Case No: 1805424/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs M Knight

Respondent: Hull City Council

Heard by CVP: **On: 6 to 10 December 2021**

Before:
Employment Judge JM Wade
Mr D Wilks
Dr D Bright

Representation
Claimant: In person
Respondent: Mr R Quickfall (counsel)

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The claimant's Equality Act complaints are decided as follows:

1.1. Disability related harassment: dismissed
1.2. Failure to make reasonable adjustments: the failure to transfer the claimant to an existing vacancy (practice manager role) and/or provide a supervisor, or other support such as HR support, or an advocate, succeed; otherwise dismissed;
1.3. Section 15: succeeds as to the respondent's failure to retain/redeploy the claimant; otherwise dismissed.

2. The claimant's complaint of unfair dismissal is well founded and succeeds.

REASONS

Introduction, complaints and issues

1. The claimant had a long history of working in local government. From 2014 to 2020 she held two posts for the respondent – 21 hours in member services; and 18 hours in housing. She was at all material times disabled by fibromyalgia, depression and anxiety, with, by late 2018, symptoms of PTSD. Pain, fatigue,

and psychological symptoms were part of her daily life, treated with medication and other strategies.

2. In 2017, and from 2018, she had persistent absence from work, being very unwell. A restructure of housing started in 2019 and resulted in her being given notice to terminate her housing post for redundancy, in February 2020. The redundancy took effect in May 2020.

3. The claimant presented clear and concise details about her complaints in her claim form. She then presented forty eight pages of particulars going back to events in 2014. She was refused permission to amend her claims other than to re-label those contained in the claim form. Through two case management discussions the claims were clarified as the allegations below: unfair dismissal and three forms of disability discrimination.

4. The claimant commenced ACAS conciliation on 31 July 2020, with a certificate issued on 27 August and the claim presented on 23 September 2020. Her effective date of dismissal was 7 May 2020 - the unfair dismissal complaint was presented in time. It was due to be heard by the Tribunal in May of 2021 but by reason of judicial resources, was unable to be heard then and came before this Tribunal in December 2021. Evidence and submissions were completed in December but the case was reserved for deliberations of the panel, completed in February 2022.

5. Any Equality Act allegations before 1 May 2020 were potentially out of time. Mr Quickfall was content to leave limitation in the Tribunal's hands – it was not a pleaded defence and he accepted the balance of prejudice was not in his client's favour.

6. The factual allegations and matters for consideration in determining the unfair dismissal complaint were:

6.1. Whether the respondent's reason (redundancy) was a "sham" - this was pursued by the claimant because she did not believe a redundancy situation had existed?

6.2. Whether external advertised vacancies were brought to the claimant's attention or offered to the claimant as alternative roles?

6.3. Whether the redeployment bulletin which contained vacancies between 30 January 2020 and 7 May 2020 were provided to the claimant to consider alternative roles?

6.4. Whether the respondent should have provided to the claimant a guide/advocate/mental health support and/or referred the claimant to occupational health/stress risk assessment/wellness action plan so to ensure the claimant understood the redundancy consultation process and could engage in the same?

6.5. Whether the respondent should have appointed the claimant to two posts which had been ring fenced in the redundancy consultation process?

6.6. Whether the respondent could have offered the claimant some hours to work from the available vacant posts in the structure?

6.7. Whether the claimant should have been slotted into the structure at a grade at the same level or a lower grade?

7. The allegations of adjustments which the respondent ought reasonably to have made were:

7.1. Transferring the claimant to fill an existing vacancy;

7.2. Arranging training for the claimant;

7.3. Modifying the redeployment procedures for testing and assessment of the claimant including providing the claimant with questions prior to the redeployment interview
7.4. Providing a supervisor or other support such as HR support, an advocate, conduct a wellness action plan or tress risk assessment or seek occupational health advice
7.5. Employing a support worker to assist;
7.6. Adjusting the redundancy selection criteria;

8. The allegations of Section 15 unfavourable treatment/harassment were that the respondent:

8.1. Failed to retain/redep!oy the claimant (Section 15 only);
8.2. Sent an email 12.2.2019 to say the role was deleted out of the blue whilst the claimant was off sick (Section 15 and harassment);
8.3. On 8 November gave a short period of time to provide expressions of interests for roles (Section 15 and harassment);
8.4. On 10 January 2020 informed the claimant she was considered for four roles but did not meet the criteria for all four jobs (Section 15 and harassment);
8.5. At a meeting on 12.2.2020 the claimant requested a risk assessment and was assured it wouId take place; it did not (Section 15 and harassment);
8.6. Required to participate in a redundancy process where the claimant was not referred to Occupational Health, no risk assessment/wellness action plan/disability passport was conducted (Section 15 and harassment)

9. Further, in relation to the Section 15 and reasonable adjustments allegations, the respondent's pleaded case, in summary, was that it did not accept that the claimant's disability gave rise to an inability to participate in the redeployment process through cognitive impairment/the inability to think on her feet; and that if it did, the respondent did not know and could not reasonably have known of that disadvantage. The legal issues were set out in case management orders and we do not repeat them here. They will be apparent in our reasoning below.

Evidence and hearing

10. The hearing took place by CVP with the parties' consent. The claimant appeared as a litigant in person. The witness evidence was around two hundred pages of which the claimant's statement was 150 pages or so. That reflected the inclusion of extracts from emails and her own diary entries and other notes. A proportion of that evidence appeared directed at establishing that the respondent had breached its duty of care to her. The Tribunal indicated that it could not decide such a complaint and that earlier material was background to the complaints to be heard.

11. There were material disputes of fact, but not as many as first appeared; in fact the most material dispute of fact was whether the claimant struggled or

was unable to participate in redeployment due to an inability to assimilate information and/or that her cognitive functioning was impaired, including her thinking on her feet. This was her position for her Section 15 claim and her adjustments claim. The respondent's pleaded position was: *…C was alleging that at the time of the restructure/redeployment processes she was so disabled that she was unable to get out of bed and/or to write a shopping list and that therefore she was unable to engage properly or at all in any deployment processes, it is alleged that C's position is over-stated. By December 2019 C was able to return to a senior and responsible part-time role working in Member Services.* The gist of this position was repeated in the re-amended grounds of resistance several times.

12. Apart from this apparent dispute (upon which the respondent's witnesses abandoned the pleaded position, gave evidence inconsistent with it, or could not explain it), there was much common ground.

13. The claimant's husband, her union representative Mr Graham, and her previous housing job share partner Ms Holmes also gave oral evidence on her behalf.

14. For the respondent the Tribunal heard from Mr McEgan, the claimant's line manager, then head of housing management; his line manager Mr Richmond who was the Assistant Director responsible for the housing restructure; and three human resources witnesses: Ms Humble, Ms Booth, Ms Whittles, all of whom had engagement with the claimant over time.

15. The documentary evidence was in two files totalling around fifteen hundred pages.

16. The claimant appeared as a litigant in person, appropriate explanations and breaks were given to put the parties on an equal footing; she had prepared extensive and relevant questions for the respondent's witnesses and Mr Quickfall was exemplary in addressing matters in the hearing as they arose with pragmatism and skill to enable a litigant in person with disability not to be disadvantaged. The Tribunal adopted the following approach in making its findings on the evidence:

16.1. Is the account consistent with contemporaneous material?

16.2. Is the account consistent with subsequent investigations or witness statements given?

16.3. What evidence is there from others about conduct and demeanor at the time?

16.4. What was the Tribunal's impression of the witnesses when questioned: was the impression that they were telling the truth?

16.5. What was the Tribunal's assessment of the witnesses' reliability on relevant matters: were they generally consistent with other material and good historians or were they mistaken in their recollections or beliefs?

16.6. What does the totality of the chronology or circumstances tell the Tribunal about the inherent likelihood of the accounts?

16.7. A genuinely held belief which is wrong, or one untruth told, does not necessarily render other evidence from that witness unreliable;
16.8. The Tribunal has a duty to put the parties on an equal footing during a hearing as part of the overriding objective;
16.9. The formal rules of evidence do not apply to the Tribunal;
16.10. Justice requires witnesses to have the opportunity to comment on disputed matters in, what is still, an adversarial process.

17. The claimant had referred to recordings; and it became apparent that although these had been provided to the respondent and the need for transcripts indicated, a transcript was not available. The practical solution adopted was for the respondent witnesses to listen to a recording of a meeting on 12 February, about which there was significant dispute. The respondent's re-amended pleaded case (that the claimant had asked for a stress risk assessment at a meeting in February), was further developed to concede that a sound was made by Mr McEgan after the request such that she may reasonably have understood that such an assessment would be done; in evidence, he further conceded that she had asked in that meeting for the redundancy to be put on hold (which was denied in the re-amended response).

18. We considered generally that all the witnesses were doing their best to given honest evidence to the Tribunal. Mr McEgan was frank and struck the Tribunal as giving honest evidence, making significant concessions at times. The claimant appeared generally as honest and generally a reliable historian, although on some matters her perception of events was to see sinister intent where there was none; on one occasion she was clearly wrong: the series of events which led to her learning of her post's deletion, for example, but we do not consider that makes her a dishonest witness. Equally, the re-amended response contained matters which were unsustainable on the evidence (the request for notice to be put on hold) when nobody could explain why it was pleaded as it was; we did not consider that the error made Mr McEgan or others dishonest witnesses – more likely the draughtsman had not listened to the recording and relied on incomplete notes of the meeting to draft the response.

19. A further matter raised by the respondent about the claimant's evidence was an unfortunate exchange in the hearing, in relation to an occupational health report from January 2019. The claimant, who had identified that it was not the correct document, but an earlier version, asked Mr McEgan:"why would you put in a report which has been tampered with" – he replied I don't know how you can say that. She then suggested it had been altered – and he replied that he had not changed any documents and could guarantee that he had not tampered with anything.

20. Mr McEgan was entirely right about this. The occupational health report had been subsequently changed, at the claimant's request, by the practitioner. The only issue was that the wrong, or earlier version, had been used by the claimant by mistake in papers both internally, and for this Tribunal. The claimant apologised for her mistake and her question to Mr McEgan.

21. This again served to confirm that the claimant, like anyone else, is fallible in her memory, but also, that where things might have gone wrong, she was prepared to think the worst of Mr McEgan.

22. One final matter raised about our treatment of the evidence, was the claimant's recording of meetings without the consent or knowledge of those present. In a similar vein Mr McEgan took exception to her having written to the chief executive and deputy chief executive about an ill judged email from Mr McEgan in 2018 – in short he had shown his propensity for plain speaking. To record meetings (in circumstances where she had experienced notes not reflecting the reality of a meeting) and to write in the terms she did, were not matters to incline the Tribunal to doubt her evidence. It was instructive of her lack of confidence that meetings would be accurately recorded and that appropriate care would be taken for her mental health.

23. In short, we looked for corroboration for significant findings and used the other tools above to help us assess and check whether evidence could be treated as reliable, accepting that all witnesses believed that they were telling the Tribunal the truth.

The Law

24. The claims in this case are of contraventions of the Equality Act 2010 ("the 2010 Act"). The Disability Discrimination Act 1995, ("the 1995 Act") first regulated these matters much of the case law on reasonable adjustments was developed in relation to those provisions.

25. Section 39(2)(d) of the 2010 Act prohibits an employer discriminating against an employee by subjecting him to "any other detriment". Any other detriment means objectively viewed unfavourable treatment, rather than a subjective and unjustified sense of grievance.

26. Section 39(2) deal also describes specific types of detrimental treatment at work: terms and conditions of employment, access to opportunities and benefits, and dismissal. Section 39(2)(d) above is the "catch all".

27. Section 40 provides that harassment at work is a contravention of the Equality Act. Section 26 relevantly provides:-

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …….. (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

28. The Tribunal used the shorthand "the prohibited effect" for Section 26 (1)(b).

29. In this case three types of discrimination are pursued: discrimination by way of failures to make reasonable adjustments (Section 21); discrimination

because of something arising in consequence of disability ("Section 15" discrimination); and harassment related to disability (see above).

30. Disability is a protected characteristic under Section 4 of the 2010 Act. In this case, by this hearing the respondent conceded that at all material times the claimant was a disabled person by reason of fibromyalgia and anxiety and depression. Section 6(3) clarifies that a reference to a person with the protected characteristic of disability is a reference to a person who has a particular disability.

Section 15 Discrimination

31. In section 15 cases, the key question is the reason why the claimant was subjected to the alleged unfavourable treatment. Section 15 says:

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) The "something arising in consequence of B's disability" is sometimes accepted by the employer; in this case it was recorded in a case management discussion as: "an inability to participate in the redeployment process due to an inability to assimilate information (the claimant's case is her cognitive functioning was impaired)".

32. In T-Systems v Lewis (UKEAT/0042/15/JOJ) His Honour Judge Richardson sets out a four stage test for Section 15 discrimination:

1 There must be a contravention of Section 39(2)

2 There must be unfavourable treatment

3 There must be "something arising in consequence of the disability"; and

4 The unfavourable treatment must be because of the "something".

33. This means at stages 3 and 4 the Tribunal sometimes has to look at two different ways in which facts in the case relate to each other. The first is: does the "something" arise in consequence of disability? Stage 4 is whether the unfavourable treatment was because of the "something".

34. "Because of" at stage 4 means that the "something arising" operated on the mind of the person making the decision (consciously or sub-consciously) to a significant (that is material) extent. See Lord Justice Underhill at paragraph 17 of IPC Media Limited v Millar UKEAT/0395/12 SM and at paragraph 25. The Tribunal, as its starting point, has to identify the individual(s) responsible for the decision or act or behaviour or failure to act which is being complained about.

35. There is also often a "Stage 5" in a Section 15 claim: the employer in the example above can say that the unfavourable treatment was appropriate and necessary to achieve its aim.

36. This type of "justification" defence in section 15(2) is common to many other types of discrimination, including direct discrimination because of age, and indirect discrimination. Whether the employer's "means" are "proportionate" requires the Tribunal to determine whether they were "appropriate and necessary" (taking into account less discriminatory measures) (see Homer v Chief Constable of West Yorkshire [2012] UKSC 15 paragraphs 22 to 25). Section 15 does not derive directly from the European Equality Directive, but there is no judicial decision that the Homer approach should not be applied to Section 15 (2). Even on the bare statutory language, a structured approach is required to considering whether an employer has made out the defence.

Failures to make reasonable adjustments

37. Section 39 (5) imposes the duty to make adjustments on employers and Section 20 explains it:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
>
> *(2) The duty comprises the following three requirements.*
>
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

38. Section 21 deals with failure to comply with the duty:

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

39. An employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement (Schedule 8, paragraph 20 (1) of the 2010 Act).

40. The Tribunal has to address whether the employer knew about both disability and likely disadvantage; if not, ought the employer reasonably to have known of both? See Ridout v TC Group [1998] IRLR 628.

41. As to the type of adjustments that were envisaged by the 2010 Act, the guidance from the 1995 Act is rehearsed in the Code. The Tribunal must take into account those parts of the Code which appear to be relevant:

At paragraph 6.28: whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular to:

- *the extent to which taking the step would prevent the effect in relation to which the duty is imposed;*
- *the extent to which it is practicable for him to take the step;*
- *the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;*
- *the extent of his financial and other resources*
- *the availability to him of financial or other assistance with respect to taking the step;*
- *the nature of his activities and the size of his undertaking.*

At paragraph 6.33, the following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments

- *allocating some of the disabled person's duties to another person;*
- *transferring him to fill an existing vacancy;*

- *altering his hours of working or training;*
- *assigning him to a different place of work or training;*
- *allowing him to be absent during working or training hours for rehabilitation, assessment, or treatment;*
- *modifying procedures for testing or assessment;*
- *providing supervision or other support.*

42. We also note that the purpose of the statutory code, approved by parliament, is to provide a detailed explanation of the 2010 Act and to provide practical guidance on compliance. In Spence-v-Intype Libra Elias P (as he then was) summarised the position in relation to reasonable adjustments under the 1995 Act at paragraphs 43 and 48:

> *"We accept that the concept of reasonable adjustment is a broad one, but we do not consider that this assists the argument. The nature of the reasonable steps envisaged in s4(A) is that they will mitigate or prevent the disadvantages which a disabled person would otherwise suffer as a consequence of the application of some provision, criterion or practice. That is in fact precisely what Lords Hope and Rodger say in the paragraphs relied upon; the duty is not an end in itself but is intended to shield the employee from the substantial disadvantage that would otherwise arise… In short, what s4(A) envisages is that steps will be taken which will have some practical consequence of preventing or mitigating the difficulties faced by a disabled person at work."*

43. This statement of principle is now clear and further developed to the effect that the making of an assessment is not generally capable of being a reasonable adjustment under the terms of the 1995 Act (and by logical extension, the 2010 Act). There is a line of authorities to this effect, including the decision of Elias J, as he then was, presiding over the Employment Appeal Tribunal in Tarbuck v Sainsbury's Supermarkets Ltd [2006] IRLR 664, HM Prisons Service v Johnson [2007] IRLR 951, Environment Agency v Rowan [2008] ICR 218, Smith v Salford NHS Primary Care Trust UKEAT/0507/10 and Rider v Leeds City Council UKEAT/0243/11. The principle applied in these cases is that a reasonable adjustment must be an adjustment designed to enable the employee to attend work or return to work. The carrying out of an assessment achieves neither of these ends in itself.

44. In this case, the relationship between reasonable adjustments/indirect discrimination and Section 15 is at play. Lord Justice Elias in Griffiths v Secretary of State for Pensions.[2015] EWCA Civ 1265 said

25. I would draw attention to three matters with respect to these provisions. First, the definition of discrimination arising out of disability does not involve any comparison with a non-disabled person; it refers to unfavourable treatment, not less favourable treatment. The formulation of the duty prior to the Equality Act, in the Disability Discrimination Act 1995, did envisage such a comparison. In Lewisham London Borough Council v Malcolm [2008] UKHL 43; [2008] 1 AC 1399, a case I consider below, the House of Lords construed the relevant provision then in force so as effectively to make this form of discrimination a dead letter, in practice adding nothing to the concept of direct discrimination. The reformulation of the duty in section 15 of the Equality Act was designed to restore the law as it had been understood prior to Malcolm and thereby give the concept and the protection it affords real substance.

26. Second, it is perfectly possible for a single act of the employer, not amounting to direct discrimination, to constitute a breach of each of the other three forms. An employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled the employee to remain in employment - say allowing him to work part-time - will necessarily have infringed the duty to make adjustments, but in addition the act of dismissal will surely constitute an act of discrimination arising out of disability. The dismissal will be for a reason related to disability and if a potentially reasonable adjustment which might have allowed the employee to remain in employment has not been made, the dismissal will not be justified. Finally, if the PCP, breach of which gives rise to the dismissal, also adversely impacts on a class of disabled people including the claimant, the conditions for establishing indirect discrimination will also be met.

27. Third, it is in practice hard to envisage circumstances where an employer who is held to have committed indirect disability discrimination will not also be committing discrimination arising out of disability, at least where the employer has, or ought to have, knowledge that the employee is disabled. Both require essentially the same proportionality analysis. Strictly, in the case of indirect discrimination it is the PCP which needs to be justified whereas in the case of discrimination arising out of disability it is the treatment, but in practice the treatment will flow from the application of the PCP. Accordingly, once the relevant disparate impact is established, both forms of discrimination are likely to stand or fall together. However, the converse is not true. If it is not possible to establish that the relevant PCP created a disparate impact, the case will not fall within the concept of indirect discrimination but it may nonetheless constitute discrimination arising out of disability….

80. This is particularly relevant to the first proposed adjustment. In substance the complaint is that it was disproportionate to impose the disciplinary sanction given that the absence giving rise to it was disability-related. It is that treatment which lies at the heart of the complaint, not the failure to make an adjustment. The section 20 duty is normally relevant when looking into the future; it is designed to help prevent treatment which might give rise to a section 15 claim from arising. But that is not the purpose of the section 20 complaint here. It is really a staging post in challenging in order to invalidate the written warning - treatment which has already arisen. In my view there is a certain artificiality in arguing the case in that way.

45. As to knowledge, paragraph 25 of the judgment of Mr Justice Underhill (President) in IPC Media Limited v Millar UKEAT/0395/12/SM is a reminder that our starting point is to indentify the putative discriminator (in this case there are several), and to examine their thought processes, conscious or unconscious.

<u>The Law in relation to Unfair Dismissal</u>

46. The relevant sections of the Employment Rights Act 1996 ("the 1996 Act") are set out below:

Section 94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.
(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)

Section 98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

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

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Section 139 - Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to--

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

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

(b) the fact that the requirements of that business--

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

47. As a result of Section 98(1) it is for the respondent to establish the reason for dismissal but thereafter the burden of proof is neutral as to whether the respondent acted reasonably in dismissing for that reason: the latter is a matter for the Tribunal to determine as a matter of fact.

48. A reason for dismissal is a set of facts known to the respondent or beliefs held which cause him to dismiss (Abernethy v Mott, Hay and Anderson [1974] IRLR 213 CA); in a redundancy case, both elements must be established: the fact of redundancy within Section 139; and that it caused dismissal (see Murray v Foyle Meats Ltd [1999] ICR 827; when determining a reason for dismissal one must go to the thought processes of the employer (Amicus v Dynamex Friction Ltd [2009] ICR 511).

49. There are well established principles in the application of Section 98(4) to dismissals for redundancy: R v British Coal Corporation, ex parte Price [1994] IRLR 72 (Admin Ct) (fair consultation means when the proposals are at a formative stage, the consultee has a fair and proper opportunity to understand fully what is being consulted about, to express his views, and thereafter for those views to be considered); Vokes Limited v DC Bear [1973] IRLR 363 (it will not normally be reasonable to dismiss for redundancy unless efforts are made to redeploy that individual); "It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83 [18]; an employment tribunal is bound to have regard to events between notice of dismissal and the date when that dismissal took effect in determining whether the employers acted reasonably (Alboni v Ind Coope Retail Limited [1998] IRLR 131 CA).

50. The following principles hold good for consultation with individuals (see Williams):

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

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

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

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

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

51. When considering the position where dismissal is to be avoided through appointments to new posts, His Honour Judge Richardson in Morgan v Welsh Rugby Union [2011] IRLR 376 said this:

"30 *We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas Williams type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion"….*

"36 *To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)."…*

"39 When making an internal appointment, we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind the employer was entitled to interview internal candidates even if they did not precisely meet the job description; and it was entitled to appoint a candidate who did not precisely meet the person specification. It was, in other words, entitled at the end of the process, including the interview, to appoint a candidate which it considered able to fulfil the role. We do not, therefore, see any error of law in the approach of the Tribunal to this matter; and we do not consider the approach of the majority to be perverse."

52. The same principles have been examined in Samsung Electronics (UK) Limited v Monte-D'Cruz UKEAT/0039/11/DM, and in Cumbria Partership NHS Foundation Trust v Steel UKEAT/0635/11. The latter illustrates that the Tribunal's task in applying section 98(4) is to ask whether the respondent acted within the band of reasonable responses of a reasonable employer in the circumstances, rather than to substitute its own view. In Cumbria the Tribunal

found it was outwith the band to adopt a minimum competency benchmark, when that was not part of its publicised redundancy policy, nor had been adopted before. That was held by the Employment Appeal Tribunal to be a permissible conclusion displaying no error of law.

Findings and conclusions

53. The respondent's chronology sets out a summary of the relevant chain of events, and is to be read into these reasons. To the extent these findings depart from the chronology (and they do in two material respects), these findings are to be preferred. We set out our findings and conclusions about the various allegations in the claimant's case in chronological order, to both assist with considering the application of time limits, but also to avoid duplication - the same matters were alleged as two or three types of discrimination, and as contributory factors in an unfair dismissal.

54. At the hearing we heard helpful oral submissions on behalf of the claimant and the respondent. We do not repeat them here. It will be apparent to the parties where they have born fruit, and where not.

Background

55. The claimant had many years' service in local government, including in a neighbouring authority, before re-joining the respondent in 2011 as Principal Member Support Officer (Grade 10)("PMS"). The claimant also held a Landlord Services Manager Grade 12 ("LSM") job share post in Housing, from May 2014, having secured an earlier post in Housing in 2013.

56. The way the dual employment worked in practice, was as follows: the claimant did two eight hour days, plus a three hour (short) afternoon in housing, and two eight hour days plus a five hour (long) morning in member services.

57. The housing LSM post covered estate management, rent collection, and tenancies across the respondent's social housing estate. The city was divided into three, with one LSM post managing teams of people in each area. In the claimant's area she "job-shared" the LSM post. There were therefore four colleagues in total in those LSM posts. Three out of four had disability.

58. The claimant had previously delivered a significant IT change project and had an appropriate qualification; she also had an established track record in managing teams in adult, family and other services: she had managed across all local authority client groups.

59. From the outset of her LSM post, staff beneath her behaved badly towards her and her job share colleague, including, to all intents and purposes, meeting to agree a vote of no confidence in the claimant at a very early stage of her appointment, challenging her authority, putting items on face book, not responding to emails and calls, and other similar behaviours. One colleague, in particular, was very difficult.

60. The claimant's worsening mental health and fibromyalgia was documented through 14 occupational health reports from June 2016 until June 2019; at no stage did Mr McEgan consider that the claimant's conditions were exaggerated by her; he sought to remove strain from work he allocated; he also understood that management of a mental health illness was complicated and that the two main conditions were interlinked.

61. From 11 July 2018 the claimant was absent from work from both posts. She was very unwell and attributed her ill health substantially to her treatment

by colleagues in housing. She also acknowledged to occupational health that she had experienced significant adverse personal life events.

62. She was, throughout this period, subject to absence management from Mr McEgan and HR, using the respondent's absence management procedure. An HR representative was allocated to attend all meetings at the claimant's request, and that representative had no alignment to the housing department.

63. After PTSD symptoms developed at the end of 2018 the claimant told Mr McEgan that she did not want to return to work in the same housing role, "as it will just continue to perpetuate the issues that have led to my current condition". She confirmed the same in a discussion with occupational health the following month (January 2019).

64. On 6 February 2019 the respondent notified the start of collective consultation on a restructure of housing grades 10 to 14. This eliminated eight posts, including the three LSM posts under Mr McEgan. New posts were created. The overarching ambition of the restructure was to provide more resource for housing, not less; and to transform it to a high performing part of the council's service. Three LSMs (one for each part of the city) were to be replaced by one city wide Operations Manager (for the rent collection and estate management part of the role); lettings were to be moved to a further new Grade 12 position: "Access Manager ".

65. The restructure was led by Mr Richmond.

<u>The events about which the claimant complains (these findings and conclusions are subject to a decision on limitation)</u>

66. On 6 February 2019, the same day as all affected staff at work were told of the restructure by their managers, Mr McEgan forwarded invitations to briefings on 9 and 11 February to the claimant, suggesting that he was unsure if she could attend, but assuring her he would send her an invitation to a meeting with him.

67. She said she would not be able to attend, and she said: "I would appreciate you sending me the details". he agreed to send her all the details in the post "as soon as they are released". He copied that communication to the HR colleague working with him on the absence management of the claimant.

68. The claimant's three LSM colleagues (or certainly two of them), who were at work at the time, were invited to a meeting to let them know of the commencement of consultation, with Mr McEgan.

69. On 12 February, after the presentations had been presented to staff at work, Mr McEgan sent the claimant the "staff consultation pack" - a power point presentation, setting out the full details of the proposals for the restructure. He told her within the body of his email that regrettably the main impact was the deletion of the LSM roles. He offered to be in contact after the ringfencing of current job roles had been completed.

<u>Sending an email 12.2.2019 to say the role was deleted out of the blue whilst the claimant was off sick (Section 15 and harassment);</u>

70. The email was not sent out of the blue; it was prefaced by contact days earlier. The news on 12 February may have been unwelcome, but informing the claimant, as she had asked, was not unfavourable treatment **because of** her inability to participate in the redeployment process due to an inability to assimilate information/cognitive impairment (on which we make findings below and use the short hand, "inability to participate"); nor was it conduct **related to disability**. Mr McEgan was just doing what the claimant had asked him to do in

sending the documents. He outlined the main point for her from the complex presentation in the cover email. The claimant is mistaken that this came out of the blue, and she has an unjustified sense of grievance about this, however unwelcome the news. There is no detriment, applying the relevant principles, and even if there is, it was not because of the claimant's inabilities at the time, or related to her disability. These allegations do not succeed.

The slow progress of the restructure

71. The claimant then took part in a consultation meeting at her home on 29 March 2019; as there were more jobs than posts, Mr McEgan told the claimant not to worry about the restructure, or words to that effect. The claimant remained unwell.

72. The timetable set for the restructure was, overall, considerably delayed for reasons unconnected with the claimant. Eight new job descriptions were provided to colleagues affected (including the claimant) by Mr Richmond on 24 May; Mr McEgan forwarded the email to the claimant's home email address to make sure she had it; there were around 100 pages of information – more than 10 pages for each post. Mr Richmond was happy to receive comments on those new posts before any ringfencing took place.

73. In August the claimant was told, in a standard letter, that she had been ringfenced at stage 2 to two posts along with the other LSMs. She was told she needed to participate in the selection process for the new posts otherwise a redundancy payment/and or redeployment could be at risk.

74. This reflected the respondent's redundancy/redeployment policies which were absolutely clear that compulsory redundancy was a decision of last resort. **Offers of alternative employment were to be made** to avoid giving notice, or to mitigate hardship, notice having been given. That was the mandatory effect of the two policies read together. As a result it was very uncommon for colleagues to lose employment because of a restructure, particularly, as was the case in this restructure, there were more posts than people.

75. That summer the claimant was also subject to meetings in connection with absence management and a report advised in June that ill health retirement was unlikely to be granted.

On 8 November she was given a short period of time to provide expressions of interests for roles. (harassment/Section 15 discrimination).

76. On or around 8 November, and before the sickness absence procedure reached Stage 3 (potential consideration of dismissal), the claimant was invited to complete a combined "expression of interest" form for the operations manager and access manager posts. The letter from Mr Richmond asked for forms to be returned by 20 November, with interviews likely in the two weeks after that. The form expected those affected to include evidence by way of examples of their skills and competence for the roles, but not in the depth of a full application. The form was abridged.

77. The period for completion of this form was relatively short; but that is set against the claimant and everyone else affected having had the job descriptions for six months at this stage. At this time the claimant was very unwell and completing the form to any deadline was, we find, beyond her. She did not complete it and no action was taken in relation to her failing to do so.

78. Mr Richmond did not ask for the form to be completed because of the claimant's inability to participate, nor was the request conduct related to her disability at all; the claimant's case is about the impact of this upon her and that it was simply not doable for her to participate effectively in such a process. The letter caused her further stress and upset. We accept her case on inability to participate, but Mr Richmond's mind was on being able to have people appointed to posts in a process already delayed. He was not concerned with the claimant's disability or inability to participate at all.

79. As harassment or Section 15 unfavourable treatment, while finding that the requirement to complete the EOI was unwelcome, and that it created a hostile working environment for the claimant by presenting a barrier to acquiring the new posts, the conduct in asking her to do so was not related to her disability or because of her cognitive impairment/inability. It was a step which all colleagues were expected to complete where there were more people ringfenced to a post, than posts (in this case, four people and two posts). As an allegation of harassment or Section 15 discrimination, this complaint is dismissed.

<u>Modifying the redeployment procedures for testing and assessment of the claimant including providing the claimant with questions prior to the redeployment interview (alleged to be reasonable adjustments which the respondent ought reasonably to have made).</u>

<u>On 10 January 2020, informed the claimant she was considered for four roles but did not meet the criteria for all four jobs (Section 15 and harassment);</u>

<u>Whether the respondent should have appointed the claimant to two posts which had been ring fenced in the redundancy consultation process (unfair dismissal);</u>

<u>At a meeting on 12.2.2020 the claimant requested a risk assessment and was assured it would take place; it did not (Section 15 and harassment);</u>

80. By December 2019, the claimant had been absent for 17 months and had run out of sick pay. The claimant believes, with some justification, that Mr McEgan's adherence to the absence procedure was incomplete. Nevertheless, at a Stage 3 meeting on 4 December 2019, the claimant agreed a partial return to work in member services, subject to a phased return plan. Her two managers, her husband, her trade union representative and HR were present. The claimant's housing role had, during her absence, been covered by her job share partner without any agency or other cover; her member services had been covered by temporary cover (both agency and internal).

81. At that meeting the claimant struggled to function: she was in a great deal of pain, her temperature had dipped, she was trembling excessively, she

had trouble forming sentences and remembering details, and she was upset and emotional.

82. The respondent's Director of Legal services chaired the meeting and made findings, including based on occupational health advice, which were recorded in a careful letter. They included that: "you advised that you would not want to return to work [**in your Housing role/the area of the Housing Service where you were previously working]** if you were to face the same situation on your return". This referred to the claimant's belief in the effects on her health of her colleagues.

83. The letter's findings included that the claimant had not responded to the EOI in housing and the restructure. The decisions reached were:

83.1. The claimant's ability to return to work needed to be tested in a phased return to member services, in liaison with the claimant's GP and the respondent's occupational health service;

83.2. The stage 3 hearing was adjourned to January 2020 for a good understanding of how the claimant had coped on return;

83.3. The restructure needed to be progressed and a desktop exercise was to be undertaken to review the claimant's suitability for the new roles (confirming in effect that there was no need to complete the form);

83.4. Further housing positions to emerge in the restructure would be brought to the reconvened hearing in January, when the Director would consider the claimant's progress in returning to member services.

84. On 12 December Mr McEgan wrote to the claimant indicating another vacancy which might arise in housing and asking about her engagement in the process; he also confirmed (as above) that a desktop exercise was to be conducted to decide suitability for the new posts, and her trade union representative could bring information to that desktop review if she wished. That was considered undesirable by the claimant and her trade union representative, because they wrongly understood that the role of the representative would be to answer questions in an interview situation. That was not what was envisaged by human resources, but Mr Richmond's communications were less than clear; human resources intended that any information the claimant wanted to submit could be brought by the union representative and he could attend to observe the desktop (ie paper) review of those ringfenced for the posts.

85. A meeting was offered for 7 or 10 January 2021. That was understood to be an interview appointment (which it was not) and a request was made on behalf of the claimant to have the interview questions in advance. That request was refused by Mr Richmond, but there were, in any event, no interviews. A desk top review did take place on or around 7 to 10 January and the claimant (and her two disabled colleagues) were not appointed to either of the two ringfenced roles, nor to two other Grade 12 roles in the new structure: Specialist Housing and Support Manager and Business Change Manager (which the claimant did not even know she was being considered for). While the four roles were assessed as Grade 12 roles, in reality, as in many restructures, the bar was high for those posts because the respondent's ambition was to transform the service: there were higher expectations of the city wide post than of the regional LSM post and a better candidate existed for the latter post.

86. The assessment of the claimant as not to be appointed, was very brief, and unsupported by her record in local government before the 2018 absence. The obvious mistakes in the very cursory paperwork, the delay in its provision when the claimant requested it, and the delay in providing feedback generally, were unexplained. Mr McEgan's oral evidence, when challenged on these matters, was to the effect that he could not, in reality, support the appointment of the claimant to any of these posts because she was so unwell, and had been for such a long time.

87. His view was consistent with the claimant's case. We find there was an inability to engage in the process through cognitive impairment. He knew this because of her presentation at the December stage 3 meeting. She did not provide paper evidence sufficient to convince him that she would be able to deliver to the job specification, and she had not been delivering in her current post through ill health for some eighteen months. She was not, with reasonable grounds, considered appointable to any of the Grade 12 posts, at that point in time, Mr McEgan exercising his judgment in good faith.

88. The claimant had commenced her phased return to her member services role on or around 18 December by attending the respondent's headquarters with her husband and trade union representative for a few hours, and spending a short time in her office. She even found locating her office difficult; at times "fibro fog" impaired her thinking and she struggled with that first visit back to the workplace.

89. She then had some holiday and in January 2020 attended the member services role on a phased return: in the first week attending on one afternoon only, with the second week off by pre-arrangement; the third week, she attended a day a week; and the fourth week of January, a day per week.

90. There was no reconvening of the stage 3 absence meeting in January. It was not until 25 February 2020 that the claimant was at work three consecutive days per week.

91. It was during the second week of January when not attending work at all, that the claimant received the unwelcome news that she had not been appointed to any of the four Grade 12 roles for which she was considered, and she wrote in brief, careful, and measured terms to Mr McEgan expressing her upset about that, and its impact on her symptoms. Those measured terms were in contrast to her diary entries at the time, which were written in streams of consciousness, which betrayed the claimant's overwhelming feelings of injury at the hands of the housing department. It is clear that the claimant's functioning fluctuated; at times she was her former self; at times not.

92. We find the claimant was impaired from engaging in a competitive appointment process because of her complex disability, and her functioning was being made worse by the strain of a restructure process in which her post had been eliminated. The outcome of the desktop appointment process was unfavourable treatment because of something which arose from her disability. Informing her of the outcome was not related to her disability; it was a necessary step in the respondent's process in order to bring its restructure to a conclusion, and to enable other appointments to those key posts to be progressed.

93. We then come to consider justification for the unfavourable treatment. In this case the respondent said the claimant's dismissal was a proportionate means of achieving its legitimate aim, which was said to be: "*the finality of the process; the respondent could not continue to employ C in a deleted post and there were no vacant posts for which C was considered suitable….Dismissal from the Housing Role was a proportionate means of concluding a redundancy process which could not continue indefinitely."*

94. In our judgment the respondent, and in particular Mr McEgan, knew very well from his engagement with the claimant that she was impaired from engaging with this process, because she had told him; and he had witnessed her being very unwell; he knew she was returning to work in member services only, to see if she could manage that, in the knowledge that a capability dismissal may be considered if she could not do so.

95. The discriminatory effect on the claimant of not appointing her to the four posts, because she could not participate in an appointment process nor demonstrate the capacity for them at that time, is to be weighed against the respondent's need to finish its restructure and start delivering its aspirations for its housing service – for the residents and those waiting for housing in the city.

96. We consider it **was** appropriate and reasonably necessary to not appoint the claimant to those posts, and to tell her so. The respondent needed significant leadership posts to be filled by colleagues capable of delivering operational and other leadership for the client groups without further delay. The restructure had already taken far longer than expected. The Operations Manager post needed to be filled first, before the changes could be implemented for lower operational grades; and there was a better candidate at that time.

97. Less discriminatory means were not canvassed in any detail before the Tribunal but sufficient for us to find they would have been to appoint the claimant to 19 hours of the Operations Manager post, relying on her pre 2018 record, and taking a leap of faith that she would recover her pre 2018 functioning. Alternatively, appointing her to 19 hours of any one of the Grade 12 posts; and in either post appointing another colleague to the balance, but on a permanent basis for half the role, and a temporary cover basis for the claimant's 19 hours, until she was well enough to undertake the role.

98. We consider these potentially less discriminatory means may well not have achieved the respondent's legitimate aim; such a course would have perpetuated uncertainty in significant leadership posts at a very important time. Furthermore, it would have delivered very little real benefit to the claimant as she would not have been entitled to be paid in the new post, until she was well enough to return to it; she would have retained the post in name only and absence management would have continued. In our judgment, weighing the discriminatory effect on the claimant against the respondent's legitimate aim, we conclude it was appropriate and reasonably necessary not to appoint the claimant, and to tell her of that.

99. As an allegation of harassment, telling the claimant she did not meet the criteria for all four posts was telling her the respondent's good faith, on reasonable grounds, belief. Yes that news was unwelcome; yes it related to the claimant's disability because that was disabling her from her previous

functioning at the time; but Mr McEgan did not have as his purpose violating her dignity or creating the prohibited effect; others were present at the meeting and there is no suggestion the news was delivered in a way to suggest that. Was it reasonably to be perceived as doing so – it is difficulty territory to give bad news which is inextricably related to disability, and Mr McEgan is a plain speaker. We take into account the claimant's subjective feelings of extreme upset at the time, driven by her view that colleagues were to blame for her health, and the context, a recruitment process which was delayed, and whether it is reasonable for this to have the prohibited effect, and we conclude that it did not have that effect. The claimant was entitled to know of the decision promptly, notwithstanding her illness. This allegation also fails as harassment.

100. As to providing interview questions in advance (and/or modifying the testing and assessment for the restructure posts), the claimant has not proved that interviews were a practice or criterion putting her at a disadvantage, because the respondent abandoned them. In any event we do not consider this would have obviated the effect on the claimant of her cognitive impairment in a situation of high stress. The claimant's impairment was such that she could weep, shake and tremble, experience shortness of breath and associated pins and needles and pain, and would not remember relevant matters. Furthermore the claimant's ability at this time to assimilate written information and address it in writing, under time pressure, was also impaired, hence she was unable to complete the EOI. An interview would have been a high stress environment, and so would any other test/selection process requiring her involvement; much like the December Stage 3 meeting. These adjustments, given that the claimant could did not suggest particular modifications other than interview questions, were not ones in all the circumstances the respondent ought reasonably to have made.

101. After the 10 January news, the claimant sought a meeting to understand why she had not been appointed, and also sought the relevant score sheets; these were not provided but a meeting was arranged for 22 January to discuss matters. It is clear from her diary entries that the claimant had not understood fully what was going on in the restructure, which, had she not been impaired, she would have done. Learning in that meeting that she had been considered as not meeting the essential criteria for the posts, that notice might be given, and that she could apply for other posts, was so upsetting that she was too impaired to think sensibly.

102. The Practice Manager post was considered by Mr Richmond and Mr McEgan as one for which the claimant had the relevant skills and was "right up her street". It was a post concerned with policy and technical expertise rather than being directly concerned with operational management. It also had far fewer colleagues to manage. Her most likely response in the January 22nd meeting (taking into account her own notes of the meeting and diary entries) was along the lines of, "how can I consider housing posts".

103. Nevertheless, the practice manager post details were sent to her on or around 29 January, as well as the two Grade 12 posts which remained vacant. She was invited to apply or express interest. She did not know what to do about these because she had received no useful feedback on why she had not been allocated the Grade 12 posts in the first place, and because of her impairments; she did not respond. She was in a very fragile state after the 22 January meeting, only just completing 7 hours per week in her member

services role, and she was trying very hard to achieve a return back to three days per week.

104. The claimant's union representative wrote to express concerns that the impact of the way the restructure was being conducted was materially prejudicing her ability to return to the other post. He alleged a breach of the duty of care by the respondent. He also pointed out that there had been promised a member of HR to work with the claimant, which did not materialise between 10 January and 12 February. On 31 January, Mr McEgan did send the claimant a summary of the key points as to why she was not appointed to the Operations Manager (a better candidate) or the three other Grade 12 posts (essentially there were difficulties assessing whether she had the relevant skill set because information was historic).

105. The claimant attended a meeting on 12 February with her union representative at which notice was given on her LSM role. During that meeting with Mr McEgan present, the claimant said she would lodge a grievance, and asked for the redundancy to be put on hold pending the outcome of that grievance. Mr McEgan said he would talk to "legal". She also asked for a stress risk assessment to be done. Mr McEgan made a sound which the claimant considered was an agreement that a stress risk assessment would be done.

106. The respondent did not at any stage conduct a stress risk assessment of the impact of the restructure on the claimant. Mr McEgan's explanation was that this was something to be done in the context of a new post being identified – ie it was not something for him once the claimant was, as it were, handed to HR for redeployment. This misses the claimant's point: she believes the respondent should have risk assessed the restructure itself for possible impact on her stress, and potential harm to her as a result. Stress risk assessments had been recommended in the past for the claimant and had been tardy in their delivery, by Mr McEgan. This neglect, or omission, following 12 February was more of the same but it stemmed from a lack of understanding of the nature of the request. The failure did not, therefore, relate to the claimant's disability, nor was it **because** she could not engage with a restructure process – it was because Mr McEgan and others perceived it to be required at the point a new post was being considered or discussed. That position never arose. As Section 15 and harassment, this allegation is dismissed. The Tribunal cannot determine, and makes not comment on, a negligence/duty of care case.

<u>Further material background</u>

107. The claimant did lodge a clear and short grievance the same day. She completed the form herself. She indicated failures in the respondent's duty of care; she complained that there were roles to which she could have been slotted; she considered the process to have been taken at undue speed, without catering for her complex disabilities.

108. Subsequently, she did **not** at any stage ask for her grievance to be put on hold; a colleague was appointed to address it, virtually straight away, but a meeting had not yet taken place by the start of the national lockdown. On 25 March 2020 HR sent a communication asking if the claimant was happy for it to be put on hold. She replied saying she had spoken to the person appointed to investigate, who was to liase with HR for a later date. The claimant was then

waiting for that to happen. Amidst the pandemic the grievance was not investigated or determined and that remains the case.

What was the reason for the claimant's dismissal? Has the respondent established that its requirements for employees to carry out work of a particular kind, had ceased or diminished?

109. Dismissal in his case means the giving of notice to terminate a contract to work as a Landlord Services Manager for 19 hours per week; unusually it does not involve the end of the parties' employment relationship, which was comprised of two contracts.

110. The reason for a dismissal are the facts known and beliefs held which cause dismissal. Mr Richmond knew that the line management work involved in three teams of lettings, rent collection, and estate management people had been conducted for at least a year by 2.5 people albeit there were three FTE posts in the previous structure (the claimant being on long term ill health absence). He had also decided to arrange the work city wide and to appoint two managers to undertake that work, albeit some aspects of the work may have been redistributed. The Tribunal therefore finds that the respondent's core need for employees to undertake Grade 12 **area based** management of lettings, rent collection and estate management had ceased. Rather than three full time area management posts, there was to be a split of the work functionally rather than by area, and it was to be undertake by two rather than three people. We find area based management is work of a particular kind, for the purposes of the Act.

111. This was the reason to give notice to terminate. The respondent has established the principal reason for dismissal was redundancy. Whether the respondent acted reasonably in treating that reason as sufficient reason to give notice falls to be considered both on 12 February, and when the notice expired in May.

Whether external advertised vacancies were brought to the claimant's attention or offered to the claimant as alternative roles (unfair dismissal)
Whether the redeployment bulletin which contained vacancies between 30 January 2020 and 7 May 2020 were provided to the claimant to consider alternative roles (unfair dismissal)

112. We refer to our findings about the mandatory nature of offers of suitable alternative employment within the respondent's procedures. There were no alternative vacant roles offered to the claimant within the housing restructure and before giving notice. In that the respondent acted outside of its own procedures – most notably in connection with the Practice Manager post, for which Mr Richmond considered the claimant suitable.

113. The claimant was required to express interest, rather than simply being offered a post for which she was considered qualified. In failing to make that offer, he was potentially spending council tax payers' money on an unnecessary redundancy payment; he was also requiring the claimant to make a decision to express interest, which she was not well enough to make. There was a deficiency in Practice Manager hours (see page 446) at the beginning of the proposed restructure. When one person succeeded in gaining a different job, the deficiency in hours was even greater – and any number of hours in that

post could have been offered to the claimant. In principle **any** vacant hours in posts in housing for which the claimant was considered to have suitability, with a prospect of return before her contract expired, could have been offered to her between 12 February and 11 May, but there was no further information available from Mr Richmond or Mr McEgan about such vacancies after 12 February. We find that no reasonable employer would have failed to offer any hours in any vacant restructure post, as this employer did, in these circumstances, either by reconvening the Stage 3 hearing, or outside of that process.

114. As to redeployment outside the housing restructure, the redeployment policy provided that redeployment colleagues were to be provided with a vacancy bulletin or list one week before those vacancies were published to general colleagues (or externally). This was in the context that the redeployment policy included a mandate to meet the respondent's Equality Act duties. The respondent had not conducted an impact assessment of the likely impact of its housing restructure on colleagues with particular protected characteristics (for example those on maternity leave, those with disability, those of minority faiths and races). It relied on its redeployment policy.

115. Contrary to the policy and, potentially to its stated aim, the redeployment system had changed by February 2020 (unknown to the claimant or any reader of the policy). The vacancy list was not sent to every colleague seeking redeployment; rather the respondent's recruitment team filtered posts to be sent to such colleagues. They operated a filter by grade and post. They did not, in fact, send the claimant any vacancies at all one week ahead of their publication or advertisement in the period 12 February to 11 May 20. This was despite the fact that there were many vacancies in that period. They did not send any vacancies at all.

116. The respondent's specialist HR practitioner, Ms Whittles, had a formal role from 1 April 2020 to work solely on redeployment; she had previously undertaken this work with a good track record. She conducted this activity for four colleagues (the claimant, her two LSM colleagues, and one other) from January 2020. She identified and offered one alternative role to one of the four at the eleventh hour, but that was agreed not to be suitable alternative employment (in the sense of being reasonably suitable to the person offered) and the colleague exited the respondent with a redundancy payment.

117. Ms Whittles did not provide any roles for discussion or consideration to either the claimant or her job share partner. She considered the claimant too upset and emotional when they met on 27 February 2020, to even discuss redeployment or the claimant's skills. The claimant had spoken about how she had been treated by her housing managers and Ms Whittles had sought to tell her about the support she could provide.

118. Ms Whittles' usual practice was to complete a skills matrix with a colleague and then to look for suitable posts. She did not hear from the claimant about redeployment and she considered that redeployment, "is a two way street – an individual must want to be redeployed otherwise steps taken are unlikely to be successful". She had sent an email on 16 March 2020 asking for a further meeting with the claimant, but the claimant had not responded, and she did not follow that up. The claimant had not received the email.

119. The vacancy list at the material times contained vacancies for managers in Children and Family Services at Grade 12 and Grade 11; a Grade 11 post as an ICT Project Lead for a fixed term; various posts in Children and Young Peoples services at Grade 11 and below (which were not obviously social worker posts) and various other posts. We supplement our background findings above: the claimant had previously been a business manager in adult social care, had managed fostering and adoption services, had been a foster parent herself; and had specific experience in delivering new IT to a service area.

120. The respondent knew throughout, through the sickness absence process and from the claimant's grievance, that she was, for all the reasons above, likely to require greater assistance to redeploy than someone without her disability.

121. Given our further conclusions on reasonable adjustments, and the redeployment policy's aim of ensuring compliance with the Equality Act, the reasonable employer would have at least delivered on its policy requirements. The respondent acted outside the range of conduct of a reasonable employer in all the circumstances of this case context, when it failed to do so.

Whether the respondent should have provided to the claimant a guide/advocate/mental health support and/or referred the claimant to occupational health/stress risk assessment/wellness action plan so to ensure the claimant understood the redundancy consultation process and could engage in the same (unfair dismissal/reasonable adjustment)

Required to participate in a redundancy process where the claimant was not referred to Occupational Health, no risk assessment/wellness action plan/disability passport was conducted (Section 15 and harassmen)

Arranging training for the claimant (reasonable adjustment)

Employing a support worker to assist (reasonable adjustment)

Adjusting the redundancy selection criteria (reasonable adjustment)

122. We consider the first group of allegations as allegations of an employer acting unreasonably, that is outside the band of reasonable responses. The respondent's policy stipulation was for employees to engage in redeployment, and where they did not do so, the penalty was refusal of a redundancy payment. The policy requires suitable alternative employment **to be offered.** It does not require employees to express an interest. The respondent's policies also offer pay protection for a period if a member of staff is allocated in a restructure to a lower graded post.

123. Any reasonable large employer (this employer employed 8000 employees), approaching a restructure of this kind, would have sought advice about what might lessen the obvious negative impact on the claimant. That advice or work could have been done through an occupational health referral, or a stress risk assessment, or a wellness action plan (all of which appear in the respondent's policies), to give practical insight into what might help the claimant engage with redeployment within and without the restructure; and mitigate the

impact of a possible compulsory redundancy process on her. As part of her unfair dismissal case, we consider the respondent's failure to do so to be part of the overall circumstances affecting our Section 98(4) assessment.

124. Formulated as reasonable adjustments pursuant to the Equality Act the body of case law above leads us to conclude that these allegations have to be dismissed. Assessment and advice may be routes to identify practical and reasonable adjustments, but we cannot uphold this failing as a failure to make reasonable adjustments.

125. As allegations of Section 15 discrimination/harassment – requiring her to participate in a process where these things were not done - must also fail. We repeat our comments about the stress risk assessment above. We consider the reasonable employer would have sourced advice and used the other tools in its procedures, but its failure to do so was just that; a failure. It was not because of the claimant's inability to participate; nor relating to her disability. Its failure had an impact on her, and informs our Section 98 (4) conclusion, but it is not an Equality Act contravention.

126. As to the suggestions for a supervisor/guide/advocate/mental health support person, we approach this as follows. The Tribunal has found that the respondent did require the claimant to engage in competitive redeployment within the housing restructure by completing expressions of interest. The Tribunal finds that the PCP of restructure/redeployment engagement (as others are expected to engage in a "two way street" before assistance was provided) – did put the claimant at substantial disadvantage because she had cognitive impairment through her illness; this manifested itself as upset, inability to function on her feet, lack of memory, and so on. We repeat that although "over statement" of disadvantage was pleaded, that case completely failed evidentially.

127. The respondent also had actual knowledge, or ought reasonably to have known – the tearful and shaking meeting, the direct communications seeking adjustments, the need for a very careful and slow phased return; the failure to answer a request to engage; the multiple occupational health advices; the grievance. All of these, and indeed the respondent's evidence, was that it did know the claimant was very impaired at this time and faced the disadvantage she did.

128. No respondent witness could explain why the respondent had included in its re-amended response that it believed the claimant was overstating her position on impairment. It was however put to the claimant that she was able to put together a short written grievance, and was able to engage in writing with her union representative around the same time. That may have been so, but these matters and impairment are not mutually exclusive - recovery of function was expected to need "trialling", indicating it was unlikely to be uniform, and the claimant was at the early stages of that return to work – Mr McEgan in particular considered the claimant to be so impaired that he would not have deployed her in housing, at all, fearing further deterioration.

129. We do consider that one practical step which would have obviated the disadvantage the claimant faced, would have been the appointment of an advocate or mental health support worker to discuss vacancy lists in detail with the claimant, to work with her to capture and understand her skills base, ensure

offers were made to her before vacancies went live; and work with the phased return/absence management process (which appeared to have fallen away) to understand how that return was progressing and how that should inform possible vacancies. In short, someone to enable someone with complex disability to engage with an inherently difficult process, in extremely difficult circumstances, seeking appropriate occupational health input and undertaking appropriate risk assessment.

130. The respondent's case was that it was not reasonable to do so given the existing support afforded to the claimant by other means which was not successful. Her trade union representative did seek to advocate for her, and her husband sought to support her personally, but neither of these two could access the respondent's vacancy list or work with other management and gather the appropriate advice and assistance in connection with vacancies. We take into account that Ms Whittles could have been this person, and that the pandemic pulled her and Mr McEgan's resources away from assisting. Nevertheless, the claimant, as a person with complex disability, was inherently at disadvantage in this restructure, with the likely hardship of losing half her income. No reasonable employer, taking into account the size and resources of this one, would not have undertaken these practical combined measures to enable her to decide, if she were able, to return to different vacant posts on some further hours. We find the respondent ought to have provided an additional support person to work with the claimant on achieving redeployment. We repeat that vacancies were supposed to have been brought to an adjourned Stage 3 meeting for discussion and support of the claimant; they never were.

131. This allegation succeeds as a failure to make a reasonable adjustment and informs our Section 98(4) conclusions.

132. The Tribunal do not consider it was reasonable for the respondent to have to provide training or a support worker, to enable the claimant to **deliver** a Grade 12 housing role. For the reasons above, these measures would have needed to be twinned with the less discriminatory means approach above, which was already fraught with difficulty in achieving the respondent's aim. The issue was not whether she had the skills or could acquire them, but whether the history and her health would enable her to successfully and safely return to one of those roles at some point.

133. Similarly this is not a case where adjusting redundancy selection criteria could assist; the claimant was not "selected" against criteria in the conventional sense: the LSM post was abolished.

<u>Whether the respondent could have offered the claimant some hours to work from the available vacant posts in the structure (unfair dismissal);</u>

134. It will be apparent from our comments above that the Tribunal considers it was outside the band of reasonable responses, in circumstances where the claimant was considered suitable for the Practice Manager post, not to allocate her 19 hours, without interview or assessment, on a phased return as appropriate (given that a colleague would be moving to another post and presumably there could have been a handover over time). This could have been trialed in March, April and early May. It was then for the claimant to say why such an offer of suitable employment was not one which she considered reasonable or doable. The respondent did not identify this as a post which

could not have been done on a job share or part time basis (and recruitment to the other hours achieved through another candidate). We have found that practice managers were not all full time in any event. Mr Richmond agreed the post could have been allocated, and the only reason for not doing so was that to do so was not the process. On the contrary, the respondent's policies required suitable alternative employment to be offered; in any event its Equality Act obligations would permit allocation as an adjustment if that would mitigate disadvantage to the claimant. That would similarly be the case for other vacant posts.

Whether the claimant should have been slotted into the structure at a grade at the same level or a lower grade (unfair dismissal).

135. "Slotting in" appears to be a process of unilateral contract change - that is allocating a post to a person without their agreement but in circumstances where it will often be welcome because the alternative is uncertainty/job loss. In this case we have found, in essence, that it was outside the band of reasonable responses and discriminatory not to offer some of the practice manager Grade 11 post hours without competition. For the reasons above, we do not consider the respondent's decision not to allocate the claimant to some hours of the Grade 12 posts outside the band of reasonable responses in all the circumstances described above.

Failing to retain/redeploy the claimant (Section 15)

136. The finality of the process of restructure was the only legitimate aim pleaded; failing to redeploy the claimant does not achieve or even engage that aim. The respondent had the practice manager vacancy; allocating hours within that vacancy would have assisted to fill the vacancy; offering hours in posts outside of housing would not have interfered with the aim of concluding the housing process.

137. The respondent pleaded that there were no alternative posts that the claimant could do. It has not succeeded in proving that case at all material times; certainly there were posts that the claimant could not do because of her health, in January 2020, when the selection was done. By April, however, there may well have been posts which she could do, and Mr Richmond's evidence was that she could certainly have done the practice manager post if well enough. By the end of February she was working three days a week; by April she may have been able to work five days per week; but this was not explored at all by the respondent to avoid the hardship of redundancy, when it had said it would do so.

138. Its failure to retain/redeploy the claimant, which in this case means retaining her in employment for a further 19 hours a week, was unfavourable treatment. It was because of her inability to engage in the process. It was not a proportionate means of achieving its legitimate aim, when balancing the discriminatory effect on the claimant and its reasonable needs. The discriminatory effect is the hardship described above. The respondent's aim was achieved by delivering recruitment in the Grade 10 to 14 housing restructure and bringing that to a close. We have found there were several roles, that is less discriminatory means, which could have been offered to the claimant to give her the opportunity to return to full time hours. The practice manager post was within housing, and others without. The former would have

helped to achieve the respondent's aim. We have also found that the respondent has failed to make two reasonable adjustments to address the disadvantage she faced. This Section 15 complaint succeeds also.

139. Repeating our conclusions above, we stand back and ask ourselves whether the respondent acted reasonably in treating redundancy as sufficient reason to dismiss the claimant. In light of our conclusions on its approach to avoiding hardship for the claimant, as a disabled person in a recruitment restructure , it will be apparent that we consider the respondent did not act reasonably and the unfair dismissal complaint is well founded and succeeds.

140. As to limitation, it will also be apparent that the contraventions we have found occurred between December 2019 or so, when it was clear to the respondent the claimant was at disadvantage and was not well enough to be appointed to the Grade 12 posts, and her dismissal date.

141. The earlier complaints about 12 February 2019 and 8 November 2019 were presented outside the primary Equality Act time limit. Notwithstanding the claimant's ill health, we would not extend time to address those complaints had we considered them well founded. There is inherent prejudice in facing stale complaints and they were certainly out of time, and the claimant's union could have presented a claim on her behalf sooner, had there been any merit in those complaints. The failure to make reasonable adjustments and to retain/redploy the claimant was conduct extending over a period from December 2020 until her dismissal took effect, and those complaints are properly to be determined as having been presented in time.

JM Wade

Employment Judge JM Wade

Date 4 March 2022