EMPLOYMENT TRIBUNALS

Claimants: **(1) Ms C Craig**
(2) Ms S Richardson

Respondent: **The Commissioners for HM Revenue & Customs**

Heard at: North Shields **On: 9,12,13,14,15, 16 and 21 November 2018**
Deliberations in chambers: **7 January 2019**

Before: **Employment Judge Shepherd**
Members: Ms L Jackson
Ms M Clayton

Representation:
Claimant: Mr E Legard
Respondent: Mr D Bayne

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims brought by the first claimant of age, sex, disability and part-time worker status discrimination are not well-founded and are dismissed.

2. The claims brought by the second claimant of age, sex and part-time worker status discrimination are not well-founded and are dismissed.

REASONS

1. The claimants were represented by Mr Legard and the respondent was represented by Mr Bayne.

2. The Tribunal heard evidence from:

Christina Craig, the first claimant;
Susan Richardson, the second claimant;
Irene Loh, Deputy Director, Making Tax Digital for Business;
Mark Willis, Portfolio Management Office Manager;

Jeff Worrell, Team Leader, Policy and Design Team;
Mark Wardell, Deputy Director Strategy;
Jeff Woodhouse, Team Leader, Business Case and Benefits;
Mark Wilson, Director of Business Tax.

3. The Tribunal had sight of two bundles of documents, a pleadings bundle numbered up to page 134 and a bundle of documents numbered up to page1555. The Tribunal considered those documents to which it was referred by the parties.

4. The issues were identified at a Preliminary Hearing before Employment Judge Buchanan on 25 May 2018 and were as follows: -

4 The first claimant – Ms C Craig

Disability

4.1 Did the claimant suffer from a disability namely a work related upper limb disorder during at least the period beginning in 2011 to September 2017?

4.2 If so did the respondent know or ought it to have known that the first claimant suffered from a disability during that period?

Direct age and disability discrimination

4.3 Was the first claimant treated less favourably than any of them Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams by being displaced from her previous post with the first respondent in May 2017 because of (1) her alleged disability and/or (2) being over 56 years of age?

Indirect age, sex and disability discrimination

4.4 Did the first respondent and/or the second respondent operate a provision, criterion or practice ("PCP") of either: -

4.4.1 Requiring employees to work full time and/or –

4.4.2 Replacing part time employees with full time employees?

4.5 If so did either PCP put persons with the following characteristics at a particular disadvantage: -

4.5.1 Females.

4.5.2 Disabled employees and/or –

4.5.3 Employees over age 56 years of age?

4.6 If so did either PCP put the first claimant at that disadvantage by: -

4.6.1 Displacing her from her previous role in May 2017 and/or –

4.6.2 Preventing her from being appointed to any of the posts referred to in paragraph 24 of her claim form? It is noted and recorded that the first claimant will further particularise the posts and details of them pursuant to the following orders.

Discrimination arising from disability

4.7 In consequence of her part time working was the first claimant: -

4.7.1 Displaced in May 2017 from her previous role and/or –

4.7.2 Prevented from being appointed to any of the posts referred to in paragraph 24 of her claim form – which post the first claimant will further particularise pursuant to the following orders.

4.7.3 If so did the first claimant work part time in consequence of her alleged disability?

4.7.4 If so were the actions of the first respondent a proportionate means of achieving a legitimate aim? It is noted and recorded that the first respondent will further particularise the legitimate aim pursuant to the following orders.

A claim of discrimination pursuant to the 2000 Regulations

4.8 Was the first claimant treated less favourably than any of them Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams on the grounds of her part time status by: -

4.8.1 Being displaced from her previous post with the first respondent in May 2017?

4.8.2 Having her skills removed from the skills list in around May 2017 and/or

4.8.3 Being prevented from being appointed to any of the posts referred to in paragraph 24 of her grounds of complaint? It is noted and recorded that the first claimant will give further of those posts pursuant to the following orders.

Further particulars have been provided by the claimant in respect of three posts, a Grade 7 – Boarding Role in CREST (vacancy holder Julian Hatt), a grade 7 post C&C (vacancy holder Dave Smith), Grade 7 Senior Policy Advisor (vacancy holder Jeff Worrell).

4.9 If so were any of them Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams comparable full-time workers within the meaning of regulation 2(4) of the 2000 Regulations?

4.10 If so was that treatment justified on objective grounds?

4.11 If so has the claimant sustained any recoverable losses?

4.12 If so can the claimant sustain any claim against the second respondent? It is noted and recorded that the claimant will confirm pursuant to the undermentioned orders whether or not any claim is to be pursued against the second respondent personally.

The claim against the second respondent has been dismissed upon withdrawal.

Time limits

4.13 Did the claims of the first claimant occur within three months of the commencement of ACAS early conciliation on 11 September 2017 or form part of a continuing course of conduct (or the continuing series of acts under the 2000 Regulations) and within that time? If not, would it be just and equitable to extend time?

5 The second claimant – Ms S Richardson

Direct age discrimination

5.1 Was the second claimant treated less favourably than any of them Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams by being displaced from her previous post with the first respondent in May 2017 because of being over 56 years of age?

Indirect age and sex discrimination

5.2 Did the first respondent and/or the second respondent operate a PCP of either (1) requiring employees to work full time and/or (2) replacing part time employees with full time employees?

5.3 If so did either PCP put persons with the following characteristics at a particular disadvantage: -

5.3.1 Females and/or –

5.3.2 Employees aged over 56 years of age?

5.4 If so did either PCP put the second claimant at that disadvantage by displacing her from her previous role in May 2017?

5.5 If so was either PCP a proportionate means of achieving a legitimate aim? It is noted and recorded that the first respondent will clarify the legitimate aim pursuant to the following orders.

The first respondent has set out the legitimate aim as that there were new and inexperienced team members who required a manager in the office on a day-to-day basis, to provide close and visible leadership, support, and coaching, to bring about necessary service improvements.

Discrimination pursuant to regulation 5 of the 2000 Regulations

5.6 Was the second claimant treated less favourably than any of them Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams on the grounds of her part time status by (1) being displaced from her previous post with the first respondent in May 2017 and/or (2) having her skills removed from the skills list in around May 2017?

5.7 If so were Clive Barnett, Brian Griffiths, Chris Knowles and/or Claire Williams comparable full-time workers within the meaning of regulation 2(4) of the 2000 Regulations?

5.8 If so was that treatment justified on objective grounds?

5.9 If so can the second claimant sustain a claim against the second respondent? It is noted and recorded that the second claimant will confirm whether she pursues a claim against the second respondent personally pursuant to the following orders.

The claims against the second respondent have been dismissed upon withdrawal.

Time limits

5.10 Did the claims of the second claimant occur within three months of the ACAS early conciliation on 12 September 2017 or form part of a continuing course of conduct (or a continuing series of acts under the 2000 Regulations) ending within that time?

5.11 If not would it be just and equitable to extend time.

6 Remedy issues (applicable to both the first claimant and the second claimant

6.1 If any of the claims succeed to what remedy is the first claimant and/or the second claimant entitled?

6.2 In particular what sums (if any) should be awarded to the first claimant and/or the second claimant for loss of earnings and/or injury to feelings?

7. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

7.1. The first claimant was employed by the respondent from 17 March 2000. At the material time in respect of this case she was employed as a Business Service Team Leader. On 1 April 2011 the first claimant took partial early

retirement and from then she was employed to work 29.6 hours over four days a week. .

7.2. The second claimant was employed by the respondent from 1 December 1974. At the material time in respect of this case she was employed as a Business Manager. On 1 June 2011 the second claimant took partial early retirement and from then she was employed to work 21 hours a week, working Tuesday to Thursday for seven hours a day.

7.3. Partial retirement with the respondent means that the employee is precluded from returning to full-time work.

7.4. The claimants were employed on the Making Tax Digital for Business Programme (MTDfB) within the Transformation Directorate. The first claimant was a grade 7 and the second respondent was a Senior Officer (SO). The first claimant was the second claimant's line manager.

7.5. In January 2017 Mark Willis became the Portfolio Management Office Manager and he managed two teams, Portfolio Management Office (PMO) and Corporate. The Deputy Director position above Mark Willis had been vacant for some months and, approximately two weeks after his appointment, Irene Loh became the Deputy Director of MTDfB. She was one of five Deputy Directors. Above her was a Director, Theresa Middleton and above her was the Director General, Nick Lodge.

7.6. The first claimant was the head of the Corporate team. The second claimant was one of three Senior Officers beneath the first claimant. However, the other two Senior Officers left in early 2017, one retired following a period of illness and the other left for a career change. There were four Higher Officers and a vacancy at Officer(O) level. The second respondent managed one of the Higher Officers.

7.7. The first claimant was based in Newcastle and the second claimant was based in Manchester. The first claimant worked from home on two days a week. Mark Willis worked in Newcastle and was aware that the claimant worked from home on two days due to the first claimant having a neck problem. Irene Loh was based in London. She was aware that the first claimant worked four days a week but was unaware that the first claimant suffered from a neck problem which necessitated working from home two days a week. She was aware that the second claimant worked part-time hours.

7.8. On 31 January 2017 Irene Loh sent an email to all the grade 6s and the first claimant. In this it was stated:

> "Now that I am in post, can I ask that you and your teams clear items with me before they go to Theresa and/or the whole of SLT.
>
> Theresa has asked me to do QA before things are put to her, so we really do make the most of her time. We've found that in a few cases, this pre-check would have helped refine the ask of her and/or SLT.

> We have transitioned to this for recurring events like Working Group and Programme Board. I feel we need the same level of rigour and understanding on the other items.
>
> Please give me a heads up where you have urgent things that need clearance and factor this in the time requirements for getting back, and if necessary, seek an extension.
>
> I see this as part of the natural process of establishing the ground rules for working together as a team, and hope you do too."

7.9**.** The first claimant said that the effect of this email was to cut her out of the management chain. However, it was sent to all the grade 6 managers and the claimant. Irene Loh said that this acted as a filter so that Theresa Middleton would only have to deal with matters that she needed to and resulted from a request from Theresa Middleton for Irene Loh to carry out a "quality assurance" test on the work that was to be put to her. The Tribunal is not satisfied that this was an attempt to cut the claimant out of the management chain.

7.10. In February 2017 Mark Willis asked the first claimant to provide an outline of her job which was referred to as a "pen picture". On 21 February 2017 the first claimant sent Mark Willis an email providing the outline of her job. Mr Willis asked the claimant to add the key activities of her team. The first claimant asked "what's it for? Is Irene job matching?". Mark Willis replied indicating that it was a favour for someone "not at all attached". He informed the Tribunal that this was totally unrelated to the later restructuring process and was nothing more than a favour for an old colleague.

7.11. Between February 2017 and March 2017 four members of the Corporate team left. These roles were not "backfilled" and this was agreed with the first claimant. Two of the members of staff went to the PMO team where the workload was significantly higher than in the Corporate team.

7.12. The PMO team was under resourced and Mark Willis said that he needed additional support in this area in the form of another Grade 7 to work in parallel with the existing grade 7 in that team. That role was advertised and the vacancy information sheet provided for a closing date of 28 March 2017. That recruitment was later frozen when the reprioritisation exercise commenced.

7.13. Irene Loh arranged for an "awayday" which took place in Newcastle on 1 March 2017. The first claimant said that, during the awayday Irene Loh had said that she needed to deal with the "problem of resilience" in her team and that people were working long hours and were overloaded. This was not sustainable and she had said that one of the things she had to deal with was part-time working and she said that part-time working was a problem. Irene Loh denied expressing a view that part-time working was a problem for her.

She said that she considered part-time workers to be very valued members of staff.

7.14. The Tribunal heard evidence from Jeff Woodhouse, a Grade 6 heading up the Business case and Benefits team, who was present at the awayday. He said that he remembered a discussion about part-time working taking place. He could not remember exactly what was said but he was clear in that he was confident that Irene Loh did not say anything negative about part-time workers and, that if she had, he would have spoken to her about it.

7.15. Following the awayday, during March 2017, group calls took place in which grade 6 and 7s reported back on progress. Jeff Woodhouse said that he recalled the subject of part-time working coming up again in one of those calls and he remembered Irene Loh talking about how it was important for part-time working to be an arrangement that satisfied both the business needs and those of the employee. He said that he understood the sentiment to be that it would not be fair to set out a role as part-time and the employee to then have to work over the hours that had been agreed. Irene Loh said that a suggestion had been made that part-time workers were prejudiced against by the appraisal process and that she had said that it was important that managers did not dress up a full-time role as a part-time one as that would not be fair on the individual. The first claimant said that this conversation took place on 1 March 2017 and that Irene Loh had commented that full-time roles should not be dressed up as part-time roles.

7.16. On 11 April 2017 Mark Willis sent an email to the first claimant stating

> "Can we ensure that anything is sent out by your team to the programme is reviewed by Irene/myself before they go out."

Both Mark Willis and Irene Loh said that this request was unrelated to the later reorganisation and no responsibility was being removed from the first claimant.

7.17. On 11 April 2017 the Executive Committee agreed budget allocations. The Transformation programme had a budget cut and a reprioritisation exercise commenced.

7.18. The Tribunal had sight of an email from Dan Goad, HR Director. This stated that the reprioritisation process would mean some changes to the shape of the Transformation Programme but there should be no job losses as a result.

7.19 On 20 April 2017 Mark Willis sent Irene Loh an email in which he had set out the current MTDfB corporate team and a potential new model. In the potential new model it was set out that the first claimant/new G7 would report to Mark Willis and there is a note that states "consider PMO reporting G7 to manage corporate team as well". With regard to the second claimant's role it was provided that this would be a role reporting to the first claimant, responsible for three HOs. It was stated "to consider if this needs to be full-time".

7.20. Discussions took place between Mark Willis and Irene Loh. It was agreed that the corporate team could operate with three HOs who would be managed by Mark Willis. It was considered whether a full-time SO was needed to manage the HOs but it was decided this was not necessary and therefore the proposal was never implemented.

7.21. It was agreed that four posts within the MTDfB corporate team would be removed.

7.22. A "matching" exercise was commenced. A "people data" template was to be created in respect of each of the displaced members of staff. This would then go to a central group, the Resourcing and Redeployment workshop to attempt to match the employees with suitable roles. The deadline for submitting the template was 5 May 2017. Mark Willis completed the people data template in respect of the first and second claimant and sent it to Irene Loh on 5 May 2017. Mark Willis completed the template using the "pen pictures" provided by everyone in the team when he had started in his role. Included on the template in respect of the first and second claimants was a comment that the staff member "was not aware of potential redeployment".

7.23. Irene Loh amended the template. She removed some of the skills that Mark Willis had included. She did this on the basis that she felt the best way to complete the template was to include the skills that she had seen them demonstrate in their current roles. She also removed a skill on the template in respect of a full-time member of the team.

7.24. On 10 May 2017 the Resourcing and Redeployment workshop took place and potentially suitable matches were found for the first and second claimant.

7.25. On 12 May 2017 Irene Loh sent an email to Mark Willis stating

> "Good news that there is a match.
>
> Are you OK to speak to Christina or did you want me to join you?
>
> We can pitch this as there is an area in Transformation with a greater need than MTDB for someone with her skills, and having looked at our structure, we are happy to release her and don't plan to backfill her role if she agrees to go. (If she says she doesn't want to go, worth saying we don't think her role will continue in its existing form due to prioritisation.)
>
> It feels like a conversation I shd join you for, and happy to do this on Tuesday. I think Friday would be too long away.
>
> Equally happy for you to do this without me. Let me know either way."

7.26. Although it had been indicated that this should be treated sensitively and any further contact should be through Mark Willis or Irene Loh, on 15 May 2017 the first claimant was contacted by a manager in respect of the potential redeployment opportunity for the second claimant.

7.27 The first claimant telephoned Mark Willis. She was upset that she had been contacted about a role for the second claimant. This was the first time she had been made aware of the potential redeployment of someone she managed. She asked whether the situation also applied to her and Mark Willis said that it did.

7.28. On 16 May 2017 a telephone conversation took place between the first claimant, Irene Loh and Mark Willis. The claimant said that during the call she expressed concern about the way the situation been handled and how they had been entirely excluded from the process with decisions being made without them being told and allowed to have any input into them.

7.29. The first claimant also said that she had said that she thought replacing part-time people with full-time might be illegal and Irene Loh had replied and just said that she needed people who worked "Monday to Friday 9 to 5 and beyond" and that she had also said that she was replacing the second claimant's post with a full-time post.

7.30. Irene Loh denied saying that she needed people who worked "Monday to Friday 9 to 5 and beyond" the only reason the first and second claimant and the other roles were selected was because their work was not required to deliver the identified priorities or it could be absorbed elsewhere.

7.31. Mark Willis said that, during the call on 16 May 2017, he had no recollection of Irene Loh making the comments about needing people to work full-time, Monday to Friday 9 to 5 and beyond.

7.32. Interviews had taken place in respect of the G7 role in PMO. No one was appointed at that stage as the recruitment was frozen due to the reprioritisation exercise.

7.33. On 23 May 2017 the second respondent sent an email to Suzanne Newton, Transformation Director, asking whether an equality impact assessment has been done in respect of the reprioritisation exercise.

7.34. On 23 May 2017 the first claimant commenced a period of sickness absence. Mark Willis said that, as the first claimant's line manager, he managed the first claimant's sickness absence and had regular contact with her.

7.35. On 24 May 2017 the second claimant commenced a period of sickness absence. The first claimant asked Mark Willis not to contact the second claimant and updated Mark Willis with regard to the second claimant.

7.36. The matching process produced very few matches and was abandoned in favour of a process whereby each displaced employee being sent all the vacancies for their grade and the employee or their manager would then contact the manager holding the vacancy to express an interest.

7.37. On 26 May 2017 Theresa Middleton replied to an email in respect of the redeployment pool within that email she stated:

> "So we have taken some people in from this exercise where they have the right skills and are in the right location. But I have pushed back where that is not the case, and where the working pattern is not what I need in the role (we are already maxed out with folk doing a range of different patterns and have started turning down requests in the existing teams unless and until we get more headroom as people leave, so I am not willing to accept people from elsewhere on those terms)"

7.38. On 1 June 2017 Mark Willis forwarded the grade 7 spreadsheet to the first claimant with a timetable for responding. On the spreadsheet was the new G7 PMO vacancy. The first claimant did not express an interest in the role and towards the end of June 2018, after the appointment freeze had ended, the role was filled. It was initially taken on a full-time basis but it is understood that the role is now carried out on a part-time basis.

7.39. On 5 June 2017 the second claimant submitted a grievance raising complaints of bullying, harassment and discrimination on grounds of age.

7.40. The first respondent submitted a grievance on 14 June 2017 raising complaints of bullying and discrimination on grounds of age, sex and part-time workers status.

7.41. The first claimant returned to work on 21 June 2017. She made enquiries about three vacancies, one was with Dave Smith in Capacity and Capability. The claimant sent her CV. She discussed the vacancy with Dave Smith. She felt that she had the skills and motivation to carry out the post however, Dave Smith was not able to accommodate the claimant's working pattern or her requirement to work from home. He needed someone in the office all of the time. The claimant had been informed that the post was available to her, but only on a permanent basis/managed move and he would be looking for a commitment of at least 12 months. The claimant declined the post. She sent an email indicating that she understood and accepted why he needed someone in the office all the time.

7.42. Another post which the first claimant enquired about was with Julian Hatt. The claimant did not proceed with this post. She said this was because it involved a lot of travelling and that was difficult to accommodate with her working pattern.

7.43. The other vacancy was with Jeff Worrell as a Senior Policy Adviser in the MTDfB Policy and Design team. The Tribunal heard evidence from Jeff Worrell who indicated that the job specification indicated that the role was a full-time

role. However, he said that, in theory, it could have been carried out by a part-time employee, for example as part of a job share or to spread a sufficient number of contracted hours across five days. The role was to support the progress of legislation through Parliament and flexibility was required to meet the demands of Ministers, the policy partnership with HM Treasury and senior officials in HMRC. The role could have been based outside London but would require frequent travel to London, often at short notice. The claimant had the relevant skills.

7.44. Jeff Worrell asked the claimant whether there was a possibility of her spreading her part-time hours over five days a week but she said that was not possible. The claimant's working pattern combined with her location would have created significant challenges to the team's ability to increase its effectiveness, maintain its impact and deliver the output required by ministers. It has now been determined that this role can only be carried out by an employee based in London or Birmingham.

7.45. Carol Sweet, Specialist Investigation Manager, was appointed to provide an investigation report.

7.46. On 13 September 2017 the first claimant presented a claim to the Tribunal. She brought claims of discrimination on grounds of age, disability and sex.

7.47. On 14 September 2017 the second claimant presented a claim to the Tribunal. She brought claims of age and sex discrimination. It was later agreed that claims under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 were included in respect of both claimants.

7.48. On 11 October 2017 Irene Loh sent an email to Carol Sweet stating:

> "At our meeting on 31 August, I had mentioned in the interview about the grievance relating to the SO that we would be looking at having a full-time SO to oversee the work of the team.
>
> I'm writing to update you that having discussed the business need for such a role, the MTDB SLT decided yesterday that we will not in fact be doing this, giving our current funding constraints and our overall programme priorities; instead we would look to spread and absorb the work into existing SOs within management capacity.
>
> I wanted to share this with you as it is an update on the evidence I provided at our meeting in August."

7.49. On 3 November 2017 Carol Sweet provided a report in respect of the first claimant's grievance and on 6 December 2017 she provided a report in respect of the second claimant's grievance. These were lengthy and detailed reports. The conclusion was that, based on the findings of the report it was recommended that the allegations of bullying and discrimination should not be upheld.

7.50. Mark Wardell, Deputy Director Strategy, was appointed as the Decision Maker in respect of both of the grievances.

7.51. On 22 December 2018 Mark Wardell sent grievance outcome letters to the first and second claimant. He provided a deliberations document. The decision was not to uphold the grievances. He did not accept that there was bullying and discrimination but he did find that the redeployment exercise was not handled well by the managers involved.

7.52. Both claimants appealed against their respective decisions. The first claimant referred to the telephone call on 16 May and, once again, mentioned that there was a witness, the other participant in the call Mark Willis. She also mentioned having spoken to her PCS trade union representative in February/March and that no effort had been made to speak to her trade union representative.

7.53. Mark Wilson, Director of Business Tax was appointed as the appeal manager. He met with the claimants. He provided a deliberation document to each of the claimants. In those meetings both of the claimants referred to Pam Horton and Claire Williams as potential witnesses in respect of comments made by Irene Loh about part-time workers.

7.54. On 18 March 2018 Mark Wilson wrote to the claimants. He did not uphold the appeals. He attached a deliberation document. In his deliberation document for the first claimant he referred to his role being one of review as opposed to a rehearing. He agreed that the redeployment process had been mishandled but saw no evidence that this had been on the grounds of part-time working or any protected characteristic.

7.55. On 13 April 2018 the second claimant was dismissed on the ground that she had failed to maintain an acceptable level of attendance and was unable to provide a return to work within what was considered a reasonable timescale. The second claimant was given 13 weeks' notice and was dismissed with effect from 12 July 2018.

7.56. The second claimant has issued a further claim to the Employment Tribunal relating to her dismissal. That is not an issue before this Tribunal.

7.57. The first respondent remains in the respondent's employment. She has been provided with a number of temporary posts.

The law

8. Section 6 of the Equality Act 2010 states:

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, an

(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Schedule 1 provides:

Long-term effects

(1) The effect of an impairment is long-term if—
(a) It has lasted for at least 12 months,

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

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

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

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

Section 212 provides that substantial" means more than minor or trivial.

Direct discrimination

9. Section 13 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

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

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

10. In **Islington Borough Council v Ladele** [2009] ICR 387 Mr Justice Elias explained the essence of direct discrimination as follows:

"The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he

> or she is less favourably treated than the comparator who did not share the prohibited characteristic."

11. In **Glasgow City Council v Zafar** [1998] ICR Lord Browne-Wilkinson stated

> "Those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them"

12. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome.

13. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Carter v Ashan** [2008] ICR 1054. The Supreme Court in **Hewage v Grampian Health Board** [2012] ICR 1054 confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

14. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong** [2005] ICR 931 and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

15. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar** [1998] ICR 120. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society** [2004] IRLR 799.

16. In the case of **Qureshi v Victoria University of Manchester and another** [2001] ICR 863 Mummery J said:

> "There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

17 Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the Tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830, **Ladele, Amnesty International v Ahmed** [2009] IRLR 884, **Aylott v Stockton on Tees Borough Council** [2010] IRLR 994, **Martin v Devonshires Solicitors** [2011] ICR 352**, JP Morgan Europe Limited v Cheeidan** [2011] EWCA Civ 648, and **Cordell v Foreign and Commonwealth Office** [2012] ICR 280.

18 For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

19. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

20 In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

Discrimination arising from the consequence of a disability

21. Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams** *UKEAT/0415/14* at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

    The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see *IPC Media Ltd v Millar [2013] IRLR 707*: was it because of such a consequence?

22. The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

Indirect Discrimination

23. Section 19 of the Equality Act 2010 states:

> (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.

24. In the case of indirect discrimination the aim is to secure equal treatment results for members of a group to which that individual belongs. The essential inquiry is into whether the members of that group, who appear not to have been discriminated against on the ground of a protected characteristic, have not in fact had equal treatment protection on the basis of the prohibited ground as a result of the disproportionate adverse impact of a neutrally worded provision, criterion or practice.

Burden of Proof

25. Section 136 of the Equality Act 2010 states:

> (1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

26. Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** (a sex discrimination case decided under the old law but which will apply to the Equality Act) and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

27. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

Time limits

28. Section 123 of the Equality Act 2010 states:

> (1)...Proceedings on a complaint within section 120 may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable....
>
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

29. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an "ongoing situation or continuing state of affairs" as oppose to "a succession of unconnected or isolated specific acts". It will be a

relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

30. In the case of **Humphries v Chevler Packaging Ltd EAT 0224/06** the Employment Appeal Tribunal confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170** the Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the recently reported Court of Appeal case of **Abertawe Bro Morgannwg University v Morgan [2018] WLR197** it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

31. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and *'the exercise of discretion is the exception rather than the rule*' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576** per Auld LJ *at para 25)*.

. Discretion to grant an extension of time under the just and equitable formula has been held to be as wide as that given to the Civil Courts by Section 33 of the Limitation Act 1980 **British Coal Corporation v Keeble** [1997] IRLR 336. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension having regard to all of the circumstances, in particular: -

(a) The length of and the reason for the delay;

(b) The extent to which the cogency of the evidence is likely to be affected by the delay;

(c) The extent to which the parties sued had cooperated with any request for information;

(d) The promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and

(e) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

These are checklists useful for a Tribunal to determine whether to extend time or not. Using internal proceedings is not in itself an excuse for not issuing within time see Robinson v The Post Office but is a relevant factor.

32. Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant, the Tribunal can make a constructive recommendation. Left unresolved, even minor omissions by employers often have devastating consequences which it is too late to remedy in that way.

Discrimination pursuant to the 2000 Regulations

33. The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide:

> 5.
>
> (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.
>
> (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.

> (3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.
>
> 8
>
> (1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).
>
> (2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months (or, in a case to which regulation 13 applies, six months) beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.
>
> (3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

34. The Tribunal had the benefit of written submissions from Mr Legard and Mr Bayne together with further oral submissions provided by each of the representatives. These submissions were helpful. They are not set out in detail but both parties can be assured that the Tribunal have considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

Disability

35. The Tribunal is satisfied that the first claimant was a disabled person within the meaning of section 6 of the Equality Act 2010. The claimant provided a statement in respect of her disability which the Tribunal accepts. She has a work-related upper limb disorder which was diagnosed in 2000. She is unable to sit at a desk for prolonged periods of more than 20 minutes. She has residual numbness down the side of her left arm. She is unable to carry shopping for significant distances. Walking to and from the office with her laptop causes pain and discomfort. Hoovering, making a bed, loading and unloading the dishwasher causes pain. She drives an automatic car as driving a manual car causes pain and discomfort. Her head movement is limited as moving her head to the side causes pain and discomfort. She does not go to the theatre or cinema as sitting for a prolonged period of time causes pain. This applies equally to driving and travelling on a train. When working at home she uses support pillows for her neck to prevent the pain.

36. The Tribunal is satisfied that the respondent had knowledge of the first claimant's disability. She took early partial retirement in 2011. From around 2014 she had been allowed to work from home for two days a week. This had been arranged with her previous manager. Adjustments had been made.

Time limits

37. With regard to time limits, Mr Bayne submitted that all of the second claimant' complaints were out of time and that all of the complaints relying on the conduct of Irene Loh were out of time. The decisions of other, different, managers in the redeployment process arise out of entirely different facts and do not form part of a continuous state of discriminatory affairs. Mr Legard, on behalf of the claimants submitted that the treatment was a continuing course of conduct extending over a period from Irene Loh's arrival in January 2017 until the dismissal of the claimants' appeals in 2018.

38. The Tribunal is satisfied that, if the first claimant's allegations are considered, then there was a continuing course of conduct in relation to the transformation reprioritisation exercise and the continuing redeployment issues and it is accepted that those claims are in time.

39. With regard to the second claimant, the issues that were identified and agreed do not relate to any allegations after May 2017 which is not within three months of the ACAS early conciliation on 12 September 2017. There was no allegation that the grievance and appeal process and outcome were acts of discrimination to be considered by the Tribunal. The Tribunal heard little oral evidence with regard to time issues from the second claimant as she was not cross-examined on this point. In her witness statement to the Tribunal she said that she was on sick leave between 18 May 2017 until her dismissal in July 2017. The first claimant submitted a Tribunal claim on 24 August 2017 containing the second claimant's name. The claim was rejected as the claimant had not gone through the Early Conciliation procedure. The claimants then went through the Early Conciliation procedure and the claim was issued on 14 September 2017. Taking into account the ongoing relationship, the internal grievance process, the ill health of the second claimant, the effect on the cogency of evidence and the balance of prejudice, the Tribunal considers it just and equitable to extend time.

Direct age and disability discrimination

40. With regard to direct age and disability discrimination, the Tribunal has to consider the question of causation, that is, why the claimants were treated as they were. This was a national reprioritisation exercise. There was no credible evidence that the decision to delete the claimants' posts was because of disability or age. The identified comparators did not work in a team that was being de-prioritised in the exercise. The Tribunal did not consider them to be appropriate comparators and it has also borne in mind the judgment of Lord Nicholls in **Shamoon** in which he stated that

> "Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"

41. Also, Elias J in **Ladele** said that often, in practice, a Tribunal will be unlikely to be able to identify who the correct comparator is, without first asking and answering the question why the claimant was treated as she was. Until that question is answered, he said, the appropriate attributes of the comparator will not be known. His

conclusion was that, whilst comparators may have evidential value, often they cast no light on the 'reason why' question.

42. Mr Bayne submitted that the first claimant made it clear in her evidence that she did not regard either Mark Willis or Irene Loh as 'a villain', and did not have any ill will towards either; she simply alleged that Irene Loh had used the TRE exercise as a way of increasing her available 'man-hours' by reducing the number of part-time employees within her command which was not an allegation of direct discrimination.

43. The Tribunal is not satisfied that the claimant has established facts from which it could be concluded, in the absence of any other explanation, that the claimants had been treated less favourably because of the first claimant's disability or the age of the first and second claimant. The Tribunal found the evidence of Irene Loh and Mark Willis to be clear and credible. This was an exercise in which it was identified which roles were displaced as lower priority. There was no credible evidence that the claimants were selected on grounds of age or disability.

Indirect age, sex and disability discrimination

44. In respect of both claimants, the Tribunal is not satisfied that the respondent operated a provision criterion or practice of either requiring employees to work full-time and/or replacing part-time employees with full-time employees.

45. The allegation of the application of the identified PCP is largely based on inferences which are drawn by the claimants in respect of Irene Loh. There was no credible evidence that Irene Loh was seeking to replace or reduce the number of part-time workers in her command. With regard to the remarks said to be made at the awayday, the only evidence was from the first claimant. This was rebutted by Jeff Woodhouse who gave clear evidence that Irene Loh did not say anything negative about part-time workers or show a negative attitude towards them. He remembered Irene Loh talking about how it was important for part-time working to be an arrangement that satisfied both the business need and the employees and that her sentiment was that it would not be fair to set out a role as part-time and then require the employee to work longer hours.

46. That evidence accorded with Irene Loh's evidence that she said it was important that managers did not dress up a full-time role as a part-time one as it would not be fair on the individual.

47. The first claimant had mentioned other individuals who could have been questioned about the events at the awayday and the telephone engagement workshop. However, no evidence was provided to the Tribunal in this regard.

48. The first claimant said that she was so concerned with the way in which she thought that Irene Loh did not want part-time workers in her team that she contacted her trade union about it. She referred to an email of 22 March 2017 about another matter in which there was a reference to an earlier discussion "about the position of part-time workers going forward". The first claimant said that it referenced the earlier conversation and the sense of insecurity about her part-time status. However, the Tribunal is not satisfied that this provides any evidence to support an inference that

Irene Loh was seeking to reduce or remove part-time workers. It merely reflects the first claimant's position and that there had been a discussion with her trade union representative about the position of part-time workers.

49. The evidence of the second claimant was simply that "Irene often said that she had a problem with part-time working." The second claimant was wholly unable to provide any evidence to substantiate this claim.

50. With regard to the telephone conversation on 16 May 2017 involving the first claimant, Irene Loh and Mark Willis, the first claimant said that she could remember the conversation verbatim, however, she was unclear about the actual date it occurred and with regard to other events. It was submitted by Mr Legard that the alteration of Mark Willis's written statement at the commencement of his oral evidence was fundamental. In his written witness statement Mark Willis stated that, in the call on 16 May 2017 the first claimant had made some accusations about replacing part-time staff with full-time. He altered this evidence to say that he had read that the first claimant had alleged that she had made those accusations. Mark Willis said that this had simply been a mistake on his part.

51. The Tribunal has considered this aspect carefully. It found Mark Willis to be an honest witness who admitted mistakes such as the lack of consultation with the claimants when they were displaced and he made it clear that he did not recollect Irene Loh making comments about needing people to work full-time, Monday to Friday, 9-5 and beyond. He was very clear that he would recollect any such remarks being made. The Tribunal accepts that to be the case.

52. The allegation in respect of that telephone call is made by the first claimant. There is no corroboration and the other two parties to the telephone call gave clear and credible evidence that no such remarks were made. Having considered all the evidence, the Tribunal is not satisfied that any such remark was made during that telephone conversation.

53. With regard to the quality of the first claimant's evidence, Mr Bayne was careful to make it clear that he was not contending that the first claimant was deliberately misleading the Tribunal. He referred to an interesting extract from the judgment of Leggatt J in Blue v Ashley [2017] EWCH 1928 in which he made observations about the unreliability of human memory and

> "While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose (1) that the stronger more vivid is our feeling our experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.… In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are

> retrieved. This is true even of so-called 'flash bulb' memories, that is memories of experiencing or hearing of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of experience). External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled is memories which did not happen at all or which happen to someone else (referred to in the literature as a failure of source memory)…. Our memories of past beliefs are revised to make them more consistent without present beliefs…. The nature of litigation is such that witnesses often have a stake in a particular version of events."

54. Leggatt J went on to refer to academic psychologists' papers which explained that what gets retrieved from memory is determined by a multitude of factors and that it is a reconstructive rather than reproductive process.

55. Mr Bayne submitted that there was no doubt that the claimants were doing their best to give honest evidence but that did not mean that it was accurate. They both had a propensity to see discrimination around every corner which was not justified Mr Legard submitted that the reference to the passage from Leggatt J in Blue v Ashley was indicative of a weak factual case.

56. The email from Theresa Middleton in which she refers to "we are already maxed out with folk doing a range of different patterns…" Is an indication that there are challenges when a substantial number of members of staff are working atypical patterns. The Tribunal does not accept the submission by Mr Legard that this was evidence that Theresa Middleton was clearly exasperated by part-time workers or that there is an abundance of evidence to show that the respondent was biased against part-time working. The Tribunal finds that the totality of the evidence does not establish or provide an inference of such bias.

57. The evidence of Irene Loh was understated and, at times, far more lengthy than necessary. However, the Tribunal found her to be an honest individual and there was no credible evidence that she had a bias against part-time working. The Tribunal accepts Irene Loh's evidence that she removed some of the skills from the template in respect of both of the claimants because she wanted to reflect the skills she had observed. She had also removed a skill from the template in respect of a full-time employee at the same time. It was not established that this was related to the claimants' part-time status, age, sex or disability or an inference of the application of the alleged PCP.

58. The reference to the way that the position could be 'pitched' to the first claimant in the email of 12 May 2017 is not evidence of determination to move a part-time employee. It is redolent of a wish to pacify a genuinely concerned displaced employee. This is indicative of the claimants' interpretation of events from the perspective of discrimination. However, when they are considered dispassionately do not support that interpretation.

59. It is clear that there was a complete failure to inform and consult the claimants with regard to the displacement and proposed matching process. However, whilst this may be indicative of unreasonableness it does not go to establish less favourable treatment on grounds of a protected characteristic or the application of an indirectly discriminatory PCP.

Discrimination arising from disability

60. With regard to the claim for discrimination arising from disability. There was some dispute with regard to identification of the 'something' arising in consequence of the first claimant's disability. Mr Bayne contended that the 'something' had been identified in the pleadings and at the Preliminary Hearing as the need to work part-time as a result of the first claimant's disability. Mr Legard referred to the section 15 complaint as unfavourable treatment because of the first claimant's need to work from home arising in consequence of her disability. The unfavourable treatment was a failure to be appointed to a permanent role. He did not believe that the respondent had presented any evidence of justification.

61. Mr Bayne submitted that it was too late to add this point. If it had been pleaded the respondent would have dealt with it.

62. The respondent had provided a response to the first claimant's further and better particulars which included details of justification and, although this may have been predicated on the basis that the 'something' was the need to work part-time, it did also cover points with regard to the claimant's working pattern and the arrangement of working two days per week at home. Also, the Tribunal heard evidence in respect of justification including the evidence of Jeff Worrell who was the vacancy holder in respect of the most relevant post.

63. With regard to the first two roles in question, there was an email from Dave Smith indicating that he was unable to accommodate the first claimant's arrangement of working two days per week at home and indicating that it required a manager who would be in the office providing day-to-day leadership. The first claimant replied that she understood and accepted the need for someone in the office all the time. With regard to the role with Julian Hatt, it was the first claimant's decision not to pursue the role. The role involves a degree of travel and the claimant indicated that she did not wish to travel to the extent required.

64. There was discussion with Jeff Worrell in respect of the Senior Policy Advisor role. The first claimant had the required skills. The first claimant indicated that she was prepared to travel if required, but this would need to be within the framework of her current working pattern and adjustments which included working 50% of her hours from home. The first claimant was asked whether she could spread her contractual hours across five days per week but she said it would not be possible. Homeworking itself was not a problem but the role required someone who could 'flex' their days to deliver on a set of stretching outputs to meet the demands of ministers and frequent travel to London, often at short notice.

65. The Tribunal has considered the justification defence to the section 15 claim on the basis of the something arising in consequence of the claimant's disability in this

case as the need to work part-time and two days working from home. The Tribunal is satisfied There were legitimate business reasons not to appoint the first claimant to any of the three identified positions and, balancing the discriminatory effect against that business need, it was objectively justified.

Discrimination pursuant to regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000

66. As already set out in these reasons, the Tribunal has found that it has not been established that the first and second claimant were displaced because of her part-time status and she was not refused any of the three identified posts because of their part-time status. If the claimants had established a prima facie case then the Tribunal is satisfied that the respondent has shown that the reason for the displacement was the Transformation Reprioritisation Exercise which was not on the grounds of part-time working.

67. It was established that there were legitimate business reasons for the decision to displace both the first and second claimant. This was in order to save money following the reduced budget having been set for Transformation and it involved displacing employees from lower priority roles.

68. The first claimant was not matched to the new G7 role. This role had been identified and advertised in February 2017. It was in a different area of work to that of the first claimant and Mark Willis stated that the claimant had indicated no interest in working in the PMO team. This was prior to the Transformation Reprioritisation Exercise. Once that exercise commenced the recruitment to the G7 PMO role was frozen. The matching exercise had been commenced and then abandoned and the process was changed so that each displaced employee was sent all the vacancy information sheets for their grade. The first claimant had the opportunity to express an interest in the new G7 role but did not do so.

69. The second claimant was not matched to the proposed SO role as that role had not been created in May 2017. It was not on the vacancy list and the claimant could not have been appointed to that role.

70. It was submitted by Mr Legard that regulation 5 refers to a comparable full-time worker and these comparators were identified. In addition, he referred to regulation 3 whereby a full-time worker who becomes a part-time worker could compare herself to herself as a full-time worker in appropriate circumstances. Mr Bayne submitted that the addition of a regulation 3 comparator was a new pleading. The comparators had been specifically set out and it was too late to add a new comparator.

71. The right conferred by regulation 5 is specifically stated to be applicable only if the treatment is on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds. The Tribunal has found, taking into account all the evidence, that it was not established that the treatment of the claimants was on grounds of their part-time worker status as set out above.

72. There is an inevitable amount of overlap where there are claims of a multiplicity of discrimination allegations arising out of the same factual matrix and, although

matters have been dealt with under specific headings, where the reasons are applicable to differing claims the parties should read the reasons on that basis.

73. The Tribunal has considered the burden of proof pursuant to section 136 of the Equality Act 2010. The claimants have not established facts from which the Tribunal could conclude, without a non-discriminatory reason being given, that the respondent was guilty of discrimination on grounds of age, sex or disability. The burden of proof did not shift to the respondent. If it had shifted, the Tribunal is satisfied that the respondent has shown that its actions were not on grounds of discrimination.

74. The Tribunal has some sympathy with these claimants. They were long serving and loyal employees displaced from their roles and they have not been provided with alternative roles to their satisfaction. However, this was not shown to be on grounds of their age, sex, part-time worker status or the second claimant's disability.

75. In the circumstances, the claims are not well-founded and are dismissed.

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Employment Judge Shepherd

15 January 2019