.

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Stansfield**

Respondents: **NHS England**

Heard at: **Leeds**

On: **9, 10, 11, 12, 13 and 16 January 2023.**
Deliberations in Chambers: 17 and 18 January 2023.

Before: **Employment Judge Shepherd**
Members: Mr L Priestley
Mr R Stead

Appearances

For the Claimant: Mr Lewis-Bale, Counsel

For the Respondent: Mr Price, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of unfair dismissal is not well-founded and is dismissed.

2. The claim of indirect sex discrimination is not well-founded and is dismissed.

3. The claim of disability discrimination is not well-founded and is dismissed.

REASONS

1. The claimant was represented by Mr Lewis–Bale and the respondent was represented by Mr Price.

2. The Tribunal heard evidence from:

   Christine Joy, Joint Project Acting Director of HR and OD Operations;
   Caroline Chipperfield, Deputy Managing Director of Leadership Academy;
   Bethany McIntyre, HR and Organisational Development Business Partner (evidence given by CVP video link);
   Laurie Williams, HR and Organisational Development advisor (evidence given by CVP video link);
   Anne Elgeti, Deputy Director of contracts and performance;
   Michelle Stansfield, the claimant;
   Michael Mullins, Independent Leadership Development Consultant (evidence given by CVP video link).

4. The Tribunal also had sight of a written witness statement from Reverend Rob Denton, Vicar at St Wilfrid's Church, Calverly. It was agreed that the Tribunal would take this written witness statement into account. Mr Price, for the respondent indicated that he had no questions to ask this witness.

5. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 2165. Also, a supplemental bundle of documents numbered up to page 609. The Tribunal considered those documents to which it was referred by the parties.

6. The issues had been identified following earlier Primary Hearings and then agreed between the parties as follows:

1 Jurisdiction

1.1 Have the discrimination claims been issued in time, taking into account any extension for taking part in Acas Early Conciliation?

1.2 If not, do the allegations form part of a continuing act under section 123(3)(a) of the Equality Act 2010, or would it be just and equitable for the Tribunal to extend the time for submission of these parts of the claims under section 123(1)(b) of the Equality Act 2010?

2 Unfair Dismissal

2.1 Did the Respondent have a fair reason to dismiss the Claimant?

The Respondent contends that the Claimant was dismissed for the fair reason of redundancy.

The Claimant accepts that she was dismissed for redundancy and this was a potentially fair reason for dismissal.

2.2 Did the Respondent follow a fair procedure in dismissing the Claimant?

The Claimant contends that the Respondent failed to adequately warn and consult her and failed to reach a reasonable selection decision, including its approach to the selection pool.

The Respondent contends that it at all times followed a reasonable procedure in the circumstances in respect of selection criteria, identifying those at risk and informing and consulting with the Claimant about her potential redundancy.

2.3 Was dismissal within the reasonable band of responses available to the Respondent and was the dismissal fair in all the circumstances?

3 Indirect Sex Discrimination

3.1 Did the Respondents apply the following provision, criteria or practice (“PCP”) to the Claimant:

3.1.1 A policy of no regrading and no re-evaluation which was applicable from April 2019 until her dismissal in March 2022; and

3.1.2 A policy of matching employees only to “same grade roles” when determining who was at risk of redundancy during the initial stages of the Joint Working Programme reorganisation (i.e. between April 2019 until 11 October 2019).

The Respondents accept that the above amount to PCPs but do not accept that these were applied by the Respondents as described by the Claimant.

3.2 Did the Respondents apply either or both of the PCPs to men or would it have done so?

3.3 Does the application of that PCP put women at a particular disadvantage when compared with men, in that:

3.3.1 Women who have taken a career break and subsequently worked in a lower graded role are more likely than men to be employed in roles which are incorrectly graded lower than they should be. As they are ineligible to be matched into comparable higher graded roles, or have their roles re-evaluated, the risk of them being placed at risk of redundancy or being made redundant is greater; and/or

3.3.2 The application of these policies put at a particular disadvantage those who were 'Downwardly Occupationally Mobile', having taken a career break for childcare / maternity reasons, and, subsequent to that, working in a lower graded role, making it more likely that they would unfairly be placed at risk of redundancy and made redundant.

3.4 Did either or both of the PCPs put the Claimant at that disadvantage? *The Claimant contends that it did and the disadvantages listed above led to her redundancy.*

3.5 If so, can the Respondent show that either or both of the PCPs was a proportionate means of achieving a legitimate aim?

The Respondents contend that both PCPs were a proportionate means of achieving a legitimate aim, namely to adopt a proportionate approach whilst achieving as even a playing field as possible for all members of staff selected for potential redundancy, and in order to manage the significant demands and scale of the reorganisation process.

4 Disability Discrimination

<u>*Disability*</u>

4.1 Was the Claimant a disabled person within the meaning of s6 EqA 2010 at the relevant time(s)?

The Claimant relies on "post-traumatic stress disorder (PTSD)" as her disability, which she purports to have been diagnosed with in October 2018. The symptoms of this condition are flashbacks, disturbed sleep, tiredness, lack of concentration and memory, loss of confidence, sense of being overwhelmed, muscle tension, chest pains, wringing of hands, tension headaches, palpitations, emotional distress, anxiety, low mood and suicidal thoughts. It is alleged that this condition affects the Claimant's day to day ability to: work as part of an organisation that she

experiences as highly triggering and neglectful; concentrate and work effectively with confidence; sleep the required amount; start the day feeling refreshed and in a positive mood; carry out certain tasks with her right hand due to tendon damage; and undergo operations without extra measures and reassurance from the anaesthetist.

It was accepted by the respondent that the claimant was a disabled person within the meaning of the Equality Act 2010 at the material time.

4.2 Did the Respondents know or could it reasonably have been expected to know that the Claimant had that disability? If so, from what date?

The Claimant contends that she made the Respondents aware on 11 March 2021.

The respondent accepts that it had knowledge of the claimant's disability from 11 March 2021.

Failure to make reasonable adjustments

4.3 Did the Respondents apply the following provision, criterion or practice (PCP) to the Claimant:

4.3.1 Not dealing with grievance or appeal processes in an expeditious manner;

4.3.2 Not recognising or appropriately avoiding trigger mechanisms of disabled employees on the following dates;

a) 6 April, 4 and 6 May 2021 when HR did not take action in response to the Claimant's concerns about the lack of an independent and suitably experienced senior HR professional on the redundancy appeal and grievance panel;
b) On 7 and 13 July 2021 when the redundancy appeal and grievance outcome letter, and exchanges that led up to it and followed it, did not accurately record and respond to many points made by the Claimant;
c) Between 13 July 2021 and 20 April 2022 by HR failing to ensure a timely response to the grievance appeal;
d) 14 and 26 October 2021 when Caroline Chipperfield requesting daily meetings with the Claimant and changed her position on the Claimant's secondment to say that it could no longer be extended and must end on 26 October 2021;
e) In the lead up to the OH meeting on 22 October 2021 when no specific questions were posed in the referral around a lack of responsiveness and absence of right

support being "devastating" for the Claimant's mental health nor was her therapist letter provided; and

f) Between 29 December 2021 and 9 February 2022 when the Claimant's request that her objection to having her post-secondment time classed as sickness absence be treated as a grievance was ignored until 10 February, and the Respondent then continued to fail to recognise and appropriately avoid trigger mechanisms on 22 February in respect of the Claimant's email dated 17 February.

4.3.3 Not obtaining professional or expert advice on reasonable adjustments for disabled employees on the following dates;

a) On 11 March 2021 following the Claimant's letter to Caroline Chipperfield in which she stated she had PTSD and the severity of her condition and need for treatment;
b) On 11 March (request for therapy), 14 May (requested outcomes) and 21 September 2021 (second therapist's letter) when the Claimant voiced her PTSD symptoms and Caroline Chipperfield was dismissive and failed to carry out a stress risk assessment for the Claimant;
c) At the end of March 2021 following the Claimant's emails to Bethany McIntyre stating that not having a voice and not feeling heard were triggers for her PTSD for which she was now receiving therapy;
d) At the end of March 2021 following the Claimant's emails with Caroline Chipperfield in which she shared diagrams and illustrated her PTSD triggers and their impact;
e) In early May 2021 following the Claimant's emails to the Chair of the redundancy appeal on 10 and 13 May where she talked about her PTSD condition and set out a list of requested outcomes she had discussed in the appeal meeting;
f) In late June 2021 following receipt of a letter from the Claimant's therapist which highlighted the impact of her psychological needs being ignored;
g) In early July 2021 following the Claimant's emails with Bethany McIntyre about the impact of the "Future of HR" document on the Claimant adding to her feelings of anxiety and non-safety;
h) In mid-July 2021 following submission of the Claimant's grievance appeal in which she reiterated the negative impact of the Respondent's treatment of her and the fact that this should be investigated, and not referring the Claimant to OH

for over 3 months despite the Claimant requesting this in an email to Bethany McIntyre on 16 July 2021;

i) In early September 2021 when the Claimant reminded HR that she was not currently applying for jobs at the Respondent because it was not psychologically safe for her to work there and that the Respondent's failure to respond about non-safety is considered to be a failure to make reasonable adjustments;

j) In late September 2021 following the Claimant's email to Caroline Chipperfield on 21 September including a second therapist's letter and details about her worsening condition, and the "devastating" impact a lack of responsiveness and support was having, or when the Claimant was signed off work for 3 weeks and reiterated that it was not safe for her to return to the Respondent without investigation and relevant action to protect her mental health;

k) In early October 2021 following the Claimant's email on 7 October in which she shared her latest therapist letter and a request that the Respondent investigate the psychological harm she had suffered;

l) In mid-October 2021 following the Claimant's emails to HR on 12 and 16 October when she asked for reasonable adjustments to be specifically looked at as part of her complaint, and following the Claimant declining an invitation to meet face to face with Caroline Chipperfield after requesting limited contact;

m) In late October 2021 following the Claimant's request on 20 October for reasonable adjustments and an extension to the process, which was not granted, and the Claimant's emails to HR and Caroline Chipperfield on 24 October asking for vigilance around her PTSD triggers and highlighting the fact that OH had not been requested to provide advice on reasonable adjustments; and/or

n) In early November 2021 following a meeting between the Claimant, Caroline Chipperfield and Laurie Williams on 9 November in which the Claimant likened the inappropriateness of their treatment of her to having her "arse on fire" and Caroline Chipperfield "thinking that the thing to do is give a boiled sweet".

4.3.4 *Not responding in a timely manner to the Claimant regarding welfare measures from the end of December 2021 until 10 February 2022.*

The Respondents deny that the above amount to PCPs and that they were applied by the Respondents.

4.4 If so, did the PCP put the Claimant at a substantial disadvantage compared to non-disabled persons?

The Claimant's position is that the PCPs above put her at a substantial disadvantage because they triggered symptoms of her PTSD (as set out at 3.1 above) or caused the Claimant's PTSD to worsen. The Claimant's position is that PCP (d) above put her at a substantial disadvantage because of the sense of her not being listened to and responded to with action which triggered symptoms of her PTSD or caused the Claimant's PTSD to worsen.

4.5 Did the Respondent know or ought it have been reasonably expected to know, at the relevant time, that the Claimant was likely to be placed at a substantial disadvantage in the way set out above?

4.6 If so, and the duty to make reasonable adjustments arose, did the Respondent take reasonable steps to avoid the disadvantage?

The Claimant suggests that a reasonable adjustment would have been to:

(a) Bethany McIntyre, or any members of the HR function that may have influenced her actions, putting a person with senior HR experience onto the appeal panel to aid empathy and understanding of the issues raised;

(b) Being provided with written acknowledgement and commitment to action by Anne Elgeti in the outcome letter after the Claimant shared in the grievance and redundancy appeal hearing that, in consultation with her therapist, it had been concluded that, without appropriate action from NHSE/I, it was not safe for her to return to NHSE/I. 'Commitment to action' relates to the requested outcomes the Claimant set out in the hearing and in writing on 13 May 2021 and responding to each with empathy, reassurance and action to:

a. Acknowledge the request had been made and that it relates to serious matters of feeling unsafe at work and harm to the Claimant's mental health and future career;

b. *Provide reassurance that the panel have understood the critical nature of the request in avoiding harm to the Claimant's future career or mental health;*
c. *Demonstrate some empathy by referencing the fact that the Claimant shared with the Respondent that she had PTSD and demonstrating compassionate leadership to facilitate learning for the organisation; and*
d. *Set out the steps by which the organisation would investigate the "significant psychological harm" claimed, including a named individual to lead the investigation and reassurance about timescales;*

(c) *Caroline Chipperfield allowing the extension of the secondment until an investigation into the psychological harm caused by the Respondents (set out in the grievance appeal letter dated 13 July 2021) had been undertaken and appropriate action had been taken and reassurances given;*

(d) *Caroline Chipperfield and Helen Bullers extending the individual consultation period as requested in a letter dated 20 October 2021 and in line with OH recommendations;*

(e) *Ensuring measures were in place to respond to the Claimant from the end of December 2021 to 10 February 2022 when the assigned welfare officer was absent; and*

(f) *Ensure that the grievance appeal was dealt with rapidly and with vigilance in relation to her PTSD triggers.*

The Respondents aver that the adjustments suggested by the Claimant were not reasonable and that they did, in any event, make a number of adjustments to mitigate the effects of the alleged substantial disadvantage relied upon, including: agreeing minor extensions to the secondment process, appointing Ms Chipperfield to support the Claimant with her concerns and ensuring other points of contact were available to offer support, arranging and paying for the Claimant's therapy sessions from March 2021, removing certain individuals from the redundancy process whom the Claimant had identified as triggers for her PTSD and creating a supernumerary role with limited duties once her secondment had ended so that she could solely focus on applications for alternative roles at her own pace in order to try and avoid redundancy.

5 Remedies

It was agreed that this hearing would deal with liability only and, if the Tribunal found in favour of the claimant, further orders would then be made in respect of a remedy hearing.

Background information/Facts

8. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given.

9. Some of the Tribunal's findings are also set out in its conclusions, to avoid unnecessary repetition and some of the conclusions are set out within the findings of fact.

10. The claimant started employment with the NHS in 2015. She was employed from 14 January 2019 by NHS Trust Development Authority as Head of Transformation-Talent Management from 14 January 2019. The claimant's role transferred to NHS England & NHS improvement on 1 April 2019.

11. A Joint Working Programme (JWP) reorganisation was carried out as a result of government mandated cost reduction targets for NHS England whereby it was arranged for a merger of the two organisations which are now known as NHS England. It is agreed that the appropriate respondent is NHS England.

12. The respondent's Organisational Change Policy was negotiated with the Trade Unions. There were approximately 8,500 members of staff. It was decided not to permit any re-evaluation or re-grading and that the third phase of the reorganisation would proceed on the basis of the employees' existing bandings.

13. The affected staff were categorised as:

Not affected by the reorganisation ('out of scope') ;

'Slot-ins' where a new role was 70% or more similar to their existing role;

At risk of redundancy.

14. The claimant was identified as at risk of redundancy on 11 October 2019.

15. On 6 February 2020 the claimant appealed against her notice of redundancy.

16. Caroline Chipperfield said that, around the onset of the coronavirus pandemic, in March 2020, it became more urgent to retain as many staff as possible. She arranged with the Director of HR and OD at Health Education England (HEE) for the claimant to be placed on secondment with HEE on a band 8C role. Her substantive role being 8d and her salary was maintained during the secondment.

17. The claimant's secondment with HEE commenced on 27 April 2020 and was to last for 18 months until 21 October 2021.

18. On 11 March 2021 the claimant sent a letter to Caroline Chipperfield in respect of the impact of the ongoing delay in dealing with her redundancy appeal and grievance. She informed Caroline Chipperfield that she had been diagnosed with Post Traumatic Stress Disorder in 2018. It is accepted by both parties that this was the date the respondents had knowledge of the claimant's disability.

19. The claimant requested the respondent to pay for her therapy, Caroline Chipperfield supported this application and passed it on to the Director of HR and OD. The respondent paid for specialist therapy assessment and further psychotherapy and EMDR sessions up to the end of her employment.

20. There was some discussion about extending the claimant's secondment which Caroline Chipperfield supported. However, Lisa Wilson, the Director of HR and OD at Health Education England did not offer an extension.

21. On 23 March 2021 the claimant was invited to the grievance and redundancy appeal hearing. This took place on 6 May 2021.

22 The claimant was provided with the outcome letter for the redundancy appeal and the grievance on 7 July 2021.

23 The outcome letter was thorough and detailed. It provided the facts found and details of the actions of the respondent and the outcome. The Tribunal finds that it appropriate to set out the substance of this letter in the appendix to these reasons which should be read together with the judgment and these reasons.

24. On 13 July 2021 the claimant submitted a grievance appeal.

25. The claimant attended an appeal hearing on 5 October 2021

26. On 14 October 2021 the claimant was provided with the hearing outcome in respect of her redundancy appeal and formal grievance.

27. On 15 October 2021 the claimant was informed that she was at risk of redundancy and arrangements were provided for individual consultation.

28. The claimant's secondment came to an end on 26 October 2021. The claimant was kept on in a supernumerary position and not given any substantive duties. She was to spend her time recuperating, improving her health and applying for alternative roles.

29. The claimant did not find alternative employment with the respondent and was issued with notice of redundancy on 7 December 2021. The claimant obtained employment with another organisation and her employment ended on 7 March 2022.

The Law

Time limits

30. Section 123 of the Equality Act 2010 states:

(1)...Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
...
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) a failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

31. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686***,* that *i*n cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for a claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and *(b)* that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as opposed to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals. In the case of **Sougrin v Haringey HA [1992] ICR 650** an allegation that decision not to upgrade was influenced by race the continuing consequences of the act were that the claimant continued to be paid less than someone of a different race. The act was not applied to the claimant again and the respondent contains the same logic applies to this case.

32. In the case of **Humphries v Chevler Packaging Ltd EAT 0224/06** the EAT confirmed that a failure to act is an omission and that time begins to run when an employer decides not to make reasonable adjustment. In the case of **Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170. T**he Court of Appeal held that where an employer was not deliberately failing to comply with the duty and the omission was due to lack of diligence or competence, or any reason other than conscious refusal, it is to be treated as having decided

upon the omission when the person does an act inconsistent with doing the omitted act or when, if the employer had been acting reasonably, it would have made the adjustments. In the Court of Appeal case of **Abertawe Bro Morgannwg University v Morgan [2018] WLR197** it was stated:

> "In the case of omissions, the approach taken is to establish a default rule that time begins to run at the end of the period in which the respondent might reasonably have been expected to comply with the relevant duty. Ascertaining when the respondent might reasonably have been expected to comply with its duty is not the same as ascertaining when the failure to comply with the duty began. Pursuant to section 20 (3) of the Equality Act, the duty to comply with the requirement relevant in this case begins as soon as the employer is able to take steps which it is reasonable for the employer to have to take to avoid the relevant disadvantage. It can readily be seen, however, that if time began to run on that date, a claimant might be unfairly prejudiced. In particular, the claimant might reasonably believe that the employer was taking steps to seek to redress the relevant disadvantage, when in fact the employer was doing nothing at all. If this situation continued for more than three months, by the time it became a should have become apparent to the claimant that the employer was in fact sitting on its hands, the primary time limit for bringing proceedings would already have expired."

33. In the case of **Hale v Brighton & Sussex University Hospitals NHS Trust UKEAT/0342/16** the EAT held that various stages of a disciplinary procedure which culminated in the claimant's dismissal constituted an act extending over a period rather than a succession of unconnected or isolated specific acts

34. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576** per Auld LJ *at para 25)*.

35. Discretion to grant an extension of time under the just and equitable formula has been held to be as wide as that given to the Civil Courts by Section 33 of the Limitation Act 1980 **British Coal Corporation v Keeble** [1997] IRLR 336. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension having regard to all of the circumstances, in particular:-

(a) The length of and the reason for the delay;

(b) The extent to which the cogency of the evidence is likely to be affected by the delay;

(c) The extent to which the parties sued had cooperated with any request for information;

(d) The promptness with which the claimant acted once he or she knew of the facts giving rise to the course of action; and

(e) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

36. These are checklists useful for a Tribunal to determine whether to extend time or not. Using internal proceedings is not in itself an excuse for not issuing within time see **Robinson v The Post Office** but is a relevant factor.

37. Time limits are short for a good purpose- to get claims before the Tribunal when the best resolution is possible. If people come to the Tribunal promptly when they have reached a point where the employer has said it will not take a step which the claimant believes should be taken, then, if it agrees with the claimant, the Tribunal can make a constructive recommendation. Left unresolved, omissions by employers often have devastating consequences which it is too late to remedy in that way.

Indirect Discrimination

38. Section 19 of the Equality Act 2010 states:

> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> > (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> >
> > (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> >
> > (c) it puts, or would put, B at that disadvantage, and
> >
> > (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

PCPs cannot be considered in isolation. The adverse disparate impact must also be established. Once a PCP has been established, the complainant must show that the PCP is to the disadvantage of his or her group. Before any assessment of the impact of the PCP can be made, the appropriate pool for comparison must be identified.

39. In the case **of Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice [2017] UKSC 27** the Supreme Court stated that the purpose behind indirect discrimination legislation is to protect people with a protected characteristic from suffering disadvantage where an apparently neutral PCP is applied. It is about achieving a level playing field and removing hidden barriers.

40 . There is no obligation on the employee to explain the reason why the PCP put the group at a disadvantage when compared to others: it is enough simply to show that there is disadvantage. However, the requirement to justify PCP should not be seen as placing an unreasonable burden on employers.

41. In Chief Constable of **West Midlands Police v Harold [2015] IRLR 790,** the EAT emphasised that justification is an objective evaluation. Further what has to be justified is the outcome, not the process followed. In **Allonby v Accrington and Rossendale College and others [2001] IRLR 364** the Court of Appeal made it clear that:

> "once an employment tribunal has concluded that the [PCP] has a disparate impact on a protected group it must carry out a critical evaluation of whether the reasons demonstrate a real need to take the action in question. This should include consideration of whether there was another way to achieve the aim in question."

42. The EAT emphasised in **Rajaratnam v Care UK Clinical Services Ltd (UKEAT/0435/14)** that it is the rule that needs to be justified and not its application to the individual concerned.

43.The Supreme Court held, in **Homer v Chief Constable of West Yorkshire Police [2012**] UKSC 15 that to be proportionate, a measure must be an appropriate and necessary means of meeting the legitimate aim. Actions will not be proportionate if less discriminatory means to achieve the result were available.

44.The burden of proving objective justification is on the employer. The employer needs to produce cogent evidence that the justification defence is made out. However, the claimant has to show some evidence of disparate impact before the burden of proof placed on the employer.

Failure to make reasonable adjustments

45. Section 20(3) of the Equality act 2010 provides:

> "…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, [there is a requirement] to take such steps as it is reasonable to have to take to avoid the disadvantage."

46. Section 212(1) provides that "Substantial" is defined at to mean "more than minor or trivial".

47. Whilst there is no definition of 'provision, criterion or practice' found in the legislation, and it is left to the judgment of individual Tribunals to see whether conduct fits this description, not every act complained of is capable of amounting to a PCP. In **Ishola v Transport for London [2020] IRLR 368** Simler LJ stated:

"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

In context and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that 'practice' here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or 'practice' to have been applied to anyone else in fact. Something may be a practice or done 'in practice' if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

48. In **Environment Agency v Rowan [2008] IRLR 20**, the EAT provided guidance on how an Employment Tribunal should approach a reasonable adjustments claim The Tribunal must identify:

"(a) the provision, criterion or practice applied by or on behalf of an employer, or;
(b) the physical feature of premises occupied by the employer;
(c) the identity of non-disabled comparators (where appropriate); and
(d) the nature and extent of the substantial disadvantage suffered by the claimant."

49. In **Bank of Scotland v Ashton [2011] ICR 632**, Langstaff J held:

"The Act demands an intense focus by an Employment Tribunal on the words of the statute. The focus is on what those words require. What must be avoided by a tribunal is a general discourse as to the way in which an employer has treated an employee generally or (save except in certain specific circumstances) as to the thought processes which that employer has gone through."

50. In **Chief Constable of Lincolnshire Police v Weaver KEAT/0622/07/DM**, the EAT held that a Tribunal must also take into account wider implication of any proposed adjustment, not just focus on the claimant's position. This may

include operational objectives of the employer, which may include the effect on other workers.

51. Schedule 8 of the Equality Act 2010 provides that an employer is not under a duty to make reasonable adjustments unless it knows or ought to know the employee has a disability and is likely to be placed at the substantial disadvantage in question.

52. The required knowledge, whether actual or constructive, is of the facts constituting the employee's disability as identified in section 1(1). Those facts can be regarded as having three elements to them, namely (a) a physical or mental impairment, which has (b) a substantial and long-term adverse effect on (c) his ability to carry out normal day-to-day activities; and whether those elements are satisfied in any case depends also on the clarification as to their sense provided by Schedule 1. The employer does not need to also know that, as a matter of law, the consequence of such facts is that the employee is a disabled person as defined in section 1(2) **Gallop v Newport City Council [2014] IRLR 211**.

Burden of Proof

. 53. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.
>
> (5) This Section does not apply to proceedings for an offence under this Act.
>
> (6) A reference to the court includes a reference to –
>
> (a) An Employment Tribunal."

Unfair Dismissal

54. Where an employee brings an unfair dismissal claim before an Employment Tribunal and the dismissal is established or conceded it is for the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason, the Employment

Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with Section 98(4) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Redundancy is a potentially fair reason for dismissal under Section 98(2).

55. The definition of redundancy is contained in Section 139(1) of the Employment Rights Act 1996. This states:

> "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 the 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"

56. If it is accepted that the reason for dismissal was redundancy then it is necessary to decide if that dismissal was reasonable under Section 98(4) of the Employment Rights Act 1996. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band of reasonable responses within which one employer might reasonably take one view and a different employer might reasonably take another view and the function of the Tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which an employer might have adopted.

57. The factors of which a reasonable employer might be expected to consider are whether the selection criteria including the pool for selection were objectively chosen and fairly applied, whether the employee was warned and consulted about the redundancy, whether any alternative work was available.

58. In **Williams & Others v Compare Maxam Limited [1982] ICR 156**, the Employment Appeals Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested which a reasonable employer might be expected to consider were whether the selection criteria were objectively chosen and fairly applied,

whether employees were warned and consulted about the redundancy, whether, if there was a union, the union's view was sought and whether any alternative work was available.

59. In carrying out a redundancy exercise, an employer should begin by identifying the pool of employees from whom those who are to be made redundant will be drawn. The Tribunal will consider whether an employer acted reasonably in identifying the pool for selection and may consider whether other groups of employees are doing similar work to the group from which the selections were made, whether employees' jobs are interchangeable and whether the employees' inclusion in this unit is consistent with his or her previous positions. A fair pool of selection is not necessarily limited to those employees doing the same or similar work. Employers may be expected to include in the pool those employees whose work is interchangeable.

60. Written submissions were provided on behalf of the claimant and the respondent. The parties' representatives were given the opportunity to provide oral submissions. Mr Lewis-Bale relied on his written submissions. Mr Price provided limited oral submissions. The Tribunal has not set these submissions out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

<u>Conclusions</u>

Jurisdiction

61. It is accepted by the respondent that claims of unfair dismissal and disability discrimination were brought within time.

Indirect Sex Discrimination

62. The claim of indirect sex discrimination is brought in respect of the PCPs of no re-grading and no re-evaluation which was applicable from April 2019 until March 2022 and the policy of matching employees only to same grade roles when determining who was at risk of redundancy during the initial stages between April 2019 and 11 October 2019. The claim for discrimination was presented to the Tribunal on 17 November 2021 following The ACAS early conciliation notification on 16 November 2021 and the early conciliation certificate dated 16 November 2021.

63. Mr Lewis-Bale, on behalf of the claimant, argued that the practice of no re-grading/re-evaluation and not re-matching was a practice ongoing throughout the entirety of the redundancy process resulting in the claimant's dismissal and that this was a continuing act. The nature of the redundancy process is that there are varying steps and elements to proceed through and those finished with the claimant's ultimate dismissal.

64. Mr Price, on behalf of the respondent, submitted that the claim had to be presented to the Tribunal by 30 June 2020 in order to comply with the primary limitation period. He said that this is a quintessential example of arguing that the application of a discriminatory act which had lasting effects or continuing consequences. The claimant was not subject to application of the PCPs after April 2020.

65. The Tribunal has given careful consideration to this issue. This was not a disciplinary process. The PCPs were determined by the respondent following consultation with the trade union. The PCPs that were applied to the claimant prior to her job being deleted were the policies of no regrading, no re-evaluation and matching employees to the same grade roles. The claimant's job was deleted on 31 March 2020.

66. The claimant challenged the decision but that decision was not revoked or changed. It was not conduct extending over a period it was an act which had continuing consequences and the claim was not presented to the Tribunal within the primary limitation period.

67. The Tribunal has considered whether to extend time pursuant to section 123(b) of the Equality Act 2010 in that it would be just and equitable to do so. The claim was presented over 16 months beyond the primary time limit. The claimant referred to having taken legal advice during her interview with the investigating officer on 24 November 2020. She had discussed the extent of her claims with Michael Mullins in January or February 2021. It was submitted by Mr Price that the evidence provided on behalf of the respondent had suffered in that Christine Joy had some difficulty recalling the events leading to the organisational change policy with precision. The balance of prejudice should be weighed against extending time.

68. The Tribunal finds that it has no jurisdiction to hear the claim of indirect sex discrimination and it is not just and equitable to extend time to when the claim was presented. The claimant was aware of allegations of discriminatory treatment and had taken advice a substantial amount of time prior to the date the claim was presented to the Tribunal.

69. The Tribunal has gone on to consider the merits of the claim on the basis as if it had jurisdiction to hear the claim of indirect discrimination.

70. The claimant provided evidence of academic research into Downward Occupational Mobility such as a paper by Sara Conley and Mary Gregory in respect of the impact of a spell in part-time work on subsequent earnings and career trajectories. The Tribunal accepts that women returning from a career break may be likely to become downward occupationally mobile. This is a societal problem but the Tribunal must focus on the application of the PCPs in this case.

71. The respondent provided uncontested statistical evidence from the Joint Working Programme Equality Analysis report which showed that people

included in the Phase 3 workforce consisted of 68% female and 32% male. In the People Directorate the proportion of women employed were 72%.

72. The percentage of women slotted in was 70% and those not placed at risk was 72% The percentage of women placed at risk was 67%. This meant that the chance of avoiding being put at risk of redundancy was higher if the employee was female and the percentage of women put at risk was no higher than those in the workforce.

73.Those actually given notice of redundancy consisted of 38% men and 62% women against people included in phase 3 of 32% men and 68% women.

74. Those within the People Directorate at band 8D were 91% women to 9% men. Of those actually made redundant there were 4 employees 3 (75%) of whom were women and one was a man (25%).

75. It was submitted by Mr Price, on behalf of the respondent, that this shows that, not only were women within the People Directorate more likely to avoid being placed at risk at all by being slotted in also that within Band 8D, a higher proportion of men were made redundant compared to women. The Tribunal accepts that submission.

76. The Tribunal is not satisfied that the application of policies placed women, or women who had taken a career break, at a particular disadvantage.

77. With regard to whether the claimant was put at a disadvantage, the claimant contends the PCPs of no regrading and no re-evaluation and matching employees to the same grade roles when determining who was at risk of redundancy placed her at a disadvantage.

78. If the claimant had been regraded at band 9 she would have been more likely to have been made redundant as those in band 9 were reduced by 11% whereas those at band 8D were reduced by 1%.

79. The claimant commenced employment with the respondent in January 2019. She worked 32 hours a week in a role which she accepted at band 8D. There was no evidence that the claimant was placed at a disadvantage by reason of being Downwardly Occupationally Mobile. She had taken a career break following employment at the Department for Work and Pensions in grade SCS1.

80. During her career break she had started up and managed a limited company and worked on a self-employed basis during that time from October 2014 to October 2015. She had been offered a job at band 9 but chose to accept the band 8D role because it was nearer to Leeds railway station which suited her personal circumstances and she told the Tribunal that she wished to work near a shop which provided meal suitable for a coeliac diet. The Tribunal is not satisfied that the claimant was placed at a disadvantage by reason of DOM.

81. There was no evidence that the claimant was made redundant because of the application of the PCPs.

82. If there was any discriminatory effect caused by both PCPs then the respondent contends that the legitimate aim to adopt a proportionate approach whilst achieving as even a playing field as possible for all members of staff selected for potential redundancy, and in order to manage the significant demands and scale of such a reorganisation process. The reorganisation was in respect of 8,500 employees. The Joint Organisational Change Policy was agreed with the involvement of the Trade Unions.

83. An equality impact assessment was carried out and the decision not to permit any regrading and to allow everybody to proceed on their existing bandings was proportionate. Christine Joy gave clear and credible evidence that the scale of the change programme would have made such an approach impossible in the timescales. It was discussed with the unions and staff representatives. The agreed priority was to attempt to secure suitable alternative roles for people based on their substantive grade. The Tribunal accepts that it would not practicable for roles to be regraded as part of such a large reorganisation. It was a proportionate attempt to achieve the legitimate aim.

Disability discrimination

84. It was agreed by both parties that the claimant was a disabled person by reason of Post Traumatic Stress Disorder at the material time and that the respondent had knowledge of the claimant’s disability from 11 March 2021.

85. The PCPs alleged are:

1. Not dealing with grievance or appeal processes in an expeditious manner;
2. Not recognising or appropriately avoiding trigger mechanisms of disabled employees;
3. Not obtaining professional or expert advice on reasonable adjustments for the employees.
4. Not responding in a timely manner to the claimant regarding welfare measures from the end of December 2021 until 10 February 2022.

Further particulars were provided with regard to PCP 1 and PCP 2.

86. The claimant submitted her redundancy appeal on 6 February 2020. On 27 April 2020 the claimant commenced her 18 month secondment with HEE. On 5 May 2020 the claimant was informed that, due to the Covid 19 pandemic, her redundancy appeal had been considered and allocated low

priority status. Many members of staff were redeployed to Covid affected areas of the NHS. This meant that her appeal was paused due to the pandemic and the claimant's 18 month secondment.

87. On 13 November 2020 the claimant was told that her redundancy appeal would be reactivated. The investigation was to include the grievances raised in her letter of 18 October 2020.

88. The grievance investigation report was finalised on 8 February 2021 and the redundancy appeal investigation report on 23 March 2021.

89. The respondent did not have knowledge of the claimant's disability until 11 March 2021. The Tribunal is not satisfied that there was a PCP of not dealing with grievance or appeal processes in an expeditious manner. Once the respondent was aware of the claimant's disability the redundancy appeal and grievance was dealt with expeditiously taking into account the amount of issues and the complexity.

90. The second alleged PCP was not recognising or appropriately avoiding trigger mechanisms of disabled employees. The claimant provided the respondent with a diagram which referred to trigger mechanisms as a "lack of compassion, no reassurance, speaking but not feeling heard, lack of empathy, pre-programmed explanations, listening appears to be to defend, not to learn and evolve and minimal time seeking to understand me, my experience and my response".

91. At issue 4.3.2 a) –f) the list of issues sets out dates which are referred to as not obtaining professional or expert advice on reasonable adjustments for disabled employees. These all relate to individual issues in respect of the claimant. The Tribunal has considered all these allegations carefully. and finds that the respondent did not apply that PCP to disabled employees.

92. The claimant requested that an experienced senior HR professional be on the redundancy appeal and grievance panel. Those involved were experienced and the claimant's request was not granted. The redundancy and grievance appeal outcome was thorough and detailed and provided an appropriate response.

93. Caroline Chipperfield suggested daily meetings which was in line with the guidance given by Occupational Health of keeping in touch. There was nothing to show this was lacking in empathy or compassion or not supportive. The decision with regard to the ending of the claimant's secondment was not as a result of Caroline Chipperfield changing her position. She had supported an extension to the secondment but the decision was that of the HEE Director of the HR and Operations.

94. Caroline Chipperfield was the claimant's direct line manager for a limited period of time from around March 2021 until 27 April 2021 when the claimant went on the 18 month secondment and Caroline Chipperfield was

then acting as the claimant's line manager from 28 October 2021 until 9 November 2021.

95. The referral to Occupational Health was made by Laurie Williams. She had not been provided with the claimant's therapist's letter until after the referral had been made. The claimant did discuss the therapist's letters with the Occupational Health practitioner.

96. The treatment of claimant's absence during her notice period was a matter of concern for the respondent. Laurie Williams said that, if the claimant was unable to engage with the respondent during her notice period due to her health, then it should be recorded as sickness absence. This is not evidence of lack of compassion.

97. The Tribunal is not satisfied that the respondent applied a PCP of not recognising or appropriately avoiding trigger mechanisms of disabled employees. The respondent provided reasonable support to assist the claimant.

98. The third PCP set out with regard to the allegation of failure to make reasonable adjustments is that of not obtaining professional or expert advice on reasonable adjustments for employees. The list of issues provides dates from a) to n). The respondent did consult its HR and OD staff. The respondent agreed to pay claimant's therapist until the date her employment terminated. Caroline Chipperfield provided support during the claimant's employment following the end of her secondment. The Occupational Health referral was made and a stress risk assessment was instigated by Caroline Chipperfield.

99. The Tribunal is not satisfied that the respondent applied the PCP of not obtaining professional or expert advice on reasonable adjustments for disabled employees.

100. The PCP at 4.3.4 is that of not responding in a timely manner to the claimant regarding welfare measures from the end of December 2021 until 10 February 2022. Laurie Williams continued to keep in touch with the claimant during this time although she was off work for a period of one or two weeks whilst recovering from an operation. The claimant continued to receive support and the claimant withdrew from a grade 9 recruitment process. She later obtained employment outside of the respondent.

101. The Tribunal is not satisfied that the respondent applied the PCPs as alleged. In those circumstances Tribunal does not find the claimant was placed at a substantial disadvantage compared to someone who was not disabled or that the respondent knew, or was reasonably expected to know, that the claimant would be placed at a disadvantage.

102. The claimant's suggested reasonable adjustments are not applicable. Tribunal finds that the respondent took reasonable steps to support the claimant, she was placed on secondment for 18 months she was given a

supernumerary role for approximately five months in order to look for alternative employment. Her therapy was paid for by the respondent. She was provided with reasonable adjustments in the circumstances.

Unfair dismissal

103. It was accepted that there was a genuine redundancy situation and that was the reason for the claimant's dismissal.

104. The respondent discussed and agreed the procedure with the Trade Unions. The claimant was given reasonable warning and was individually consulted. The pools for selection were set out within the procedure. The claimant was placed in Band B and the practice of not allowing regrading, revaluation and matching employees to the same grade roles was not a discriminatory practice.

105. There was an agreed procedure and it was applied fairly. The claimant was permitted to raise grievances with regard to the procedure.

106. The claimant was provided with support to find alternative employment. The claimant was provided with a secondment of 18 months. She was then employed on a supernumerary basis and given five further months to find alternative employment.

107. The decision to dismiss the claimant by reason of redundancy was within the band of reasonable responses available to the respondent in all the circumstances.

108. The Tribunal has great sympathy with the claimant. She is an intelligent and highly motivated individual. There was no criticism of her performance. She had clearly been through significant trauma and continued to suffer from the long-term consequences of that. However, her evidence was genuine but fixated on the issues and tended to see matters through the lens of discriminatory and unfair treatment.

109. The circumstances were such that the claimant was subject to a great deal of distress. However, the Tribunal finds that the respondent provided reasonable and proportionate support for the claimant.

110. The Tribunal has considered all the circumstances carefully and has reached the unanimous decision that the claims are should be dismissed in their entirety.

Employment Judge Shepherd

26 January 2023

Sent to Parties

13 February 2023

For the Tribunal Office:

APPENDIX

The contents of the outcome letter for the redundancy appeal and grievance dated 7 July 2021 are as follows:

"Re-: Combined Appeal and Grievance Hearing: Forming Stage Outcome

Thank you for attending the Grievance Hearing on the 6th May 2021 with myself and Luke Culverwell, Deputy Director Specialised Commissioning, and Rebecca Coleman,
HR and OD Advisor was also in attendance to take notes on behalf of the panel.
The purpose of this meeting was to review the facts associated with the appeal and subsequent grievance submitted by you and to come to a decision on how we can resolve them. We very much appreciate the time that you have taken to prepare supporting evidence and your additional presentation at the hearing .
Your appeal and grievance are listed below:

Appeal
• That you should not have been put on notice of redundancy as of 31st January 2020, as you believed you were unfairly selected for redundancy and the selection process was unfair and not applied as per the policy.

Grievance
• Based on your belief that you were at risk of redundancy whilst undertaking your 18-month secondment to HEE, that you should have been considered as "at risk" when applying for the Head of Capability, Talent and L&D ROLE

• That you should have been appointed to this role based on your belief of your "at risk" status.

Additional consideration requested at hearing

o During your presentation to the hearing you raised the possibility of potential discrimination towards women returning from maternity leave, taking lower grade roles. The panel has considered this, and findings are set out below.

Correspondence sent to the panel following the hearing

o 24th June: Email from Michelle including a letter from her therapist dated 21.6.2021 asking for a swift resolution of the appeal and grievance to support Michelle's recovery. The letter set out the therapist's view of the impact on Michelle relating to timescale for a final decision. The panel apologised and confirmed a revised timetable that we have adhered to.

o 5th July: The panel was provided with a further email and documentation from Michelle relating to an exercise carried out by the people directorate to consider the "Future of HR" in the NHS. The panel note Michelle's comments that this has made her more anxious about her future and reflect that this also illustrates Michelle's dissatisfaction with the direction in which NHSE/I HR practices are developing. Although this information was submitted after the panel had agreed a decision, we took time to review the information provided before finalising this correspondence.

Summary of hearing discussions:-

The panel members introduced themselves to Michelle and confirmed that she was comfortable and had everything she needed for the hearing. They also confirmed receipt of the emails and presentation she had sent prior to the panel.

MS talked the panel through her presentation which focussed on two issues i) redundancy appeal and her belief that she should have been matched to the Band 9 Head of role as part of the JWP process ii) her at risk status following her secondment to HEE. Areas covered included:-

• The process used to evaluate roles and bandings which Michelle believed was not carried out to a consistent standard.

• Michelle's belief that she had been working at a Band 9 level prior to JWP and as such should be matched to the Band 9 Head of role created.

• Michelle's views on Talent Management in the NHS and her previous experience, touching on the meeting on 12th August at which Prerena Issaar was present.

• Michelle's views on mothers in senior roles taking lower banded roles on return from career breaks and her belief that this could amount to indirect discrimination

• Michelle's "at risk" status and further clarification on the origins of her PTSD and triggers which include her voice not being heard.

• What Michelle would like to see out of this appeal including (but not limited to) reinstatement of permanent status at the appropriate grade (9) including backpay; a recognition by NHSE/I of Downward Occupational Mobility and

links to the gender pay gap; transformation of HR processes on the principles of restorative justice; continuation of therapy for PTSD currently paid for by NHSE/I on the recognition that if this is not found and goes to an employment tribunal this could go on for years.
Overall Conclusions
The panel considered all evidence submitted by Michelle, interviews and evidence collated as part of the investigation and the investigation reports provided. Our decisions are set out below:-
Appeal: We find this to be Not upheld overall therefore we believe the notice of redundancy was fair.
The panel felt that the following points within the appeal to be upheld/partially upheld.
o Point 6 – Upheld
o Point 8 – Partially Upheld
o Point 9 – Upheld
Grievance: We find this to be not upheld.

PANEL FINDINGS AND COMMENTS
Appeal: I believe that I have been unfairly selected for redundancy and the selection process has been unfair. The process has also not been applied as per the policy.
Not upheld.

1. I should have been matched to Band 9 Head of Talent Insights role because I clearly demonstrated that all 8 key aspects of that role (as laid out in the JD) areareas of work that are in my current role

We find this Not Upheld for the following reasons:-

• NHS England and NHS Improvement engaged and consulted with recognised unions in relation to JWP. The process of job matching to same grades was agreed as part of the consultation with unions.

• We accept that NHSE/I had to close re-grading applications to ensure fairness and consistency throughout the JWP process.

• Job evaluation/review process were in place prior to JWP and would so an individual who believed they were operating at a different level/their JD was inaccurate could have requested a job evaluation. This opportunity was open to you at any time before the JWP for ANC grades commenced. At your hearing we queried whether you had taken any steps towards obtaining a job evaluation prior to JWP commencing, and you advised that you had not.

• You have explained how you believe you were performing some elements of your pre-JWP role at Band 9 level, which would be expected as part of career development and readiness for promotion. This would be the case for many other individuals working in 8d roles and does not mean that the organisation should match you against band 9 roles as this would unfairly give promotion opportunities to some employees but not others.

The scope of the work also meant that while you may have covered some aspects of your role in detail at this level, you only had light-touch oversight of other aspects. Work around talent insights accounted for a quarter of your pre-JWP 8d role alongside 3 other areas of work whereas the role that you believe you should have been matched to was wholly focused on talent insights at band 9 level. We considered that there was a difference in the degree of licence, autonomy and responsibility that would be expected of someone holding this post. We accepted that there was a changed organisational requirement from your pre-JWP role with breadth of coverage over a range of programme areas to several new roles with depth of coverage in focused programme areas and increased accountabilities which justified a change in banding.

should have been informed promptly after the team session with Prerana on Monday 12th August that the encouragement I made in that session (for us to live out mature talent management practice during the transformation) was perceived as something that sought to undermine the transformation process. Instead I was told this as part of feedback on my Pool B interviews on 19th November which led me to query the relationship between this feedback/perspective and the outcome of the Pool B interviews.

We find this Not Upheld for the following reasons:-

• We have seen no evidence that your encouragement to live out mature management practice during the transformation was perceived to be undermining the transformation process and that this affected your interview prospects.

• When HB met with you on 19th November 2019 her purpose was to give you overall feedback and steer on interview approach as part of the supportive HR function. She conveyed to you feedback in relation to your performance in Pool B interviews which had been given to her by the lead interviewers. In the same meeting she also took the opportunity to pass on feedback she had been given regarding the meeting of 12th August from a separate source.

• Your Pool B interviewers had not been present at the meeting on 12th August and were not aware of any comments you may have made at that meeting or how they were received by others in the organisation when making their decision.

• HB did not take part in the Pool B interview process or have any influence over the decisions that were made by the Pool B panels. Her knowledge of the 12th August meeting and any reservations senior staff may have had about your contribution at that meeting did not, therefore, taint the Pool B interview process.

3. I should have been offered Pool B1 roles on the basis that my values-based answers should have been judged to have been above the bar. Feedback from my later interview where the Director of OD and Talent for

NHSI/E was on the panel also illustrates that my values should have been judged as “solid” as they were by her.

We find this Not Upheld for the following reasons:-

• Interview processes provide a structure for reasoned and objective decision making but a candidate’s performance at different interviews may vary, and two separate panels may reasonably reach different conclusions on the relative strengths and weaknesses of a candidate. The scoring for each interview should therefore be considered in isolation

• A candidate’s opinion of their own performance at interview is subjective and it is not unrealistic to imagine that candidate and panel may have different perspectives on this. In this case, your own views on your performance do not reflect those of the Pool B1 interview panel and this was discussed with you as part of the feedback from KB.

• We have seen that KB provided feedback over two calls (totalling about 1 hour) following B1 interviews and that you asked for a high level of detail in this feedback. KB felt that you did not accept the feedback. Examples of feedback given by KB taken from the note in the file demonstrate why you were not successful. We encourage you to reconsider this feedback and seek further support for interview processes.

o Panel perception that MS didn’t project herself in the new role and failed to strongly present learnings.

o Panel were looking for responses that were more in depth and reflected the ambitions of the LTP and IP outcomes.

o Didn’t talk enough about how she would influence and deliver outcomes in new role.

• Based on the evidence we have seen; we consider the decision made by the Pool B1 interview panel was reasonable and justifiable. The rationale given for not appointing you was consistent with the detailed feedback given to you by KB.

• This feedback was consistent with that received from subsequent panels, and we consider you had the opportunity to revise your approach in future interviews strengthening your chances of securing a role.

4. I should have been asked about my modelling experience during the Head of HR & OD Workforce Insights, Analytics & Planning interview rather than the panel inferring from my other answers that this was not a strong area of experience for me and then declining to offer me the role on this basis. If 1 and 2 above are not proven, I should have been given this role.

We find this to be Not Upheld for the following reasons:-

• Pool C interviews were undertaken in line with NHSE/I policy. The interviewers have a discretion to select the questions which are most pertinent based on their knowledge of the role, and their view on which aspects of the candidates' suitability for the role needs to be tested. It is beyond the remit of this panel to define the questions that should have been asked at interview.

• Candidates would normally be expected to demonstrate suitability for a role by providing detailed answers which demonstrate experience required for the role and how they would deliver the objectives of the role. In doing so, candidates would be expected to have regard to the job description and person specification as well as to the specific wording of the questions asked.

• At an 8d level we would expect a candidate to be aware of this and capable of demonstrating wider (valid) skills through responses to the questions asked. We believe the panel was entitled to draw inferences from your answers, allowing you to include information you believed appropriate to the questions. In providing responses for this role, you should have considered all aspects including modelling were included in your responses.

• We wonder whether you took forward learning from the B1 interview feedback when preparing for Pool C.

5. I should have been offered the Head of Talent Insights role when I applied for it through open internal competition.

We find this to be Not Upheld for the following reasons:-

• You failed to meet the bar for appointment in this interview, therefore, regardless of "at risk" status could not be appointed.

• As noted in regard to issue (3), above, performance at different interviews may vary and the scoring for each should be considered in isolation.

• Part of the panel rationale for not appointing you to this role was that your response to the Equality, Diversity and Inclusion question did not demonstrate your own personal values in this regard, and you have objected to this as the question did not explicitly mandate an answer which referenced personal values. As noted in our response to issue (4), above, interview questions provide an opportunity for candidates to select the information they feel is most relevant to the panel and is most likely to demonstrate the skills, abilities and character that will persuade the panel to appoint. In our view it would be reasonable to have expected you to include personal views on any EDI question to demonstrate how you meet the values of the organisation, particularly in a senior role where the postholder is required to lead authentically and by example in the development of organisational culture.

6. I should only have been issued with a notice of redundancy once discussions with HEE about potential opportunities had concluded – as per written correspondence I have received.

We find this to be Upheld for the following reasons:-

• You were initially advised that a potential redundancy notice would be delayed pending the conclusion of discussions with HEE regarding potential opportunities.

• You were only notified of a change in this position and that the redundancy notice would be served imminently on 30th January 2020

Points to note: -

• When confirming a redundancy notice would be issued on 31st January, CC offered a call to support at 9am 31st January.

• The redundancy notice did not impact on discussions regarding future roles, but created an additional pressure which you had not foreseen as you said “this action increased the sense that I needed to put a strong application together for remaining People Directorate roles I could be suited (and not rely on, as yet un-discussed opportunities)”

• Many people who received redundancy letters remained in discussion on further posts, up to the date of redundancy and so the timing of the letter did not materially impact on you finding a role.

• We recognise that the organisation continued to support you to successfully find another role following issue of the redundancy notice.

• Line managers should not have agreed to defer issue of redundancy notices as policy was to issue notices on 30th January. In this instance we accept this was done to be supportive of you but in the end was not helpful.

Recommendation: NHSE/I need to ensure that line managers stick to agreed processes particularly in respect of employment and redundancy matters.

7. I should have been encouraged to apply for remaining roles within the People Directorate as there were ones remaining for which I meet the essential and desirable criteria.

We find this Not Upheld for the following reasons:-

• A list of available roles was sent to you following your request. It was your responsibility to determine the suitability of these roles and progress discussions/applications, as it was for all people with unallocated roles in the JWP process. Correspondence with your line managers demonstrates that she discussed opportunities with you and encouraged you to look at

external opportunities to increase potential of finding a suitable role.

• Line managers were responsible for providing support to individuals seeking new roles and from emails provided we believe that this support was given.
• You specifically refer to the encouragement you were given to also consider opportunities outside the organisation, and your perception that this constituted a discouragement from continuing to apply for roles internally. We consider that it is responsible and appropriate HR practice for the organisation to encourage you to explore alternative options and to offer you support in pursuing external opportunities where these exist. This is entirely compatible with the organisation fairly and objectively considering your suitability for any internal roles at the same time, should you apply for them.

8. As per the policy, I should only have been issued with the notice of redundancy
after the final consultation meeting had been held. My final consultation meeting was scheduled to take place on Tuesday 4th February, after my notice of redundancy was issued.

We find this Partially Upheld

• The conversations confirming delay to issue of this notice was outside of the policy and no delay should have been offered. This does not detract from evidence provided which shows that up to 30th January you had expected the notice to be served after your planned meeting on 4th February.

• The delay to notice would have been a maximum 5 working days and so would have had negligible impact.

• CC confirmed to you on 30th January that a redundancy notice would be issued the following day and offered to meet you at 9am on the 31st. Messages were sent via email and text message.

Repeat Recommendation to organisation to ensure adherence to these policies and processes.

9. The termination date in the notice of redundancy is incorrect, not only because of 8 above but because 3 months' notice has not been applied from the date the letter was issued.

We find this to be Upheld for the following reasons:-

• NHSE/I have acknowledged that the notice dates were incorrect and confirmed to you that these would have been amended had you moved to a redundancy situation.

Recommendation: NHSE/I should ensure the accuracy of data contained in correspondence and particularly notices of redundancy. Issued 31st Jan notice to 31st March should have been 30th April.

The recommendations made above by the panel in relation to the appeal points will be forwarded to the HR&OD team. The HR&OD team will ensure that these are actioned during future periods of organisational change within NHS England & NHS Improvement as part of lessons learned in this process.

You should be aware that the internal procedure has now been exhausted in relation to the above, and you have no further right of appeal against this decision.

Grievance
Not upheld
10. Based on your belief that you were at risk of redundancy whilst undertaking your 18-month secondment to HEE, that you should have been considered as “at risk” when applying for the Head of Capability, Talent and L&D ROLE

We find this Not Upheld based on the following reasons:-

o Having taken legal advice on the matter, we understand that there is no legal definition of “at risk” status, but employers should be consistent in their application of “at risk” status to ensure a) it is correct with regard to a fair redundancy process and b) that the process is consistently applied. In general, it is accepted that employers would not keep an employee “at risk” for more than 12 months and NHSE/I policy is consistent with this general guidance and understanding.

o You were advised verbally by Helen Bullers that your “at risk” status had been removed following your acceptance of the 18-month secondment with HEE and your TRAC jobs account was closed in recognition of this (as was applied to all others in your position). You would have been automatically notified of this closure.

o Your role with HEE could reasonably be considered as Suitable Alternative Employment and this further supports removal of your “at risk” status at that point. This is supported by The Employment Appeal Tribunal which has in case law confirmed that Suitable Alternative Employment doesn’t have to be permanent because no employment is permanent.

11. That you should have been appointed to this role based on your belief of your ”at risk” status.

We find this Not Upheld for the following reasons:-

o Even if you had been granted “at risk” status, it would not have changed the outcome as you failed to meet the suitability threshold at

interview.

o Granting you “at risk” status when applying for this role, would have created an unfair advantage over other candidates on fixed term contracts (who hadn’t been in a permanent role first).

o NHS E/I policy is fair, and you have not been treated unfavourably and should not have benefitted from “at risk” status throughout your secondment period.

Additional Items for panel consideration

o Indirect Discrimination: During your presentation to the hearing you raised the possibility of potential discrimination towards women returning from maternity leave, taking lower grade roles.

We find this Not Upheld for the following reasons:-

o We believe that the NHSE/I policies for flexible working and family leave policies provide an opportunity for parents to balance work and family life.

o Your correspondence demonstrates that you took a career break and actively applied to work for NHSE/I following your decision to return to work. You also confirmed that you had made a conscious decision to take a lower grade role (despite having been offered alternatives of a higher grade) though you did not detail why this was we have concluded that it was choice of employer rather than grade which determined your decision.

Overall recommendations

o The panel note from the Therapist’s letter (21.6.21) that Michelle requires a degree of certainty in her life to enable her to complete her healing (PTSD). NHSE/I is asked to consider this when making decisions on Michelle’s future employment status and work with her to find a suitable resolution which will allow Michelle to progress her healing.

o The panel recognises the challenges of operating in the midst of a Covid-19 pandemic, a completely unprecedented scenario, but feels that the HR team could have managed the delays to the appeal process in a more compassionate way; managing expectations by giving specific dates and timescales to review the recommencement of paused HR processes would have provided Michelle with more certainty and given her the ability to transfer focus to other areas whilst waiting for her appeal to be considered.

o The delays to the appeal and grievance process due to Covid-19 pandemic and subsequent delays following illness of a panel member, have created a lot of uncertainty for Michelle. At the panel hearing Michelle confirmed that she suffers from PTSD and that this was heightened when she felt that she was not being listened to. The panel took great care to listen to Michelle’s views and ensure that she felt supported throughout the hearing.

The panel will relay these recommendations to the appropriate individuals within the HR&OD team to ensure that they are actioned as required.

The panel recognises that this decision is not the one you had been hoping for and you will, naturally, be upset by it. In consideration of this , the panel believe that you may require additional support upon receipt of the panel's decision and following this. We have recommended that a dedicated welfare contact be allocated to ensure your health and wellbeing and have asked for this to be arranged. You will receive confirmation of the named contact within the next few days and we would encourage you to engage with them.

We further recommend that NHS E/I continue to pay for your treatment for PTSD for a further period to be agreed subject to medical advice and will ensure this recommendation is passed to Sarah Sutcliffe, Senior Transformation Lead for actioning. Right of Appeal – Grievance Outcome You have a right of appeal in relation to the grievance outcome only in line with the Grievance Policy on the following grounds: -

▪ a failure to adhere to a fair procedure; and/or.
▪ new evidence has come to light, which was not previously considered

If you wish to exercise this right of appeal you should email Matthew Baker, Head of HR and OD Advisory and Operations Service via matthew.baker3@nhs.net clearly stating your grounds of appeal within 5 working days of the date on this letter.

I appreciate that this has been a very difficult time for you and am grateful for the updates you have provided us with during this time. I know that you will find this result disappointing, but I would like to assure you that Luke and I have considered every point made by you alongside the evidence you submitted. We have truly listened to you and taken your views into consideration when making this decision.

I would like to thank you for complying with NHS England's Grievance Policy and Procedure. You are entitled to access the Employee Assistance Programme which is confidential and available at no cost to you and I would encourage you to do this. They can be contacted on 0800 716 017. I have also requested you be allocated welfare contact to provide you with additional support at this time.

Finally, I would like to thank you for your professionalism through this process and the hearing. I wish you the very best for the future. "