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EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Looker**

Respondent: **Mind in the City, Hackney & Waltham Forest Ltd**

Heard at: **East London Hearing Centre** **On: 23 – 26 May 2017**

Before: **Employment Judge Brown**

Members: **Mr N J Turner OBE**
Mrs S Amatuzzi

Representation

Claimant: In Person

Respondent: Mr T Sheppherd (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:-

1. The Respondent dismissed the Claimant fairly for redundancy.

2. The Respondent did not subject the Claimant to direct disability discrimination or discrimination arising from disability.

3. The Respondent did not victimise the Claimant.

REASONS

1. The Claimant brings complaints of ordinary and automatic unfair dismissal for trade union activities *s146 Trade Union and Labour Relations (Consolidation) Act 1992* ("TULR(C)A 1992"), direct disability discrimination, discrimination arising from disability and victimisation against the Respondent, her former employer. The Claimant relies on

her disability of depression and anxiety in bringing her disability discrimination complaints. The Respondent admits that the Claimant was a disabled person at all relevant times for the purposes of this claim.

2. The parties had agreed the following issues at a Preliminary Hearing in front of Employment Judge Ferris on 3 March 2017.

The issues

Unfair dismissal

2.1. Was the Claimant dismissed for a potentially fair reason?

2.1.1. The Respondent submits that the Claimant was dismissed for the potentially fair reason of redundancy in accordance with Section 98(2)(c) of the Employment Rights Act ("ERA 1996").

2.1.2. The Claimant submits that she was dismissed for an automatically unfair reason, namely trade union activities contrary to Section 146 of the TULR(C)A 1992.

2.1.3. Was the dismissal fair or unfair pursuant to Section 98(4) ERA 1996?

Disability discrimination

2.2. The Respondent accepts that the Claimant was disabled at all relevant times by depression and anxiety.

Direct disability discrimination

2.3. What treatment does the Claimant allege amounted to less favourable treatment? The Claimant submits that she was not slotted into an alternative job role because of her disability and was therefore made redundant.

2.4. Who were the appropriate comparators? The Claimant submits that the appropriate comparators are Michelle Okpocha (aged 48) and Reshma Karia (aged 32). The Respondent submits that these are not appropriate comparators as their circumstances are materially different and therefore that the appropriate comparator is a hypothetical comparator.

2.5. Did the Respondent treat the Claimant less favourably than the comparator because of a disability pursuant to Section 13 Equality Act 2010 ("EA 2010")?

Discrimination arising from disability

2.6. What treatment does the Claimant rely upon as being unfavourable? The Claimant relies upon the failure by the Respondent to slot her into an alternative role and her dismissal.

2.7. Was that unfavourable treatment a consequence of something arising because of the Claimant's disability?

2.8. Was that treatment a proportionate means of achieving a legitimate aim?

Victimisation

2.9. What protected act or acts does the Claimant rely on?

2.9.1. In May/June 2015 the Claimant spoke to her line manager Anne Thomas about age discrimination impacting on her colleagues Okpocha and Karia.

2.9.2. On 13 July 2015 at a consultation event to discuss changes to the Respondent's sickness allowance the Claimant complained at the meeting about drastic measures which she contended were disability discrimination and address those complaints to the Respondent's CEO Krishna Maharaj.

2.9.3. 1 December 2015 at a staff meeting chaired by the CEO Krishna Maharaj the Claimant read out passages from her staff survey questionnaire answers about disability and age discrimination which were critical of the Respondent's employment practices and policy.

2.9.4. Emailing Anne Thomas on 28 January 2016 her line manager and Dionne Emmanuel head of HR about the potentially discriminatory wording of the workshop attendance criteria.

2.9.5. On the day of the staff conference on 17 February complaining during discussions about the discriminatory nature of the workshop attendance criteria.

2.10. What detriment does the Claimant claim she was subjected to?

2.10.1. The Claimant was selected for redundancy and dismissed on 31 March 2016.

2.10.2. On 26 February 2016 the Claimant's mother passed away and later that day the Claimant against her expressed wishes at the time was forced to go through a leaving ceremony involving Krishna Maharaj as Chief Executive.

2.11. Was the Claimant subjected to these detriments because of a protected act?

Limitation

2.12. Are any of the Claimant's complaints out of time?

2.13. If yes, do any of the alleged acts qualify as conduct extending over a period for the purposes of Section 123(3)(a) EA 2010, the last of which is in time?

3. The Claimant had withdrawn her age discrimination complaints.

4. The Tribunal heard evidence from the Claimant. It heard evidence from Anne Thomas (Employment Development Manager), Krishna Maharaj (the Respondent's Chief Executive Officer) and Hilary Potter (Chair the Respondent's Board of Trustees). There was a joint bundle of documents and a Claimant's supplementary bundle. Both parties had prepared chronologies. There was a cast list. Both parties made submissions and the Tribunal reserved its decision and set a provisional Remedy Hearing date for 15 September 2017.

Findings of Fact

5. The Claimant was employed by the Respondent as a Job Retention Advisor from 17 May 2010. She worked part-time, 17.5 hours per week. The Respondent is a registered charity which aims to provide services to, and empower, people who have experienced mental ill health. The Respondent is funded through a combination of grants, tenders for contract work and limited donations. Grants are awards of money, whereas tenders are for commissioned services which, if successful, become paid contracts for services.

6. The job retention service provided by the Claimant was popular and well utilised by clients. The Claimant was considered by the Respondent's other employees to be a highly skilled and productive employee.

7. Anne Thomas was the Claimant's line manager from 4 March 2013. Ms Thomas' role was Employment Development Manager. She managed a team of five advisors, including the Claimant. Ms Thomas' role was to run and develop the service, including obtaining funding. When Ms Thomas joined the Respondent, Employment Services were funded by three rolling contracts, which formed part of a larger block contract which the Respondent held with the London Borough of Hackney. Contracts were for a "Moving on" project, an employment support service and a job retention service. The larger block contract was ended by LB Council, which, instead, commissioned an Independent Mental Health Network. The Respondent tendered for, and won, the Independent Mental Health network contract. The new Independent Mental Health Network contract did not fund the Claimant's role. London Borough of Hackney funding for the Claimant's role therefore ceased on 5 January 2015 (page 533-534).

8. By then, Anne Thomas had already obtained funding from a grant-giving organisation called Trust for London ("TFL"), which would fund the Claimant's role for another year, until January 2016. The grant was for the Respondent to pilot and test a new job retention model, in conjunction with City University.

9. Anne Thomas also applied for further sources of funding for the Claimant's role. She made an application to the Lankelly Chase Foundation Grants Programme (page 544). The Lankelly Chase application was for funding to expand the Respondent's existing job retention service, to introduce a specialist post to train 50 people a year in Acceptance and Commitment Therapy training ("ACT"). The application said that the

specialist job retention advisor would support 50 people annually to identify early intervention strategies and prevent deterioration in wellbeing; facilitate training to 50 individuals in ACT to ensure their health and work remained stable; support 50 individuals and their employers to maintain good mental health whilst at work, including strategies for return to work; and develop proactive and constructive relationships with employers to improve employers' understanding and attitudes to mental health and strategies to minimise the impact of the work environment on their employees' wellbeing. That application was not successful. Ms Thomas also applied for a contract for the provision of a mental health employment service in the London Borough of Redbridge, covering the period 1 October 2015 to 30 September 2017. Again, unfortunately, the application for that contract was not successful.

10. The Claimant contended that the Respondent could and should have applied for more sources of funding for her job retention role. She contended that Ms Thomas should have contacted the Trust for London to ask for an extension of the funding it had already provided. Ms Thomas told the Tribunal that grants from the Trust for London are specifically for a one year period only. The Claimant disputed this. Ms Thomas explained, further, that the particular grant from Trust for London which ended in January 2016 was to fund a pilot project for one year, to assess the impact of a particular type of intervention on people in work.

11. Both Ms Thomas and Mr Maharaj (the Respondent's CEO) told the Tribunal that the funding environment for charities such as the Respondent has become particularly challenging in recent years. Mr Maharaj said that the Respondent received 70% of its funding from local authorities, but, in recent years, local authorities have been subject to cuts in their funding, so it has therefore been harder for the Respondent to acquire grants. Mr Maharaj said that, in addition to the Claimant, 6 other members of staff were made redundant in 2016, including the Head of Recovery, Nicola Lauder, Allison Hughes, Suzanne Adebari, Andrew Baptiste and Jackie Paton. In early 2017, the Respondent had terminated the contracts of its HR manager, Dionne Emmanuel and of its Management Accountant, Triona Dowd. Ms Thomas told the Tribunal that the availability of contracts and grants varies, depending on what is seen as desirable by the funding organisations. She told the Tribunal that, in the past, job retention work was very popular; however, in the recent past and at present, funders are more interested in providing contracts for group interventions and, for example, ACT / mindfulness-type strategies for employees to keep them in work.

12. The Tribunal decides that Anne Thomas, as Employment Development Manager, who applied for sources of funding, and Mr Maharaj, as CEO, whose role was to provide leadership strategic direction and to raise funds for the Respondent, were in a better position than the Claimant to know what sources of funding were available and what types of contract the relevant funding bodies were seeking to commission. The Claimant, by contrast, did not work in a fundraising strategic role. The Tribunal, therefore, prefers the evidence of Ms Thomas and Mr Maharaj and finds that the Respondent did apply for all sources of funding which could have continued the funding for the Claimant's role. It does not accept the Claimant's assertion that they had failed to do so.

13. Both Mr Maharaj and Ms Thomas told the Tribunal that two of the Claimant's colleagues, Michelle Okpocha and Reshma Karia, started doing some work for the new London Borough of Hackney Independent Mental Health Network contract in about

February 2015, albeit that they were still employed as employment advisors at that time. Mr Maharaj said that the Independent Mental Health Network contract was a new tender which the Respondent was commissioning and that the Respondent had to develop the network. He said that the Respondent could not simply recruit 40 people to work under the contract, but had to place existing staff in developing roles and assess, after 5 or 6 months, where the demand for the services would be. Both told the Tribunal that, when Michelle Okpocha and Reshma Karia were going to be made redundant from their employment advisor roles in mid 2015, they had already been carrying out Independent Mental Health Network roles for a number of months. They had been working 3 days a week in those roles. Both Mr Maharaj and Ms Thomas told the Tribunal that those employees were, therefore, slotted into the Independent Mental Health Network roles that they had already been undertaking, rather than being made redundant from their nominal employment advisor roles.

14. The Claimant disputed that Ms Okpocha and Ms Karia had been working in the Independent Mental Health Network roles before July 2015. She told the Tribunal that she had spoken to at least one of those employees and that the employee had denied having moved to the new role in February 2015. The Claimant pointed to a letter sent to Reshma Karia dated 29 July 2015, offering her alternative employment as an assessment and support planning coordinator. The letter said that the assessment and support planning coordinator role was not the same as Ms Karia's current position and that she was entitled to a trial period of 4 weeks in the role (page 668).

15. The Tribunal considers that Ms Thomas and Mr Maharaj, as senior managers in the Respondent organisation, had knowledge of the development of the Independent Mental Health Network contract and of the allocation of staff resources to it. They were, therefore, in a better position to give evidence to the Tribunal about whether Ms Okpocha and Ms Karia were carrying out the assessment and support planning coordinator roles, as a matter of fact, under the IMHN contract from about February 2015. Neither Ms Okpocha nor Ms Karia came to give evidence to the Tribunal to support the Claimant's assertion that they had not done any work in those alternative roles until July 2015 when they were put at risk of redundancy. On balance, therefore, the Tribunal finds that Ms Okpocha and Ms Karia were carrying out assessment and support planning coordinator roles on at least some days each week from about February 2015.

16. In May or June 2015, the Claimant spoke to Anne Thomas about Michelle Okpocha and Reshma Karia and the fact that they were being put at risk of redundancy. She told Anne Thomas that she considered that the Respondent was potentially discriminating against those employees because of age. Ms Thomas advised the Claimant gently not to become involved.

17. On 7 July 2015, the Respondent wrote to its employees proposing changes to the sick pay allowances included in its sickness and wellbeing policy (page 56). The Respondent held a number of consultation meetings with its staff about the proposed changes. In one meeting, on 13 July 2015, the Claimant challenged Mr Maharaj, asking him why drastic changes were being imposed and whether he had considered looking into the underlying reasons as to why staff were off sick with stress-related illnesses. The Claimant told the Tribunal that Mr Maharaj responded by stating that he used to be "a militant" like her. In evidence to the Tribunal, Mr Maharaj said that it was possible that this could have happened. The Claimant also told the Tribunal that she

had gone on to explain the impact that the changes would have on disabled staff and that Ms Hughes, a human Resources officer, imitated the playing of a violin and said, *"ahh poor staff."* Again, Mr Maharaj agreed that this could have happened, saying that Ms Hughes was eccentric. The Tribunal accepts that the Claimant did challenge Mr Maharaj about the changes, explained that they would have an impact on disabled people. It finds that Mr Maharaj said that he had once been militant like the Claimant and that Ms Hughes imitated playing a violin and said, *"Ahh poor staff,"* when the Claimant mentioned disabled employees.

18. It appears that, partly because of the proposed changes to sick pay, there was increased union membership amongst staff at the Respondent in 2015. The Claimant joined Unite the Union in September 2015. She attended a meeting in a pub in Hackney on 8 September 2015, to discuss unionisation in the workplace with a number of other employees.

19. On 14 October 2015, Laura Francis (assistant to Mr Maharaj and fundraising officer) sent a staff survey to all staff. The survey was conducted via SurveyMonkey.com. The Claimant responded to the survey by saying that the culture of the organisation could feel very toxic and that discrimination and unfair treatment towards staff was rife. She mentioned that there were different rates of pay for people doing the same job. The Claimant contended, at the Employment Tribunal, that SurveyMonkey surveys were not necessarily anonymous and that the person who controlled them could trace the IP addresses of respondents to the survey. The Respondent's witnesses wholly denied that they had traced the IP addresses of those who had responded to the survey. The Tribunal rejects the allegation that the Respondent traced the identities of the staff who had responded to the survey. There was no evidence to support the allegation.

20. On 19 October 2015, the Claimant emailed Mr Maharaj, complaining that Ms Thomas had said that she would not pay the Claimant for all 72 hours of "time off in lieu (TOIL)" which the Claimant had accumulated. The Claimant said that she appreciated that the Respondent had a policy not to pay for overtime, but it was only the second time in five years that she had asked for a payment and that the Claimant had genuinely needed to work the additional hours, in order to provide the service to the Respondent's clients. Shortly afterwards, Mr Maharaj agreed to pay for the whole of the Claimant's accumulated 72 hours TOIL.

21. On 26 October 2015, Mr Maharaj wrote to staff, telling them that, following consultation, the proposed changes to sick pay allowances would be implemented from February 2016 (page 674). On 27 October Mr Maharaj announced, through a staff email, that the Respondent had been successful in securing National Lottery funding for employability, basic skill and ACT therapy. Two new posts were going to be available in conjunction with that funding. Unfortunately, those posts did not become available before the Claimant's dismissal.

22. Ms Thomas has formal line management supervision meetings with Mr Maharaj every six weeks. On about 11 November 2015 she met with Mr Maharaj in a supervision meeting. She explained that funding for the Claimant's role was due to end in January 2016 and that Ms Thomas had not managed to obtain any replacement funding. Mr Maharaj agreed that there was, therefore, a redundancy situation.

23. The Respondent has a practice whereby, when a grant or contract for a particular role comes to an end and no replacement funding is obtained, then it is the person occupying that particular role who is put at risk of redundancy and not anyone else in the wider workforce. Ms Thomas told the Tribunal that the Respondent followed this practice because the Respondent organisation is funded by grants and contracts which come to an end on a frequent basis. If the Respondent put a wider group of employees at risk of redundancy every time a grant or tender came to an end, then employees would be constantly destabilised by the threat of redundancies.

24. On 16 November 2015, Ms Thomas met with the Claimant informally and told her that her job was at risk of redundancy because the TFL funding was ending in January. The Claimant was very upset by the news.

25. On 17 November 2015, the Claimant emailed Ms Thomas, saying that Ms Thomas had told her that her job role was at risk of redundancy because the funding stream was coming to an end and asked Ms Thomas to put this in writing. The Claimant said that Ms Thomas should have told her sooner. Ms Thomas told the Tribunal that the reason that she had not told the Claimant that she might be at risk of redundancy earlier was that, in her experience, warning people of a possibility of redundancy was upsetting and destabilising and was not something that Ms Thomas would want to do where it was not absolutely necessary. Ms Thomas told the Tribunal that, in fact, the meeting on 15 November was an informal meeting, to give the Claimant more warning than she was entitled to under the Respondent's formal redundancy process.

26. On 25 November 2015, the Claimant emailed Anne Thomas, asking whether she would be offered one year's protected salary in the same way as Ms Okpocha and Ms Karia had been during their redundancy situation (page 75). The following day the Claimant asked the same question of the Respondent's HR coordinator (page 77). The HR coordinator replied saying:

> *"At this point there isn't a job vacancy open at CHM that closely matches what role you are currently doing now. So in this vein there is no guarantee that this will happen in the same way as your colleagues.*
>
> *Anne…assured me that you are a very valuable member of staff and she sees and values your hard work. …"*

27. On 30 November 2015, Ms Thomas wrote formally to the Claimant, saying that a redundancy situation had arisen as the funding stream for the project on which the Claimant was working had come to an end. She said that the Respondent would begin its consultation process, the purpose of which was to explore ways of avoiding or reducing the redundancy. Ms Thomas said that the organisation would discuss other options, such as suitable alternative employment, and that the Claimant would have an opportunity to make suggestions or proposals as to how the redundancy could be avoided or minimised. Ms Thomas invited the Claimant to a formal consultation meeting on 14 December 2016 and told her of her right to be accompanied at that meeting (page 79).

28. The next day, on 1 December 2015, the Claimant attended an all staff meeting. Mr Maharaj outlined the results of the staff wellbeing SurveyMonkey. He invited

volunteers to read out parts of the responses to the survey. The Claimant volunteered. Mr Maharaj asked her to read out some of the responses which included her own responses. The Claimant contended that Mr Maharaj did this, knowing that it was the Claimant who had made the particular comments. Mr Maharaj denied this in evidence, saying that the survey was anonymous and that the Claimant had volunteered. The Tribunal accepted Mr Maharaj's evidence that the survey was anonymous. It is clear, on the evidence, that the Claimant did volunteer to read out the comments, rather than being forced to by Mr Maharaj.

29. On 1 December 2015, the Claimant wrote to Ms Thomas asking for details of funding criteria, funding applications made by the Respondent to various bodies in the past three years, and pending funding applications in relation to her post and other employees' posts. She also asked for a copy of the business accounts for the Respondent and the amount of money currently being held in unrestricted reserves by the Respondent (page 85).

30. On 2 December 2015, the Claimant made a Data Protection Act request in relation to her personnel records, files and emails, minutes and other correspondence which made reference to her or to job retention (page 86). Ms Thomas replied on 10 December 2015, saying that she would provide some of the information at the consultation meeting where it was relevant and would provide reasons at the meeting for not providing other documents.

31. The Claimant attended her first redundancy consultation meeting on 14 December 2015 (page 100). The Claimant said that she would like to make further funding applications to support her job retention role and, in particular, to try to persuade the LB Hackney commissioners to provide funding. Anne Thomas said that the Respondent had lots of funding applications in the pipeline, but that none specifically referred to the Claimant's post. Ms Thomas said that there would be two internal stepping up opportunities and new jobs available in the New Year. She also said that jobs would be becoming available with National Lottery funding, including a part-time employment manager and sessional worker tutors, but not a job retention role. The Claimant asked why the National Lottery funding did not include job retention and Ms Thomas said that the application originally included a job retention role, but that National Lottery had taken it out of the budget.

32. Ms Thomas told the Tribunal that, in fact, it was the Respondent who had taken an application for in-work support out of the National Lottery application, because the application budget had been exceeded. She said that in-work support was different to job retention, in any event. Ms Thomas explained, in some detail, that the funding from the National Lottery was for a 10 week "employability" course for people who had not been in work for long periods. She had considered, in discussion with the National Lottery, that the least important part of the funding application was the in-work support funding. This was because there was no guarantee that people would actually obtain work after the 10 week course and, therefore, there might not be any work for an in-work support officer to do. The Tribunal accepted her evidence on this; she had detailed knowledge of the particular course and the funding process for it.

33. On 4 January 2016, Ms Thomas emailed the Claimant, enclosing an internal job vacancy advert for a role as a young person's employment advisor. Ms Thomas said that the advert would be advertised internally in the next couple of days. The role

involved working 22.5 hours a week. It attracted a lower salary than the Claimant's post and was graded two spinal points lower than the Claimant's post.

34. The job description and person specification for the young person's employment advisor (Talent Match) post were in the bundle (pages 114-118). The information attached to it said that the Talent Match Programme was a youth-led employability programme, which aimed to create sustainable opportunities by supporting people into training, work and careers. The main tasks were to undertake assessments of young people's needs, vocational history, skills and aspirations and use this to create a realistic vocational plan and to provide regular face to face support to young people to empower them to access appropriate employment, training, educational and voluntary work opportunities. The job also involved assisting in marketing job seekers to employers and maintaining a database of employers who were willing to provide recruitment and work experience to young people with mental health needs.

35. On 5 January 2016, the Claimant asked Anne Thomas again if her pay would be pay protected for a year if she applied for internal posts. Ms Thomas replied the same day, saying that the Claimant's salary would be protected for a year if she was successful at internal recruitment (page 121).

36. The Respondent has a redundancy/redeployment policy (pages 507-511). In its introduction it says:

> *"**Introduction***
>
> *a) City and Hackney Mind will endeavour to avoid a redundancy situation at all costs. However, if this is unavoidable this policy aims to help ensure fair, objective and consistent treatment, avoid uncertainty and assist in the process of change. …*
>
> *f) Throughout the procedure all reference to an employee's (current) employment refers to their substantive post and the procedure does not apply to employees who are seconded in or who are employed in any other temporary capacity. …*
>
> ***Redeployment***
>
> *a) City and Hackney Mind will consider whether employees likely to be affected by redundancy can be offered suitable alternative work within the organisation. Whether alternative work may be considered suitable depends on a number of factors, these include whether the job is fundamentally the same as the job that is being made redundant, in terms of major elements of the duties and responsibilities.*
> *b) Comparisons will be made between the job descriptions and person specifications, and the skills and abilities required, workload, grade and salary. This list is not exhaustive. Any suitable alternative work should be at least 70% similar to the employees current post and can be no more than one grade higher than their current post.*
> *c) If suitable alternative work is available the employee may be*

slotted in without an interview. This will be confirmed in writing together with any amendment to the job description, pay or conditions of service.

d) The new job must start immediately after the old job ends. If a suitable position were offered before the old contract of employment expires, then there would not be an entitlement to a redundancy payment. A payment would only be due if there is no alternative, suitable position. Where posts are declared potentially redundant and redeployment possibilities are identified, appointment(s) must be offered. Where an employee unreasonably refuses to accept an offer of redeployment this could affect their rights to a redundancy compensation payment.

e) If an employee is placed into a new post where the salary of the new post is one grade lower, the employee will maintain the higher grade but will not receive any increment increases. The employee will still be entitled to inflationary increases.

f) If there is a more significant change in job content and/or salary the employee may be required to participate in a ring-fenced selection and/or assessment process to assess the essential skills required for the post and whether the employee has transferable skills.

g) Where an employee is redeployed they will be entitled to a trial period of four weeks and the preservation of redundancy compensation rights. The employee and/or City and Hackney Mind will have the opportunity of terminating the employment if it has not proved a suitable position. … "

37. The Claimant attended a second consultation meeting on 13 January 2016. In the meeting the Claimant said that she did not want the young person's advisor role and that she could not bear the thought of doing the role. The Claimant also told the Tribunal that she said that she should not have to apply competitively for the role and that she should have been slotted into it. While that does not appear in the notes of the meeting, it is clear, from an email she sent to another employee on the same day (page 135), that the Claimant did consider that she should not have to go through a competitive interview process, but should be slotted into any role that was available. Seeing that the Claimant said to another employee that she should simply be slotted in, the Tribunal considers it is likely that the Claimant said the same thing at the consultation meeting. In any event, it is quite clear from the notes of the meeting that the Claimant pointed out that two other people had got posts when their posts were made redundant. The Claimant she asked why she could not be treated in the same way. Ms Emmanuel, from Human Resources, said that she would not discuss other people's processes, as they were confidential.

38. In this consultation meeting the Claimant was told that Ms Thomas had agreed to extend the consultation until the end of February 2016. She was told that, during the consultation, the Claimant could apply for any posts which became vacant if she met the criteria.

39. Anne Thomas told the Employment Tribunal that she had decided that the Claimant could not be slotted in to the young person's role, because the Claimant's existing job role was not a 70% match to the young person's advisor job role. There is

no record of Ms Thomas having made that decision; there is also no record of Ms Thomas having said this to the Claimant at the time in any of the consultation meetings. The Tribunal notes, however, that, at the outset of the January consultation meeting, the Claimant had said that she was not interested in the young person's employment advisor role. That being the case, it is, perhaps, not surprising that Ms Thomas did not go into any more detail about why the Claimant would have been required to interview competitively for a post in which she was not interested.

40. The job description for the Claimant's job retention worker post was also in the bundle (page 47). Its main tasks required the post holder to work with people with mental health problems who were currently employed, but felt that their jobs were at risk due to their mental health. The job also required identifying, with the client and employer, what barriers existed to the client meeting the job requirements, exploring the possibility of reasonable adjustments and in-work support, to maintain current employment, and supporting the client to access legal advice regarding employment rights. It involved working with employers to raise their mental health awareness and awareness of support mechanisms and devising in-work support plans for clients and employers. One of the main tasks was to provide a job search and CV building service for clients who wished to consider another career path.

41. Ms Thomas wrote to the Claimant on 27 January 2016, recording what had happened in the second consultation meeting. She said:

> *"You were also advised that, during the consultation period, should suitable alternative employment within CHM come up, that you would be the first to be considered for the role. Dionne also advised you that unless the role was 70% match in duties and skill set to you current role, you[r] would be expected to go through a selection process for any roles that sit outside of the 70% Job match."*

42. The following day, 28 January 2016, the Claimant emailed Anne Thomas and Dionne Emmanuel (Head of Human Resources), saying that the wording of attendance criteria at a workshop to be held at a staff conference was potentially discriminatory, page 159.

43. On 3 February 2016, Dionne Emmanuel emailed a revised programme for the staff conference to employees, removing references to the potentially discriminatory workshop attendance criteria.

44. On 27 January, Alan Scott (full-time official at Unite the Union) wrote to Mr Maharaj about the Respondent's proposed reductions to its occupational sick pay scheme. He said that, although the scheme was described as discretionary in the contract of employment, the Unite members would argue that the payments had always been honoured and, therefore, that the current sick pay entitlement had become a contractual entitlement by custom and practice and could not be unilaterally altered. He asked for an opportunity to discuss the matter with Mr Maharaj (page 158).

45. Ms Thomas assisted the Claimant by reading over and suggesting changes to external applications the Claimant made during the redundancy consultation period. On 29 January 2016, for example, she emailed the Claimant with comments on an application the Claimant had made to South Bank University (page 166).

46. On 1 February 2016, Ms Thomas wrote to the Claimant, providing copies of the Respondent's application for the Trust for London grant and a copy of the LB Hackney contract for the funding stream for the Claimant's job. Ms Thomas told the Claimant that a funding application for job retention work was submitted to Lankelly Chase and that a tender to the London Borough of Redbridge for job retention and employment support had also been submitted, but was unsuccessful.

47. The Claimant submitted a formal grievance to Hilary Potter (Chair of the Respondent's Trustees) on 12 February 2016. The Claimant said that she believed that she was being dismissed because she had been involved in discussions about Unionising the Respondent, because of her role as an informal union rep, because of her responses to the staff wellbeing survey and, because, in general, she was an employee who challenged and openly raised concerns with management. She said that she had not been offered the same treatment as her colleagues, Michelle Okpocha and Reshma Karia, in that she had not been offered an alternative position without a competitive interview (page 241).

48. On 17 February 2016, Ms Thomas sent the Claimant an advert for a job in an external organisation, saying that she thought she might be interested in it (page 248).

49. At the annual staff conference on 17 February, the Respondent inadvertently included the criteria for workshops which the Claimant had said were discriminatory, rather than the updated criteria (page 251).

50. The Claimant attended a final consultation meeting on 24 February 2016 (page 268). Ms Thomas told her that the Claimant's proposals for alternative funding had not been accepted. The Claimant asked about being slotted into a role. Ms Emmanuel said that the Claimant had not wanted the young person's advisor post. The Claimant agreed, but said that she should have been slotted in because of her disability. Ms Emmanuel explained that there were no roles for the Claimant to slot into. She said that, if one came up, the Claimant could be slotted in if she met the criteria sufficiently, or she might have to go through a selection process. Ms Emmanuel said that the Claimant would be expected to go through a selection process if she did not meet the required skill set. Ms Emmanuel stated that the Claimant's job description needed to be a 70% match to the new role (page 268). The next day, Ms Thomas forwarded some external vacancies to the Claimant, for the Claimant to consider applying for.

51. Following the final consultation meeting, Dionne Emmanuel (Head of Human Resources) wrote to the Claimant, saying that the Claimant's last day of service would be 31 March. She said that, in the third consultation meeting, Ms Thomas had said that none of the proposals Claimant had been put forward had been accepted by the Respondent, because none of the Claimant's alternative proposals provided relevant funding required to keep her role. Ms Emmanuel said that the Claimant had been advised that there were currently no vacant posts suitable for the Claimant to be slotted into, but that, if any suitable roles became available during the Claimant's notice period, she would be considered for them as an alternative to redundancy (pages 277-278).

52. Sadly, the Claimant's mother died following an accident on 26 February 2016. The Claimant was understandably extremely distressed.

53. The 26 February 2016 had been due to be the Claimant's last day in the workplace. Anne Thomas, who had been talking to the Claimant about the Claimant's mother's accident, told the Claimant that she did not need to come to work on the 26 February. The Claimant wished to come to work however because had some money which had been collected for an employee at work.

54. Normally, when an employee of the Respondent leaves, the appropriate manager organises a ceremony, to thank the employee for their work and to say a formal "farewell" from the workplace. The Claimant told Ms Thomas that she did not want to go through this process on 26 February. She made it very clear that she did not want to do so. Ms Thomas spoke to Mr Maharaj about it, who said that it would best to proceed with a ceremony, because, if the Respondent did not, the Respondent could look like it was treating the Claimant less favourably than other employees. Ms Thomas told the Tribunal that she agreed with Mr Maharaj and that she made a warm speech, thanking the Claimant for her work, saying what a valued employee she had been by Ms Thomas and by everybody else. The Claimant was, nevertheless, distressed by having to go through this process, when she had specifically asked not to. The Tribunal accepted Ms Thomas' evidence that she had agreed with Mr Maharaj. The Tribunal thinks it very unlikely, in the circumstances that the Claimant and Ms Thomas had previously had a very good working relationship, that Ms Thomas would have complied with an instruction from Mr Maharaj which she believed was damaging and with which she disagreed.

55. On 1 March 2016, Dionne Emmanuel emailed the Claimant with details of vacancies (page 281). On 6 March 2016 the Respondent's staff Spring Briefing announced that the Respondent was reverting to its old sickness policy with immediate effect (page 299).

56. The Claimant appealed against her redundancy on 14 March 2016 and submitted a more detailed appeal by letter of 21 March 2016 (page 337). She said that she disputed that there was a valid redundancy, said that the consultation process was not real and that the Respondent had failed to supply requested information or answer to questions. The Claimant said that she had been denied redeployment opportunities and had been treated differently than her colleagues, Michelle Okpocha and Reshma Karia. She said that the Respondent did not take reasonable steps to find alternative employment for her.

57. The Claimant attended a redundancy appeal meeting on 14 April 2016 (page 355). The meeting was conducted by Diana Sackey, who had been appointed as an independent investigator. Ms Sackey produced a redundancy appeal report on 6 May 2016 (page 372). She also produced a grievance investigation report on 17 May 2016 (page 391). In it, Ms Sackey said that Ms Thomas had said that both the Claimant and another temporary employee had met the skill set for the role and that this meant the role required a competitive selection process.

58. The Claimant pointed out, in the Employment Tribunal, that this appeared to suggest that the Claimant had been assessed as being a 70% job match to the young person's advisor role. Ms Thomas, in her evidence to the Tribunal, was unequivocal that the Claimant's role did not 70% match the new young person's advisor role. Me Thomas said that the wording of the grievance report was wrong and misleading. She had not seen it. Ms Thomas told the Tribunal that the young person's advisor role was

a young person's specialist role, which helped young people get into work and helped them over a long period of time to find a positive and productive future, for example, by applying for voluntary work and undertaking short courses. The role was directed particularly to people excluded from the job market, perhaps who were gang affiliated. She said that the Claimant did not have that experience.

59. The Tribunal accepted Ms Thomas' evidence on this. From looking at the job descriptions, it is clear that the young person's advisor role was, indeed, a role directed to helping young people access employment opportunities and training opportunities; whereas the Claimant's role was directed to assisting people, who were already in work, to retain that work. There is very little apparent overlap in the job duties between one job description and the other. Accordingly, the Tribunal accepted Anne Thomas' evidence that she genuinely decided, at the time, that there was not a 70% match between the Claimant's existing role and the young person's advisor role.

60. The Claimant attended a redundancy appeal hearing with Hilary Potter on 28 June 2016. On 1 August 2016, the Claimant was told that her redundancy appeal had not been upheld.

61. The Respondent's former interim head of finance and operations, Les Dittrich, told the Claimant in an email on 27 August 2016 that the Respondent had cancelled a contract with the London Borough of Tower Hamlets, which would have put James Howlett, another member of Unite, out of a job. Mr Dittrich said that it was his view that Mr Howlett was seen as part of the union recognition drive and that the Respondent felt that he had to be stopped, either by being pushed out, or by curtailing his union activities. It appears, however, that James Howlett has remained in the Respondent's employment and, indeed, has been promoted to the post of manager.

62. Ms Thomas agreed, in evidence in the Employment Tribunal, that she was aware that the Claimant was involved in Unite the Union and was seeking recognition of the Union. Mr Maharaj denied that he was aware that the Claimant was involved in Unite's activities, or was a member of Unite. He said that he was supportive of union membership generally, albeit that he is a member of a different union.

Relevant Law

63. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

64. *S98 Employment Rights Act 1996* provides that it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*. Redundancy is a potentially fair reason for dismissal.

65. Redundancy is defined in *s139 Employment Rights Act 1996.* This provides, so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
…
(*b*) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind… have ceased or diminished or are expected to cease or diminish."

66. By *s152 Trade Union & Labour Relations (Consolidation) Act 1992*, for the purposes of the Unfair Dismissal parts of the Employment Rights Act 1996, the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee "(a) was, or proposed to become, a member of an independent trade union.. b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time."

67. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

68. *Williams v Compair Maxam Ltd* [1982] IRLR 83 sets out principles which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

69. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

70. There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding [1980] IRLR 255*. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant (see *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55*, EAT.*

71. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296*; British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

72. In all these matters, the employer must only act reasonably and there is a broad band of reasonable responses open to a reasonable employer.

Procedural Unfairness

73. If an employer has dismissed an employee in a way which is procedurally unfair, the ET can then consider what is the likelihood that the employee would have been dismissed fairly by the employer, had a fair procedure been adopted – *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974.

Disability

74. One of the protected characteristics under the *Equality Act* 2010 is disability, *s4 EqA 2010.*

Direct Discrimination

75. Direct discrimination is defined in *s13(1) EqA 2010*:

"(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."

76. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Discrimination Arising from Disability

77. s 15 EqA 2010 provides:

"(1) Discrimination arising from disability

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

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

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

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

78. In *Basildon & Thurrock NHS Foundation Trust v Weerasinghe* UKEAT/0397/14, Langstaff P said that there were two issues regarding causation under s15:

78.1. What was the cause of the treatment complained of ("because of something" – what was the "something"?)

78.2. Did that something arise in consequence of the disability?

79. The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

80. By *27 Eq A 2010*, " (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act; …

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

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

81. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith, *s27(3) EqA 2010*.

82. There is no requirement for comparison in the same or nor materially different

circumstances in the victimization provisions of the EqA 2010.

Detriment
83. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC* [2003] UKHL 11.
Causation
84. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic, *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830.

85. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Burden of Proof
86. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

87. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does not simply shift in a direct discrimination case where M proves a difference in protected characteristic and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58.

88. In a victimization case, if the Claimant establishes that he has done a protected act and that he has then suffered a detriment at the hands of the employer, a prima facie case of discrimination will be established if there is evidence from which the Tribunal can infer a causal link.

89. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Discussion and Decision

Dismissal

90. The Tribunal finds that the Respondent has shown that the only reason for the Claimant's dismissal in this case was redundancy. The Tribunal is satisfied, on the Respondent's evidence, that funding for the Claimant's post came to an end in January 2016 and that, despite the Respondent's efforts to secure alternative funding from suitable sources, none was available. This resulted in a redundancy situation affecting

the Claimant's role.

91. The Tribunal does not find that the Claimant was dismissed for trade union activities contrary to *s152 TULR(C)A 1992*. There was no evidence that this affected any of the Respondent's decision making in relation to the Claimant's redundancy process. The Tribunal notes that, despite the Claimant's contention that employees who supported unionisation were targeted for dismissal by the Respondent, James Howlett has remained in the Respondent's employment and, indeed, has been promoted to the post of manager.

92. The Tribunal does not find that the Claimant was treated less favourably than comparators who were in the same, or not materially different, circumstances when she was not slotted into a young person's advisor role. Her comparators, Michelle Okpocha and Reshma Karia, were not in the same material circumstances as the Claimant. They had been carrying out roles for five to six months before they were put at risk of redundancy and were then slotted into these roles. Seeing that they had previously been carrying out the roles into which they were slotted in, the comparators fulfilled the criteria under the Respondent's redundancy/redeployment policy requiring a 70% match between job being undertaken by an employee before a redundancy process and the vacancy which is available. The Tribunal has accepted the Respondent's evidence on this, see paragraphs [13] – [15] above.

93. The Claimant was not in the same position because her job was not a 70% match to the young person's advisor role, see paragraphs [39] and [40] and [57] – [59], above. The Claimant, therefore, did not meet the criteria for automatic slotting in. The reason that the Claimant was not slotted into the young person's advisor role was that she was not performing a role which was a 70% match for the vacant post. In any event, the Claimant made clear that she did not want the young person's advisor role. The reason that she was not given the young person's advisor was neither her disability, nor something arising from her disability.

94. While the Claimant did a number of protected acts, the Tribunal finds that none of them were any part of the reason that she was selected for redundancy. The Claimant also contended that she was seen as a troublemaker because of her mental health issues and that this influenced the decision to dismiss her – and was disability related discrimination.

95. Again, the Tribunal is satisfied that the Claimant was selected for redundancy because the funding for her post, and her post alone, had come to an end; and because there were no "suitable alternative vacancies" for her to be slotted into, within the meaning of the Respondent's redundancy/redeployment policy.

96. From the evidence, the Claimant was active in bringing issues regarding discrimination to the Respondent's managers' attention. In one meeting, Mr Maharaj said that he had previously been a "militant" like the Claimant and an HR professional said, "Ahh, poor staff."

97. On other occasions, Mr Maharaj agreed to the Claimant being paid for all her accrued TOIL. That did not indicate a general hostility towards the Claimant.

98. Further, the ET did not find that Mr Maharaj singled the Claimant out, to read

aloud her own comments from a staff survey. Mr Maharaj asked for volunteers and the Claimant volunteered. That did not show that Mr Maharaj was targeting the Claimant because of her critical comments in the survey about the Respondent organisation.

99. The Claimant was required by Anne Thomas to go through a leaving ceremony, against the Claimant's express wishes. The Tribunal accepts that that distressed the Claimant greatly and, therefore, amounted to a detriment. However, the Tribunal has accepted Mr Maharaj and Anne Thomas' evidence that Anne Thomas agreed with Mr Maharaj that the ceremony should go ahead, because, otherwise, it would look like the Respondent was treating the Claimant unfavourably compared to other employees who had left the organisation. The Tribunal accepts that that was the only reason for the ceremony going ahead and finds that it was not to do with the Claimant's protected act in any way.

100. The Claimant's discrimination and victimisation claims fail.

101. The Tribunal has found that the Respondent dismissed the Claimant for the potentially fair reason of redundancy. The Tribunal goes on to consider whether the Respondent acted fairly under *s98(4) ERA 1996* in dismissing the Claimant for that reason.

102. The Claimant contended that Respondent failed to apply for alternative sources of funding for her post, despite the fact that she had provided a popular and important service for employees with mental ill health. The Tribunal has found that the Respondent did apply for relevant funding and that Ms Thomas and Mr Maharaj were able to give more reliable and well informed evidence on this than the Claimant, see paragraphs [8] – [12] above.

103. The Claimant also argued that the Respondent acted unreasonably by not warning her earlier that funding was coming to an end and that she could be made redundant. The Tribunal finds that Ms Thomas did warn the Claimant informally, in advance of the formal redundancy process, on 16 November 2015, that her post was likely to be at risk of redundancy. The Tribunal accepts that Ms Thomas acted reasonably in not warning the Claimant earlier; it was reasonable for Ms Thomas to consider that earlier warnings of redundancy could have a significantly unsettling effect on employees, which would not be in their, or the Respondent's, interests. Furthermore, the ET notes that the Claimant was not made redundant until 31 March 2016. She was therefore given informal notice of her redundancy 4 and a half months before she was dismissed. The Tribunal concludes that this period was reasonable for the Respondent fairly to consult the Claimant and to explore alternatives to redundancy.

104. The Claimant contended that she should have been pooled with other employees and that the Respondent acted unreasonably in putting the Claimant, alone, at risk of redundancy. The Tribunal concludes that Ms Thomas did apply her mind to the issue of the pool, but took the reasonable view that, in the context of the Respondent's organisation being funded by grants and contracts, too much uncertainty and destabilisation would be caused to employees if they were constantly being pooled for redundancy, when sources of funding came to an end. It was reasonable for the Respondent to put only those people, whose specific posts were no longer being funded, at risk of redundancy.

105. The Respondent acted within the broad band of reasonable responses in consulting with the Claimant, conscientiously considering the issue of pool and in making reasonable efforts to find alternative work for the Claimant. On the evidence, there were no suitable alternative posts (a 70% match) available at the Respondent during the Claimant's redundancy process.

106. By way of postscript, the Tribunal observes that the Claimant conducted her case in a very impressive manner. She prepared detailed questions and had excellent knowledge of the documents and the bundle. She clearly is a very competent and capable individual and it is not surprising that the Respondent valued her so greatly as an employee.

Employment Judge Brown

20 June 2017