bullying by Mr Frith in a number of respects. The matters that she complained about are identified in the list of issues at 3.1.4. The claimant did not, however, assert in this document that Mr Frith had discriminated against her on grounds of her race or sex or disability. The claimant stated that what she wanted was for the issues to be resolved and to be able to work in harmony and that she considered that part of the difficulty was:

> "Its not clear what our roles and responsibilities are when it comes to tendering and this is the bone of contention. A monthly progress meeting would help."

19 Shortly after the claimant submitted her bullying complaint in relation to Scott Frith the respondent moved her to work from its head office, the respondent having formed the view that it would be difficult for the claimant and Mr Frith to work together in close proximity in a portacabin whilst that investigation was ongoing. The claimant raises no complaint about the decision to move her to head office. Any failure to make reasonable adjustments in relation to the claimant's working conditions in the portacabin therefore came to an end in early March 2020 when the move to head office took place.

20 The claimant also states that she was reprimanded for arriving late. Mr Gunyon messaged the claimant to ask where she was on one occasion

when she appeared to be late. The claimant explained that she had a medical appointment and no further action was taken. Mr O'Connor accepted that, after the claimant moved to work at head office, he had mentioned to the claimant informally that she was arriving later than her colleagues. It was not, however, a reprimand.

21 The claimant's bullying complaint was referred to Mr O'Connor who investigated it and interviewed the claimant and Mr Frith and also a third employee, Bob Lucas, who worked in the portacabin together with the claimant and Mr Frith.

22 Following his investigations Mr O'Connor concluded that there had obviously been a difficult working relationship between the two individuals and that there had been disagreements about how tasks should be managed and delivered. This had led to friction and a further contributing factors had been the lack of a clear tender process and the less than ideal physical set up with both staff working in the portacabin. He concluded:

> "My summary conclusion is that I can find no evidence of bullying in the workplace on behalf of Scott Frith. Whilst it's noted that both Peris and Scott have had uncomfortable discussions I cannot find evidence that these discussions can be classed as bullying in the workplace. As such I would confirm that no disciplinary action is recommended but this view will need to be sanctioned by Pat Mc Grath the construction director."

23 Mr O'Connor made three recommendations which were intended to improve the working relationship:

23.1 That Bob Gunyon should act as a mediator for a three-month period to assist the two with their working relationship;

23.2 That there should be a review of current processes to provide a clearer process to be followed in tendering and

23.3 That the office set up should be improved.

24 Mr O'Connor concluded his report on 15 May 2020 but it had needed to be authorised internally before the outcome could be communicated to the claimant. On 16 June 20202 Mr O'Connor telephoned the claimant to explain the conclusions that he had reached in relation to the grievance that she had filed against Mr Frith. She raised no objection to the grievance outcome.

25 In March 2020 the impact of the covid pandemic began to be felt and on 24 March 2020, RHUL emailed the respondent to indicate that it would be going into lockdown. The email instructed the respondent to make sites safe and store any materials and to cease all other non-urgent work.

26 The respondent's staff began to work from home and they held team meetings over video. The claimant attended such a meeting on 31 March 2020. The next day the respondent emailed the claimant to inform her that

she would be placed on furlough with effect from 1 April 2020 and would not be required to attend work until notified.

27 The claimant complains that the decision to place her and others on furlough was taken on 31 March but she was not informed of this at the team meeting. The respondent's evidence, which we accepted, was that the decision to place staff on furlough was taken late in the evening on 31 March 2020 and that the claimant was placed on furlough in the same way and at the same time as the other members of the respondent's staff who were furloughed.

28 During April, May and June 2020, the respondent remained in touch with its clients at RHUL in order to understand whether the existing programme of works was likely to be resumed in the near future. However, RHUL confirmed that there was no budget for the completion of the works that had originally been planned and that only critical emergency works would be taken forward. There were subsequent exchanges of email between the respondent and RHUL in the period August 2020 to March 2021 in which the respondent tried to establish whether there was any likelihood of the works resuming. However, the position remained unchanged. RHUL did not instruct the respondent to resume the programme of works that had been planned before the pandemic. The respondent no longer has a framework contract with RHUL to perform any construction work. The financial impact of RHUL's cessation of planned works has been considerable. Pre pandemic, the monthly value of works being undertaken ranged from, at its highest, £263,000 in September 2019 to, at its lowest, £77,000 in December 2019. By May 2020 the value of works being undertaken was £6,000.

29 On 22 June 2020, Mr Gunyon called the claimant. There is a dispute as to exactly what occurred during that call. Mr Gunyon stated that he gave the claimant a warning that she may be at risk of redundancy if the situation with RHUL continued. The claimant does not recall matters in that way and does not believe that she was told that she was at risk of redundancy. There is an email from Mr Gunyon which was sent shortly after the discussion which gives his account of the discussion. The email states: "*Spoke with Peris and updated: RUL confirmed that discussion and works could be subject to redundancy at a later date*" and then later "*Stated was uncertain when we could return Peris to work at present as there is insufficient for her*". The email records that he explained that what had happened to the claimant's colleagues in the Property Service Division who had worked on the RHUL contract. Bob Lucas had been transferred and Scott Frith was on part time furlough. Scott Frith's work was focussed on concluding the RHUL work on outstanding defects. The email records that the RHUL site was still locked down, most of RHUL's staff were on furlough, all current contracts remained on hold and there was no expectation that students and staff would return to RHUL before March 2021. We found that that Mr Gunyon did tell the claimant that that she might be made redundant at some future point but that he did not specifically warn the claimant that she was at any immediate risk of redundancy.

30 The was a further conversation between the claimant and Bob Gunyon a week later. Again, there is a conflict of evidence about exactly what happened. We found that the two spoke on either 29 or 30 June 2020 and that Mr Gunyon then informed the claimant that she was being made redundant and the claimant asked about the possibility of her remaining on furlough. On 1 July 2020, the claimant was sent a letter by Mr Gunyon confirming that she was to be made redundant.

31 The reason that the respondent gave for making the claimant redundant was that there had been a very considerable drop off in the work that RHUL required. All non-essential works had been placed on hold when the lockdown began in March. There was no need for a quantity surveyor to be engaged in order to complete the limited works that were still ongoing during the summer months. By June 2020, it was clear to the respondent that the situation was unlikely to change in the autumn and that there would be no need to employ a quantity surveyor at RHUL.

32 The respondent did not engage in any consultation nor did it follow any selection process before making the claimant redundant. The reason given by the respondent for this was that it understood that it could follow an "abbreviated process" where employees, as in the claimant's case, had less than two years' service. At around the same time the respondent also made another quantity surveyor (also with less than two years' service) redundant. This individual was also made redundant following a similarly "abbreviated process". The individual in question (TJ) was white, male and had no declared disability.

33 On 1 July 2020, the claimant submitted her appeal against the decision to dismiss her. Her grounds of appeal were that the underlying framework contract with RHUL had not been terminated and some work was still going on. The claimant suggested that she had been made redundant to be replaced by another surveyor, and that she had not had an adequate explanation of her reasons for being made redundant and she went on to state:

> "I feel you have discriminated against me why I say this I was hired by a different commercial manger perhaps current manager feel I do not fit in their current team ideals as they did not hire me and have not worked with me previously in their previous employment yet I have worked diligently and delivered as expected. I am the longest serving employee within the Surveying Team and Property Services Division. I am the only female in the team from BAME background and I have health challenges. Regardless I have performed to the best of my ability and my project is one of the best performing projects commercially if not the best. My margin returns speak for itself although this might not be apparent because CVRs are not honest. Accounts costs reports are more accurate in my view."

34 The claimant went on to complain at being placed on furlough without warning. She referred to the fact that she had previously made a bullying complaint and she finished by stating that she had just finished shielding when she received the call to inform her that she was being made redundant and that this has caused her a great deal of distress.

35 The claimant was invited to attend an appeal hearing on 28 July before Mr Karim and he reviewed the points for appeal raised by the claimant. It is relevant to note that the claimant did not explain in any detail during the appeal hearing why she considered that the decision to make her redundant was discriminatory on grounds of her sex, race or disability. The appeal hearing did however discuss the claimant's feeling that she did not "fit" within the team.

36 On 6 August 2020 Mr Karim wrote to the claimant dismissing her appeal against redundancy. He confirmed that the previously planned programme of work at Royal Holloway had ceased. Although some outstanding work was going to be completed, no new work would be made available. He also made the point that there had been several company-wide redundancies. He informed the claimant that the reason for her dismissal was not that she "did not fit in" and was not related to any previous issues with her performance, it was purely based on the diminished requirement for her work as a quantity surveyor at Royal Holloway. He explained that it had not been possible to give more notice of the furlough decision. He confirmed that the claimant's earlier bullying complaint played no part in the decision to make her redundant. It is right to say that the appeal decision does not explicitly address whether the claimant's protected characteristics had motivated her dismissal. However, the appeal decision does address the claimant's allegation that she did not fit within the team and that this was the reason for dismissal and rejects this.

37 After the claimant's dismissal, the framework contract with RHUL came to an end. The respondent has no ongoing work with RHUL and did not appoint a replacement for the claimant.

38 On 9 September 2020 the claimant commenced early conciliation which concluded on 24 September 2020. The claimant's ET1 was filed on 29 October 2020. The claimant explained that she did not see the need to bring a Tribunal complaint at an earlier stage. She only considered it necessary to challenge her treatment by the respondent when she lost her job, because her main concern was to remain employed. However, even after the claimant was made redundant on 1 July 2020, she did not take any immediate steps to bring a claim. The claimant accepted that although she was shielding in the months after the first lockdown, she had been able to research the legal position in relation to her right to bring a claim. When she had contacted ACAS she had been informed about the three month time limit.

The law

39 Section 6 of the Equality Act 2010 provides that

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

(2) A reference to a disabled person is a reference to a person who has a disability.

……

(6) Schedule 1 (disability: supplementary provision) has effect.

Substantial, in this context, means "more than minor or trivial" (section 212 Equality Act 2010). Schedule 1 to the Act supplements section 6 as follows:

2 Long-term effects

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—

(a) measures are being taken to treat or correct it, and

(b) but for that, it would be likely to have that effect.

40 Section 20 of the Equality Act 2010 provides

20 Duty to make adjustments

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

(2) The duty comprises the following three requirements.

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

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons

who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

41 Under section 20 of Paragraph 8 of the Equality Act 2010, the duty to make reasonable adjustments does not apply where the employer did not know, or should not reasonably have known, that a claimant was a disabled person and was likely to be placed at a substantial disadvantage by the provision criterion or practice, or physical feature or lack of an auxiliary aid.

42 The EHRC Code of Practice on Employment provides helpful guidance on the question of "constructive knowledge" and when it may be reasonable for an employer to make enquiries to establish whether an individual is disabled or is placed at a disadvantage. The Code states:

For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. 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.

43 Section 13 of the Equality Act 2010 provides

13 Direct discrimination

(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.

44 Section 136 of the Equality Act 2010 deals with the approach to be adopted by Tribunals in relation to the burden of proof

136 (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.

45 The approach to be adopted by a Tribunal to the application of the burden of proof is detailed in the judgment of the Court of Appeal in **Igen v Wong** [2005] IRLR 259 CA

"(1) Pursuant to section 63A of the SDA , it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an

adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as "such facts".

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

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

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

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA .

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

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

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

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

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

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the

tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

46 It is not sufficient to establish a prima facie case for a claimant simply to show less favourable or unfavourable treatment, there must be "something more" which could enable a Tribunal to find that the protected characteristic could be the cause of the treatment (**Madarassy v Nomura** [2007] IRLR 246 CA). That something more may be found in matters such as the making of discriminatory comments, in a breach of a code of practice, in evasiveness or failure to provide information that the respondent could reasonably be expected to provide etc.

47 Section 123 of the Equality Act 2010 deals with the application of time limits as follows:

123(1) Subject to section140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2)Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4)In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

48 An act, or acts, may be treated as "conduct extending over a period" where there is a discriminatory policy or rule or where there was a "continuing state of affairs" in which a claimant was subject to discrimination as opposed to a " succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed" **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 CA. A "relevant but not conclusive factor" in determining whether acts are connected will be whether the same individuals were involved in the acts in question **Aziz v FDA** [2010] EWCA Civ 304. Only acts which are found to be discriminatory can form part of a course of conduct extending over a

period **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548.

49 The discretion to extend time conferred by section 123(1)(b) of the Equality Act 2010 is a broad one but it is for the claimant who is seeking to have that discretion exercised in her favour to persuade the Tribunal that it is just and equitable in the circumstances. In considering whether it is just and equitable to extend the statutory time limit it is relevant to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the effect of delay on the cogency of the evidence; whether the respondent has cooperated in relation to any information requests, whether the claimant acted promptly once aware of the facts which gave rise to the claim; and the steps taken by the claimant to obtain appropriate advice once aware of the potential claim (**British Coal Corpn v Keble** [1997] IRLR 336).

Conclusions

Disability

50 We have concluded that the claimant was disabled within the meaning of s.6 of the Equality Act 2010 by both rheumatoid arthritis and partial hearing loss.

51 Dealing first with rheumatoid arthritis: it is clear that the claimant had the impairment of rheumatoid arthritis and that this was long-term condition having been diagnosed as present since February 2016. We considered that the impairment had a substantial, in the sense of more than minor or trivial, adverse effect on the claimant's ability to carry out normal day to day activities in that the claimant experienced difficulties or limitations in her mobility and fine motor skills and that she experienced joint pain and difficulty with her mobility in the mornings. Those effects were present even with medication and were likely to have been more substantial if one disregards the effect of her medication.

52 We also considered that the impairment of partial hearing loss would also have had a substantial effect on the Claimant'sday to day activities. The claimant experienced a total hearing loss in her left ear and she describes it as making it difficult for her to hear in noisy environments. She explained that if she is on the telephone in a noisy environment she finds it particularly difficult. She also mentioned having to ask colleagues to repeat themselves from time to time. It is also clear that the impairment is a long-term one as it is described as a congenital condition in the letter from her GP.

Direct discrimination

53 We have found that some of the matters complained of by the claimant as less favourable treatment did not in fact occur. We have found that the claimant was not subjected to excessive workloads or routinely required to

work long hours or placed under unreasonable pressure to meet deadlines. We have also found that the claimant was not reprimanded for arriving late.

54 In relation to the complaint of bullying by Scott Frith, we have found that the claimant's allegations of bullying (which were detailed in the list of issues) were investigated by the respondent and that the respondent concluded that there had been no bullying but that there were difficulties in the working relationship between the claimant and Scott Frith which were largely attributable to a lack of clarity around roles and responsibilities in the tender process. The claimant did not challenge the respondent's assessment at the time and we considered that the respondent's assessment of the position was a credible one. We did not therefore consider that the claimant had been subject to bullying by Scott Frith. Nor did we consider that the claimant had established a prima facie case from which we could conclude that any adverse treatment that took place had occurred on grounds of her race, sex or disability. The claimant has not established any facts which would support such a link. It was notable that the claimant did not suggest at the time that Scott Frith's behaviour was related to her race, sex or disability

55 It was not disputed that the claimant was given a written warning under the respondent's performance management process in relation to issues with her performance in relation to the completion of CVRs. However, we did not consider that the claimant had proved facts from which (in the absence of an adequate explanation) we could conclude that she was subjected to performance management because of her race, sex or disability. It was not disputed that completion of CVRs was an aspect of her role that the claimant had struggled with despite some on the job training. It was understandable that the respondent decided that it was necessary to give a warning for poor performance in the circumstances. There was no reason to think that a hypothetical comparator who had proved unable to complete CVRs but who lacked the claimant's protected characteristics would not have been treated in the same way.

56 It is also not disputed that the claimant was placed on furlough without warning on 1 April 2020. However, we have found that the claimant was not less favourably treated than anyone else in this respect. A number of other employees were placed on furlough on 1 April 2020 and they were treated in the same way as the Claimant.

57 The claimant was issued with notice of redundancy on 1 July 2020 without much prior warning and without consultation. We do not consider that the claimant has established facts from which, (absent an adequate explanation), we could conclude that she was treated in this way because of her race, sex or disability. There is an evidential comparator, a white, non-disabled, male quantity surveyor who was treated in the same way as the claimant in being made redundant following what the respondent has described as an "abbreviated process". Even if we are incorrect to consider that the facts established by the claimant were not sufficient to shift the burden of proof to the respondent, we concluded that the respondent had proved that the reason why the respondent followed an abbreviated process was in no sense whatsoever related to the claimant's sex, race or disability

but was due to the respondent's perception that employees who had been employed for less than two years could be dismissed without a lengthy process because they would not have the right to claim unfair dismissal.

58 Turning to the decision to make the claimant redundant, we do not consider that the claimant has established facts from which (in the absence of an adequate explanation) we could conclude that she was treated in this way because of her race, sex or disability, given the treatment of the evidential comparator. We further considered that, even had the burden of proof shifted to the respondent, the evidence put forward by the respondent established that the decision was, in no sense whatsoever, on grounds of race, sex, or disability. We concluded that the decision to make the claimant redundant was motivated by two factors. First, that there had been a very significant drop off in work as a result of the lockdown and RHUL's decision to complete only emergency works, with the result that the respondent formed the view that it did not need to employ a quantity surveyor on that project. Second, the respondent's perception that making persons with less than two years' service redundant was a straightforward step which could be undertaken through an "abbreviated process".

59 In relation to the claimant's complaint that her appeal was rejected on 6 August, we have found that Mr Karim did reject the claimant's appeal against dismissal. However, we did not consider that the Claimant has established facts from which, if such treatment was not explained, we could conclude that she was treated in this way because of her race, sex or disability. From the documents that we have seen it appears that the claimant raised a number of grounds of appeal all of which Mr Karim dealt with, reaching conclusions that appeared reasonable in the circumstances. There is nothing to indicate that the claimant's protected characteristics could be said to be a factor in his decision to reject the appeal.

Failure to make reasonable adjustments

60 We found that, although Mr Gunyon was aware that the claimant had a hearing impairment of some sort, he was not aware of the extent of that impairment and such that the respondent did not have actual knowledge that it amounted to a disability. Nor did we consider that the respondent should have known that the claimant was disabled as a result of her hearing impairment. The claimant did not report any difficulties to the respondent in relation to her hearing impairment. Nor did she give any appearance of experiencing difficulties with her hearing such that the respondent should have been on the alert that any hearing impairment might amount to a disability and prompted to investigate the matter further.

61 The position is different, in our view, when one comes to the question of whether the respondent knew, or should have known, that the claimant was disabled by rheumatoid arthritis and was placed at disadvantage by the temperature in the portacabin. Mr Gunyon knew that the claimant had arthritis. He knew that she was attending regular medical appointments in connection with her arthritis. He also knew that the claimant was concerned to ensure that the portacabin was kept warm. The claimant did not explain

to Mr Gunyon that she needed to be warm because she had arthritis nor did she state that she considered that her arthritis amounted to a disability. However, we consider that Mr Gunyon had enough information both to put him on the alert that the claimant's arthritis might be affecting her to a degree that it would amount to a disability and for it to have been reasonable for him to enquire about her condition and whether the temperature of her working environment was causing her a disadvantage as a result. If he had taken the reasonable step of asking the claimant about her arthritis and she would have explained the impacts of her condition to him, he would have understood that it was likely to be a disability and that she was particularly affected by colder temperatures as a result of her condition.

62 We also considered that the respondent did apply a provision, criterion or practice of requiring the claimant to work in a portacabin and that there were times when this was a cold working environment for the claimant. Although there were heaters in the cabin and it was not the respondent's intention that it should be a cold working environment, we have found that there were occasions when the working environment was cold for the claimant, who needed warmer temperatures than her colleagues to be comfortable, either because the door had been left open or because the heaters were not sufficient. We considered that the requirement to work in the portacabin, placed the claimant at substantial disadvantage because there were occasions when the claimant felt cold and this caused her pain or discomfort because the cold exacerbated her arthritic joint pain.

63 The claimant proposed that the respondent should have made reasonable adjustments either by moving her to a warmer workplace, for example, to the respondent's head office, or ensuring that the portacabin was heated adequately. The claimant began to experience a disadvantage as a result of the temperatures in around October 2019. We consider that once it became clear to the respondent that the claimant was concerned about the temperature in the portacabin, the respondent should spoken to the claimant to establish whether or not the working environment was suitable for her given her arthritis and to establish what temperature she needed her working environment to be at in order not to experience discomfort. Those discussions should have taken place in around October 2019 and the implementation of adjustments could have taken place shortly afterwards. It would have been a reasonable adjustment for the claimant to move to the respondent's head office or for the respondent to arrange for additional or different heaters and for the temperature in the portacabin to be monitored. Had the respondent done either of these things then it would have alleviated the disadvantage that the claimant was suffering.

64 The respondent therefore failed to make reasonable adjustments from October 2019 until early March 2020, when the claimant moved to head office because she had been redeployed there temporarily whilst her bullying complaint was being investigated. Subsequently, the claimant was working from her own home until being placed on furlough in 1 April 2020.

65 Early conciliation in this case began on 9 September 2020 and concluded on 24 September 2020 and the claim was presented on 29 October. As such, the claimant's complaint is out of time in relation to acts which occurred before 9 June 2020. The only complaint which we have upheld, the complaint of failure to make reasonable adjustments, is out of time because that failure came to an end in early March 2020. It is for the claimant to persuade us that it is just and equitable to extend the usual statutory time limit of three months. We were not persuaded that it would be just and equitable to extend time in this case.

66 We recognised that a failure to extend the time limit will cause prejudice to the claimant. However, we had very little evidence before us to explain the claimant's failure to bring her complaint within the statutory time limits. The claimant says that she did not see the need to bring a complaint until she lost her job because that was the main focus of concern for her. However, even after the claimant was made redundant on 1 July 2020, she did not take any immediate steps to bring a claim. The claimant accepted that although she was shielding from March to July 2020, she had been able to research the legal position in relation to her ability to bring a claim. However, she did not contact ACAS until 9 September 2020. After the conciliation process was concluded, although she was by this time aware of the time limits for bringing a claim, she delayed filing her claim by a further month.

67 We noted that this was not a case where the respondent could point to any particular prejudice as a result of delay but we do not consider that a lack of prejudice on the part of the respondent was sufficient in itself to warrant exercising the discretion to extend time in the claimant's favour. On that basis, we have concluded that we have no jurisdiction to hear the complaint of failure to make reasonable adjustments because that complaint was filed approximately three months outside the relevant time limit and we are not satisfied that it would be just and equitable to extend time in all the circumstances.

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Employment Judge Milner-Moore

Date: …4 October 2022…

Sent to the parties on: 4 October 2022

For the Tribunal Office