Case No: 1301395/2017
1301396/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms. M. P. Evans Nixon**

Respondent: **Staffordshire South West Citizens Advice**

Heard at: **Birmingham** **On:11-14 December 2017**
19 January & 19 February (tribunal only)

Before: Employment Judge Cocks **Members: Mr K Palmer**
Mr R Virdee

Representation
Claimant: In person
Respondent: Miss L Franklin Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal, on liability only, is:

1. **The claim of unfair dismissal succeeds;**

2. **The claim for direct age discrimination fails and is dismissed;**

3. **The claims for direct disability discrimination and for a failure to comply with the duty to make reasonable adjustments fail and are dismissed;**

4. **A remedy hearing will be held, if required by the parties.**

REASONS

1. The Tribunal had an agreed bundle of documents. We heard evidence, by way of witness statements supplemented orally, from Mrs Angela Jones (Advice Services Manager), Ms Claire Davis (Advice Services Manager), and Ms Sue Nicholls (Chief Executive) for the Respondent. Apart from evidence from the Claimant herself, we had evidence from Ms Jennifer Jung (Volunteer Adviser), Mr

Patrick Robotham (Volunteer Adviser) and Ms Sandra Grosvenor (ex -Training Officer).

The issues

2. The Tribunal had a list of agreed issues which had been set out in Employment Judge Algazy's Case Management Order of 25 July 2017 (82-88). It is not necessary for us to reproduce it in this judgment but we have followed it, with limited amendment, in our conclusions.

3. There are some developments since that Order was produced. The Claimant now accepts that there was a genuine redundancy situation, that there was a selection process, and that employees were not just slotted into new roles following a restructuring of the Respondent's service.

4. Ms Nixon's position is that she was unfairly and discriminatorily selected for redundancy. As we understand her case, she accepts that most of the selection criteria used in the scoring system were fair but were applied in a subjective way by the two Managers who carried out the selection exercise. In effect, the Claimant believes her selection to be unfair as other less experienced employees with less knowledge than she had, were retained. She also says that this was either direct age discrimination as they were all younger people or because of her disability.

5. Her other argument is that if her performance was not good enough, and this had an impact on the selection process, this was because of stress at work which she contends arose from a poor relationship between the two Managers, Ms Davis and Mrs Jones. She says this stress was related to and exacerbated her disability. The respondent does not accept this to be the case or that it had, or should have had, the requisite knowledge at the time. It is accepted by the Respondent that Ms Nixon was a disabled person at the relevant time. She has Leukoencephalopathy. It is a rare brain condition. One of the effects of her condition is that the Claimant had TIA's (mini strokes), although she had had no difficulties at work with these since 2015.

6. Initially, the Claimant contended that the Respondent had included sickness absence arising from disability in the matrix scoring, but now accepts that the two week absence she had in 2016, which was stress related, was not taken into account in the scoring.

Findings of Fact

We have made our findings of fact on the basis of the material before us taking into account contemporaneous documents, where they exist, and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

7. The Claimant was employed for ten years by the Respondent as an Advice Session Superviser (ASS). She had begun as a Volunteer Adviser in 2003 in what was then Stafford & Stone Citizens Advice Bureau. In 2012 there

was a merger between Stafford and Stone, and Cannock Chase and Rugeley CABx into Staffordshire South West Citizens Advice.

8. After the merger, Ms Davis, who had been the Claimant's line manager, became Manager for contracted work and managed all the paid Caseworkers in the new organisation. Mrs Jones became the Advice Service Manager, the line manager for the Claimant and responsible for the general advice service. Both worked under the Chief Executive, Ms Nicholls.

9. The Respondent was aware that the Claimant had been diagnosed with mild Multiple Sclerosis when she became a volunteer. We deal more specifically with the Respondent's knowledge of her condition in respect of later events further on.

10. In December 2006, the Claimant applied for an Advice Session Superviser post. She did not state that she was disabled, but it is not relevant as the Respondent accepts that the Claimant was a disabled person. What is not accepted is that the Respondent's managers knew that the Claimant's stress related ill-health in 2016 was linked to her disability, made her symptoms worse or affected her performance at work.

11. Prior to 2012, the Claimant had divided her time across the two offices, although she worked primarily in Stafford. Ms Davis told us that the Claimant helped with the training of volunteers. It was a small organisation with paid staff carrying out different roles, for example managers covered advice session supervision work and advice session supervisers helped the manager with training. There is a dispute between Ms Davis and the Claimant over how much training work she did prior to 2012. The Claimant says that she acted as Guidance Tutor and this was part of her role. Ms Davis disagrees and says the Claimant simply assisted with training. We make no findings about this because it is not relevant to events in 2016 and 2017.

12. Prior to the merger, the Claimant had excellent appraisals and had been told she was an asset to the organisation. From 2013, after Mrs Jones became her line manager, the Claimant's appraisals were not so positive. Mrs Jones says that the Claimant struggled with change and the new management following the merger. For example, see the appraisal of 3 October 2016 (249). This was a relevant appraisal as it was used in the scoring process. In particular, it states:

"Pat can struggle with changes to systems and is working hard to overcome this. She has recently started to change some practice and incorporate the changes, can see that these work better - a big step for her to take. She can also be keen to make changes in her own way, lack of consultation with others can make the processes inconsistent across the sites and lead to tensions."

Aside from this paragraph, it would not be fair to categorise the appraisal overall as a poor one.

13. The organisation had been through a number of redundancy exercises. When funding was lost, it became necessary to lose services and cut staff numbers. In the past, it had been the practice that when specific service funding was cut, only the employees in that service were made redundant. The situation in early 2017 was different. Despite the Claimant's perception of the funding

being cut for the telephone advice line service only, we accept the Respondent's evidence that the funding cut was across all areas of the service and not just the telephone advice line work. This is confirmed by contemporaneous documents, such as pages 308-309 and 312-314. The decision that the whole service needed to be restructured and redundancies made across the whole organisation is entirely understandable in the circumstances which the Respondent found itself.

14. There had been a redundancy exercise in March 2016. The same matrix and scoring criteria were used in that exercise as were used in 2017. This had been adopted after taking legal advice and advice from Citizens Advice, the national body. The Claimant's score in 2016 was 106/155. As she did not fall into the lowest band, she remained employed. The point was made to us that she made no complaint about the selection criteria in 2016, but that is hardly surprising as she did not lose her job in 2016.

15. In February 2017 the Respondent was facing severe cuts in funding for the county wide service. It was identified that a new structure would be needed (319) and that there would be seven redundancies. Three pools for selection were identified: Managers; Administration Staff; and Advice Staff (313). Not all employees were included in the pool, the decision was taken to exclude the Housing Solicitor, the Pension-Wise Advisors and the Victim Gateway Support Workers. This was because of specific skills and knowledge they had. There is no complaint about this. The Respondent's view was that all other advice staff were multi-skilled and had similar and interchangeable skills. Accordingly, after taking advice, all the advice workers - those covering the telephone advice line, caseworkers and Advice Session Supervisers were put into one pool.

16. It is clear that the Respondent did turn its mind to the question of appropriate pools, sought advice and acted on that advice accordingly. In the advice worker pool there were twelve employees. At page 329 we see the list of employees in that pool. One employee (HL) took voluntary redundancy.

17. Advice Session Supervisers support generalist advisers in their work across all specialisms. Caseworkers, unless they are doing advice session supervision work, have specialisms such as debt and benefits. It would be fair to say that their specialist knowledge, in their own area of work, would be at a higher level than that of an ASS, who is expected to have general knowledge across all areas. That said, an ASS could well have been a specialist worker previously and might then have a greater knowledge of a specific area.

18. Whilst people were doing different tasks and jobs, they all had basic knowledge about each other's roles and were able to work in those areas. For instance, the Claimant was not a debt caseworker, but supported volunteer advisers in giving debt advice and from time to time conducted interviews herself with clients if necessary. Ms Nixon has British Sign Language skills and would have appointments with clients who had hearing loss. On occasions, if a debt worker could not see a client for an appointment, a volunteer adviser would do so, supported by the ASS.

19. In January 2017, Ms Nicholls told everyone in an information briefing, (276 -277) that they were campaigning to persuade the County Council to review the decision to pull the funding for the county-wide advice service contract. This

further confirms the Respondent's position that it was not just the telephone advice service funding that was being cut.

20. The next briefing on the 8 February 2017 (308) was not an optimistic one. The Respondent now knew that the Council was not going to reconsider and the funding would be cut. The contract was to end on the 2 March 2017. This briefing warned people that the Respondent was in a position where it had to consider redundancies. Staff were also informed that the Senior Management Team were going to meet to implement a restructure plan.

21. The Respondent's Trustee Board and senior management took advice from the national association and ACAS guidance (440-445). Of note, the ACAS advice states:-

"Next you arrange one-to-one consultation meetings and discuss proposals in more detail. Constructive feedback helps you draw up a final list of selection criteria which you then use to score each employee. Individual scores are disclosed at further consultation meetings only to whom they relate and everyone has the opportunity to discuss them and raise any other matters." (443).

22. It is accepted by the Respondent that there was no consultation with employees on the pool for selection, namely the eleven advice staff. This was despite the guidance given about this on page 440 about the need to do so.

23. The Claimant was invited to a first consultation meeting on the 17 February. The minutes of this meeting are at pages 315-318. It seems that the first part of the meeting followed the format of the document at pages 312-314. The Claimant was told about the pools and given a copy of the matrix selection. The Claimant was told about how the pool for selection had been arrived at, although there had been no been consultation about the proposed pool beforehand. The Claimant asked a number of questions, including whether people would have to apply for their own jobs. The reply was that because of the number being made redundant, once the Respondent knew who had been selected for redundancy the remaining staff would be matched to available roles. The Claimant also asked about how would her disability be scored and was reassured that it would not be scored.

24. On the 22 February 2017, Mrs Jones and Ms Davis met to do the scoring. The Claimant's redundancy selection matrix is at pages 320-321. Brief notes of the rationale applied in the scoring are at 322. The Claimant was given a score of 97/155. In the appeal process, Ms Nicholls asked the managers for further details on why and how they had arrived at these scores. At pages 352-355 we see the additional notes provided to Ms Nicholls by Mrs Jones. She told us that both managers had made notes during the scoring meeting and that this document was a combined record.

25. After scoring each of the employees in the pool, the Managers did not total the scores until they had scored all the employees. They did not want any influence from knowing other scores while they were still scoring individuals.

26. Both managers have given further evidence to us about the scoring of the Claimant. Although the Claimant now alleges to us that the differences in approach and an alleged conflict between the Managers meant that they should

not have done the scoring together, she made no complaint about this at the time, despite having raised a grievance with Ms Nicholls, in part, about them in 2016 (237-242).

27. In 2016, the Claimant had complained about a number of matters, but mainly her difficulties working with Sam Cureton (another ASS); non-standardisation of office practices and procedures over four sites; the Service Managers not working well together and there being a lack of communication about the gathering of statistics and recording them on 'Petra'. The Claimant sets out in her letter of 27 July 2016 that the problems that she was complaining about were giving her sleepless nights and she was suffering with work related stress. What she does not do in this letter is link this stress with her disability. She now says that the Managers should have known that it was linked but we have no evidence that she told them that there was a causal link.

28. Ms Nicholls spoke to the Claimant about her concerns at an informal meeting on the 25 August 2016. The Claimant confirmed that she accepted the outcome of the informal process and did not want to proceed to the formal procedure (248). What is clear is that Ms Nicholls went into considerable detail at her meeting with the Claimant. It is noteworthy from the notes of the meeting (246): "Sue told Pat that she needed to accept Angela as her Line Manager and explained that going between Angela and Claire was not appropriate or constructive." From Ms Nicholls' evidence to us, and from the notes (243-248), she viewed the conflict with Sam Cureton as a personality dispute. The reference at (page 244) to Sam not having 'that baggage' was a reference to the Claimant having been used to doing things in the way that she had for many years but that this did not apply to Sam.

29. This informal grievance is of limited relevance to us. First, the Claimant did not want to pursue it formally. Secondly, the managers who did the scoring, whilst aware of the difficulties between the Claimant and Sam Cureton and that complaint had been made about them, did not know the details because the matter had not been progressed to a formal grievance. What was discussed between Ms. Nicholls and the Claimant could not have influenced the scoring. Both managers told us in unchallenged evidence that it had played no part. Furthermore, if the Claimant had had reservations about them carrying out the scoring, we would have expected to see an objection from her.

30. After carrying out the scoring process, the two managers discussed the results with Jane Mathewman, a Solicitor with HR experience on the Trustee Board. She was happy with their decisions and justification when she reviewed the scores with them.

31. At page 331 is the invitation to a second consultation meeting "to discuss the outcome of the selection process" on the 28 February. The minutes of this meeting are at pages 332-333. The Claimant was handed a copy of her matrix assessment with a score of 97/155 and was told she was at risk and likely to be made redundant. The individual scores were not discussed with her, nor was she given an opportunity to dispute them before the decision to dismiss her had been taken. The Tribunal would describe it as a 'fait accompli'. The minutes themselves show that the uncertainty over whether the redundancy would take place rested not on any challenge to the scoring, or that the scoring was provisional, but whether alternative funding or other roles would become

available in the period before dismissal took effect.

32. It is clear that the Claimant could not dispute or attempt to change the scoring given. She was not told that the scores were provisional and open to consultation, or of being changed through such consultation. She had been selected and was not given an opportunity to comment on the individual scores or to be told why she had received the scores she had.

33. As the letter from Ms Nicholls at page 344 states:-

"Following the meeting with Angela Jones and Claire Davis on the 28 February where you were informed of the termination of your employment by reason of redundancy and your subsequent appeal against this decision….."

Despite the Respondent's representative suggesting to us that it was only provisional, that is not what Ms Nicholls' letter states and we accept that better reflects the true situation on the 28 February 2017.

34. The Tribunal now turns to the actual scores the Claimant received and the reasoning behind them. We are aware that it is not our role to examine the scores given with a fine tooth comb. It is not appropriate for us to scrutinize the markings, unless there is an obvious mistake or an absence of good faith. However, it is necessary for us to make some findings of fact about what led to the two managers reaching the scores that they did.

35. The Claimant received a 4/5 for 'Knowledge'. We do not need to go into it as the Claimant accepted she was happy with that score (362). She was scored 3/5 for 'Skills'. The managers considered that whilst she was competent in her role she was unable to undertake more roles. It has become clear from the evidence before us that the Claimant's training skills was a factor used in reaching this score (352). Likewise, under this criterion, Mrs Jones told us that the Claimants failure to attend the web-chat and email training played a part in their scoring. This also fed into 'Participation in improvement/development activity', for which the Claimant received a 10 - an average score.

36. The Managers' view about development and training was that other staff had attended additional courses and completed qualifications. They knew that the Claimant had not completed Level 2 of an NVQ in Management, but more pertinent for them was the web-chat and email training. This was being given to all paid staff (and volunteers if they were interested). The view was taken that the Claimant had not embraced the idea of doing this training and did not attend a training session for which she had been booked in. The training should have been done on Friday 8 July 2016. The Claimant did not attend. Initially the Claimant told us this was because she could not attend at 4pm because of tiredness. The diary shows that the booking was for 1pm. The Claimant's evidence then was that she was told she could not attend at 1pm because Mrs Jones had told her not to leave Geoff, a volunteer ASS, on his own. The Claimant was not on the rota as ASS for that day, Geoff was. We have heard considerable evidence about this matter. Mrs Jones told us that there had been an occasion in the past when Geoff had a number of trainees to supervise, and she had asked the Claimant to help him. She did not accept she had told the Claimant to supervise Geoff thereafter, on the basis that he was not competent. The Claimant did not challenge Mrs Jones about this evidence and we accept it.

In any event, on the Claimant's case, if she had been booked into the training and knew she could not do it because of Mrs Jones' instructions, why did she not go to Mrs Jones and say I need cover for someone to supervise Geoff so that I can do the web-chat and email training?

37. Furthermore, Ms Nixon told us that she had done email training in the past, suggesting that she did not see the need to do this training. However, as the two managers knew, this was specific training under a national pilot project and very different to giving email advice as before. It was not about individual local emails asking for advice, but being part of a national scheme whereby a Citizens Advice office dealt with enquiries by web-chat and email from around the country. It may well have been that the Claimant felt she did not need this training, but it gave the Managers an impression she was reluctant to do it and in fact the Claimant's explanation that she had had to supervise Geoff was not before them at the time, although it was given at the appeal stage. It is an example of what the claimant might have told them if she had known their reasoning for her scores on 28 February 2017. The Claimant's position at the appeal (364) was that she could easily have acquired the webchat and email skills.

38. The Claimant was marked down on 'Skills', in part from the Managers' view of her training skills. For assessing these, they had the training and evaluation appraisals. We see these at pages 165-181 and 209-237. The analysis at page 267 was not done before the scoring. Mrs Jones had not seen it before and believed it was prepared for the benefit of these proceedings. It is therefore of little relevance to our considerations and looks like an attempt to justify a view after the event. Ms Davis told us that the sheets which they had seen showed mixed results.

39. The training evaluations caused the Tribunal some concerns; we have learnt that the Claimant was particularly marked down for the evaluation sheets from 'Benefits for Older People' delivered in April 2016. Ms Nixon told us that she had not prepared the course, did not have the requisite pensions knowledge (although she knew the benefits situation well) and the volunteer advisers were critical of the content and Powerpoint presentation rather than her delivery of the training. Looking at pages 167-181, the evaluations reflect what the Claimant is telling us. For example, 172 – an adviser wrote: "because the Trainer was using material she was not familiar with, some aspects were unclear". There was also praise for Ms Nixon in the sheets (169, 170, 177,179, 183). It seems that had the Respondent used an analysis of the sheets, such as we see at page 267, it would then have been measurable but they did not do so. Indeed, that analysis suggests the training skills of the claimant were better than the managers' perception of them. At one meeting to score 11 employees, it could not have been more than a cursory impression from the number of evaluation sheets. Yet this contributed significantly to the score on 'Skills' in circumstances where giving formal training was a small part of the Claimant's job.

40. It is also indicative of what the Claimant may have told the Managers had she been given an opportunity to comment on the scoring and been told the reason why she had been given a score of 3 out of 5. However, the Tribunal knows that Miss Nixon was given this opportunity at the appeal stage and her score was increased to 4 out of 5.

41. Under the criterion of 'Quality', the Respondent used the Quality Assessment Analysis at 323. These results come from a Client outcome summary and the results extracted from cases taken at random, assessed and independently verified. As the notes show, the Claimant was marked down on the basis of her score on this. This was a matter of fact. As we see from the results, all the people in the pool were subjected to this Customer Service Summary and Customer Outcome Summary and scored according to these figures. Miss Purse is one of the Claimant's comparators who also received a 3 for quality on the basis of her score, which was similar to that of the Claimant. The finding of the Tribunal on this marking is that it was entirely measurable and clearly a matter of fact.

42. Turning to 'Performance', the Claimant received 4 out of 5. This was an above average score. The Claimant made little complaint to us about her scoring on this criterion. It seems from the Managers' notes that they held a positive view of her performance (353).

43. Under 'Participation in improvement/development activity', the Claimant received a 10, which was an average score. One of the matters taken into account was a perceived resistance to change. This is supported by the October Appraisal (149) which had been agreed and counter-signed by Ms. Nixon. Under this criterion, the Managers also took into account the Claimant's use of her own template with the Stafford volunteers before April's template had been approved. They felt that the Claimant considered hers to be better and therefore was to be used.

44. This is a matter which overlaps with the Claimant's score on 'Attitude towards others' (354). The history to this is that April Hedley had been tasked with producing standardized guidance and templates for the volunteer advisers. This arose in part from the Claimant's complaint the previous year about the lack of standardisation across the offices. Ms Hedley was the Advice Session Superviser Coordinator. The Claimant, working into the early hours of the morning produced her own version of the guidance and templates and issued it to the advisers, before Ms Hedley had finished the task. Mrs Jones' view about this was that the Claimant's guidance was not up to standard and the templates, being used in a quasi legal advice environment, were dangerous. She felt that they did not necessarily reflect the actual advice to be given, or had been given, to an individual client. They were cut and pasted into the advice record. Mrs Jones considered that the Claimant was trying to reintroduce old templates which had been used by her previously and she had been told not to use them.

45. There had been a meeting about this matter with the Claimant in July 2016 (189-190). It is clear that the Claimant took what Mrs Jones said badly. From the Claimants own notes: "AJ said she was my manager and she was right and I should follow her lead. I was left confused, distraught and had an overwhelming sense of despair at Angela's opinion about my performance". The notes go on to express the Claimant's frustration with Mrs Jones as a manager. This was seen by the managers, when doing the scoring, that the Claimant was critical of changes made by management and sided with the volunteers rather than supporting managers and the organisation.

46. It is clear to the Tribunal, from the evidence we heard from Ms. Jung and Mr Robotham, that the Claimant was held in high regard by the volunteer

advisers she supervised. The issue over the templates supports the point about the Claimant being conflicted between what management wanted and what the volunteers were happy with and what she considered, in a protective way, they should be expected to do.

47. The other issue which played a part in the scoring on 'Attitude' was the relationship with Sam Cureton. This was seen by the Managers as a personality clash and both Ms. Cureton and the Claimant were given a '10' because of this. That seems to the Tribunal to be an entirely reasonable result on the scoring, both employees were marked equally.

48. Under 'Timekeeping', we understand the score of 3/5 related to two matters. First, was the managers' belief that the Claimant was not complying with the flexi-scheme rules. She did not complete timesheets. She says that Mrs Jones told her she did not have to complete timesheets, as she did not have the time to do so, and that Mrs Jones had said she would do them for her and Sam Cureton. Mrs Jones denies that she had said this, or would have done so. She made the point that to do so she would need to be in the same office and with both employees all the time in order to record their times. This was not feasible. We see at page 322D that Sam Cureton did comply with the flexi-scheme rules and sent her timesheets on a regular basis to her manager. This undermines the Claimant's evidence. We do not accept that Mrs Jones had said that she would complete the Claimant's timesheets. We find that whilst advice and assistance in doing so was given, this never amounted to an instruction to the Claimant that she did not need to do them herself. Further, the Tribunal finds this proposition difficult to accept. It is proper practice and the personal responsibility of employees to complete their own timesheets. The Claimant had not been permitted to opt out of the flexi-time scheme and filling in timesheets was an essential part of that scheme. It is simply incomprehensible that a Manager would have agreed or offered to complete her timesheets for her.

49. The other issue taken into account under timekeeping and punctuality was that the Claimant was late on occasions for work and had gone off on sick leave and not notified anyone of her absence in circumstances where she needed to have her work covered by another ASS. It had been left to a manager to call to find out why she had not come in. The Claimant told us that she had been unable to talk, but the evidence was that she had been able to talk to the manager who called her. Ms. Cureton received a 4 rather than a 3 due to her punctuality in not attending meetings on time. The Respondent draws a distinction between them in terms of seriousness. Whilst the Tribunal may take a view that lack of punctuality is a lack of punctuality however it occurs, we cannot say that the managers view was unreasonable and reminded ourselves that it is not our role to re-score, applying our views about the matter. The managers were able to justify the difference in treatment to us.

50. The meeting on the 28 February did not go well. The Claimant was upset and left the meeting, stating that she would get a sick note for her notice period. The Claimant said (333) she did not expect to be made redundant "she does not understand why she has scored so low on the matrix; she says that when she scored herself, she came out with a much higher score".

Had the Claimant had an opportunity to comment on and give her views about her scores, she may have had some influence in changing them, as indeed

happened to a limited extent in the Appeal. But this would have been futile at the meeting on the 28 February as the decision had already been taken that the Claimant was one of those to be dismissed.

51. The Claimant decided to appeal the decision to dismiss her, her first Letter of Appeal is dated 28 February (334-336). What the Claimant does is to set out how she disagrees with the scoring. She does not believe that the Managers have scored her fairly. She sets out in some detail why she disagrees with some of the scores she had been given. In effect, what the Claimant is doing is what she should have had the opportunity to put to the Managers during the consultation about her provisional scores and before the decision to dismiss her was taken.

52. Before the Appeal hearing, Ms. Nicholls sent out another information briefing which stated that although she had not named the selected staff (338), it was clear that people knew who was going.

53. The Claimant sent a further Appeal letter to Sue Nicholls on 3 March (340A-340C). By now the Claimant had taken advice and was asking for a breakdown of the scores she received for knowledge, skills, quality and performance; participation in improvements/developing activity; and attitude towards other. She points out in the letter that she felt she had not been given the opportunity to undertake training in Web-chat and emails as her time had been spent supervising the Advice Sessions.

54. The Claimant also raised a complaint about some of the criteria being vague and subjective: such as attitude to others, attitude to work and commitment. She states that the weighting was not explained in advance and repeats her case that the pool was a sham and defined as it was for the purposes of keeping the telephone advice line staff on. She states that she may have a case for age and disability discrimination and unfair selection. Before the Appeal Hearing, due to be heard on the 15 March but rescheduled to the 21 March, the Claimant sent a further letter dated 9 March, asking for a breakdown of the scores that she had received (341).

55. After receiving the matrix and her scoring on them, the Claimant was sent the consideration notes which were prepared by the Managers to explain their scoring. She set out detailed comments in a document for the appeal we see at pages (347-351). She raised further complaints about the scoring and that younger employees appear to be replacing her. She also took issue with the length of the period examined - being only a year.

56. The documentation the Claimant was sent are the detailed notes at 352-355 which were prepared by Mrs Jones and Ms. Davis after a request from Ms Nicholls. We understand that these notes were prepared from handwritten notes made by the Managers at the scoring stage which are no longer available. After receiving these, Ms. Nicholls met with a Trustee to review the notes before the appeal meeting. Before the hearing, after receiving the scoring matrix and the notes, the Claimant raised a grievance which she wanted dealt with alongside her appeal against her selection for redundancy. It was primarily around the Managers not working well together and the impact that this had on her work.

57. At pages 361-376 are the Appeal Hearing notes. By now, the claimant was

aware of the reasoning behind the scores she had been given. Ms Nicholls talked through the Managers' rationale for each score with the Claimant.

58. On knowledge, Ms. Nixon agreed with four out of five. In relation to 'skills', the Claimant disputed this score on the basis that she did not struggle with debt work, and that she had taken longer with the Money Advice Service training because of having to support a volunteer advice session supervisor. She also pointed out that no desk or facilities had been provided for her to do the training. She considered that she was good at giving training and had qualifications in it. She felt that she could obtain the skills needed to be able to train the volunteers on web-chat and giving advice by way of emails. She felt the 'skills' score was an underestimate and inaccurate.

59. Another area of dispute was the three out of five on 'quality'. Ms. Nicholls explained that the quality checks had been part of the new QAA system which had been introduced the previous year. It was done on the basis of random selection of a cross-section of cases each month which were assessed both internally and externally. Ms. Nicholls explained this was a system which was a more comprehensive measure and she discussed with the Claimant why her scores had been lower. The important thing about the QAA system was that it applied to everybody and by using this to measure quality of work, the managers had not formed a subjective judgment but relied on the QAA results.

60. In respect of the four for 'performance', the Claimant set out detailed evidence about her performance but accepted that she could get stressed and behave irrationally when she felt the volunteers were having to work so hard. It was pointed out that whilst Ms. Nixon wanted to support the volunteers, sometimes her actions had an adverse effect on the organisation as a whole. Ms. Nicholls referred to the use of the templates and the Claimant's own standardised case recording practice in relation to this.

61. What is clear from the hearing is that it was a very full and detailed meeting. Ms. Nicholls explained in detail why Ms Evans had been scored as she had been on the criteria that she disputed. She was given every opportunity to discuss and put forward explanation and evidence as to why she felt her scores were wrong. The Claimant talked about the lack of cooperation between the two managers and how she felt this had affected her work and performance. Each point that the Claimant raised in her letter was discussed in detail with her.

62. The outcome letter from the Appeal (dated 27 March) is at pages 377-382. Ms. Nicholls sets out her own reasoning for agreeing with most of the original scores. She increased the score for 'skills' to four out of five which gave, with the appropriate weighting, a final score of 100/155. This still meant that the Claimant fell into the lower part of the pool and would have been selected in any event. It did not change the outcome for redundancy selection.

63. At page 378, Ms. Nicholls' letter deals with further points which the Claimant had raised in her appeal:

"An employee who is declared redundant on the basis of selection criteria which uses skills or performance matrix has the right to see a breakdown of their score and should be given limited information about their position on the matrix relative to other employees in the selection pool".

Ms. Nicholls's reply to this was:

"You were given a copy of the proposed matrix at the first consultation meeting. The matrix form clearly details what will be considered under each point of the assessment, it identifies the score allocated to each and the weighting allocated based on its level of importance. Additionally, you were given the opportunity at the first consultation meeting to make any comments about the matrix being used, you did not make any, and at the second consultation meeting when you were advised of your score, it was offered to further explain how the score had been arrived at. You declined this offer. We have subsequently also as part of this process provided you with detailed information that was considered in the determination of your scores." This was not upheld.

64. The Claimant's point that attitude and the extent to which an employee is a team player was too subjective and could render the criteria unfair was dealt with. Ms. Nicholls pointed out [379] that the matrix used was a standard tool widely used, that the weighting used was a reasonable one and that the conclusion reached by the Managers was evidenced through copies of minutes, meeting records, appraisals, timesheets, training records, attendance and sickness records and documents drafted by the claimant. She considered that the assessment was a factual assessment which was evidence based. The subjectivity point was also not upheld.

65. On the matter raised that the Claimant had been congratulated for excellent performance and that a view was held it was difficult to fault her on anything, Ms. Nicholls looked at the appraisal records for the previous two years (in fact it had only been over the previous year). She found that whilst there was recognition for the Claimant's strengths and commitments, areas for development had been identified and she could find no evidence of excellent performance. In relation to the web-chat and email service pilot, Ms. Nicholls took the view that all staff and volunteers had been given the opportunity to train with the advice line team, that training dates had been arranged for the Claimant but she did not attend.

66. In relation to the contention that when she was completing the MAS training, the Claimant was unable to find a comfortable desk on which to work due to her disability, Ms. Nicholls noted that the Claimant had not requested any assistance nor had any recommendations for such been made in the occupational assessment in 2015. She makes the point that if recommendations or requests had been made, then the Respondent could and would have considered adjustments to support the Claimant. She pointed out that as an employer, they can only respond or take steps if they are made aware of the need.

67. Ms Nicholls dealt with the Claimant's allegation that three of the people who were retained did not have her skills and she believed one reason they scored above her was because they did web-chat and emails (which she had never been asked to undertake). Ms. Nicholls stated that all the staff in the redundancy pool were assessed using the same matrix and criteria. She found that there was no evidence that the delivery of email and web-chat was included or considered within this process. However, it would be fair to say that this had played a limited part in the assessment of the Claimant's skills and it had been

taken into account in assessing these.

68. In relation to the complaint that people being retained were younger and less experienced and that age was a factor in the selection, Ms. Nicholls points out that the current redundancies identified were in the age range 35-64. She stated that there was no evidence to suggest that age was a consideration at all within this process and that the Claimant had provided no evidence to support her statement. This was not upheld.

69. It is clear that this appeal process was not a simple review or 'rubberstamping' of what the Managers had decided. Ms Nicholls not only examined what had been done by them, but looked at the evidence, listened to what the claimant was saying and formed her own conclusions on the appropriate scores. She did not entirely go along with what had been decided on the scoring. Her appeal process was a comprehensive and detailed reassessment.

The Law

Unfair Dismissal

70. Section 98 (1) Employment Rights Act 1996 provides that in determining for the purposes of this part, whether the dismissal of an employee is fair or unfair, it is for the employer to show:

> (a) The reason (or if more than one the principle reason for the dismissal).
>
> (b) That it is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

A reason falls within the subsection if it –
……
> (c) Is that the employee was redundant,

71. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)

> (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

72. In Williams v Compair Maxam Ltd [1982[ICR 156 the Employment Appeal Tribunal laid down guidelines which a reasonable employer might be expected to follow in making a redundancy. It stressed that in determining the

question of reasonableness it was not for the tribunal to impose its own standards. It has to determine whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. It identified four factors which a reasonable employer might be expected to consider, namely.

- Whether the selection criteria were objectively chosen and fairly applied;
- Whether employees were warned and consulted about the redundancy;
- Whether, if there was a union, the unions view was sought;
- Whether any alternative work was available.

73. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision to as to what the right course of action should have been for that of the employer. The function of the Tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss fell within the band of reasonable responses, which a reasonable employer might have adopted.

74. In a redundancy situation, the factors which a reasonable employer might be expected to consider are those set out in the Williams case. In order for a dismissal to be reasonable, the selection criteria must be objective and applied in a non-subjective way. It is reasonable for an employer to attempt to retain a workforce balanced in terms of ability. Thus an individual's skill and knowledge are reasonable considerations providing they are assessed objectively. The precise choice of factors and their relative weight will be determined according to the current and future needs of the business. When faced with selecting employees for redundancy, it is common practice for employers to decide upon a number of different criteria according to which the employees in the pool for selection should be assessed. Where an employee complains of unfair selection, all the employer has to show is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned.

75. After hearing the evidence, the tribunal drew the attention of the parties to the case of John Brown Engineering Ltd v Brown and ors [1997[IRLR 90 as we considered it relevant to the facts here. We were referred by the respondent to Taymech v Ryan [1994] EAT/663/94 and Dabson v David Cover & Sons Ltd [2011] UKEAT/0374/10. The latter setting out that:

"It was not appropriate for an Employment Tribunal to scrutinize the marking in redundancy selections in the absence of obvious mistake or absence of good faith."

We have considered the cases referred to in our considerations.

Direct Age Discrimination

76. The claimant alleges that her selection for redundancy was less favourable treatment because of her age. Section 13 of the Equality Act provides:

(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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

Disability Discrimination

Direct Discrimination

77. Section 13 Equality Act 2010 provides that a person (A) discriminates agents another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevant protected characteristics include disability. Section 23 provides that on a comparison for the purposes of section 13 there must be no material difference between the circumstances relating to each case and that the circumstances relating to a case includes that person's abilities if the protected characteristic is disability.

Failure to make reasonable adjustments

78. The duty to make adjustments is contained in section 20 of the Equality Act 2010, which provides:

> "(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.
>
> (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
>
> (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to

require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.

(9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to—

(a) removing the physical feature in question,

(b) altering it, or

(c) providing a reasonable means of avoiding it.

(10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to—

(a) a feature arising from the design or construction of a building,

(b) a feature of an approach to, exit from or access to a building,

(c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or

(d) any other physical element or quality.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service."

79. Subsection (13) contains a table which identifies Schedule 8 as the applicable schedule in relation to cases in the field of work.

80. Section 21 provides:

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

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

81. Schedule 8 makes it clear that knowledge (or imputed knowledge) of B's disability is required in respect of "work" cases.

82. The reasonable adjustments claims in this case involve the first requirement, identified in section 20(3), because the claimant argues that she was placed at substantial disadvantage in comparison to a non-disabled person by a Provision, Criterion or Practice (PCP) adopted or applied by the respondent.

This relates to the claimant having to do the MAS training and not being given more time to do it or a suitable desk to work at.

83. When considering the question of reasonable adjustments, the Employment Tribunal should: identify the provision, criterion or practice and/or arrangements and/or physical feature giving rise to disadvantage; identify any non disabled comparator if appropriate; and evaluate the nature and extent of the disadvantage (Environment Agency v Rowan [2008] IRLR 21 EAT).

84. After following the steps set out in Rowan, the Tribunal should identify the adjustment or adjustments the respondent is alleged to have failed to have taken. Finally, the Tribunal should determine whether any proposed adjustments were reasonable, bearing in mind the extent to which they would prevent the disadvantage.

85. Ms Franklin drew our attention to Secretary of State for the Department for Work and Pensions v Alam [2009] UKEAT/0242/09 on the question of what knowledge the employer is required to have for the duty to make reasonable adjustments to arise. These are (paras 17-19):

"*Did the employer know both that the employee was disabled and that her disability was liable to disadvantage her substantially?*

Ought the employer to have known both that the employee was disabled and that her disability was liable to disadvantage her substantially?"

Conclusions

86. In reaching our conclusions, the tribunal has applied the relevant law to our findings of fact. We largely follow the agreed list of issues and have taken each party's submissions into account in our deliberations. We refer to pertinent points made where they are relevant.

Unfair dismissal

What was the reason for dismissal?

87. The reason for dismissal was redundancy. It has never been seriously contended by the Claimant that this was not a redundancy situation, or that the redundancy was a sham in order to cover up her dismissal. Therefore, the Respondent has shown that it had a potentially fair reason for dismissal under ss 98(1) & (2) of the Employment Rights Act 1996.

88. It has also not been disputed that the managers who made the decision to dismiss the Claimant and to uphold that dismissal, did not hold a genuine belief that this was a redundancy situation and that the Claimant was being dismissed by reason of redundancy. To suggest otherwise brings us back to whether the redundancy situation was a sham, or whether the Managers were acting in bad faith. They patently were not.

Did the Respondent hold that belief on reasonable grounds?

89. This is not a conduct or capability dismissal. It seemed to the tribunal that the Claimant was viewing her selection for redundancy through the prism that she was being seen as incompetent at her job. That was not the reason for her dismissal. In a situation where an employer has to make redundancies, and decide which employees are to be made redundant, all the employees facing redundancy may be competent at their jobs. Such a situation underpins the importance of following a fair procedure and the requirement to apply a fair method for assessing each employee against criteria which are as objective and measurable as practicable. As Polkey v AE Dayton Services Ltd [1988] established: procedural fairness is an integral part of the reasonableness test set out in section 98(4) Employment Rights Act 1996.

90. The Claimant's challenge to the fairness of the dismissal is essentially that an unfair and incorrect matrix had been used and that she had been unfairly scored against that matrix. Although she initially contended that the pool for selection should not have included employees outside those in the telephone advice service, the evidence shows that the choice of a wider pool was appropriate as cuts in funding were being made across the whole service and the Claimant accepted this.

91. As our findings of fact show, the Tribunal does not agree with the Claimant about the matrix. It had been used the previous year without complaint. We are satisfied that the criteria applied were reasonable ones. Whilst the criterion of 'attitude' could be seen as a subjective one, the Respondent has shown that as far as it was able to do so, it used objective measures for this. Even criteria which are matters of judgment and cannot be objectively scored or assessed do not necessarily mean the criteria are unfair. Sometimes employers need to use criteria which require personal judgment and a degree of subjectivity. Employers have a wide discretion in their choice of criteria and how they are applied and we can only interfere where the criteria, or the application of them, fall outside the range of reasonable responses.

92. However, when the Tribunal assessed the process followed, particularly in the light of the case of John Brown Engineering Limited –v- Brown and Others, and the Respondent's own guidance to which we have referred, it is clear that there was a failing. The Claimant was not provisionally scored and selected. She was not given her individual scores, and an opportunity to discuss or dispute them in the consultation process, before the decision to dismiss was made. It is quite clear that there had been no consultation about her scoring with the Claimant prior to the decision to dismiss her being made. She had had no opportunity prior to that decision being taken to contest her selection.

93. Whilst the Claimant was given that opportunity at the appeal stage, and Ms. Nicholls did change one of the scores, that does not get round the unfairness of not discussing her scoring with her and taking on board any points she could have made at the pre-dismissal stage. The Tribunal is aware that an appeal process can put right procedural errors at the dismissal stage, but in this case we have had no evidence that had the Claimant scored more highly on appeal, that she would have retained her job or there would have been a re-run of the redundancy selection process. Indeed, by the appeal stage, it would have been

impracticable, and unfair on employees who had been told their jobs were safe, for the whole selection process to be re-run. Accordingly, the Tribunal finds that this procedural error was more than minor or trivial and that the dismissal was procedurally unfair.

94. However, and this refers to Issue 4.4, what happened at the appeal stage is relevant in relation to whether we would make a Polkey reduction and by how much. The Tribunal considers that Ms. Nicholls took on board what the Claimant was saying about her selection and dealt with each point raised in detail. This was not a 'rubber-stamping' exercise by her. She had gone back to the Managers and found out more details for their reasoning for selecting the Claimant, had talked through it with the Claimant and clearly listened to what the Claimant had to say. She dealt with the points the Claimant raised and we can find no fault with her reasoning in upholding the selection and the decision to dismiss. It cannot be said that her conclusions fell outside the band of reasonable responses.

95. We consider that a reduction of 80% to any compensatory award would be applicable as we find that the detailed and comprehensive appeal dealt with the points which the Claimant is likely to have raised during the consultation prior to dismissal, had she had the opportunity to do so at that stage. Even with the extra points she received on 'skills' from Ms Nicholls, the Claimant would still have been selected for redundancy as she still fell below the threshold for retaining her job.

96. This is not a case where an appeal put right what had been done wrongly at the first stage, because it is highly unlikely the Respondent would have conducted the redundancy selection process again. But on the evidence that we have heard and seen, had there not been the procedural irregularity, and the Claimant given a chance to comment on her scores before the final decision to dismiss her was taken, there is a high chance that the outcome would still have been the same. The reason for saying this is the process and outcome of the appeal, with which we can find no fault. Therefore, we make an 80% Polkey reduction. We considered whether this was a situation in which a 100% reduction was appropriate. We decided not, on the basis that we cannot know whether the Managers who did the scoring, had there been proper consultation on it by them, might have reached different conclusions to Ms Nicholls in the light of what the Claimant might have said to them in relation to her scores. A reduction of 80% reflects the low chance that if the Claimant had the chance to dispute her scores before the decision to dismiss, she might not have been selected for redundancy.

Age Discrimination

97. The claim is for direct age discrimination. The question is whether the Respondent treated the Claimant by dismissing her for redundancy, or selecting her for redundancy, less favourably than it treated or would have treated her comparators. The Claimant relies on her comparators being Jane Whitehouse, Stacie Purse and Antoinette Idehen and/or hypothetical comparators.

98. The Claimant's perception is that the people who remained in employment, were the younger staff. She specifically raised this at the appeal stage. She says that the scoring was done in such a way as to favour the

younger employees over older ones.

99. Has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of age?

100. The selection criteria used were applied across all the people in the pool. The Claimant was 59, she was the oldest person in the pool. Jane Whitehouse was 42, Stacie Purse was 35 and Antoinette Idehen was 31 (page 329). In the group who were retained, HA was 56. Furthermore, among those who were selected, 3 people were significantly younger than the Claimant. We can draw no inferences of discrimination from the table of results.

101. The Tribunal does not accept the Respondent's arguments about the total workforce ages. As the Claimant points out, volunteers should not be considered as they were not in the pool for comparison. The relevant group for us to look at is the pool of advice workers from which the selection for redundancy was made. Has the Claimant shown facts from which we could conclude that the scoring was done in a way so as to retain younger staff, and predominantly those employed on the telephone advice line service and to dismiss older staff?

102. Unfortunately for the Claimant, the table does not reflect this, nor was it put to the Managers in cross-examination that the Claimant's age had played a part or influenced their scoring of her. Looking at the table, everyone who remained employed was younger than the Claimant, but then she was the oldest employee in the group. There were also younger people to her who were selected for redundancy, for example CB and SW.

103. This claim has not been put to us as an indirect age discrimination claim. The claimant appeared to be saying that her comparators were not chosen for redundancy because they carried out webchat and email advice. The evidence did not support that contention and even if it had, there would need to be a causal link between employees' ages and their ability, or inability, to carry out such tasks. The case is put very much on the basis that the Claimant was treated less favourably than her younger comparators because of her age. The Claimant says that the Managers wanted to keep younger staff and that was the motivation for marking her as they had done. However, whatever the Claimant's suspicions, the evidence does not support this and there is nothing from which we can draw inferences to support that suspicion.

104. The Managers did not add up the scores for each individual until they had marked everyone. The scores were discussed and reviewed with a legally trained Trustee. Their rationale was to keep staff who had a range of skills which the Respondent had identified as necessary for the future. It is clear that webchat and email advice skills were important for the future and that the Claimant had not developed her skills in this area by not attending the training opportunity. That was not related to her age and, in any event, is only one example of where she did not score as highly as other people.

105. The criteria used were not just about IT skills, they covered attitude, performance, and quality. The Respondent's scoring has been challenged on the basis that the Claimant's performance was marked down because of her age. She was marked down because of the quality assessments which we have seen which were used equally in relation to each employee and we have seen their

relative marks for the under the QAA system. Furthermore, where the Claimant was marked down was in relation to training which other employees had done as part of their personal development. When the Claimant became aware that she had been marked down in two areas, namely 'personal development' and 'knowledge and skills', after listening to what she had to say about this, Ms. Nicholls increased this score on appeal.

106. The Claimant says in her submissions that ASSs and the Caseworkers should not have been in the same pool. This comes back to her contention that the Caseworkers were a younger group and all of the telephone advice helpline staff should have been dismissed when the funding was cut. As we have pointed out in our Findings of Fact, the evidence does not support this. The Tribunal can see nothing wrong with the Respondent putting people with genuinely interchangeable skills into the same pool. The Respondent wanted to retain the best staff, as it saw them via the scoring matrix, irrespective of the part of the business they worked in or their age.

107. The Claimant points out that the younger staff on the telephone advice service did not have the same experience and skills as she had. That misses the point of what the Respondent was doing in the redundancy selection process. It was to decide which staff you need to take the service forward and this was reflected in the criteria used and the scores given.

108. The Claimant also states that she believes Ms Davis wanted her team as Advice Session Supervisors and that she was stronger than Mrs Jones in achieving this. Two points can be made about this. First, even if it was correct - it is not to do with age, but the personal preference of a Manager to retain her staff. Secondly, there was no evidence before us that this had been the case. Ms Davies was not challenged that she only wanted younger staff. Indeed, she was not challenged that she just wanted "her team" to be retained.

109. Another point the tribunal makes is that the Claimant has not pursued her discrimination claims with any great enthusiasm. Indeed her Witness Statement says: "I make this statement in connection with my claim for unfair dismissal", which is how we believe she really views this claim. We hesitate to say so, but the age discrimination claim almost appears as an add-on or an afterthought. That said, the claim has been made and we have assessed the evidence in the light of the relevant legal principles and the issues as set out. We conclude that there is simply no evidence from which we could conclude, at the first stage in our analysis, that the Claimant's selection for redundancy amounted to direct age discrimination. The process used was applied to all employees and there has been no evidence that there was subjective marking such as to ensure that the younger employees were retained and the older ones made redundant.

<u>Direct Disability Discrimination</u>

110. Looking at Issue 6, the question for us is whether the Claimant can show facts from which we could conclude, in the absence of an explanation from the Respondent, that she was treated less favourably because of her disability than someone who does not have that disability? She relies on the same comparators as for her age discrimination claim. The treatment complained of is the dismissal. Put simply, was the difference in treatment between those employees and the Claimant because of her disability?

112. The Tribunal has struggled to understand the Claimant's case about this. She accepted that her absence in 2016 had been discounted in the selection process. In cross-examination, she suggested that her selection was because she had told Mrs Jones that she would require more time off for hospital appointments. This had not been put to Mrs Jones in the Claimant's questioning of her.

113. In response to questions from the Tribunal, the Claimant said: "I believe they got together and decided I had to go because of my condition" and then gave the example of how Mrs Jones had looked when she was told about hospital appointments and the Claimant needing time off for them.

114. In fact the point about hospital appointments is in the Claimant's Witness Statement, she says that Mrs Jones seemed perturbed about them. Mrs Jones's evidence was that this had not been the case, that the Claimant had taken time off for hospital appointments in the past, this had not been a problem and would not be in the future. There is simply no evidence before us that there was a joint motivation on the part of the Managers to mark the Claimant down because of her disability.

115. In fact, the evidence before us suggests that the managers had no issues around the Claimant's condition and it had not been a concern for them in the past, other than in relation to her wellbeing. An example of this was when she was referred to Occupational Health to see if her work was having an adverse effect on her condition. This had been at the Manager's instigation. Further, the Claimant had had no disability related absence in the previous year and had been off for two weeks with stress. The Claimant accepted that she tended to downplay her condition and its effects.

116. The Claimant put forward an argument that the stress caused to her at work by the two Managers not getting on had an impact on her condition which affected her performance and therefore her scoring. There are a number of points to be made about this. First, we have no medical evidence that the stress the Claimant says she was under was linked to her disability in any way. Secondly, there is no evidence that the Respondents knew at the time that there was a medical link between stress, the Claimant's condition and her performance. The Respondent knew that the Claimant had had stress: Mrs Jones has been concerned about the Claimant working in the early hours of the morning, having insomnia and had advised her to go and see her GP. What Mrs Jones did not know, nor did the management team, was that the stress the Claimant had was the result of her disability, or that it was work related, or that work-related stress had an adverse effect on her condition to the extent that it affected her performance. Furthermore, by late 2016 onwards there was no indication that the Claimant was unwell, she was working normally and had actually taken on extra hours.

117. The Respondent says that it did not have knowledge that the Claimant was suffering with work-related stress and that this was linked to her disability. We accept that evidence. In fact the Claimant herself told us that she got on with her job, did not complain and that she thrived on stress. What the Respondent had been aware of was a two week absence for stress in 2016. There is no evidence at all that the Claimant's condition played a part in the selection process

or that the Managers who conducted it consciously or unconsciously marked her as they did because of concerns about hospital appointments and time off due to her condition.

118. There is simply no evidence from which we could conclude that the managers scored the claimant as they did with the intention of dismissing her because of her disability or because she would need time off for hospital appointments. The claim for direct discrimination because of the protected characteristic of disability must fail.

Failure to comply with the duty to make reasonable adjustments

119. The Claimant's case to Employment Judge Algazy at the Case Management Preliminary Hearing was that there was a failure to comply with the duty in relation to the Money Advice Service training. The Claimant says that she should have been given more time and a suitable desk and chair to work at when she was doing this training.

120. The practice criterion or provision (PCP) was to require the Claimant to complete the Money Advice Service training before the end of March 2017. The Claimant says that this put her under a substantial disadvantage as she was not given more time to do the training and a suitable desk and chair to do it at.

121. All staff were required to do this online training and given from January until the end of March to do it. The Claimant actually completed this training in good time. However the crux of this is that the Claimant admitted, when asked by the Tribunal, that she had not told anyone she needed more time or that she needed a suitable desk and chair to work at in order to do the training.

122. This was confirmed by the Training Officer, Miss Grosvenor who gave evidence for the Claimant. The Claimant had not asked for any adjustments to enable her to do the MAS Training. As far as the Respondent knew, the Claimant had no difficulties in doing the training due to her disability and did not inform the Managers about any disadvantage or a need to make adjustments to enable her to do this training. The Respondent simply could not and did not know that the PCP to do the MAS training by the end of March 2017 would put the Claimant at a substantial disadvantage and that reasonable adjustments were needed to obviate that disadvantage. Following the requirement in Paragraph 20 of Schedule 8 Equality Act for an employer to know that a disabled person is likely to be placed at a disadvantage and the Alam case - this claim must fail.

123. In the course of giving her evidence, the Claimant told us about not being able to take proper breaks and that the Respondent failed to carry out recommendations on the Occupational Health Report, it had obtained, which identified that she was fit to work, but needed to balance life and work, and take lunch and drinks breaks.

124. This was not in the list of allegations and issues identified with Employment Judge Algazy. However, because the Claimant has raised it and the Tribunal can deal with it briefly, we have done so. The Claimant says that Ms. Davies had enabled her and checked that she took regular breaks. She said that this did not continue and that she was unable to take breaks when she was

line managed by Mrs Jones.

125. The impression the Tribunal has from the evidence we have heard is that opportunities were there to take lunch breaks but the Claimant did not do so because of her own desire to support the volunteers and to get the work done. It is very much to her credit that she did so but meant that she didn't always take her breaks. This is a very different situation to being prevented from taking her breaks by the Respondent. As had happened under Ms. Davies, the Tribunal is of the view that if the Claimant had told Mrs Jones that she needed to take breaks, cover would have been provided for her to do so. She did not tell the Respondent that this was not happening and has only made complaint to us after she was made redundant.

126. The other difficulty for the Claimant is that this alleged failure to comply with the duty to make reasonable adjustments relates to a period before December 2016 and is therefore out of time. We have not been told why it was not possible to bring such a claim within time. Accordingly, we have not accepted this element of the claim but, for the sake of completeness, give our view about the allegation above. Essentially, much of what the Claimant complains of, both disability related and otherwise, has only come about because she was dismissed. That is the nub of her claim to us, as she herself recognized in her witness statement.

Employment Judge Cocks
22 August 2018