EMPLOYMENT TRIBUNALS

Claimant: Mrs K Whitmore

Respondent: Middlesbrough Council

HELD AT: Middlesbrough **ON:** 13 and 14 December 2017

BEFORE: Employment Judge Wade
Mrs L E Sutton
Mr T D Wilson

REPRESENTATION:

Claimant: Mrs J Dalzell (solicitor)
Respondent: Mrs L Heard (solicitor)

Note: The written reasons provided below were provided orally in an extempore Judgment delivered on 14 December 2017, the written record of which was sent to the parties on 5 January 2018. A written request for written reasons was received from the Claimant on 18 January 2018. The reasons below are now provided, corrected for error and elegance of expression, in accordance with Rule 62 and in particular Rule 62(5) which provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the terms of the Judgment given on 14 December 2017 are repeated below:

JUDGMENT

1 The claimant's equal pay complaint is dismissed.

2 The respondent shall pay to the claimant the following sums in respect of her successful complaints of unfair dismissal and victimisation:

£77,265.00	(maximum compensatory award)
£15,000.00	(compensation in respect of injured feelings)
£ 2249.00	(interest at 8% for 684 days)

£ 94,514.00 Total

REASONS

Introduction and issues

1. This Judgment is largely in respect of complaints in respect of which the Tribunal's Reserved Judgment was sent to the parties on or around 19 June 2017. That hearing took place over some 10 days in March, with two days of deliberations in April and June of this year.
2. In the interim the Tribunal has had a number of case management discussions to ensure that the questions that we have had to address in this hearing have been agreed by the parties; they were largely set out in an agreed list of issues. That list included not only addressing Mrs Whitmore's remedy for the complaint of unfair dismissal, which we found was well founded, and a complaint of unlawful victimisation, but also some of the matters that arose in connection with her equal pay complaint, in relation to the pay that she received whilst an employee in comparison with a colleague, Mr Punton.
3. The live issues from that list appear as headings or otherwise in our conclusions below.

Evidence and argument

4. The directions that were in place for this hearing made it very clear that we would have further documents before us. We would have our Judgment from the previous occasion, we would hear witness evidence, and the parties were at liberty to put before us over two days whatever additional material they saw fit, to deal with the issues in dispute.
5. As it transpires we have had a lengthy witness statement again from Mrs Whitmore, dealing with the injury to her feelings that arose, she says, from the act of victimisation that she suffered, and dealing with the losses that she considers she will suffer and to a more limited extent, the equal pay complaint. As on the last occasion, we have assessed that evidence on the basis of all the tools available to us, including consistency and coherence with the documents that were before us.
6. On behalf of the respondent we heard from Mrs Schofield, again, from whom we heard on the last occasion: as the respondent's head of HR. Mrs Schofield was able to give us further information in relation to job evaluation and equal pay. Further she put before the Tribunal some documents and evidence of other jobs that were available in the North East during the time after the claimant had ceased to be employed by the council. On Mrs Schofield's evidence they were roles which the claimant should, and could, have applied for.
7. The Tribunal also had the benefit of detailed written skeleton arguments in relation to the agreed issue list and addressing the claimant's schedule of loss and the respondent's counter schedule. In pursuit of delivering an extempore Judgment in a timely fashion we do not repeat those here but are very grateful for their careful presentation and development orally today.

Equal pay complaint

8. For convenience the Tribunal has addressed the issues in a different order to those set out in the issue list: it was convenient for us to deal with the live equal pay matters first (namely:

    a. Was the step taken by Mrs Schofield/Mr Robinson (see paragraphs 64 to 66 of our reserved Judgment) part of a Section 65(4)(a) job evaluation study?

    b. If not, is the respondent bound by the pre Schofield/Robinson values (and resulting salary)?

    c. If the Schofield/Robinson adjustment was part of a Section 65(4)(a) study, should the claimant's equal value complaint be dismissed (sections 131(5) and (6) Equality Act 2010 are applicable and the Employment Tribunal must determine that the Claimant's work is not of equal value to the work of Mr Punton) or are there reasonable grounds for suspecting that the evaluation contained in the study:

        i. was based on a system that discriminates because of sex or
        ii. is otherwise unreliable

Equal pay – further findings of fact

9. These further findings should be read with the comprehensive findings that appear in our previous reserved Judgment including paragraphs 4, 38-39, 64 to 66, 158 to 159, and 177 to 181.

10. The phase 3 job evaluation procedure (applicable to chief officers) is at page 156 to 160 of today's bundle. It was updated in November of 2013. At page 161 there is a flow chart describing the process to be followed and there then follows a number of helpful documents, application forms and other relevant documents to enable posts to be evaluated.

11. Mrs Schofield told us, and we accepted her evidence, that this was the Council's procedure to be adopted when either new posts were created in the senior group, or there was any kind of restructuring of those posts. That had occurred in 2013 and again in 2014. Those senior posts include the chief executive, the executive directors, strategic directors, assistant directors and S, R, Q, & P bands below them.

12. The process of phase 3 job evaluation was adopted as part of a general agreement with the unions to move to "single status" (that is the historic adoption of a new job evaluation and pay procedure for all employees) in this Council. Phase 3 was not, however, a procedure in which there was active union participation, in the sense that union representatives were not involved in its implementation on panels, by virtue of the nature of the cohort of the employees to whom it applied: they were the most senior.

13. A number of practical adjustments were made to that documented procedure, albeit the written procedure itself was not updated to reflect those adjustments. They included, for example, that rather than there being external ratification by "NEREO", there was external ratification by the local government association

(“LGA”). That was a step that was introduced when Mrs Schofield was in charge. “NEREO” involvement was on the panels carrying out evaluation which comprised a NEREO representative, Mrs Schofield and line management involved in these senior posts. A step which was not included in the written stage 3 procedure was “review” by the Chief Executive. The last documented step in the procedure was “external ratification”.

14. The process of evaluation of posts was transparently and comprehensively recorded. Any discussions arsing in relation to the various scores and so forth were captured so that the information was available, albeit that those detailed ins and outs, if I can call them that, were not communicated to those whose posts were subject to evaluation.

15. An important feature of that exercise is that the post holder happens to be the person at the time who holds the post, and is at the time paid the evaluated rate for that post, but their interest in the evaluation ought properly to be remote from the job evaluation exercise to enable the required objectivity, and indeed in this process design, it was.

16. It is clear that the process was followed as envisaged by the written procedure and subsequent practical amendment as to external ratification by the LGA, and that the scores for the eight senior posts came back from that external ratification. It is clear that there were then a number of different adjustments to be made following discussion between Mrs Schofield and Mr Robinson, the chief executive, characterised as “chief executive review”. One of those changes was in relation to the governance post which held by the claimant. The result was to put the post back at “assistant director two” level, rather than “assistant director one”, with a consequent reduction in the salary allotted to the post. We note that when the posts had been evaluated at all previous stages, the governance post, along with several others, had been evaluated at “assistant director two”. It was only following the comments of the external ratification exercise that it moved up a band to “assistant director one”.

The Law

17. We have been referred by the respondent to the principles set out in a very lengthy equal pay Judgment, Hartley and Others in Northumbria Healthcare NHS Foundation, Unison, the Secretary of State, the NHS Confederation and the GMB, heard between October 2008 March 2009 and on which a member of this Tribunal sat. That case was concerned in part with the predecessor section in the 1970 Equal Pay Act to the following section, and the Tribunal decision examined in great detail the “safety” for want of a better word, of a large job evaluation scheme. We are today concerned with the provisions of the Equality Act 2010 that were designed to consolidate the Equal Pay provisions in the previous act. Section 131(6) of the 2010 Act provides as follows:

“The Tribunal must determine that A’s work is not of equal value to B’s work unless it has reasonable grounds for suspecting that the evaluation contained in the study … (b) is otherwise unreliable”.

18. The claimant did not pursue a case that the evaluation contained in the study was based on a system which discriminated on the ground of sex. The essential question for us was whether chief executive review stage was part of the valid job evaluation study and whether it rendered the study otherwise unreliable.

Consideration and discussion

19. This is an Equality Act matter in which Section 136 (2) provides that where there are facts from which the Tribunal could hold that a contravention of the Act has occurred, it must do so unless the respondent shows otherwise, or words to that effect.

20. In this case the documents and facts that were before us were certainly such that we needed to hear an explanation of how these matters had arisen and examine them in some detail to decide whether the respondent had shown that an equal pay contravention had not occurred.

21. Mrs Schofield has answered a great number of questions about these matters both today and on the last occasion.

22. Having heard that evidence again, and while it is clear that the chief executive review was not part of the documented stage 3 process, we have concluded that it was clearly and in good faith part of the valid study. It was not done for any improper motive, but to ensure that the final scores "felt fair" as between the various factors and job weights as they were known to those with the "on the ground" experience of those matters, namely Mr Robinson and Mrs Schofield. Of course it was a step which, because it is undocumented, exposed the Council to just this sort of challenge, nevertheless having heard all the evidence we are satisfied that it was part of a valid study. For similar reasons, and in all the context of this case, we have concluded that there are not reasonable grounds for suspecting that the evaluation is otherwise unreliable, that is, tainted by bad faith or improper motive. The result of that conclusion is that the claimant's equal pay complaint is dismissed.

Victimisation – non financial loss

What amount should be awarded to the Claimant in respect of injury to feelings as a result of the Employment Tribunal's victimisation finding?

23. A causation issue in relation to potential financial loss arising from victimisation also applies to an injury to feelings award, and therefore we also need to deal with the respondent's primary submission on that out of order.

    To what extent would the Claimant's situation have differed had the victimisation not taken place, and what is the effect of this on the financial position of the Claimant?

24. This concerns the claimant being sent on home leave on 27 January 2016. In answering the first causation question we note paragraphs 338 to 345 of our Judgment which concern events following the claimant's disclosures to external parties, including the meeting on 5 January with Mr Robinson. We note that the claimant stood down from her Monitoring Officer role on 18 January as a result of a perceived conflict on that matter. These events are well before a script was prepared to send her home.

25. It is a matter of record that the disclosure to the external bodies had caused some discomfort to Mr Robinson and was part of the reasons to send the claimant home. (See paragraphs 365 to 371 and paragraphs 424 to 429 of

Judgment). We also know that Mr Parkinson was aware of a limited withdrawal from work by the claimant, about which we have also made findings. Nevertheless addressing the respondent's primary submission, had the act of victimisation not occurred, the result would have been the same and the claimant would have been placed on garden leave anyway, on balance we do not consider that the claimant would have been sent home by Mr Parkinson or by Mr Robinson, had she not raised the grievance that she raised (and had Mr Parkinson not had that in his mind).

26. The events in January (see paragraphs above) and most importantly the timing and order in which they occurred are simply not supportive of the respondent's submission and nor are the other events in this case. A finding that there were several different matters in the mind of Mr Parkinson when sending the claimant home (and agreeing that with Mr Robinson, and settling a script to be read out in doing so), does not necessarily amount to a conclusion that he would have sent her home in any event, absent his knowledge of the grievance. We reject that submission: it is more likely than not that the act of victimisation caused any loss arising from the act of sending home. It cannot be said that that loss would have occurred anyway because there were other reasons to send her home. The act of victimisation was the real cause of any loss and we do not consider she would have been sent home absent that act.

27. With that conclusion in mind we can address the claimant's injury to feelings in relation to that act of victimisation in the circumstances about which we have heard. We refer to the findings in our earlier Judgment, in particular paragraphs 410, 370, 429.

28. As to the effect on the claimant's feelings, we adopt and refer to the stigmatising effect that it clearly had, which is captured in our earlier Judgment. We also refer to the contrast to be found in her medical record, which at page 269 records that on 19 January the claimant…."had some stress and some issues at work, harassment from her boss that was causing stress. She might need to give up her job but she wants to continue at the moment and does not think time off will help. She is trying to deal as best she can." That was her report to her GP. She denied low mood or anxiety symptoms at that time.

29. By the end of February she was reporting that she was considering or wanting to change career, she was on home leave, that she felt much better and that her anxiety symptoms, which she had been experiencing, were better. Between these two points in the chronology and at large, she gave unchallenged evidence about the degree of upset that the sending home had caused to her, and the deep embarrassment that arose when people asked her about it. She discussed that embarrassment and upset during counselling that took place in May, and later in the year, by which time she was having further difficulties emotionally. She was very concerned, as she saw it, about the commonly held perception that people considered she must have done something wrong to have been exited from the building in the way that we have described.

30. We accept the claimant's unchallenged evidence about those feelings. They are of course entirely probable and very much reflective of a fall from a previously unblemished and ascending career. In those circumstances it is unsurprising that she would feel that loss very acutely.

31. Having made those findings about the degree and nature of the injury, we apply the law, well known to the advocates and reminding ourselves that punishing an employer plays no part in an award of injury to feelings: it is about compensating for loss and injury felt.

32. This was a single act of victimisation by the respondent employer, but it was not a minor one given the real and stigmatising repercussions for the claimant and for her ascending career. In our judgment it does not fall within the lowest of the Vento bands which was contended for, on behalf of the respondent. It is appropriate to assess the loss in the middle band and we have assessed that award for injury to feelings by a compensating sum of £15,000.

33. In addition to that the claimant is entitled to interest at the court rate of 8% and that falls to be calculated from 27 January which was the date when the interest started to accrue until today's date, 14 December. It is a sum in interest of something around £2,000 but the advocates will be able to undertake that precise calculation, and if not the Tribunal will do so.

<u>Should any sum be awarded to the Claimant in respect of aggravated damages, and if so in what amount?</u>

34. We were invited on this occasion to make an award of aggravated damages. The principle for making that award is where something exceptional has occurred in the way that an act of discrimination has been carried out: where there has been high handed, malicious, insulting or oppressive conduct and again, such an award is not penal.

35. The claimant relied upon was the fact that Mr Parkinson had received HR advice and had pressed on regardless of that advice. It is true to say that in our earlier findings we did conclude that it was characteristic of Mr Parkinson to press on come what may, but on this occasion when we re-visited our findings of fact, it was not the case that HR advised him not to send the claimant home. Instead HR gave advice to change the letter articulating the reasons for the sending home: that is not the same thing at all and arguably provided comfort to Mr Parkinson that it was not a contravention to send the claimant home in these circumstances. For that reason, as well as our consideration that this is not territory in which it is just to make an award of aggravated damages, we have not done so.

<u>To what extent has there been a failure on the part of the Claimant to take reasonable steps to mitigate her loss, taking into account:</u>

<u>What were the steps that should have been taken by the Claimant to mitigate her loss; and</u>

<u>What was the date upon which such steps would have produced an alternative income for the Claimant had such steps been taken.</u>

36. The claimant asserts a further head of loss in relation to the upheld complaint of victimisation: the impact on her earnings in the future and between the date of her employment ending and this hearing, and that is a substantial claim founded

on the assertion that the placing on home leave has caused career long loss of earnings. She also pursues the maximum unfair dismissal award for compensatory loss on the basis that she will not recover her earnings over the remaining career length. It is convenient to address her case on the unfair dismissal compensatory award and mitigation first, and the necessary findings of fact and conclusions, because the issues overlap.

Further findings of fact concerning events after victimisation (27 January 2016) and unfair dismissal

37. At the point of victimisation the claimant had always and recently been shortlisted for any posts for which she had applied externally. That was her unchallenged evidence: a very concrete example was for an assistant chief executive post in Rotherham in or around August or September of 2015. That involved an application process in which she was down to the last two or three candidates for the post: she was long listed and then short listed in that process.

38. It is also clear that from a point later on in 2015, certainly at around that time she was considering posts outside this council, the claimant saw her future beyond this employer: relationships were clearly souring. She was not successful in the Rotherham application, despite being one of two or three appointable candidates. We repeat the reference to the medical note on page 269 on 19 January: the claimant was trying her best to carry on and did not want a sick note to keep her away from work, albeit she was stressed and considering having to give up her job. She was doing her best with the circumstances that she then faced, knowing of the potential redundancy and conflict with Mr Parkinson.

39. In January 2016 the claimant applied for three other roles and in February she discovered that she had not been long listed for any of them. The posts were: a director of corporate services (in effect Mr Parkinson's post but at East Riding), a director of HR in education (for a college in Blackpool); and in Sunderland a director of performance. None of those posts were an exact match to the post she was carrying out for the respondent, but they were posts for which objectively she had, and felt she had, a reasonable chance of being short listed, and would certainly expect to be long listed. Otherwise she would not have applied for them.

40. When she was not even long listed for those posts she genuinely felt that her career in local government had come to an end: as she had felt when she was escorted from the building on 27 January.

41. In addition to the claimant's own evidence about her feelings, we also had, within our bundle, email evidence from a councillor of the council to the effect that many people had approached him with questions about the claimant's sending home. It is clear to us that the rumour mill had ensured that those questions were being asked far and wide. That is consistent with the claimant's belief in the effect of the sending home on her likely success in applying for roles at that time: whereas on previous occasions she had been shortlisted for roles that were not an "exact match", and in some cases for promotion opportunities, immediately following her being sent home she was not even long listed for posts for which she felt she had a reasonable chance, and for which objectively she had the skills and experience.

42. Having been interested in fostering, the claimant made a decision after February 2016 to pursue that interest, as an activity of great value in the community, and which holds some respect, and from which she thought she would get a great

deal of satisfaction and enjoyment. That was a reasonable decision in our judgment, in the circumstances which the claimant then faced, and taking into account her own beliefs at the time based on her experience, and taking into account that she had been taking steps to vigorously resist her dismissal.

43. The claimant did not entirely abandon the prospect of further local government service outside the respondent and fostering is not inconsistent with that. She applied in March 2016 for the head of legal and democratic services in Durham, which again was a post for which she had a great deal of experience, having carried out line management of that post within Middlesbrough. Again she was not long listed.

44. The claimant's job seeking activity was that she visited the "Jobs North East" website ten times or so in the period of nearly two years (from being sent home in January 2016 to the date of this hearing in December 2017) thereabouts. She collected and saw there thirty or so further posts, in addition to the thirty or so posts about which Mrs Schofield gave evidence, and about which the claimant was cross examined during the course of this hearing.

45. The claimant was not provided with the respondent's re-deployment opportunities because she had had her email access removed and as a result and by error the Council failed in its normal process to supply re-deployment opportunities that might have arisen. They may well have appeared on Jobs North East and Mrs Schofield tells us that they would have done, but the claimant did not see them there.

46. That failure meant that the respondent's "assistant director of environment", which became available in or around May or June of 2016 because of a review of Mr Punton's post, was not drawn to the claimant's attention, nor was she aware of it. Its availability followed part of the responsibilities of the post being outsourced (leisure services) and Mr Punton's wish to take voluntary redundancy and access an unreduced pension, which was made available to him in such circumstances. We note from our previous findings that Mr Slocombe had canvassed that Mr Punton's post be included in the review affecting him and the claimant, a request which was rejected by Mr Parkinson, and we also note that the subsequent review of Mr Punton's post, while Mr Slocombe and the claimant remained employed, was not put before the Tribunal in evidence at the last hearing, and the claimant had not known of it.

47. Also in May 2016 the claimant's fostering reference was given by Mr Parkinson and her application to be a foster carer was being processed. We have already recorded that in our main findings. Again the claimant did not give up the local government service aspiration entirely. She sought counselling about it. She had some certified ill health at around this time, which has also informed our conclusions about her hurt feelings.

48. In July and August of 2016 it was suggested to the claimant that she apply for non executive posts and that that might be a route back into a career in public service. Again she was not long listed or short listed for two posts for which she applied.

49. In October 2016 a post at Sunderland council came up: an executive director, corporate services, role. Again, the post held by Mr Parkinson within Middlesbrough at the time. Following a written application the claimant was

invited to attend an assessment centre at which there were ten or so appointable candidates. Her evidence is that she performed badly in that exercise, not least because of the circumstances that had affected her, and she was not successful in that competitive process. She does not say she was not successful because of Sunderland's knowledge or belief in rumours concerning her sending home.

50. On 9 December 2016 the claimant started to provide a foster placement from which she receives an allowance for the care of a young person. That is not a wage or income, but is for the purposes of the young person's care.

51. It was evident to the Tribunal, from the respondent's search of potential jobs in the North East and the claimant's own observations about the same website, that there were, in the material period some 50 or 60 posts, which on the face of it, appeared posts for which the claimant might be a candidate or might have relevant skills to offer. In reality, as an external candidate applying competitively, it was clear that there were only a handful of those for which she was truly a viable candidate. We have reached that conclusion having had many, if not all of those posts, put to Mrs Whitmore in cross-examination and having heard her deal with the detail in those job specifications and requirements. We accept her judgment and evidence on the viability of those posts and the likelihood of her appointment to them.

52. We consider that it was reasonable for the claimant's judgment about her own prospects, and about what was a viable post for which she ought reasonably to apply, to be affected by the rejections that she had sustained early in 2016, in all the context of this case, following her sending home on leave.

53. Against the additional material that we have had to assimilate in this hearing, we have to ask ourselves whether the respondent has proven that if the claimant had taken a particular step at a particular time (the steps asserted have been applications for the posts that have been put to her in cross-examination) she would have gained other employment at a similar level of remuneration by now or at an earlier stage.

54. The Tribunal has answered that question on the balance of probabilities: is it likely that the claimant would have gained employment before today had she made those applications? We have answered that question in the negative: even if the claimant had applied for the posts suggested by the respondent (or indeed others she saw) the claimant would not in our judgment have succeeded in gaining those posts, against the claimant's background and experience, and the chain of events that we have recorded. The respondent has not proven steps which the claimant should reasonably have taken at a particular time which would have resulted in her mitigating her lost earnings before the date of this hearing.

55. In our judgment she has sustained a loss in earnings to the date of this hearing in consequence of the dismissal, and that loss is directly attributable to action taken by the respondent.

56. There is a lengthy list of questions in the issue list which we have addressed in the round, as follows:

<u>In light of the Employment Tribunal's finding that there was a genuine redundancy situation and the Claimant's dismissal was by reason of redundancy is it the case that the Claimant would have been dismissed in any event?</u>

If the Claimant would have been dismissed, notwithstanding the finding that her dismissal was unfair, when would the dismissal have occurred had the Respondent acted fairly?

What would have been the result had the Respondent acted fairly? In particular:

Would the Claimant's employment have ended on the date on which it did in fact end [or on a different date and if so when and on what basis (including the financial basis of any ending of that employment]?

Would the Claimant's employment have continued?

If the Claimant's employment would have continued, for what period and on what basis?

What impact does this have on the compensatory award?

On what basis should any pension loss on the part of the Claimant be calculated?

Taking the above into consideration, what is the period of loss in respect of which the Claimant is entitled to be compensated as a result of the action taken by the Respondent, and what is the amount of the compensatory award that relates to that period?

What sum/s should be deducted from the basic and compensatory awards?

Is an adjustment required to the compensatory award as a result of the application of the statutory cap of 12 months' gross pay

57. In order to address those questions, we have to go beyond the conclusion that we reached in our earlier Judgment about what did happen, and consider the what would have happened and the future beyond this hearing. That exercise involves assessing what the future would have held had matters been addressed differently, and we have to assess the evidence and decide whether it is capable of sustaining findings, on the balance of probabilities, as to what would have happened. We also have to consider what is the likely outcome if the claimant applies her mind and her considerable energies and skills to replacing her earnings in the future, taking into account the advice that she has been given and the experiences that she has had.

58. The claimant in her evidence has given an indication that she is willing to move location at a point when that is practical, given her daughter is likely to attend university and the increased sense of certainty and confidence that she expressed during her evidence. That has arisen from having had this matter decided and a Judgment given and indeed the sense of reward that she has been receiving from the fostering activity that she has been undertaking.

59. Taking all of the circumstances into account, that is the positive and the negative, in the sense of the impact on the claimant’s ability to secure a similar post notwithstanding these events, we have assessed that the claimant will

recover her earnings by some 75% after a period of two years from the date of this hearing. Over the remaining lifetime of her expected working life until age sixty, which we accept is the time when she would otherwise have retired, we assess that she will, in all likelihood be able to recover them fully after this initial period (she is now fifty years of age).

60. The consequence of that assessment is that she will have sustained a loss of earnings which is in excess of the statutory cap which we are limited to awarding, arising from an unfair dismissal, taking into account pension loss. The claimant has proven that she will suffer lost earnings in excess of the statutory cap as a result, again, of the dismissal, the action taken by this employer and for no other reason.

61. The respondent's further case in relation to that decision or conclusion is that notwithstanding the Tribunal's conclusion that her complaint was well founded, the claimant would have been fairly dismissed in any event, such that we should apply, to use the shorthand, a 'Polkey' deduction to our assessment of the proven loss, both to the date of this hearing, and as regards future loss.

62. We have of course heard new facts in the course of this hearing which were not available to us on the last occasion. They do not assist the respondent's "Polkey"case. They include that the director of environment (the successor to Mr Punton's post) did not require a professional qualification, as one might have envisaged, such as a chartered surveyor or civil engineer. That is one reason why it was given the same value as the claimant's post for "depth of knowledge". We know that this new post was subject to a re-evaluation for salary purposes and downgrade in April or May of 2016, such that it became assessed at the same level as the claimant's post, possibly even before her employment came to an end. We also know that chief officers have, in the past, covered areas outside of their direct expertise and experience, and that was the case for Mr Robinson (social care) and that picture forms part of our already comprehensive findings of fact.

63. We know that the post was not mentioned to the claimant during the redundancy consultation exercise or as part of her appeal. Not only was it not sent to her as part of the re-deployment process for the administrative error reason that Mrs Schofield describes. It was also not the subject of any phone call, discussion, consultation process or otherwise, which would have been the actions of a reasonable employer in circumstances where an employee was about to lose their job **and** where the respondent's re-deployment procedure was such that hardship and compulsory redundancies were to be avoided if possible.

64. As to the merger of the posts of director of finance and director of governance, we have concluded that that merger might well have continued had there been paragraph 82 consultation. For that conclusion we draw on the past experience of decisions by chief executives (which are recorded in our earlier findings) and would include within that consideration that Mr Parkinson was perhaps anticipated and expected to become chief executive given Mr Robinson's likely retirement.

65. Nevertheless we have also concluded that in all likelihood, notwithstanding that the merger would have continued, had there been confidential paragraph 82 consultation as took place on previous occasions (an example is the change in relation to Ms Broad's area) and taking into account the need to avoid hardship

and avoid compulsory redundancies, there would have been a different outcome. We take into account that in this case there were very unusual decision making arrangements within the council by reason of the chief officer terms of employment. We have constructed, on the basis of evidence, an alternative reality in which paragraph 82 consultation was undertaken by a reasonable employer, without the closed mind of Mr Parkinson at the time and in which the director of environment post was discussed with the claimant as part of redeployment consultation, as any reasonable employer would have done. It was a post which the claimant was capable of carrying out, at least for a period of time until in all likelihood another comparable or promotion post would have arisen either inside or outside the respondent.

66. Timing was everything for the claimant because unlike others on whom chief officer re-structuring had impacted, her career progression had been such that she was forty nine, not an age where she could access an unreduced early retirement pension. As a result her circumstances were materially different to those previous chief officers impacted in a similar way (and we now know that includes Mr Punton). The claimant also knew that she had tried to gain employment outside of this respondent at a similar level but had not been successful. As a result her interests lay very much in co-operating with the respondent and trying to undertake a role which was a suitable alternative at that time and which she could have undertaken.

67. In all probability then, had the paragraph 82 consultation been undertaken and had there been discussion of the AD environment post, the claimant's employment would not have come to an end and she would not have sustained the loss that we have assessed.

68. In her schedule of loss the claimant has given credit for the redundancy payment that she received, but nevertheless, she is entitled to an award at the statutory cap. The respondent has not succeeded in establishing that had section 82 consultation and a reasonable re-deployment processes been adopted, the claimant would have been dismissed anyway. In our judgment she would not.

69. For all these reasons we assess her compensatory award at the statutory maximum award that we can make for unfair dismissal.

Victimisation – financial loss

What financial loss is directly attributable to the Employment Tribunal's finding that the Claimant was the subject of an act of victimisation in relation to one of the factors found to have been taken into account in the Respondent's decision to place the Claimant on home leave on 27 January 2016?

To what extent may such loss be taken into consideration in the calculation of the Claimant's compensatory award in respect of her unfair dismissal (and should therefore not be awarded in the interests of justice)?

70. There is one further matter that we have to address in relation to financial loss and that is that the claimant seeks compensation by virtue of the stigma that she says has arisen from sending her home on 27 January 2016 and her mental ill health as a result, acknowledging, as she does that there was no direct loss of earnings from the act of victimisation itself – her salary and benefits continued.

71. We adopt the statement of the appropriate general legal principles at paragraphs 63 to 67 of the respondent's skeleton and the helpful extracts which follow from Chagger v Abbey National [2010] IRLR 47 concerning loss asserted as arising from stigma.

72. The burden is on the claimant to prove that the stigma she experienced will result in the excess lost earnings and beyond the two year period that we have identified. We understand how she puts her case on that, and commendably so: the only evidence that she feels she can give with any certainty is as to her earnings had she remained employed by the council; in contrast she is not confident that she will replace those earnings in the future given the facts we have recorded above.

73. For the purposes of assessing unfair dismissal compensation, the Tribunal has had to reach a judgment, tethered in the evidence before us, as to the future earnings of the claimant - that is part of our task in this hearing.

74. That judgment has concluded that there will be loss in excess of the statutory cap in the first two years from now, but after that and measured over career life until sixty, that loss will reasonably be extinguished in comparison with the earnings and benefits she would have received from the respondent.

75. The question for us is whether the stigmatising effect of the victimisation and health concerns, which we have taken into account in reaching the findings of fact above, can be said to have caused the loss which we have found the claimant will suffer beyond the statutory cap.

76. Our further observation is that the stigmatising effect was diluting by October 2016, such that the claimant was invited to take part in the Sunderland post Assessment Centre. The claimant has also indicated that she is prepared to take advice to look further afield for future employment when she is reasonably able. She also had great insight into the difficulty that she understands she faces from a Tribunal Judgment which concerns, inevitably, the maintaining (or not) of relationships at a very senior level amongst colleagues with significant responsibility for the public purse. She recognises that any future employer is going to consider that she might pose some risk in that respect. She accepts advice that the best way of overcoming that issue is to seek interim work and prove that she is no risk in relationship terms at all.

77. In those circumstances taking into account the dilution of the stigmatising effect that we have observed after a reasonably short period, the improvement in the claimant's mental health and confidence, and her expected path to employment in the future, the evidence is a very long way from establishing, on the balance of probabilities, that because of the stigmatising effect of an act of victimisation which occurred on 27 January 2016, rather than or in addition to the primary cause of loss, which has been the actions of the respondent in an unfair dismissal, she has suffered and will suffer uncompensated loss.

78. We have compensated the claimant's injury to feelings as a result of the act of victimisation, which we have already announced. That award takes into account the extra strain on the claimant's mental health of being placed on home leave, albeit no personal injury award was sought. That was a wise course given that the first stress diagnosis by her GP was before home leave was implemented, and given the complexity of any causation analysis required, in the light of the

number of complaints brought by the claimant said to have occurred prior to her dismissal. In these circumstances the claimant's financial compensation remedy case, in relation to victimisation, does not succeed and we make no further award.

79. To summarise for the parties the Tribunal awards £77,265, which is the maximum unfair dismissal award available to us. For the reasons we have explained we award £15,000 in respect of injury to feelings, and the calculated interest sum from the date of the act of victimisation (27 January 2016) to today's date, 14 December 2017, calculated at the court rate is £2249.

Employment Judge JM Wade

Date 21 February 2018