EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Sharon Vygus **V** **Crawley Borough Council**

Heard at: London Central **On**: 7, 8 and 11 November 2019 and 29 November 2019 (in chambers)

Before: Employment Judge Joffe
Ms S Pendle
Ms S Boyce

Representation

For the Claimant: In person

For the Respondent: Mr S Bellim, solicitor

RESERVED JUDGMENT

1. The claim for unfair dismissal is not upheld.

2. The claim for direct disability discrimination is not upheld.

3. The claim for breach of a duty to make reasonable adjustments is not upheld.

REASONS

Claims and issues

1. The claimant brings claims of unfair dismissal and disability discrimination. The issues had been agreed at a case management hearing in front of EJ Welch on 15 September 2018 and are as set out below. As the hearing progressed, there was a lack of clarity about how the claimant wished to put her complaint of direct disability discrimination, which was ultimately resolved, and the issues set out below have been adjusted to reflect that change in position.

Unfair dismissal

(i) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for reason of redundancy.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses', namely:

a. Did the respondent follow a fair, meaningful and genuine consultation process?
b. Did the respondent follow a fair selection procedure?
c. Did the respondent carry out a fair scoring process?
d. Did the respondent consider the claimant for redeployment? In particular:
    i) Did the respondent act unfairly by its belated offer of interview for the 2-year fixed Benefits Case Officer job as a redeployment opportunity?
    ii) Did the respondent act in a fair way by refusing the claimant's request to be interviewed for the part time Older Persons Officer post via means of redeployment?

(ii) If the claimant was unfairly dismissed and the remedy is compensation: if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v

Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604].

Disability

(iv) The respondent accepts that the claimant was disabled at all material times with the condition of Sjogren's Syndrome.

EQA, section 13: direct discrimination because of disability

(v) Has the claim for direct discrimination been brought out of time?

(vi) Should time be extended on the basis that it is just and equitable to do so?

(vii) Has the respondent subjected the claimant to the following treatment: Did the respondent prevent the claimant from working more than her contractual hours in accordance with the respondent's flexi scheme between November 2016 and March 2017, i.e. working up to an extra 8.11 hours during any four-week period and taking flexi leave?[1]

(viii) Was that treatment 'less favourable treatment', i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The claimant relies on the following comparators:

a. Kay Patel;
b. Natasha Sutcliffe;
c. Ryan Jenkinson;
d. Mary Gaskins;
e. Paul Windust.

(ix) If so, was this because of the claimant's disability?

Reasonable adjustments: EQA, sections 20 & 21

(x) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Having essential criteria, namely core hours, for posts offered as part of the redeployment process;
b. Having full time hour requirements for alternative posts?

(xi) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:

[1] At the case management hearing, this was 'Did it remove the claimant's ability to work in accordance with the respondent's flexi-contract by working additional hours over her contracted hours for the period October 2016 to March 2017'?

a. It prevented the claimant being able to meet the essential criteria for alternative jobs?
b. It prevented the claimant obtaining alternative employment?

(xii) If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

(xiii) If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:
a. Slotting her into the job of Finance Business Partner (Capital)
b. Allowing the claimant to have priority consideration for alternative roles i.e. the Benefits case Officer and the Older Persons officer roles.

(xiv) If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

Findings of fact

The hearing

2. The Tribunal heard evidence from the claimant and, on behalf of the respondent, Sarah Barnes, interim head of community services, Karen Hayes, head of finance, revenues and benefits, Carron Burton, HR and OD manager, and Paul Windust, chief accountant. We were provided with a witness statement from Lucasta Grayson, head of people and technology. The claimant indicated that she did not propose to challenge Ms Grayson's evidence and we took the evidence in the statement into account so far as was relevant, without having heard any live evidence from Ms Grayson. We had an agreed bundle of some 411 pages.

3. On the second day of the hearing, there were a number of discussions between the parties and the Tribunal about how the claimant's direct disability discrimination claim was being pursued. It appeared that the formulation adopted at the case management hearing was not specific enough; it was not clear whether the claimant was saying that she should have been able to work additional hours over and above her contractual hours of 30 per week and take flexi days, work additional hours and be paid for those hours or some combination of those two things. On the afternoon of the second day, we allowed the claimant a break to consider what her position was. When she returned, she asked us to consider this factual complaint as a complaint of breach of the duty to make reasonable adjustments instead of considering it as a direct discrimination claim. The PCP she was contending for was a requirement to work full time and the adjustment she was contending for appeared to be being allowed to work between 30 and 37 per hours per week and to be paid for the additional hours up to 37 which she worked over and above her contractual 30 hours.

4. Mr Bellim on behalf of the respondent objected to this proposed change to the agreed issues. He said that the claim had proceeded on the basis of the agreed issues and that this was a new case the respondent had not prepared to meet. If the issues were amended, evidence would be required as to the size of the claimant's role, especially as to whether it required work over and above the contractual 30 hours. Consideration of whether it was reasonable to allow the claimant to work 30 – 37 hours per week at her own choice would require evidence which had not been adduced about, for example, the effect of such an adjustment on budgets and payroll arrangements. An adjournment would be required in circumstances where the change of case was being put forward at the end of day two of a three day hearing. The respondent would be put to additional cost and inconvenience.

5. We considered the claimant's application and rejected it. Although we could see that the complaint in the claim form: 'My trouble at work started in October 2016 when my new interim managers withdrew the adjustments put in place to assist me in managing my Sjogren's Syndrome' could be read as a complaint of failure to make reasonable adjustments, there had subsequently been what EJ Welch described as 'a detailed analysis … to ensure that the claims were understood' at the case management preliminary hearing which had resulted in the issue being defined substantially as at paragraph 1 above.

6. We agreed that the respondent would need to call additional evidence in order to meet this claim and that an adjournment would be necessary. The claim was still in some respects unclear. We concluded that it would not be in the interests of justice nor in accordance with the overriding objective to allow the claimant to pursue her claim on this basis We bore in mind that the claim was on its face out of time, the claimant had had an opportunity to pursue the claim on that basis and had not previously done so, and that the respondent, a public body, would be put to substantial expense and inconvenience.

Facts in the claim

7. The claimant started working for the respondent on 3 February 2002 as a bank reconciliation clerk. She undertook various qualifications and became a full member of the Association of Accounting Technicians. In 2012, she applied for and was appointed to the role of capital accountant. She remained in this role until she was dismissed.

8. The claimant has Sjogren's Syndrome, an auto immune condition which causes a number of symptoms such as dry eyes, dry mouth, joint pain and fatigue. As well as requiring more significant periods of rest between working weeks, the claimant told us that she benefitted from starting her working day earlier when she was more refreshed.

9. On 21 October 2013, the claimant made a flexible working application to reduce her contractual hours to 30 per week (four 7.5 hour days) in order to help her cope with her fatigue. This was granted on a temporary basis on 23 October 2013 and the new hours commenced from 2 November 2013.

10. The respondent has a flexible hours working scheme which we were referred to ('the flexi scheme'). This was a scheme by which staff could work their hours within what is described as a 'band width' of 7:00 to 20:00. Full time staff are able to work up to an additional 10 hours in a four week period which may be credited to the next four week period and then taken as leave. At a manager's discretion the 10 hours may be increased to 15, if a manager has requested additional work. The scheme makes clear:
'The operation of the council's service must be paramount and to ensure adequate staffing levels during opening hours, cover for peak workloads and service to the public and other departments, you must agree your flexible working hours with your line manager in advance'.

11. The flexi scheme does not contain a definition of 'core hours'. It seemed that the phrase was used in the respondent organisation for what might be called office hours, defined as 9 am – 5 pm or 8 am – 4 pm and possibly other patterns depending on the role.

12. On 30 October 2014, the claimant had a telephone assessment with the respondent's occupational health provider who gave the respondent advice that the claimant should meet with management to review her work hours. The claimant wanted to formalise her reduction to four days per week and the occupational health adviser supported that suggestion, which she said should have a positive impact on the claimant's management of her energy levels and support her remaining in work.

13. The claimant submitted a further flexible working application on 19 November 2014. She wanted a permanent arrangement of 30 hours over four days 'flexible to meet workload'. She said in her application in the box about how 'The effect on the council and colleagues' could be dealt with: 'Current arrangements involve additional hours being worked at peak load times'.

14. The application was granted by the claimant's then line manager, Brian Dodd, financial accounting manager, on 19 November 2014 and the permanent arrangement commenced from 1 December 2014.

15. There were changes to the claimant's role and that of others within the finance team over time, partly consequent upon new technology. Collaborative Planning was a real time financial information system which enabled budget holders to access information directly rather than have to be provided with that information by a member of the finance team. The claimant played a significant role in introducing Collaborative Planning in the capital accounting function. The introduction of Collaborative Planning freed up finance staff time so that staff were able to get involved in other sorts of support / advice to budget holders.

16. In November 2016 the respondent initiated a three-year transformation plan. Part of that plan was a review of the finance team, which review was felt to be

overdue. This was to take account of changes in technology and the reduction in government funding. £90,000 in savings were required.

17. As described to us by Ms Hayes, the new model for the finance team involved the finance team moving away from producing spreadsheets and detailed information to budget holders, which information those budget holders could access themselves using the new technology. The role of the finance team would be to provide other types of support to the budget holders. This would be what was described as the 'finance business partner model'.

18. The respondent commenced informal consultation about the restructuring with the finance team in November 2016. Ms Hayes spoke to the team in a team meeting about the changes which were proposed. The team were told that the new ways of working would involve providing support and advice to managers and challenging them on their budgets; this was described as being a 'critical friend'. The finance business partners would be expected to support managers to manage their budgets by being more challenging, proactive and persuasive. Job descriptions would be rewritten to reflect the changes to the roles. Staff were told that formal consultation would begin once job descriptions had been rewritten.

19. In a team meeting at about this time, Mr Windust spoke about the finance business partner model and shared a Chartered Institute of Public Finance and Accountancy ('Cipfa') document entitled 'Accountability Performance and Transformation' which he encouraged staff to read as it explained the difference between traditional finance roles and the finance business partner roles.

20. There was then a delay in moving towards a formal consultation process and Ms Hayes relaunched discussion of the restructuring at a team meeting on 25 January 2017 at which she circulated a paper which set out the proposals for the redesigned service and the expected changes to roles. Staff were asked to look at their current job descriptions and feed back on them. Ms Hayes told staff that she was not sure that the new roles would be 'straight slot-ins' as she had previously hoped and that she would be taking advice from HR on that issue. The reference to 'slot-ins' was a reference to a situation where one role would simply be matched to a new role and the postholder would transfer to the new role without any requirement for assessment.

21. Ms Hayes' paper included the statement: 'Below are some extracts from the HR JD that we will be using when writing your new job descriptions some of this we can replace 'HR' with 'finance''. This reflected the fact that the business partner model had migrated from the HR function. The paper also asked finance staff to look at their existing job descriptions and say what was no longer relevant and what was missing.

22. At a team meeting on 1 February 2017, there was a discussion about the restructure. The minutes record that, 'Due to events this will not now be a straight slot in, the job descriptions will be written and evaluated. HR will

advise whether the new roles are ring-fenced in the new structure.' It was recorded that: 'We are now in informal consultation and encourage feedback.' Employees were encouraged to look at the new job descriptions and make comments by 6 February 2017.

23. In terms of how the matching of the old jobs against the finance business partner roles was done, we did not hear evidence from the HR consultant who conducted this process, Sian Pierre. Ms Pierre has left the employment of the respondent and no written record of the matching exercise had been found. The respondent's Management of Organisational Change procedure referred to 'identification of job matches and ring-fence arrangements' but did not set out any criteria or process for carrying out job matching.

24. The evaluation of the roles for the purpose of assessing grades was done by a panel of Ms Pierre and the Unison branch secretary, John Braidley.

25. The job descriptions for the existing accountant roles, including the claimant's, dated from 2012 and were not revised prior to the restructuring. It was clear that there had been some evolution to the accountant job roles since 2012 and the claimant challenged the respondent's witnesses on this issue in cross-examination. Mr Windust said that parts of the 2012 job description should have been deleted, e.g. reference to the 'Covalent system' but 'they were generally right' Ms Burton's evidence was that she would not necessarily have expected old job descriptions to be revised prior to a matching exercise; it 'depends on the gap'.

26. Mr Windust and other managers did not have input into the slotting in process. Ms Burton said it would have been 'possibly useful' to have a manager involved. She said that the things which would have been taken into account in slotting in, if roles were on the same grade, would be levels of responsibility and skills needed for the role. She said that if there were issues about whether there should be a slot in or not in particular circumstances, unions or individuals would usually raise that. The union had not raised any issues in relation to this exercise.

27. Mr Windust's evidence was that he had a very good idea of what the claimant and the other accountants were doing, having done most of the roles himself, and that the new job descriptions for the finance business partner roles were 'complete rewrites'.

28. We ultimately heard a significant amount of evidence from the claimant and Ms Hayes and Mr Windust about resemblances and differences between the accountant role and the finance business partner role. We found some of this evidence difficult to analyse, particularly since the respondent's witnesses concentrated on the 'behaviours' required for the new roles in their witness statements and we really only heard about differences in the tasks which would be undertaken in oral evidence.

29. It was clear that some aspects of the finance business partner role were already performed at some level by the claimant and her accountant colleagues.

30. Ms Hayes said in evidence that the tasks which were new to finance business partner role were:
    27.1 Going to department management to advise on financial matters affecting service areas;
    27.2 Getting involved in corporate project development, corporate project assurance group, looking at governance in place;
    27.3 Looking for external funding opportunities;
    27.4 Getting involved in creating business cases and investment appraisals;
    27.5 Challenge of budget process with the chief executive. Attending along with head of service to see they if could challenge and reduce budgets;
    27.6 Supporting and coaching stakeholders.

31. The claimant in her cross examination of Ms Hayes seemed to accept that the second, third and fifth of those tasks were new and it appeared to us that the remaining tasks were going to form a larger part of the finance business partner role than they they had been of the accountant role, although we accepted specific evidence given by the claimant as to occasions when she had taken part in those activities. The effect of these changes was also to change the nature of the relationship the finance business partner would have with budget holders when compared with that between accountants and budget holders.

32. So far as the ongoing informal consultation was concerned, Mr Windust told us he had to chase staff for feedback on the draft job descriptions for the new roles.

33. An employee called Natasha Sutcliffe, who was an accountant on the revenue rather than the capital side, provided some feedback on the proposed restructuring under cover of an email dated 2 February 2017. Ms Sutcliffe proposed a different structure and was critical of the consultation process. She also provided comments on her own job description on 7 February 2017, highlighting parts which she felt were no longer relevant. She provided some further feedback in which she raised a concern that there had been discussion about having a team meeting to discuss job descriptions and the change in the way of working ‘but nothing has come of it’.

34. Ms Sutcliffe sent a further email on 7 February 2017, ‘having taken some time to review all correspondence and discussions form meetings regarding the restructure’ updating her feedback. Essentially Ms Sutcliffe was proposing a different structure for the finance team from that which had been put forward by management.

35. Also on 7 February 2017, the claimant and another employee, Kay Patel, emailed Mr Windust to say that they had received two different job descriptions in November 2016 and January 2017 and: ‘Although we would

like to provide feedback, as we are unsure of what the proposed restructure includes, specifically around roles and responsibilities, we feel unable to do this at the present time.' They asked to be provided with job descriptions and the proposed restructure once it had been confirmed so that they could provide informal feedback before formal consultation commenced. Mr Windust was surprised at these comments as the restructuring had been discussed in weekly team meetings and he had encouraged the team to read a document from Cipfa which he had provided and which explained the difference between the traditional finance roles the team were working in and the finance business partner roles which were being proposed. He had invited feedback on the draft job descriptions and had chased feedback in January and February 2017.

36. The final job descriptions for the new finance business partner roles were circulated by Mr Windust on 16 March 2017. In his covering email, he explained to the members of the team that the next stage would be for the jobs to be evaluated and then the formal consultation process would commence. A webinar about the finance business partner role was shown to staff. There was no feedback from the claimant about the job descriptions. The job descriptions were shared with Unison, who were supportive of the new model.

37. Mr Windust also emailed Ms Sutcliffe on 16 March 2017 responding to her suggestions about the restructuring and questions which she had raised. Mr Windust told us that the restructuring was discussed at every weekly team meeting over the consultation period. Those discussions included discussions about job descriptions.

38. One other event relevant during this period was that during a team meeting on 30 January 2017, there was a discussion about 'core hours'. The minutes of this meeting record that 'there will be a need for office cover between 9am – 5 pm and that attending later than 10 am and leaving before 4 pm should be by way of arrangement with a manager'. 'It was agreed that there would either be a rota or cooperation between colleagues'. Mr Windust said that he raised the issue because he had found in December 2016 that he was sometimes the only person in the office after 3:30 pm. Some members of the finance team needed to be available during office hours of 9 am – 5pm and needed to be seen by other departments to be available. After discussion with staff, a rota was introduced so that there was someone on duty until 5 pm every day.

39. The claimant told us that this was evidence that there was going to be a requirement for the finance business partners to work 'core hours' of 9 am to 5 pm and not within the flexi scheme 'bandwidth'. Mr Windust said that this was not the intention and that there was no 'core hours' requirement for the finance business partner role.

Formal consultation

40. Formal consultation commenced with a meeting with the finance team, led by Ms Hayes, also attended by union representatives, on 8 June 2017. The claimant received a letter from Ms Hayes on the same date which explained that the consultation period would be 30 days unless the parties agreed otherwise. She was offered an individual consultation meeting with Ms Hayes if she wished to have one. Neither she nor any other member of the finance team requested an individual consultation meeting.

41. The consultation document set out what the posts were going to be in the new structure and which existing posts were being deleted. It set out that the recruitment process would involve employees applying for and having a short interview for the new posts, including the finance business partner posts. Two of the finance business partner posts were to be for revenue and one for capital but all three of the existing accountants were entitled to apply for the three posts and there was one recruitment exercise for the three posts. The posts were ringfenced for the existing accountants in the first instance. The consultation document envisaged that the formal consultation process would end on 25 July 2017, although this period 'may be shortened with the agreement of all parties'.

42. Ms Hayes told the team that they should fill in 'expression of interest' forms for the new roles. A shared drive was set up where staff could access relevant documents including the formal consultation document, the webinar about finance business partner roles, FAQs and the relevant managing change procedures. Each member of staff was also given a Cipfa document which explained the difference between traditional finance roles and finance business partner roles.

43. The FAQs document included a question about training and development 'to make it easier to adapt to the new roles', to which the answer was inter alia:
'Also we can offer a course over 2 days that covers
Communication and presentation skills
Behavioural skills and
Influencing skills – Impact and presence.'

44. The claimant suggested at the consultation meeting that there could be a 'systems thinking' or work review. She told us that Ms Hayes was not receptive to these suggestions. No one fully explained to us what a 'systems thinking' review' was but Ms Hayes' evidence was that the claimant raised the possibility at a very late stage. Ms Hayes had previous experience in the area but felt it was more suited to transactional services than advice and support services. Ms Hayes said in her later report for the claimant's appeal: 'It appeared that Sharon wanted to put the consultation on hold to go through a systems thinking process.'

45. At around this time, the claimant went to speak with Ms Hayes to seek reassurance that her negative attitude to date to the changes which were

being proposed would not be held against her and Ms Hayes assured her that she would not be looking backwards and it was behaviour in the future which mattered.

46. The finance team, after discussions with trade union representatives, requested that the consultation process be shortened so that it could be completed by 4 July 2017.

47. The three accountants in the team, the claimant and two revenue accountants, all expressed interest in the three finance business partner posts and all three were interviewed.

48. The claimant was interviewed for the finance business partner roles on 22 June 2017 by Ms Hayes, Mr Windust and Ms Burton.

49. The interviews were designed to test what were perceived to be the new skills required in the finance business partner roles rather than technical accounting skills, which were taken as read. Each candidate was asked the same set of questions which were designed to test those skills. The questions included: 'What behaviours do you expect you and your team to adopt and can you tell me how you have demonstrated these?' and 'Can you give me an example of where you have dealt with a difficult customer or colleague and what did you do to diffuse the situation?'

50. The answers were marked from A-E. In order to succeed in being appointed, a candidate needed to achieve scores of C ('some concerns') or above. This was a lower level than an external candidate would have been expected to achieve, which was described as being at least a mixture of Bs and Cs. In respect of the five questions asked, the claimant scored two Cs, two Ds and an E.

51. The claimant accepted that she had not performed well at interview and Ms Hayes described her performance as 'very poor'. The claimant said that she was petrified and felt like her redundancy was a 'done deal'. She was 'confused and baffled by most of the questions'. The claimant required many prompt questions, spoke over the interviewers at times, was rude at times and gave weak answers to questions.

52. Ms Hayes said the interviewers discussed whether the deficiencies in the claimant's performance could be met with training and concluded that they could not. She said that there were so many areas lacking and that some could not be taught, for example active listening.

53. The claimant was informed at a meeting with Ms Hayes and Mr Windust on 28 June 2017, confirmed in a letter which she was handed, that she had not been successful in being appointed to the finance business partner role. She was informed that she was being made redundant from 20 September 2017, given information about her redundancy payment, and provided with

information about the redeployment process and her right to appeal the decision to dismiss her.

54. The claimant attended an interview feedback meeting on 7 July 2017.

55. Only one of the claimant's accountant colleagues, Natasha Sutcliffe, was offered a finance business partner role. Ms Sutcliffe was offered the finance business partner (capital) role but ultimately she did not take up the role. The claimant said that Ms Sutcliffe told her that this was because she was not able to meet the requirement to work 9 – 5 core hours. Mr Windust told us that there was no such requirement and that Ms Sutcliffe had asked to work hours outside of the respondent's flexible working 'bandwidth' of 7:00 – 20:00, which could not be accommodated.

56. The requirement for the finance business partner roles and the finance team generally was that the core hours of 9 am to 5 pm would have to be covered by the team. The roles were advertised as full time, i.e. 37 hours. The question of what hours a person could work was not whoever considered at the selection stage, but was looked at once the offer had been made, as in Ms Sutcliffe's case.

57. The claimant appealed her dismissal and her appeal was heard by the Staff Appeals Board, made up of three councillors, on 17 August 2017. The Staff Appeals Board was supported by Ms Grayson. Ms Hayes presented the management case and the claimant attended with her trade union representative, John Braidley. The claimant submitted a detailed written appeal submission in which she raised broadly the following grounds of appeal:
- That her role was not redundant;
- That there was no meaningful consultation;
- That the pool of employees at risk was not as extensive as it could have been;
- That the selection criteria were not in accordance with the respondent's Management of Organisational Change procedure.

58. Ms Hayes produced a detailed report which was also considered by the Board. After deliberating, the Board concluded that there was a redundancy situation, that there had been meaningful consultation, that the pool was appropriate and the process in accordance with council procedures.

59. The Board sent the claimant a detailed letter on 22 August 2017 explaining why the appeal had not been upheld in relation to each ground of appeal.

60. A report from the claimant's consultant rheumatologist, Dr Shattles, dated 27 June 2017 is relevant to an understanding of the claimant's health and wellbeing at this time. Dr Shattles refers to the claimant's profound tiredness, achiness and a 'significant depressive element' to her symptoms.

Redeployment

61. Section 4 of the respondent's Management of Organisational Change procedure covers redeployment. Employees at risk of redundancy have 'redeployment status' until they are found a new position or their employment terminates. There are provisions for the keeping of a redeployment register, for various types of support for employees and for the creation of a redeployment profile for the individual redeployee.

62. Clause 4.7: 'Identification of potential 'Redeployment Opportunities', provides that 'Where the Human Resources Team agree there is a potentially suitable redeployment opportunity (i.e. the redeployee's experience, knowledge, and skills match the essential requirements set out in the person specification for the post **or** he/she could meet those requirements within a reasonable period with training) the recruiting manager will be notified, and the redeployee guaranteed a redeployment interview for the post, prior to the consideration of other candidates.'

63. In an email dated 11 July 2017 sent to the claimant by Ms Burton after the interview feedback meeting, the claimant was advised to meet with Sian Pierre, HR consultant, for advice on the redeployment process and assistance in preparing a redeployment skills profile.

64. The claimant prepared a profile but was not matched with any roles prior to her appeal meeting. We had a copy of the claimant's skills profile in the bundle. In addition to the claimant's finance and administrative experience, the profile made reference to past experience in a bakery, as a teaching assistant and in a bank. The claimant raised the issue that she had not been matched for any roles at her appeal meeting.

65. On 18 August 2017, Ms Burton sent the claimant details of a vacancy for a benefits case officer in the housing benefits service. Although the claimant was not regarded as a good match for the role, it appears that it was considered appropriate after the claimant's appeal that she should be offered the opportunity to apply for the role. This role had already been externally advertised but that process was put on hold so the claimant and another redeployee could be considered.

66. The claimant and a colleague facing redundancy were given the opportunity to observe the work of the housing benefits team and the claimant then expressed interest in the role. She was interviewed for the benefits case officer role on 29 August 2017 by Ms Barnes. She was asked a series of set questions designed to test skills required for the role and scored on her answers. She received marks on a scale of 1 - 5 which we were told equated to the respondent's A – E marking system. The claimant scored between 1 and 3 on the various questions. Ms Barnes said that she was looking for a minimum score of 3 in each area.

67. Ms Barnes was concerned that the claimant could not demonstrate an ability to work in a demanding service, independent working, ability to adapt to changing requirements in a positive way, any real face to face or customer

service experience, any evidence of being able to deal with challenging / difficult customers or the ability to create and support positive working in a team. Ms Barnes described to us what she felt was a poor answer to a question about how to deal with a situation where the candidate was being talked over in a team meeting, in response to which the claimant said that she would say to a colleague: 'Excuse me, may I speak please'. She said that interpersonal skills were not demonstrated throughout the interview and she had grave concerns about the claimant's suitability. She said there was consideration given to the level of the shortfall in skills and the possibility of training but she had no confidence the gaps could be filled in a reasonable time.

68. Ms Barnes told us and we accepted that the hours the claimant could work did not form part of this assessment and that the existing team works a variety of full and part time hours, although, understandably, between them the team do have to cover the core working hours when the face to face desks are open.

69. The claimant was not successful in being appointed to this post.

70. The claimant emailed Ms Pierre on 6 September 2017 to express interest in a vacancy which she had seen externally advertised for an older persons support officer. This post was advertised both full and part time and the hours were said to be 8 am – 4:30 pm Monday to Thursday and 8 am – 4 pm Friday. The claimant said that she had experience of looking after an elderly neighbour and parents. She asked whether she could shadow a member of the team so she could see whether the post was suitable for her.

71. The job description of this post showed that the duties included monitoring the wellbeing of a caseload of supported tenants by means of calls and personal visits, helping residents obtain health, social care and support services, attending case conferences, and a variety of other duties.

72. Ms Pierre wrote to the claimant on 8 September 2017 to say that she had considered whether the claimant was a match for the post before it was externally advertised and concluded that she was not and therefore the claimant would not be considered for the role.

73. The claimant wrote to the recruiting manager on 8 September 2017, repeating her request to have an opportunity to shadow a postholder. Becky Pearce, Sheltered Housing and Telecare Manager, wrote to the claimant on 11 September 2017 to say that it would not be possible for the claimant to do shadowing as that might put her at an advantage over other applicants and also she would require security checks before working with vulnerable adults.

74. The claimant did not apply for the role but Ms Grayson asked Ms Burton to review the claimant's suitability for the role. Ms Burton sent the claimant a detailed email on 29 September 2017. She set out areas of the specification where she felt the claimant did not 'appear to have the skills …in…the specifications essential criteria', including 'Knowledge of the role and support

function of other agencies in meeting the needs of the elderly and vulnerable tenants.'

75. Ms Burton also said in her email that selection for alternative roles:
'is first and foremost to ensure suitability and that the employee will be able to perform in the role
The council offer a number of flexible working arrangements such as the job share scheme, or requests to work flexibly – different patterns of working hours and/or reduced working hours. Adjustments can be and are made in instances where an employee has a medical condition and where different hours or working patterns would assist them, these requests would be considered as a reasonable adjustment.'

76. Ms Burton said that the claimant's working patterns and ability to work particular hours had no bearing on the decisions as to appointment to alternative roles.

77. Ms Burton was questioned by the claimant about the fact that she referred to having revisited 'the job and the duties of the post, the specification set out in the job description and the job advert.' Ms Burton told us that she felt it was relevant to look at all of these documents. The claimant put to Ms Burton that the advert and job description should not have been taken into account pursuant to section 4 of the Management of Organisational Change procedure.

78. the claimant also put to Ms Burton that her experience of looking after elderly relatives and neighbours might have showed she had the ability to perform this role. Ms Burton said that what the claimant said about this in her email did not demonstrate to her that the claimant did have the requisite skills and experience.

Discussions about the claimant's hours in 2016 – 2017

79. The claimant's line manager was Mr Dodd until some time in 2016. Because Mr Dodd was reducing his hours in preparation for retirement, the claimant began to report to Mary Gaskins, corporate accountant, in about April 2016.

80. In the past, under Mr Dodd's management, the claimant could run a balance of over 8.11 hours in a four week period (8.11 hours being her pro rata entitlement under the flexi scheme, i.e. the number of hours she could work over her contractual hours in a four week period and then reclaim as flexi leave) and then instead of losing the additional balance over that allowed in the respondent's scheme, be paid an overtime payment. The respondent's general policy on overtime payments was that overtime payments should be made for pre-authorised specific pieces of work.

81. Ms Gaskins and Mr Windust had some discussions about the claimant's working hours during this period. It appeared that the claimant was regularly

working more than 30 hours per week. Ms Gaskins and Mr Windust took the view that the claimant's workload did not require her to work additional hours.

82. Mr Windust was looking more generally at the whole team's flexi leave situation, excessive carryover of hours and what seemed to him to be misuse of the flexi system. He spoke to Ms Gaskins about her use of the flexi scheme. He also spoke to Ms Sutcliffe. Because of personal circumstances specific to Ms Sutcliffe, she was allowed to have a separate arrangement until December 2017 whereby she could continue to build up a balance outside the limits for the scheme and take flexi days to reduce it.

83. Ms Gaskins raised the issue with the claimant in November 2016 and told her that she should work thirty hours per week. She also said to the claimant something along the lines of 'have you ever considered that we'd all like to have every Friday off?' and Ms Gaskins later apologised for this remark when she realised that the claimant was working reduced hours for health reasons.

84. On about 19 January 2017, Ms Gaskins met with the claimant to discuss her hours and the claimant requested a referral to occupational health. On 20 January 2017, the claimant wrote to Ms Gaskins to say that she was disappointed at management's decision not to 'reinstate the option for me to claim additional hours'. We note that 'additional hours' as used by the respondent and its employees meant extra hours over contractual hours which were paid for, i.e. overtime. The claimant said that she was requesting an occupational health referral as a result of this decision by management and also asked for that decision to be reviewed as she said it would have a detrimental effect on her health and her working relationship with colleagues

85. On 23 January 2017, Ms Gaskins wrote to Sian Pierre saying that she had confirmed to the claimant that she should only work 30 hours per week 'as per her occupational health report' and that there had been a discussion about any pieces of work which could be passed to others.

86. In a referral to occupational health dated 24 January 2017, Ms Pierre wrote inter alia: 'Based on her illness which is classed as a disability we do not feel that Sharon should be working 7 hours overtime as and when she feels the need to do so as the previous report advises 30 hours per week only and does not mention overtime'. One of the questions to the occupational health adviser was: 'Please confirm whether 30 hours are recommended or whether you feel that 37 hours (full time) is recommended'.

87. The claimant told us that there was meeting between herself, Ms Pierre and the cliamant's trade union representative, Mr Braidley, at around this time.

88. Mr Windust accepted that the discussions with Ms Gaskins were to the effect that the claimant should work 30 hours per week. In an email dated 19 January 2017 from Ms Gaskins to Sian Pierre, Ms Gaskins says:
'We also discussed the previous referral and Sharon explained when speaking to the occupational health doctor she had been trialling working

extra hours at peak times and that she was able to manage this although it was not mention[ed] in the report. My reply to this was that we could only look at what we have and we asked her to only work 30 hours over 4 days and if the necessity arises we could look at her work load.' Mr Windust said that that did not mean that the claimant could not still work extra hours within the parameters of the flexi scheme. He said in evidence: 'I know Sharon did not take it to mean that because she did work flexibly.'

89. There was email correspondence between the claimant, Ms Gaskins and Mr Windust on 20 and 21 March 2017. The occupational health report had not yet been received by the respondent and the claimant wrote to say that she had understood some of her work would be removed but that had not yet happened. Ms Gaskins replied that she had asked for the claimant's suggestions as to what could be handed over but had not received a response.

90. Mr Windust's view was that the claimant's role could be performed in 30 hours per week except perhaps at peak times such as the financial year end. There were aspects of the role which had been removed. Mr Windust highlighted these in an email to the claimant dated 21 March 2017 and also areas of work which could be handed over to other staff. He said in evidence that the claimant seemed to be spending longer on tasks than he would have expected and that it was 'difficult to understand where the time was going. Maybe the previous manager should have picked it up.'

91. The records we were shown relating to the period November 2016 – March 2017 showed that the claimant did regularly work over her 30 contractual hours a week and that she took flexi leave during the period to reduce the balance of hours she was owed. The claimant accepted in evidence that the records were correct.

92. There were also records in the bundle for the comparators which appeared to show much the same pattern of extra hours being worked within the limits of the flexi scheme and then taken off as leave.

93. On 23 March 2017 Mr Windust had a meeting with the claimant about her hours. A follow up email records that she would have the choice of using the additional eight hours worked in a four week period for a flexi day or claiming it as overtime.

94. The occupational health report we have seen is dated 27 February 2017 (Amended 2 March 2017) but by 22 March 2017, the claimant had not yet given consent for the report to be released to management. Dr Sade Adenekan, the OH physician recommended inter alia that the claimant retain her four-day working week. A stress risk assessment was recommended to assess whether support such as working an additional 8.11 hours at peak times was advisable.

95. Once the report was received from occupational health, Ms Gaskins met with the claimant on 12 April 2017, which resulted in an agreement that the claimant could work up to 37 hours per week depending on demand. Those extra hours would count as additional hours, ie paid overtime. After 31 May 2017, the claimant would revert to no more than 128.11 hours in a four-week flexi period with any hours additional to that being agreed with Ms Gaskins beforehand. Mr Windust said in evidence that the claimant had 'worn him down' and he agreed the arrangement pending a further occupational health review.

The Law

Unfair Dismissal

96. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Reason for Dismissal

97. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is "either a reason falling within subsection (2) or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

Redundancy

98. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

99. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provision which is relevant for the purposes of this claim is s 139(1)(b):

"*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …

…….

have ceased or diminished."

100. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. This does not mean, however, we must always take the employer's stated reasons for the dismissal at face value.

101. We have considered the case law on how to properly assess whether an employer's requirements for employees to carry out work of a particular kind have ceased or diminished. Every case of reorganisation depends ultimately on its own facts; it is for the tribunal to determine whether the reorganisation and reallocation of functions amongst staff is such as to change the work the particular employee or successive employees is or are required to carry out, and whether such change has had an effect on the employer's requirement for employees to carry out a particular kind of work: Murphy v Epsom College 1985 ICR 80*,* CA.

102. An authority which seemed to us to be useful in considering the facts of this case was Hakki v Instinctif Partners Ltd (formerly College Hill Ltd) EAT 0112/14. In Hakki, an HR administrator who carried out administrative tasks for the HR manager, as well as providing administrative assistance to the CEO and the Financial Director, was dismissed consequent on a reorganisation that created two new full-time posts, one of HR adviser and one of PA to the CEO/Financial Director. The reorganisation resulted in an increase in the work required to be done but the new roles required different skill-sets from those that the claimant had demonstrated and involved greater responsibility. The EAT agreed with the Tribunal that this created a redundancy situation.

Reasonableness

103. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

104. When considering reasonableness, the tribunal cannot substitute its own view. Instead we are required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

105. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

106. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer has genuinely applied its mind to the problem. (Capita Hartshead Ltd v Byard *[*2012] ICR 1256 (EAT)).

107. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

Direct discrimination because of disability

108. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:
- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic,

109. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

110. The exercise of considering whether there has been direct discrimination must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: '(2) if there are facts from which the court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

111. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

112. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

113. In determining who is an appropriate actual comparator under s 23 Equality Act 2010, there must be no material difference between the circumstances relating to each case.

Failure to comply with a duty to make reasonable adjustments

114. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.

115. In considering a reasonable adjustments claim, a tribunal must consider:

- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
- The identity of non-disabled comparators (where appropriate) and
- The nature and extent of the substantial disadvantage suffered by the claimant.

  Environment Agency v Rowan [2008] ICR 218, EAT.

116. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from

which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.

117. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial.

118. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.

119. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:

- The extent to which taking the step would prevent the effect in relation to which the duty was imposed
- The extent to which it was practicable for the employer to take the step
- The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
- The extent of the employer's financial and other resources
- The availability to the employer of financial or other assistance in respect of taking the step
- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Time limits

120. Under s 123 Equality Act 2010, discrimination complaints should be presented to the Tribunal within three months of the act complained of (subject to the extension of time for Early Conciliation contained in s 140B) or such other period as the Tribunal considers just and equitable. The onus is on

a claimant to convince the tribunal that it is just and equitable to extend the time limit: Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA.

Submissions

121. The claimant and Mr Bellim made oral submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Conclusions

Unfair dismissal

Issue (i) what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for reason of redundancy.

122. We had to decide whether the replacement of the accountant roles by finance business partner roles created a redundancy situation. Did the respondent no longer require employees to carry out work of one kind, the work of an accountant, and instead require employees to carry out work of a different kind, that of a finance business partner?

123. We considered in particular the list of differences in tasks required by the new roles which Ms Hayes provided in evidence. The claimant accepted in her cross examination of Ms Hayes that a number of these tasks were not tasks which she had had to do as an accountant, in particular: being involved in corporate project development and the corporate project assurance groups and looking at the governance in place and challenging the budget process with the chief executive. It was also evident to us that the remaining tasks were being required to be done more extensively than they had been by those in the accountant roles.

124. In addition, we were persuaded that the new role encompassed a new relationship with the budget-holders who were being supported which required a different skillset to that which was required by the accountant roles – this was the 'critical friend' relationship. We therefore concluded that there was a redundancy situation in that the respondent had a diminished requirement for employees to carry out work of a particular kind, being the work of an accountant, whether capital or revenue, with the duties carried out by the claimant and her accountant colleagues.

Issue (ii) If so, was the dismissal fair or unfair in accordance with ERA section 98 (4)?

125. Although the list of issues as agreed at the case management preliminary hearing to some extent organised our consideration of the issues into specific questions or criticisms of the process raised by the claimant, we reminded ourselves that we are required to scrutinise the reasonableness of the dismissal as a whole by reference to the guidance in the case law we have cited. So although we have structured our conclusions by reference to the list of issues, we have considered the question of reasonableness more generally.

a) Did the respondent follow a fair, meaningful and genuine consultation process?

126. We concluded that there was a fair consultation process. Informal consultation which made clear what the new finance business partner roles would look like commenced for the first time in November 2016. There were invitations to comment on the proposed new job descriptions and the proposed new structure when both were in draft form. The claimant's email of 7 February 2017 did not seem to us to reflect the reality of the situation. The proposed restructure had been made clear, as had the roles and responsibilities of the new finance business partner posts. There was the opportunity to comment on all of those matters when the proposals were still at a formative stage and no indication that the respondent would not have conscientiously considered any representations made. The claimant did not suggest that her role was the same as the new finance business partner role nor raise any issues about the 2012 job description not being up to date nor suggest that the accountants were entitled to be slotted into the finance business partner roles.

127. Mr Windust had provided the finalised job descriptions to staff for comment by 16 March 2017. Detailed information about the finance business partner role including a webinar had been provided.

128. The commencement of formal consultation on 8 June 2017 included an invitation to staff to attend an individual consultation meeting. The finance team as a whole asked to curtail the formal consultation process.

129. The claimant raised the idea of a 'systems thinking' review at this stage. We accepted Ms Hayes' position that this was a suggestion that could and would more profitably have been made at an earlier stage of the process and her evidence that she considered the suggestion but concluded it was not suitable.

130. We considered whether there was unfairness in staff not having direct input into the slotting-in exercise conducted by HR but concluded that there was not. Staff were notified at the point when it appeared that the finance business partner roles might not be straight slot-ins – at the team meeting on 1 February 2017; no member of staff argued that the roles should be straight slot-ins nor sought to have further involvement in that process. There had been opportunities to comment on both old and new job descriptions and an

extended time over which protest could have been made if staff and/or the trade union felt that the matching exercise had reached the wrong result.

b) Did the respondent follow a fair selection procedure?

131. Where there is a reduction in the number of employees required to carrying out existing roles or the existing roles have not changed significantly, the Tribunal would be concerned to look at the pool from which selection for redundancy was to be made, the criteria for selection and how those criteria were applied.

132. This was a different situation in which the old roles were disappearing and new roles with some resemblance to the old roles were being introduced. As we found that the finance business partner roles were indeed new roles requiring a different skillset, we concluded that it was reasonable for the respondent to follow the process which it did, which was to ringfence those roles to the accountants but require the accountants to demonstrate competence for the new roles by way of interview. If the three existing accountants had all demonstrated that they were competent to perform the new finance business partner roles, all would have been appointed.

133. Although the evidence as to why Ms Pierre had concluded the accountants should not be slotted in was not available to us, we had regard to what Mr Windust told us about the adequacy of the 2012 accountant job descriptions and our own findings as to the difference between the accountant roles and the finance business partner roles and accepted that this was a reasonable decision. We took account of the fact that no member of staff objected to the decision that there should not simply be slotting in and nor did Unison.

134. We also considered the claimant's submission that the finance business partner (capital) post should have been considered separately from the two revenue finance business partner posts. Ms Hayes and Mr Windust told us that capital accounting skills could be taught and it was considered appropriate to look at all three posts together. We were not able to say that was an unreasonable decision and we found in any event that it did not disadvantage the claimant who would have been appointed to one of the posts had she met the standard required in interview.

c) *Did the respondent carry out a fair scoring process?*

135. Because the new roles required new skills and new tasks to be carried out, we concluded that it was reasonable for the respondent to conduct interviews which were designed to test the new skills and to require a certain degree of competence or potential to be demonstrated.

136. The claimant said that it was unreasonable for the respondent not to consider whether she had demonstrated the required behaviours in her performance of her existing role. We considered that, given the changes to the role, it would probably have been impossible for the respondent to ascertain whether the claimant and her colleagues had the required skills by looking at their past performance. Such an exercise – trying to extrapolate from performance in one role to reach conclusions about potential performance in a different role – in any event seemed to us to be highly subjective.

137. Looking at a related argument raised by the claimant, because the roles were different roles, we concluded that it was reasonable for the respondent not to select on the basis of employees' past appraisals.

138. The claimant was critical of the fact that the interviews did not test technical accountancy skills. The respondent said that it was assumed that candidates had these skills because they had been performing the accountant roles. What was important was to test for the new skills required by the finance business partner posts. We understood the logic of that and it seemed to us to be a fair approach.

139. The claimant said that the questions which were asked did not enable her to demonstrate the behaviours the respondent was looking for in the new roles. We considered the questions; they seemed to us to be open questions which gave candidates a fair opportunity to illustrate that they were able to demonstrate the required skills and behaviours.

140. As to whether the assessment of the claimant's performance in interview was fair, the interviewers were consistent that the claimant's performance had been poor and the claimant essentially agreed that she had not performed well. Some of the behaviours which caused concern in the interview were behaviours we also noted in the hearing as being exhibited by the claimant in a situation in which she was no doubt under stress, such as the claimant talking over others.

141. The claimant said that it would have been fair to have trained her prior to the interview to exhibit the behaviours required in the finance business partner role and pointed to the fact that the respondent had said that a two day course would be offered to those appointed to the new roles. She also questioned whether the panel had given adequate consideration to whether she could perform the role competently with reasonable additional training.

142. On the first issue, it seemed to us that it was reasonable for the respondent not to provide that training prior to the interview but rather to assess in the interview whether a candidate would be able to perform the role with that or other reasonable training. The respondent had provided candidates with a significant amount of information about the new role and what it entailed.

143. We accepted that the interviewers had put their minds to the issue of whether the claimant could perform the role with a reasonable amount of training and reasonably concluded, on the basis of her performance in the interview, that she could not. As Ms Hayes said, there were many areas lacking and some were skills which she felt could not be taught.

Issue (ii) (d) Did the respondent consider the claimant for redeployment? In particular:

(i) Did the respondent act unfairly by its belated offer of interview for the 2-year fixed Benefits Case Officer job as a redeployment opportunity?

144. Although we did not have the evidence of Ms Pierre as to why the claimant was not initially matched for this role; we did have Ms Burton's evidence, as another member of the respondent's HR team, that she could see why the claimant would not have been regarded as a match and we could also see, looking at the job description and person specification for this role, that it was very different from the capital accountant role and involved very different duties and skills.

145. In any event, although the claimant was not initially matched to the role, she did undergo a non-competitive interview of the type she would have been entitled to had she been matched. We accepted Ms Barnes' evidence that the claimant had not demonstrated in interview that she was able to meet the essential requirements of the post or would be able to do with training within a reasonable period. In those circumstances, it was reasonable for her not to be appointed to that post.

(ii) Did the respondent act in a fair way by refusing the claimant's request to be interviewed for the part time Older Persons Officer post via means of redeployment?

146. The claimant's complaint was that she was not 'matched' to this role and therefore was not interviewed as a redeployee, as opposed to having the opportunity to compete for the role against external applicants who might apply. Being interviewed as redeployee would have meant that she would not have had to compete against any candidates other than redeployees, would have had to achieve 3s only, and consideration would have been given to whether she could meet the requisite standard within a reasonable period of time with training.

147. We were satisfied that Ms Pierre and Ms Burton both reasonably took the view that the claimant was not a match for this role, which was very different

in terms of skills and, knowledge and experience from the role of capital accountant and required some knowledge and experience of housing, health and social care. We did not think it was unreasonable for the respondent to look more broadly at the job description and the job advert in undertaking this exercise. It was clear that Ms Burton was considering, as the respondent's procedure required, whether the claimant met the essential criteria of the post.

148. Looking at the issue of redeployment more generally, there was no evidence before us that there were any other posts which might have been suitable for the claimant and for which she should have been considered.

149. For all of the above reasons, we concluded that the claimant's complaint of unfair dismissal should not be upheld.

Disability discrimination

Direct

Issue (vii) Has the respondent subjected the claimant to the following treatment: Did the respondent prevent the claimant from working more than her contractual hours in accordance with the respondent's flexi scheme between November 2016 and March 2017, i.e. working up to an extra 8.11 hours during any four week period and taking flexi leave?

150. We were satisfied that during this period, the claimant had conversations with Ms Gaskins in which Ms Gaskins told her to keep to 30 hours per week. Taken literally of course, that would have meant that the claimant was not able to work within the respondent's flexi scheme by working up to an additional 8.11 hours over a four week period and then taking flexi leave.

151. However, as Mr Windust said, the claimant did not 'take it that way'. She continued to work in accordance with the flexi scheme, working extra hours and taking flexi leave, throughout the relevant period. Her real complaint, as she made clear in her evidence, was that she was not able to work in accordance with the arrangement she had had with Mr Dodd, outwith the respondent's flexi scheme. That arrangement had enabled her to 'bank' as many hours as she wished and to be paid for some of those hours if she did not use flexi leave. It appeared to us that both the claimant and her managers understood at the time that what the claimant was being asked to do was to stop working in accordance with the arrangement with Mr Dodd and start working in accordance with the respondent's flexi scheme. That is what the claimant then did.

152. We therefore did not find that the claimant had been subjected to the treatment she complained of and which had been carefully defined at the preliminary hearing and then redefined at the full merits hearing and so her claim of direct discrimination fell at the first hurdle.

153. Since we were not satisfied that the claimant had been subjected to the treatment she complained of, it was not necessary for us to go on to consider whether that treatment was less favourable than that accorded to other employees and her comparators in particular and whether the reason for any such difference was the claimant's disability. It appeared that Mr Windust was concerned to put a stop to employees working outside of the flexi scheme during this period, but the claimant's complaint to us, as we have set out above, was not being able to work in accordance with the flexi scheme.

Issue (v) Has the claim for direct discrimination been brought out of time?

154. On its face this claim was out of time. The situation the claimant complained about had ceased by March 2017. The claim form was presented on 10 January 2018 after an early conciliation period between 17 October 2017 and 17 November 2017.

Issue (vi) Should time be extended on the basis that it is just and equitable to do so?

155. Even if we had found this claim to be made out, the claimant did not present evidence which would have persuaded us that it was just and equitable to extend time. She had access to trade union advice over the relevant period. She was, as the March 2017 occupational health advice confirmed, coping with and attending work. We accept that by June 2017, her rheumatologist was reporting on her profound tiredness and depression but the clamant did not suggest to us that there was any connection between her health and her failure to submit her direct discrimination claim in time. There was just no significant evidence on the basis of which we could exercise our discretion in the claimant's favour.

156. The claimant's complaint of direct disability discrimination is not upheld.

Reasonable adjustments

Issue (x) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP(s):

a. Having essential criteria, namely core hours, for posts offered as part of the redeployment process;
b. Having full time hour requirements for alternative posts?

157. The respondent's evidence, which we accepted, was that the ability to work either or both of full time and 'core hours' was not a matter which was looked at during the selection stage for the finance business partner roles. The hours and any adjustments required were for discussion after selection. The issue which arose in January 2017 about having cover during office hours was not an overall change to the flexibility allowed under the respondent's flexi scheme, which was subject to limits, nor was it a precursor to greater inflexibility in relation to the finance business partner roles. The intention was that there would be a similar level of cover by the finance team (9 am to 5 pm) after the restructuring.

158. The issue for Ms Sutcliffe, after she had been selected for the role, was that she wished to work hours outside the 'bandwidth' altogether not that she was unable to work 'core hours'.

159. We concluded that the alleged PCPs were not applied to the claimant. She did not reach a stage where she was appointed to the role. Had she been appointed, it appears that there would have been a discussion about how the postholders would cover the required hours in accordance with the flexi scheme and particular needs of particular postholders.

160. Similarly, in respect of the alternative post of benefits officer, the evidence we accepted was that the benefits officer post could be performed part time and flexibly provided the team covered the desk opening hours and that Ms Barnes was not considering what hours the claimant could work when assessing her for the post. The reason for non-appointment was that the claimant did not demonstrate suitability in interview.

161. In respect of the older persons support officer post, the roles were advertised 'full time and part time' and it was clear that there was scope to work flexibly in accordance with the respondent's procedures in relation to all potential redeployment roles. We accepted that it was the fact that the claimant did not appear to meet the essential criteria of the post which meant she was not matched rather than any perception about her ability to work full time or core hours.

162. Because we did not find that the PCPs were applied, we did not need to go on to consider the further issues under this head. Because no PCP was applied, there was no resultant disadvantage and no duty to make adjustments.

163. For those reasons, the claim of failure to comply with a duty to make reasonable adjustments was not upheld

164. Because none of the claims were upheld, we did not have to consider any issues of remedy.

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Employment Judge Joffe
London Central Region
18/12/2019

Sent to the parties on:
19/12/2019.

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For the Tribunals Office