EMPLOYMENT TRIBUNALS

Claimant: Ms M Scott

Respondent: Wyre Borough Council

Heard at: Manchester **On:** 17-21 January 2022 and 2 March 2022 (in chambers)

Before: Employment Judge Leach
Mrs Linney
Mr Gill

REPRESENTATION:

Claimant: Ms L Kaye (Counsel)
Respondent: Ms R Mule-Mullen (Solicitor)

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed.

2. The respondent did not discriminate against the claimant contrary to section 15 Equality Act 2010 (discrimination arising from disability).

3. The respondent did not fail in its duty (under sections 20/21 Equality Act 2010) to make reasonable adjustments

The claim is therefore dismissed.

REASONS

Introduction

1. The claimant was dismissed from her employment with the respondent on 9 September 2019. The respondent claims that the reason for her dismissal was redundancy.

2. The claimant says the dismissal was unfair. She also makes complaints under the Equality Act 2010 (EqA). These are specifically (1) complaints that the respondent failed in its duty to make reasonable adjustments, and (2) the respondent's invitation to attend an appeal hearing amounted to discrimination contrary to section 15 EqA (discrimination arising from a disability).

The Hearing

3. The hearing took place over five days.

4. The claimant gave evidence first. The order of evidence was determined at an earlier preliminary (case management) hearing. The claimant called a witness, Carole Leary (CL). CL was a colleague of the claimant during her employment with the respondent.

5. We heard from Mark Broadhurst, a senior employee of the respondent, who managed the claimant at all relevant times.

6. We also heard from Alice Collinson, an elected councillor with the respondent and chair of the respondent's Employment and Appeals Panel that heard the claimant's appeal against her dismissal.

7. We were provided with a main bundle of documents comprising 778 pages as well as a supplementary bundle provided by the claimant, comprising 116 pages. Unless stated to the contrary, our references to page numbers below are to the main bundle.

The Issues

8. We are grateful to both Ms Rule-Mullin and Ms Kaye for agreeing and providing an agreed list of issues at the end of day one. Various complaints had been withdrawn over the preparation and management of this case prior to the hearing and far fewer complaints than initially included in the claim form remained at the start of the final hearing.

9. We set the list of issues out below:

> *<u>Jurisdiction</u>*
>
> *1. Were the Claimant's claims of reasonable adjustments brought within the time limit set out in section 123(1)(a) and (b) of the Equality Act 2010? This may require the Tribunal to consider the subsidiary issue of whether there was an act and/or conduct extending over a period.*
>
> *2. If not, is it just and equitable for the Tribunal to extend time?*
>
> *<u>Unfair Dismissal</u>*
>
> *3. Can the Respondent show a potentially fair reason for dismissal? The Respondent relies on redundancy and/or some other substantial reason.*
>
> *4. Did the Respondent act fairly in all the circumstances, given its size and administrative resources in treating redundancy and/or some other substantial reason as a fair reason for dismissal?*

a. *Did the Respondent engage in adequate and meaningful consultation with the Claimant?*

b. *Did the Respondent reasonably consider alternatives to redundancy?*

c. *Did the Respondent consider suitable alternative roles?*

d. *Was dismissal within the range of reasonable responses?*

5. *Was the procedure followed by the Respondent fair in all the circumstances?*

6. *If the procedure was not fair; is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

7. *If so, should the claimant's compensation be reduced? By how much?*

8. *Did the claimant contribute to her own dismissal by culpable or blameworthy conduct? If so, should the claimant's basic award and/or compensation be reduced? By how much?*

Section 15 Equality Act 2010 – discrimination arising from disability

9. *What is the unfavourable treatment? The Claimant relies on being required to attend a redundancy appeal meeting when she was unfit to do so and when signed off from work as such.*

10. *What is the something arising? The Claimant's ill-health and her sickness absence from work.*

11. *Does the something arise in consequence of the Claimant's disability?*

12. *Did the Respondent treat the Claimant in the manner described above because of the something arising in consequence of her disability?*

13. *Can the Respondent show the treatment is a proportionate means of achieving a legitimate aim? The Respondent relies on ensuring a degree of finality to restructure process to put the restructure plan into practice, to discharge duty to other candidate and take steps to confirm appointment to the new role. To facilitate the required cost saving envisaged by the restructure.*

Section 20 and 21 Equality Act 20110 – failure to make reasonable adjustments

14. *What is the provision, criteria or practice relied upon?*

a. *PCP 1 – attending appeal meetings whilst absent from work due to ill-health/sickness.*

b. *PCP 2 – the practice of not supplying employees with information about the redundancies/and or related to the redundancies in a timely fashion.*

c. *PCP 3 – the requirement for and/or practice of pressure from management for employees to attend face to face meetings whilst absent from work due to ill-health;*

d. *PCP 4 – the requirement to attend Occupational Health meetings at the Respondent's workplace;*

e. *PCP 5 – requiring employees to engage in and adhere to unreasonable timescales/deadlines whilst absent from work due to ill-health.*

f. *PCP 6 – the practice of failing to make adjustments to redundancy process;*

g. *PCP 7 – require ringfenced candidates to apply for a new post through a competitive redundancy process.*

15. Does the PCP put a disabled person at a substantial disadvantage when compared with persons who are not disabled?

a. PCP 1 – exacerbation of health conditions/disabilities and effective participation more likely to be impeded.

b. PCP 2 – exacerbation of pre-existing health conditions/disabilities and effective participation in the process more likely to be impeded.

c. PCP 3 - exacerbation of pre-existing health conditions/disabilities and effective participation in the process more likely to be impeded.

d. PCP 4 – unable to attend such meetings and/or doing so causes an exacerbation of pre-existing health conditions and disabilities.

e. PCP 5 - exacerbation of pre-existing health conditions/disabilities and an inability to/more difficulty with complying with deadlines.

f. PCP 6 – increased likelihood of a need for adjustments and the employee's participation in and presentation during a redundancy process is likely to be negatively affected. Further, an exacerbation of pre-existing health conditions/disabilities.

g. PCP 7 – the employee's participation in and presentation during a competitive process is likely to be undermined. Further, more likely that there will be an exacerbation of pre-existing health conditions/disabilities.

16. Did the Claimant in fact suffer the substantial disadvantage?

17. Did the Respondent know, or ought it to have known, that the Claimant was likely to be placed at a substantial disadvantage?

18. What steps were taken by the Respondent to alleviate the substantial disadvantage?

19. Were the steps taken reasonable in all the circumstances?

Pre termination negotiations

10. The claimant attended a meeting with the respondent on 8 July 2019. The meeting was held during a period when the claimant was absent from work due to sickness. The parties agree that this meeting was held under cover of "without prejudice" and also that it was a pre termination negotiation within the meaning of s111A Employment Rights Act 1996. (a "s111A meeting").

11. The case involves a compliant of unfair dismissal and complaints of discrimination. Any evidence of pre termination negotiations (including evidence that such negotiations took place) is inadmissible in proceedings on complaints of unfair dismissal (s111A(1) ERA) but not complaints of discrimination.

12. Helpfully the parties agreed that we should simply be informed that a meeting took place on 8 July 2019. We have taken no account of the occurrence of that meeting when determining the complaints in these proceedings.

Findings of Fact

<u>The claimant's employment</u>

13. The claimant began employment with the respondent in May 2005 as a manager in the respondent's housing team.

14. Prior to her dismissal in September 2019, she managed the respondent's care and repair team and the cleaning and caretaking team.

15. At all relevant times the claimant reported to and was managed by Mark Broadhurst (MB) who held the position of Director of Health and Wellbeing.

<u>The claimant's role as an elected councillor</u>

16. In March 2017, the claimant was elected as a councillor for Blackpool Council. That election came part way through an election term. The previous councillor for the relevant ward had retired. This meant that the claimant was up for re-election two years later in 2019.

17. The claimant was required to confirm her intention to stand for re-election by early April 2019. The elections themselves took place in early May 2019.

18. Some employment posts in local authorities are politically restricted. The holder of such a post is restricted from certain political activities including holding office as an elected councillor for a local authority. The respondent's guidance on politically restricted posts is included in the bundle at page 404-407. For the purposes of this judgment, the following is relevant:

18.1 Posts which are on the local government salary scale at spinal column point (SPC) 44 and above are politically restricted. Within the respondent's pay and grading structure this translates to posts which are at grade 12 and above.

18.2 Posts may be politically restricted if graded lower than national SPC 44, where the duties of the post holder involve giving advice on a regular basis to the authority and/or any committee of the authority and/or speaking on behalf of the authority on a regular basis to journalists and broadcasters.

19. The role of care and repair manager had been graded at grade 11 and was not politically restricted. The claimant's election as a local councillor for Blackpool had no impact on the claimant's ability to continue in that role with the respondent.

<u>The claimant's disability</u>

20. The respondent accepts that the claimant has a long-term stress and anxiety condition and that it amounts to a disability for the purpose of the Equality Act 2010 (EQA).

<u>The Service</u>

21. At all relevant times, the Care and Repair Service (Service) was part of the respondent's housing services (Housing Services). MB was the director who had overall responsibility for Housing Services.

22. The work carried out by the Service broadly fell in to 2 parts:-

22.1 Housing improvement services (HIS). These services assisted disabled and/or vulnerable adults maintain independent living in their own homes by helping with repairs and adaptations. HIS enabled qualifying Wyre residents to receive advice on repairs and improvements and assistance in identifying available funding and in carrying out the work itself.

22.2 Minor adaptations services (MAS). This service provided minor improvements to the homes of qualifying disabled residents. “Minor” in this context was defined by cost. The maximum cost of a minor adaptation was £1000.

23. Lancashire County Council (LCC) has a statutory duty to provide a MAS service across the County including Wyre. It fulfilled this statutory duty within the borough of Wyre by sub-contracting the operation of the MAS to the respondent. LCC then paid the respondent to provide this service on the basis of invoices submitted for each minor alteration carried out.

24. There is (and was) no statutory duty on LCC to provide the HIS but holistically (taking account of needs and delivery of wider services across health and social care) it was recognised as a valuable service. The respondent had a particular need for this as it had a higher than national proportion of elderly and/or frail residents.

25. LCC provided the respondent with a grant to fund the costs of operating the Service (principally the HIS). This was about £170,000 per year. This grant was additional to the money received as payment for invoices submitted under the MAS as explained above.

26. The respondent’s operating costs of the Service were around £300,000 per year. In addition to LCCs grant for the HIS (£170,000), funding was also received from (1) Fylde council - £30,000 – as the Service operated by the respondent extended to both boroughs of Wyre and Fylde (2) an allocated budget of £30,000 from the respondent’s overall budget. There was also payment of invoices for the MAS work.

27. Within Housing Services there was also a team responsible for private sector housing issues particularly relating to enforcement and disabled facilities grants (DFG). This was led by David MacArthur (DM), private sector housing manager.

28. A qualifying resident would apply for a DFG when the adaptation required for their home cost more than £1000. The respondent’s DFG team would support residents in this process and then, where a grant application was successful, in arranging for the completion of the works. LCC’s funding to the respondent for DFG work within the borough of Wyre was much larger (about £1.6 million) but a much higher proportion of the works under DFG was carried out by local trades people. Successful DFGs within Wyre were such that the spend exceeded the funds received from Lancashire (MB internal report of 28 November 2018, pages 288/9 at 289).

29. The respondent (not LCC) had a statutory duty to provide the DFG service.

30. The respondent believed that the Service was an important part of health and social care services within its Borough. Prior to the events leading up to the claimant’s

dismissal, it hoped that it would be able to secure more funding (for example from the local clinical commissioning group – CCG) and therefore to be able to expand the Service.

31. LCC's funding was provided under a formal three-year contract to March 2018, with options to extend that for up to a further two years (ending on 31 March 2020).

32. Both the claimant and MB were confident that LCC's funding would continue beyond that current contract, for the whole of the two-year extension and beyond. However, they received news in late November 2018 indicating that this might not be the case and that LCC proposed to end their funding. During the hearing, MB was asked if he expected to receive this news in November 2018. His evidence (which we accept) is that it was *"a bolt from the blue"* and that the news was devasting.

33. LCC also wrote to the respondent and other authorities in Lancashire with a proposal to bring the funding under the then existing contract to an end in December 2019 rather than March 2020. The claimant referred to this reduction in funding for the 2019/20 financial year (1 April to 31 March) as a disaster.

34. By the end of November 2018 therefore the respondent faced the prospect of losing funding for the Service of around £170,000, which amounted to about 56% of the costs of providing the Service.

<u>The claimant's manager</u>

35. As noted already, the claimant was managed by MB whose evidence we heard. He gave evidence that he believed he had a good working relationship with her although also noted that there were occasions when he was required to be involved in resolving what he called "fall outs" between the claimant and colleagues. The claimant did not provide evidence of a good working relationship with MB. She had little respect for MB. She considered that he had been promoted when he did not deserve to be, had denied her training opportunities and blocked her advancement and promotion. (for example, comments in claimant's appeal letter @ 389).

36. The claimant also told us that, through what she termed as historic negative experiences with the respondent, her employer was *willfully disruptive and unsupportive* and that the work environment was *"festering and toxic"* Whilst these charges are not directed solely against MB, they were in part focused on MB and what she regarded as her poor working relationship with him as well as the respondent more widely.

37. We find that the task of managing the claimant was at times very challenging for MB, but that he did so calmly and professionally, even when he was subject to hurtful comments from the claimant.

<u>Active Lives role</u>

38. In January 2018 the respondent advertised a new position with the job title of *Active Lives and Community Engagement Manager*. Internal and external applications were invited. The claimant applied for the role, but her application was unsuccessful. An external candidate was appointed.

39. At this stage, the respondent was not aware that the funding from LCC would be withdrawn in 2019. On the contrary, the expectation was that LCC's funding for the Service would continue.

Proposed restructure

40. As noted above, MB learned in late November 2018 that the respondent proposed withdrawing its funding for the Service. He drafted and submitted a report to the respondent's management board within 5 days of receiving the news.

41. He worked with the claimant to understand better the sums received from Lancashire and the costs of operating the Service. On 26 November 2019 the claimant emailed MB with information requested from her. We note particularly from this email: -

43.1 The team at that stage had two vacancies;

43.2 Staffing costs were just under £240,000;

43.3 External funding received was as noted above, approximately £170,000 from LCC plus £30,000 from Fylde;

43.4 An additional £65,000 had been received from the MAS works.

42. Following the initial shock of the news, the claimant and MB learned that LCC's proposal would be subject to consultation in early 2019 in advance of a decision in February 2019. There were delays to the process and the consultation did not occur until March 2019.

43. Both the claimant and MB worked, before and during the consultation process to try to persuade LCC not to proceed in the way proposed. The claimant acknowledged her own hard work at this stage but did not acknowledge that MB also worked to try to persuade LCC not to follow through on its proposal. We find that both individuals worked hard in pursuit of the common aim of persuading LCC to continue the funding.

January 2019 initial review – consideration of restructure

44. At the same time as the respondent faced the threat of LCC's funding, MB was in receipt of information (from national organisations such as the District Council Network) persuading him that the respondent should consider integrating existing services so that adaptations services were placed within the same team as housing options and handyperson services. These considerations, together with the possibility that LCC would withdraw its funding, caused MB to contact the respondent's HR team in January 2019 to explain that he wanted to consider the possibility of integrating the Service with other Housing services, particularly those provided by the private sector/DSG team.

45. With the input of the HR team, a draft job description and person specification was drawn up for a potential new role of Housing Services manager to head up a more integrated service. These proposals were then brought to the respondent's Job Evaluation (JE) panel for consideration of grading.

46. The JE Panel is made up of employees in the HR team, senior managers and local officials of the Unison trade union.

47. At pages 512 to 515 is a form signed by 3 members of the JE Panel and dated 22 January 2019, which grades the potential new post as Grade 12.

48. An HR employee contacted MB soon after the grading, presuming that MB would then look to progress with the proposal to create the new post and merge the services and to submit a report called an Officer Delegation Report (ODR). MB responded to ensure that the matter was being kept as confidential. He did not say that he would complete an ODR at this stage. We accept MB's evidence that he was at this stage trying to secure the continuation of LCCs funding and that would impact on the structure of the housing services (particularly the Service) going forward. We accept that MB wanted to know what LCC's decision about the funding was before considering the restructure further. At that time, he was expecting to receive this decision in February 2020 (although it was delayed). By late March 2020 he had received clear indications that LCC would be stopping the funding. The respondent's Chief Executive was also clear by this stage that LCCs funding would stop and he wanted MB to take steps to safeguard the respondent's financial position in the light of the forthcoming funding cut. At this stage therefore MB's attention turned to the internal processes he needed to go through in order to undertake a restructure. He arranged to meet with the HR team on 9 April 2020.

Restructure Policy

49. The respondent has a policy called Managing Restructures and Changes of Terms and Conditions (pages 244-251) ("Restructure Policy")

50. Where redundancies may result from a restructure, the Restructure Policy includes a requirement at management planning (pre consultation) stage for a written proposal report.

> *The report should be written in consultation with Financial Services and Human Resources and must include the following information:*
>
> *> A clear rationale for making the changes / including the benefits of the proposals;*
>
> *> Details of the current position including staffing structure and post numbers;*
>
> *> The proposed staffing structure and how it will operate;*
>
> *>The number and grades of staff who are at risk of redundancy, the measures to be taken to avoid potential redundancies and the proposed method of selecting the staff at risk of redundancy.*
>
> *> The proposed method of recruitment to any new posts, ensuring that all appointments are made strictly in accordance with Corporate Policies.*

> *The financial implications of the proposals and reference where appropriate to entitlements to redundancy payments, protected pay arrangements or early release of LGPS pension.*

Restructure Report

51. MB produced a report, with support from the respondent's HR department. A copy of the report is at pages 347-348.

52. The proposal was for the deletion of the 2 grade 11 housing manager posts (the claimant's position as Care and Repair manager and the private sector housing and housing options manager position) and the creation of a new housing manager post with management responsibilities for all teams within Housing Services.

53. MB provided 3 reasons in his report for his proposal:-

53.1 A need for better integration of the DFG and care and repair services;

53.2 Because LCC's funding of the care and repair service would cease;

53.3 Overall financial pressures on the respondent local authority.

54. An explanation for each reason was provided in the report.

55. MB was also instructed by the respondent's HR team, to complete a form called the Officer Delegation Scheme (ODS) form. There are 2 versions of this form on the bundle; one (unsigned) is at pages 523 to 526 and another (signed but dated 6 September 2019) at pages 527a to d. The 2 versions are in the same terms except for the presence of signatures and dates. We comment further on these below.

56. The ODS form contains the same 3 reasons for the proposal as the report. The only significant additional information on the ODS form is a list of all posts and grades within Housing Services.

57. During the hearing, the claimant was critical of there being 2 versions of the form in the bundle, one signed (but dated 6 September 2019 rather than a date in April 2019) and one unsigned. We comment further on this below

Criticisms of the reports (proposal report and ODS form).

58. The claimant's case includes criticism of these documents, stating that they were defective in significant ways.

59. The claimant says that the proposal report did not provide all of the information required by the restructure policy. We find that the proposal report provides:-

59.1 The rationale for making the changes
59.2 Details of the current position
59.3 The proposed staffing structure and how it will operate
59.4 The number and grades of staff who it is proposed will be made redundant.

60. The proposal was (1) to delete 2 posts and create a new post (2) for that new post to be responsible for those services and teams which the 2 deleted posts had been responsible for. At this stage the respondent's restructure proposal was limited to that. The restructure report and ODS make that clear and the required information in relation to this small restructure was provided. To support this, we see that the restructure report starts *"This report relates to a review of the management structure of housing services."*

61. The report does not comment on one aspect that the restructure policy refers to, namely: *The financial implications of the proposals and reference where appropriate to entitlements to redundancy payments, protected pay arrangements or early release of LGPS pension."*

62. The proposal was to ringfence the application process for the new post to the 2 affected postholders. It was premature (and therefore not appropriate) to set out entitlements to redundancy payments, the cost of early pension release and so on.

63. As for the 2 different versions of the report, we find that an unsigned copy was approved and sent to relevant parties in early May 2020 and this was picked up on (and signed) during an appeal process. However, we are satisfied that the report was considered by the relevant parties (HR and finance) prior to its approval. We accept the evidence from MB that this was the case and note email correspondence between him and HR at the time confirming their involvement. (at page 351 for example).

Consultation

64. MB decided to inform the claimant and the other affected employee (D McArthur- DM) of the proposal on 9 May 2019. We accept MB's evidence that he did not begin consultation until this date due to pre booked annual leave that he, DM and the claimant had over and following Easter (Easter weekend in 2019 was 19-22 April). Various leave dates are noted in the diary print outs at 352-355 up to and including Friday 3 May 202.

65. Local Unison representatives were also informed on 9 May 2019 and provided with copy of the proposal report and ODS report.

66. Also, on 9 May, MB met with the claimant and DM. MB explained to both (but in separate meetings) that they were at the beginning of a formal consultation period and he handed them a letter (dated 9 May 2019) explaining this and enclosing a copy of the proposal report. The letter provided to the claimant is at 362.

67. MB had been provided with a template for the meetings by the respondent's HR team. We do not have notes of this meeting. We accept MB's evidence that the template effectively represents a note of the meeting as that was closely followed by him (copy at page 419).

68. Understandably the claimant did not welcome this information. However, the timing of the meeting was particularly unfortunate as far as the claimant was concerned. She had only just (a few days previously) been reelected as a councillor and the implications of the proposed restructure were that the available post was graded as a politically restricted one.

69. The claimant was told that the consultation period would continue until 7 June 2019 (a period of 30 days); she was provided with contact details for the HR Department and for an employee assistance programme operated by the respondent; she was told that no decisions had been made and would not be made until after consultation had concluded. The claimant was also told that consultation would take place with Unison and with her individually and that a meeting would be arranged with her, which would provide an opportunity for her to make any suggestions or proposals and to raise any concerns or questions.

70. MB then met with the claimant again on 22 May 2019. The claimant attended this meeting with a Unison representative. We have not been provided with a note from the respondent of that meeting. The respondent's position is that the "follow up" communication to the claimant (email of 24 May 2019 timed at 16.26- page 369) is effectively the note of that meeting.

71. The claimant has provided a note (pages 678-680). The claimant did not make any reference to this meeting (or her note of the meeting) in her witness statement. She briefly refers to the meeting in a further particulars document provided by her as part of the case management process (para "sss" at page 55). She also provided evidence about this meeting in cross examination.

72. Having considered the note at pages 678-680 and the claimant's evidence, we find the note to be one which sets out the claimant's views about the process, rather than a note of the meeting itself. It includes information and comments that the claimant did not provide at the meeting. It is clear from the note that the claimant had by this stage decided that the process was a contrived attempt to get rid of her and there are reasons stated in the claimant's note as to why they would want to do that:-

a. "supported a colleague- victimization"
b. "age- cheap to get rid of me"

73. The claimant contributed to the consultation meeting on 22 May by raising questions about 3 areas:

a. how one person could do the job of 2 people
b. the impact on other employees in the Service
c. the timing of the restructure

74. MB noted these questions and responded to them in the email at page 369. The claimant was asked whether there was anything else she raised or wanted to raise but did not. Her only point in response was that the consultation should have been wider (i.e. involved all employees within the Housing Services).

75. The claimant's position at this Tribunal (and – as is clear from her note at p678-680 – at the time the consultation was being followed) is that the respondent had made up its mind that it wanted to be rid of the claimant and had therefore contrived this redundancy. In fact, the claimant was the party who had made up her mind by this stage, that she was not going to remain in the respondent's employment. Although she was provided with an opportunity to make suggestions and proposals that might have seen her employment continuing, she focused on finding criticism with the

respondent's motives and processes as well as trying to secure higher redundancy payment

76. The claimant emailed MB on 4 June 2019 with criticisms of the proposal and the process. These included reference to the proposal to integrate the 2 manager roles as a "pseudo restructure exercise" stating that it was only a small part of the full restructure of the services affected; that MB had already made clear that he had determined the outcome, that the proposal put the claimant in an impossible position given the grading of the new post (being politically restricted) and that the date when the consultation commenced was chosen deliberately, having regard to the local elections in early May. It also referred to the Active Lives post that had become available in 2018 and was critical of the respondent's decision not to recruit her into the post when (according to the claimant) it knew that her job was at risk.

77. The claimant also told MB in this email that the stress and anxiety caused to her by the process was making her ill and set out the financial implications of the decision for her. She finished the email by asking the respondent to *"provide a compensatory settlement figure including consideration of an enhanced pension entitlement."*

78. Following the meeting on 24 May and subsequent correspondence, MB hoped to meet with the claimant again as part of the consultation process. He was particularly keen to meet and discuss the contents of her email of 4 June 2019.

79. On 5 June 2019 the claimant commenced a period of absence due to sickness and did not return to work prior to her dismissal. MB hoped to be able to meet with the claimant again before concluding the consultation process. He wrote to the claimant to ask that she attend an occupational health appointment on 14 June 2019 and offered also to meet with her on that day. His offer of a meeting was put in the following terms

> *" As you have been signed off work for a month, I have arranged for you to meet with Occupational Health and the appointment is on Friday 14 May 2019 at 09.15 am in the members library. For your convenience, we could then meet to discuss your email after this at 10am or if you would prefer to have this meeting sooner please let me know."*

80. In her response (email dated 5 June at 20.02pm) the claimant stated that MB had called the claimant on the morning of 5 June 2019 and *"exerted unreasonable pressure on me to meet with you to discuss the content of my email dated 4 June 2019."* She told MB that his *"continued pressure"* had exacerbated her illness. She asked instead for a written response from MB to her email of 4 June 2019.

81. As requested, MB provided a written response. His reply on 5 June 2019 included the following:

> " *..your opinion that I have already made my decision and intend to proceed with the proposed restructure I would answer that yes I do believe it is the right thing to do. I would not have started the consultation*

> *unless I thought it was the right thing to do, however I am open to suggestions raised during the consultation process and will consider these before finalizing my report."*

82. We accept that accurately reflected MB's (and the respondent's) position at that time.

83. We do not criticise MB for contacting the claimant at the start of her illness. In our experience, many managers would make and maintain contact with an employee who is absent due to illness. We do not criticize MB for enquiring about a further meeting with the claimant. He did not persist with this. The claimant responded in clear terms, highly critical of MB and blaming him for worsening her illness. MB then did as the claimant asked and provided a response in writing.

Notice of Dismissal

84. Both claimant and DM were issued with a formal notice of dismissal on 13 June 2019. The consultation process had by then closed and the respondent had decided to proceed with the proposal to delete the 2 existing management posts and create a new management post.

85. The claimant was informed of her redundancy entitlement and also the early release of her pension under the Local Government Pension Scheme. The notice letter:-

a. Provided the claimant with the opportunity of applying for the newly created post. She was told to inform the respondent by 21 June 2019 whether she wished to apply.
b. Provided the claimant with a right of appeal.

86. On 14 June 2019 the claimant wrote to appeal the decision. The claimant's letter is long and detailed. In essence the points raised are:-

a. In relation to the timing of the redundancy – having regard to her reelection.
b. That 33 employees were affected by the redundancy (i.e. the whole of the Housing team) but only 2 consulted.
c. The restructure report had significant deficiencies.
d. Regarding MB's conduct in contacting her whilst absent due to illness.
e. That the redundancy compensation terms were not sufficient.

87. Liesl Hadgraft (LH), the respondent's Head of Business Support, replied to the claimant's letter of appeal. LH's reply effectively informed the claimant that she had not at that stage been made redundant and the appeal was premature. We find the terms of this letter to be puzzling. The respondent had by that stage provided the claimant with notice of dismissal and the right of appeal against that dismissal.

88. The claimant had also made pretty clear by that stage that she would not apply for the new Grade 12 post. LH wrote to the claimant asking for confirmation that was her position and the claimant confirmed it by email on 26 June 2019

89. The respondent then went ahead with its internal recruitment and appointed DM into the new role but first providing the claimant with another opportunity to consider applying for the position (MB email to claimant dated 6 August 2019 – page 397).

Claimant's ongoing sickness absence

90. The claimant continued to be absent due to sickness. On 26 and 30 June 2019 she updated MB that her illness had become more severe. She refers (26 June 2019) to trigeminal neuralgia, persistent headaches and (30 June 2019) large blisters and shingles in her head.

91. There are 3 medical fit notes in the bundle; 4 June 2019 - 2 July 2019 (stress at work); 2 July 2019 -13 August 2019 (stress at work and herpeszoster); 13 August -15 September 2019 (stress at work).

92. The claimant attended an appointment with the respondent's occupational health providers on 30 July 2019 (she had not attended the appointment initially arranged for 14 June 2019 as the OH provider arrived late and the claimant had left by then). The OH report that followed the appointment, included the following:-

a. That the claimant continued to be absent due to work related stress.
b. That she reported low mood that she considered was directly linked to work related stress.
c. That she felt the redundancy was unfair and "constructed."
d. That she reported that had also suffered from shingles and had been prescribed a strong analgesia.

93. The OH advice was that at the date of the appointment, the claimant was unfit for her role and would find attending a meeting a challenge due to her low mood even though the only way of progressing to a resolution would be for her to attend a meeting. The OH adviser stated that the claimant should be better able to cope with a meeting when the symptoms of shingles had reduced and that this may be possible in 2 weeks' time (which would mean on or after 13 August 2019).

94. MB wrote to the claimant on 6 August 2019 following this report. He explained that arrangements would be made to hear her appeal and that those arrangements may take some time but that hopefully that would mean that the symptoms of her shingles would have been reduced. MB had read the OH report and taken account of the advice and recommendations.

95. The appeal hearing took place on 9 September 2019, approximately 6 weeks after the OH referral.

OH appointments

96. Generally, occupational health appointments arranged by the respondent, take place on the respondent's premises. Over her employment with the respondent, the claimant attended 27 occupational health appointments and did so without raising objection.

97. We heard evidence from Carole Leary (CL) who had also been asked to attend occupational health appointments. On one occasion CL asked the respondent if an appointment she was due to attend, could take place away from the respondent's premises. That was agreed and the appointment took place elsewhere.

Invitation to appeal hearing

98. The respondent wrote to the claimant by letter dated 7 August 2019, inviting her to an appeal hearing on 9 September 2019. Unfortunately, this letter was not correctly addressed. It was addressed to house number 55 on the street where the claimant lives, whereas the claimant lives at house number 33. A letter dated 15 August 2019, chasing the claimant for a response was also incorrectly addressed. That second letter did reach the claimant on 18 August 2019 via a neighbor. It also enclosed a copy of the first letter so the claimant did then become aware of the appeal hearing date and arrangements.

99. The claimant raised concerns about the incorrectly addressed correspondence and of a breach of her article 8 human rights and data protection rights. These were considered internally by the respondent's deputy data protection officer. The claimant was provided with an outcome of that investigation, an apology and contact details for the ICO.

Further offer of alternative employment

100. On 8 August 2019 MB wrote to the claimant (at the correct address) to inform her of another post that had become vacant. This was also a politically restricted post however which he acknowledged may well be unsuitable for the claimant.

101. In this letter MB also confirmed to the claimant that (as with the new housing manager post) should she decide not to apply for the post due to its politically restricted status, there would be no adverse impact on her redundancy and early pension entitlement. Understandably, the claimant had wanted this assurance at the stage when deciding that she would not apply for the new housing manager post and the respondent had provided it.

The Appeal

102. The respondent's processes require an appeal against dismissal to be heard by their employment and appeals panel comprising 3 councillors. We heard from Alice Collinson a councillor of the respondent and the chair of the panel which heard and determined the claimant's appeal.

103. The claimant provided the panel with significant detail about her points of appeal, in addition to the detailed appeal letter already provided. She had prepared an 18-page document which she read out to the panel at the beginning of the appeal. This took 2 hours for the claimant to read. She then left the panel with a copy of that document. We highlight the following points raised by the claimant in this written document:-

103.1 That she was still unwell, the task of preparing for the appeal hearing had been very difficult for her and that the panel should bear with her in the event of any delay in her presentation. It is relevant to note here that the claimant did not ask for the hearing to be postponed either before or at the hearing, Instead, she wanted the panel to know that allowances might need to be made.

103.2 That the new post was politically restricted and that she could have chosen to have withdrawn from her candidature for councillor had she known about this before 3 April 2019.

103.3 That all employees in Housing Service should have been involved in the consultation process.

103.4 That there were various other deficiencies in the process – as the respondent had not followed its policies.

103.5 That the claimant should have been moved into the project manager position in 2018 as the respondent should have foreseen the funding issues in 2019.

103.6 That she should have been informed earlier in 2019 of the potential restructure and the impact that would have had on her.

103.7 That not all of the duties of the existing posts were covered in the job description of the new post, that MB's response on consultation was that some duties could be done by (cascaded down to) more junior employees within Housing Services but (1) that had not been covered in the restructure plan and (2) in that event, other employees should have been involved in the restructure;

103.8 That the claimant completed its restructure (by appointing DM to the new post) before the claimant's appeal had been heard.

103.9 That MB forced the claimant to attend an Occupational Health appointment at the respondent's premises.

103.10 That the respondent had targeted the claimant and failed in its duty of care to her and by following this process has caused her to be ill.

103.11 That the respondent had not properly exercised its discretion to fund a further uplift to the claimant's pension benefits under the Local Government Pension Scheme.

104. MB also addressed the appeal panel by reading a pre prepared statement, a copy of which is at pages 739-744.

105. The appeal hearing started at 10am and continued until 4pm. This included time taken for the panel to consider and reach its decisions, which AC estimated was about 2 hours.

106. One of the points raised by the claimant is the extent that the appeal panel relied on an HR adviser for legal and other advice/guidance even though that adviser was not on the panel. AC's evidence is that they asked for some assistance on legal issues (but could not recall the detail of these); that they asked HR to draft the decision letter but that the decision was the panel's own. We accept that.

107. We find AC to have been a candid witness. She struggled to answer some of the questions put to her by Ms Kaye and we find that she and the panel had not considered in detail some of the issues/ points of appeal raised by the claimant. However, we are satisfied that the decisions on the points set out in the appeal decision letter were those reached by the panel and genuinely held by AC.

108. The claimant's appeal was unsuccessful and the claimant was informed of this by letter dated 11 September 2019. In this decision letter, the panel identified 3 key points of appeal and provided its decision in each

The Council has placed you deliberately at a disadvantage in respect of timing of the restructure

109. Under this heading, the panel noted that the timing was "not ideal" given the claimant's candidature for re-election. However, they decided that the claimant's external interests as a councillor should not have made any difference to the business decision about the restructure and also noted their view that there is never a good time to announce potential redundancies.

110. The panel did not agree that the claimant had been blocked from the selection process for the new role; that was a decision that the claimant made.

111. We accept that the panel considered this appeal point and decided that the council had not deliberately placed the claimant at a disadvantage.

Failure to comply with the Restructure Policy and Selection Procedure

112. The panel decided that full and meaningful consultation had taken place with the employees affected by the restructure. It decided that the consultation process should not have been widened to include everyone in the housing services. It noted that this restructure and consultation was about merging 2 posts in to one post.

113. It acknowledged that the claimant could have been informed earlier than 9 May but decided that not doing so did not breach the respondent's policy. It also noted the claimant's involvement in the consultation process with LCC (i.e. about the funding earlier in the year) and Unisons involvement in the initial grading exercise as well as Unison's involvement in the consultation process from 9 May onwards.

114. One of the claimant's complaints is that she was disadvantaged by the respondent's decision to go ahead with the appeal hearing when it did. The claimant was asked whether there were any points, not already contained in her long appeal statements, that she would have made had there been a delay to the appeal hearing. The claimant's told us that there were no other points. The claimant also told us (in

response to a question) that she had no alternative to the decision to merge the 2 management roles.

Failure to comply with the Redeployment Policy

115. Under this heading, the appeal panel set outs its decision on the claimant's appeal points – that she should have been redeployed into the Active Lives role in 2018. Their decision on this point is below.

> ***"It was considered by the panel that the redeployment policy did not apply when the post of Active Lives and Community Engagement Manager was advertised. Recruitment to this post took place in January 2018 and it was unreasonable to suggest that ring fencing and non-competitive selection to this post should have been considered at this time. Your post of Care and Repair Manager was not 'at risk' until the consultation started on 9 May 2019."***

<u>The reason why the respondent dismissed the claimant</u>

116. The respondent says that the claimant was dismissed for reason for redundancy. The claimant disputes this. Part of the claimant's case is that she was not redundant at all; that her dismissal was engineered, and that the engineered process included purposefully grading the new role at Grade 12 to put it beyond the claimant's reach (see for example the claimant's comments in her appeal letter at page 389.)

117. In their evidence to the Tribunal the claimant and CL provided some information which, they say, support the allegation that the respondent wanted the claimant out of the respondent authority. Chronologically, the information goes back to a grievance raised by the claimant in 2008; which itself went back through events from 2007 when a colleague of the claimant returned from maternity leave.

118. The claimant's evidence included snippets of information about certain events. We understand that these were provided so that when considering them either individually or collectively, we would conclude that there was some sort of organizational campaign to remove the claimant. The past events include:

118.1 An ongoing disagreement between the claimant and a more junior employee going back many years. The claimant claims that she had no support yet has not challenged the evidence provided by MB that steps were taken to move the colleague away from the claimant and resolve what was ultimately treated as a personality clash.

118.2 A comment made by the leader of the respondent council at a Blackpool illuminations opening.

118.3 A "look" given to the claimant by the Leader of the respondent council.

118.4 The claimant's decision to support a colleague at their grievance meeting.

118.5 Alleged comments speculating about the claimant's sexual orientation made in 2011.

118.6 That MB designed this redundancy to protect his own position in a senior management restructure later in 2019.

119. We decided that was not for us to reach decisions on the rights and wrongs of these historical issues. We heard the information provided. We considered whether this information caused us to doubt the respondent's position that redundancy was the reason (or principal reason) for dismissal.

120. We decided that redundancy was the reason for the claimant's dismissal

120.1 We considered the budgetary position as it affected the area in which the claimant was employed.

120.2 The claimant's challenges did not to any significant extent challenge the need for the financial savings and restructure.

120.3 We found MB to be a good witness and believed his evidence which explained the reasons for making the 2 management posts redundant and replacing them with a single management post at a higher grade.

Submissions

121. We heard submissions from both representatives and thank them for these. We have considered these in reaching our decisions on the various complaints and issues. We do not set out the submissions in this judgment although reference is made to various points made on submissions in our conclusions below. .

122. The allegations relating to alleged PCP 7 were withdrawn in the course of submissions and do not therefore refer to it in the conclusion section below.

The Law

Equality Act Claims

Time limits

123. Section 123 EqA provides that complaints may not be brought after the end of 3 months "starting *with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

124. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

125. We note the following passages from the Court of Appeal judgment in the case of Robertson **v Bexley Community Centre** **2003 IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."* (para 25 of the Judgment)

126. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT**. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

s.15 EqA Discrimination arising from disability

(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) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

127. Subsection 2 above does not apply to this case. The respondent accepts it knew that the claimant had the disability.

128. In **Secretary of State for Justice and anr v Dunn EAT 0234/16** the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

a. there must be *unfavourable treatment;*

b. there must be *something* that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is *a* proportionate *means of achieving a legitimate aim.*

129. In **Paisner v.NHS England (UKEAT/0137/15/LA)** the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

a. The Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.

b. There may be more than one cause. The "something" might not be the sole or main cause but it must have a significant impact.

c. Motives are irrelevant.

d. The Tribunal should decide whether the/a cause is "*something arising in consequence of*" the claimant's disability. There could be a range of causal links under the expression *"something arising in consequence of…"*

130. When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see most recently, **DWP v. Boyers UKEAT/0282/19).**

S20 EQA Duty to Make Reasonable Adjustments

131. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision* criterion *or practice of [the employer] 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."*

132. We note that, for the duty to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

133. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied (or would be more widely applied).

134. Chapter 4 of the EHRC Code of Practice on Employment 2011 concerns indirect discrimination. Paragraph 4.5 says this in relation to PCPs:-

> *"The first stage in establishing indirect discrimination is to identify the relevant provision criterion or practice. The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

135. Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

136. We also note the recent authority of **Charles Ishola v. Transport for London [2020] EWCA Civ.112** on this point, particularly paras 35-37.

137. It does not matter why a particular group of persons is disadvantaged by a PCP. What is important it that they are; that there is a causal link between the PCP and the particular disadvantage suffered (**Essop and others v. Home Office (UK Border Agency and others) [2017] UKSC 27**.

138. The decision in **Tarbuck v. Sainsbury's Supermarkets UKEAT/0136/06** (Tarbuck) makes clear that, whilst there is a duty on employers to make reasonable adjustments, there is no separate and distinct duty to consult about what reasonable adjustments an employer might make. Whilst that might be good practice, either there has been compliance with the duty to make reasonable adjustments or there has not.

Unfair dismissal

139. The respondent must show that there was a potentially fair reason for dismissal within section 98(1) and (2) ERA. A 'reason for dismissal' is *'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'* **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.**

140. Section 98 (1) and (2) of the Employment Rights Act 1996 (ERA) provides that redundancy is a potentially fair reason for dismissal.

141. Redundancy, for the purposes of the ERA, is defined by s139 ERA.

(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.

(6) In subsection 1 "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.'

142. As the claimant disputes that redundancy is the reason for dismissal the statutory presumption of redundancy (s162(2) ERA) does not apply and the respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA.

143. If we decide that the respondent has shown that the reason was a potentially fair reason (in this case, redundancy) then we need to consider the general reasonableness of that dismissal, applying section 98 (4) ERA.

144. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

145. Procedure is an integral part of the reasonableness test under s98(4) in redundancy dismissals (**Polkey v AE Dayton Services Ltd [1988] ICR 142, HL***).* In this case, the House of Lords decided that a failure to follow correct procedures would make a dismissal to be unfair unless, exceptionally, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. It is what the employer did that employment tribunals must consider when deciding whether a dismissal was fair or unfair.

146. As for the steps that should be taken in a redundancy dismissal in order for the dismissal to be fair in accordance with s98(4) will depend on the circumstances of the case including the size of the employer, the number of proposed redundancies, whether it is necessary to select employees to be made redundant from a pool of similar employees, whether there is a recognised trade union, agreed redundancy procedures and so on.

147. Ms Kaye and I both referred to the well-known judgment in **Williams v. Compair Maxam Limited 1982 ICR 156**. In this case the EAT provided guidelines or principles that a reasonable employer might follow, also making clear that it was not for an employment tribunal to set down its own standards but to decide whether dismissal fell within the range of reasonable responses.

148. The principles are:

a. 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.*
b. To consult with the recognised union
c. To seek to establish criteria for selection
d. To ensure fair selection in accordance with the criteria
e. To look for alternative employment in order to avoid dismissals.

149. Returning to the judgment in Polkey, I note the following extract from the judgment of Lord Bridge (consistent with the principles above)

> "*in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."*

Discussions and conclusions

150. We have considered and reached decisions on the various complaints and issues.

Jurisdiction

1. *Were the Claimant's claims of reasonable adjustments brought within the time limit set out in section 123(1)(a) and (b) of the Equality Act 2010? This may require the Tribunal to consider the subsidiary issue of whether there was an act and/or conduct extending over a period.*

2. *If not, is it just and equitable for the Tribunal to extend time?*

151. We find that the reasonable adjustments claim all relate to the process and decision to dismiss the claimant. Whilst strictly some out of these fall out of the time limit provided for in s123(1)(a) EqA, it is just and equitable to extend time (under

s123(1)(b) so that we can consider and determine all of the issues, not just a selection of them. In reaching this decision, we are satisfied that the relevant evidence has not been adversely affected by the short period that some may have been out of time.

Unfair Dismissal

3. *Can the Respondent show a potentially fair reason for dismissal? The Respondent relies on redundancy and/or some other substantial reason.*

152. We find the reason for dismissal was redundancy. The respondent had a cessation in its requirement for a care and repair manager and for a private sector housing and housing options manager. The definition at s139 (1) (b) (i) ERA is met.

4. *Did the Respondent act fairly in all the circumstances, given its size and administrative resources in treating redundancy and/or some other substantial reason as a fair reason for dismissal?*

   b. *Did the Respondent engage in adequate and meaningful consultation with the Claimant?*

   c. *Did the Respondent reasonably consider alternatives to redundancy?*

   d. *Did the Respondent consider suitable alternative roles?*

   e. *Was dismissal within the range of reasonable responses?*

153. We find the dismissal was fair. The respondent was willing to engage in adequate and meaningful consultation with the claimant. It was the claimant who did not engage in adequate and meaningful consultation. She decided that the process was a “pseudo restructure” and that the outcome of the consultation had been pre-determined. Such was the claimant’s lack of respect for MB and strength of feeling towards the respondent as her employer, that consultation with the claimant (in circumstances where the claimant’s role was at risk)) was almost bound to fail. However as noted, the respondent was willing to engage in meaningful consultation and took reasonable steps to attempt to do so.

154. The alternatives to redundancy were limited but made available to the claimant. We accept that it would have been difficult for the claimant to consider giving up her role as councillor of a neighbouring borough but that was a decision for the claimant to make because of her choice of activities outside of work.

155. The respondent’s process was not without flaws:-

155.1 The claimant and DM were given notice of dismissal and a right of appeal – yet the claimant was then told that her appeal was put on hold pending the process to recruit into the new role;

155.2 Where internal documents (in this case the grading report and the restructure report) required certain signatories, they were not present;

155.3 We would expect notes of consultation meetings to be made and retained, rather than reliance on follow up emails. Such meetings have

significant impacts on affected employees and an accurate record should be made and kept.

155.4 The letter informing the claimant of the date and arrangements for the appeal hearing was incorrectly addressed.

156. We do not agree with the claimant that the dismissal was unfair because the consultation process was not widened to all employees in housing services. The focus was the merger of 2 roles. It would have been "overkill" at that stage to have consulted with 18 employees. To the extent that other roles were affected once the management restructure was finished and implemented, then consultation could have taken place with those employees at that stage. We note that there was no suggestion that any other roles would be deleted; just that there may be some changes in some tasks employees would be required to carry out and, inevitably, a change in the person to whom some of the employees would report to.

157. We have also considered carefully the evidence about the appeal process. As noted in our findings of fact, AC had difficulty responding to some questions put to her by Ms Kaye about the claimant's detailed grounds of appeal. However, we are satisfied that the appeal panel focussed on the following key aspects (1) was there a genuine redundancy (2) was the respondent's procedure followed and (3) should the claimant have been dismissed.

158. Also, and importantly, AC's evidence (which was confirmed by the claimant's own evidence) was that the claimant did not at the appeal stage put forward alternatives to the decision to amalgamate the 2 management roles.

5. Was the procedure followed by the Respondent fair in all the circumstances?

159. We find it was. We do not agree with the claimant that there was any significant departure from the respondent's own policies. We find a genuine attempt was made to engage with the claimant in consultation about a genuine proposal to reduce the operating costs of the service in the light of the significant loss of funding and a business decision to more closely integrate the different services within housing.

160. We also refer to our findings under issue 4 above.

6. If the procedure was not fair; is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

161. Had we decided that the few points of criticism by us meant that the dismissal was unfair then we would have found such unfairness made no difference to the outcome.

7. If so, should the claimant's compensation be reduced? By how much?

8. Did the claimant contribute to her own dismissal by culpable or blameworthy conduct? If so, should the claimant's basic award and/or compensation be reduced? By how much?

162. Issues 7 and 8 are not relevant.

<u>Section 15 Equality Act 2010 – discrimination arising from disability</u>

9. What is the unfavourable treatment? The Claimant relies on being required to attend a redundancy appeal meeting when she was unfit to do so and when signed off from work as such.

163. Whilst the Claimant was invited to a meeting on the 9 September 2019 she not required to attend. Having heard from the claimant at the hearing, we are satisfied that the claimant is a person who is well capable of asking for changes to dates and sticking up for herself. Had she considered it necessary she could and would have requested a postponement and the respondent would in our view, probably have agreed a postponement. The claimant prepared for the appeal (including drafting a long and detailed statement) and then attended the hearing because she was ready and able to present her appeal.

164. The Occupational Health report recommended a delay of 2 weeks. the claimant knew this because she received a copy of the report. There was in fact a gap of 6 weeks.

165. We do not find that the claimant was treated unfavourably as alleged.

10. What is the something arising? The Claimant's ill-health and her sickness absence from work.

11. Does the something arise in consequence of the Claimant's disability?

12. Did the Respondent treat the Claimant in the manner described above because of the something arising in consequence of her disability?

13. Can the Respondent show the treatment is a proportionate means of achieving a legitimate aim? The Respondent relies on ensuring a degree of finality to restructure process to put the restructure plan into practice, to discharge duty to other candidate and take steps to confirm appointment to the new role. To facilitate the required cost saving envisaged by the restructure.

166. Issues 10– 13 do not require a decision.

<u>Section 20 and 21 Equality Act 20110 – failure to make reasonable adjustments</u>

14. What is the provision, criteria or practice relied upon?

a. PCP 1 – attending appeal meetings whilst absent from work due to ill-health/sickness.

b. PCP 2 – the practice of not supplying employees with information about the redundancies/and or related to the redundancies in a timely fashion.

c. PCP 3 – the requirement for and/or practice of pressure from management for employees to attend face to face meetings whilst absent from work due to ill-health;

d. PCP 4 – the requirement to attend Occupational Health meetings at the Respondent's workplace;

e. PCP 5 – requiring employees to engage in and adhere to unreasonable timescales/deadlines whilst absent from work due to ill-health.

f. PCP 6 – the practice of failing to make adjustments to redundancy process;

15. Does the PCP put a disabled person at a substantial disadvantage when compared with persons who are not disabled?

a. *PCP 1 – exacerbation of health conditions/disabilities and effective participation more likely to be impeded.*

b. *PCP 2 – exacerbation of pre-existing health conditions/disabilities and effective participation in the process more likely to be impeded.*

c. *PCP 3 - exacerbation of pre-existing health conditions/disabilities and effective participation in the process more likely to be impeded.*

d. *PCP 4 – unable to attend such meetings and/or doing so causes an exacerbation of pre-existing health conditions and disabilities.*

e. *PCP 5 - exacerbation of pre-existing health conditions/disabilities and an inability to/more difficulty with complying with deadlines.*

f. *PCP 6 – increased likelihood of a need for adjustments and the employee's participation in and presentation during a redundancy process is likely to be negatively affected. Further, an exacerbation of pre-existing health conditions/disabilities.*

16. Did the Claimant in fact suffer the substantial disadvantage?

17. Did the Respondent know, or ought it to have known, that the Claimant was likely to be placed at a substantial disadvantage?

18. What steps were taken by the Respondent to alleviate the substantial disadvantage?

19. Were the steps taken reasonable in all the circumstances?

We comment and record our decision on each claimed PCP in turn

167. PCP 1 – attending appeal meetings whilst absent from work due to sickness.

a. In her submissions, Ms Rule-Mullin told us that the respondent accepts that this PCP was applied but denies that the claimant was placed at any disadvantage. For the claimant Ms Kaye submitted that the respondent failed to take any steps to mitigate the disadvantage.

b. We find that the respondent did take steps to mitigate the disadvantage. They obtained an OH report (shared with the claimant) who made a recommendation that the hearing be delayed for 2 weeks. The hearing was delayed for 6 weeks.

c. We also note that the claimant was willing and able to prepare for the appeal hearing and, had there been a delay, she would not have put forward any additional points (that is what she told us).

d. We also refer to our conclusions under issue 9 above. Whilst the respondent applied a PCP of inviting employees to attend appeal hearings whilst absent due to sickness and applied this PCP to the claimant, they did not require the claimant to attend an appeal hearing when she was too ill to participate in the hearing.

e. We find therefore that the claimant suffered no disadvantage by the application of PCP1.

168. PCP 2 – the practice of not supplying employees with information about the redundancies/and or related to the redundancies in a timely fashion.

a. Ms Rule-Mullin did not accept this is a valid PCP as, the alleged PCP is in reality a complaint made by the claimant because of the way that she was (or perceived she was) treated on this particular occasion.

b. We agree with Ms Rule-Mullin. The respondent's PCP is set out in its own restructure policy. The claimant is not critical of that policy. Her criticism is that the respondent failed to follow its own policy when dealing with her specifically. Further, we had no evidence that a PCP of not providing information was more widely applied. .

169. <u>PCP 3 - the requirement for and/or practice of pressure from management for employees to attend face to face meetings whilst absent from work due to ill-health.</u>

a. There is no evidence that the respondent has a PCP of pressure being applied to employees to attend face to face meetings whilst off sick. Again, this is really a complaint that the claimant has about her treatment during the particular consultation exercise. It relates to the communication with MB on 5 and 6 June. As made clear in our findings of fact, MB did not pressure the claimant to attend. Nor did he require her attendance. When the claimant objected, MB agreed to the claimant's request to provide a reply by email.

170. <u>PCP 4– the requirement to attend Occupational Health meetings at the Respondent's workplace.</u>

a. In her submissions, Ms Rule-Mullin accepted that this was a PCP. Generally, OH appointments are arranged to take place at the respondent's workplace.

b. As stated in our findings of fact, the claimant had attended many OH appointments previously. In so far as the claimant was placed at a substantial disadvantaged in attending an OH appointment on the respondent's premises, the respondent did not know and could not reasonably have been expected to know this.

171. <u>PCP 5 - requiring employees to engage in and adhere to unreasonable timescales/deadlines whilst absent from work due to ill-health.</u>

a. This is another PCP which is in reality a complaint by the claimant about the way that she was treated. We had no evidence that such a PCP was more generally applied. Further, we find that the claimant was not required to engage in and adhere to unreasonable deadlines or timescales.

172. <u>PCP 6 - the practice of failing to make adjustments to redundancy process.</u>

a. In her submissions Ms Kaye explained this PCP further, that the respondent should have sought OH advice about extending the deadlines in the process and also checked with the claimant if she felt able to comply with the timescales. We expressed our concerns that the complaint was effectively along the lines of the alleged reasonable adjustment considered (and rejected by the EAT) in Tarbuck (see above).

b. Having considered carefully the submissions by Ms Kaye, we find it difficult to draw a distinction except perhaps that the claimant's case is

that the possibility of reasonable adjustments should have been considered by the respondent, either with or without consultation with her.

c. Further, we have not heard any evidence from which we conclude that, where the duty to make reasonable adjustments applies, this respondent refuses (or fails) to make those adjustments. We note that where information was received that the claimant may struggle to move to the next stage of the process – the appeal – that this was delayed so that the claimant had more time. When the claimant asked for a written response rather than attending another meeting, the respondent (MB) agreed.

d. We also note that the process itself provided for a reasonable amount of time for consultation. The claimant and the other affected employee were informed of the proposal on the 9 May and a month was then provided for individual and collective consultation with parties being informed of the outcome on 13 June 2020.

e. Finally, in relation to this PCP, the claimant has not provided any evidence that (1) she was substantially disadvantaged by a consultation period of one month and (2) a longer consultation period would in some way have avoided any disadvantage.

Employment Judge Leach
Date: 24 March 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
25 March 2022

FOR THE TRIBUNAL OFFICE

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