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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103719/2020

**Hearing held in Glasgow between 11 and 15 October 2021 Members' Meeting
on 9 November 2021**

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**Employment Judge Shona MacLean
Tribunal Member Ijaz Ashraf
Tribunal Member Martha McAllister**

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Miss M Johnston

**Claimant
In Person**

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Energy Agency

**Respondent
Represented by
Mr A Mowat,
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Employment Tribunal is that the claimant's claims are dismissed.

REASONS

Introduction

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1. The claimant complained to the Tribunal that she was unfairly dismissed. The claimant disputes that there was a redundancy situation when she was dismissed. She says that the selection process and her dismissal was unfair because it was discriminatory: that she was selected for redundancy because of her age and/or sex or because she had made complaints of harassment. The claimant seeks compensation.

2. The respondent admits that the claimant was dismissed; maintains that the reason for dismissal was redundancy; and that in all the circumstances the dismissal was fair and reasonable. The respondent disputes that the claimant was discriminated against on grounds of age and/or sex as alleged or at all.
- 5 3. At the final hearing the witnesses produced written statements which were treated as evidence in chief. Each witness was asked supplementary questions. The witnesses were cross-examined and re-examined in the usual way.
- 10 4. For the respondent the Tribunal heard evidence from Elizabeth Marquis Director, Alan McGonigle Deputy Director, Andrew Filby, Project Manager, and Ian Cochrane, Chair of the Board of Management. The claimant gave evidence on her own account. The parties also provided a joint set of productions extending to over 1,000 pages not all of which was referred to in evidence.
- 15 5. It was agreed that as expert evidence may be required about the claimant's pension loss this hearing would be restricted to liability only and a remedy hearing would be arranged if necessary.
6. After hearing the evidence Mr Mowat and the claimant provided written submissions on which addressed the Tribunal orally.
- 20 7. The Tribunal has set out its finding in fact. Not every fact that could be found in the documents or all evidence has been set out; the Tribunal has set out the facts as found that are essential to the Tribunal's reason or to its understanding of the important parts of the evidence. The Tribunal has carefully considered the submissions during its deliberations and has dealt with points made in submissions while setting out its facts; the law and the application of the law to those facts. It should not be taken that a point was overlooked, or facts ignored because the fact or submission is not part of the reasons in the way that it was presented to the Tribunal by a party.
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The Issues

8. During its deliberations the Tribunal's approach was to consider the issues that it had to determine, which were as follows.

Direct age and sex discrimination

- 5 a. The claimant is female. Her age group is over 60 and she compares herself with people in the age group 25 to 40.
- b. Did the respondent do the following the following things:
- (i) Fail to select the claimant for the post of Project Co-ordinator?
- (ii) Fail to select the claimant for the post of Project Assistant?
- 10 (iii) Select the claimant for redundancy?
- c. Was that less favourable treatment? The claimant compares herself to Diarmid Turnbull and Brendan McCann, male colleagues in the age group 25 to 40.
- d. If so, was it because of age and/or sex?

Unfair Dismissal

- 15 a. What was the reason or principal reason for dismissal? The respondent says that the reason was redundancy or some other substantial reason.
- b. If the reason was redundancy, did the respondent act reasonably in all
- 20 the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide whether:
- (i) The respondent adequately warned and consulted the claimant.
- (ii) The respondent adopted a reasonable selection decision including its approach to a selection pool.
- 25 (iii) The respondent took reasonable steps to find the claimant suitable alternative employment.

(iv) Dismissal was within the range of reasonable responses.

- c. If the principal reason was a substantial reason justifying dismissal: reorganisation then did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

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The relevant law

9. Direct discrimination is defined in section 13 of the EqA. The provision is satisfied if there is less favourable treatment because of a protected characteristic. There must be less favourable treatment than an actual or hypothetical comparator whose circumstances are not materially different from that of the claimant (section 23 of the EqA).

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10. Section 39 of the EqA provides that an employer must not discriminate against an employee by subjecting the employee to a detriment.

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11. Section 136 of the EqA provides that if there are facts from which the court decides, in the absence of any other explanation that the person contravened the provisions of the EqA the court must hold the contravention occurred.

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12. In relation to unfair dismissal the onus is on the respondent to show the reason (or if there is more than one the principal reason) for dismissal and that it was a potentially fair one under section 98 (1)(a) and (b) of the Employment Rights Act 1996 (the ERA).

13. The potentially fair reasons set out in section 98(2) of the ERA include redundancy. The respondent asserts this is reason for dismissal.

14. At this stage the employer does not have to prove that the reason actually did justify the dismissal.

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15. If on the face of it the reason the employer shows for dismissal is potentially fair the Tribunal has to consider section 98(4) of the ERA and the question of reasonableness.

16. As the respondent is asserting that the dismissal was for redundancy, the respondent must show that what is being asserted is true; that the claimant was in fact redundant as defined by statute.

5 17. Section 139(1)(b)(i) of the ERA states that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to be the fact that the requirements of that business for employees to carry out work of a particular kind has ceased or diminished or are expected to cease or diminish.

Findings in Fact

10 18. The respondent is a registered charity that provides free, impartial and expert advice to households, business and communities covering energy efficiency, renewable energy and sustainable transport. It is a company limited by guarantee. The respondent operates in southwest Scotland.

15 19. The respondent's two main areas of work are Home Energy Scotland (HES) and Area Based Schemes (ABS).

20 20. HES operates through a contract with Energy Savings Trust to deliver Scottish Government funded advice network. It works on a three-year contract but is subject to annual approval dependent on Scottish Government funding and performance targets. It involves running a call centre and associated work.

25 21. ABS operates thorough contracts with local authorities to deliver area based large scale insulation projects. The respondent holds managing agent contracts with South Ayrshire Council, East Ayrshire Council and Dumfries and Galloway Council. The contract for each local authority is generally renewed on a two or three yearly basis. Normally this is the result of competitive tendering. Each local authority is charged a management fee. The respondent uses this management fee to employed staff to run the ABS programmes. All the employees within the ABS department are employed on fixed-term contracts.

22. The respondent employs approximately 30 employees. Almost all are employed on fixed term contracts, two thirds of whom work on HSE.
23. South Ayrshire Council has an agreement with the respondent to provide limited human resource facilities. This includes provision of payroll services and general HR advice.
24. Elizabeth Marquis, Director (aged 62) is effectively the respondent's chief executive. She reports to a management board comprising 11 non-executive directors.
25. Alan McGonigal, Deputy Director (age 50) was between 2013 and 2020 directly involved in the ABS department initially overseeing the budgets and management then from 2014 also project managing. The ABS department went through restructures in 2014 and 2015.
26. The respondent employed the claimant from 3 October 2011 until 24 June 2020 on a series of fixed-term contracts. Initially she worked on HES as an administration assistant. She was promoted in 2013 to temporary ABS Administration Assistant. In August 2014 she was promoted to temporary ABS Projects Administrator.
27. When the ABS department was structured in 2015 two members of staff were allocated to each of the three council areas. Each council had a designated Project Coordinator and Project Officer. There was also a Quality Inspector and a Research Officer. They split their time equally between the three council areas. In addition, 85 percent of Mr McGonigle's time was spent on ABS project work and line managing the ABS department. While the Project Officers principally work in one council area they also worked together to ensure householders received the best possible service.
28. In July 2018 the claimant was offered the post of ABS Project Officer. Her contract was subject to annual renewal in line with funding continuing. The claimant was informed that she remained a permanent employee of the respondent at the end of her contract and should no further funding be available for the post the Agency's Managing Workforce Policy would be

applied. This refers to the Framework for Managing Workforce Change (March 2018) (the Framework). The claimant's appointment was extended on an annual basis on 20 April 2016, 17 February 2017, 17 August 2018 and 8 August 2019. The last fixed-term contract ran out on 30 September 2020.

5 29. The Framework is designed to deal with workforce changes at South Ayrshire Council required as a result of legislative organisational changes. Under the Framework there is a matching policy where all posts of a particular job kind are deleted but new and different ones are created. If the number of new posts differ from the original number of posts that have been deleted the
10 matching process is used to match displaced employees to the new posts. If there are more employees for whom the new job is potentially a suitable match, employees have to go through competitive selection process. When the only alternative employment available to an employee is to a lower grade the employee will be advised that he or she is at risk of redundancy; placed
15 on the redeployment register of South Ayrshire Council and issued with appropriate notice of termination of employment on the grounds of redundancy. At this point the redundancy policy of South Ayrshire Council applies. Under the redundancy policy complaint about the outcome of the redundancy selection process should be made to be Head of Employee and
20 Customer Services within fourteen days of being advised of the outcome of the matching process. Complaints are to be investigated by an independent Council Officer and a response normally issued within ten working days of receipt of the complaint. A further right of appeal to the Head of the Regulatory Services. Such an Appeal is dealt with at stage 2a of the Council's grievance
25 policy: mediation.

30. In 2018 additional funding was obtained from the Scottish Government for an Energy Efficient Scotland (EES) pilot project as part of the ABS department. The funding was for one Project Specialist for two years (up to 31 March 2020). The respondent advertised the post. The claimant did not apply. Six
30 candidates were interviewed including two of the claimant's Project Officer colleagues, Diarmid Turnbull and Brendan McCann. Mr Turnbull and Mr McCann interviewed well and were the strongest candidates. It was decided

that they would both be appointed and share the new role. They were appointed as Project Specialist – EES. It was a combined role (50 percent Project Officer and 50 percent Project Specialist). They were both paid at the starting salary level at which the Project Specialist - EES role had been advertised. The claimant raised no issue about these appointments at the time.

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31. Mr McCann stopped carrying out the combined role in February 2019. He reverted to working solely as a Project Officer and was paid at his previous salary level. Mr Turnbull remained in the role of Project Specialist – EES. He carried out the Project Specialist role and assisted with other tasks for the ABS department including Project Officer work. It was anticipated that Mr Turnbull would refer back to the Project Officer role on a full-time basis when the pilot came to an end on 31 March 2020.

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32. Around October 2019 there was a serious situation with the Dumfries and Galloway Council programme. It was more challenging than the programmes in the other council areas; the respondent was behind target and there were a huge number of tasks to progress as well as new projects to develop. The budget was underutilised and funds were to be returned to the Scottish Government. There respondent's contract with Dumfries and Galloway was at risk. The claimant who was the Project Officer principally allocated to the Dumfries and Galloway Council programme and Sandie Ross, the Project Coordinator were aware of this from the fortnightly progress meetings that they attended.

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33. Mr McGonigle's solution involved the claimant, Mr Turnbull and Mr McCann coming together to work on the Dumfries and Galloway Council programme. He informed the Project Coordinators. The Project Coordinators for the South Ayrshire Council programme (Andrew Filby) and East Ayrshire Council programme (Ruth Sutherland) were told to free up the Project Officers working on their programmes. Mr McGonigle intended to oversee the Dumfries and Galloway Council programme.

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34. On 30 October 2019 the claimant spoke to Mr McGonigle about being ignored by Mr Filby when responding to information he had requested. Mr McGonigle said that he could not comment as he was not present but if the claimant raised a grievance, he would speak to Mr Filby for his comment and progress it from there. The claimant said that she did not wish to raise a grievance. The claimant expressed concern about the resource meeting that was to take place. She also expressed concern about the team spirit. Mr McGonigle explained that no one was at fault and he hope that the sharing of ideas would improve the team spirit.
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35. Mr McGonigle spoke to Mr Filby privately reminding him to follow the code of conduct when interacting with colleagues.
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36. A resource meeting about the Dumfries and Galloway Council programme took place on 30 October 2019. Mr McGonigle, Ms Ross, the claimant, Mr Turnbull and Mr McCann were present. The claimant felt that her spreadsheet was dismissed out of hand; Mr McCann was annoyed with her and she felt intimidated by him. The claimant spoke to Mr McCann afterwards, but he did not wish to discuss matters and left the room.
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37. Later the claimant spoke to Mr McGonigle about Mr McCann's behaviour at the resource meeting and his criticism of the Dumfries and Galloway Council programme. Mr McGonigle said that he took Mr McCann's comments as lessons to be learned from one programme to another which was why the Project Officers were working together. It was not a criticism of the claimant. The claimant complained about the lack of communication and sharing of information. The claimant said that the poor performance of the Dumfries and Galloway Council Programme was making her ill. Mr McGonigle reiterated that the performance was no one's fault. The situation had reached a critical stage and that he was trying to bring in further resource. Mr McGonigle was aware of the personal tension. He felt that the claimant was taking the criticism of the Dumfries and Galloway Council programme personally and that the process was now underway to improve the team situation and focus should be on the tasks to get through the workload and get the project on track.
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38. Mr McGonigle spoke to Mr McCann. Mr McCann did not like the claimant's attitude to him and another colleagues. Mr McGonigle said that there was no need to be friends, but colleagues must treat each other with respect and follow the code of conduct. Mr McGonigle also spoke to Mr Filby, Ms Ross and Ms Sutherland and reminded them that all colleagues should treat each other with respect and to follow the code of conduct at all times. Mr McGonigle mentioned to Ms Marquis that the claimant was not pleased with other colleagues in the ABS department, but no formal grievances were raised.
39. The claimant was absent with a virus in late November 2019. When she returned Mr McCann was on leave until early January 2020.
40. The Scottish Government ABS Guidance for 2020/2021 focussed more on quality control and a wide range of technical measures being available for householders. These changes would be enforced with programmes starting April in 2020.
41. In late 2019 the respondent was considering how best to comply with funding requirements. The exact nature of any restructures was unclear as the respondent was expecting to tender for the North Ayrshire Council ABS contract. This invitation to tender was delayed.
42. Around December 2019 it was clear that the tender invitation from North Ayrshire Council would be delayed and that a decision required to be taken to address the changing requirements of the ABS service. It was not unusual for the ABS department to undergo restructures. In the past this had been in response to increase scale of projects and to make tighter demands regarding quality.
43. Restructuring in 2020 was considered necessary due to concerns with the ability to meet quality standards. There was a concern about different performance in different regions and it was considered that there was over reliance on the Quality Inspector. Additionally, Mr McGonigle had less time to dedicate to the ABS department due to other commitments particularly the lengthy setup and co-ordination of a new hydroelectric project for Ayr.

44. It was concluded that there was no alternative other than to introduce a new structure in the ABS department effective from 1 April 2020. This involved the introduction of a new role: Project Manager to oversee all of the ABS projects and to manage the three existing Project Coordinators involved in the day to day running of the ABS programmes in the different council areas. This would bring all three projects in line in terms of performance, timing and budget spent using a dedicated and experienced Project Manager.
45. In the new structure the three Project Officer roles were replaced with a Projects Assistant and a Quality Inspection Assistant. The Project Officer role had evolved and there was divergence of procedures and approaches in the different regions. In a similar way to the new Project Manager role by introducing the Project Assistant and Quality Inspection Assistant roles into the structure there would be a common approach to delivering the ABS programmes across three local authority areas. It was considered that the processes and procedures had become more automated within a new structure a single Project Assistant provided the required support to the three existing Project Coordinators.
46. A new post of Quality Inspection Assistant was created to provide support to the existing Quality Inspector who had a demanding role covering the three local authority areas; concurrently running construction sites; and changing quality assurance standards in the insulation systems being installed.
47. In early January 2020 the respondent advertised posts of Customer Service Advisor on the HSE contract at a salary of £18,852. The closing date for applications was 26 January 2020 with interviews in the week commencing 3 February 2020.
48. On 7 February 2020 the respondent advertised the post of Home Renewables Advisor on the HSE contract at a salary of £25,258. The closing date for applications was 23 February 2020 with interviews in the week commencing 2 March 2020.
49. The claimant was on annual leave until 28 January 2020. On her return Mr McCann spoke to her in an unacceptable manner for which he apologised the

following day. They worked together until 10 February 2020 when an issue arose about who would accompany Mr Turnbull “door knocking” later that week. Mr McCann said that there was no reason why the claimant could not door knock two days in a row; he blamed the claimant for the problems with the Dumfries and Council programme ; and for not pulling her weight or doing the job properly.

50. The claimant was upset. On reflection she considered that Mr McCann’s behaviour was bullying and intimidation.

51. On 11 February 2020 the claimant spoke to Mr McGonigle as she felt bullied by Mr McCann. Mr McGonigle said that the claimant should raise the matter formally as a grievance. The claimant said that she was not going to do that. The claimant also said that she was on medication because of this situation. Mr McGonigle advised that there was to be a restructure and as a result there are often physical changes in office spaces and desk layouts and that this might help improve the situation.

52. Around 12 February 2020, Ms Marquis and Mr McGonigle met with Brenda Fraser of South Ayrshire Council’s HR Department to obtain advice on the way in which the respondent managed the proposed restructuring process of the ABS department. They were advised of the need to consult and that the selection for the new roles should take place by competitive interview. Although the respondent did not have a trade union recognition agreement, Ms Marquis telephone Unison and explained what was being proposed in terms of restructuring the ABS department. No issues were raised, and Unison did not ask to be further consulted.

53. On 13 February 2020 Ms Marquis attended a meeting of the Board of Management chaired by Ian Cochrane. She explained the reasons behind the need for the ABS department restructure.

54. On 17 February 2020 Ms Marquis hosted a short meeting attended by Mr McGonigle, Ms Sutherland, Ms Ross, Mr Filby, Mr Turnbull, the claimant and Mr McCann (the 17 February Meeting). Ms Marquis explained that while the existing structure that had been in place for five years had worked well the

evolving nature of the EEs and ABS programmes along with the need to manage the respondent's management of the hydro scheme it was proposed to restructure the ABS department.

55. A chart showing the existing ABS department structure and the new ABS
5 department structure was displayed on screen. It was explained that the number of roles were the same (eight) but there would be a new Project Manager role to free up Mr McGonigle's time and greater focus on quality. Ms Marquis said that South Ayrshire Council HR Department, Unison and the Board of Management were aware of the proposed changes. She also
10 advised that following the meeting the charts, job descriptions and meeting notes would be emailed to the attendees who were invited to request discussions with her or Mr McGonigle at any time that week and to send expressions of interest in the new posts by 24 February 2020 at 9am. Questions were invited during which it was confirmed that details of the
15 Project Manager post would be clearer from the job description; it was anticipated that everything would happen quickly with the new structure in place for the beginning of April 2020; and the Project Coordinator role would stay much the same as before

56. Mr McGonigle sent an email to the ABS department on 17 February 2020 at
20 11:10 (the 17 February Email) attaching notes of the 17 February Meeting; the restructure document showing the current and proposed structures; description of changes and ceased roles, method and timing structures; and the job descriptions for the new posts. The 17 February Email stated, "If you wish to discuss any of this please come through or send a meeting request
25 to go over anything in greater detail".

57. Under the proposed structure a new role of Project Manager would be created with responsibility for managing the ABS department. Two further new roles were created, Projects Assistant and Quality Inspection Assistant. The role of Project Officer would cease to exist in the proposed structure. The
30 restructure document stated that it was expected that the Project Coordinators within the current structure would apply for the Project Manager position. It was expected that the current Project Officers would apply to

backfill the vacant Project Coordinator role (if applicable). It was then expected that the current Project Officers would apply for the roles of Project Assistant and Quality Inspection Assistant.

58. Ms Marquis sent an email to the claimant on 18 February 2020 at 10:27 (the 18 February Email) advising that she was writing in line with the Framework to inform that the post of Project Officer had been deleted as explained at the 17 February Meeting and Email. The new posts may represent suitable alternative employment therefore a matching process would be undertaken to match displaced employees with the new posts. The post of Project Coordinator would only become available if one of the existing Project Coordinators was promoted into the Project Manager role. The claimant was invited to rank the potential posts in order of preference. As the new posts had greater responsibility and higher grades and did not directly replicate the deleted posts the Manager had to be satisfied using established recruitment and selection arrangements that the employee is capable of carrying out the new job. Where there were more employees for whom the new job is a potentially suitable match than there were available posts employees would go through a competitive selection process. If the claimant had any concerns or wished to discuss the structure in more detail, she was to ask Ms Marquis.
59. The claimant responded by email sent on 18 February 2020 at 11:10. The claimant ranked her preference as follows: Project Assistant - 1 most preferred choice; Quality Inspection Assistant - 2; and Project Coordinator - 3.
60. Between 17 and 18 February 2020 Ms Sutherland, Ms Ross, Mr Filby, Mr Turnbull and Mr McCann individually spoke to Ms Marquis and Mr McGonigal. The claimant did not request an individual meeting and did not speak to or raise concerns by email with either Ms Marquis or Mr McGonigal.
61. By 21 February 2020 each of the affected employees had submitted their nominations for their preferred roles in the new structure. Mr McGonigle sent an email to Mr Turnbull, the claimant and Mr McCann asking them to keep 27 February 2020 and 2 March 2020 free for possible interviews.

62. Mr Filby (aged 35) was the only Project Coordinator to apply for the Project Manager role. He was interviewed by Ms Marquis and Mr McGonigal on 25 February 2020 and was successful. Mr Filby was offered the post. His appointment to this post resulted in him becoming involved in the remaining interviews to conclude the restructure process.
63. Mr Turnbull and the claimant applied for the now vacant Project Coordinator role for which interviews took place on 27 February 2020. The panel included Ms Marquis, Mr McGonigle and Mr Filby. The interviews lasted approximately 45 minutes and each candidate was asked the same set of questions. The questions included five questions on knowledge and experience and four questions on technical aspects and policy. Each panel member collated notes and scored each question. Notes and scores were compared following the final interview. Mr Turnbull performed better and had the highest score from each panel member. After discussion the post was offered to Mr Turnbull.
64. The panel met with the claimant on 27 February 2020 and advised her that she had been unsuccessful and gave her feedback. The claimant was disappointed with the outcome but was pleased for Mr Turnbull.
65. The panel discussed the remaining situation. There were two remaining Project Officers (the claimant and Mr McCann) and two vacancies: Project Assistant and Quality Inspection Assistant. Both candidates had applied for the Project Assistant role but only the claimant had included the Quality Inspection Assistant role on her preference form.
66. The panel recognised that neither the claimant nor Mr McCann had the required knowledge, skills or experience to carry out the Quality Inspection Assistant role. It would be necessary to recruit an external candidate. There was therefore going to be a risk of redundancy for whoever was unsuccessful at the Project Assistant interview.
67. In the afternoon of 27 February 2020 Ms Marquis and Mr McGonigle met with Mr McCann. He was advised that as they were two people applying for the Project Assistant role he was at risk of redundancy if unsuccessful at the interview. It was acknowledged that he had not applied for the Quality

Inspection Assistant role, but he did not have the necessary skills or experience. Mr McCann said that he was only interested in the Project Assistant role. He was not interested in voluntary redundancy.

5 68. Ms Marquis and Mr McGonigal then met the claimant on 27 February 2020 (the 27 February Meeting). It was explained that the claimant and Mr McCann were applying for one post and if unsuccessful there was a risk that she would be made redundant. The claimant said that she understood this. She was asked if she was interested in voluntary redundancy. The claimant referred to the difficulty that she was having finding any information about redundancy options as she had tried unsuccessfully to talk to Lorraine Boyd of HR 10 Department, South Ayrshire Council. Ms Marquis suggested that the claimant contact Citizens Advice or the trade union. She asked if the claimant was in the pension scheme. The claimant said that she had looked into this and believed that it was only around £2,000 per year. The claimant said that she 15 was interested in the Quality Inspection Assistant role. She considered that either she or Mr McCann could do this post if given training. Mr McGonigle said that they did not have the skill set for the role. The claimant accepted that she did not have the essential qualifications. Ms Marquis said that there were no other suitable jobs available. The claimant referred to the post of 20 Home Renewables Advisor and said Mr McCann previously held that role. There were notes taken at the 27 February Meeting which were sent to the claimant for comment. The claimant also made notes.

25 69. The interviews for Project Assistant role took place on 2 March 2020. The interview panel included Ms Marquis, Mr McGonigle and Mr Filby. The claimant and Mr McCann were each interviewed for approximately 45 minutes. Each candidate was asked the same set of questions. The questions include seven questions on knowledge and experience and two on technical aspects and policy. Each panel member collated notes and scored each question, calculating an overall score. Notes and Scores were compared 30 following the final interview. The claimant's performance was better than she had in the Project Coordinator interview. Mr McCann performed better than the claimant and had the highest score from each panel member. It was

agreed that the panel would meet the following day to finalise the decision given that the unsuccessful candidate would be at risk of redundancy. Following that discussion, it was decided that the post should be offered to Mr McCann.

5 70. On 3 March 2020 Ms Marquis met with the claimant (the 3 March Meeting). They were unaccompanied and took notes. Ms Marquis' notes were headed "Outcome of Interview for Projects Assistant Post". The claimant was informed that she had been unsuccessful in the interview for the Project Assistant post. While the claimant had a good interview, demonstrating her
10 administration skills, the wider skills were not referenced. The claimant was upset. She said that she had 40 years' customer service and administration experience; and the process had been a charade. It all started when she raised issues of being bullied and the past fortnight been a rollercoaster. Ms Marquis explained that the claimant had the administration skills, but the
15 Project Assistant post was wider than administration and was also expected to be much busier than the Project Officer post had been.

71. The claimant said that she had been bullied since October 2019. More recently Mr McCann shouted at her and accused of it being her fault that the Dumfries & Galloway project was unsuccessful. The claimant accepted that
20 she had not raised the matter formally, but she had told Mr McGonigle. The claimant said that she had not been sleeping properly for two weeks and had been taking antidepressants. The claimant said that Ms Ross had got off Scot free and had no job change. Ms Ross was the Project Coordinator (for Dumfries and Galloway council programme) and should be held responsible,
25 the claimant was only the Project Officer. Her work had never been questioned by Mr McGonigle and the Dumfries and Galloway Council programme had not failed in all the years she worked with another Project Coordinator.

72. The claimant asked what was to happen to her now. Ms Marquis suggested
30 that the claimant may wish to go home for the rest of the day. Ms Marquis anticipated having a further meeting the following day to discuss other job options. Ms Marquis explained there were no other options at present but that

she would be continuing to look at other job options for the claimant. The claimant said that she was being put out to pasture. She was not accepting this and would take things further. Ms Marquis asked if the claimant wished to leave the office now. The claimant said that she “had everything organised and tidied up already. The claimant asked if she would be paid if she was not in the office”. Ms Marquis said that she would confirm all details in a letter. The claimant collected her personal belongings and left. She did not return.

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73. On 3 March 2020 Ms Marquis wrote to the claimant (the 3 March Letter). The 3 March Letter was headed “Service Review – Area Based Team, Energy Agency – Formal Notice of Termination.” It advised that as explained at the 27 February Meeting the claimant was now identified as being at risk of redundancy and that the 3 March Letter constituted eight weeks’ notice of redundancy. In the first instance through the Framework the respondent had established procedures for redeployment of employees at risk of redundancy and during the notice period attempts would be made to identify suitable alternative employment to prevent the requirement to terminate the claimant’s contract of employment. If this was not possible then the contract would come to an end on the ground of redundancy on 28 April 2020. If redeployment was successful, then the redundancy notification would be withdrawn. The claimant was encouraged to apply for external vacancies and as an alternative to redeployment was asked if she wished to consider a voluntary severance. The claimant was informed that she had a right to request a review of the circumstances that had led to the decision to dismiss her on the grounds of redundancy and that she could do so by writing to Ian Cochrane. She was told that any decision regarding the restructure could not be overturned. The claimant was advised that she would continue to be individually consulted and kept fully informed.

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74. The claimant did not return to work on 4 March 2020. Ms Marquis telephoned the claimant to ask if she was interested in the post of Home Renewables Advisor. If so, she would be offered an interview the following week. This conversation was followed by an email confirming the discussion, attaching details of the Home Renewables Advisor post which had a salary of £25,258.

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The claimant was informed that if she wished to be considered for the post, she was to let Ms Marquis know before 2.00pm on Friday 6 March 2020 and if the claimant was interested, she would be asked to attend an interview the following week. The interviews for the post had been scheduled for 4 March 2020.

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75. On 5 March 2020 the claimant emailed Ms Marquis explaining that she had not received an at risk of redundancy letter in terms of the Framework.

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76. There was an email chain between the claimant and Ms Marquis on 6 March 2020 in which Ms Marquis sought clarification whether the claimant was interested in the post of Home Renewables Advisor. The claimant's response initially focused on whether the 3 March Letter was an at risk of redundancy letter or notice of termination. The claimant asked if she was being offered of the post of Home Renewables Advisor. Ms Marquis confirmed that the claimant was being asked if she was interested in being interviewed as the post was not an offer of suitable alternative employment.

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77. At 14.05 on 6 March 2020 the claimant sent an email referring to the Framework which stated that an offer of alternative suitable employment does not mean having to go through the normal recruitment and selection process. She was unsuccessful in the interviews for Quality Inspection Assistant and Project Assistant because her skills and experience were not relevant for the post. The email concluded, "I do not have any in depth knowledge of Micro generational technologies and I do not have an HND or equivalent in a technical discipline and/or work experience in a similar field as is essential on the job advert for Home Renewables Advisor and therefore cannot see how I could be suitable for this job".

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78. In Ms Marquis' reply sent at 15:41 she stated that from the reply she "took it that [the claimant] was not interested in the interview for the HRA post" but suggested that it would be hopeful to have a conversation during the week of 16 March 2020.

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79. Ms Marquis was going on leave. She advised other senior staff that the claimant was not interest in an interview for the Home Renewables Advisor

post. Accordingly, the offer of the contract starting on 1 April 2020 should be made to the preferred candidate from the interviews that had taken place on 4 March 2020.

- 5 80. At 16:12 on 6 March 2020 the claimant sent an email advising that she was interested in the Home Renewables Advisor role and would be happy to discuss this at a meeting. The claimant received an out of office message from Ms Marquis to the effect that she was now on leave. The claimant did not contact anyone else in Ms Marquis' absence. Ms Marquis did not return to read her email until 18 March 2020.
- 10 81. On 12 March 2020 wrote to Ian Cochrane requesting a review of the circumstances that led to the decision to dismiss her on grounds of redundancy. The claimant said that she believed that she had been "treated unfairly and had been discriminated against".
- 15 82. On 20 March 2020, Ms Marquis wrote to the claimant confirming that the claimant was still on garden leave. Ms Marquis also explained that based on the information available before going on leave that the claimant did not consider that her skills matched the technical skills required for the Home Renewables Advisor post therefore she authorised the appointment of an internal staff member who had been successful at interview to this role. Ms Marquis had only received the further emails on her return to business following annual leave in France and self-isolation. The claimant was advised that Ms Marquis would continue to look for suitable alternative employment and keep her informed. The claimant was informed that her notice period would be extended until 27 May 2020. The claimant was offered assistance for applications and interviews from the HES Centre Manager. Ms Marquis said that she would be delighted to meet with the claimant but she was self-isolating.
- 20 25 30 83. On 30 March 2020 Councillor Cochrane (aged 62) emailed the claimant offering a meeting to discuss her concerns and appeal against the decision to terminate her employment. Given the COVID-19 restrictions it was

proposed the meeting take place remotely. The claimant was informed that she had the right to be accompanied by a work colleague.

84. On 3 April 2020 the claimant sent an email to Councillor Cochrane attaching her appeal summary and various documents. The claimant confirmed that Stephen Brindley would be accompanying her at the virtual meeting.
85. In the appeal summary the claimant set out her primary reasons for seeking a review of the outcome of the matching process was the strength of her skills match and experience to the job description of Project Assistant. The claimant believed that she had at least two years greater experience in the area required for the role ahead of the candidate who had been appointed. She also considered that the whole process had been undertaken with haste and that she had not had sufficient time to prepare for the interviews.
86. The claimant also referred to “other considerations”. She said that it inappropriate to advise her that she was at risk of redundancy at the 27 February Meeting and during the matching process to have been asked about her pension. This had destroyed her confidence before going to the interview on 2 March 2020. The claimant said that she had great difficulty obtaining impartial information about the matching process, voluntary severance options and pension information. The claimant complained that she had never received performance appraisals or performance review during her employment.
87. The claimant did not mention the post of Home Renewables Advisor. In support of her allegation of discrimination the claimant stated that in October 2019 she raised with Mr McGonigle an issue of a colleague not speaking to her and how his general attitude was causing her stress for which she had to seek medication. The claimant was not aware of any action being taken. The treatment continued and she raised with Mr McGonigle on 11 February 2020 that she believed she was being bullied. She thought she was following the grievance procedure. Mr McGonigle advised that there was going to be a meeting on 17 February 2020 and implied that changes would be made which would make things better.

88. Councillor Cochrane sought advice from South Ayrshire HR Department. The Framework is designed for a local authority not an employer with approximately 32 employees who with the exception of three are employed on fixed-term contracts reflecting the funding of the respondent's support. Although the respondent works where possible with the HR policies and procedures of South Ayrshire Council, Councillor Cochrane was advised to adapt the Framework to be more suitable to the requirements and capabilities of the respondent.
89. On 8 April 2020 the appeal meeting took place remotely on screen. The claimant was joined by Mr Brinley along with Emma Bernard, HES, Centre Manager who took notes. The claimant was invited to explain her grounds of appeal and refer to any supporting documentation.
90. Afterwards Councillor Cochrane carried out further investigation on some of the points raised. Ms Marquis sent an email to him on 16 April 2020 providing some further details in response to the queries. Councillor Cochrane also spoke to Mr McGonigle about the complaints of bullying made to him by the claimant. Mr McGonigle's position was that there were two discussions in 2019 when the claimant mentioned that she was unhappy with colleagues' behaviour. There was no mention of bullying, medication, stress or anxiety. On one of those occasions, she mentioned that "things were making her ill". Mr McGonigle said that it was on 11 February 2020 that the claimant mentioned bullying and that she was on medication. While the claimant had been spoken to about the grievance procedure the claimant did not lodge a grievance about bullying.
91. Councillor Cochrane looked at the process followed by the respondent and concluded that it acted appropriately. Consultation took place and selection for the available positions took place by competitive interview. While the claimant was not interviewed for one post (Quality Inspection Assistant) it was considered that her skills and experience did not match those required for the role. There was competitive interviewing for the post of Project Assistant. The claimant was unsuccessful. Councillor Cochrane considered that the respondent had acted appropriately in the way in which matching was

considered. The interview process was carried out fairly and the claimant was informed at the appropriate point at which her position was at risk of redundancy. The respondent was also continuing to consider whether suitable types of employment could be identified. Councillor Cochrane recommended the Framework be adapted to be more suitable for the respondent.

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92. Councillor Cochrane was also satisfied that the decision to dismiss the claimant resulted from a genuine need to reorganise the structure and that the correct process was followed. Information provided to him showed that the claimant's complaints about bullying had nothing to do in the decision to terminate her employment. There was no evidence to support the allegations of discrimination on the basis of sex and age.

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93. He also considered that the time frame was not conducted in undue haste and was similar to a timeframe used in previous years. Councillor Cochrane acknowledged that the claimant was advised when contacting South Ayrshire Council HR Department to have a discussion with her line manager or the respondent's management about her circumstances. Councillor Cochrane acknowledged it would be difficult for people who are not trade union members and that he would consider how this could be addressed from a local perspective.

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94. Councillor Cochrane concluded that he was unable to uphold the claimant's appeal. He also advised that there was no further right of appeal against the decision. The appeal outcome was sent to the claimant on 22 April 2020. A copy was sent to Ms Marquis on 27 April 2020.

95. Ms Marquis continued to look for suitable posts for the claimant. She contacted Ms Bernard for possible training on HES online in case there was another advisor post in the near future. Ms Bernard advised that due to budget cuts in the HES contract they were currently over full capacity of advisors and that they would be relying on natural wastage to reduce costs over the next year therefore she did not anticipate any advisor posts in the near future.

96. On 11 May 2020 Ms Marquis wrote to the claimant advising that it had not be possible to find alternative work. The claimant received a severance payment of £6,539 equating to twelve weeks pay, based on the claimant having completed eight years' service at her leaving date. Under the Framework, being over 55 and being dismissed by reason of redundancy the claimant had immediate access to her pension benefits.
97. On 13 May 2020 Ms Marquis agreed to extend the notice period by four weeks from 27 May 2020 to 24 June 2020. This was to allow the claimant to take independent financial advice. There was to be no change to the severance payment for accrued holidays adjusted to reflect the revised leaving date.
98. As at the date of termination of her employment the claimant was 61 years of age. Her gross annual salary was £28,415.25. The claimant felt insulted and humiliated at being told that her skills and experience were not suitable for the Project Assistant role. She felt that it was being implied that because it was to be busier, she would not be able to cope.
99. The claimant started medication for anxiety in September 2019. Her medication was increased in February 2021 and then on 7 July 2021 to its maximum dose. She has been in receipt of Jobseeker Allowance. Most of the jobs that she applied have been at a lower salary.

Observation on witnesses and conflict of evidence

100. The Tribunal considered that Ms Marquis was a credible and reliable witness whose evidence generally corroborated contemporary correspondence. The Tribunal did however form the impression, particularly during cross-examination, that Ms Marquis response to some of the claimant's legitimate questions were dismissive. The Tribunal's impression was that Ms Marquis did not treat the Tribunal process with the respect it deserved.
101. The Tribunal felt that Mr McGonigle and Mr Filby were reliable and credible witnesses. Both gave their evidence in an understated manner. The Tribunal considered that Mr McGonigle was candid about his recollection of the

claimant's complaints. The Tribunal felt that he had a good working relationship with her and had no reason to misrepresent the position. If anything the Tribunal's impression was that he considered that all employees should be courteous to each other and focus on the task rather than holding each other responsible for issues with the Dumfries & Galloway Council project.

102. The Tribunal considered that Mr Filby's evidence was particularly persuasive in relation to the panel members' conduct and assessment of the candidates at interview.

103. The Tribunal impression was that Councillor Cochrane's witness statement and the contemporary documents were consistent. The Tribunal was therefore surprised during cross examination when his evidence became confusing although this clarified on re-examination. While the Tribunal appreciated his involvement was over a year ago it was disappointing that he gave the appearance of not having familiarised himself with his witness statement and the contemporary documents before attending the final hearing.

104. The Tribunal considered that the claimant's evidence was well prepared and she conducted herself throughout the proceedings politely and with dignity. The Tribunal had no doubt that the claimant found the restructuring process and her subsequent dismissal distressing. The Tribunal also appreciated that conducting the proceedings and cross-examining colleagues was challenging. It was apparent that these proceedings and various subject access requests have been the focus of the claimant's life since her employment ended and she has continually reviewed events through that prism.

105. In general, the Tribunal had no doubt that the claimant gave her any evidence honestly based on her perception and recollection of events. There was however one area where the Tribunal considered that the claimant's position was unconvincing. That was in relation to the suggestion that the interview notes were fabricated and that the respondent's witnesses were lying when

they said that these were the notes taken by them at the time. The Tribunal understands the claimant's concern that when she requested the notes she was told that they could not be found. They were only subsequently located. The claimant considered this suspicious and indicative that they had been fabricated. To make such a finding the Tribunal would have had to believe that Ms Marquis, Mr McGonigle and Mr Filby conspired to prepare the notes after the event, then attending the final hearing and lied to the Tribunal. As explained the Tribunal found Mr McGonigle and Mr Filby credible and reliable. Neither of them had any animosity towards the claimant and both were able to explain why they had reached the conclusion that they did in the course of the interviews. The Tribunal was also mindful that during the period the interview notes were to be produced COVID-19 restrictions were in place and the respondent's employees were working from home.

106. Ms Marquis took full responsibility of not being able to locate the interview notes and the delay in producing them. Given that shortly after the interviews Ms Marquis had been on annual leave, and on her return, she had to self-isolate just before the first lockdown the Tribunal felt that it was understandable that she may not have been able to locate the whereabouts of the interview notes when they were first requested. The Tribunal suspected that when she was requested to produce them, she perhaps did not treat that request with the urgency and importance that it deserves. The Tribunal did not consider that she would have gone to the length of fabricating the interview notes and asking Mr McGonigle and Mr Filby to lie about the notes at the final hearing.

107. There was also conflicting evidence about the timing of and the exact nature of the claimant's complaints to Mr McGonigle about her colleagues' behaviour. The Tribunal considered that it was significant that issues appeared to have come to a head when the spotlight was on the Dumfries & Galloway Council programme which was significantly lagging behind the other councils' programmes. There was no suggestion that Mr McGonigle considered that anyone was responsible for this as he recognised the challenges of Dumfries & Galloway Council programme. However, the need

to reallocate resources from other council programmes clearly put pressure on all the ABS department including the claimant.

5 108. The claimant attributed the responsibility for issues with the Dumfries and Galloway Council programme with the Project Coordinator. That seemed to be a source of frustration to Mr McCann. The Tribunal had no doubt that the increased pressure and focus caused the claimant to feel stressed and anxious. The Tribunal also had no doubt that the claimant was disappointed in her colleagues' behaviour. The Tribunal did not accept that the claimant referred to bullying in 2019 as it appeared on her own evidence she did not regard the behaviour as such until early 2020. The Tribunal considered that it was highly likely that in the absence of the claimant being willing to raise a grievance Mr McGonigle nonetheless reminded the ABS department about the code of conduct. The Tribunal's reasoning was that while the claimant had complained to McGonigle about a colleague's behaviour it was apparent 10 there was general frustration and that all colleagues needed to be reminded of how they should behave. It was in Mr McGonigle's interest to do so as he considered that they should be focusing on the task rather than complaining about who was responsible in the situation. 15

20 109. The Tribunal accepted that the claimant did raise specific concerns about Mr McCann's behaviour on 11 February 2020 and mentioned that she was on medication for stress and anxiety. The Tribunal was not convinced that the claimant was intending to actually raise a formal grievance at this stage. In any event she did not so on being assured the restructuring would mean that there would be physical changes in the layout of where people were sitting.

25 110. There was conflicting evidence about who raised the issue of the claimant's pension at the 27 February Meeting. Under the Framework if an employee is over 55 and at risk of redundancy, they would be eligible to access their pension. In the context of obtaining information about redundancy options the Tribunal noted that it was the claimant who said that she was having difficulty finding information and had asked for help from the South Ayrshire Council HR Department. Ms Marquis then suggested from whom the claimant might 30 obtain advice. The Tribunal considered that it was therefore more likely that

Ms Marquis asked the claimant if she was a member of the pension scheme. What was more significant in the Tribunal's view, from the exchange of correspondence in May 2020, was that in February 2020 Ms Marquis did not have any detailed understanding or information in this regard which suggested that issue arose naturally during the conversation.

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111. There was no dispute that at the 3 March Meeting Ms Marquis referred to the Project Assistant role being "busier". Ms Marquis accepted that it was an unfortunate use of the word but the context in which she used it was that the Project Assistant role had more than an administrative function and that there were other aspects to it. The claimant said that she took this to mean that she was not able to do the role and that was because of her age. The Tribunal had some difficulty following the claimant's rationale. It was apparent that the claimant was an experienced Project Officer with responsibility for one of the more challenging areas. There was no suggestion that the claimant was not capable of undertaking her existing role and she performed well at the interview on 2 March 2020. Had Mr McCann not applied for the role or had not performed as well as he did, there was no reason to believe that the claimant would not have been appointed to the Project Officer role. The reason why the claimant was not offered the position was not because she was not able to do the role but because at competitive interview Mr McCann performed better particularly in relation to technical and policy knowledge.

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Submissions

112. Mr Mowat and the claimant helpfully provided written submissions which they addressed the Tribunal orally. The following is summary of those submissions.

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The respondent's submissions

113. Mr Mowat said that the respondent had established the reason for the dismissal was redundancy in terms of section 98(2)(c) of the ERA. There is a fair reason for the dismissal.

114. The Tribunal was referred to section 139(1)(b)(i) of the ERA. A restructuring took place within the ABS department. Three roles were deleted: two Project Officers and one Project Officer/Project Specialist. Three new roles were created: Project Manager; Project Assistance; and Quality Inspection Assistant. While there was no reduction in the actual number of posts the restructuring resulted in a reduction in the requirement to employ Project Officers. The Project Assistant role was the closest to the Project Officer role and only one Project Assistant was required in the new structure. This created a redundancy situation or alternatively dismissal was for some other substantial reason: necessary restructuring to deliver a better service. The Tribunal was invited to find that there was a fair reason for dismissal,
115. The claimant accepted the business rational for the Quality Inspection Assistance. She did not accept the rationale for the reduction in the number of Project Officer posts. That does not matter. The respondent is free to structure the business as it chooses, and the removal of the Project Officer posts from the structure amounted to a redundancy situation. The new structure is working effectively, and the claimant has not been replaced.
116. Mr Mowat also submitted that the respondent acted reasonably in dismissing the claimant. The respondent's procedure for dealing with restructuring/redundancy is the Framework, in particular section 2 the Matching Policy. The procedure followed by the respondent met the key components of the Framework.
117. The Tribunal was referred to the evidence and invited to consider that the respondent acted fairly. The Framework that the respondent adopted is designed for local authority, not a much smaller charity.
118. The respondent followed the main principles and procedures. While it might be felt that further consultation should have taken place and specific individual consultation arranged the Tribunal was invited to have regard to the size of the respondent's organisation and its business. The respondent followed similar procedures and timescales in previous restructures in which the claimant was involved. The claimant should have received a formal

invitation to a dismissal meeting but that proved difficult due to the circumstances of the claimant's departure on 3 March 2020. It was submitted that further consultation would not have altered the final outcome.

- 5 119. The Framework has a "no compulsory redundancy pledge". The is a pledge by South Ayrshire Council that the respondent cannot give. The Tribunal was invited to note that in the Framework the pledge is "in addition to the statutory and contractual undertakings outlined in this Framework". The respondent has adopted the Framework but cannot offer the additional undertaking. In all the circumstances the Tribunal was invited to find that the dismissal was fair.
- 10 120. Mr Mowat referred to Tribunal to section 13 of the EqA. The crucial question in a case of direct discrimination is why the complainant received less favourable treatment. Was it on the grounds of the protected characteristic or some other reason (see *Nagarajan v London Regional Transport* 1999 ICR 877).
- 15 121. The Tribunal was also referred to section 136 of the EqA and reminded that the first stage requires the claimant to prove facts from which the Tribunal could apart from the section conclude in the absence of adequate explanation that the respondent committed the unlawful act of discrimination. The Tribunal is required to make an assumption at the first stage which may be contrary to reality the plain purpose being to shift the burden of proof at the second stage
20 so that unless the respondent provides an adequate explanation the complainant will succeed. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not treated as having committed the unlawful act, if
25 the complaint is not to be upheld (see *Igen Limited v Wong* 2005 ICR 931).
- 30 122. In relation to age the claimant compared herself to employees aged 25 to 40. Me Mowat said that there is no basis in evidence to conclude that the claimant was dismissed due to her age. She refers to the fact that employees in her comparator group were appointed to the vacancies. Those appointments were after rigorous and fair competitive interviews bases on who was the best candidate for the post.

123. In support of her age discrimination claim the claimant referred to a comment made by Ms Marquis that the Project Assistant role was busier than the previous Project Officer role. That was a statement of fact as accepted by the claimant and nothing to do with her age.

5 124. Mr Mowat said that the same applied to the sex discrimination claim. The claimant's comparator is Mr McCann. There is no basis on the evidence to conclude that the claimant was dismissed because she is female. The fact that the successful candidate is male does not establish that the claimant was selected on the grounds of her sex. Mr McCann was appointed after a rigorous and fair competitive interview. He was the best candidate for the post. The rationale for that decision had nothing to do with the claimant's sex.

10 125. The claimant also suggested that the selection was linked to having complained about harassment. Mr Mowat said that this does not stand up to scrutiny on the evidence.

15 126. The Tribunal was invited to dismiss the claimant's discrimination claims.

The claimant's submissions

127. The claimant invited to make certain findings. In relation to disputed facts the claimant invited the Tribunal to prefer her evidence to that of the respondent's witnesses. There were discrepancies between the respondent's management witnesses about the final decision making process for Project Manager.

20 128. The timing of the restructure in 2020 is highly suspicious and accelerated to remove the claimant as she was likely to raise a grievance. If restructure was necessary, why did it not start sooner. A companywide approach should have been taken. It was disingenuous to dangle the Quality Assurance Assistant role when the respondent must have known that no one from the existing team was going to fit. It was also disingenuous to dangle the Home Renewables Advisor post. Ms Marquis was nervous about appointing the claimant to the role of Home Renewable Adviser as she did not fit the criteria.

This was a token interview. The respondent was unprepared to invest in training to equip an internal candidate for these posts.

129. The claimant is highly skeptical about the interview notes. The respondent initially did not admit to their existence or the fact that they were missing. Mr
5 Filby had not been trained on interviewing. Mr McGonigal said that the claimant could apply for any post, but Ms Marquis said that emails were tailor in terms of the level of the members of staff.
130. The Framework is the policy in place. The respondent failed to follow it or the ACAS code or guidelines. The Framework was unsuitable. Councillor
10 Cochrane had no training in conducting appeals. He disregarded the Framework and ACAS code or guidelines. He was not independent. Management behaviour through the period of bullying suggest that the decision was a predetermined. The funders are less involved in staff selection than Ms Marquis had the Tribunal believe.
- 15 131. Mr McGonigal's evidence about meetings is incorrect. He was a rigorous note taker but none were provided. The claimant did not want to raise a formal grievance but she did want Mr McGonigle to deal with the complaint. If he spoke to Mr McCann there was no change in his behaviour. He turned a blind eye to the claimant's mental health and complaints. He appeared to be an
20 expert on mental health and did not appreciate that in early stages people might still be working. Is employees were referred to the code of conduct why was the claimant also not referred to this and given feedback that this had been done. Management did not address workplace harassment.
132. Despite speaking to HR three times the claimant was referred back to
25 management.
133. Mr McCann and Mr Turnbull were paid more for the Project Officer between October 2018 and February 2019. Mr McCann was offered the Project Assistant post, making the claimant redundant when he had already relinquished the post of EES Specialist Advise in February 2019.

134. The positions of Project Manager, Project Coordinator, Project Assistant and Home Renewables Advisor were all filled by male employees in the age range 26 to 40.

5 135. Ms Marquis raised the issue of the claimant's pension. She told the claimant that the reason she was not successful was because it was busier. If the claimant had been a younger male employee, she would not have been treated in the way that she was and would have still been employed.

Discussion and Deliberations

136. The Tribunal referred to the issues that it had to determine.

10 *Direct discrimination*

137. Turning to the disability discrimination claims it should be emphasised that the legal test for determining discrimination is different from the test of determining unfair dismissal. While the latter allows for an employer a range of reasonable responses, the former is an objective test that required the Tribunal to consider whether the selection for the posts of Project Coordinator and Project Assistant and the claimant's selection for redundancy could be said to be discriminatory and were in breach of the respondent's obligations under the EqA.

138. The claimant relies on two protected characteristics: sex and age. She is female. Her age group is over 60 and she compares herself with people in the age group 25 to 40.

139. The Tribunal then referred to its findings. It was satisfied that the respondent failed to select the claimant for the post of Project Coordinator and for the post of Project Assistant. The respondent also selected the claimant for redundancy.

25 140. The Tribunal then asked whether that was less favourable treatment. Direct discrimination focuses on whether an individual has been treated less favourably because of a protected characteristic. This involves a comparison exercise to shed light on the reason for the treatment. The comparator (actual

or hypothetical) is a person who does not share the claimant's protected characteristic and is not in materially different circumstances from her: all other characteristic which are relevant to the way in which her case was dealt with must be the same.

5 141. The claimant compares herself to Mr Turnbull and Mr McCann, male colleagues in the age group 25 to 40. They were appointed to the roles of Project Coordinator and Project Assistant respectively. Mr McCann was not selected for redundancy.

10 142. In relation to not being appointed to the role to Project Coordinator the Tribunal first asked if this was because of the claimant's sex. There was some difficulty with Mr Turnbull as a comparator as while he was male, he had spent almost two years as a Project Specialist. The Tribunal considered that a more appropriate comparator would be a male Project Officer with similar experience to the claimant applying for the role of Project Coordinator and attaining a similar score at competitive interview.

15 143. The claimant referred to the pay arrangements for the role of Project Specialist between October 2018 and February 2019. While the Tribunal found the decision to award both Mr Turnbull and Mr McCann the pay for the Project Specialist role surprising there was insufficient information to draw any inference that this was sex discrimination. In any event when Mr McCann reverted to the Project Office role his pay rate was reduced to reflect that.

20 144. The Tribunal did not consider that the claimant had proved facts from which it could conclude in the absence of adequate explanation that the respondent committed the unlawful act of sex discrimination by failing to select her for the role of Project Coordinator.

25 145. The Tribunal then turned to the failure to select the claimant for the Project Officer role and whether this was because of her sex. The claimant compared herself to Mr McCann. They attended a competitive interview at which they were asked the same questions by the same interview panel comprising one woman and two men. Each interviewer scored the claimant lower than Mr McCann. For the reasons explained above the Tribunal did not consider that

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there were any facts from which it could conclude that in the absence of adequate explanation that the respondent committed the unlawful act of sex discrimination by failing to appoint her to the role of Project Officer.

5 146. The Tribunal then considered if the claimant was selected for redundancy because of her sex. The claimant compare herself to Mr McCann who held the same deleted post of Project Officer but was not selected for redundancy. Mr McCann was not selected because he was successful at the competitive interview for the Project Assistant role. The claimant was unsuccessful and was placed at risk of redundancy. In the Tribunal's view the claimant's sex had no bearing on the issue of the claimant not being interviewed for the Home Renewables Advisor post. While in her submissions the claimant referred to a male being appointed to this role the only evidence before the Tribunal was that that there was a competitive interview for the post following which an internal candidate was appointed. As there was no suitable alternative employment the claimant was selected for redundancy. The Tribunal did not consider that there were any facts from which it could conclude that in the absence of adequate explanation that the respondent committed the unlawful act of sex discrimination by selected the claimant for redundancy.

20 147. The Tribunal then considered the same questions but asked if the reason for the failure to be selected for the Project Coordinator role was because of her age. While Mr Turnbull was in a different age category from the claimant the Tribunal considered that he was in materially different circumstances than the claimant. He had worked as a Project Specialist. The Tribunal considered that a more appropriate comparator would be a Project Officer aged between 25 to 40 with similar experience to the claimant applying for the role of Project Coordinator and attaining a similar score at competitive interview.

30 148. The age range of the interview panel was 35 to over 60. The same questions were asked of each applicant and independently scored by each interviewer. There were no facts from which the Tribunal could conclude in the absence of adequate explanation that the respondent committed the unlawful act of age discrimination by failing to appoint her to the role of Project Coordinator.

149. The Tribunal then turned to the failure to select the claimant for the Project Officer role and whether this was because of her age. The claimant compared herself to Mr McCann.
150. Before the competitive interview the claimant attended the 27 February Meeting when Ms Marquis mentioned the claimant's pension. At the 3 March Meeting Ms Marquis said that the Project Assistant post was wider than administration and was also expected to be much busier than the Project Officer post had been. At the competitive interview the claimant and Mr McCann were asked the same questions by the same interview panel with an age range of 35 to over 60. Each interviewer scored the claimant lower than Mr McCann. The Tribunal did not know if Mr McCann was a member of the pension scheme but in any event as he was under 55 years of age this was irrelevant in relation to redundancy payments and early access to a pension. In relation to wider skills Mr McCann had also worked as a Home Renewables Advisor; held the post of Project Specialist for a few months and scored higher than the claimant on the technical questions.
151. The Tribunal was not satisfied that the claimant had proved facts from which it could conclude in the absence of adequate explanation that the respondent committed an unlawful act of age discrimination by failing to appoint her to the role of Project Assistant.
152. The Tribunal then considered if the claimant was selected for redundancy because of her age. The claimant compared herself to Mr McCann who was aged between 25 and 40 held the same deleted post of Project Officer but was not selected for redundancy. Mr McCann was not selected because he was successful at the competitive interview for the Project Assistant role. The claimant was unsuccessful and was placed at risk of redundancy.
153. The Tribunal felt that the raising the claimant's membership of the pension scheme at the 27 February Meeting was understandable in the context of obtaining advice on the options available to the claimant when at risk of redundancy. The Tribunal considered that it was relevant that Ms Marquis did

not know the claimant's situation at that stage, and it was not until May 2020 that details were obtained from the pension provider.

154. The Tribunal was surprised at the claimant's interpretation of Ms Marquis' comment about the role of Project Assistant being busier as a comment about the claimant's age. There was no evidence that the claimant's age had any impact on her ability to undertake her existing role or a more challenging one. Ms Marquis ages with the claimant and undertakes an equally busy role.

155. In the Tribunal's view the claimant's age had no bearing on the issue of the claimant not being interviewed for the Home Renewables Advisor post. While in her submissions the claimant referred to the appointee being aged between 26 to 40 the only evidence before the Tribunal was that that there was a competitive interview for the post following which an internal candidate was appointed. As there was no suitable alternative employment the claimant was selected for redundancy. The Tribunal did not consider that there were any facts from which it could conclude that in the absence of adequate explanation that the respondent committed the unlawful act of age discrimination by selected the claimant for redundancy.

156. Having reached the conclusions that it did the Tribunal dismissed the discrimination complaints.

20 *Unfair Dismissal*

157. The Tribunal then turned to consider what was the reason or principal reason for dismissal. The respondent says that the reason was redundancy or some other substantial reason. The claimant did not accept the rationale behind the reduction of the role of Project Officer.

25 158. As the respondent asserts that the dismissal was for redundancy it must show what is being asserted is true: the claimant was redundant as defined by statute. The Tribunal referred to section 139(1)(b) of the ERA.

159. The Tribunal found that in 2020 there was a restructuring exercise which resulted in the reduction of the respondent's requirement for the role of Project Officer. Three roles were deleted. While three new roles were created

only one of these, the Project Assistant role was similar to the Project Officer role. The Tribunal was satisfied that a redundancy situation existed.

160. The Tribunal then considered if that is what caused the claimant's dismissal. The claimant suggested that her dismissal was related to her complaining to the respondent about bullying by her colleagues. While in October 2019 the claimant raised issues with Mr McGonigle about colleagues' behaviour the Tribunal did not consider that was the reason behind the decision to restructure the ABS department. In the Tribunal's view the reason behind the restructure was concerns about the ability to meet quality standards; inconsistent performance in different regions and Mr McGonigal's other business commitments. The Tribunal acknowledged that the claimant complained again to Mr McGonigal in early February 2020 which coincided with the start of the consultation process but that appeared to be coincidental. The respondent had delayed the process pending the tender for North Ayrshire and due to annual leave the claimant and Mr McCann had little involvement with each other in January 2020.

161. The Tribunal concluded that the reason for the claimant's dismissal was redundancy and that it was a potentially fair reason under section 98(2)(c) of the ERA.

162. The Tribunal then asked whether in all the circumstances did the respondent act reasonably in treating redundancy as a sufficient reason for dismissal under section 98(4) of the ERA. The determination of that question depends on whether, in the circumstances, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably in treating it as a sufficient reason for dismissing the claimant and shall be determined in accordance with equity and the substantial merits of the case.

163. The Tribunal was mindful that it had to ask if the dismissal lay within the range of conduct which a reasonable employer could have adopted.

164. The respondent's procedure for handling restructuring/redundancy is the Framework. The Tribunal appreciated that where possible the respondent follows the procedure of South Ayrshire Council. However, the Tribunal had

difficulty understanding why the respondent agreed to adopt this procedure which is plainly for a local authority and not an employer of the size and administrative resources of the respondent.

5 165. The most obvious difficulty is that under the Framework the complaints procedure about the outcome of matching provided for complaints to be investigated by an independent Council Officer and for a right of appeal to the Head of Regulatory Service to be deal with at stage 2A of the South Ayrshire Council's Grievance Policy. Where an employee is not appointed to an alternative post through matching or redeployment their employment is terminated on grounds of redundancy at the end of the notice period there is a right to request a review of the circumstances that led to the redundancy dismissal as outlined in the redundancy policy. The review is not an appeal and is considered by South Ayrshire Councils Appeals Panel who if they have issues/concerns can refer the matter back to the Head of Regulatory Services to discuss with the employing service Executive Director.

10 166. These procedures cannot be followed by the respondent. Any complaint about that matching procedure needed to be to someone other than the postholders identified in the Framework particularly as Ms Marquis was involved in the matching process. Councillor Cochrane is not an independent Council Officer or Head of Regulatory Service. He is not an employee of South Ayrshire Council. He is an elected representative who sits on South Ayrshire Council. He is the Chair of the respondent's Management Board which is a non-executive post.

15 167. While Ms Marquis may have considered that certain departures were obvious and necessary having decided to use the Framework the Tribunal felt that it would have been helpful when seeking advice from the HR Department of South Ayrshire Council and Unison in January 2020 for Ms Marquis to have considered with them the extent to which it would be necessary for the respondent to depart from the Framework and those departures to have been clear to all concerned when announcing the restructure.

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168. The Tribunal considered where there had been a departure from the Framework and the evidence for that departure.
169. The Framework requires collective consultation with trade unions. While the respondent does not recognise any trade union Ms Marquis did informally consult Unison.
170. The claimant took issue with the reasons for the proposals and the specific changes what were proposed. She considered that the respondent should consider the organisation as a whole notwithstanding the separate funding streams. The Tribunal considered that it was for the respondent to decide how the business was to be restructured and it was entitled to consider ABS separately from HES.
171. In addition to collective consultation the Framework provides for individual consultation by managers with employees affected by the change as soon as practicable “either collectively or individually” and will be accompanied by a representative from the “HR Team” as appropriate.
172. While the respondent received limited HR support from the HR Department of South Ayrshire Council the respondent did not have an HR Team. In any event there was no requirement for an HR Team representative to be present at the 17 February Meeting at which the respondent otherwise followed the Framework. Although the Framework did not require the respondent to meet individually with the claimant, she was provided with the required details in the 17 February Email and the 18 February Email and given the opportunity to raise concerns, comments and objections. While it might have been prudent to offer a specific appointment for this purpose the Framework does not specifically state this and other than the claimant all affected employees took up the offer.
173. The affected employees returned the preference forms by 18 February 2020 which was earlier than the deadline. This allowed the respondent to start the competitive interviews. The Tribunal considered that this was a reasonable approach given that the new structure was expected to be in place by April

2020 and until the Project Manager post was filled there was uncertainty about other posts that might be available.

174. Mr Filby having been appointed Project Manager, there were competitive interviews for the Project Coordinator role. The claimant was unsuccessful. She was informed of the decision and given feedback.
175. At this stage a decision was taken by Ms Marquis and Mr McGonigle that of the remaining applicants: the claimant and Mr McCann neither had the required skill set for the role of Quality Inspection Assistant. Indeed, Mr McCann had not expressed any interest in applying for that role. The Tribunal accepted that when this post was created the respondent did not know which employees would apply and be successful for which roles. The claimant did not assert at the 27 February Meeting that she had the required skills and that she should be interviewed for that post.
176. At this point it was apparent that there were two applicants and only one post which had greater responsibility and did not directly replicate the deleted post of Project Officer.
177. On 27 February 2020 the respondent consulted individually the claimant and Mr McCann. No member of the HR Team was present but there was no requirement for this. Neither employee was offered the right to be accompanied by a trade union representative or work colleague as required by the Framework. The claimant did not raise an issue about this at the time or subsequently. There were notes taken at the 27 February Meeting which were sent to the claimant for comment. The claimant also made notes.
178. At the 27 February Meeting the claimant was advised that she was at risk of redundancy; there was discussion about the Quality Inspection Assistant role; that a competitive interview was scheduled on 2 March 2020 for the Project Assistant role; voluntary severance and where advice might be sought. The claimant was given an opportunity to comment. While she raised the post of Home Renewable Advisor, she did not indicate that she was interested in this post but rather suggested that it was a post that Mr McCann had previously held.

179. The respondent did not send a letter to the claimant setting out the points. The Tribunal considered that this was not unreasonable given that the competitive interview was a few days later. The competitive interview process for the Project Assistant role was in line with the Framework. The decision was unanimous. The claimant was unsuccessful and Mr McCann was appointed.
180. The Tribunal considered that at this point the claimant was at risk of redundancy. Her post had been deleted. There was no suitable alternative employment. The Framework refers to a no compulsory redundancy pledge. The Tribunal agreed with Mr Mowat's submission that this is a pledge by South Ayrshire Council in addition to the statutory and contractual undertakings in the Framework. It was not unreasonable given the respondent's size and administrative resource for it not to be bound by this pledge and the Tribunal did not understand the claimant to argue that.
181. Ms Marquis met the claimant on 3 March 2020. From the heading in the notes taken by Ms Marquis the Tribunal considered that the 3 March Meeting was to give the claimant feedback on the interview the previous day. The Tribunal did not understand it to be a consultation meeting under the Framework. However, the discussion moved to the claimant's response to the outcome and her complaints about Mr McCann and Ms Ross. It was the claimant who asked what was to happen next. The Tribunal considered that as with the feedback on 27 February 2020, Ms Marquis did intend to have a separate meeting with the claimant to discuss the next stage. That did not happen as the claimant was understandably upset but had already packed her belongings inferring that she was not returning to work.
182. While it is arguable that the claimant should have been sent an at risk of redundancy letter following the 27 February Meeting, given the proximity of that to the 3 March Meeting when the claimant was told that she was unsuccessful at interview; there was currently no suitable alternative employment and she was selected for redundancy the Tribunal considered that it was understandable to issue the 3 March Letter giving notice of termination of employment in accordance with contractual entitlements.

183. The Tribunal considered that the claimant had in the circumstances been adequately warned and consulted the claimant about her risk of redundancy and the selection process.
184. The Tribunal next considered if the respondent adopted as reasonable selection decision including its approach to a selection pool. In the Tribunal's view it was a matter for the respondent to determine how to restructure its business. Given the separate funding streams and the need to restructure ABS there was a logic to the approach that the respondent took.
185. The Tribunal's impression was that in early 2020 the respondent thought that all employees would be retained within the new structure. Given that there were the same number of posts in the new structure the Tribunal felt that this was a reasonable approach. The Tribunal did not accept that the respondent should have known from the start that the Quality Inspection Assistant post would need to be advertised externally as that depended on who applied for which posts and were successful. It was only as the process developed it became apparent that the remaining displaced employees did not possess the essential requirements of the post candidates.
186. When there were two displaced employees applying for the Project Assistant post it was reasonable to adopt the view that whoever was unsuccessful in the competitive interview would be selected for redundancy and dismissed for that reason if suitable alternative employment was not found. Had the claimant been successful then Mr McCann would have been so selected and vice versa.
187. The Tribunal then asked if the respondent took reasonable steps to find the claimant suitable alternative employment.
188. The Tribunal noted that the 3 March Letter confirmed that during the contractual notice period the respondent would try to identify suitable employment for the claimant.
189. The claimant was aware that the respondent was recruiting for the post of Home Renewables Advisor; she had raised this at the 27 February Meeting.

She did not indicate that she was interested in this role but rather mentioned it in relation to Mr McCann. The interviews for the post took place on 4 March 2020 and a preferred candidate had been identified.

- 5 190. The Tribunal did not understand that the respondent, or the claimant considered that this post was suitable alternative employment for the claimant. It attracted a lower salary. Nonetheless Ms Marquis did bring it to the claimant's attention and advised that if she was interested, she would be invited for an interview. Ms Marquis also said that the claimant would be informed of any other vacancies that may arise.
- 10 191. While Ms Marquis put a time limit for the claimant to express her interest the Tribunal did not considered that this was unreasonable. The claimant already knew about the post and had not previously been interested, the contract was scheduled to start around 1 April 2020 and interviews had already taken place.
- 15 192. The claimant says that she was interested within the time limit. Her emails suggested that she was not interested and did not think she would be suitable for the job. While the claimant suggested in evidence that she was being sarcastic that was not evident, and she did not follow the matter up with anyone else or raise this as part of her appeal.
- 20 193. The Tribunal heard evidence about a recruitment exercise for adviser role in HSE in January 2020. These roles were not suitable alternative employment and had been filled by 3 March 2020.
- 25 194. Ms Marquis referred to claimant to Ms Bernard for assistance in applying for posts. Ms Marquis also explored possible training on the HES line in case jobs became available. Unfortunately, there were no opportunities by the time the claimant's notice period expired on 24 June 2020. The Tribunal considered that the respondent took reasonable steps to find the claimant suitable alternative employment.
- 30 195. The Tribunal then asked whether dismissal was in the range of reasonable responses.

196. The Tribunal noted that after the 3 March Meeting Ms Marquis did not meet with the claimant. The Tribunal appreciated that Ms Marquis was on annual leave and then had to self-isolate. The national lockdown was then announced. In the circumstances the Tribunal considered that it was reasonable for them not to meet especially as they continued to communicate by email.
197. The Tribunal considered the appeal process. The Tribunal had already concluded that the respondent had to depart from the Framework. The Tribunal understood the claimant's difficulty in navigating the Framework. However, the 3 March Letter did state to whom the appeal was to be made and the claimant wrote to Councillor Cochrane on 12 March 2020 advising that she wished to appeal. The claimant sent a four-page summary of her appeal and supporting document on 3 April 2020. It was agreed that the appeal would be conducted remotely on screen.
198. The Tribunal accept the claimant's submission that Councillor Cochrane was not an independent officer of South Ayrshire Council. She did not raise this at the 8 April Meeting. In any event the Tribunal considered that the point was that an independent officer of South Ayrshire Council cannot substitute the decision that has already been taken. By contrast Councillor Cochrane was independent in the sense that he was not previously involved in the matching process or the decision to terminate the claimant's employment by reason of redundancy. He was also the most senior person in the respondent's organisation by virtue of being the Chair of the Board of Management.
199. While it would have been helpful to have clarified before the 8 April Meeting how the respondent was departing from the Framework in relation to the appeal the Tribunal felt that the claimant knew that this was an appeal about the decision to terminate her employment as she raised issues not only in relation to the matching process but also "associated issues" including alleged discrimination.
200. The Tribunal considered that at the 8 April Meeting the claimant was given an opportunity to raise all her concerns. Councillor Cochrane considered what

she had to say, made his own enquires and concluded that the appeal was unsuccessful. He set out his reasoning in writing.

5 201. The decision to dismiss by reason of redundancy is always challenging as it often involves losing employees who would under other circumstances have continued to be employed. This decision was further exacerbated by the national lockdown and the fact that there was limited alternative employment. While the decision to dismiss was regrettable the Tribunal concluded that it was in the range of reasonable responses.

10 202. In all the circumstances the Tribunal concluded that the decision dismiss the claimant was fair.

203. Accordingly the complaints were dismissed.

15 Employment Judge: Shona MacLean
Date of Judgment: 23 November 2021
Entered in register: 13 December 2021
and copied to parties