Case Numbers: 3201163/2017, 3201402/2017 & 3201404/2017

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EMPLOYMENT TRIBUNALS

Claimants: **1. Mrs C Rogers**
2. Mrs S Darby
3. Mr M Osmani

Respondent: **London Borough of Barking & Dagenham**

Heard at: **East London Hearing Centre**

On: **30-31 October 2018, 1-2 & 6 November 2018**

Before: **Employment Judge Brown**
Members: **Ms L Conwell-Tillotson**
Mr D Ross

Representation

Claimants: Mr N Purchase (Counsel)

Respondent: Mr S Cheves (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that: -

1. **The Respondent unfairly dismissed all the Claimants.**

2. **The Respondent wrongfully dismissed the Third Claimant, Mr Osmani, when it failed to give him 12 weeks' notice to terminate his employment.**

3. **The Respondent subjected the Second Claimant, Mrs Darby, to less favourable treatment of a part-time worker and discrimination arising from disability when Mr Otitoju told her he did not want part-time workers in the new structure.**

4. **The Respondent subjected the First and Second Claimants, Mrs Rogers and Mrs Darby, to less favourable treatment of part-time workers by giving them low scores in the selection exercises in February and May 2017 and, therefore, not offering them PSO roles in the February and May 2017 processes, and dismissing them.**

5. **The Respondent subjected the Second Claimant, Mrs Darby, to discrimination arising from disability by giving her low scores in the selection exercises in February and May 2017 and, therefore, not offering her PSO roles in the February and May 2017 processes and dismissing her.**

6. **The First Claimant, Mrs Rogers, was not a disabled person at the relevant times.**

7. **The Respondent did not subject Mrs Rogers to Direct Disability Discrimination by Association.**

8. **The Respondent subjected the Third Claimant, Mr Osmani, to direct race discrimination when it did not offer him a position as a Property Services Officer in May 2017, when there was direct race discrimination in the marking of Mr Osmani's written test.**

9. **The Respondent subjected the Third Claimant, Mr Osmani, to indirect race discrimination in the written test part of the February 2017 ring fenced selection exercise when it applied a PCP of selection by interview and written test, but did not allow access to an online dictionary during the written test.**

10. **The Claimant's other claims failed.**

REASONS

Preliminary

1 The Claimants were all employed as Housing Officers by the Respondent, a Local Authority, until their dismissals in 2017.

Mrs Rogers – the First Claimant – Claims and Issues

2 Mrs Cherie Rogers, the First Claimant, brings complaints of direct disability discrimination, failure to make reasonable adjustments, less favourable treatment because of part-time work and unfair dismissal against the Respondent. In her disability discrimination complaint, she relies on an impairment to her hearing and/or balance and/or tinnitus. Mrs Rogers also brings associative disability discrimination complaints, relying on her son's disability and her husband's disability.

3 The Respondent admits that both Mrs Rogers' son and Mrs Rogers' husband were disabled people at all material times. It does not admit that Mrs Rogers was a disabled person at the relevant times. Specifically, the Respondent concedes that Mrs Rogers has an impairment to her hearing, which has effects on her balance and causes tinnitus, which will persist long term, but it does not concede that these amount to substantial adverse effects on Mrs Rogers' ability to carry out normal day to day

activities.

4 The issues in Mrs Rogers' case were agreed between the parties and were as follows:

Time Limits

4.1 Was any part of the claim presented later than the period of three months beginning with the date on which the act was done together with the extension of time for the purposes of early conciliation?

4.2 If so, did the act form part of conduct extending over a period which ended 'in time'?

4.3 If not, is it just and equitable to consider the complaint?

Claimant's Disability

4.4 Was the Claimant's impairment to her hearing and/or balance and/or tinnitus an impairment which had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities?

Direct Disability Discrimination

4.5 Did the Respondent have knowledge of the Claimant's alleged disability?

4.6 Did the Respondent treat the Claimant less favourably because of her disability than it treated or would have treated employees who did not have her disability?

4.7 The Claimant relies on the following alleged acts of less favourable treatment:

4.7.1 The Respondent's decision in February 2017 not to offer the Claimant a position as a Property Services Officer after the ring-fenced redundancy selection process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Hakeem Osinaike, Toby Hartigan-Brown and Nicki Lane. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

4.7.2 The Respondent's decision in May 2017 not to offer the Claimant a position as a Property Services Officer after the redeployment process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Toby Hartigan-Brown, Nicki Lane and Michelle Priest. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

4.7.3 The Respondent's decision not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 53 of the Grounds of Claim. This decision was communicated in a letter dated 16 June 2017 from Claire Symonds, the Respondent's Chief Operating Officer;

4.7.4 The dismissal of the Claimant on 7 July 2017.

Direct Disability Discrimination by Association

4.8 Did the Respondent treat the Claimant less favourably because of her son's disability than it treated or would have treated others?

4.9 Did the Respondent treat the Claimant less favourably because of her husband's disability than it treated or would have treated others?

4.10 The Claimant relies on the following alleged acts of less favourable treatment:

4.10.1 The Respondent's decision in February 2017 not to offer the Claimant a position as a Property Services Officer after the ring-fenced redundancy selection process;

4.10.2 The Respondent's decision in May 2017 not to offer the Claimant a position as a Property Services Officer after the redeployment process;

4.10.3 The Respondent's decision not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 53 of the Grounds of Claim;

4.10.4 The dismissal of the Claimant on 7 July 2017.

Failure to Make Reasonable Adjustments

4.11 Were the following provisions, criteria or practices of the Respondent?

4.11.1 Interviewing employees as part of the Respondent's ring-fenced redundancy selection process;

4.11.2 Interviewing employees for roles as part of the Respondent's redeployment policy/process;

4.11.3 When interviewing employees under 3.10.1 and 3.10.2 above, speaking at the volume at which the interviewers spoke;

4.11.4 Allowing interviews under 3.10.1 and 3.10.2 above to be interrupted by members of staff entering the interview room after the interview had started;

4.11.5 Requiring employees to take tests on computers as part of the interview process under 3.10.1 and 3.10.2 above, and requiring employees to take the test in a room with others also taking the test;

4.11.6 Instructing employees to wait outside the interview room in an open plan office if the interviews held under 3.10.1 and/or 3.10.2 above were running behind schedule.

4.12 If so, did any or all of the above PCPs place the Claimant at a substantial disadvantage compared with persons who were not disabled, in particular because she was unable and/or found it difficult to perform at her best because of hearing difficulties, balance difficulties and/or tinnitus?

4.13 If so, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage, namely:

4.13.1 Waiving the need for an interview and relying on its knowledge of the Claimant's work and abilities; or

4.13.2 Ensuring that the interviewers spoke loudly when interviewing the Claimant; and/or

4.13.3 Ensuring that no-one interrupted the Claimant's interview by entering the room after the interview had begun; and/or

4.13.4 Arranging for the Claimant to take the tests alone in a quiet room; and/or

4.13.5 Allowing the Claimant additional time to take the tests; and/or

4.13.6 Providing a quiet place for the Claimant to wait before interviews; and/or

4.13.7 Giving the Claimant the opportunity to attend an interview for the role of Property Services Officer with some or all of the adjustments set out in 3.12.2 to 3.12.6 above in place before dismissing the Claimant.

4.14 If the PCPs in paragraph 3.10 above are not made out, was the open plan waiting area for employees waiting for an interview a physical feature?

4.15 If so, did this physical feature put the Claimant at a substantial disadvantage compared with persons who were not disabled, in particular because it meant that she was unable and/or found it difficult to perform at her best during the interview because of hearing difficulties, balance difficulties and/or tinnitus?

4.16 If so, did the Respondent take such steps as it was reasonable to take to

avoid the disadvantage, namely providing the Claimant with a quiet place to wait before interview?

4.17 Has the Respondent shown that at the material times it did not know and could not reasonably have been expected to know that the Claimant had the disability and was likely to have been place at the disadvantage?

Unfavourable Treatment because of Part-Time Work

4.18 Did the Respondent treat the Claimant less favourably than a comparable full-time worker? The Claimant relies on the following alleged detriments:

4.18.1 The Respondent's decision in February 2017 not to offer the Claimant a position as a Property Services Officer after the ring-fenced redundancy selection process;

4.18.2 The Respondent's decision in May 2017 not to offer the Claimant a position as a Property Services Officer after the redeployment process;

4.18.3 The Respondent's decision not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 53 of the Grounds of Claim;

4.18.4 The dismissal of the Claimant on 7 July 2017.

4.19 Can any of the above acts be justified on objective grounds?

Unfair Dismissal

4.20 What was the Respondent's reason for dismissing the Claimant?

4.21 Was the Respondent's reason for dismissing the Claimant a potentially fair reason for the purposes of section 98 Employment Rights Act 1996?

4.22 If so, did the Respondent act reasonably in treating any such reason as a sufficient reason for dismissing the Claimant? In particular:

4.22.1 Did the Respondent act reasonably in selecting the Claimant for redundancy based solely on a written test and interview?

4.22.2 Did the Respondent take reasonable steps to avoid dismissing the Claimant by reason of redundancy?

4.22.3 Did the Respondent comply with its policies?

Mrs Darby – the Second Claimant – Claims and Issues

5 Mrs Sandra Darby, the Second Claimant, brings complaints of direct disability discrimination, discrimination arising from disability, harassment relating to disability,

less favourable treatment because of part-time work and unfair dismissal. The Respondent admits that Mrs Darby's shoulder condition and the limited use of her right arm and hand constitute a disability for the purposes of the Equality Act 2010 and that she was a disabled person at all relevant times.

6 Again, the issues had been agreed between the parties in Mrs Darby's case and they were as follows:

Time Limits

6.1 Was any part of the claim presented later than the period of three months beginning with the date on which the act was done together with the extension of time for the purposes of early conciliation?

6.2 If so, did that act form part of conduct extending over a period which ended 'in time'?

6.3 If not, is it just and equitable to consider the complaint?

Direct Disability Discrimination

6.4 Did the Respondent treat the Claimant less favourably because of her disability than it treated or would have treated employees who did not have her disability?

6.5 The Claimant relies on the following alleged acts of less favourable treatment (all paragraph references are to the Grounds of claim):

6.5.1 Akin Otitoju's repeated questioning of the Claimant about her shoulder condition and Mr Otitoju's comment that the Claimant would be "gone soon" (paragraph 14). Mr Otitoju approached the Claimant near her car and asked her about her shoulder around October 2016 and he made the comment about the Claimant being "gone soon" a few weeks before her first interview during the redundancy process, around January 2017;

6.5.2 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Hakeem Osinaike, Toby Hartigan-Brown and Nicki Lane. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

6.5.3 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Toby Hartigan-Brown, Nicki Lane and Michelle Priest. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

6.5.4 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 37. This decision was communicated in a letter dated 16 June 2017 from Claire Symonds, the Respondent's Chief Operating Officer;

6.5.5 The dismissal of the Claimant on 23 June 2017.

Discrimination Arising from Disability

6.6 Was the fact that the Claimant worked part-time something which arose in consequence of her disability?

6.7 Did the Claimant wish to reduce her hours further to 2.5 days per week? If so, was this something which arose in consequence of her disability?

6.8 Was the Claimant treated unfavourably because she worked part-time and/or because she wished to work 2.5 days a week? The Claimant relies on the following alleged acts of unfavourable treatment:

6.8.1 Akin Otitoju's comment that he did not want people to work part-time in the new structure because of the team's workload (paragraph 15). Mr Otitoju made this comment in the second half of 2016; the Claimant believes it was made around September or October 2016;

6.8.2 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process;

6.8.3 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment process;

6.8.4 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 37;

6.8.5 The dismissal of the Claimant on 23 June 2017.

6.9 Were any of the acts set out above proportionate means of achieving a legitimate aim?

Harassment Relating to Disability

6.10 Did the Respondent engage in unwanted conduct related to the Claimant's disability and did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

6.11 The Claimant relies on the following alleged acts of harassment:

6.11.1 Akin Otitoju's repeated questioning of the Claimant about her shoulder condition and Mr Otitoju's comment that the Claimant would be "gone soon", as set out in paragraph 14. As above, Mr Otitoju approached the Claimant near her car and asked her about her shoulder around October 2016 and he made the comment about the Claimant being "gone soon" a few weeks before her first interview during the redundancy process, around January 2017;

6.11.2 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process;

6.11.3 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment process.

6.11.4 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 37;

6.11.5 The dismissal of the Claimant on 23 June 2017.

Unfavourable Treatment because of Part-Time Work

6.12 Did the Respondent treat the Claimant less favourably than a comparable full-time worker? The Claimant relies on the following alleged detriments:

6.12.1 Akin Otitoju's comment that he did not want people to work part-time because of the team's workload in the new structure (paragraph 15). As above, Mr Otitoju made this comment in the second half of 2016; the Claimant believes it was made around September or October 2016;

6.12.2 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process;

6.12.3 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment process;

6.12.4 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 37;

6.12.5 The dismissal of the Claimant on 23 June 2017.

6.13 Can any of the above acts be justified on objective grounds?

Unfair Dismissal

6.14 What was the Respondent's reason for dismissing the Claimant?

6.15 Was the Respondent's reason for dismissing the Claimant a potentially fair reason for the purposes of section 98 Employment Rights Act 1996?

6.16 If so, did the Respondent act reasonably in treating any such reason as a sufficient reason for dismissing the Claimant? In particular:

6.16.1 Did the Respondent act reasonably in selecting the Claimant for redundancy based solely on a written test and interview?

6.16.2 Did the Respondent take reasonable steps to avoid dismissing the Claimant by reason of redundancy?

Mr Osmani – the Third Claimant – Claims and Issues

7 Mr Muhamet Osmani, the Third Claimant, brings complaints of direct race discrimination, indirect race discrimination, harassment relating to race, unfair dismissal and wrongful dismissal.

8 In his race discrimination claim, Mr Osmani relies on the fact that he is a Kosovan national who came to the UK as a refugee in 1998. He relies on his Kosovan nationality and/or national origins and/or East European nationality and/or national origins and he also relies on his non-UK nationality and/or non-UK national origins.

9 Once more, the issues in his case were agreed between the parties and they were: -

Time Limits

9.1 Was any part of the claim presented later than the period of three months beginning with the date on which the act was done together with the extension of time for the purposes of early conciliation?

9.2 If so, did that act form part of conduct extending over a period which ended 'in time'?

9.3 If not, is it just and equitable to consider the complaint?

Direct Race Discrimination

9.4 Did the Respondent treat the Claimant less favourably because of his nationality and/or his national origins than it treated or would have treated

employees who were not Kosovan nationals and/or who did not have Kosovan national origins?

9.5 In the alternative, did the Respondent treat the Claimant less favourably because of his nationality and/or his national origins than it treated or would have treated employees who were UK nationals and/or had national origins in the UK?

9.6 In the further alternative, did the Respondent treat the Claimant less favourably because of his nationality and/or his national origins than it treated or would have treated employees who were not nationals of an Eastern European country and/or who did not have Eastern European national origins?

9.7 The Claimant relies on the following alleged acts of less favourable treatment (paragraph refences below are to the Grounds of Claims):

9.7.1 Hakeem Osinaike's practice of mocking the Claimant by pretending he had not understood what the Claimant had said and requiring him to repeat himself unnecessarily as described in paragraph 8? This was a frequent occurrence and the Claimant cannot remember when it last happened;

9.7.2 Hakeem Osinaike's comment that the Claimant had come from "the back of a lorry" as set out in paragraph 9. The Claimant cannot remember exactly when this happened, but believes it was either in 2015 or 2016;

9.7.3 Hakeem Osinaike's comment that the Claimant could not speak English and so was lucky to have his job as set out in paragraph 10. This comment was made around July 2014;

9.7.4 Akin Otitoju's comment to the Claimant in December 2016 that he was worried about how the Claimant would perform in his interview because of his English as set out in paragraph 22;

9.7.5 Akin Otitoju's comment in or around February 2017 that the Claimant had done badly at interview because his English was not very good as set out in paragraph 26;

9.7.6 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Hakeem Osinaike, Toby Hartigan-Brown and Nicki Lane. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

9.7.7 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment

process. This process consisted of an interview and written test. A panel of four interviewed the Claimant, namely Akin Otitoju, Toby Hartigan-Brown, Nicki Lane and Michelle Priest. This panel was chaired by Akin Otitoju. The written test was marked by Akin Otitoju;

9.7.8 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 31. This decision was communicated in a letter dated 16 June 2017 from Claire Symonds, the Respondent's Chief Operating Officer;

9.7.9 The dismissal of the Claimant on 10 July 2017.

Harassment Relating to Race under section 26 EA

9.8 Did the Respondent engage in unwanted conduct related to the Claimant's nationality and/or his national origins, and did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

9.9 The Claimant relies on the following alleged acts of harassment:

9.9.1 Hakeem Osinaike's practice of mocking the Claimant by pretending he had not understood what the Claimant had said and requiring him to repeat himself unnecessarily as described in paragraph 8. As above, this was a frequent occurrence and the Claimant cannot remember when it last happened;

9.9.2 Hakeem Osinaike's comment that the Claimant had come from "the back of a lorry" as set out in paragraph 9. As above, the Claimant cannot remember exactly when this happened, but believes it was either in 2015 or 2016;

9.9.3 Hakeem Osinaike's comment that the Claimant could not speak English and so was lucky to have his job as set out in paragraph 10. This comment was made around July 2014;

9.9.4 Akin Otitoju's comment to the Claimant in December 2016 that he was worried about how the Claimant would perform in his interview because of his English as set out in paragraph 22;

9.9.5 Akin Otitoju's comment in or around February 2017 that the Claimant had done badly at interview because his English was not very good as set out in paragraph 26;

9.9.6 The Respondent's decision in February 2017 not to offer the Claimant a position as Property Services Officer after the ring-fenced redundancy selection process;

9.9.7 The Respondent's decision in May 2017 not to offer the Claimant a position as Property Services Officer after the redeployment process;

9.9.8 The Respondent's decision in June 2017 not to offer the Claimant one of the vacant Property Services Officer roles as set out in paragraph 31;

9.9.9 The dismissal of the Claimant on 10 July 2017.

Indirect Race Discrimination under section 19 EA

9.10 When employees' current roles were to be deleted and were deemed by the Respondent to have a match of between 50% and 64% with the duties of a role in a new structure, did the Respondent apply a policy, criterion or practice of selecting applicants for the new roles solely by way of a ring-fenced interview and written test? ("PCP1")

9.11 When deciding whether to redeploy an employee at risk of redundancy to an internal vacancy, did the Respondent apply a provision, criteria or practice of basing its decision solely on the employee's performance at an interview and in a written test? ("PCP2")

9.12 Did the Respondent apply, or would the Respondent have applied, PCP1 and PCP2 to Kosovan nationals and/or those of Kosovan origin and to non-Kosovan nationals and/or those not of Kosovan origin?

9.13 Did the relevant PCP put Kosovan nationals and/or those of Kosovan origin at a particular disadvantage when compared with nationals of English-speaking countries?

9.14 Did the relevant PCP put the Claimant at that disadvantage?

9.15 Can the Respondent show that the relevant PCP is a proportionate means of achieving a legitimate aim?

Unfair Dismissal

9.16 What was the Respondent's reason for dismissing the Claimant?

9.17 Was the Respondent's reason for dismissing the Claimant a potentially fair reason for the purposes of section 98 Employment Rights Act 1996?

9.18 If so, did the Respondent act reasonably in treating any such reason as a sufficient reason for dismissing the Claimant? In particular:

9.18.1 Did the Respondent act reasonably in selecting the Claimant for redundancy based solely on a written test and interview?

9.18.2 Did the Respondent take reasonable steps to avoid dismissing the Claimant by reason of redundancy?

Wrongful Dismissal

9.19 Did the Respondent give the Claimant the correct notice of termination in accordance with his employment contract?

The Tribunal Hearing

10 The Tribunal heard evidence from each of the three Claimants. It also heard evidence from Steve Davies, a GMB Union shop steward who was a Housing Officer at the same time as the Claimants, and was appointed as a Property Services Officer and then assimilated into a Landlord Services Officer post.

11 For the Respondent, the Tribunal heard evidence from the following witnesses: Hakeem Osinaike, former Operational Director of Housing Management at the Respondent; Jonathon Woodhams, Line Manager for Mr Osmani between February 2017 and Mr Osmani's dismissal; Michelle Priest, Senior HR Adviser; Nicki Lane, Resident Involvement Manager and member of the relevant interview panels; Grant Rome, Landlord Services Manager; Stuart Beard, Landlord Services Manager and line manager for both Mrs Darby and Mrs Rogers between 2016 and 2017; Peter Watson, Group Manager, Human Resources Business Partners and Advisory Services, who was the HR Business Partner for Housing, Environment and Central Services at the time of the matters in question; Toby Hartigan-Brown, Service Manager and member of the two relevant interview panels and Akin Otitoju, Landlord Service Manager who was the group manager for Housing Management responsible for the restructure of the housing management team at the relevant time. Mr Otitoju managed the Claimant's line managers at the relevant time.

12 The Tribunal had a two-volume bundle of documents to which some documents were added during the hearing. Both parties made submissions, including written submissions on behalf of the Claimants. The Tribunal reserved its decision and set a provisional remedy hearing date for 18 and 19 March 2019. The Claimants prepared a chronology and cast list.

Findings of Fact

Mrs Rogers – The First Claimant

13 Mrs Cherie Rogers was employed by the Respondent for 37 years from 1980 until 7 July 2017. She worked as a Housing Officer for 27 years from 1990 until the date of her dismissal.

14 In 2014, the Claimant was diagnosed with a tumour called a vestibular schwannoma. That tumour was not cancerous but is in Mrs Rogers' brain. Mrs Rogers told the Tribunal that she suffers from hearing loss in her right ear, tinnitus and dizziness and balance problems. She told the Tribunal that she can only hear faintly in her right ear. She also told the Tribunal that her tinnitus is a ringing sound in her right ear, which is always there, but which fluctuates in severity. Her evidence was

that her tinnitus becomes worse when she is stressed and anxious and when there is background noise. Mrs Rogers also told the Tribunal that she feels unsteady or dizzy at least once a week, sometimes more. Her spells of dizziness and unsteadiness are often worse in the morning, but then improve through the day. Her balance problems also worsen when she is stressed and anxious and following certain movements such as turning or twisting.

15 Mrs Rogers provided NHS information to the Tribunal on vestibular schwannomas; these are also called acoustic neuromas. The NHS information says:

> "Acoustic neuromas grow on the nerve used for hearing and balance, which can cause problems such as hearing loss and unsteadiness …
>
> Any symptoms tend to develop gradually and often include:
>
> - hearing loss … that usually only affects one ear
> - tinnitus …
> - vertigo …" (pgs.955 to 956)

16 Mrs Rogers disclosed her GP records. The GP record for 30 March 2010 records that Mrs Rogers was complaining of acute vertigo which started at night and continued on waking; that she felt lightheaded and unsteady, especially when looking down (p.343).

17 In July 2012 the First Claimant went to her GP because of symptoms of hearing loss (p.343).

18 In June 2013 the GP records state that the First Claimant was complaining of reduction in hearing in both ears for a year, which was worse over the previous two months with associated ringing in both ears and occasional dizziness (p.343).

19 On 26 March 2014 the First Claimant was seen at Queens Hospital by Mrs Jabin Thaj, speciality doctor to the ENT department. Dr Thaj wrote to the First Claimant's GP after the appointment. The letter said:

> "Diagnosis: unilateral hearing loss – review with MRI results
>
> I reviewed the above patient in the ENT clinic today. … she was referred for MRI scan in view of her right sided unilateral hearing loss and tinnitus. The MRI has been reported as small focus of right T2 low signal intensity within the distal end of the left IAM …
>
> Her tinnitus is bothering her so I have referred her to the tinnitus re-training therapist and I will also request a repeat MRI without contrast …" (p.339).

20 On 1 July 2014 the First Claimant was seen in the ENT clinic at Queens Hospital again. Dr Shahid Kamal, Locum ENT Middle Grade, sent a letter to the First Claimant's GP as follows:

> "… Her hearing is still low on the right side … She gets tinnitus on the right side and sometimes on the left as well but no earache or discharge…
>
> Her audiogram from today showed mild conductive hearing loss on the right side, which may indicate noise induced hearing loss, however she has no history of loud noise exposure in the last few years …
>
> The repeat MRI without contrast was reported as a possible small intracanalicular schwannoma …
>
> I have discussed the case with Mr Kumar and have gone through the images and we could not see any gross pathology in MRI …" (pgs.939 to 940).

21 On 29 July 2014, Mrs Rogers visited her GP because she had awoken with dizziness. The GP record says as follows:

> "Labyrinthitis .. awoke this morning "swimming" room "spinning" bit better since but constant low grade vertigo, nausea, feels a bit off balance." (p.342)

22 Mrs Rogers' GP notes record that she visited the GP again complaining of dizziness in October 2014 and June 2015 (pgs.341 to 342).

23 On 24 December 2015, Mr J R Pollock, Consultant Neurosurgeon wrote to the First Claimant's GP following a review of the First Claimant in his clinic. Mr Pollock wrote that the First Claimant still had "no left sided hearing symptoms" and that an audiogram carried out on 2 July 2014 and a previous audiogram of 30 August 2013 showed "moderate high tone hearing loss on the right" side, but unimpaired hearing on the left. Mr Pollock said that the First Claimant's MRI scans demonstrated a very tiny vestibular schwannoma which was no bigger than 5mm in maximum diameter. He said that there was no progression on this from earlier scans. Mr Pollock said that he had strongly reassured the First Claimant that the outlook was excellent and it seemed very unlikely that any active treatment would be needed (pgs.934 to 935).

24 On 15 May 2017, the First Claimant visited her GP again regarding tinnitus. The GP's notes record:

> "Tearful – recently informed of upcoming redundancy (July) and now finding continuing to work extremely stressful and causing anxiety worsening of hearing/tinnitus problem" (p.341).

25 Mrs Rogers was referred to occupational health and was seen on 1 June 2017 by Dr John Gration Occupational Physician (pgs.586 to 587). In Dr Gration's report arising out of his consultation with the First Claimant he said:

> "She explained that she has kept her managers advised of her difficult benign tumour (called a "Schwannoma which is in the area of her inner ear) condition. Although she did not have scan/report details with her today, she explained that this was diagnosed in early 2015 after she had presented to her doctor with difficulties with hearing, balance and tinnitus. These symptoms have continued.

…

> My impression is that Mrs Rogers' health condition may well fall within the Equality Act as disability… She does find that her symptoms can worsen if she is anxious, and at work she has had to make some allowance/adjustment, e.g. by explaining to clients on occasion when visiting them that her hearing in her right ear is impaired. This does not usually cause her a significant difficulty unless clients themselves have language or communication problems."

26 The First Claimant has said in her witness statement that Mr Pollock, her Neurosurgical Consultant, does not consider that her hearing loss and tinnitus are caused by her vestibular schwannoma because vestibular schwannoma is on the left side, but her hearing loss and tinnitus are on her right side.

27 In her witness statement, Mrs Rogers told the Tribunal that her hearing loss and tinnitus in her right ear can make it difficult for her to have conversations with people when there is background noise, such other people talking, phones ringing, lots of people typing, or traffic. She said that, when there is background noise, she often struggles to hear people, even when they speak up. The First Claimant said that her tinnitus could be really distracting, making it hard to concentrate. Mrs Rogers told the Tribunal that the office in which she worked was open plan and, when it was busy and there was a lot of background noise, she would struggle to hear people speak. Managers who were about 20 feet away would start to speak to her and she would say, "Wait I can't hear you," and walk to their desks so that she could hear them.

28 The First Claimant told the Tribunal that, when she feels dizzy and struggles with her balance, she does not feel safe driving. If she needed to drive at work, she would ask a colleague to drive, although usually the tenants' properties were within walking distance. In this regard, in the occupational health report, Dr Gration said:

> "… she says that although she has largely continued to drive, if her symptoms are worse (and they can vary she has found) and she does not feel well enough to drive, she has on occasion asked a colleague to drive." (p.586)

If the First Claimant felt dizzy she would also ask a colleague to accompany her on property visit.

29 On the evidence, the Tribunal found that the First Claimant's audiograms recorded her as having mild conductive hearing loss on the right side on 31 July 2014, p.939. Previous audiograms carried out on 30 August 2013 "show moderate high tone hearing loss on the right but unimpaired hearing on the left". The medical reports therefore showed that the Claimant's had been tested as having, at best, "mild" and, at worst, "moderate" high tone hearing loss in her right ear, but no hearing loss in her left ear. This was not consistent with the First Claimant's evidence that she can only hear faintly in her right ear. The Tribunal preferred the medical evidence on hearing loss to the Claimant's evidence.

30 The Tribunal also accepted that the First Claimant experiences tinnitus. It accepted that she experiences dizziness. The First Claimant has a schwannoma on the left side, but this is clinically non-symptomatic.

31 The Respondent conceded that the First Claimant has impairments and the Tribunal found, likewise, that the Claimant had impairments of hearing loss, tinnitus and dizziness, at all material times.

32 However, on the First Claimant's own evidence, the Tribunal did not find that the hearing loss, dizziness and tinnitus had a more than minor effect on her ability to carry out normal day to day activities. The First Claimant described being unable to hear in a busy office; for example, being unable to hear managers speaking 20 feet away in a busy noisy office. The Tribunal did not find that this represented more than a minor impairment to hearing. It was unsurprising that someone would find it difficult to hear clearly in a noisy open plan office, particularly where people were speaking from a distance of 20 feet.

33 While the First Claimant told the Tribunal that her tinnitus could be really distracting, making it hard to concentrate, the First Claimant gave little evidence of this in her witness statement. The majority of her evidence was with regard to hearing difficulties.

34 The First Claimant continued to work despite her tinnitus and hearing problems. She was not referred to Occupational Health about her hearing loss, tinnitus or dizziness at any time before May/June 2017.

35 With regard to the First Claimant's dizziness, the First Claimant told the Tribunal that, occasionally, she felt unable to drive. The Occupational Health report also recorded this, but said that the Claimant had largely continued to drive. The First Claimant told the Tribunal that she felt dizzy once a week (paragraph 37 of her witness statement).

36 The Tribunal found that occasional inability to drive was not a more than minor effect on the First Claimant's ability to carry out normal day to day activities. The First Claimant continued to carry out all her work activities. Many people might experience occasional dizziness for a range of reasons, including symptoms of viruses, which people might experience regularly during the winter months, or tiredness caused by occasional poor sleep. If they can continue to work and carry out other normal day to day activities, this does not amount to a disability.

37 The Tribunal concluded, on all the evidence, that Mrs Rogers was not a disabled person at the relevant times by reason of her hearing loss, tinnitus and balance problems.

Mrs Darby – the Second Claimant

38 Sandra Darby worked for the Respondent from 2003 until 23 June 2017. From 2006 until the date of her dismissal, she worked as a Housing Officer. The Respondent has conceded that Mrs Darby was disabled at all material times. Due to her disability, Mrs Darby reduced her hours of work to 28 hours per week in 2015. The Respondent agreed that the Second Claimant could work Monday to Thursday, so that she could have 3 days off work in a row from Friday to Sunday, in order to rest,

because of her disability.

39 In Mrs Darby's witness statement, Mrs Darby said that her manager at the time, Caroline Porter, had asked Hakeem Osinaike, the Council's Director of Housing, in 2015, whether the Claimant could reduce her hours from full-time to 4 days a week. Mrs Darby told the Tribunal that Caroline Porter had then shown Mrs Darby an email from Hakeem Osinaike which said something along the lines of, "I don't really have a choice in the matter". Mrs Darby said that she remembered feeling upset about this.

40 Mrs Darby told the Tribunal that, despite the Respondent being asked to disclose the email during disclosure in the case, the Respondent said that it could not find the email to which Mrs Darby referred. Instead, an email chain was disclosed from 27 and 28 February 2015 (pgs.701.702).

41 On 27 February 2015, Caroline Porter Senior Housing Officer, had written to Hakeem Osinaike and Grant Rome, saying that she had received a request from Mrs Darby to reduce her working hours by one day from 1 April 2015. She set out Mrs Darby's reasons for asking and said that an occupational health report in September 2017 had advised that Mrs Darby's condition fell under the Equality Act and would be considered a disability. Mrs Porter reported that Mrs Darby had been told recently that the disability was permanent and she had few options left regarding pain relief and that Mrs Darby had therefore requested reduced hours.

42 Mr Osinaike had replied on 28 February 2015 saying:

> "I am very sorry to hear this. I agree that Sandra is an excellent Housing Officer and she deserves all the support that she requires. Even without that, as an employer, we have a responsibility to make reasonable adjustments for her anyway.
>
> I will quite happily agree the reduction in hours but we will need to think more about what day of the week she doesn't work …"

43 The Employment Tribunal found that the email disclosure indicated that Mr Osinaike was genuinely happy to agree the reduction in hours on account of Mrs Darby's disability, at the time.

44 Mrs Darby told the Tribunal that Akin Otitoju, the Respondent's Head of Property Management, often asked the Claimant about her shoulder disability. She told the Tribunal that Mr Otitoju did this so much that it made her feel uncomfortable and self-conscious about her disability in a way that she had not done before. She told the Tribunal in oral evidence that Mr Otitoju asked her about her shoulder in front of colleagues.

45 Mrs Darby also stated that, on one occasion in October 2016, when she had just parked her car and had bent down to retrieve her handbag, she sat up again to find Mr Otitoju's face at the car window, looking at her. When she wound the window down and asked him if everything was okay, he replied by asking how Mrs Darby's shoulder was. She also said that, around the time of the redundancy and redeployment process in January 2017, Mr Otitoju had stopped the Claimant in the office again and asked her

how her shoulder was. Mrs Darby said that she was fed up with Mr Otitoju asking about her shoulder and replied that her shoulder would never be the same again but that it did not affect her work. She then said in a joke something along the lines of, "Is this a ploy to get rid of me?" She told the Tribunal that Mr Otitoju then replied: "Not at this moment but you will be gone soon". She said that she felt shocked by this and slightly intimidated.

46 In oral evidence, in cross-examination, Mrs Darby accepted that Mr Otitoju had originally asked the Claimant about her shoulder out of appropriate managerial concern for her. She said, however, that she became less comfortable with the questioning because her shoulder was never going to change and the questioning felt intrusive. She said that she felt her disability was a confidential matter and should not be discussed in the open plan office.

47 Mr Otitoju told the Tribunal that he did ask Mrs Darby about her shoulder. He said that she had originally mentioned her shoulder disability to him. He therefore asked her about it afterwards. Mr Otitoju said that he had a welfare responsibility for his staff, as Head of Service, and would ask staff about their wellbeing if it was appropriate to do so. He said he was very, very surprised that Mrs Darby was saying that his concerns about her welfare had made her feel uncomfortable. He told the Tribunal that he believed that he had been the last person to know about Mrs Darby's shoulder injury; it was otherwise general knowledge, so that he did not consider it inappropriate to ask her about it in the office.

48 Mr Otitoju was asked about saying the Second Claimant would be "gone soon" and he replied that that was "absolute fantasy."

49 The Tribunal found, on the evidence, that Mrs Darby might have felt slightly uncomfortable, on occasion, when Mr Otitoju asked her about her shoulder. However, she did not give any indication to him that she felt uncomfortable and we accepted that Mr Otitoju was genuinely asking Mrs Darby about her shoulder, out of concern for her welfare, having been told by her about her injury. We accepted Mr Otitoju's evidence that Mrs Darby's colleagues knew about her shoulder injury and we found that there was no way that Mr Otitoju could have known that the Claimant did feel uncomfortable about his questions about her welfare.

50 Mrs Darby told the Tribunal that, in around September or October 2016, she spoke to Mr Otitoju about the upcoming restructure and potential redundancies. Mrs Darby was considering whether to apply for voluntary redundancy. She mentioned this to Mr Otitoju and said that she was finding her current hours too much and that she would like to reduce her hours to two and a half days a week. She told the Tribunal that Mr Otitoju replied that he did not want people to work part-time in the new roles in the proposed restructure, because the workload would be too great. Mrs Darby said that the conversation took place in the meeting room next to Mr Otitoju's office. Mrs Darby said that, after this conversation with Mr Otitoju, she went to Hakeem Osinaike and told him that Mr Otitoju had said that she could not work part-time in the new structure. Mr Osinaike responded: "He can't say that it's against the law," or something along those lines.

51 Mrs Darby said that she then went on to say to Mr Osinaike that a colleague,

Ray Bagley, who had worked part-time in a job share arrangement with Cherie Rogers, was retiring. She suggested that Mrs Rogers and she could share the job after Mr Bagley retired. Mrs Darby told the Tribunal that Hakeem Osinaike then replied, in relation to Mrs Rogers: "But who is to say she will get a job?"

52 Mr Otitoju was cross-examined about Mrs Darby's allegation that Mr Otitoju had said that he did not want part-time workers in the new structure. It was put to Mr Otitoju that he did not want Mrs Darby in the new structure because of her disability and part-time hours. He said that he totally disagreed; the Respondent had policies on disability and that he himself had a disability.

53 Mr Osinaike was cross-examined about not wanting to have part-time workers in the new structure. He said it was absolutely not his view that he did not want part-time workers in the new PSO role. He said that any service area had a budget for staff and the budget allowed the Respondent to employ someone else to cover the remaining full-time hours of a part-time worker's role. He said that, if Mrs Darby had asked to work two and a half days, the request would be made to her immediate managers who would report to Mr Otitoju with proposals about how they could manage the situation and that he would make a decision.

54 Mr Osinaike told the Tribunal that he did not recall any conversations with Mrs Darby about job sharing with another colleague. He did not recall her approaching him about a conversation she allegedly had with Mr Otitoju in 2016.

55 Mr Osinaike was cross-examined about his knowledge of the Claimant's performance in the Housing Officer role. He agreed that he knew that Mrs Darby was a very good Housing Officer. He did not agree that he knew that Mrs Rogers and Mr Osmani were very good Housing Officers. It was not clear how much experience he had had of Mrs Rogers and Mr Osmani in their roles.

56 The Tribunal found that Mr Osinaike may well have said to Mrs Darby that the outcome of the reorganisation and redundancy selection exercise was not certain and that it was not yet known whether Mrs Rogers would get a job in the new structure. That would not necessarily have been related to her part-time status, but could simply have been a statement by a manager that the outcome of any redundancy selection exercise is not certain at the outset.

57 With regard to Mr Otitoju allegedly saying that he did not want part-time workers in the new roles, the Tribunal preferred Mrs Darby's evidence. She had two separate recollections of this, one of being told by Mr Otitoju, and another of reporting it to Mr Osinaike afterwards and discussing the possibility of part-time working with him.

58 By contrast, Mr Otitoju's answers in cross examination related to council policy and what should properly happen under Council processes. They appeared to fall back on general principles about what ought to have happened. Mr Otitoju was not speaking from memory of a conversation he had with Mrs Darby. The Tribunal preferred Mrs Darby's evidence; it found that she was more credible in her recollection of the conversation with Mr Otitoju.

Mr Osmani – the Third Claimant

59 Mr Osmani worked for the Respondent from June 1999 until 10 July 2017. He was a Housing Officer from 2005 until his dismissal. Mr Osmani is an Albanian Kosovan national and came to the UK as a refugee in 1998 when he was 26 years old.

60 Mr Osmani told the Tribunal that, when he came to the UK, he could not speak any English. He first came to work for the Respondent as a volunteer translator.

61 Mr Osmani told the Tribunal that Hakeem Osinaike, the Council's Director of Housing, would take the lead in teasing Mr Osmani – he would pretend that he had not understood what Mr Osmani had said and would make him repeat himself again and again. Mr Osinaike and others would laugh at the Third Claimant when he repeated himself. Some of the Third Claimant's colleagues would then copy Hakeem Osinaike and make the Third Claimant repeat himself.

62 Mr Osmani also told the Tribunal that, on one occasion, he went to see Mr Osinaike in the manager's office where Mr Osinaike was talking to some colleagues. Mr Osmani said that, when he entered, Mr Osinaike turned round and said, "He is one of them, he came off the back of a lorry". The Third Claimant said that Mr Osinaike knew that the Third Claimant was a refugee, which is why Mr Osinaike said it. The Third Claimant said that this happened in 2015 or 2016.

63 The Third Claimant also told the Tribunal that Mr Osinaike would lose his temper and shout at members of staff. On one occasion, around July 2014, Mr Osinaike wanted Housing Officers to work at the weekend because there was going to be a police raid at one of the Council's properties. The Third Claimant said that he had asked about being paid more to work at the weekend and Mr Osinaike had shouted at him, saying that their job descriptions did not say that they worked Monday to Friday, but that they worked whenever required. Mr Osmani said that Mr Osinaike told him that he was already lucky to have a job because he could not speak English.

64 In cross examination, it was put to Mr Osmani that he and Mr Osinaike were friendly. Mr Osmani agreed that he had told Mr Osinaike about a particular jean shop where Mr Osmani bought his jeans and that he had taken Mr Osinaike there. He also agreed that, on occasions, he had socialised with Mr Osinaike and his partner.

65 On 6 September 2013 Mr Osmani had sent an email complaining about Mr Osinaike's behaviour to him in relation to visits carried out by police to tenants' addresses. The Third Claimant said, in the email, that he had not been willing to work on Saturday and that Mr Osinaike had immediately become very irate and angry, saying that Housing Officers got paid for 7 days and that he could tell Mr Osmani to work on a Saturday. He said that Mr Osinaike shouted over him and there was a very aggressive argument. The Claimant said that he was very stressed and upset by Mr Osinaike's unprofessional and inappropriate behaviour (pgs.835 to 836).

66 The Tribunal found that this complaint related to Mr Osmani's allegation that Mr Osinaike had shouted at him in relation to his query about being paid more to work at the weekend. The Tribunal noted that, in the Third Claimant's email, he did not complain that Mr Osinaike said to him that he was already lucky to have a job because

he could not speak English. Mr Osmani was cross-examined about this at the Tribunal. He said that he did not want to mention Mr Osinaike's comment about him not being able to speak English because that would have made the matter much more serious.

67 The Tribunal noted that the tone of the complaint email did not appear to be intended to minimise Mr Osinaike's behaviour. In the email, Mr Osmani described Mr Osinaike at various points as unprofessional, inappropriate, aggressive, rude; he said he wanted an apology. He copied the email to his Union representative and said he wanted the matter to be investigated as a grievance.

68 The Tribunal considered that the email, which was written contemporaneously, was likely to have been an accurate reflection of what happened at the time. It therefore found that Mr Osinaike did not say to the Claimant that he could not speak English.

69 Mr Osinaike gave evidence to the Tribunal. He denied telling the Claimant saying he could not speak English, asking him to repeat things, laughing at the Claimant. He also denied saying that the Claimant had come on the back of a lorry. Mr Osinaike said that he was not born in this country himself and could himself be the subject of comments that he had come on the back of a lorry. He said that he was extremely upset about the allegation and would never use words of that nature.

70 The Tribunal considered Mr Osinaike to be a credible witness on these matters. His evidence was spontaneous; it appeared uncontrived.

71 The Tribunal also noted that Mr Osmani gave little detail of any of the conversations during which he was said to have been laughed at. He gave almost no context for the alleged comment by Mr Osinaike that he had come on the back of a lorry.

72 On balance of probabilities, the Tribunal preferred Mr Osinaike's evidence and found that he did not tease the Claimant about his English, or laugh at him, or ask him to repeat things. It found that he said he did not say to the Claimant that he had come on the back of a lorry.

Mrs Rogers' Caring Responsibilities (Associative Discrimination) and Part Time Work

73 Mrs Rogers told the Tribunal about her caring responsibilities for her son and for her husband.

74 Around 2008 her son, X, who was eight years old at the time, was diagnosed with bilateral idiopathic panuveitis. This is a serious eye condition which can cause reduced vision and blindness. The First Claimant's son was admitted to Great Ormond Street and Moorfields Eye Hospital. His treatment included the chemotherapy drug methotrexate and regular eye drops, which he needed to take every two hours.

75 Around 2008, after her son's diagnosis, the First Claimant reduced her working hours to 17.5 hours per week, to allow her to look after her son and take him to hospital

appointments. Thankfully, Mrs Rogers' son's condition did improve and he did not need to continue with methotrexate after a few years of treatment. Nevertheless, Mrs Rogers continued to need to accompany him to hospital appointments.

76 However, in 2013 the First Claimant's husband, Y, was also diagnosed with stage 4 cancer, which required treatment with chemotherapy and radiotherapy. Mrs Rogers became her husband's carer during his treatment. Thankfully again Mrs Rogers' husband treatment was successful and he is now in remission.

77 Mrs Rogers sought to increase her working hours from January 2017 because her caring responsibilities for her son were significantly reduced.

78 Mrs Rogers clearly had significant caring responsibilities from 2008 and in 2013 and 2014, associated with her son's and husband's disabilities.

The Role of a Housing Officer

79 The Claimants were all employed as Housing Officers before the restructuring exercise which is the context of these claims. The job description for a Housing Officer was at page 6 in the Tribunal's bundle. Housing Officer was graded SO2.

80 The main responsibilities specified in the Housing Officer job description included; carrying out all duties connected with providing a housing management service on a defined patch; taking an active role and promoting community development i.e. attending residents' and tenants' association meetings and other forums; carrying out regular estate inspections with appropriate stakeholders; implementing corrective action and identifying and recommending potential improvements; being responsible for monitoring and reporting on all aspects of performance of other service providers in the area; tackling areas of poor performance; being responsible for all aspects of housing management including, but not limited to, overseeing repairs, avoid property management, tenancy management, proactive anti-social behavioural management, garage and estate management and management of leasehold and freehold properties; ensuring lawful occupation of tenancies; taking enforcement action as necessary including court action; addressing enquiries and complaints; taking ownership and responsibility for their patch and advocating solutions on behalf of residents, ensuring problems are taken through to completion; proactively identifying and addressing vulnerability and safeguarding issues; ensuring appropriate support and referrals are made; being responsible for ensuring income maximisation through active participation in supporting rent collection and taking responsibility for the overall management, maintenance and improvement of estates, road and properties within their area; proactively monitoring and inspecting standards of estate blocks, street cleansing and ground maintenance and resolving any poor performance; carrying out block inspections and ensuring fire safety requirements are addressed; being responsible for health and safety including playground areas and blocks; addressing any parking enforcement issues on the estates.

81 With regard to customer care, Housing Officers were said, in the job description, to be responsible for promoting good customer care practice, dealing with complaints openly and fairly, actively seeking the views of customers and staff and providing services that were fair and accessible to all.

82 The job description also included general accountabilities and responsibilities. These included attending meetings as required, some of which might be outside normal working hours. The job description concluded by saying:

> "The above mentioned duties are neither exclusive nor exhaustive and the post holder may be called upon to carry out such other appropriate duties as may be required within the grading level of the post and the competence of the post holder."

The Restructure

83 On 7 October 2016, the Respondent formally launched a Housing Management Service Review. In preparation for this, a staff consultation report was prepared, setting out the proposed changes (pgs.18 to 42). Pursuant to proposals in the report, the Council's Housing Management Service became the Property Management Service (p.22). The report said, with regard to income collection by the newly named Property Management Service:

> "It is proposed that Property Management Services will take an active role in driving up income. Currently that responsibility lies with Elevate. This does not change the role and responsibility of Elevate, neither is it a duplication of what Elevate already does but it simply requires all property management Staff to take a very active role in driving rent collection … Property Management staff are to make any rent or service charge arrears their primary focus of discussion in any interaction with tenants.
>
> The change in emphasis on income collection is reflected in the job description of the Property Services Officers and the Property Services Managers." (p.24)

84 Under the Property Management Service section, the report said that the post of Senior Housing Officer was being deleted (p.25). The report said:

> "This is because more responsibility is being given to Property Services Officers and they will be expected to operate much more on their own initiative and with less dependence on direct management. This is being reflected in their proposed grade. This will mean that the Property Services Officers will be required and expected to be of the calibre that will be able to make significant operational decisions without reverting to managers."

Under the section, Housing Support, the report said:

> "In order to continue providing support and management to our vulnerable residents in sheltered accommodation, a Housing Support Team is being created. This team is proposed to be made up of a Team Leader who will report directly to the Head of Property Management and responsible for managing 8 Housing Support officers. This team will deal with all required services to the Residents with particular emphasis on safeguarding, obligatory service provision and general tenancy sustainability." (p.26)

85 The report said that some posts would be deleted: 1 Estates Services Coordinator, 1 Garage Support Services Officer, 8 Senior Housing Officers, 29 Housing Officers, 15 Scheme Coordinator and 1 Area Team Manager. The following posts were being created: 30 Property Services Officer, 8 Housing Support Officers, 1 Estate Services Commissioning Manager, 2 Quality and Performance Officers, 1 Income Performance Manager and 1 Housing Support Team Leader. In total 55 posts were being deleted and 43 were being created. The report also said that the following redundancies had been approved under the council's voluntary redundancy policy: 6 Senior Housing Officers, 5 Housing Officers, 7 Scheme Coordinators, 1 Area Team Manager, 2 Housing Neighbourhood Officers and 1 Housing and Neighbourhood Supervisor; a total of 22 voluntary redundancies (pgs.26 to 29).

86 Under the Housing Business Services section of the report, it was proposed to delete 8 Tenant Participation Officers. The report said:

> "The function of this role will be part of the future role of the Property Officers within the Property Management Service" (Property Officers means Property Services Officer)
> 3 x Resident Liaising Officer – the function of this role will be split in the future and be part of both the Property (Services) Officers and Service Support Officers" (p.31).

87 It was recorded in the report that 3 Tenant Participation Officers had accepted voluntary redundancy (p.33).

88 On the report, therefore, whilst 1 Garage Support Services Officer, 8 Senior Housing Officers and 29 Housing Officers, as well as 8 Tenant Participation Officers and 3 Resident Liaison Officers posts were all being deleted, a total of 49 posts, 30 Property Services Officers posts had been created. Further, 6 Senior Housing Officers, 5 Housing Officers, 8 Tenant Participation Officers and 3 Resident Liaising Officers had all accepted voluntary redundancy. The total number of voluntary redundancies therefore was 22. Of the 49 posts that were being deleted, 22 had accepted voluntary redundancy, leaving 27 officers whose job role had been deleted, but in the circumstances that there were 30 Property Service Officers posts available.

89 It was clear from the report that a number of posts were being deleted. Mr Otitoju told the Tribunal was that the review was partly necessary as a response to the Government's Housing and Planning Bill, which would introduce several changes to how social housing was managed and would result in a reduction of the Council's housing revenue account by £33.6m over 4 years. At the same time, there had also been a reduction in the Council's general fund account due to grant reductions from Central Government, leaving the Council with a funding gap of £63m.

Property Services Officers Compared to Housing Officers

90 Mr Otitoju told the Tribunal that PSOs were expected to have more responsibility and operate on their own initiative, with less dependence on direct management compared to Housing Officers. The proposed grade of the PSO Officer was PO1, compared to the Housing Officer grade of SO2. This meant that the PSO role was one pay band above a Housing Officer role. Mr Otitoju said that PSOs had responsibility

for income maximisation, project management, resident engagement and liaison relation tasks. They would also hold a small budget for improvements. The consultation report made clear that the functions of the Tenant Participation Officer and Resident Liaison Officer were being given, either wholly, or partly, to the Property Services Officers (p.31).

91 It was not in dispute that the incremental pay scales for SO2 and PO1 overlapped, so that a Housing Officer at the top of the SO2 grade would be paid as much as a PSO at the bottom of the PO1 grade.

92 The Property Services Officer job description was in the bundle at page 51. Mr Otitoju told the Tribunal that he was responsible for drafting it. The job description of the Property Services Officer was 7 pages long and included 76 duties. Mr Otitoju was cross-examined about the comparative length and detail of the Property Service Officer and the Housing Officer job descriptions. He accepted that the Housing Officer job description was short and concise and was a "high level" job description. He agreed that the general, high level, duties in the Housing Officer job description would include a range of more specific tasks. He agreed that, after the restructure, the old Housing Officer duties were not removed from the PSO job description.

93 Mr Otitoju agreed that the detailed and lengthy job description for the PSO set out each individual duty. He agreed that there had been a different approach to drafting that job description, compared to the approach that had been adopted to drafting the Housing Officer job description. He said that he had joined the Council in 2013 and knew about getting the details of a role very correct. He said that this was demonstrated clearly in the very well-defined role of the PSO. Mr Otitoju said that, by contrast, the job description for the Housing Officer was already in place before Mr Otitoju joined the Council and he had had no input into drafting that job description. It was drafted pre-2013 and neither he nor managers had updated it by the time of the restructure.

94 Mr Otitoju was cross-examined about the duty of managers in the assimilation process (p.254) to ensure, at the outset of an assimilation process, that job descriptions were relevant and up to date. Mr Otitoju responded that, during the assimilation process, officers who were affected had the opportunity to revisit their job descriptions as part of a consultation, and anything missing from the job description could be raised. Mr Otitoju was asked whether it was appropriate to expect Housing Officers, who would not necessarily have the competences required in drafting job descriptions, to redraft their own job description, rather than expecting more senior managers, who had experience in this area, to ensure that the job description was properly drafted, with an appropriate level of detail. Mr Otitoju said that Housing Officers had a responsibility to fill the missing gaps; he also accepted, however, that the responsibility was two-fold, both with the post-holder and the manager.

95 Under the Respondent's Managing Organisational Change Restructuring and Redundancy Procedure there is an Assimilation process. The procedure states:

> "4. Assimilation will involve matching the items on the old and new job descriptions, … and/or the time spent on specific tasks.

5. Matching will be against the duties detailed on the job description only, not grades or salary …

6. Managers must ensure their employees have a relevant, up-to-date job description before starting the process. Where there is not an up to date job description, the manager must prepare and agree with their employees a list of the duties and responsibilities being undertaken." (p.254)

96 The Property Services Officer job description had a number of categories responsibility; one was Income Maximisation paragraph 3, this said:

"3.1 The post holder will have a responsibility for income maximisation through actively engaging with Tenants and Licence holders.

3.2 Post holder will reach agreements to pay arrears on income from rents, service charges and Garages.

3.3 The post holder will actively support Elevate to collect income by providing logistics and evidence in court hearings where required.

3.4 At every contact with the residents, where there are arrears on the rent or service charge account, the post holder will be expected to discuss arrears actions with the aim being to reduce or clear the arrears owed.

3.5 All records of arrears actions taken by the post holder are to be logged on the System.

3.6 The post holder will deploy all good practices available so as to improve the income collection and maximisation.

3.7 Post holder will report all issues and findings in the process of arrears actions to the Property Services Managers."

The job description also had a section on Resident Engagement, paragraph 6. This was divided out into 13 separate duties. These included:

"6.1 To take an active role in promoting resident engagement and community development, i.e. arrange and attend tenants and resident association meetings and other forums as required, and advocate solutions on behalf of residents ensuring problems are taken through to completion.

6.2 The post holder will proactively identify and address vulnerability and safeguarding issues ensuring appropriate support and referrals are made.

6.3 To ensure a high quality of service is delivered and will engage with residents and resident groups to address enquiries and complaints. To understand and be the lead source of information on residents in a locality.

6.4 To promote the culture of consultation in order to maximise the level of resident involvement in influencing Council decision making processes.

…

6.6 Attend tenant and resident meetings as required – they will often be in the evening and occasionally at weekends…

6.9 To promote the Council's engagement structure, encouraging local TRA's to attend and participate in meetings. Also, to encourage the attendance of hard to reach groups and interested residents.

6.10 To carry out resident consultation as required, including estate regeneration schemes and action the outcome.

6.11 To be the landlord's representative for all Capital Delivery works and responsive repairs in their homes, blocks and estates, acting as the liaison between the contractors and the residents.

6.12 To facilitate access to homes and blocks for contractors and to resolve conflicts between tenants and contractors.

6.13 To prepare and present reports at relevant meetings including TRA and QUAG meetings." (p.55)

97 The job description included a section on Estate Management/Inspection which required the post holder to provide property management to all council managed assets in a defined area including communal services, playground areas, parking issues and Health and Safety. It also required the postholder to proactively monitor and regularly inspect, with the appropriate stakeholders, standards of estates, blocks, street cleansing and grounds maintenance and to resolve any poor performance and supply the Property Services Manager and other officers with relevant information and reports as required (p.56).

98 The Property Services Officer job description included a Sheltered Services section, requiring PSOs to be responsible for all sheltered and supported housing schemes in the area and to ensure that high quality services are provided to all residents of sheltered schemes, to ensure that landlord obligatory and safety checks are carried out in sheltered accommodation schemes and ensure that all safety critical checks and safeguarding concerns are raised as soon as safeguarding issues are suspected (p.56).

99 The PSO's job description included a section on Financial Management, paragraph 10, this stated that PSOs would be responsible for managing a small improvement budget of no more than £50,000, assisting with ensuring that services are provided in the most cost effective and efficient way and accounting for recovery of costs for each major work scheme, amongst other things. It also had a Project Management section, which required the post holder to be responsible for monitoring and reporting on all aspects of performance of other service providers in the area and

tackling areas of poor performance, managing assigned projects, ensuring that agreed outcomes are delivered on time, within budget and to the expected standard (p.57).

100 All the Claimants addressed the duties set out in the new PSO job description. They said that they regularly assisted income collection by actively engaging with tenants and residents, visiting residents in their homes, discussing their incomes and outgoings and the implications of not paying their rent. They also said that they visited vulnerable residents in both sheltered and independent properties, making sure that they were well, liaising with family members, care and social services, occupational health, hospitals and doctors or clinics. They said that they did promote and develop tenant and resident participation, advertising meetings and events on notice boards within blocks and dropping leaflets to houses and local centres such as doctors and libraries. They attended housing forums and community activities, attended existing tenant and resident associations meetings.

101 The Claimants told the Tribunal that they carried out all the duties in the new PSO job description, apart from supporting the home ownership team to coordinate information relating to repayment of discounts, or supporting the preparation of annual service charge accounts, or leading on consultation relating to the Council's Housing Stock, or designing and implementing capital revenue schemes, or helping to organise Tenants' Conferences, or accounting for recovery of costs for major works schemes. They did not receive funds and pay them into appropriate accounts.

102 They said, however, that they did carry out right to buy inspections to clarify boundary responsibilities and to verify that the tenants who were seeking to exercise the right to buy were eligible to do so. They said that they were responsible for the investigation of possible fraudulent cases and represented the authority in Court proceedings. Mrs Darby gave an example of having done that in relation to a tenant who had returned to their home country, leaving a person in occupation who did not have the right to the tenancy.

103 The Claimants conceded that they did not carry out the duties at 2.15 to 2.18 of the PSO job description. Those were assisting with the production of service charge invoices, having input into the calculation and apportionment of service charges for all leasehold and freehold properties, supporting the production of estimated and final account invoices and leading on consultation activities relating to housing stock. The Claimants agreed that they did not assist in organising and servicing the Tenants' Conference and other public events. They said that the prepared and presented reports at relevant meetings, including tenant resident associations, but said that QUAG meetings were attended by management. They said that they were responsible for all issues relating to the building, property services and tenancy matters for sheltered and supported housing schemes and that they liaised with residents to ensure that the properties were suitable for their needs and any problems were addressed. They also carried out fire risk assessment and health and safety checks on these properties and would report and investigation repairs and log them on the system. The Claimants said that these were part of their key performance indicators.

104 The Claimants were cross-examined about not holding a budget. They agreed that they did not hold budgets of £50,000. Mrs Darby said that Housing Officers were allocated an £8,000 budget for spending on improvements and works to estates. The

Claimants all told the Tribunal that they had responsibility for obtaining 3 competitive quotes for works and would make recommendations to their managers for small improvement works. The managers would have ultimate responsibility for approving expenditure for work that needed to be done.

105 With regard to the £50,000 budget allocated to the PSOs, it was put to Mr Otitoju that PSOs were offered no training on financial management. He responded that some of the PSOs asked to shadow him. He said that, in the event, the PSOs never held these budgets and that Property Service Managers continued to hold responsibility for budgets after the PSOs were appointed.

106 The Claimants conceded that they were not responsible for accounting for recovery of costs for each major works scheme, nor for working with the home ownership team to ensure that service charge accounts were accurate. They accepted that they were not responsible for receiving funds in relation to financial management responsibilities and ensuring that the funds were paid into the appropriate accounts.

107 The Claimants were cross-examined about their assertions as Housing Officers undertook the vast majority of the PSO role. It was put to the Claimants that they were not responsible for income maximisation. They said that, as Housing Officers, they would speak to people who were in arrears before eviction and would also carry out tenancy audits and identify derelict land where the Council might build houses and increase income in that way. Mrs Darby said that, of course, it was Housing Officers' responsibility to take early intervention to prevent rent arrears. She gave an example of a tenancy audit that she had carried out. Her mother had two sons who were not working and Mrs Darby had analysed her income and expenditure. She had advised the mother to sell her car which she was not using, so that she would not be spending money on car insurance. She identified that the sons had lost confidence about work and showed them how to access apprenticeships. In that case, the mother was free of rent arrears in six weeks.

108 Mrs Darby also gave an example of how income was maximised following an outbreak of antisocial behaviour. She said that she had secured money for lighting and had worked with the police, so that the Council had saved money because the antisocial behaviour stopped.

109 With regard to income maximisation, Mr Osmani said that Housing Officers, including him, would always encourage tenants to sign up for direct debits to pay their rent and associated charges, to ensure that rent arrears did not arise. He also said that, after tenants had moved into a property, Housing Officers would carry out a 4 week "settling in" visit and would ensure that tenants had applied for Housing Benefit, if appropriate, and encourage them to sign up for direct debits.

110 The Tribunal considered that the Claimant's evidence on income maximisation was very impressive and had little hesitation in finding that Housing Officers did routinely carry out housing audits, during which they would identify whether properties were in arrears and would assist and advise tenants with regard to their rent arrears in a proactive way; that they had frequent contact with tenants in any event and would discuss rent arrears, if any existed at the properties; and that they had particular responsibility for visiting tenants before evictions and assessing whether the eviction

was appropriate, or whether rent arrears could be addressed in other ways.

111 Mr Otitoju told the Tribunal, paragraph 13 of his witness statement, "The Housing Officer role had nothing in its job description about income maximisation". That was incorrect, even on the wording of the Housing Officer job description page 7: "This post will also be responsible for ensuring income maximisation through active participation in supporting rent collection."

112 Mr Otitoju was asked in evidence what was the difference between the income maximisation duties of the PSO and the Housing Officer. He answered saying that PSOs should take every opportunity to maximise income and that there was a change of emphasis in the PSO role.

113 It was put to the Claimants that they did not provide vulnerable residents in sheltered accommodation schemes with support and assistance to promote independent living.

114 Mrs Rogers told the Tribunal that Housing Officers would visit sheltered accommodation on a daily basis and that if wardens of sheltered accommodation had problems with tenants for example, antisocial behaviour, the wardens would automatically refer the matter to Housing Officers.

115 Mrs Darby told the Tribunal that, if wardens were off work on holiday or sick, the Housing Officers would cover for them and had done this on occasion for a whole week. Mrs Darby dealt with social services and mental health agencies in relation to tenants of sheltered accommodation and carried out risk assessments and fire risk assessments.

116 The Tribunal noted that, in the Housing Officer's job description, Housing Officers had responsibility to proactively identify and address vulnerability and safeguarding issues and to ensure appropriate referrals were made. They were required to liaise with other professional services where a multi-disciplinary approach to problems was required and to take a proactive approach to problem solving. The Tribunal accepted the Claimant's evidence that they carried out such duties in relation to sheltered accommodation tenants and that they covered for sheltered accommodation wardens when they were off sick.

117 It was put to the Claimants that they did not act as the liaison officer between tenants and contractors in homes where improvement works and repairs were being carried out, but that this was the responsibility of Tenant Liaison Officers.

118 Mrs Rogers and Mrs Darby said that Tenant Liaison Officers may have had this in their remit, but Mrs Rogers said that she attended every repair that was being carried out. She said that she had dealt with asbestos removal and had made arrangements for tenants to live elsewhere. Mrs Darby said that, when new kitchens and bathrooms were being fitted in tenants' houses, Housing Officers were the point of contact between contractors and tenants and that Housing Officers would only get in touch with Tenant Liaison Officers if there were problems. She said that Housing Officers were heavily involved in capital delivery projects; that is, improvement to properties. Mrs Darby said that the first point of contact was the Housing Officer and

the Housing Officer would check that the works had been done appropriately.

119 The Claimants were asked about promoting and developing tenant and resident participation. It was suggested that this was the responsibility of Tenant Liaison Officers. Mrs Darby agreed that she had not set up Housing Forums but said that Housing Officers did encourage tenant participation. For example, if there was antisocial behaviour in an estate, Housing Officers would encourage Resident Associations to be set up. She accepted that Tenant Engagement teams would actually draw up the constitution for such organisations, but Mrs Darby said that she would check that, for example, the Chair, Vice Chair or Treasurer of a Tenant Association was elected fairly.

120 Mrs Rogers said that Housing Officers would always attend residents' meetings but she agreed that she had not specifically set up a Tenants' Forum.

121 Mr Osmani explained that when he was Housing Officer for 5 years on an estate which was going to be redeveloped, he attended every meeting of the Tenant Housing Forum.

122 Mr Otitoju told the Tribunal that Housing Officers did not have any responsibility for regeneration projects. He said that these were the type of projects to which the project management responsibilities in the PSO role applied.

123 The Claimants were not cross-examined about large regeneration projects. The Claimant said that they had responsibility for project management, in that they were required to report on performance of other service providers and to tackle areas of poor performance.

The Assimilation and Matching Process

124 Under the Council's Managing Organisational Change, Restructuring and Redundancy Procedure (p.246), where new posts are being created and old posts deleted, managers are required to carry out a Matching exercise under the Assimilation Process therein. The Procedure provides:

> "10. Managers will carry out an assessment of the duties in the new job description and/or time spent on these against those in the old job description i.e. assess what percentage of the requirements of the new job (excluding items that are common to all) is covered in the old job description.
>
> Managers must use the standard pro-forma assimilation matrix provided by the Human Resources Business Change Team.
>
> 11. Where there is a 65% or more match i.e. the employee is assessed as carrying out 65% of the duties on the new job description … they will normally be assimilated directly into the post. Where two or more employees are similarly matched, selection will be by competitive interview.

> 12. Where there are clear similarities between the duties of old and new job descriptions and/or the time spent on specific tasks of at least a 50% but less than a 65% match, the posts will be ringfenced and selection shall be by competitive interview.
>
> Employees do not have any right of appeal against the outcome of a ring-fenced interview; unplaced employees may re-apply for any unfilled posts advertised at the end of the assimilation process on the same basis as other redeployees …". (p.255)

125 Put simply, where there was a 65% match between the old and new posts, employees would be assimilated to the new posts. Where there was a 50% to 65% match, the relevant post-holders would be ringfenced and selected by competitive interview for the new jobs.

126 Mr Otitoju carried out the matching process using a standard pro forma assimilation matrix (p.114). He assessed the Housing Officer role as having a 53.4% match to the Property Services Officer role.

127 Mr Otitoju was cross-examined about how he arrived at his assessment. He was given an opportunity in re-examination to explain. He was completely unable to explain the method which he used to arrive at his percentage assessment of the match between the Housing Officer and Property Services Officer roles.

128 In his witness statement, he purported to give specific examples of why the Housing Officer role did not reach the 65% match required for assimilation to the Property Services Officer role. He said that there was no resident involvement in the Housing Officer role. However, even on his assimilation matrix, he assessed the Housing Officer role as having had some resident engagement. Further, he said that the Housing Officer role had nothing in its job description about income maximisation. In his assimilation matrix, he appeared to assess the old role as having a greater percentage of income maximisation than the new role.

129 Mr Otitoju said that Housing Officers had never held a budget. However, with regard to financial management, he appeared to assess the Housing Officer role as having had at least some financial management responsibility.

130 Mr Otitoju was cross-examined about his assertion in his witness statement that Housing Officer roles had no responsibility for income maximisation. He said in cross-examination that he stood by that statement. Later, he appeared to concede that there may simply have been a change of emphasis. He conceded that Elevate continued to be responsible for income maximisation and the collection of rent after the restructure.

131 Mr Otitoju was asked whether any training had been offered to Housing Officers to enable them to carry out the new PSO officer roles. He said that training could take a number of different forms and that people could "work shadow." It was not clear to the Tribunal on his evidence when, if ever, work shadowing had occurred.

132 Mr Otitoju told the Tribunal that, in fact, the people who were appointed to the new PSO roles never carried out the full PSO functions. He conceded that Housing

Officers had continued to operate in the same way after they took up their new PSO positions.

133 The Tribunal heard evidence from Steve Davies, GMB Union Shop Steward, who was employed as a Housing Officer before the re-organisation and was successful in securing a Property Services Officer role as a redeployee in May 2017, having failed the initial ringfenced interview given to Housing Officers in February 2017.

134 Mr Davies told the Tribunal that, having done both the Housing Officer and Property Services Officer roles, there was no difference between the roles operationally. When he became a Property Services Officer, literally all that changed was his job title. He carried on exactly as before, doing the same job as when he was a Housing Officer. He said that he did not receive any training when his job title changed from Housing Officer to Property Services Officer. He raised this with management after the restructure. Management could not identify where the training was required. Mr Davies also told the Tribunal that he was then assimilated to the Landlord Services Officer role and that the PSO post lasted only for a period of 8 to 9 months, before being deleted in another reorganisation. The new structure in which the Landlord Services Officer existed was called My Place and it came into existence on 2 October 2017. Mr Davies told the Tribunal that he believed that the Property Services Officer job description had been deliberately drafted to ensure that Housing Officers would not assimilate to the new role.

135 Grant Rome, Landlord Services Manager, who had previously been employed as a Tenancy Services Manager, Property Services Manager and Housing Manager, amongst other roles, gave evidence to the Tribunal for the Respondent. He was asked in cross-examination about his view of the assimilation process in relation to the Housing Officer and Property Services Officer roles. He said that he felt that the assimilation exercise was not fair, although he had not carried out the assimilation exercise. In his opinion, he felt that the Housing Officers had an assimilation right because their role was very similar indeed to that of the Property Services Officer.

136 Mr Stuart Beard gave evidence on behalf of the Respondent. He is a Landlord Services Manager still employed by the Respondent and had previously been employed as a Property Services Manager. He told the Tribunal that the role of PSO was operationally virtually identical to that of Housing Officer. Although there were changes in the job description, operationally the officers did what needed to be done and what needed to be done was the Housing Officer roles. He said that it could have changed in the future when the Property Services Officer became more established. However, what eventually happened was that Property Services Officers became Landlord Services Officers and there was no significant change between the Housing Officer role and the Landlord Services Officer role. He said that he had managed all the Claimants and that they were, in his opinion, all capable of carrying out the PSO role.

137 Mr Rome, in his evidence, admitted that he had gone so far as to describe the assimilation process to Mrs Rogers as “corrupt.” He said that he now regretted the use of that word as a senior manager, but that it reflected the fact that he believed that the process had not been fair.

138 On the evidence, the Tribunal preferred the evidence of the Claimants, Mr Davies, Mr Beard and Mr Rome, to the evidence of the Respondent's other witnesses, particularly to Mr Otitoju who had carried out the assimilation exercise. The Tribunal found that Mr Otitoju's evidence was not reliable and was not consistent with the job duties as set out in the Housing Officer's job description. His assertion that Housing Officers had no income maximisation responsibilities, for example, was plainly wrong. His assessment that there was little or no tenant engagement responsibility in the Housing Officer role was also plainly wrong, as described by the Claimants.

139 Significantly, despite being given a number of opportunities in cross-examination and in re-examination by his own representative to explain percentage match he had arrived at using the assimilation matrix, he was completely unable to do so.

140 The Tribunal found that, in reality, the duties of a Housing Officer were more than a 65% match for the duties in the Property Service Officer job description. The Tribunal accepted the Claimants' characterisation of the Housing Officer job description as being very high level; and that, in fact, it incorporated many of the detailed duties which were set out in a very differently drafted Property Service Officer job description.

141 Furthermore, the Tribunal found that, when other Housing Officers moved to the PSO role following the ringfenced interviews in February 2017, they continued to work in exactly the same way as they had before, so that, by the time of the later redeployment interviews - and by the time of the Claimants' dismissal - the Property Service Officers were carrying out Housing Officer roles. There was little or no difference between the Property Services Officer roles and the Housing Officer roles that the Claimants were doing when they were dismissed.

142 The Tribunal also found, on the evidence, that the Respondent knew that there was going to be a further reorganisation with a new Property Management Division called My Place, coming into effect in October 2017.

143 The target operating model for My Place was approved on 16 January 2017. It included new structures for Project Management and Capital Delivery (p.961). Even if the Respondent had, at the beginning of the 2016 reorganisation, intended that the Property Services Officer role would evolve into a more responsible managerial position, the Tribunal found that the Respondent knew throughout 2017 that there would be a further reorganisation and that the Property Services Officer role would not evolve away from the Housing Officer role.

144 The GMB Union appealed against the assimilation outcome on the Claimant's behalf, but the appeal was not successful. At the assimilation appeal, Tony Sargeant, the Assimilation Appeal Officer, slightly increased the percentage match between the Housing Officer and PSO officer roles from 53.4% to 54.3% (p.152 to 162). Mr Sargeant did not give evidence at the Tribunal and therefore could not shed further light on Mr Otitoju's assimilation exercise. Other council witnesses agreed that Mr Otitoju had carried out the assimilation exercise on his own.

Ringfenced Interview Process February 2017

145 Following the decision that Housing Officers would not be assimilated to the

post of PSO, but would instead be ringfenced for competitive interviews, an interview process was undertaken in February 2017.

146 All Housing Officers, including the Claimants, were invited to a ringfenced written test, scheduled for 3 February 2017, and an interview on 7 February 2017. All the candidates were asked to answer the same written scenario questions and interview questions. The panel for the interview consisted of Mr Otitoju, Hakeem Osinaike, Nicki Lane and Toby Hartigan-Brown. Each candidate was asked 8 questions.

147 The Respondent's standard interview record matrix requires that interview questions must "be cross-referenced to the criteria on the person specification" and compared to model answers, p165.

148 Mr Otitoju admitted in evidence that there were no model answers, either for the interview, or for the written test.

149 The scoring criteria on the Respondent's interview matrix gives guidance on scoring by reference, at all points, to the model answer, p165. For example, a score of "A. - fully meets criteria" means: "A full and detailed response which fully demonstrates knowledge and understanding of the subject and reflects all the model answer"; and "B. - partially meets criteria," means, "A response that demonstrates a knowledge and understanding of the subject but did not reflect all the model answer."

150 The Respondent had mislaid records of interviews for the Claimants, other than Mrs Rogers. Mr Otitoju said that the pass mark was set at 40%, which would be a combined mark for the interviews and the written test.

151 On 21 February 2017, Dave Clark, Unison Branch Secretary, wrote to Mr Otitoju, asking him to provide the questions which had been used in the interview exercise and the model answers. Mr Otitoju replied on 1 March 2017, saying that he was not convinced that it was appropriate to supply the questions and model answers (pgs.532 and 534). Mr Otitoju did not admit that there were no model answers.

152 There was no evidence before the Tribunal that the interviewers discussed, in advance of the interview, what they would expect an answer to include. It appears that, after the interviews were concluded, the interviewers discussed their scores.

153 In the absence of model answers, either for the interview, or for the test, the Tribunal found that there was no objective benchmark against which to measure the candidates' responses. This meant that a significant degree of subjectivity was allowed in the process. The Tribunal considered that it was difficult to see how the interviewers fairly assessed the candidates against, either, each other, or the standard required for the job, when the standards had not been set at the outset.

154 13 Housing Officers at risk of redundancy achieved a score of over 40 and were assimilated into the PSO role. The remaining 8 Housing Officers who interviewed for the PSO roles, including the Claimants, did not score 40 and were put at risk of redundancy. Mrs Rogers scored 4 for her written exercise and 26.25 in her interview, a total of 30 out of 100. Mr Osmani scored a total of 25 out of 100 and Mrs Darby a total

of 24 out of 100.

155 After the process was completed Mr Otitoju told Mrs Rogers that the total available score for the written exercise had been 40 marks and the total available score for the interview were 60 marks, making a total of 100. He advised Mrs Rogers that her written exercise had scored 4 marks and that she had scored 26.25 marks at the interview. 26.25 marks out of 60 is 44% and, therefore, Mrs Rogers did score above the threshold to be appointed, on the basis of her interview answers only.

156 The written test was marked entirely by Mr Otitoju and there was no review or moderation of this by anyone else.

157 Again, the Tribunal found that it was difficult to see how Mr Otitoju made any fair or objective assessment of the written tests when he had no model answer to compare them with, and no scoring criteria agreed for them. It was not clear at all in evidence what sort of answers might be required in order to achieve a mark of 10 or 20 or 30 out of 40.

158 During Mrs Rogers' interview, Mr Osinaike asked her why she worked part time. Mrs Rogers complained about this on 12 February 2017, shortly after the interview, p529. Mr Otitoju's reply conceded that the question had been asked, p528. Mr Osinaike did not deny that he asked Mrs Rogers about her part-time hours during the interview, in evidence to the Tribunal, but said that it was not part of the interview assessment process.

159 On 22 February the Respondent generated letters for all Claimants confirming that they were at risk of redundancy and telling them that they would be placed on the redeployment register in accordance with Council policy (pgs.533, 736, 875 to 877).

Mr Osmani's English Language Skills – Interview and Written Test

160 Mr Osmani is Kosovan from Eastern Europe and is not British. He does not have English as a first language. He spoke no English when he arrived in the UK as a refugee. Mr Osmani told the Tribunal that he had taken classes in English when he came to the UK. He also told the Tribunal that he had undertaken an English writing skills course, through the Respondent, about 8 or 9 years ago. He also participated, along with the other Claimants, in a CV and job applications writing skills course, in about March 2017.

161 Mr Osmani told the Tribunal that doing a written test and interview was more difficult for him than for his colleagues who spoke English as a first language. He had only started learning English when he was 26 and did not take exams in English at school. Normally, outside exam conditions, he had access to an online dictionary and/or to Google translate.

162 During the written test in February 2017 none of the candidates was allowed access to the internet. The Claimant told the Tribunal that this put him at a disadvantage, because he needed access to those online facilities, in order to produce accurate English answers. He told the Tribunal that it took him longer to write in English than his colleagues, which made the written test even more difficult because of

the time limits imposed.

163 Mr Osmani told the Tribunal that he is not as comfortable in speaking in English as his colleagues and that, when he is stressed, he finds it even more difficult to communicate in English. He felt under extreme pressure during the interview process because he wanted to keep the job that he had been undertaking for 18 years. He told the Tribunal that this affected his confidence, which made the interview even more difficult for him.

164 Mr Osmani also told the Tribunal that, shortly before the redundancy process had begun, Mr Otitoju had told the Claimant that he was worried about him because of his English skills. Mr Osmani understood Mr Otitoju to be telling him that he was worried about how the Claimant would perform in the selection process because of his English language skills. Mr Osmani told the Tribunal that, thereafter, he was very worried that he would not be selected to be retained during the redundancy process. He said that his fears were exacerbated when, at the outset of the interview, Mr Otitoju had told him that he had failed the written test. Mr Osmani said that the resulting anxiety led to further deterioration of his English skills during the interview.

165 Mr Otitoju told the Tribunal that he knew that there were issues with the standards of Mr Osmani's English. He said that he did not recall telling Mr Osmani that he was worried about him in relation to the process because of his English, but he said that he was willing to concede that he had an issue with Mr Osmani's writing. The Tribunal found, on the balance of evidence, that Mr Otitoju was likely to have made a comment to Mr Osmani that he was concerned about his likely performance in the redundancy process because of the standard of his English.

166 In cross-examination, Mr Otitoju told the Tribunal that he had not said to Mr Osmani that he had failed the written test, but that he had made a comment in all candidate's interviews to the effect that the written test was finished and done with and that the candidate should forget about it, unless they had anything that they wanted to add or subtract, but that, in any event, anything they did say would not affect the marking of the written test. He repeated this in re-examination, conceding that candidates might have got the impression that he had already marked the tests.

167 The Tribunal found Mr Otitoju's explanation of what he said about the tests in the interview to be illogical and incomprehensible. If nothing the candidates could say in interview was going to alter their written test scores, there was no point in mentioning the written test at all. On the balance of probabilities, the Tribunal concluded that Mr Otitoju had marked the written test before the interviews, which led him to mentioning the written test. The Tribunal preferred Mr Osmani's evidence with regard to what was said. It found that Mr Otitoju did say words to the effect to Mr Osmani that he had not passed the written test. The Tribunal accepted Mr Omani's evidence that it increased his nervousness and had a negative effect on his performance in the interview.

168 However, the Tribunal did not accept Mr Osmani's evidence that Mr Otitoju told him that he had done badly in interview because his English was not every good. The Tribunal considered that Mr Osmani's evidence about this was lacking in detail and it did not find it credible.

Treatment of Another Candidate

169 Mr Otitoju told the Tribunal that one of the Claimant's colleagues, SJ, was on bereavement leave at the time of the February 2017 interviews and that Mr Otitoju decided that he would not interview SJ during the bereavement leave. SJ was allowed to undertake her interview when she returned from leave.

170 Mr Otitoju told Mrs Darby, after the February 2017 interviews, and confirmed at the Tribunal, that his impression of Mrs Darby in the February interview was that she did not care about the interview and simply wanted to be out of the room.

171 Mrs Darby told the Tribunal that, very sadly, her brother had Motor Neuron Disease and, at the time of interviews, she had just been told that he was very likely to die imminently. She had also sadly been told that her mother had terminal brain cancer. Mrs Darby told the Tribunal that, in those circumstances, the interview did not appear to be very important to her.

172 She also told the Tribunal that she had informed Mr Otitoju about her brother's and mother's conditions when he had spoken to her after the interviews.

173 It was put to Mr Otitoju in cross-examination that he should have considered allowing Mrs Darby to have a second interview when he discovered about her family circumstances. Mr Otitoju said that, at the beginning of the interviews, everybody was asked whether they wished to proceed and Mrs Darby had said that she had. He agreed in cross-examination that he knew that Mrs Darby could perform better than she had done at the interview and that the results of the interview did not reflect her capabilities. Indeed, he agreed that all 3 Claimants did not perform in interview in a way which reflected their capability to perform the PSO role.

Redeployment Process

174 The Respondent has a Redeployment policy as part of its Managing Organisational Change Procedure (p.272). The policy says that the Council is committed to trying to redeploy, where possible, employees whose posts are deleted as a result of budget restraints or changing organisational requirements (p.273).

175 With regard to roles and responsibilities, the policy provides that managers and redeployees are required to comply with the arrangements detailed in the procedure, which are designed to find suitable alternative employment for employees. The policy says that managers are required to consider redeployees before any internal or external job applicants and to offer redeployees, who meet the minimum criteria for the post, a 4-week trial period. The policy provides that, where there are two or more redeployees, selection for the trial period will be by interview (p.274).

176 The Tribunal considered that the logical meaning of the requirement for selection by interview in the case of two or more redeployees was that, where there are fewer posts than redeployees, selection for the available trial periods would be by interview.

177 The policy also provides, at paragraph 14:

> "Redeployees will be given priority consideration as a re-deployee and interviewed if they meet the minimum criteria for the post i.e. the essential skills and ability criteria and with additional training, supervision and support can be expected to meet the experience criteria within a reasonable period, (from 1 to 3 months depending on the nature of the job).
>
> Note: Redeployees must demonstrate that they meet the minimum criteria to be interviewed for the post. Where two or more re-deployees have demonstrated they meet the minimum criteria, selection will be by competitive interview.
>
> 15. If, at interview, the redeployee meets the requirements for the post, they should be offered a 4 week trial period during which they will be monitored to assess their suitability. The trial period may be extended for retraining purposes if both sides agree and in which case, the arrangements must be confirmed in writing." (p.277)

178 It was put to the Respondent's witnesses in cross-examination that managers were required to offer re-deployees, who met the minimum criteria for a post, a 4 week trial period (p.274). The Respondent's witnesses said that there was a dispute about the interpretation of the policy and pointed to paragraphs 14 and 15, which they said required re-deployees to be interviewed, even if they met the minimum criteria for the post.

179 Peter Watson, Group Manager for Human Resources Business Partners and Advisory Services at the Respondent, gave evidence to the Tribunal. He was cross-examined about this apparent inconsistency in the policy. He said that the general statement at the beginning of the policy about manager's duties was a truncated description of the process and was a general statement, but that the detail of the process was set out in paragraphs 11 to 15. Mr Watson said that it was not sufficient for candidates to satisfy the minimum criteria for the posts. Candidates were required, in the redeployment process, to be interviewed to show that they did meet the requirements of the post and then they would be given a 4-week trial period. The interview is a substantive assessment of whether the redeployee can do the job.

180 All the Respondent's witnesses who were asked about the policy said that the Respondent did require redeployees to demonstrate, at interview, that they met the requirements for a role, before being given a 4-week trial period.

181 The Tribunal accepted the Respondent's evidence, particularly Mr Watson's evidence, who had intimate knowledge of the Respondent's HR processes, that the Respondent's normal practice in a redeployment process is to require candidates to demonstrate that they meet the requirements of a role before being given a 4-week trial. They are required to do this at an interview and are offered an interview when they meet the minimum criteria for the post; that is, the essential skills and ability criteria for it.

182 The Tribunal was not shown a requirement in the redeployment policy that re-deployees attain any particular score during the interview, in order to demonstrate that

they could fulfil the requirements of a post to which they sought to be redeployed.

183 The policy said that, if redeployees met the requirements of a role, they would be given a 4-week trial. The policy only provided for a competitive interview process if there were fewer available posts than redeployees who met the requirements for them, see paragraphs 175 and 176 above.

184 There were still vacant PSO posts after the February 2017 ring fenced interviews. The Claimants entered the Respondent's redeployment process.

185 On 19 March 2017 Mrs Darby applied for the vacant PSO posts under the redeployment policy (p.738). On 21 March Mrs Rogers applied for the vacant PSO posts (p.542). Mr Osmani also applied for a PSO post under the redeployment process in March 2017 (p.891).

186 On 13 April 2017 Mr Otitoju informed the Claimants that they had all been shortlisted for the vacant PSO posts under the redeployment policy (p.551).

187 On 18 April the Respondent prepared notices of termination of employment for all three Claimants (pgs.552, 748 and 887).

Mr Osmani's Notice of Termination

188 Mr Osmani told the Tribunal that he did not receive his notice of termination until 6 July 2017. Mr Osmani's notice of termination of employment was signed by Mr Otitoju and stated that Mr Osmani's employment would end on 7 July 2017. Mr Osmani told the Tribunal that he heard from his colleagues that they had received letters giving notice of termination of employment. He realised that he should have received one too, and that this was a mistake on behalf of the Respondent, but he did not say anything because he was afraid of losing his job. Eventually, on 6 July 2017, he emailed Peter Watson and Siobhan Davies in the Respondent's HR department, saying that he had been provided with an at-risk letter regarding redundancy on 22 February 2017, which told him that he would be issued with formal contractual notice in due course, but that he had not received that notice. He said that he had taken advice from his union the GMB and that they had advised that his employment could only legally be ended by a formal contractual notice letter (p.916).

189 Mr Watson forwarded Mr Osmani's letter to Akin Otitoju the same day, asking him whether the formal notice letter had gone to Mr Osmani (p.917). Mr Otitoju replied saying:

> "I can confirm that I wrote all letters and personally handed all affected Housing Officers letters to Grant Rome with instruction to pass on to each manager for direct hand delivery to each staff. I have confirmation from Jonathan Woodhams that the notification letter for Meti (Mr Osmani) was handed over to him.
>
> Jonathan has no doubt about handing Meti's letter to him." (p.917)

190 Mr Osmani told the Tribunal that Mr Woodhams had not handed the letter of

notice of termination to him and that, in fact, nobody had in April 2017.

191 Mr Rome was cross-examined about the letters of termination. He said he thought Mr Otitoju had given them to him to pass on.

192 Mr Woodhams gave evidence to the Tribunal. He said that he did not make any record of giving letters to affected staff, nor did he ask staff to sign for them. He said, however, that he was confident he handed the relevant letter to Mr Osmani in the office where they were both based at that time. He could not remember what time of day he gave the letter to Mr Osmani, but he said that he knew that the letter was important to both the Council and the member of staff and he was confident he delivered it. Mr Woodhams agreed that Mr Osmani was also working in another location at the time, and that Mr Osmani was not in the office at all on Wednesdays.

193 In his witness statement, Mr Woodhams said that, in April 2017, he had been tasked by Mr Otitoju to hand deliver the notice letters. He said at paragraph 6: "I distinctly remember being handed these letters by Akin as it was such an important piece of correspondence."

194 However, on Mr Otitoju's evidence, he handed the letters to Grant Rome and, in evidence to the Tribunal, Mr Rome said that he thought that Mr Otitoju had handed them to him. There was therefore an inconsistency in the evidence of the Respondent's witnesses. While Mr Woodhams said that he distinctly remembered Mr Otitoju personally handing the letters direct to him, Mr Otitoju and Mr Rome's recollection was that Mr Otitoju handed the letters to Mr Rome.

195 On balance, the Tribunal preferred Mr Osmani's evidence. He was honest about the fact that he knew other people had received their notices of termination and that he kept quiet about not having received his own. Given the inconsistency in the Respondent's evidence and Mr Osmani's apparent honesty in relation to his actions at the time, the Tribunal found Mr Osmani's version of these facts to be more credible. It found that the Respondent did not give Mr Osmani his termination letter in April 2017.

Conduct of Redeployment Process

196 Candidates for the vacant PSO posts in the redeployment process were required to sit a written test marked by Mr Otitoju on 28 April 2017. Mrs Rogers' test was at page 563 of the bundle; Mrs Darby's at page 753 and Mr Osmani's at 897. All the Claimants also underwent an interview process on 2 May 2017. The members of the interview panel were Mr Otitoju, Nicki Lane, Toby Hartigan-Brown and Michelle Priest. The records of the Claimants' interviews were in the Tribunal bundle. Michelle Priest attended in an advisory capacity.

197 It was not in dispute that a 65% score was set as the pass mark for redeployment interviews in relation to the PSO post.

198 Mr Otitoju was cross-examined about why 65% was set as the score. He said that there were more candidates for the PSO posts from outside the Housing Department and that the Respondent was trying to drive an improvement in the service and wanted higher expectations than in the ringfenced interview.

199 In his witness statement he said, at paragraph 41, in relation to the interview: "Due to the higher threshold candidates were expected to exceed the requirements in response to each question…".

200 Mr Otitoju was cross-examined about an email that he sent to Mrs Rogers on 5 May 2017. He conceded that he had said in that email:

> "The required standard was set very high and on this occasion, you did not meet that required standard."

201 Mr Otitoju was also cross-examined about paragraph 41 of his witness statement, wherein he said that candidates were expected to exceed the requirements in response to each question. It was put to him that that statement contradicted the redeployment policy, which said that, if at interview the redeployee met the requirements for the post, they should be offered a 4-week trial period. Mr Otitoju agreed that that was what the policy required and that his redeployment interview process had required more than the redeployment policy set out. Mr Otitoju said that the 40% pass mark in the original redundancy process had been felt to be low.

202 The Property Services Officer interview pro forma gave scoring guidance to the interviewers. It said that the questions would be scored out of 3; a score of 0 meant that the required standard was "not met"; 1 meant "partially met"; 2 was "met"; and 3 meant, "exceeded". Candidates were asked 11 questions. Nicki Lane gave Mrs Rogers a total score of 22 out of 33. However, she conceded in cross-examination that the score should have been 23, because Ms Lane added up Mrs Rogers' marks incorrectly. Mr Hartigan-Brown scored Cherie Rogers 2 for each question, meaning that she met the criteria. Akin Otitoju scored Mrs Rogers 21. On an average of the interviewers' scores, therefore, Mrs Rogers was assessed as meeting the required standard. Mr Otitoju once more marked the written test. There does not appear to have been any moderation of his scores for that test. It was clear from Mr Otitoju's evidence he was applying a standard of requiring candidates to "exceed" requirements, which was not consistent with the Respondent's redeployment policy.

203 Mr Otitoju gave Mrs Rogers 15 marks for her written test. The maximum possible marks were 40.

204 Mrs Darby's written test was scored 20 out of 40 by Mr Otitoju. At interview Mr Otitoju scored Mrs Darby 18.5 out of 33. Toby Hartigan-Brown scored her 20.5 and Nicki Lane gave her scores of 19 in total.

205 Mr Otitoju gave Mr Osmani 20 out of 40 for his written test. He gave him a total score of 18.5; Mr Hartigan-Brown gave Mr Osmani 19 and Nicki Lane gave him 18.

206 Mr Otitoju told the Tribunal that candidates were expected to exceed requirements in response to each question and that they were required to attain about 65%. The Tribunal found that the 65% was not in accordance with the redeployment policy. Insofar as Mr Otitoju justified it by saying that the Respondent wanted to drive an improvement in the service, this was not in accordance with the Respondent's redeployment policy, which said that the council was committed to try to redeploy,

where possible, employees whose post were deleted as a result of budget restraints or changing organisational requirements and that managers were required to comply with the arrangements detailed in the procedure, which were designed to try and help find suitable alternative employment for employees unable to continue in their post because of redundancy. The redeployment policy did not say that the purpose of the policy was to drive improvements in the service; its policy was to retain employees who were at risk of losing their jobs.

207 On 5 May 2017 Mr Otitoju wrote to Claire Symonds (p 237), saying that he had completed the recruitment to the Property Services Officer vacancies. He said that there were 8 designated redeployees (Housing Officers) who had applied for and were short-listed for interviews. Out of those 8, 3 had passed the threshold for appointment as Property Services Officers. He said that the threshold for appointment had been set at 65%; when the ringfenced interviews were carried out in February the threshold had been 40%, but the standard had been set higher in the second process. He said that 5 of the current Housing Officer redeployees had not met the recruitment standard, but that 5 other internal candidates had met the required standard and would appointed in post as Property Services Officers. Mr Otitoju said that the outcome meant that the recruitment drive had facilitated the appointment of 9 additional Property Services Officers to the 15 already in place. The total compliment for Property Services Officers was 30 and that the outcome of the redeployment process meant that there would now 24 Property Services Officers in post, so that Mr Otitoju would have to recruit externally to make up the shortfall.

208 In his evidence to the Tribunal, Mr Otitoju described the other internal candidates being interviewed as candidates from outside Property Management. The wording of his email at p237 on 5 May 2017 distinguished between the Housing Officers who were redeployees and other internal candidates. He described the exercise as a "current recruitment drive," rather than a redeployment process. It appeared therefore that the May 2017 Property Services Officer selection process was not simply a redeployment process, but was a recruitment drive, competitively scored, and open to Council employees who were not redeployees. The aim of the exercise, as Mr Otitoju told the Tribunal, was to improve the service. This accorded with paragraph 37 of Mr Otitoju's witness statement, wherein he said that the PSO vacancies were advertised. Again, this suggested that the recruitment process was an open, competitive recruitment process, rather than simply a redeployment exercise; and that the redeployees were measured according to a competitive recruitment standard, as opposed to a redeployment standard.

209 The three Claimants were told that they had been unsuccessful in securing the Property Services Officer posts.

210 Mr Otitoju was cross-examined about his marking of Mr Osmani's written test during the redeployment exercise. It was put to Mr Otitoju that he had underlined various spelling mistakes in Mr Osmani's written exercise. Mr Otitoju said that he did give marks during the written exercise for spelling and grammar because presentation was relevant to the scores.

211 It was put to Mr Otitoju that he had underlined Mr Osmani's spelling errors, but not Mrs Rogers' mistakes, in her equivalent written exercise. It was correct, looking at

the markings on the two written exercises, that Mr Otitoju did underline spelling errors in Mr Osmani's, but not in Mrs Rogers' written exercises.

212 Mr Otitoju's response was that Mrs Rogers' total score was higher than Mr Osmani's and her score of 15 reflected a higher score for presentation, which included spelling and grammar. Mr Otitoju's answer was factually incorrect. Mr Osmani scored 20 in his written exercise when Mrs Rogers scored 15, overall, p239. Either Mr Otitoju wrongly calculated Mrs Rogers' score and therefore her score should have been higher for the written exercise, or he did pick out spelling mistakes in Mr Osmani's which he did not highlight in Mrs Rogers but, even so, Mr Osmani scored 20 marks, compared to Mrs Rogers' 15. That suggested that Mr Osmani's score on the written test would have been higher if Mr Otitoju had not been more critical of his spelling mistakes and grammatical errors than he was of other candidates'.

213 Mrs Rogers' effective date of termination was 7 July 2017.

214 Mr Osmani told the Tribunal that Mr Watson wrote to him on 6 July 2017, attaching his notice letter, which said that his last day of service was 7 July 2017. Mr Osmani also told the Tribunal that his redundancy calculation had never been provided to him. He conceded that it may have been sent in the post to him, but said that it had never arrived. Mr Osmani said that, because he had not been given his contractual notice, he turned up to work on 10 July 2017. Mr Woodhams' manager told him to leave because his employment had been terminated. Mr Osmani left work on 10 July 2017.

Characteristics of PSOs who were Appointed

215 The Respondent told the Tribunal that one of the candidates who was appointed to the PSO role worked compressed (full-time) hours and another was disabled by reason of dyslexia.

216 No part-time PSOs were appointed.

Presentation of the Claims

217 Mrs Rogers' claim was presented on 15 September 2017 (p.283). Her early conciliation period was from 19 July 2017 to 19 August 2017 (p.282). Therefore, complaints about acts done prior to 20 April 2017 would be outside the primary three month time limit unless they formed part of conduct extending over a period.

218 Mrs Darby's claim was presented on 25 October 2017. Her early conciliation period was 29 August 2017 to 29 September 2017. Therefore, complaints about acts done prior to 30 May 2017 were outside the primary three month time limit, unless they were part of a continuing act.

219 Mr Osmani's claim was presented on 25 October 2017. His early conciliation period was 29 August 2017 to 29 September 2017. Mr Osmani accepted that complaints about acts done before 30 May 2017 were outside the primary three month time limit unless they formed part of conduct extending over a period.

220 The Claimants contended that conduct which formed part of the redundancy process from October 2016 was conduct extending over a period.

Relevant Law

Discrimination

221 By *s39(2)(b)(c)&(d) EqA 2010*, an employer must not discriminate against an employee in the way the employer affords the employee access, or by not affording the employee access for receiving any benefit, facility or service, or by dismissing him or subjecting him to any other detriment.

222 In approaching the evidence in a discrimination 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 judgement.

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

Direct Discrimination

224 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."

225 Disability and race are each a protected characteristic, *s4 EqA 2010*. By *s9 EqA 2010*, race includes colour; nationality; ethnic or national origins.

226 *S13 EqA 2010* applies to associative discrimination, *Attridge v Coleman* [2010] ICR 242.

227 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.*

228 The test for causation in direct discrimination cases is a narrow one. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the ET must determine why the alleged discriminator acted as he did. What, consciously or unconsciously, was his reason? Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified. Para [77]. See also *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 paragraph [12].

229 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.

Discrimination Arising from Disability

230 s 15 EqA 2010 provides: “Discrimination arising from disability (1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.”

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

231.1 What was the cause of the treatment complained of (“because of something” – what was the “something”?)

231.2 Did that something arise in consequence of the disability?

232 Simler P in *Pnaiser v NHS England* [2016] IRLR 170, EAT, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15*:

“(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.

(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.

(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport [1999] IRLR 572*. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises.

(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the

statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.

(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the “because of” stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the “something arising in consequence” stage involving consideration of whether (as a matter of fact rather than belief) the “something” was a consequence of the disability.

(h) Moreover, the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the “something” leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of “something arising in consequence of the claimant's disability”. Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to “something” that caused the unfavourable treatment.”

Indirect Discrimination

233 Indirect discrimination is defined in *s19 Equality Act 2010*.

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (*a*) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (*c*) it puts, or would put, B at that disadvantage, and
>
> (*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.

234 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].

235 A PCP will not be proportionate unless it is necessary for the achievement of the objective and this will not usually be the case if there are less disadvantageous means available, *Homer* [2012] ICR 704.

Harassment

236 By *s40(1)(a) EqA 2010* an employer (A) must not, in relation to employment by A harass a person (B) who is an employee of A's. Harassment is defined in *s26 EqA 2010.*

237 s26 Eq A provides

"(1) A person (A) harasses another (B) if—

(*a*) A engages in unwanted conduct related to a relevant protected characteristic, and

(*b*) the conduct has the purpose or effect of—

(*i*) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

….

(4) In deciding whether conduct has the effect referred to in subsection (1)(*b*), each of the following must be taken into account—

(*a*) the perception of B;
(*b*) the other circumstances of the case;
(*c*) whether it is reasonable for the conduct to have that effect."

238 In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT said that, in determining whether any "unwanted conduct" had the proscribed effect, a Tribunal applies both a subjective and an objective test. The Tribunal must first consider if the employee has actually felt, or perceived, his dignity to have been violated or an adverse environment to have been created. If this has been established, the Tribunal should go on to consider if it was reasonable for the employee to have perceived this. In approaching this issue, it is important to have regard to all the relevant circumstances, including the context of the conduct. A relevant question may be whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence: the same remark may have a different weight if evidently innocently intended, than if evidently intended to hurt (paragraph [15]).

239 The EAT also commented that "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by offensive comments or conduct (which are related to protected characteristics), ".. it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase", paragraph [22].

240 In *Land Registry v Grant* [2011] IRLR 748 at [47] Elias LJ said that words of the statutory definition of harassment, ".. are an important control to prevent trivial acts causing minor upsets being caught by the definition of harassment." In *GMBU v Henderson* [2015] 451 at [99], Simler J said, "..although isolated acts may be regarded as harassment, they must reach a degree of seriousness before doing so." The shifting burden of proof applies to claims under the Equality Act 2010, s136 EqA 2010.

241 *Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000* provides,

242 "(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker – (a) as regards the terms of his contract; or (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

243 (2) The right conferred by paragraph (1) applies only if – (a) the treatment is on the ground that the worker is a part- time worker, and (b) the treatment is not justified on objective grounds."

244 By *Reg 8(6) Part-Time Workers Regulations 2000*, "Where a worker presents a complaint under this regulation it is for the employer to identify the ground for the less favourable treatment or detriment." In deciding whether part-time worker status was "the ground", it is sufficient that it is an effective cause of the treatment; it need not be the only cause, *Sharma v Manchester City Council* [2008] IRLR 336, para [51] and *Carl v University of Sheffield* [2009] IRLR 616, paras [25], [28], [42].

245 The employer has the burden of proof to justify any less favourable treatment done on the ground that the worker in a part-time worker, *Ministry of Justice v O'Brien* [2013] ICR 499.

Unfair Dismissal - Redundancy

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

247 *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.

248 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."

249 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.

250 *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.

251 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.

252 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.

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

Discussion and Decision

<u>Unfair Dismissal</u>

254 The Tribunal considered the unfair dismissal claims first because this claim was

common to all the Claimants. The Tribunal addressed the question as to whether the Respondent had shown that the reason for the Claimants' dismissal was redundancy. It decided that the Respondent had not shown that the reason for dismissal was redundancy.

255 At the time that the Claimants were dismissed, and for some months before, the Respondent had known, on the Tribunal's findings of fact, that the Property Services Officer roles were not going to operate as intended and that, in fact, the Housing Officers who had been successful in attaining the PSO roles were simply continuing to operate as they had previously. The PSO roles did not develop beyond Housing Officer roles. It was known that a further restructure was to be undertaken and the PSO roles would be further restructured.

256 Furthermore, when the Claimants were made redundant, there were 6 vacant PSO officer posts in total. There were, at all times during the redundancy and redeployment processes, more vacant PSO posts than there were applicants within the Housing Service to fill them. It is correct that other candidates applied for the PSO officer roles in the second recruitment round, but the Tribunal has not seen evidence that those people were redeployees and that their posts had been deleted – they were employees who already had jobs.

257 The Tribunal found that, during the redeployment exercise and at the time of the Claimant's dismissal, Housing Officers/Property Services Officers were continuing to do Housing Officer work and that there remained vacant posts for Housing Officers/Property Services Officers in the Housing Department; in that the envisaged PSO roles and duties had never come into being and were not going to come to being before the next restructure exercise. The reason for the Claimants' dismissal was not that there had been a reduction in the Respondent's requirement for employees to carry out work of a particular kind.

258 The Respondent did not discharge the burden of proof to show that there was a potentially fair reason for dismissal. No reason for dismissal, other than redundancy, was relied on.

259 If the Tribunal was wrong its decision on whether the Respondent had shown that the reason for dismissal was redundancy, the Tribunal went on to consider whether, even if the reason for dismissal was redundancy, the Respondent had acted fairly in dismissing the Claimants for that reason (applying a neutral burden of proof).

260 The Tribunal decided that the Respondent acted unreasonably in dismissing the Claimants; in that the procedure it adopted for selection of employees was outside the band of reasonable responses of a reasonable employer. The Tribunal decided this for a number of reasons, as follows.

261 Mr Otitoju conducted the assimilation process unreasonably. He was completely unable to explain to the Tribunal how he had arrived at the assimilation scores, despite being asked to do so in both cross examination and re-examination, by the Respondent's Counsel.

262 In any event, in breach of the Respondent's policy, Housing managers had not

ensured that the Housing Officer job description was up-to-date and/or drafted in a similar way to the Property Services Officers job. The Property Services Officers post was drafted in a detailed, granular form, whereas the Housing Officer post was drafted in a very high level, general form. The Tribunal concluded that it was very difficult to see how any reasonable comparison could have been made between them for the purposes of the assimilation exercise. That perhaps explained why Mr Otitoju's justification for his assimilation assessment, as set out in his witness statement, was simply factually inaccurate in many respects.

263 As the Tribunal has found, Mr Otitoju said in his witness statement that there was no income maximisation function in the Housing Officer role; this was plainly incorrect and completely unreasonable. It contradicted the wording of the Housing Officer job description.

264 In Mr Otitoju's witness statement, he purported to give specific examples of why the Housing Officer role did not reach the 65% match required for assimilation to the Property Services Officer role. He said that there was no resident involvement in the Housing Officer role. However, even on his assimilation matrix, he assessed the Housing Officer role as having had some resident engagement. Further, he said that the Housing Officer role had nothing in its job description about income maximisation. In his assimilation matrix, he appeared to assess the old role as having a greater percentage of income maximisation than the new role.

265 Mr Otitoju said that Housing Officers had never held a budget. However, with regard to financial management, he appeared to assess the Housing Officer role as having had at least some financial management responsibility.

266 The Tribunal preferred the Claimants' evidence, to Mr Otitoju's evidence, about the roles of Housing Officers compared to Property Services Officers roles. The Tribunal noted the evidence of the Respondent's own manager witnesses, who said they believed the Housing Officers should have been assimilated to the PSO roles. Grant Rome, Landlord Services Manager, said that he felt that the assimilation exercise was not fair and that the Housing Officers had an assimilation right because their role was very similar indeed to that of the Property Services Officer. Mr Stuart Beard, Landlord Services Manager, told the Tribunal that the role of PSO was operationally virtually identical to that of Housing Officer. Although there were changes in the job description, operationally the officers did what needed to be done and what needed to be done was the Housing Officer roles.

267 Given that Mr Otitoju was completely unable to explain how he arrived at his assimilation assessment, the Tribunal found, on the balance of probabilities, that the Property Services Officer role was very similar to that of the Housing Officer and that it was unreasonable not to assimilate the Housing Officers into the Property Services Officers roles.

268 Insofar as the Respondent did adopt a process which selected or appointment to new posts wholly on the basis of performance at interview, ignoring any past service and performance, the Tribunal accepted that this could be a fair way of selecting for redundancy and/or retention to new posts. However, if such a method was adopted, the Tribunal considered that it was important for the process to be administered fairly

and for there to be objectivity in the assessment.

269 The Tribunal found that the Respondent's failure to have model answers, either for the written test, or for the interview, breached its own standard process. Mr Otitoju was the only person who marked the written exercise and had no objective criteria against which to mark the exercise. There was no moderation of his score. The written exercise for two of the Claimants had been mislaid.

270 For the avoidance of doubt, the Tribunal did not find that it was unreasonable, per se, to include a written test as part of the interview process. The Tribunal accepted the Respondent's evidence that it was standard practice for it to have written test as part of an interview process. The Tribunal did not find that an interview process necessarily excluded any form of written test. Further, in a job where there are record keeping and administrative elements, was not unreasonable to access candidates' ability to produce written reports.

271 The Tribunal has found that Mr Otitoju did tell Mr Osmani the outset of Mr Osmani interview that he had failed his written test. The Tribunal considered that doing so was outside the band of reasonable responses of a reasonable employer. It was inevitable that such news would seriously discourage a candidate and have an impact on their performance. The Tribunal accepted Mr Osmani's evidence that it did, in his case.

272 Further, the Tribunal found that it was outside the band of reasonable responses for Mr Otitoju not to offer a second interview to Mrs Darby when he discovered her very tragic family circumstances. Another candidate was on bereavement leave and she was not required to go through an interview process until later. When Mr Otitoju discovered Mrs Darby's situation relating to terminal illnesses of two very close family members, it appeared from his evidence that he did not even turn his mind to whether Mrs Darby ought to have been required to go through an interview process in those circumstances. He did not consider whether she should be permitted to take a second interview when the tragic news was not so acutely in her mind. Given that the Respondent had decided to select for the new posts solely on the basis of an interview, it was outside the band of reasonable responses for the Respondent to hold Mrs Darby to her performance in that interview, when she, on any reasonable assessment, was in the midst of family circumstances which would have been highly distracting.

273 Further, the Tribunal found that the Respondent acted unreasonably and outside the band of reasonable responses in the way in which it treated the Claimants' applications for redeployment.

274 The Tribunal has found that, rather than assessing the redeployees on whether they met the requirements for the PSO role, Mr Otitoju, who alone marked the second written exercises and was the manager in charge of the process, decided that candidates would have to score 65% to be appointed. He was measuring candidates against whether they exceeded the requirements of the post. It appears that he did so because he was considering other external candidates, who were not redeployees, but who were being considered as part of a competitive recruitment process.

275 The Council's redeployment process existed to allow employees who were at

risk of redundancy to be appointed to available jobs where they meet the required standards. The Tribunal considered that it was outside the band of reasonable responses for the Respondent to require the Claimants to compete competitively for available jobs and to exceed the standards required for those available jobs.

276 The Tribunal found that stated the purpose of the Respondent's redeployment policy was to retain employees in employment where possible. In fact, it appeared that Mr Otitoju subjected the Claimants to a competitive process which would have applied to anybody, applying from any department in the Respondent, whether at risk of redundancy or not.

277 There was no moderation of Mr Otitoju's marking of the written test again and the Tribunal found that Mr Otitoju applied an unreasonably high standard in marking of the test, as he did to the interviews.

278 In the original redundancy exercise, the Respondent had decided that a score of 40% was sufficient for employees to be appointed to the PSO roles. The Tribunal found that, as a matter of logic, the Respondent must have considered that a score of 40% meant that the candidates met the requirements for the roles, otherwise they could not have been appointed. As a matter of inference, the Council would not have appointed people in the February 2017 ring fenced selection exercise to the PSO roles if it did not consider that people scoring 40% were capable of doing the roles.

279 On each of the Claimants' scores at the May 2017 redeployment process, they did score 40% and therefore they met the standard which was required in the February 2017 selection exercise. The Tribunal considered that, in those circumstances, it was unreasonable for the Respondent to dismiss the Claimants who had met the standard which had originally been required for people to be appointed to the PSO role. They were not external candidates, they were redeployees within the Housing Department.

Part-Time Worker Discrimination

280 Mrs Rogers and Mrs Darby contended that they had been subjected to part-time worker discrimination when they were dismissed. The Tribunal accepted Mrs Darby's evidence that Mr Otitoju had said to her that he did not want part-time workers to work in the new structure. The Tribunal found that Mr Osinaike asked Mrs Rogers, during her interview, why she worked part-time. Mrs Darby and Mrs Rogers were the only part-time workers who worked as Housing Officers; they were both dismissed following the redundancy and redeployment exercises. No part-time PSOs were appointed.

281 The procedure adopted for appointing to the PSO posts, both in February 2017 and in May 2010, was unreasonable and lacking in objectivity. The Tribunal considered that the burden of proof was on the Respondent to prove that Mrs Darby and Mrs Rogers' part-time status was not part of the reason that they were given low scores in these exercises and therefore dismissed.

282 The Respondent contended that it applied the same standards to all interviewees, both in the redundancy exercise and the redeployment exercise, but that each of the Claimants simply did not perform sufficiently well to be appointed to the new posts in either exercise.

283 However, the Tribunal has found that there were no model answers to the interview questions, or for the written exercises, and therefore no pre-existing objective standard against which candidates were measured. Furthermore, the requirement of a 65% pass rate in the redeployment exercise was arbitrary and not justified under the redeployment procedure. It subjected redeployees, including the two part-time workers, to an unreasonably high standard in order to secure redeployment.

284 Given Mr Otitoju's statement to Mrs Darby and Mr Osinaike's questioning of Mrs Rogers, there was evidence that two very senior members of the Housing Department did view part-time working unfavourably. Mr Otitoju alone marked candidates' written exercises in both the February 2017 ring fenced selection exercise and the second May 2017 selection exercise. Mr Otitoju was a member of both interview panels. He had said he did not want part-time workers in the new posts. Mr Osinaike was a member of the February 2017 interview panels. The Tribunal considered that the scoring of all the written exercises and of the interview performances was not objective.

285 The Tribunal has found that the Respondent has not discharged the burden of proof to show that part-time working was not part of the reason that Mrs Rogers and Mrs Darby were given the scores that they were in the February 2017 ring fenced selection and May 2017 redeployment processes and therefore selected for dismissal. A number of the Respondents' witnesses told the Tribunal that Mrs Darby and Mrs Rogers' interview outcomes did not reflect their ability to do their jobs and/or that Mrs Darby and Mrs Rogers were good Housing Officers, who would be capable of undertaking the PSO roles.

286 The Tribunal concluded that part of the reason that Mrs Rogers and Mrs Darby were given low scores was their part-time status.

287 Tribunal concluded that Mr Otitoju treated Mrs Darby less favourably than he treated full-time workers when he told her he did not want part-time workers in the new structure. This was worrying and discouraging for Mrs Darby, a part-time worker.

288 The Respondent discriminated against Mrs Rogers and Mrs Darby on the grounds of their part-time status in giving them low scores in the selection exercises in February and May 2017 and, therefore, not offering them PSO roles in the February and May 2017 processes and dismissing them.

289 The Respondent did not argue that less favourable treatment of Mrs Rogers and Mrs Darby as part-time workers was objectively justified.

290 The Tribunal concluded, however, that the decision not to automatically offer the vacant PSO roles to the Claimants was not because of their part-time worker status. None of the Housing Officers who were unsuccessful in the February 2017 exercise was offered a PSO role automatically. All were required to go through a redeployment exercise and selection process in May 2017 instead. The Claimants were treated, in this respect, in the same way as their full-time Housing Officer colleagues who had not been selected for PSO posts in February 2017.

Disability Discrimination

291 The Tribunal has decided that Mrs Rogers was not disabled.

Discrimination Arising From Disability

292 Mrs Darby was disabled. She was working part-time because of her disability. The Tribunal has decided that the Respondent did not offer her a PSO post in the February and May 2017 processes and dismissed her on the grounds of her part-time status. Therefore, for the reasons set out above, the Tribunal found that the Respondent subjected Mrs Darby to discrimination arising from disability when it failed to offer her a PSO post in those processes and dismissed her. Her part-time status was something arising in consequence of her disability.

Mrs Rogers – Direct Discrimination by Association

293 Mrs Rogers had originally become part-time because of her caring responsibilities for her family members, who were disabled. She no longer had those caring responsibilities at the time of the February and May 2017 processes. Her part time hours were no longer associated with her family members' disabilities. She had sought to increase her hours before February 2017.

294 There was no evidence that the panel members in either selection exercise had the Claimant's husband's or son's disabilities in their minds.

295 The Tribunal did not find that the Respondent subjected her to direct discrimination on the basis of association with disabled family members.

Mrs Darby – Direct Disability Discrimination and/or Disability Harassment

296 Mrs Darby contended that Mr Otitoju had subjected her to direct discrimination and harassment by his repetitive questioning of her. The Tribunal has found that, at the time, Mrs Darby did not object to Mr Otitoju's questions of her, which were well intentioned, if somewhat clumsy, on occasion. It found that other employees did know about Mrs Darby's disability and Mr Otitoju did not have the purpose of violating her dignity or creating the prohibited environment for Mrs Darby. On all the facts, including Mrs Darby's own perception, the Tribunal found that his questions about Mrs Darby's shoulder did not have the effect of violating her dignity or creating a prohibited environment, in that a reasonable person would not have objected to a manager making enquiries about a health condition which they had themselves disclosed, and where other employees knew about the condition. In those circumstances, it would not be reasonable for the words to have the prohibited effect. Mr Otitoju did not subject Mrs Darby to disability harassment.

297 For the same reasons, the Tribunal found that Mr Otitoju's questions did not amount to detriments.

298 The Tribunal has found that Mr Otitoju did not make a comment about the Claimant being gone soon.

299 Regarding her direct disability discrimination claim, the Tribunal found that the burden of proof had not shifted to the Respondent to show that Mrs Darby's disability, per se, was not part of the reason that she was not offered a position as Property Services Officer. Neither Mr Otitoju nor Mr Osinaike made any negative comments about disability at any point. There was no evidence that any of the panel members viewed disability in any negative way; this is simply a case of a difference in treatment and a difference in status, without more.

300 The Tribunal did not find that the failure automatically to offer the Claimants one of the vacant Property Services Officer roles in May 2017 was an act of direct disability discrimination. The Tribunal accepted the Respondent's evidence that it interpreted the redeployment policy as requiring individuals to go through an interview process in order to satisfy the Respondent that they could carry out the requirements of a role. The Respondent did not operate a process whereby it automatically offered trial periods vacant posts to redeployees. The Tribunal accepted that it was reasonable for employers to require redeployees who wished to take up a vacant post to show that they were capable of carrying out the role. The Respondent did this through an interview process. Insofar as the Respondent did not automatically offer either a trial period, or simply offer the vacant post, it was acting in accordance with its redeployment policy and there was no less favourable treatment of the Claimants.

Race Discrimination – Mr Osmani

301 The Tribunal has not found that Mr Osinaike mocked Mr Osmani, or pretended he had not understood him, or said that the Claimant had come in a back of a lorry, or said that the Third Claimant could not speak English and was lucky to have his job.

302 The Tribunal has found that Mr Otitoju told the Third Claimant that he was worried about how he would perform in his interview because of the standard of his English language. The Tribunal found that this was not because of the Third Claimant's race but because of Mr Otitoju's genuine concern about the standard of Mr Osmani's English. Mr Osmani told the Tribunal that his English language skills in exam conditions was not as good as his colleagues'. The Tribunal will consider this further under the head of "indirect race discrimination" below.

303 The Tribunal did not accept Mr Osmani's evidence that Mr Otitoju told him in February 2017 that he had done badly in interview because his English was not every good. Like Mr Osmani's evidence about Mr Osinaike's alleged discriminatory comments to him, this allegation lacked detail and was little more than a bare assertion.

304 The Tribunal did not find that the burden of proof shifted to the Respondent to show that the reason that Mr Osmani was not offered a PSO job in the February 2017 process because of his race. The Tribunal has rejected Mr Osmani's evidence about Mr Osinaike's behaviour towards him. There was no evidence that the interviewing panel had any negative views about Mr Osmani's race. Mr Osmani was subject to the same interview and assessment process as all other candidates. Mr Osmani was one of a number of Housing Officers, many of whom were British, who were not selected for the PSO posts.

305 Nor did the Respondent subject Mr Osmani to race discrimination when it failed to give him a vacant PSO post automatically. As the Tribunal has decided elsewhere, all redeployees were required to undertake an interview to show that they met the requirements of the vacant posts. Mr Osmani was not treated less favourably than other non Kosovan, UK redeployees.

306 There was evidence, however, that Mr Otitoju subjected Mr Osmani to more scrutiny of his English language than other candidates in his written exercise for the May 2017 redeployment process, when he underlined spelling mistakes in Mr Osmani's report, which he did not in Mrs Rogers'. The burden of proof shifted to the Respondent to show that Mr Otitoju did not discriminate against Mr Osmani in his marking in this process. Mr Otitoju's explanation of the scores he gave for this written test did not make sense and was factually incorrect. Mr Otitoju took a more stringent approach to Mr Osmani's English than he did to other candidates in respect of this written test. Given the unsatisfactory nature of Mr Otitoju's explanation, the Tribunal found that Mr Otitoju did not discharge the burden of proof to show that race discrimination did not affect his marking of Mr Osmani's test during the redeployment exercise.

Indirect Race Discrimination

307 The Tribunal found that basing selection for posts on a written test and interview process put people who had English as a second language at a disadvantage, compared to people who did not. It was likely that people who had English as a second language would take longer to mentally process questions and answers in a test situation and would not be able to produce as prompt and detailed answers.

308 In the particular circumstances of this case, in the first test, candidates were not permitted to make use of the internet, so that Mr Osmani could not use Google Translate or an online dictionary, to assist his expression.

309 The Tribunal considered that it was a legitimate aim for Respondent to seek to ensure that employees had a suitable standard of English. An interview and test process might be a proportionate means of achieving this. However, in this case, the fact that Mr Osmani was not allowed access to an online dictionary, or Google Translate, meant that the means were not proportionate to the aim, in that they were not the least discriminatory method that could be used. In his ordinary working life, the Third Claimant would have had access to Google Translate, or an online dictionary, and so the test applied a more stringent requirement than his ordinary job would. Accordingly, the Tribunal found, with regard to the February 2017 written test, that the Respondent subjected Mr Osmani to indirect race discrimination.

310 However, it did not subject him to further indirect discrimination by applying an interview and written test, more generally, in the redundancy selection and redeployment exercise. It was appropriate for the Respondent to require candidates to be able to communicate in English in an interview and in a written test, as they were required to communicate with members of the public in their public-facing role and were also required to write reports in their role. It was appropriate and necessary for the Respondent to test candidates' ability to do this at a satisfactory level.

Time Limits – Discrimination Claims

311 The Tribunal found that the Respondent's Restructuring exercise, encompassing the February 2017 ring fenced interviews and the May 2017 redeployment exercise, in relation to the same PSO roles, and the Claimants' subsequent dismissals, was a continuing state of affairs. Mr Otitoju was responsible for decision making in both processes. He marked the written tests in both the February 2017 and May 2017 processes. He sat on both selection panels. Mr Otitoju's comment to Mrs Darby about not wanting part time workers in the new structure was made in the context of the same restructuring exercise. The Tribunal concluded that all the Respondent's actions in the restructuring exercise were part of a continuing act, continuing until the Claimants' dismissals and that the Claimants' successful discrimination claims were brought in time.

Wrongful Dismissal – Mr Osmani

312 The Tribunal preferred Mr Osmani's evidence to the evidence of the Respondent's witnesses and decided that Mr Osmani was not given notice of termination of his employment until 6 July 2017. It was not in dispute that Mr Osmani was entitled to 12 weeks' notice of termination of employment. He was not given this and was asked to leave the office on 7 July 2017.

313 The Respondent wrongfully dismissed the Claimant when it failed to give him 12 weeks' notice of termination of contract.

Employment Judge Brown

21 December 2018