EMPLOYMENT TRIBUNALS

Claimant: Mrs M Balderstone

Respondent: St Ann's Hospice

HELD AT: Manchester **ON:** 15 to 17, 23, 24 and 25 April 2019
16 August 2019 (In Chambers)

BEFORE: Employment Judge Holmes
Ms C S Jammeh
Mr W Haydock

REPRESENTATION:

Claimant: Mr J Balderstone, Son
Respondent: Mr D Bunting, Counsel

RESERVED JUDGMENT

It is the unanimous judgment of the tribunal that:

1. The claimant was unfairly dismissed.

2. Had the respondent carried out reasonable warning and consultation with the claimant , at an appropriate stage, the claimant would still have been dismissed by reason of redundancy, but at a later date, so that the Tribunal proposes to reduce her compensatory award on the basis of the principles in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503.***

3. The Tribunal considers that had reasonable warning and consultation been carried out, whilst the claimant would still have been dismissed, that dismissal would not have occurred for 4 weeks. The Tribunal accordingly proposes to make a compensatory award equivalent to 4 weeks pay.

4. The claimant's claim of age discrimination arising upon , and out of, her dismissal was presented within time, but is not well founded, and is dismissed.

5. The claimant's other age discrimination claims were presented out of time, and it would not be just and equitable to extend time for their presentation. The Tribunal has no jurisdiction to hear them, and they are dismissed.

6. The parties are to seek to agree remedy. In the event that a remedy hearing is still required, the parties, or either of them, are to inform the Tribunal by no later than **6 March 2020,** and in so doing shall inform the Tribunal of the issues to be determined in relation to remedy, an estimated length of hearing, and dates to avoid.

REASONS

1. By a claim form presented to the Tribunal on 7 March 2018, the claimant brought claims of unfair dismissal and age discrimination, arising out of (largely) her dismissal for redundancy on 3 December 2017. The respondent admitted dismissal, but contended that the dismissal was fair, and denied age discrimination.

2. A preliminary hearing was held on 10 August 2018, at which the claims were identified , and further particularised. Case management orders were made, and this hearing was listed.

3. The hearing was conducted over six days, but the Tribunal could not sit on 17 April 2019 due to the indisposition of one of the Panel. The claimant was represented (may we say very courteously, and effectively, for a lay representative) by Mr J Balderstone, her son , and the respondent by Mr D Bunting of Counsel. The claimant gave evidence, and called Jacqueline Cook, a former colleague, as her witness. The respondent called Victoria ("Vicky") Entwistle, Kay Jackson, Eamonn O'Neal and Rachel McMillan. There was an agreed bundle. The hearing of the evidence was concluded on 24 April 2019. On 10 May 2019 , following a direction of the Employment Judge, the respondent disclosed to the claimant and the Tribunal further documents, from 2017, relating to the consideration of the redundancy proposals by the respondent's Board. These documents were sent to the Tribunal on 13 June 2019. The parties wished to make written submissions. Directions were given for these to be filed, and they duly were, the respondent's submissions being received by the Tribunal and the claimant on 31 May 2019, and the claimant's on 18 June 2019. The additional documents have been added to the hearing bundle by the Tribunal and paginated as follows:

Chief Executive Officer's Report – 25 September 2017	361 – 365
Finance Committee Meeting – 19 September 2017	366 – 371
e-mails 8 September – 10 September 2017 (reverse order)	372 - 377

4. Neither party asked for any further evidence to be heard following this disclosure, and they prepared their submissions on that basis. Whilst the Tribunal had listed the In Chambers deliberations for 3 July 2019, one of the Panel was not available that day, and hence it was re-listed for 16 August 2019 . The Tribunal began drafting the reserved judgment, but this has been delayed by firstly pressure of judicial business, and secondly, flooding which affected the Tribunal's offices in October 2019, which disrupted some IT systems, and which led to part of the draft judgment being lost. The Tribunal apologises to the parties for this delay, and thanks them for their considerable patience. Having heard the evidence, read the documents referred to in the bundle, and considered the submissions of both parties, the Tribunal unanimously finds the following relevant facts:

4.1 The respondent is a charity which provides palliative care to cancer patients, across three clinical sites, the Neil Cliffe Centre ("NCC"), which is in the grounds of Wythenshawe Hospital, the Hospice at Heald Green, and a site at Little Hulton. At the time to which these claims relate it employed around 400 paid members of staff and had around 800 volunteers.

4.2 The claimant was employed as a Day Therapy Medical Secretary at the NCC, from 11 January 2010 until 3 December 2017. Her contract of employment is at pages 85 to 90 of the bundle. She worked 18.5 hours a week over 2.5 days each week, on a job share basis with her colleague Ms Yvonne Rogers, who also worked 18.5 hours over 2.5 days. From February 2017, Yvonne Rogers had not been working on Fridays at the NCC. Instead, she spent this time working on the EMIS patient records system.

4.3 On 25 July 2012, the claimant's Individual Performance Review ('IPR') Form recorded, under 'communication', concerns about the accuracy of the claimant's work and the need for prioritisation (p166). Her objectives stated likewise (p168).

4.4 In or around 23 February 2015 the respondent appointed Victoria Entwistle as its new Clinical Services Manager , and she became the claimant's manager at the NCC. Prior to this, the claimant had enjoyed her working environment, and had a good working relationship with Kay Jackson, who from September 2014 was Team Leader, and her line manager . Whilst no action was taken, Kay Jackson did at this time have some concerns over the claimant's performance, particularly in relation to her time management and the frequency of errors that she made. She did not, however, raise these with the claimant.

4.5 On 22 June 2015, the claimant was required to attend an informal sickness absence review meeting as a result of her multiple short-term absences (p127). The claimant claims that that at this meeting, Victoria Entwistle made a comment about the claimant's age. The respondent has denied that Victoria Entwistle asked the claimant whether she was thinking about retiring. As set out below, the Tribunal finds that this claim is out of time , and it would not be just and equitable to extend time for its presentation.

4.6 To the extent that it is necessary to do so in relation to the other claims that the claimant makes, the Tribunal does not accept that the comment alleged by the claimant was in fact made. Further, in any event , if it was , then the Tribunal considers it a perfectly innocuous and legitimate enquiry that an employer may make of an employee.

4.7 In September 2016, the respondent implemented a new electronic medical record system called 'EMIS.' At the time of implementation and thereafter, training on the system was given to all employees, including the claimant. The respondent had high hopes for this system. It was anticipated that its introduction would lead to greater efficiencies, and the possibility of reviewing staffing requirements. Nothing, however, was proposed at that stage about any re-structuring or redundancies, although there were rumours and an expectation amongst staff that reorganisation may take place as a result of this new system.

4.8 In or around November/December 2016, Kay Jackson and Victoria Entwistle had considered and discussed with each other starting a performance management process with the claimant. The claimant, however, in January 2017 commenced a period of sickness absence , having broken her wrist (her fit note is at p203). Upon her return in March 2017, the claimant received additional one-to-one training on the EMIS system, from Kay Jackson and Yvonne Rogers . Following her return, her performance did not improve.

4.9 Kay Jackson therefore commenced an informal performance management process with the claimant on 10 May 2017, as a result of frequent inaccuracies in her work. The claimant did say that she was easily distracted during working hours by a volunteer receptionist, and did not react well to this initiative.

4.10 After the meeting on 10 May 2017 , Kay Jackson put in place an informal performance improvement plan , which was intended to support and assist the claimant with her areas of weakness. Kay Jackson carried out this plan with monitoring and additional support, on occasion assisting the claimant at her desk.

4.11 This process was formalised in a letter dated 15 May 2017 , but was probably actually given to the claimant on 17 July 2017 (p206). Attached to this letter was the plan, which set out areas of concern, the improvement required, the support being provided, the timescale for achievement, and when progress would be reviewed (p207 to p210). There was a meeting on 17 July 2017 when the claimant's performance was further reviewed by Kay Jackson. To the extent necessary, whilst this claim as a discrimination claim is out of time, as a matter of fact the Tribunal finds that this was an entirely legitimate and genuine performance issue, and was not related to the claimant's age.

4.12 The claimant attended a further PDR on 22 August 2017 (p212). The handwritten comment on p219, "capability policy and procedure in place", as it was, and this was handwritten on the document retrospectively by Kay Jackson. The Tribunal finds no age discrimination (any such claim being out of time) in this.

4.13 In summer 2017 the respondent started to consider reorganising its Clinical Services Directorate. Precisely when this was first discussed is in unclear, but it was something which it was expected the introduction of the EMIS system would have led to.

4.14 Rachel McMillan was the Director of Clinical Services , and Deputy Chief Executive at the time. She had started a review of the respondent's administrative clinical services functions in late 2016. This involved discussions with the executive team and senior clinical managers. This had identified the need for a new electronic system to replace the existing system which was partly electronic and partly paper based. This, and other IT limitations, led to the acquisition of the EMIS system , and its introduction in September 2016.

4.15 The opportunity to review the clinical services function which the EMIS system presented was taken in summer 2017. Whilst Rachel McMillan stated that she undertook this review in September 2017, the Tribunal considers that it was likely to have been earlier than that. Indeed, she had consulted with managers such as Victoria Entwistle as part of this process before September 2017.

4.16 As part of the review two Clinical Services Organisational Charts were produced. One bears the rubric “current structure” , and the other “proposed structure” (pp.163 and 164). The footer of both bears the date “August 2017”.

4.17 Further, a Redundancy Policy and Procedure document was also produced (seemingly the respondent’s first) which also bears in its footer the date of “August 2017” (pp.93 to 96).

4.18 The first communication of any impending redundancy exercise to non – managerial staff was on 7 September 2017, when Rachel McMillan sent an email to all potentially affected employees, including the claimant, informing them of the review of the clinical administration function across the 3 clinical sites. In this email she invited all the recipients to a briefing session so she could share her proposals with them. She went on to say how this would be followed later in the week by 1 to 1 meetings. The briefing meetings were to be held on 18 September 2017, at two locations. The 1 to 1 meetings would follow on 20 and 22 September 2017. Staff at the NCC were to have their meetings at Heald Green. Follow up meetings were then scheduled for 2 October 2017. This email appears at page 246 of the bundle. No other documents were attached to this email, or referred to in it, and there was no further detail of the proposals.

4.19 The Executive Summary (i.e. the formal proposal) for the administrative review was emailed from Rachel McMillan to the Honorary Treasurer (Allan Beardsworth) on 8 September 2017 . Rachel McMillan had forwarded the document prior to the next Finance Committee meeting as she intended to start the formal consultation process on 18 September 2017 , the same date as the next Finance Committee meeting.

4.20 Later on 8 September 2017, Mr Beardsworth confirmed his approval of the proposal and forwarded it to the other members of the Finance Committee, namely Eamonn O’Neal, Fiona Taylor, Luke Dillon, Alan Bond and David Spilsbury. Eamonn O’Neal and Fiona Taylor confirmed their support by email on 8 September 2017. Alan Bond confirmed his support by email on 8 September 2017 (pp. 372 to 377). In her email to Allan Beardsworth of 8 September 2017 in which she sought his approval of the administration review, she ended with this:

“The reason I am bringing it to your attention prior to the next finance committee is because I need to start on 18th Sept to enable me to follow the correct robust HR process and to do it in a timely way so as not to clash with other commitments.”

4.21 The Finance Committee met at 9:30 am on 18 September 2017 (pp. 366 to 371) . The meeting was quorate (agenda item 1). Rachel McMillan’s proposal was approved under ‘any other business’ (agenda item 16). The minutes read:

‘RM raised the review of the admin team, which starts on the day of this meeting. RM noted that it had been approved in advance by the Trustees on the Finance Committee.’ The proposal was ratified.

The proposals also featured in the Chief Executive Officer's Report dated 25 September 2017 (pp.361 to 365) , which recorded the following under the heading 'Commissioning and Developments' :

'A review of the clinical administration function is underway to ensure the right structure and roles are in place following the implementation of EMIS and also to support the 5 year organisational strategy and clinical strategy'.

4.22 On 18 September 2017, at 12:30 pm, the claimant attended one of the group briefings at Heald Green. She and all similarly affected employees were provided with , either at the meeting or shortly after it, a letter and the Consultation Document setting out the details of the proposals and rationale for the restructure (p248, pp.155 to 164). To summarise, it explained that measures were being taken to ensure that the respondent's administrative functions remained cost effective and fit for purpose. It contained a review of the current structure and details of the proposed structure .

4.23 In the document, it was proposed that ten administrative and secretarial roles at the sites in Heald Green, Little Hulton and Wythenshawe (i.e the NCC) would be placed at risk of redundancy. The claimant's role, as one of two Medical Secretaries at the NCC, was one of the roles identified as potentially redundant. In addition to both Medical Secretary roles at the NCC being placed at risk, it was proposed that the role of Support Services Officer at NCC also become redundant.

4.24 The proposed new structure therefore would have two posts dedicated to the EMIS system, with the purpose of providing administrative support to the Rehabilitation team, addressing inconsistencies in support across the three sites and the services provided, addressing difficulties in covering absences and vacancies , and addressing information and data protection issues posed by the imminent introduction of GDPR.

4.25 The claimant's role in the existing administration structure was identified in the table on the first page of the Consultation Document (p156) , as part of the NCC Medical Secretary – band 3 – 1.0 FTE , which in fact comprised of the claimant and her colleague Yvonne Rogers, who shared the role, making up 37 hours per week.

4.26 In the proposed structure (p157) the two 0.5 FTE posts of medical secretary at NCC (i.e those of the claimant and Yvonne Rogers) were to be removed.

4.27 In the new structure there was to be one, 0.66 FTE , new post of Clinical Services Secretary at the NCC.The details of this role are set out in page 3 (p158) of the document. This post would provide administrative support to the NCC from the Heald Green site, over 5 days per week, but working only part time to provide 0.66 FTE. Volunteer roles would continue at the NCC , but there would no longer be a requirement for a clinical services secretary to be based at the NCC.

4.28 The claimant's and Yvonne Rogers' roles were therefore identified (p159) as being at risk of redundancy in this exercise.

4.29 Selection was to be, firstly, by voluntary redundancy. Slotting – in was then considered, where a post in the new structure was unchanged (i.e 80% or more the same as the previous role) as an existing post and job band, and, where there was

only one employee, the existing postholder would be slotted in automatically , without the need for an interview. Only two posts, both PFST (Patient Family Support Team) secretaries at Heald Green and Little Hulton, were identified as suitable for slotting – in. Ring – fenced recruitment was also an option, where there was more than one postholder. Only one such post, that of Day Therapy Secretary at Heald Green was identified as suitable for this approach (p160).

4.30 In relation to new posts, and vacancies, employees whose current role was at risk of redundancy would be eligible to apply for one of the new posts, one of which was the Clinical Services Secretary at the NCC.

4.31 Selection criteria for the new roles were set out in this document (p161). For a secretarial role these were:

NVQ qualification or equivalent
Experience of using medical terminology
Experience of using EMIS
Experience of using Microsoft package
Ability to prioritise
Effective organisational skills

4.32 The Consultation Document went on to set out the relevant timescales which were:

Informal briefing meetings with affected staff	w/c 18th September 2017
Announcement to unaffected staff	w/c 18th September 2017
First Formal Consultation Meetings	w/c 18th September 2017
Search for suitable alternative opportunities begins and continues throughout	w/c 18th September 2017
Second Formal Individual Consultation Meetings	w/c 2nd October 2017
Consultation Ends	6th October 2017
New structure communicated to staff	12th October 2017
New posts advertised internally	12th October 2017
Closing date for applications to new posts	18th October 2017
Selection interviews	w/c 23rd October 2017
New appointments confirmed or affected roles Declared redundant, if no suitable alternative Identified	6th November 2017

4.33 The document went on to set out the redundancy payments that would be payable, and the current and proposed organisational structure charts were attached (pp 163 and 164, with colour copies at pp 164A and p164B). Rachel McMillan told the Tribunal that this timetable had been set on advice from HR, and there was no particular reason for the dates that had been chosen.

4.34 The claimant was invited to her first individual consultation meeting by letter from Rachel McMillan handed to her at , or just after, the meeting on 18 September 2017 (p248). The meeting was scheduled for 20 September 2017 at 12.30, at the NCC. It was to be chaired by Victoria Entwistle, with HR support , and the claimant was informed that notes would be taken and the meeting recorded. The claimant

was informed of her right to be accompanied by a trade union representative or a colleague.

4.35 The meeting was duly held on 20 September 2017. The claimant attended with the accompaniment of the Hospice Chaplain. The notes are at pages 249 to 253 of the bundle. Victoria Entwistle explained the background to the proposed restructure, and effectively summarised and reiterated the contents of the Consultation Document . She acknowledged that there was a lot of information to take in. She referred to the selection criteria for the two new roles, the Clinical Services Administrator , and the new Secretarial role , and how the claimant would need , amongst other things, an NVQ qualification or equivalent for the latter.

4.36 She invited questions from the claimant, who raised the fact that she was due to be on holiday at the critical time in October. She wanted to know how she would be able to get the paperwork to have an honest chance of applying for a post at the NCC. There was a discussion as to how this could be managed, and Victoria Entwistle assured the claimant that she would be able to submit critical documents.

4.37 The claimant then (p251) asked about the new post. She asked if it was to be a one secretary post, as at the time it was a two secretary post, a part - time post. She asked if it was to be a full time post, as she had noted that it was a 5 day per week role. Victoria Entwistle explained that it was for 25 hours over 5 days a week. The claimant said then that it was a full time post, but Victoria Entwistle confirmed it was not, it was for 25 hours. The claimant asked if it would be temporary or permanent, and was it would be permanent. She confirmed that it was a one secretary post.

4.38 The claimant at this juncture asked how one secretary at the NCC could cover all the problems, as she and Yvonne Rogers covered the role between them, and covered for each other. How, she asked, would that be solved when there was only one secretary ? Victoria Entwistle could not answer that question, and said she would take it away, and come back to her with a full answer. The claimant asked further how the secretarial role at the NCC was at risk . Whilst the hours had changed, and person specification had been modified , but if the post was still there, how could it be at risk? Again , Victoria Entwistle said she would come back to the claimant with an answer later.

4.39 The claimant then asked more questions about ring fenced posts, and why was there only one , when most of the jobs were essentially revamped and streamlined. Again Victoria Entwistle could not provide an answer, and would come back with a fuller answer later.

4.40 There was then discussion about which posts the claimant could apply for, and whether any were part – time. She was advised of the vacancies in the Consultation Document, and the FTE details of each post.

4.41 The Tribunal does not accept that Victoria Entwistle in this meeting informed the claimant that there was no opportunity for any alternative proposal regarding the hours to be considered.

4.42 The meeting concluded with Victoria Entwistle handing the claimant a letter, dated 20 September 2017, which had been pre-prepared (pp 254 to 256). That too reiterated and summarised much that was in the Consultation Document In this letter the claimant was informed that her next meeting would be held on 3 October 2017, which would provide her with an opportunity to ask questions, seek clarification, and to comment upon the proposals , as well as make alternative suggestions and to submit counter proposals.

4.43 The claimant on 27 September 2017 took sick leave, providing a fit note dated 27 September 2017 (p257) for 4 weeks, for stress related illness.

4.44 On 28 September 2017 she wrote to Victoria Entwistle , copied to Rachel McMillan, an email (pp 258 to 260) in which , having had time to digest the documents she had received on 20 September 2017, she wished to raise a number of points in advance of the next consultation meeting. At points (a) to (e) she asked a number of questions, the first of which was when it was first realised that there was a risk of redundancy and what had triggered it? She went on to refer to the monitoring of her performance from May 2017, suggesting this was when it was known that major changes were to come. She alleged that this had been done to set her up for redundancy. She went on to say that she felt discriminated against because she was the oldest member of staff at the NCC, which she felt was a significant factor and would be used to trigger redundancy for her.

4.45 She went on to allege that ageist comments had been made by Victoria Entwistle in July in 2015, and on another , later, occasion when comment was made about other older secretaries retiring.

4.46 She continued by stating that her training on EMIS had been poor and unfocussed.

4.47 At point (f) she went on to say that the criteria for the Clinical Services Secretary job were ageist and discriminatory , as she did not (because of her age) have NVQ or CSE qualifications, she had not been encouraged to train for these or any equivalent qualifications. Her requests for training had been denied , and the criteria were not objective.

4.48 She went on to seek answers to the questions from her first consultation meeting in relation to the new post, and how it would solve the problems. In particular, she asked if there was leeway in the 25 hours in the new post, such as these hours being worked over 4 days?

4.49 She concluded by putting on record the fact that the way she had been treated leading up to the performance monitoring and the redundancy process was affecting her health, and detailed the symptoms she was experiencing. She made reference to her sick leave for a month , and further health check at that point. She did, however, say that she would attend all meetings in connection with the redundancy process.

4.50 Victoria Entwistle did not respond to the claimant's email, preferring instead to deal with the issues she had raised in their next meeting.

4.51 On 3 October 2017 the claimant's second consultation meeting was held, Victoria Entwistle again being supported by HR, and the claimant having the accompaniment of the Hospice Chaplain. This meeting was recorded, and the notes are at pages 263 to 269. In the first part of the meeting Victoria Entwistle explained the purpose of the meeting, and how it was an opportunity for the claimant to present alternative suggestions and counter proposals. A "frequently asked questions" document had been prepared (this does not appear, however, to be anywhere in the bundle) and the claimant was invited to read through it. Victoria Entwistle asked about the claimant's forthcoming annual leave and her four week sick note. The claimant told her that she had to go back to her GP on 27 October.

4.52 Victoria Entwistle then went through the questions that the claimant had previously raised. Addressing the issue of how having one secretary at the NCC would work to provide cover if one person was off work, she explained that the Clinical Services Administrator would co-ordinate absences across the teams , which would be cohesive and flexible to support each other. The access to EMIS , irrespective of site would mean there would be no issues with accessing and updating patient records and activity.

4.53 In response to the claimant's query as to how the Secretary's post at the NCC could be at risk when there was still secretarial work there, Victoria Entwistle said that the proposed new role of Clinical services Secretary at the NCC was different to that of the Medical Secretary at the NCC, and the new role would incorporate some elements of the current Support Services Officer role. The claimant said she did not understand this, and Victoria Entwistle explained further how as the Support Services Officer role was not in the new structure, elements of that role such as liaison with the Trust, booking of transport, liaising with Key Workers around diaries and other things would be incorporated into the new role. The claimant asked if this new role was not a Medical secretary, to which Victoria Entwistle replied that it was not just that, there were other tasks within the role. The claimant asked if this was not what she already did anyway. Victoria Entwistle replied that it was a new job description.

4.54 Victoria Entwistle went on the address a question the claimant had raised about ring – fencing, and referred her to the frequently asked questions. She then turned to the further specific questions that the claimant had raised in her email of 28 September 2017. In answer to the first, Victoria Entwistle said that the main trigger for the review was the implementation of the EMIS system, and the need for the respondent to plan for a changing future, to ensure it was fit for purpose.

4.55 In response to the claimant's second question about her performance plan being undertaken in May 2017 , Victoria Entwistle said that the Consultation process had nothing to do with her performance, but the claimant said that she thought it had.

4.56 In relation to the next questions raised by the claimant (points (c) to (e)(ii) in her email) Victoria Entwistle refuted these points, pointing out the performance management process was quite independent of the consultation process, and would apply to any employee highlighted as a concern. She pointed out also how the

Consultation process was affecting others as well, and refuted any ageism on any grounds, saying how the Hospice lived by its values in treating everybody as equals.

4.57 The claimant replied that she did not think that she had been treated in that way, and referred again to the allegedly ageist comments.

4.58 Victoria Entwistle then addressed the claimant's comments about her EMIS training being poor and unfocussed. She asked if the claimant had reported this, and she said she had asked for help and had not got it.

4.59 The meeting then moved on to discuss the claimant's contention that the selection criteria for the new role were ageist and discriminatory. She explained how equivalent qualifications could be 'O' Levels, or qualifications gained outside the UK. She went on to refer to the claimant's contention that she felt she had been treated unfairly and discriminated against as she had never been encouraged to train for these.

4.60 Victoria Entwistle then explained that to apply for any role, employees were asked to provide a letter of interest which could detail their qualifications and experience, and employees would be asked to attend a selection interview. She referred the claimant to the Consultation document. There was further discussion about the claimant's training and her reviews ('PDRs') . Victoria Entwistle referred to the Person Specification, and asked if she wanted to see it. The claimant said she got it, and that it was almost identical to the original one, save for one sentence. The job descriptions and person specifications are at pages 357 to 360 – the claimant's role from 2011, and pages 353 to 355 – the new role.

4.61 The discussion then revisited ring – fencing, and the claimant was told that if she thought that there were other posts that should be ring – fenced, she should put this in writing , and why she believed this . She was asked to do this by 6 October 2017.

4.62 Victoria Entwistle then turned to the question that the claimant had raised about whether there was any leeway as to the 25 hours of work in the new post over 5 days, for a discussion of these hours being worked over 4 days. She referred to the need for employees who wished to consider other working arrangements to submit their counter proposals or alternative suggestions by 6 October 2017.

4.63 The claimant said that this did not answer her question, which was whether there was any leeway. She pressed Victoria Entwistle on this, and was told that she had to put the proposal in writing . The claimant said that she was not satisfied with the answer, and wanted that recording and putting in the notes, as indeed it was. As above, the exchange at the top of p267 was in dispute. It has since been agreed, the parties having listened to an audio recording that the notes at the top of p267 of the bundle are accurate up until where Victoria Entwistle is noted as having said 'Well today's answer is put that in writing'. The agreed audio recording shows that Victoria Entwistle's verbatim response was in fact: "Right, well today's answer is please put that in a paper with how that is going to be achieved".

4.64 Victoria Entwistle then moved onto other points that the claimant had made, in relation to her health and how this was a difficult and distressing time. The claimant said that she was very unwell and very unhappy.

4.65 There ensued further discussion about the support that was available , and the possibility of an appointment with Occupational Health. The claimant's availability for the next meeting was discussed. It was pointed out that the Consultation ended on 6 October 2017, and the new structure would be announced by Rachel McMillan on 12 October 2017. The claimant said she would not be able to attend that meeting. There was discussion as to how the claimant should communicate with Rachel McMillan. The claimant then asked about how she would receive the necessary paperwork if she decided she did not want to apply for any of the new posts. It was clarified that she meant if she did not want to apply, which she confirmed. She was told that it would be emailed to her.

4.66 The claimant went on to say how she did not feel that her questions had been answered, and went on to say that she meant all of them, basically.

4.67 The Chaplain accompanying the claimant, Peter O,Brien was asked at this point whether there was anything he wanted to say, and he said :

"Make sure Marion that any proposals are written up by Friday, is that 5 o'clock Friday? Is that by email or a typed letter?"

4.68 Victoria Entwistle replied that it was Friday, and by whatever means was the quickest, a letter could be attached to an email.

4.69 After further exchange about emails addresses, and the lack of a response to the claimant's email of 28 September 2017, the claimant expressed her view that the respondent was not applying its core values both ways, and that she did not feel she had received respectful treatment. The meeting ended. The claimant had decided by the time of this meeting that she would not apply for any of the new roles.

4.70 Thereafter there was email communication on 4 October 2017 between the claimant and Victoria Entwistle about the minutes of the first meeting, (pp 270 to 274), the claimant having one issue with the use of the word "quite" in relation to changes to the person specification , when she had actually said that it had been "slightly" changed.

4.71 The claimant did not submit any proposals for any other working arrangements, or any counter proposals in writing by 6 October 2017, nor did she apply for any of the new posts.

4.72 On 9 October 2017 Rachel McMillan sent an email to all affected staff informing them that the consultation period had ended on 6 October 2017 , and she was inviting them to one of two briefing sessions to be held on 12 October 2017 , at which she would share the new structure with them . If anyone was unable to attend, she asked them to let her know how she was to communicate the information (p275).

4.73 The same day Victoria Entwistle sent the claimant a copy of the minutes of her second consultation meeting, which she returned with handwritten comments and her signature on 18 October 2017 (pp276 to 276G).

4.74 Rachel McMillan wrote to the claimant personally on 12 October 2017, to pass on the information which was discussed at the briefing meetings, namely, to share the new structure for the Clinical Administration Function. The claimant was advised of the closing date for applications for the remaining vacancies, which was 18 October 2017 (p277). Those six vacancies were all in Clinical Services, one was an Admissions Officer at Heald Green, two were Clinical Services Administration Co – ordinators, one at Heald Green, the other at Little Hulton, and three were Clinical services Secretary posts, one in Day Therapy at Heald Green, one in Community, and one at the NCC. The only differences from the proposals that had been originally made were that the job title of the role of Clinical Services Administrator had been changed to Clinical Services Administration Co-ordinator, and the hours for each of the roles for the Clinical Services Admissions Officer role had been increased to 30 hours per week.

4.75 A Post Preference Form (p279) was attached to this email, and the claimant was told that she should fill it in and attach it to any application letter, which had to be submitted by 18 October 2017. Rachel McMillan also stated in this email that a number of members of staff had raised the possibility of job sharing or reduced hours. The claimant was told that if she would like to consider a job share or reduced hours when applying for a job, she would need to include this in her letter of interest.

4.76 The letter went on to provide the timetable for applications , interviews and appointments into the new roles.

4.77 On 15 October 2017 the claimant turned 73.

4.78 On 16 October 2017, Michelle Bradbury (Head of HR) emailed the claimant a list of vacancies , other than those arising under the restructure (p280). She did so again with a further list on 19 October 2017 (p282).

4.79 On 19 October 2017, Rachel McMillan telephoned and emailed the claimant because she had not applied for any alternative roles (p284). There was a discussion about the new post at the NCC being for 25 hours over 5 days per week. Rachel McMillan asked the claimant to clarify the position by 4 November 2017.

4.80 The claimant responded on 20 October 2017 (p286), requesting confirmation that she would still be at risk of redundancy if she chose not to apply for one of the vacant roles and querying what her redundancy package would be if she decided not to apply. Rachel McMillan replied to her on the same day, confirming that her role would still be at risk of redundancy and advising that details of her redundancy package would be forwarded early the following week. The requested details were sent to the claimant on 24 October 2017 (p290 & 292).

4.81 On 24 October and 3 November 2017, Michelle Bradbury emailed the claimant further lists of vacancies (pp288 & p295). She did not apply for any vacancies.

4.82 The claimant on 4 November 2017 raised some queries about the information about her redundancy entitlements, and arrangements in an email to Michelle Bradbury (p299).

4.83 On 7 November 2017 Rachel McMillan sent an email to all affected staff, and copied in the claimant, announcing the new structure (p297).

4.84 On 8 November 2017, having received no applications from the claimant for any of the alternative roles, Rachel McMillan wrote to the claimant inviting her to a further meeting to take place on 17 November 2017 (p301). The letter set out the issues to be discussed and reminded the claimant that she was entitled to be accompanied by a colleague or a trade union representative. The letter explained that one possible outcome of the meeting was the claimant being given notice of the termination of her employment on the grounds of redundancy. On 11 November 2017 the claimant contacted Rachel McMillan to advise that she would be unable to attend the meeting on 17 November 2017 due to appointments. It was agreed that the consultation meeting would take place on 27 November 2017.

4.85 On 16 November 2017 the claimant raised a grievance regarding the changes to her post and the threat of redundancy, together with concerns about alleged comments made by her Line Manager which she alleged amounted to age discrimination (p302). The claimant alleged that the performance management process that she had been subjected to between May to September 2017 had been fabricated to orchestrate her removal from the business as a result of her age. These were largely the issues she had raised in her letter of 28 September 2017.

4.86 On 27 November 2017, the final formal meeting went ahead. Rachel McMillan was supported by Michelle Bradbury on this occasion, and the claimant was again accompanied by Peter O'Brien. Rachel McMillan referred to the claimant's grievance letter, and said she would talk about that at the end of the meeting.

4.87 Rachel McMillan recapped upon the process that had been followed up that point. She also referred to the fact that the claimant had chosen not to apply for any of the new posts , or vacancies in the new structure, and she had to confirm that her role was redundant. Michelle Bradbury then went through the redundancy terms notice and holiday pay entitlements, and other details of the termination process. Rachel McMillan confirmed that she would not be required to work her notice, and referred her to a letter which set out all the relevant details. She was offered assistance in any future job hunting, and told that updates on any vacancies within the Hospice would be notified to her, until the last day of her employment, which was 3 December 2017. She also advised the claimant of her right of appeal, and how she should exercise it.

4.88 She also confirmed that, as the claimant's grievance consisted of issues arising from the redundancy procedure which had its own right of appeal, her grievance would be treated as an appeal , and would be forwarded to Eamonn O'Neal, the Chief Executive. The meeting ended with Rachel McMillan thanking the claimant for her hard work and contribution that she had made, and acknowledging that the last few weeks , or months, had been very difficult for her.

4.89 The notes of this meeting (pp303 to 305) were sent to the claimant for her to agree and sign, which she subsequently did on or about 30 November 20178 (pp306 to 308). Whilst the claimant made handwritten comments upon them, these were to disagree with the merits of what had been said, not to disagree what had actually been said, in this meeting.

4.90 The claimant was provided with a letter dated 27 November 2017 (pp310 to 311) in which the information about her redundancy entitlements was set out and confirmed, and her right of appeal was similarly advised to her.

4.91 On 29 November 2017, the claimant wrote to Rachel McMillan formally appealing the decision to dismiss her (p313). She made six points in this letter, the first being that she had been treated in way that amounted to age discrimination, the second that her questions in the consultation meetings were not adequately answered, the third that she had been discouraged from putting forward ideas for a different working arrangement, by being told a definite "no" to any possible changes to the hours of the "new" post, the fourth referred to her grievance, the fifth referred to harassment due to unfair monitoring, which she felt was fabricated to force her to leave her post at the NCC, and the sixth was a contention that the respondent's core values had been ignored in the treatment she had received, triggering a period of ill health.

4.92 On 30 November 2017 Eamonn O'Neal wrote to the claimant, inviting her to a redundancy appeal hearing to take place on 12 December 2017 (p314). He referred to her letter of 16 November 2017, which had been forwarded to him to consider as her appeal against the decision to dismiss her from her employment. With this letter he enclosed a copy of the documents from the consultation process.

4.93 The respondent decided to hold a combined meeting, during which Eamonn O'Neal would hear the claimant's grievance of 16 November 2017 and also the points that had been raised in her appeal letter of 29 November 2017. By letter of 5 December 2017 Eamonn O'Neal wrote to the claimant (p319) acknowledging receipt of her appeal letter of 29 November 2017, and informing her that his intention was to consider the points in this letter at the appeal hearing on 12 December 2017.

4.94 On 1 December 2017, Rachel McMillan received a 'script' in respect of her attendance at the appeal meeting (p315). She was being assisted by Michelle Bradbury of HR. Rachel McMillan effectively was presenting the management case, and this was what she was going to use to do so. Eamonn O'Neal did not receive this document.

4.95 Eamonn O'Neal was assisted at the appeal by Gill Turnpenney (then Director of Organisational Development). He received a 'Manager's Briefing Sheet' for the appeal hearing (pp 319A to 319D) to him conduct the appeal. It is a step by step guide setting out the structure of the process to be followed, and the questions to be asked. The Tribunal considers it an entirely neutral document, with no indications of any predetermination.

4.96 The appeal was held on 12 December 2017 at Heald Green, Eamonn O'Neal being supported by Gill Turnpenney , and the claimant again being accompanied by

Peter O'Brien. Rachel McMillan was present to present the management case, and ask questions.

4.97 Eamonn O'Neal , after an introduction largely based upon the script referred to above, invited the claimant to go through her appeal and the two letters. The claimant at this point did say that she felt quite intimidated being faced with three Directors, who obviously knew more about employment law than she did, when she had allowed any legal support at this meeting. There is no evidence that the claimant had asked to be allowed legal support. She went on to say how her letter of 29 November stated what her appeal concerned, and these issues had been discussed at the previous meeting. She continued to say that her grievance had not been adequately looked at, and she thought she had been dismissed in a discriminatory manner. She referred to having been legally advised to attend the meeting as a final chance for discussion about adequate compensation (though the notes say "conversation") for what she considered to be an unfair dismissal. She did not want to add anything else, it was all in her letter of 29 November.

4.98 Eamonn O'Neal then went through each of the points in the claimant's grievance of 16 November 2017 . and she was given an opportunity to explain her concerns . These were discussed at some length.

4.99 Eamonn O'Neal then discussed each of the points raised in the claimant's appeal letter.

4.100 During this meeting, the claimant said that she could not work five days a week due to spending one day per week with her granddaughter one day a week. She had not previously mentioned this in any of the consultation meetings, or in any written communication that she had with the respondent. It was common knowledge that the claimant spent time with her granddaughter, but she had never informed the respondent that this prevented her from being able to work a 5 day week, or on Fridays.

4.101 Eamonn O'Neal asked the claimant whether she had put in any counter proposals about the working hours, as she had been advised to do during the second consultation meeting. The claimant confirmed that she had not, but said this was because of the definite "no" that she alleged Victoria Entwistle had given her when she raised this in the meeting, when she had asked about "leeway", which had discouraged her, and led her to think that it would be a waste of time to pursue.

4.102 Rachel McMillan was then invited to present the reasons for her decision, which she did by largely reciting the text of the script document referred to above. The claimant was invited to ask her questions, which she sought to do, but in effect made a statement that she considered that the NCC already had a workable system in place with the two of them (i.e herself and Yvonne Rogers) ensuring that work was covered for the full week, even though they both only worked half a week. There was never no one there, except may be for one day, when the work was then picked up and dealt with by whoever was next in work.

4.103 Eamonn O'Neal then questioned Rachel McMillan himself, taking her through some of the points raised by the claimant which had not been covered, or which he felt had not been adequately covered.

4.104 At the conclusion of the appeal meeting, the claimant said this:

"I've no objection whatsoever to the fact you have to make changes, none whatsoever. What I've objected to is the fact that I was forced not to apply for any of these jobs because I was told there was no [the notes say *"so"*] *leeway for discussion, and therefore there was no point in my applying."*

4.105 Eamonn O'Neal, as he had said he would, adjourned the meeting, and said he would make further investigations , and review all the evidence and submissions before giving his decision. He asked how the claimant wanted it communicating, and she asked for this to be by email. She said she would take legal advice depending on the outcome. The notes of the appeal are at pages 320 to 328, with the claimant's corrected version, which contains only minor , largely grammatical and spelling, corrections is at pages 329 to 337.

4.106 Before deciding upon the appeal, Eamonn O'Neal interviewed Victoria Entwistle on 15 December 2017 and Kay Jackson on 22 December 2017 (notes at pp339 – 340 & pp344 - 347). He then wrote to the claimant to confirm her appeal was dismissed, on 3 January 2018 (pp348 - 350).

4.107 In relation to the claimant's allegations of ageist comments being made by Victoria Entwistle , Eamonn O'Neal's findings were that he could not come to a conclusion in respect of these allegations . In respect of the other grounds of her appeal and grievances, he dismissed them. He concluded that the claimant's complaints were not sustained, and dismissed her appeal against these aspects of the grievances she had raised. His reasons appear in his letter, and his witness statement to the Tribunal.

4.108 Yvonne Rogers, the claimant's former colleague, applied for one of the alternative roles in the restructure and that she was successful in her application. Ms Rogers' successful application was for the line management role of Clinical Services Administration Coordinator that was available within the new structure. She was appointed to the role. She put forward a proposal to temporarily reduce her hours (from 30 to 28) around 29 November 2017, which was granted.

4.109 The claimant also gave evidence that there was another post, a part – time secretarial post at Heald Green , which she could have applied for, and would have been suitable for her. She did not, however, apply for it, as she felt it would have been unfair , and mean, to do so, because someone else she knew, whose post it had been, was going to apply, and she considered that she should have that post, and so did not apply for it.

5. Those, then are the relevant facts found by the Tribunal. There has not been much dispute as to the facts, and the Tribunal does not consider for one moment that any witness has not told the truth as they saw it, but such divergence as there has been the Tribunal attributes to the passage of time, and the possible effects of perception distorting the accuracy of, in the main, the claimant's recollection. The Tribunal has found that in some instances where the claimant has claimed that a contemporaneous, or allegedly recent , handwritten note on a document has shown that some comment was made, we have not been able to accept that the claimant's

recollection, or the note, has been correct. A prime example of this is the dispute about what was said in the meeting with Victoria Entwistle on 3 October 2017 , in which the claimant was adamant that Victoria Entwistle had said that there was no leeway, but on reviewing the recording of that meeting, she agreed the transcript that confirmed that she did not say that in those terms, she told her to put her proposals in writing. In some instances we feel that there is not so much a dispute about what was said, but more about how it was said, and why it was said. We do not doubt that the claimant, by the time of her dismissal, had come to believe that her age was a factor, but we have grave doubts as to whether things that the claimant claimed were said had actually been said. We can see how the claimant had this perception by then, and this may have affected her recollection. In the final analysis, whilst not for one moment suggesting that claimant was deliberately lying to us, we have found parts of her disputed evidence unreliable, and so have preferred the evidence of the respondent's witnesses where there has been a dispute.

The submissions.

6. The parties have made written submissions, which are extensive, are available on the Tribunal file, and which cannot conveniently and economically summarised in this judgment. When the issues are discussed, each' party's position will be apparent from the discussion and findings.

The Law.

7. The relevant statutory provisions are set out in the Annex to this judgment, unless set out in the body of the judgment. In relation to relevant caselaw, on redundancy dismissals , and extension of time on the basis of the just and equitable discretionary power, the leading cases are set out below in the discussion of the claims and the issues.

Discussion and Findings.

i)The unfair dismissal claim.

8. The Tribunal starts with this claim, as it is within time, and stands alone and separate claim from any age discrimination claims. Whilst this may be a surprise to the claimant and Mr Balderstone, a discriminatory dismissal (unless for pregnancy or maternity related reasons) is not necessarily an unfair dismissal, and it is legally possible to an employer to have dismissed fairly, but also in a discriminatory manner, and vice versa.

9. The first issue is whether the respondent, upon whom the burden rests, has shown that the reason for the dismissal was redundancy. Redundancy is defined for these purposes in s.139 of the Employment Rights Act 1996, which provides:

139 Redundancy

(1) 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—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish.

10. The respondent relies upon the latter , s.139(1)(b) in this instance. The requirement for employees to carry out work of the particular kind that the claimant was employed to carry out at the place where she was employed to do it, the NCC, diminished, in that whilst the claimant and Yvonne Rogers between them carried out 37 hours of medical secretarial work at the NCC, the respondent's requirement for that work reduced to 25 hours, and it was not required to carried out by two employees, but one, over five days.

11. If it is established that there was a redundancy situation, the Tribunal then has to be satisfied that this was indeed the reason for the claimant's dismissal. If so, the next issue, however, upon which the burden is neutral, is whether the decision to dismiss the claimant was fair in all the circumstances. The leading case on the approach to fairness of redundancy dismissals is ***Williams v Compair Maxam Ltd [1982] IRLR 83,*** where the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows:

"… there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim'.'

12. In relation to warning and consultation , in the House of Lords in ***Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987] ICR 142***, Lord Bridge said this:

"… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative"

The decision of the EAT (Judge DM Levy QC presiding) in ***Rowell v Hubbard Group Services Ltd*** ***[1995] IRLR 195*** also strongly emphasises the importance of consultation. In that case the employees had been warned of impending redundancies, and were informed in their letters of dismissal that any relevant matters could be discussed. The tribunal held that the dismissals were fair but the EAT overturned this decision and substituted a finding of unfair dismissal. The EAT stressed that the obligation to consult is distinct from the obligation to warn, and that there were no justifiable reasons for not consulting in this case. Moreover, whilst accepting that there were no invariable rules as to what consultation involved, the tribunal stated that so far as possible it should comply with the following guidance given by Glidewell LJ in the case of ***R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price*** ***[1994] IRLR 72,*** *at para 24*:

'24. It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in ***R v Gwent County Council ex parte Bryant****, reported, as far as I know, only at* ***[1988] Crown Office Digest p 19,*** *when he said:*

'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;

(d) conscientious consideration by an authority of the response to consultation."

13. These words were quoted with approval, in the context of stipulating what was involved in consulting a trade union, by the Inner House of the Court of Session in ***King v Eaton Ltd [1996] IRLR 199.***

a)The fairness of the dismissal.

14. The Tribunal has no hesitation in holding that there was a redundancy situation. There was reduction in the need for employees to carry out the work. The Tribunal takes the claimant's point that there was still secretarial work to be done at the NCC, but whereas this had been done by two employees over 37 hours per week, there was now only a requirement for 25 hours per week. That would itself have amounted to a redundancy situation, but when the additional factor is introduced that this role, formerly split between two employees over four days now was to be carried out by one over five days, there was a further reduction in the number of employees required to carry it out. There was thus a diminution in the amount of work to be done and the number of employees needed to do it. That is a redundancy situation.

15. It is not open to an employee, or this Tribunal, to second guess the decision to make redundancies. It may be a good , bad or indifferent decision, but if it is a genuine decision, the Tribunal cannot interfere with it (see ***Moon v Homeworthy Furniture (Northern) Ltd. [1976] IRLR 298*** , an EAT authority, and ***James W Cook & Co (Wivenhoe) Ltd. v Tipper [1990] IRLR 386***, a Court of Appeal decision). The Tribunal has no hesitation in finding that there was a redundancy situation in September 2017 affecting the work that the claimant was employed to do .

16. The second issue is what was the principal reason for dismissal? Was it a potentially fair one in accordance with section 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts the claimant was dismissed for redundancy or, in the alternative, a reorganisation (some other substantial reason). That requires a consideration of the question , although there was a redundancy situation, whether that was , in fact, the real reason for the claimant's dismissal? Whilst the claimant has suggested that this was all a ploy to dismiss her, because of her age, the Tribunal equally swiftly, can dispose of that contention. The introduction of EMIS, and the challenges faced by the respondent in 2016 always meant that it was likely to review its staffing structures, particularly in the Clinical Services Administration areas. The claimant's role was not singled out, she was one of 10 potentially affected employees. That this may have been some form of elaborate smoke screen designed to achieve her departure is, with respect, a far –fetched and unsustainable proposition.

17. Similarly, we do not consider that the claimant being under performance monitoring was in any way connected to her dismissal. She was not dismissed because of her poor performance (and that is not a final conclusion that had been reached in that informal process anyway) , she was dismissed because her role was redundant. It is of note that performance does not feature at all in the redundancy exercise – it is not a selection criterion for redundancy, nor for any application for one of the new roles. It is, the Tribunal considers, irrelevant, and the Tribunal is quite satisfied that the respondent has established that it dismissed the claimant for the potentially fair reason of redundancy.

18. The next issue to be addressed therefore is whether the dismissal, though potentially fair, was actually fair in all the circumstances. The caselaw cited above sets out the various factors that need to be considered in assessing fairness. Some can be disposed of at an early stage. In carrying out this exercise, however, the Tribunal reminds itself that it is not standing in the shoes of the employer , and deciding what it would have done in the same circumstances, it is reviewing the actions and decisions of the respondent to determine whether they fell within the band of reasonable responses open to the employer , as it is required to do by the established caselaw such as ***Foley v Post Office*** and ***Midland Bank v Madden [2000] ICR 1283***.

19. A common challenge to the fairness of a redundancy dismissal is to the selection of the pool of potentially redundant employees. This has not been a point of challenge made by Mr Balderstone in this case, but to be fair to the claimant, and given that she is not legally represented, the Tribunal has considered the issue.

20. The pool of potentially redundant employees , in which the claimant was included was based simply upon the roles that they occupied. The roles, including the claimant's , were being removed, and it was thus the postholders who were at risk of redundancy, and included in the pool for selection for redundancy. This was, the Tribunal considers, reasonable . Yvonne Rogers, the other employee employed to do the same work as the claimant on the other days that the claimant did not work, was included in the pool and was potentially redundant.

21. The next issue to be considered relates warning and consultation. As the caselaw shows, an employer will not be found to have acted reasonably in dismissing an employee for redundancy if he has not engaged , in good time, in meaningful consultation with the affected employees collectively, and the individual claimant. The Tribunal therefore needs to examine the warning and consultation that occurred.

22. The timetable set by the redundancy proposals of the (undated) Consultation Document (pp161 to 162) was as follows;

Informal briefing meetings with affected staff	w/c 18th September 2017
Announcement to unaffected staff	w/c 18th September 2017
First Formal Consultation Meetings	w/c 18th September 2017
Search for suitable alternative opportunities begins and continues throughout	w/c 18th September 2017
Second Formal Individual Consultation Meetings	w/c 2nd October 2017
Consultation Ends	6th October 2017
New structure communicated to staff	12th October 2017
New posts advertised internally	12th October 2017
Closing date for applications to new posts	18th October 2017
Selection interviews	w/c 23rd October 2017
New appointments confirmed or affected roles Declared redundant, if no suitable alternative Identified	6th November 2017

23. It is clear that these proposals were at a formative stage well before 18 September 2017, which is the date that the announcement was made to the

affected employees, and they were given sight of the Consultation Document. By that date the proposals, in the Tribunal's view, had ceased to be formative, but were firm proposals. There were clearly discussions with managers before September 2017, and the fact that the organisational charts – before and after – are dated August 2017 strongly suggests that the proposals were well advanced by then. It would probably be true to say that managers were consulted when the proposals were at a formative stage, and doubtless helped to shape them. The affected employees, however, were not.

24. The Tribunal does not consider that the respondent can rely upon any general awareness or expectation amongst staff that there would probably be redundancies once EMIS had been introduced. Gossip is no substitute for consultation. Further, the Tribunal considers it not without significance that the respondent's redundancy policy is also dated August 2017. No previous version appears to have existed, whereas all the respondent's other policies pre- date August 2017. It is hard to avoid the impression that the respondent was hastily trying to prepare and produce a redundancy policy at the same time that it was carrying out an exercise which was intended to be carried out in accordance with it.

25. No one was able to explain to the Tribunal the reason for such haste. The impression we gained was that this was something that the respondent was keen to implement, and we can understand management's desire for some expedition, but there were no pressing financial imperatives (e.g the risk of insolvency, cashflow problems, pressure from creditors or anything of that nature) which required such haste. The respondent nonetheless embarked upon what was a very substantial review and re-organisation across its clinical operations with a very tight timetable. We were told that the timetable had been set on HR advice.

26. The only clue to the reason for this haste appears in an email on 8 September 2017, from Rachel McMillan, in which she says to Allan Bearsdworth that she wants to start on 18 September 2017 , so as "not to clash with other commitments ".

27. The email sent to the affected employees of 7 September 2017 is meaningless in this context, as it provided no information. Information, and a lot of it, (at pages 156 to 164) , was first provided on 18 September 2017, with the announcement and the timetable for consultation being given out at the same time that day.

28. Whilst appreciating that the respondent did , during the consultation process consider any representations made , and made some changes in response to them, we do not consider that this consultation commenced truly when the proposals were still at a formative stage. They were at a very advanced stage, and the only real changes that consultation at this stage were likely to make to any of the proposals were in the detail of individual cases (such as occurred with Yvonne Rogers) , and not in relation to the proposals and the revised structure as a whole. This is apparent from , for example, the letter that Victoria Entwistle provided to the claimant at the end of her first consultation meeting on 20 September 2017 (pp254 to 256). That letter refers to the next meeting due to be held on 3 October 2017 as an opportunity to comment upon the proposals , and to make alternative suggestions and submit counter proposals. It is clear, however, from all the evidence that the proposals then were not at a "formative stage", but had been accepted by senior management, and

were, in effect, well beyond a formative stage. Further, Victoria Entwistle's inability (for which we do not criticise her, she was merely the messenger) in that first meeting to answer crucial questions that the claimant raised, such as why her role was at risk of redundancy, and how the respondent was going to cover a role formerly carried out by two employees for 37 hours per week, with one employee working for only 25 hours per week, meant that this first meeting was not very "meaningful" at all. The claimant was supposedly being given an opportunity to comment upon proposals, if such they still were, when the rationale for them could not be explained to her by the manager carrying out the consultation.

26. All that did lead , we consider, to the claimant having inadequate time to respond to the consultation in an informed and meaningful manner. It is appreciated that the process then took until 27 November 2017 to be completed, but the claimant was off sick for this period. Further, the opportunity to comment upon the proposals as such, and to have any chance of influencing them before they were finalised , had clearly passed by 9 October 2017, as by that date Rachel McMillan had decided what the new structure would be, and was informing the affected employees that they would be told what it was on 12 October 2017. Victoria Entwistle told the claimant on 3 October 2017 that Rachel MacMillan would be announcing the new structure on 12 October 2017. There was no suggestion that this may be delayed whilst any counter – proposals or queries were considered. In short, therefore, the consultation period in respect of the proposals , when they were still meant to be at a formative stage, was from 18 September to 6 October 2017. That is a very short, an unreasonably short time, the reasons for which remain unexplained, and , in our view, unjustified. For those reasons, we consider that the dismissal was unfair.

27. Turning to the other factors to be considered in assessing the fairness of a redundancy dismissal, the next is whether the employer made reasonable attempts to find affected employees alternative employment. This , of course, does not mean suitable alternative employment, in the strict statutory sense , unreasonable refusal of which would disentitle them to a redundancy payment, but refers to the obligation upon an employer , if acting reasonably , to make reasonable efforts to find alternative employment for the affected employees. That is not, however, to be equated with offering them alternative employment, it is enough if the employer offers the affected employees the opportunity to apply for such employment.

28. This has been the focus of much of the claimant's case. The respondent clearly did, on all the evidence, offer her, and other affected employees, the chance to apply for any of the new roles, or any other vacancies which may arise , of which the claimant was notified. There has been a major dispute as to whether the respondent discouraged her from doing so, particularly in the meeting of 3 October 2017. We note that at the end of the meeting, the claimant's companion, the Chaplin, expressly clarified what she needed to do. The Tribunal's finding of fact is that the claimant was told to make any application, or counter proposal, in writing. She may have considered that there was no point in her doing so, but that is not the respondent's fault. The further correspondence to her makes reference on a number of occasions to the lack of anything in writing from her, and her failure to apply for any of the new roles. The Tribunal cannot see how the respondent can be said to have been acting unreasonably in these circumstances. The claimant made it clear she had made this decision by or on 3 October 2017. In the Tribunal's view, it discharged its obligation to offer the claimant the opportunity of alternative

employment, which she declined (as she was perfectly entitled to) to pursue, for reasons of her own, that were never articulated by her until the appeal. Whilst the claimant may have felt that the respondent should have done rather more to keep her in employment, the obligation upon her employer was merely to act reasonably, and we consider that in treating her this way, as it did all other affected employees, the respondent did act reasonably.

29. It will be apparent that the sole basis upon which we find that the dismissal was unfair is in relation to the inadequate and unreasonable lack of warning and meaningful consultation. We will consider the implications of that finding for remedy below.

The age discrimination claims.

30. We move on, however, next to consider the other claims that the claimant makes, those of age discrimination. These, unlike the unfair dismissal claim, raise issues of time limits. There are strict time limits for presenting Tribunal claims, three months, in discrimination claims, from the date of the act complained of.

31. The claimant's claims of age discrimination are:

In June 2015, Victoria Entwistle unfairly monitoring her sickness absence

On/around 2 July 2015, Victoria Entwistle asking the claimant "isn't it time you thought about retiring" or words to that effect, during an Informal Sickness Absence Meeting

On 26 July 2016, Victoria Entwistle asking the claimant "isn't it time you retired" or words to that effect, during her Performance and Development Review;

In April 2017 Victoria Entwistle asking the claimant "isn't it time you retired" or words to that effect in April 2017 after the claimant returned to work from sick leave with a broken wrist;

From May 2017, Kay Jackson, under the supervision of Victoria Entwistle, unfairly performance managing the claimant, including by performance managing her in public;

On/around 3 July 2017, Kay Jackson instructing the claimant to add an inaccurate diagnosis for a patient onto EMIS;

On/after 22 August 2017, Kay Jackson retrospectively adding written comments in the 'Comments (manager)' box which had not been discussed in the PDR meeting

Her dismissal was discriminatory in that it was on the grounds of her age.

32. The claim form was presented on 7 March 2018. Allowing for the 14 day period of Early Conciliation (19 January to 2 February 2018), events before 22 November 2017 are out of time, the Tribunal's calculation being one day earlier than Mr Bunting's. This therefore includes all claims arising , apart from the dismissal , before that date. Unless the claimant can establish that there was conduct extending

over a period of time, so as to fall within s.123(3) of the Equality Act 2010, she needs to invoke the tribunal's discretion to extend time on the basis that it is just and equitable to do so.

33. The first issue, therefore is whether there was any act of age discrimination that the Tribunal finds was perpetrated, and in respect of which the claimant had brought her claim in time.

34. The only act of age discrimination that is alleged , in respect of which the claimant's claim was presented in time is the dismissal. That occurred on 3 December 2017, in that it took effect on that day. Arguably the claimant's claim could arise when the decision to make her redundant was taken, which was before 3 December 2017, possibly on 8 November 2017, when she was sent the letter warning her that she was at risk of being dismissed for redundancy. If the earlier date is taken, this claim too would be out of time, as it pre-dates 22 November 2017. Taking the later date, however, when the decision took effect, on 3 December 2017, or the date of the final consultation meeting on 27 November 2017, however, would render the claim in time.

35. In any event, the question for the Tribunal is whether the decision to select the claimant for redundancy was influenced by her age. The Tribunal is quite satisfied that it was not. Whilst the claimant has suggested that her performance management undertaken from May 2017 was part of a plan designed ultimately to dismiss her, the Tribunal does not accept that for one moment. The decision to make redundancies affected more employees than the claimant, and was clearly part of a genuine, rational and manifestly objective review of the clinical administration requirements of the respondent.

36. Further, whilst the claimant may have felt , or have come to feel, for she did not raise any issue about it at the time, that her performance management was being carried out because of her age, or was part of a design to dismiss her because of her age, the fact is that performance played no part in the selection of the claimant for redundancy. Had performance been amongst the selection criteria in a pool of potentially redundant employees, which included the claimant, the Tribunal could see how there may be some validity in this argument. The claimant, however, was selected simply on the basis of the post that she held, as was her colleague Yvonne Rogers. Indeed, all potentially redundant employees were selected solely on the basis of the posts that they held. There were no selection criteria, so performance was irrelevant. Similarly, performance did not feature as a criterion to be considered in the selection of employees who applied for any of the new posts. Qualifications and experience of EMIS , amongst other things were, and the claimant has tried to contend that these were discriminatory criteria (although no indirect age discrimination claims have been made). The point in this context, however, is simply that if the claimant's performance management was designed to make it easier to dismiss her for "redundancy" , one would have expected performance to be amongst the criteria either for selection for redundancy, or for appointment to one of the new roles. It was not.

37. The claimant was dismissed because her role had become redundant , and because she did not apply for any alternative positions. The Tribunal does not accept that she was "discouraged" from doing so. She may have taken that view, but it is not one that is borne out by the evidence. The Tribunal gained the strong impression that the claimant considered that the respondent was , for some reason , expected to do rather more for her than it did for all other affected employees, and she seemed to expect her employer almost to offer her suitable jobs, on her terms, which she could accommodate within her own personal preferences, or to ask her what job could be tailored to suit her. It is to be noted that it was not until the appeal stage that the claimant communicated these requirements, and she refused to make any applications for any posts, or to suggest modifications to the proposed working hours, despite being told to do so in writing. All that, the Tribunal is quite satisfied, had nothing to do with her age.

38. Any way one looks at it, the Tribunal is quite satisfied that age played no part in the selection of the claimant for redundancy, nor in the decision to dismiss her, and her age discrimination claim advanced on this basis fails and is dismissed.

Effect of this finding upon the claimant's other, and prior, age discrimination claims.

39. This determination means that the claimant's only in - time age discrimination claim fails. There is thus no in - time claim which has succeeded to which any preceding claims of alleged age discrimination can be linked , so as to constitute conduct extending over a period of time, and to entitle the Tribunal to hold that any previous age claims, if proved, can be found to have been presented in time by reason of being part of such a course of conduct, which culminated with an in - time act of proven discrimination.

40. That then leaves the claimant having to rely for her remaining age discrimination claims upon the discretion to extend time on the just and equitable basis. Mr Balderstone's submissions (para. 137 to 138) addressing the time limit issues unfortunately , and this is not a criticism, as he is not a lawyer, conflates two different issues. He submits that the Tribunal should rule that it would be just and equitable to consider the events of alleged discrimination as conduct extending over a period of time. It cannot do so. It has to determine firstly whether any proven claim was presented in time, and if it was, then whether any preceding claims can be regarded as part of conduct extending over a period of time. If it did so, the preceding claims would then be in time. The just and equitable consideration only arises if the Tribunal finds that the preceding claims were presented out of time.

41. The applicable test for determining whether an out of time claim ought to be allowed to proceed under the 'just and equitable' test is distinct from the rather stricter 'reasonably practicable' test applied in unfair dismissal claims, as the respondent has submitted. The burden, however, rests upon the claimant to convince the Tribunal that it is just and equitable to extend time ***(Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA)***. In that case it was emphasised that this type of extension is the exception, and not the rule.

42. In deciding whether to exercise the discretion, guidance has been given in the leading case of ***British Coal Corporation v Keeble and ors*** **1997 IRLR 336, EAT**, as to the factors that a Tribunal should take into account in deciding how to exercise the discretion. The factors listed in s.33 of the Limitation Act 1980 , which is applicable to whether a Court should grant an extension of time for presenting personal injury claims, have been identified as the ones that a Tribunal is likely to have to consider in making its decision, (although these s.33 factors need not be strictly adhered to, see ***Southwark London Borough Council v Afolabi 2003 ICR 800, CA***) .

43. Those factors are:

a)The length of, and the reasons for, the claimant 's delay

b)The extent to which, having regard to the delay, the evidence adduced or likely to be adduced is likely to be less cogent than if the action had been brought in time

c)The respondent's conduct after the cause of action arose, including the extent to which it responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's claim

d*)* the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action;

e)The steps taken by the claimant to obtain legal or other expert advice and the nature of any such advice he may have received

Ultimately , the Tribunal has to weigh up the prejudice to both the claimant and the respondent , (see ***Bahous v Pizza Express Restaurant*** **Ltd EAT 0029/11**)

44. Turning to each of these factors:

a)Given that the last claim of alleged discrimination prior to the dismissal occurred, on the claimant's case, on or about 22 August 2017, when Kay Jackson or Victoria Entwistle retrospectively added written comments in the 'Comments (manager)' box which had not been discussed in the PDR meeting, and that the claim form was not presented until 18 March 2018, that is almost 4 months after the primary time limit for such a claim would have expired on 21 November 2017. That is clearly a significantly long period of time, the claim being submitted at a time over twice the prescribed period of three months. That is so in relation to that claim, and it is, of course, even more so the case in respect of the earlier claims , which then go back to July, May, and April of 2017, then back to 2016 and even further back to 2015. In terms of reasons for this delay, the claimant has not really explained this, and it is difficult not to conclude that she only decided to raise allegations of age discrimination when she knew she was under threat of redundancy.

b)The Tribunal does consider that the cogency of the evidence has been affected by the delay. Eamonn O'Neal so found when he was , in November 2017, four months before the claims were issued, charged with investigating the claimant's grievances

relating to these alleged acts of age discrimination. The Tribunal has been similarly handicapped, especially as much of the claimant's case in relation to these claims is based upon what individuals did or did not say, and the context in which anything that was said was meant, or reasonably understood to have meant.

c)This is not a relevant, as the claimant does not say that she could not bring these claims until she had been provided with relevant information from the respondent.

d)On the own claimant's case, she did not act promptly when aware of the facts giving rise to the claims. She claims that she was aware at the time of the various events occurring that she had been discriminated against by the comments made, but has given no explanation as to why she did not even grieve , or complain at all, let alone bring a Tribunal claim, at the time, or at the very latest during 2017. This is all the more surprising given the claimant's annotations to various documents, whether contemporaneous or not, which she has relied upon to contend that ageist comments were made.

e)The claimant has not explained what steps she took to obtain advice. She was clearly aware by September 2017 , because she was saying so in her letter of 28 September 2017, her grievance and then her appeal against her dismissal, that she had been the victim of ageist comments and treatment, and she mentioned compensation. There is no suggestion that she needed legal advice in order to present her claims, and she has done so without legal advice or representation. It is noted that the claimant has included as part of her schedule of loss two invoices for legal advice, but the dates upon which the claimant had this advice have not been given in evidence. It is of note, we consider, that the claimant said in the appeal hearing that she had attended because she had been legally advised to do so, and that at the end of the hearing she said she would take legal advice depending upon the outcome.

45. Mr Balderstone's submissions, and again, it is appreciated that he is a lay person, do not advance any reasons (other than inviting the Tribunal to treat the conduct as extending over period of time) for the Tribunal to extend time for presentation of the claims if they are out of time. Whilst he is a lay representative, the closing submissions were sequential, and these issues are expressly addressed in Mr Buntings' submissions.

46. Further, it is manifestly clear to the Tribunal that the main focus of her claims was her dismissal, in respect of which she has brought claims that were in time. No financial losses are claimed to arise from any of the previous, non – dismissal acts of discrimination, so these add little to her claims. The evidence in relation to these incidents has been before the Tribunal, and has been considered in determining whether the dismissal was discriminatory. The prejudice to the claimant of not being permitted to advance these matters as claims, given the factors referred to above, is therefore minimal. For all these reasons, the Tribunal considers that the claimant has not established why in these circumstances the exception rather than the rule should be applied, and the Tribunal does not exercise its discretion to extend the time for presentation of these claims , and has no jurisdiction to determine them. They are dismissed.

Remedy.

47. The claimant having received a redundancy payment , she is not entitled to a basic -award. This is acknowledged in the claimant's schedule of loss. It is noted that she claims loss of statutory rights, which the Tribunal can award as part of the compensatory award. Where, however, as the Tribunal has found here, the employment would have ended in any event, the Tribunal does not consider it appropriate to make such an award.

48. The respondent, however, argues that even if the Tribunal finds the dismissal was unfair, the claimant should not be awarded any compensation, or should only be awarded reduced compensation, on the basis that her employment would have ended in any event. This is based upon a principle established in the case of ***Polkey v AE Dayton Services Ltd [1987] IRLR 503,*** (referred to above in a different context) .

49. How a Tribunal should approach assessing what, if any, reduction to make on this basis was considered in some detail in the case of ***Software 2000 v Andrews [2007] IRLR 568*** by Elias LJ as he then was. One possibility is that the Tribunal comes to the conclusion that if the defects had not been present in the dismissal process, it would have made no difference at all, in which case a 100% reduction should be made. Alternatively the Tribunal may conclude that the position is not as clear cut , and consequently a percentage reduction somewhere between 0 and 100% is appropriate. Elias LJ said this:

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) [Now irrelevant following repeal of s 98A(2) ERA] ……..It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it—the onus being firmly on the employer—that on the balance of probabilities the dismissal would have occurred when it did in any event. ………..

(b) [N/a]

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the ***O'Donoghue*** *case.*

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

50. Thus it is clear that the range of options open to a Tribunal is considerable. It may make a 100% reduction in an appropriate case, a lesser reduction if it thinks the chances of the claimant being fairly dismissed were less than 100%, or may make none. Further, a Tribunal may conclude that the dismissal would have occurred in any event, but not at the time that it did.

51. We do not consider that this is a per centage case. The unfairness does not relate to the selection pool, or criteria, and the Tribunal does not have to assess the chances of the claimant retaining her employment , or any other employment with the respondent , had fair warning and consultation taken place. Having seen how matters played out, and what the claimant said on appeal , even with a longer period of warning and consultation , the outcome would have been no different.

52. Further, given the claimant’s failure to apply for any role in the new structure, and her admission that she did not apply for a role that she could have done, because she considered that a colleague had a better entitlement to it, so she stood aside for her to apply for it, the Tribunal would have been likely also to reduce any compensatory award on the basis that the claimant had unreasonably failed to mitigate her loss, or had contributed to her own dismissal.

53. What fair warning and consultation would have meant, however, we consider is that the dismissal would have been delayed. Whilst putting a timescale on such an

exercise is not a precise science, we consider, given the amount of information to be absorbed, and the scope of the reorganisation which was being undertaken, which was considerable, a further period of 4 weeks would have been reasonable to enable meaningful consultation to take place, when proposals were still at a formative stage, and we therefore propose to make a compensatory award of four weeks pay. The parties are invited to agree the amount of compensatory award , and the Tribunal has given directions for notification as to whether a remedy hearing is required. The Tribunal thanks the parties again for their considerable patience in awaiting this judgment.

Employment Judge Holmes

Dated: 7 February 2020

RESERVED JUDGMENT SENT TO THE PARTIES ON

12 February 2020

FOR THE TRIBUNAL OFFICE

ANNEXE

Equality Act 2010

123 Time limits

(1) Subject to section 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

> *(a) the period of 6 months starting with the date of the act to which the proceedings relate, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

(3) For the purposes of this section—

> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*