EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L George	v	**London Borough of Brent**

Heard at: Watford **On:** 31 January 2019

Before: Employment Judge R Lewis
Ms J Gregory
Ms S Hamill

Appearances:

For the Claimant: In person
For the Respondents: Mr E Kemp - Counsel

JUDGMENT

1. The claimant was unfairly dismissed.

REASONS

1. The claimant requested these reasons. This was the remitted hearing directed by HHJ Barklem, and subject to case management by REJ Byrne.

2. The Tribunal had before it an agreed bundle of over 700 pages, a bundle of witness statements, including those used at earlier hearings, and a helpful written skeleton from Mr Kemp.

3. At the start of the hearing, we invited the parties to identify the background and the issue for decision today.

4. The background, which was agreed, had been helpfully set out by HHJ Hand in a judgment summarised by HHJ Barklem (105). It was that in 2011 the claimant was employed by the respondent as one of six library managers. Following cuts in resource, the respondent reduced its service, and of the six library managers four were made redundant. In the course of that process, the possibility of redeployment to a customer service role arose for the claimant. She was informed that the respondent's usual provision in a redundancy, which

was to offer a 4 week trial period in a redeployed role, did not apply to her. She was not offered a trial period and was subsequently dismissed.

5. The sole issue for us was whether the failure to offer a trial period rendered the dismissal unfair in accordance with Section 98(4) Employment Rights Act 1996.

6. We recognised that the failure to offer a trial period could also arise at the remedy stage, in accordance with the respondent's ***Polkey*** submissions. As the remedy hearing had already been listed separately, we did not think it right to consider remedy point at this hearing.

7. Ms Agarwal gave brief evidence, adopting the statement which she had given on 20 January 2016. She was and is head of culture employed by Brent, and had in 2011 told the claimant that she was not entitled to a trial period. She stated that she did so on the advice of HR. It was conceded by Brent (in 2014) that that advice was wrong, and a breach of the respondent's contractual obligations to the claimant.

8. The claimant gave brief evidence, in which she drew to the Tribunal's attention the relevant procedures (208 and 209) from which we noted the statement of principle in the redundancy process:

> "The trial period gives both employee and the appointing manager the opportunity to try out the new job before making the final decision on its suitability."

9. There were closing submissions from both sides, with a lunch break between the two, so that the claimant could finalise her preparation.

10. The Tribunal was unclear as to the source of the admitted mistake made by the respondent. In a witness statement of 7 December 2012, Ms McKenzie, who gave evidence at the first hearing of this matter, stated:

> "Trial period only applies if you go to work for another service so, as we offered Ms George a post in the same service, this did not apply."

That assertion did not refer to the source of the information which it conveyed. The claimant helpfully drew to our attention the comments of HHJ Richardson on the same point:

> "The stated reason for refusing the trial period was that the claimant was being moved to a post in the same service. This reason is insupportable, and Mr Kemp did not seek to support it before me." (59)

11. We were also referred to an important email of 15 November 2011 (545) in which Ms Agarwal confirmed that she had met the claimant that day and conveyed the same information to her.

12. In oral evidence for this hearing, Ms Agarwal submitted a statement originally dated 16 January 2016, saying that it was fair and reasonable not to offer the claimant a trial period because she knew the role in which she would trial (CSO); she knew the location, where she had previously worked (Kilburn rather than Brent Civic Centre); she knew the immediate and higher line managers,

with whom she had worked over the years; and she knew what the job involved, because she had previously covered for it in addition to her own duties.

13. We take care to accept Mr Kemp's guidance to look at the matter in the round, having regard to all the circumstances, as required by Section 98(4). We must take particular care, in a case where the decision to dismiss was made over 7 years before this hearing, to avoid the layers of hindsight with which the witnesses approached it, notably the claimant. The claimant's dismissal was either fair on the date of dismissal or not (16 December 2011, 518). We must also take care only to consider the question of fairness and reasonableness, and no other related or peripheral issue arising out of the claimant's management.

14. Mr Kemp's submission was that the fact that there had been breach of the respondent's procedure was one of the material considerations, but the mere fact of that breach of procedure did not render the consequent dismissal unfair as a matter of law or automatically unfair. We agree with that cautious approach. We must also take particular care, given the history of this case, not to fall into the substitution mind set.

15. At the time of these events, the claimant had been employed by Brent for 8 years. We accept that she had progressed to library manager. We accept that she loved the job which she did.

16. We find that the failure to offer her a trial period was in principle unfair, and took the redundancy process and decision out of any band of reasonableness. We find that it deprived her of the opportunity of trialling a new role in the knowledge that the role would represent her permanent role in due course, was not a cover or short term job, knowing that her pay would only be ring-fenced at higher grade for one year, and working in a climate of reduction in local authority employment, notably in the library services. We find that it was unfair not to offer her the opportunity of meeting all of those realities, in the knowledge that dismissal was the alternative to accepting them.

17. In that context, we have considered the reasons put forward by the respondent for not offering a trial period. We set out below our short findings on them. We stress however that the underlying fault in all of these points was both that it acted on bad advice about its own procedures, and that it did not offer the claimant the opportunity to reach her own conclusions in the course of a trial.

18. We do not think that the analogy with cover for the role of CSO was useful, because we accept that the claimant had undertaken some of the cover tasks in addition to her library manager role, and only in part. We do not think that the consideration that she previously worked at Kilburn was helpful, because a temporary relocated role is different from permanent relocation. We do not think that the retention of the same senior line manager was a relevant or a helpful consideration. We attach some weight to the fact that if redeployed or on a trial period, the claimant's line manager would be one of her own previous direct reports, and it seems to us that the claimant should have had the opportunity to trial that working relationship. The fact that the claimant had undertaken CSO tasks did not seem to us helpful: we do not doubt her ability to

undertake lower grade tasks, the question was giving her the opportunity to trial a role in which the lower grade tasks were the totality of her work.

19. We noted also that before the claimant's dismissal the respondent had guidance of a stress risk assessment (546) which referred to the impact on her mental state of decisions to be made about her future in her employment.

20. Drawing these matters together it seems to us that the claimant should in fairness have had the benefit of being offered a trial period in which on the one hand she could balance retaining a role in a job that she loved and the security of pay with, on the other hand, the permanent downside of a visible demotion to a less challenging and worse-paid role, to a location which was undesirable, with a longer journey, and which required formation of a new line management relationship. One aspect of that finding is that it seems to us unfair that the respondent made assumptions against the claimant's interest about a trial period, without giving her the opportunity to make her own assessment.

21. We make no finding as to whether the trial would have been accepted by the claimant if offered, or would have succeeded in retaining the claimant in employment, or for how long, or in what capacity. We understand that the respondent reserves its position on all such points.

22. After we had given judgment, and advised the claimant of her rights in accordance with Section 112 Employment Rights Act 1996, the claimant asked for an order for re-engagement or re-instatement, and case management orders have been made accordingly.

23. The Judge, who is the writer of these reasons, adds one final observation. This hearing placed him in the now unusual position of deciding an unfair dismissal point with lay colleagues. He has been hugely assisted in doing so by the knowledge and experience of lay colleagues who have themselves been involved in redundancy issues and negotiations. He emphasises that this judgment is the joint view of all of three members of the tribunal, and that he stresses his gratitude to his colleagues.

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Employment Judge R Lewis

22 / 2 / 2019

Sent to the parties on:

15 / 3 / 2019

For the Tribunal:

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