EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Slaven

Respondent: University Hospital of South Manchester NHS Foundation Trust

Heard at: Manchester **On:** 20-23 February 2021

Before: Employment Judge Phil Allen
Ms A Jackson
Mr P Dobson

REPRESENTATION:

Claimant: Mr S Brochwicz-Lewinski, counsel
Respondent: Mr J Boyd, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent. Her claim for unfair dismissal is well-founded and succeeds.

2. Applying the principles from the case of **Polkey**, there was a 33% chance that the claimant would have been dismissed in any event had a fair procedure been followed and any compensatory award should accordingly be reduced by 33%.

3. As agreed by the parties, the claimant is entitled to be paid by the respondent for 13.77 days holiday pay and her claim for holiday pay succeeds to the extent agreed.

4. The claimant was not treated unfavourably because of her disability. The claim for direct disability discrimination under section 13 of the Equality Act 2010 does not succeed and is dismissed.

5. The claimant was not treated unfavourably because of something arising in consequence of her disability by being dismissed. The claim for discrimination arising from disability under section 15 of the Equality Act 2010 does not succeed and is dismissed.

6. The respondent did not breach the duty to make reasonable adjustments. The claim for breach of the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010 does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a cardiac investigations unit manager (band 8A). She was employed from 13 October 1975 until 23 September 2011. The claimant's employment was terminated on notice on 1 July 2011. The allegations to be determined at this hearing were the liability issues in the claimant's claims of: unfair dismissal; disability discrimination; and arising from accrued but untaken annual leave.

2. The claimant has also brought an equal pay claim. It was that claim which has taken a substantial amount of time. The issues in that claim were not to be determined at this hearing. A separate stage three equal value hearing has been listed to be heard in October 2023, a stage two equal value hearing having been conducted in December 2018 and January 2019, with Judgment in March 2019, and a reconsideration Judgment in February 2020.

Claims and Issues

3. This case has a very long and complex procedural history.

4. The parties had prepared an agreed list of issues, outlining the issues to be determined at this hearing. The list of issues (as agreed) is appended to this Judgment.

5. Issue five related to holiday pay. At the start of the hearing, it was confirmed that the parties had reached agreement about the issue. A witness which the respondent had intended to call was not called, and the parties proceeded on the basis that the issue was not in dispute. At the start of the second day, it was made clear that whilst the amount of leave to be paid was agreed and an interim estimate of the amount due could be agreed, the precise value of the agreed annual leave might be higher depending upon the outcome of the equal value hearing. On the third day the agreed wording was confirmed (as recorded in the Judgment above). The Tribunal was, accordingly, not required to determine issue five as recorded in the attached list of issues.

6. At the start of the second day, the claimant confirmed that she was not pursuing her claim(s) for discrimination which relied upon the respondent's alleged failure to address her banding issues under Agenda for Change. It was confirmed that the Tribunal could in effect cross out that issue and it did not need to be determined.

7. Whilst the list of issues was agreed, the list contained within it a dispute about whether the claimant's disability discrimination claim was brought under section 15 of

the Equality Act 2010 (discrimination arising from disability) as well as or instead of the claim under section 13 of the Equality Act 2010 (direct disability discrimination). There was no dispute that there was claim for an alleged breach of the duty to make reasonable adjustments under sections 20 and 21 of the Equality Act 2010.

8. In summary, the claim as recorded on the claim form was expressly for direct disability discrimination (8). Further particular of the claim dated 4 October 2012 also recorded (17) a claim for direct disability discrimination contrary to section 13, but not a claim for discrimination arising from disability under section 15. At a preliminary hearing (case management) conducted by Employment Judge Ross on 3 May 2022 the claims being brought had been clarified and a list of the issues to be determined had been recorded as an appendix to the case management order. The appended list of issues (39) recorded the claimant's claim as being for discrimination arising from disability under section 15 of the Equality Act 2010 (with no claim for direct disability discrimination being recorded). There was no evidence that either party had raised any issue regarding that list of issues. At the start of this hearing this dispute was identified. It was agreed that it would be addressed by the parties in submissions to be made at the end of the hearing, in order to ensure that the case and the evidence could be heard without further delay.

9. It was agreed that this hearing would determine liability issues only. Remedy issues are only to be determined after the stage three equal value hearing. It was expressly agreed that issue 1.2.5 (whether there should be any reduction on **Polkey** grounds to any unfair dismissal award) would be determined alongside the liability issues (albeit strictly speaking it is a remedy issue).

Procedure

10. Both parties were represented at the hearing by very experienced counsel, both of whom who had also represented the relevant party at previous equal pay hearing(s).

11. The hearing was conducted in person with both parties and all witnesses attending at Manchester Employment Tribunal and giving evidence in person.

12. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 568 pages. It was understood that disclosure had taken place shortly after the proceedings had been issued. It was acknowledged that there must have been other relevant documents which had existed, but due to the historic nature of the matters being considered could not now be found (for example, the occupational health report provided was clearly not the first such report, but previous reports could not be located). Where a number is included in brackets in this Judgment, that is a reference to the page number in the agreed bundle.

13. On the morning of the first day, the Tribunal read the witness statements prepared by the claimant and by Mr John Silverwood, who had been the respondent's Director of Human Resources between 17 November 2008 and 31 March 2012. The Tribunal also read the pages from the bundle referred to in those statements. A witness statement had also been prepared for Ms Logue by the respondent, but that statement was not read as the Tribunal was informed that it addressed the issues relating to annual leave which had been resolved/agreed.

14. The Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal (and being re-examined).

15. Mr Silverwood gave evidence for the respondent, was cross examined by the claimant's representative, and was asked questions by the Tribunal.

16. It was clear to the Tribunal that there were considerable gaps in the evidence available. Both counsel recognised in their questions the difficulties faced by the witnesses from whom the Tribunal did hear, in recalling what exactly had occurred in the light of the time delay involved. The respondent had previously applied for the claims determined at this hearing to be struck out because it had said a fair hearing was no longer possible. That application had been considered at a hearing on 12-13 December 2022 and refused. The lengthy and detailed Judgment of Employment Judge Slater explained her reasons (50). It is not necessary to re-produce what was said in that Judgment. Of relevance to the evidence heard in this hearing, that Judgment recorded that, sadly, Dr Neil Davidson (who would potentially have been one of the respondent's witnesses) had passed away in July 2020 (53). Ms Judy Coombes, who had also been a potential witness, had left the respondent in July 2015 and had retired from her role with another Trust in August 2021. The Judgment also recorded other reasons why contact with Ms Coombes had ceased. In any event, Ms Coombes did not give evidence at this hearing. Mr Silverwood, who did attend and give evidence, had retired in March 2012 when he had left the respondent's employment.

17. After the evidence was heard, the parties made submissions. Written submissions were prepared and exchanged, and the Tribunal read the written submissions prior to hearing the verbal submissions from the parties' representatives. It had been agreed that each representative would take no more than half an hour for verbal submissions, albeit in practice each of the representatives took slightly longer in making their verbal submissions than had been indicated.

18. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below. The final day listed was conducted in chambers when the panel reached its decision.

19. The Tribunal was grateful to the representatives for the entirely appropriate way in which the hearing was conducted.

Facts

20. The claimant was employed by the respondent for 36 years from 13 October 1975 until 23 September 2011. She was initially employed as a Trainee Cardiac Physiologist and was subsequently promoted to the role of Cardiac Investigations and Cardiology Administration Services Manager. The claimant held that position for over 20 years.

21. The Tribunal was provided with two very lengthy and detailed job descriptions for the claimant's role, both of which had in the course of proceedings been agreed by the respondent. The claimant's duties were a mixture of both clinical and

managerial, albeit it was clear that the clinical duties she undertook had significantly reduced towards the end of her career. In a letter sent by the respondent's Chief Executive to the claimant on 13 June 2012 (476) he said:

> *"it is clear that you are an employee with an exemplary record and I have no reason to doubt that you are a hardworking individual who has been dedicated to the Cardiology service and UHSM."*

22. The claimant has a deformity of both feet and ankles and an organic rotational deformity of both tibias. These have caused the claimant pain and gait problems which have impacted upon her mobility. The claimant underwent surgery on her right ankle in November 2007, which had to be repeated in December 2008. On both occasions the claimant successfully returned to work after surgery with the assistance of walking aids. Unfortunately, it transpired that the second operation was unsuccessful and, with a view to improving her mobility, the claimant underwent more radical surgery on her right ankle in August 2009. There were subsequent clinical complications which delayed the claimant's recovery. The claimant was absent from the workplace from August 2009 (albeit the claimant's evidence was that she was ready to return to work from approximately November 2009). As the respondent accepted both that the claimant had a disability and that the respondent had the requisite knowledge of her disability, it is not necessary to further address those issues in this Judgment.

23. The claimant reported to Ms Judy Coombes, the Directorate Manager. The Tribunal did not hear evidence from Ms Coombes. In an email dated 19 November 2009 (67) Ms Coombes made a commitment to the claimant that she would copy to her anything major that came her way and affected the department (whilst she was absent).

24. The respondent undertook a significant exercise of addressing the clinical leadership at the Trust, which was the subject of detailed and extensive documentation and (at least to an extent) consultation. Mr Silverwood, from whom the Tribunal did hear evidence, clearly took significant ownership of this exercise. Mr Silverwood's clear evidence was that he expected individual departmental managers to ensure that all absent employees were notified and kept informed about the process undertaken and to ensure the documents were sent out. He also expected the respondent's IT providers to ensure that access was given to the relevant documentation. The Tribunal entirely accept that that was Mr Silverwood's expectation. He genuinely believed that had been done. However, despite Mr Silverwood's assertion that he believed that such things would have occurred, there was simply no evidence before the Tribunal that what he believed had in fact occurred for the claimant.

25. It was clear that Ms Coombes had provided the claimant with some information about the clinical leadership initiative, not least because in an email of 7 July 2010 (278) the claimant informed Dr Davidson that Ms Coombes had kept her informed of progress with the clinical leadership initiative. However, when it came to the documentation itself, the Tribunal was not provided with any emails which showed the claimant being given access to the detailed documentation provided. An important exchange of emails was provided in which the claimant raised with Ms Coombes on 6 May 2010 that she was unable to access the clinical leadership

information pack via NHS.net (128/129). Ms Coombes appeared to have endeavoured to provide it again, to which the claimant had responded on 21 May explaining that the document would not open (128). The claimant then exchanged emails with the respondent's IT helpdesk explaining that an error message was appearing when she tried to access the document. No emails were provided which showed anybody in IT stating that they had resolved the issue. The claimant's clear evidence was that throughout the period she was not able to access the documents provided, and the Tribunal entirely accepted her evidence about this (there being no evidence to the contrary, save for Mr Silverwood's broad assertions that he was sure that she would have done).

26. In May 2010 a detailed document was issued to staff (albeit not received by the claimant) which explained the implementation of the new clinical leadership team at the respondent. Mr Silverwood's evidence was that each directorate would be headed up by a new triumvirate. The triumvirate would be headed by the Clinical Director, being a consultant doctor who would be ultimately responsible for the division. The senior management team would also consist of the Directorate Manager and the Head of Nursing/Matron. Whilst the document itself does not explicitly record that the Clinical Director must be a doctor or consultant, the Tribunal accepted Mr Silverwood's evidence that the Clinical Director was intended to be, would always be, and in practice was (even when the initial incumbents were replaced), a doctor.

27. It was apparent to the Employment Tribunal that the claimant's position was vulnerable as soon as the document was issued. This was shown by a diagram showing the cardiovascular team, which recorded the three roles identified above and some specialty leads, but did not contain a role equivalent to the claimant's (87). Had the claimant had access to this document at the time, it is likely that she also would have identified her position was vulnerable at an early stage in the process.

28. The document also included a number of job descriptions. Those which were potentially relevant to the claimant included the job descriptions for the Associate Director of Operations (for which there were three roles), and the Directorate Manager (for which there were a number of roles, including one in the claimant's own directorate). The initial document also set out an expected timetable, including that there would be competency-based interviews and assessments for the key roles. The document was also subsequently updated following collective consultation.

29. In the claimant's directorate, Dr Davidson was appointed the Clinical Director and Ms Coombes was appointed the Directorate Manager. At the point that they were appointed to the roles, the claimant was unaware that her own role was likely to be affected by the reorganisation. She therefore had not put herself forward for those roles. In answering questions from the Tribunal, the claimant stated that she considered this to be just another of many reorganisations at senior level and that she had not appreciated the significance for her personally of the exercise being undertaken. The claimant congratulated Dr Davidson on 7 July 2010 on his appointment.

30. As part of the matters agreed with the trade unions as part of the exercise, the redundancy selection criteria and scoring guide were agreed. Copies were provided to the Tribunal. Two important aspects of the scoring guide were that: for the

attendance score, where an individual had a known disability, then disability related absence was not considered; and, in the event of all scores being equal, length of service was to be taken into account. Mr Silverwood accepted in cross examination that had the claimant been competitively scored against someone else she would have scored very highly.

31. The claimant met with Ms Coombes and Dr Davidson on 16 July 2010. That meeting was arranged at the claimant's request, as she wished to discuss her potential return to work. The Tribunal was not provided with any formal notes of that meeting. What the Tribunal was provided was an exchange of emails between Ms Coombes and the claimant of 23 July 2010, in which Ms Coombes explained some matters arising, and the claimant then summarised her view of the discussions as a response. The Tribunal did consider the contents of the emails to be important. In Ms Coombes' email to the claimant (288) she said the following:

> *"We discussed changes in the management structure of the trust which are ongoing. You asked for some clarity about how this might affect your role. We explained that the situation is still somewhat unclear, as the corporate restructure of HR/Finance/Clinical Governance etc has not yet been announced. We indicated that once this had been clarified the new Directorate management teams would be in a better position to understand what must be managed within the Directorates, and then plan a structure accordingly.*
>
> *For your information, since our meeting, all the new management teams have been tasked with reviewing their Directorates and providing a draft structure that is fit for purpose and also reduces costs. In this process all roles which are not directly involved with patient care will be reviewed.*
>
> *You expressed your disappointment at the lack of communication from both your team and from the Consultants during your absence. You felt you should have been kept up to date in a more robust and complete way. You believe that this isolation has made your return to work more difficult as you do not have an understanding of the changes that have taken place in the department during your absence. Although you have had access to Trust emails which have provided general information about organisational changes within the Trust, you have been anxious and apprehensive about what this might mean for your return to work.*
>
> *Neil apologised on behalf of his colleagues, and assured you that the Consultant team had been thinking of you. We talked about the difficulty of getting the balance right in terms of communication when someone is on sickness absence. We had felt it was important to protect you from any stress that might hinder your recovery. It is also not appropriate for operational decisions to be made by someone who is absent from the department for a protracted period. However, we accept that communication could have been better."*

32. In her reply the claimant emphasised what she thought to have been discussed. Amongst other things the claimant said the following:

> *"I explained that the emotional burden of such a long and difficult physical recovery had been worsened by a lack of engagement with the workplace. Neil explained Clinical Governance would not have permitted me to be more involved as I would not be culpable for decisions made whilst on sick leave. Judy suggested I should take the lead and telephone team leaders, I explained several attempts at initiating contact in the past had failed and its demeaning to constantly beg for information! …I asked for views on how I would take up my role when I return to work. Judy & Neil were unable to help due to uncertainty around Trust-wide reorganisation…apparently many roles will change and it is unclear how this will impact. I explained this makes me feel very vulnerable…isolated from the service I cannot have any input. Judy kindly agreed to arrange a further meeting when she returns from annual leave by which time Trust plans should be clearer."*

33. The Tribunal was provided with no response from Ms Coombes to the specific points raised.

34. Mr Silverwood's evidence was that, at approximately the same time, those appointed in each directorate had been given the task of deciding the structure of their own directorate. It was his clear evidence that he did not want the responsibility for determining the structure of the departments and that he had passed that responsibility to the Directorate Managers and Clinical Directors (in part so that they could not blame the HR team for the structures which resulted). There was a lack of evidence available to the Tribunal about how and when directorate structures had been determined, or indeed how different directorates had chosen to approach the exercise in different ways. It was Mr Silverwood's clear evidence that Dr Davidson and Ms Coombes had been the ones to make the decisions about the directorate in which the claimant was placed. It appeared to the Tribunal that around the time of the July meeting in 2010, Ms Coombes and Dr Davidson would have been fully aware that the claimant's position was one that was potentially at risk of redundancy even if at that stage they had not made the formal decision that her role would be deleted (albeit the structure document from earlier in the year suggested that that was likely to be the outcome). Nonetheless, irrespective of the position with the decisions at that point, there was no suggestion from the respondent that the meeting which took place on 16 July 2010 in any way amounted to redundancy consultation.

35. On 4 September 2010 a directorate restructuring document was produced by the respondent, albeit it was not received by the claimant on that date. That document provided the divisional structures for each of the relevant directorates. In some of the directorates, professional management roles akin to the claimant's had been retained. In the cardio thoracic & transplant directorate structure (336) the claimant's role had been deleted. This was clearly stated as "*post deleted*" with the explanation of operational effect being "*Duties to be reallocated within the Clinical Team*".

36. On 4 October 2010 Ms Coombes sent the claimant an email asking her to meet with Mr Silverwood, the Director of HR. The claimant had been due to meet Ms Coombes for a risk assessment meeting about her return to work on 7 October, but the arrangements were changed so that the claimant would first meet with Ms Coombes and Mr Silverwood.

37. The Tribunal was not provided with any notes of the meeting which took place on 7 October 2010. There was however no dispute that Mr Silverwood presented the claimant with the restructuring document, turned to the relevant page which described the claimant's role as "*post deleted*" and told the claimant that her role was redundant. The claimant described herself as being stunned, horrified and devastated. Mr Silverwood accepted that she was surprised. There was no dispute that the claimant asked Mr Silverwood multiple times if the decision was reversible, and he replied on each occasion with an emphatic no and told the claimant that the structure was already in place. Mr Silverwood went on to discuss the availability of other jobs and the need to register with NHS Jobs.

38. It was the claimant's evidence that after Mr Silverwood had left the meeting Ms Coombes told the claimant that she had not appreciated that Mr Silverwood was going to tell the claimant the news that day. Mr Silverwood's evidence was clear that the decision to delete the claimant's role was not his own, it was one made by Dr Davidson and Ms Coombes. The claimant described the meeting as being a "fait accompli". In practice there was no real dispute that that was the effect of the meeting.

39. On 14 October 2010 Mr Silverwood wrote to the claimant (350) and confirmed:

> *"You were informed that, following a review of the supporting structures for the new Clinical Leadership Directorates, your current post would no longer exist within the new structure and that you were therefore 'at risk' of redundancy."*

40. The letter went on to address various other matters. It stated that the claimant would have the opportunity to apply for other posts. There was reference to the Trust's redeployment policy. Within the letter Mr Silverwood made a commitment that the claimant would be notified of any internal adverts for posts at her band.

41. Mr Silverwood's evidence was that he would have expected a member of the HR team to have provided the claimant with details of vacancies, however there was no evidence whatsoever provided to the Tribunal that the claimant was ever informed of any specific vacancies available within the Trust. The Tribunal was provided with a lengthy table which appeared to contain every role which had been available within the Trust over a lengthy period, much of which predated the claimant being informed that she was at risk of redundancy. The table certainly could not have been (and was not held out to be) a list of the vacancies about which the claimant was notified. Of the many roles identified, the role of Head of Product Safety and Quality (a grade 8C role) was available with a closing date of 27 October 2010. The claimant's evidence was that as far as she was aware that was a role for which she could have been qualified. There was also some suggestion that the claimant might have been able to fill a role of Post Graduate Medical Education Manager, but the claimant herself did not appear to be certain of that, and in any event the closing date from the document appeared to be February 2010 (that was long before the claimant was put at risk, or there was any argument that she should have been).

42. The claimant had been due to meet with Mr Silverwood again on or around 14 October 2010 but, as a result of ill health, she was unable to attend the meeting. In his evidence, Mr Silverwood was very critical of the claimant for not attending.

43. The claimant's evidence was that she was significantly affected by the way in which she was informed about the deletion of her role on 14 October 2010. She described that the meeting had a devastating impact on her wellbeing. It was her evidence that she could not bring herself to register with NHS Jobs as she could not accept that a final decision had been made to remove her role and, at that time, she was not mentally capable of considering another role.

44. On 2 November 2010 the claimant raised a grievance with Mr Silverwood (372). Mr Silverwood met with the claimant, Ms Coombes and Dr Davidson on 5 November 2010. There were no notes of that meeting provided by the respondent. The Tribunal was provided with some notes prepared by the claimant following the meeting (375). The claimant raised various issues of concern, including, in particular, that Dr Davidson clearly considered the claimant to be undertaking a role that was almost exclusively managerial, when the claimant considered her role to be significantly clinical. The claimant discovered in that meeting that her team had been advised two weeks prior to the meeting that her post had been deleted. Ms Coombes apologised if that caused upset. The Tribunal accepted that the fact that the team had been informed made it clear (if it was not already), that there was no intention in the meeting of 5 November to consult about the exercise that had been undertaken in a genuine way or to discuss whether the role should be deleted; that decision had already been made and communicated to others.

45. Following the meeting, Mr Silverwood wrote to the claimant on 11 November (379). It was clear from Mr Silverwood's letter and his evidence to the Tribunal, that he did not consider the 5 November meeting to be a discussion about whether the decision to delete the claimant's post should be made, but rather it was an explanation of the fact that the role had been deleted. In the letter, Mr Silverwood said the post would not be deleted until after the claimant's notice expired. In evidence Mr Silverwood explained that the new structure had gone live in July 2010 (and therefore in practice the post had already been deleted in any event). Mr Silverwood did agree to reinstate the claimant on full pay with effect from 1 November 2010, albeit that would appear to have reflected the fact that the claimant was not absent on ill health grounds at that time but was absent as her role no longer existed. There was no correspondence from the respondent which appeared to address or consider the matters raised by the claimant at the meeting. No investigations were undertaken into the points that the claimant had raised. There was also no progress made in addressing the grievance which the claimant had raised; the grievance was not addressed at all.

46. The Tribunal was provided with evidence that a further meeting took place on 6 December 2010 attended by Mr Silverwood, the claimant, and her solicitor. Rather surprisingly, Mr Silverwood did not have a note of that meeting. His witness statement said that he recalled that they discussed the claimant's upset that her job appeared to have been deleted from the structure without any reference to her, and she was not happy about it. No other outcome to the meeting was provided.

47. On 1 July 2011 Mr Silverwood gave the claimant formal (12 weeks) notice of the termination of her employment on grounds of redundancy, with termination taking effect on 23 September 2011 (382). There was no other contact with the claimant at the point of termination.

48. The claimant's evidence was that she could not recall seeing information about any suitable alternative roles that were presented to her. The respondent provided no evidence that any meetings were held with the claimant to discuss suitable alternative employment. No evidence was presented of any information about any roles being provided to the claimant at any time after she was told she was at risk of redundancy (including at any time following the 6 December 2010 meeting).

49. On 2 December 2011 the claimant submitted an appeal against her redundancy (394). The claimant's evidence was that it had previously been agreed that she could submit her appeal at that point. The claimant's appeal was never heard and was not addressed under the respondent's procedures.

50. On 10 May 2012 the respondent's Chief Executive, Julian Hartley, met with the claimant. The claimant confirmed in evidence that she found that meeting helpful, as the Chief Executive listened to what she had to say. He wrote a letter following that meeting on 13 June 2012 (476). Within the letter he said:

> *"It was clear to me that the process followed has clearly been upsetting and traumatic for you and I am sorry the process has upset you. We discussed that there were some necessary changes required to the organisational structure which have invariably resulted in some people being made redundant. This exercise has, on the whole, been undertaken with full consultation and with individuals and staff side representatives and whilst a process has been followed in your case, I can understand your argument that we could have approached your case differently…Whilst I cannot go back and undo the process for you personally I hope that you can take some assurance that I will endeavour to ensure that your points are taken on board for the future."*

51. As described above, the parties reached an agreement at the start of the hearing about the period of holiday for which the claimant was entitled to be remunerated. The Tribunal did note that it had taken over eleven years for the respondent to acknowledge the claimant's entitlement to an unpaid entitlement, which it now accepted had been due.

The Law

52. For the claim for unfair dismissal, the starting point is section 98 of the Employment Rights Act 1996.

> *"***In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) The reason (or if more than one, the principal reason) for the dismissal."**

> **"A reason falls within this subsection if it…is that the employee was redundant."**
>
> **"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.**"

53. Section 139 of the Employment Rights Act 1996 defines redundancy:

> **"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 – … the fact that the requirements of that business – for employees to carry out work of a particular kind, or 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."**

54. The question is whether there has been a diminution or cessation in the requirement for employees to carry out work of a particular kind. This is not a test which requires the respondent to cease doing that work, it is focussed on whether there is a reduced requirement for employees to carry out the particular kind of work.

55. It is generally not open to an employee to claim that her dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The Tribunal is not to sit in judgment on the business decision to make redundancies. Mr Boyd submitted that: while it is trite law that it is not for Tribunals to investigate the reasons behind such situations (**James W Cook and Co. (Wivenhoe) Ltd v Tipper and ors** [1990] ICR 716), the tribunal is of course entitled to question whether or not the decision to make redundancies was in fact genuine, in order to determine whether the redundancy was a sham

56. In **Williams v Compair Maxam Ltd** [1982] IRLR 83, (a case referred to by Mr Boyd in his submissions) the Employment Appeal Tribunal set out the standards which should guide the Tribunal in determining whether a dismissal for redundancy is fair under section 98(4). Browne-Wilkinson J, expressed the position as follows:

> *"… there is a generally accepted view in industrial relations that… reasonable employers will seek to act in accordance with the following principles:*
>
> *(1) The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*

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

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

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

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

… The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

57. Mr Boyd also relied upon the following authorities when making the following submissions:

a. **Thomas and Betts Manufacturing Ltd v Harding** [1980] IRLR 255, an authority for the proposition that employers have considerable flexibility in defining the pool from which they will select employees for dismissal – that they need only show that they applied their minds to the pool and acted from genuine motives, albeit reasonably in the circumstances;

b. **Hendy Banks City Print Ltd v Fairbrother and ors** [2004] EAT 0691/04 that the Tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances; and

c. **Sainsbury's Supermarkets Ltd v Hitt** [2003] IRLR 23, which provides authority for the principle that for each stage of the procedure adopted by the respondent, the Tribunal should consider whether that particular stage fell within the range of reasonable responses available to the respondent.

58. Mr Brochwicz-Lewinski relied upon the Judgment of Glidewell LJ in the case of **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** [1994] IRLR 72:

> *"Fair consultation means:*
>
> *(a) consultation when the proposals are still at a formative stage;*
>
> *(b) adequate information on which to respond;*
>
> *(c) adequate time in which to respond;*
>
> *(d) conscientious consideration by an authority of the response to consultation."*

59. Whilst neither party referred to it, on consultation the Employment Appeal Tribunal in the well-known authority of **Mugford v Midland Bank** [1997] IRLR 208, summarised the state of the law as follows:

> *"It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy."*

60. Section 98(4)(a) of the Employment Rights Act 1996 makes clear that the size and administrative resources of the employer's undertaking are factors which should be taken into account when considering whether the dismissal is fair or unfair in all the circumstances of the case.

Polkey

61. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) may be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction the Tribunal may have to speculate on uncertainties to a significant degree.

62. The **Polkey** assessment is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme, though more usually will fall somewhere on a spectrum between the two extremes (which recognises the uncertainties). A Tribunal is not answering the question what it would have done if it were the employer; it is assessing the chances of what the actual employer would have done.

63. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant. Mr Boyd relied upon **Eversheds v De Belin** [2011] IRLR 448, following on from **Software 2000 Ltd v Andrews** [2007] ICR 825 and quoted the following passage explaining what a Tribunal should do:

> *"It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence … [the finding that employment would have continued indefinitely] should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored"*.

Direct discrimination

64. The claim relies on section 13 of the Equality Act 2010 which provides that:

> **"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."**

65. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur and these include dismissal. The characteristics protected by these provisions include disability.

66. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. The requirement is that all relevant circumstances between the claimant and the comparator must be the same and not materially different, although it is not required that the situations have to be precisely the same.

67. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(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".**

68. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that she has been

treated less favourably than her comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

69. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

70. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

71. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

72. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

73. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably, that an employee without the protected characteristic would have been treated reasonably

74. The way in which the burden of proof should be considered has been explained in many authorities. Mr Boyd made reference in his submissions to **Shamoon v Chief Constable of the RUC [2003] IRLR 285**. He submitted that in this case the law is captured in the "reason why" question set out in the line of authorities including that case. He also relied upon the guidance in **Madarassy v Nomura International Plc** [2007] IRLR 246 re-affirming along the way the guidance provided in **Igen Ltd v Wong** [2005] IRLR 258*:*

> *"55. In my judgment, the correct legal position is made clear in paragraphs 28 and 29 of the judgment in Igen v Wong.*
> *"28. … The language of the statutory amendments [to s.63A(2)] seems to us plain. It is for the complainant to prove facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the complainant "could have committed" such act" …"*

75. Mr Boyd also submitted that the Court of Appeal in **Madarassy** had rejected the argument that the burden of proof shifted to the employer simply on the claimant establishing the facts of a difference in status and a difference in treatment per se.

76. Mr Boyd also submitted that the fact that a claimant believes that she has been treated less favourably than a comparator does not of itself establish that there has been less favourable treatment, relying upon **Burrett v West Birmingham Health Authority** [1994] IRLR 7, EAT. He emphasised that the test is an objective one, but said that the respondent appreciated that perception may often have a significant influence on a Tribunal determining whether less favourable treatment has in fact taken place.

77. Where there is no actual comparator, it is incumbent on the Tribunal to consider how a hypothetical comparator would have been treated (**Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting** [2002] ICR 646).

Discrimination arising from disability

78. Section 15 of the Equality Act 2010 provides:

> **(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.**

79. For unfavourable treatment there is no need for a comparison, as there would be for direct discrimination. However, the treatment must be unfavourable, that is there must be something intrinsically disadvantageous to it.

80. Mr Boyd relied upon **Basildon & Thurrock NHS Trust v Weerasinghe** [2016] ICR 305 as emphasising the two-stage approach identified by the statutory provision, both being causal: first, there must be something arising in consequence

of the disability; and, second, the unfavourable treatment must be "because of" that "something". He also referred to **Charlesworth v Dransfield Engineering** as confirming the same approach. The something must be more than a trivial part of the reason for the unfavourable treatment.

81. Whilst neither party expressly referred to it, the correct approach to be taken was clearly set out in the well-known authority of **Pnaiser v NHS England [2016] IRLR 170**:

> *"From these authorities, the proper approach can be summarised as follows:*
>
> *(a) A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.*
>
> *(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The 'something' that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.*
>
> *(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see Nagarajan v London Regional Transport. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises….*
>
> *(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in Hall), the statutory purpose which appears from the wording of s.15, namely to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.*
>
> *(e) For example, in Land Registry v Houghton a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was*

met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.

(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(h) Moreover, the statutory language of s.15(2) makes clear … that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the 'something' leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.

(i) As Langstaff P held in Weerasinghe, it does not matter precisely in which order these questions are addressed."

82. In his submissions Mr Brochwicz-Lewinski emphasised that the burden of proof provisions apply equally to a section 15 claim, as they do to a section 13 claim.

The duty to make reasonable adjustments

83. Section 20 of the Equality Act 2010 provides:

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

84. Section 21 of the Equality Act 2010 provides that a failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments. Schedule 8 of the same Act also contains provisions regarding reasonable adjustments at work.

85. **Environment Agency v Rowan** [2008] IRLR 20 (a case relied upon by Mr Boyd, which he submitted had been reinforced by **The Royal Bank of Scotland v Ashton** [2011] ICR 632) is authority that the matters a Tribunal must identify in relation to a claim of discrimination on the grounds of failure to make reasonable adjustments are:

a. the provision, criterion or practice applied by or on behalf of an employer;

b. the identity of non-disabled comparators (where appropriate); and

c. the nature and extent of the substantial disadvantage suffered by the claimant comprising itself the need to identify:

(i) the nature of the Claimant's disability;

(ii) why this disability placed her at a substantial disadvantage;

(iii) what the substantial disadvantage was;

d. in light of those matters what a reasonable adjustment would be.

86. The requirement can involve treating disabled people more favourably than those who are not disabled.

87. Whether something is a provision, criterion or practice should not be approached too restrictively or technically, it is intended that phrase should be construed widely. Mr Boyd placed considerable emphasis upon the decision in the case of **Nottingham City Transport v Harvey** [2012] UKEAT 0032/12/0510 and in his submissions he cited the rationale of that decision. He submitted that in terms of a PCP, of necessity a "practice" has something of the element of repetition about it. He quoted the Employment Appeal Tribunal's observations on the facts of that case about the way in which the disciplinary process was followed and why the absence of any evidence that the approach had been the employer's practice meant that it was not a PCP. The Tribunal would also note that the point has also been identified more recently in the Employment Appeal Tribunal's Judgment in **Ishola v Transport for London [2020] IRLR 368**:

> *"I consider that although a one-off decision or act can be a practice, it is not necessarily one. …in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J referred to 'practice' as having something of the element of repetition about it."*

88. In his verbal submissions, Mr Brochwicz-Lewinski, accepted that Mr Boyd had raised a valid point about the PCP in the reasonable adjustment claim in the light of the primary way in which the claimant had argued her case, which was that the claimant was treated entirely differently to others in the way that the redundancy consultation process was undertaken in relation to her. He nonetheless contended that it remained an alternative case pursued by the claimant if the Tribunal did not accept her primary arguments about the way she was treated.

89. In his written submissions, Mr Boyd also relied upon the following authorities regarding reasonable adjustments: **Fareham College v Walters**; **Smith v Churchills Stairlifts**; **Archibald v Fife Council**; **Chief Constable of Lincolnshire v Weaver** EAT/0622/07; **Tameside Hospitals NHS Trust v Mylott** [2009] 0352/09; **Project Management Institute v Latif** [2007] IRLR 579; **Newham v Saunders**;

RBS v Ashton [2011] ICR 632; **Spence v Intype Libra**; **and Knightley v Chelsea and Westminster Hospital NHS Foundation Trust** [2022] EAT 63**.**

Other issues

90. In his submissions, Mr Boyd reminded the Tribunal of a passage from **Getsmin SGPS SA v Credit Suisse (UK) Ltd** [2013] EWHC 3560 as quoted in **Marlow v AIG Asset Management (Europe) Ltd** [2017] UKEAT/0267/17. He also emphasised the well known authority of **Chandhok v Tirkey** [2014] UKEAT 0190/14/1912 with regard to the primacy of the pleadings in identifying the issues in the case.

Conclusions – applying the Law to the Facts

Unfair dismissal

91. The Tribunal first considered the claimant's unfair dismissal claim. The issues to be determined are set out at 1.1 and 1.2 in the attached list of issues.

92. The first issue was to determine whether or not the respondent had shown that the reason for the claimant's dismissal was redundancy (redundancy being a potentially fair reason under section 98 of the Employment Rights Act 1996).

93. In his submissions Mr Boyd contended that there could be little credible argument that the reason for dismissal was anything other than redundancy. He emphasised that there was a Trust-wide reorganisation involving a very significant number of other employees at all different levels of seniority. He also pointed to the documentation to which the Tribunal had been referred which explained the process and the reasons for it.

94. Mr Brochwicz-Lewinski highlighted that the evidence of Mr Silverwood was that the deletion of the claimant's post did not follow from the overall reorganisation envisaged in May 2010; but was in fact the result of a decision made by Ms Coombes and Dr Davidson. He contended that, in the absence of evidence from those individuals as to how that decision had been made and given what he contended was an inexcusable complete lack of consultation with the claimant, he questioned what the real reason for dismissal was. He highlighted that: the claimant's work was effectively simply shared out to other staff; that other directorates retained a role equivalent to the claimant's; and the lack of any specific justification for the claimant's dismissal in the documents provided.

95. The Tribunal did carefully consider whether the respondent had shown that the reason for dismissal was redundancy. As is recorded below in relation to the process followed, the Tribunal identified that the process followed was fundamentally flawed. However, in the context of the large-scale reorganisation undertaken by the respondent, the Tribunal accepted the respondent's case that the reason for the reorganisation, and the deletion of the claimant's post, was the diminution or cessation in the requirement for employees to carry out work of a particular kind. The claimant's specific role was deleted by the respondent and the reason for her dismissal was the deletion of that specific role (with her work being re-allocated to others). It was correct that the decision to delete the claimant's role was one made

by Ms Coombes and Dr Davidson, but nonetheless that was part of the broader reorganisation and followed from the triumvirate in the directorate being tasked with making the decisions about the future of the directorate. The possibility of the removal of the claimant's role was certainly clearly identifiable from the broader document issued in May 2010 (87), albeit that the decision was made by Ms Coombes and Dr Davidson when they considered the future of their directorate. The Tribunal found that the reason for dismissal was redundancy, as the respondent contended.

96. The second issue was whether the respondent act reasonably in all the circumstances in treating that reason (redundancy) as a sufficient reason to dismiss the claimant. The list of issues at 1.2.1-1.2.4 set out a number of the matters the Tribunal would in particular need to decide when determining that over-arching question. These were listed as being whether: the respondent adequately warned and consulted the claimant; the respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool; the respondent took responsible steps to find the claimant suitable alternative employment; and dismissal was within the range of reasonable responses.

97. Mr Brochwicz-Lewinski's submission was that the process followed was manifestly unreasonable and unfair. In particular, he placed reliance upon the absence of genuine consultation. The Tribunal noted, in particular, what was set out in **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price** as detailed above. That Judgment said that fair consultation occurs when the proposals are still at a formative stage. It also said that after there is a response to consultation, there must be conscientious consideration by an authority of those responses. As is detailed in the facts section of this Judgment above, there was no genuine consultation whatsoever with the claimant (as an individual). The first meeting which could possibly have been held out to be individual consultation with her, was the 4 October meeting at which Mr Silverwood told the claimant her post had been deleted. What was said to the claimant in that meeting was in no way genuine consultation about proposals at a formative stage. It was informing her of a fait accompli, as the claimant contended, with her role having already been deleted. Mr Silverwood may have been willing to discuss alternative employment (albeit that none was identified) but he was not consulting about the proposed redundancy whilst it was at a formative stage, and he did not genuinely consult with the claimant about what was proposed nor did he conscientiously consider her responses (in any of his her meetings with him). In any event it had not been Mr Silverwood's decision to delete the claimant's role (although his outline proposals had indicated it was a genuine possibility), so he was in no position to genuinely consult and conscientiously consider what she had to say about her role being deleted. It was a decision made by Dr Davidson and Ms Coombes, who did not engage in any consultation with the claimant whatsoever at any time prior to their decision. Their earlier meetings with the claimant pre-dated her being aware of the proposal. Mr Boyd submitted that the later meeting of 5 November 2010 was a consultation meeting, but that was not a meeting which involved consultation with the claimant about a decision at a formative stage, occurring as it did a month after the claimant had been presented with the fait accompli of her post having been deleted, two weeks after her team had been informed, and at least three months after the new structure had gone live according to Mr Silverwood's evidence. In the absence of any fair consultation with the claimant individually about the proposals and on that basis

alone, the Tribunal found that the process followed was fundamentally flawed and the dismissal was unfair applying section 98(4). The respondent did not act reasonably in all the circumstances in treating the reason of redundancy as a sufficient reason to dismiss the claimant

98. Mr Silverwood in his evidence placed particular emphasis on the documents that had been provided to staff at the earlier stage of the reorganisation. As the claimant did not receive those documents, they could not assist the respondent in maintaining that consultation had taken place as a result of the provision of those documents to the claimant. The claimant had raised with her manager and IT that she was unable to access the documents and no access was provided (or at least there was no evidence of such access being provided). Had the claimant been able to access the initial documents, she might have been able to draw conclusions about the likely impact on her of the reorganisation that was proposed. She would have been able to consider whether she wished to apply for the roles that were available. The absence of that information meant that she was not able to do so. That was also a failure by the respondent to inform and consult with the claimant personally. For genuine and meaningful consultation to have taken place which met the requirements set out in **R v British Coal Corpn and Secretary of State for Trade and Industry, ex p Price**, the respondent should have consulted with the claimant when the proposals were at a formative stage. In this case that would have been before they filled any of the senior roles. As the Tribunal has found, it was self-evident from the May 2010 diagram (87) showing the cardiovascular team, which recorded the three triumvirate roles and some specialty leads but did not contain a role equivalent to the claimant's, that the claimant's role might be impacted and it was at that stage when those proposals were still at a formative stage, when consultation should have been undertaken.

99. In July when both Ms Coombes and Dr Davidson met with the claimant, they also could and should have consulted with her at that time about the fact that her role could be at risk. It must have been clearly evident to the two of them that the claimant's role might be ceasing to exist, and they could have discussed that with her at that time. However, they did not do so. There was no consultation in practice by them with the claimant. The individual consultation was non-existent. A meeting at which an individual is told that their role has been deleted, is not consultation (nor is one a month later, long after the change has been communicated and a new structure put in place).

100. The Tribunal did consider what was said in **Mugford v Midland Bank**. In the circumstances of this case, the consultation with the claimant was so inadequate as to render the dismissal unfair. Whilst it was understood that the lack of individual consultation did not automatically lead to that result, in considering the overall picture the Tribunal determined that the respondent had not acted reasonably in dismissing the claimant on the grounds of redundancy.

101. Having determined that the complete absence of any genuine consultation rendered this dismissal unfair, it was not necessary for the Tribunal to determine whether the dismissal would also have been rendered unfair by the other elements relied upon. Nonetheless the Tribunal did consider the other factors identified.

102. Mr Brochwicz-Lewinski contended that an appropriate selection pool was not adopted, as other cardiac physiology employees at grade 8A ought to have been included in a pool which included the claimant. The Tribunal did not agree that the respondent was required to pool the claimant with others, for its approach to fall within the range of reasonable responses that it could adopt. The claimant fulfilled a unique role. The respondent was able to identify the pool as being just her unique role. That approach was one a reasonable employer could reasonably take. The possibility that her role could have been pooled with others, that she could have fulfilled other grade 8A physiology roles, and/or the possibility of "bumping", did not otherwise render that approach and the resultant dismissal as unfair. The possibility of such alternative approaches could have been raised during genuine consultation and considered, and the lack of opportunity to do so (before decisions were made) highlighted why genuine consultation could have resulted in a different outcome and why it should have been undertaken with the claimant at a stage when the proposals were at a formative stage. However, the pool identified and chosen did not, of itself, otherwise mean that the dismissal was unfair.

103. Issue 1.2.3 raised the question of whether the respondent took reasonable steps to find the claimant alternative employment? Mr Brochwicz-Lewinski submitted that the respondent fundamentally failed to take sufficient steps to identify potential suitable alternative employment for the claimant. There was simply no evidence before the Tribunal of the respondent undertaking any proactive steps to identify suitable alternative employment which the claimant could fulfil. To an extent (but not entirely), by the time the claimant was informed that her role was at risk, the opportunities for suitable alternative employment had been filled, although the Head of Product Safety and Quality recorded in the list of vacancies was identified as a role which might have been suitable for the claimant. However, if consultation had been undertaken at an earlier stage, there would have been potentially suitable alternative employment available. There was the possibility of the claimant fulfilling a directorate management role, either in her own directorate or in another one. Had the claimant known that her role was at risk of redundancy at the time those vacancies were advertised, she would have been able to apply for those roles. She also might have put herself forward for the Associate Director of Operations roles. The Tribunal accepted the clear distinction made between: someone's willingness to apply for an alternative role in circumstances where they think that their role is unaffected by a reorganisation; and their willingness to consider and apply for roles where they know that their employment will otherwise end (or genuinely might do so). Had the respondent consulted with the claimant when the proposals were at a formative stage, genuine consideration of a range of alternative roles could have been undertaken. Even once the claimant was informed that her role had been deleted, the respondent was remiss in its approach to alternative employment as there appeared to be no efforts made whatsoever to work with the claimant to identify potential suitable alternative employment for her or any roles which might be suitable (save for generally signposting a website which would contain such information). However, the Tribunal did also accept Mr Boyd's submission that the claimant herself appeared not to have made efforts to identify suitable alternative employment in the period prior to her termination, after she was placed at risk.

104. Issue 1.2.4 was whether dismissal was within the range of reasonable responses. In practice that issue did not add to the Tribunal's consideration of the fairness of the dismissal (applying section 98(4)). That issue in many ways went

alongside the reason for the claimant's dismissal. Where the respondent identified the need to change its structure and, as a result, the decision was made to delete the role which the claimant had uniquely filled, the dismissal of the claimant potentially followed as a reasonable decision. For the reasons already explained, the process followed by the respondent meant that the actual decision to dismiss the claimant as redundant was not fair applying section 98(4) because the respondent had not consulted with the claimant at the appropriate stage nor had the respondent genuinely sought alternative employment, particularly at the point at which doing so could have resulted in the redundancy of the claimant being avoided. The fact that the claimant's grievance and appeal were not addressed, would also have impacted upon the fairness of the dismissal, if the Tribunal had not already found the dismissal to have been unfair for the reasons explained.

Polkey

105. The next issue to be considered was set out as issue 1.2.5, which was whether there should be a reduction in any award made on **Polkey** grounds. The Tribunal accepted Mr Boyd's submission that it was obliged to undertake the required exercise (to assess whether the employer could fairly have dismissed the claimant) even though it involved an element of speculation. As recognised in the **Eversheds** case, this does involve a degree of speculation and the estimate must be somewhat uncertain. The respondent's failings meant that it was difficult to identify what might have happened had the respondent genuinely undertaken consultation with the claimant at the appropriate stage and had they proactively identified suitable alternative roles for which the claimant might wish to be considered (and addressed her grievance and appeal in accordance with procedure or a fair process).

106. The Tribunal found that it was certainly not the case that the claimant would necessarily have been made redundant. The Tribunal decided that there were a number of ways in which redundancy of the claimant might not have occurred had the respondent followed a fair procedure. She was a highly experienced and skilled individual with very long service with the Trust. She was rated very highly, both by Mr Silverwood (in his evidence) and by the respondent's Chief Executive. She had considerable managerial and clinical experience. Part of the aim of the restructure was to increase the involvement of clinicians in managerial roles, something which would in part have been achieved by the claimant being appointed to one of the managerial roles available. Appropriate and timely consultation might have resulted in an alternative to redundancy being identified. As is addressed in relation to suitable alternative employment above, there were a number of alternative roles which the claimant might have fulfilled including that of Directorate Manager (whether in the claimant's own directorate or another one), Associate Director of Operations, and/or the Head of Product Safety and Quality. The Tribunal accepted that the claimant would not have been considered for the Clinical Director roles, as it was clear from the evidence of Mr Silverwood and the supporting documents, that there was in practice a requirement that the appointee had to be a Consultant doctor in order to fill the Clinical Director role (albeit the documents did not state that in clear and unequivocal terms).

107. Assessing all of the above and undertaking the necessary speculative exercise required when **Polkey** is applied (as explained in more detail in the legal section of this Judgment), the Tribunal decided that there should be a 33% reduction

to the compensatory award made to the claimant. That reflected the fact that there was a broadly a one in three chance that she would have been made redundant in any event had a full and fair process been followed with full consultation and had suitable alternative employment been sought at the appropriate time (for the dismissal to have been fair).

Direct discrimination

108. The Tribunal then considered the claim for direct discrimination (issue 3). The claimant contended that she was treated less favourably than she would have been treated but for her disability by being selected for redundancy and/or by being dismissed. When addressing those two issues at the start of the hearing, Mr Brochwicz-Lewinski argued that the two matters were essentially interchangeable and, as a result, the Tribunal considered them both together. The failure to address the banding issues was not pursued as a claim for direct discrimination.

109. As outlined for the unfair dismissal claim above, the Tribunal found that the respondent did not follow a fair redundancy consultation process when dismissing the claimant. However, the fact that the claimant was treated badly or unfairly did not mean that her direct disability discrimination claim must succeed. Unfavourable treatment of itself does not establish discriminatory treatment.

110. The claimant had a disability. It would appear to be the case that other employees who did not have her disability were not made redundant, nor were they subjected to the flawed redundancy process.

111. As addressed in the legal section, the burden of proof still requires “something more” for the burden of proof to pass to the respondent. There must be something more from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed unlawful discrimination on grounds of disability. Was the claimant treated less favourably than a comparator in materially the same circumstances without her disability would have been treated? In this case and based upon all the evidence heard, the Tribunal did not find anything which provided the “something more” to show that the reason for the claimant’s dismissal or her being selected for redundancy was her disability, or that her disability was an effective cause or a significant influence for her being selected for redundancy or being dismissed. As a result, the claimant's direct disability discrimination claim did not succeed. The Tribunal did not find that the burden of proof had shifted to the respondent. The Tribunal did not find that a hypothetical comparator in materially the same circumstances as the claimant without her disability, would not have been selected for redundancy or been dismissed

112. In his submissions, Mr Brochwicz-Lewinski submitted that the respondent’s failure to consult with the claimant applied only to her in contradistinction to other non-disabled staff. He stated that the only material difference between the claimant and those other staff was that the claimant was disabled and absent in consequence. His submission was that it therefore necessarily followed that the respondent’s less favourable treatment of the claimant was because of her disability and/or her resulting absence. He stated that upon the facts establishing what he said was the prima facie case, there was no explanation from the respondent as to why the claimant was treated in this way. In his written submissions he submitted that the

Tribunal can and must therefore conclude that the claimant's treatment was on the grounds of her disability or by reason of something arising therefrom. He further submitted that given the facts and in particular the less favourable treatment of the claimant by the relevant decision maker(s) (with the absence of any explanation from the decision-maker(s)), a prima facie case had been made out that the claimant was dismissed by reason of her disability or because of her associated absence.

113. The Tribunal did not agree that it was required to conclude that the reason for the dismissal was the claimant's disability as submitted (or something arising from the disability). Mr Boyd was correct in his submission that the Court of Appeal in **Madarassy** had rejected the argument that the burden of proof shifted to the respondent simply on the basis that the claimant had established the facts of a difference in status and a difference in treatment per se. That was in effect what Mr Brochwicz-Lewinski's argument that the Tribunal must find in the claimant's favour amounted to. When considering the facts of this case, the Tribunal did not find that the claimant had proven facts on the balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent had committed the act of unlawful direct discrimination alleged. The Tribunal did not find that the evidence heard did provide the something more required to show that the treatment was because of disability (even though the Tribunal accepted that there were significant procedural failings as explained in relation to unfair dismissal above).

Discrimination arising from disability

114. The Tribunal next considered the claimant's claim for discrimination arising from disability (issue 2). In submissions the respondent accepted that it knew and could reasonably have been expected to know that the claimant had the disability (issue 2.1). The respondent accepted that the claimant's dismissal was unfavourable treatment (issue 2.2). The respondent also did not rely upon a contention that dismissal was a proportionate means of achieving a legitimate aim, so issues 2.5 and 2.6 did not need to be determined.

115. The respondent accepted that the claimant's sickness absence was something which arose in consequence of the claimant's disability (issue 2.3.1). That concession was correct as it was obvious that the reason why the claimant was absent was because of her disability.

116. As a result, the only issue for the Tribunal to determine in the discrimination arising from disability claim, was whether the claimant had proven facts from which the Tribunal could conclude that the dismissal was because of the claimant's sickness absence (issue 2.3.2).

117. The Tribunal did not find that the dismissal was because of the claimant's sickness absence. The claimant was not dismissed because she was on sickness absence, she was dismissed because Ms Coombes and Dr Davidson identified her role as being one that could be deleted and save costs, as part of the reorganisation and the task they were given to apply the reorganisation to their directorate. As explained, the deletion of the role was potentially identified in the May 2010 document, with the actual decision being made by Ms Coombes and Dr Davidson.

118. The Tribunal, of course, applied the burden of proof in reaching this decision. It concluded that the claimant had not shifted the burden of proof. As with the direct discrimination claim, the Tribunal did not find that the claimant had shown the something more required to shift that burden. The fact that the claimant was absent on ill health grounds at the time the decision was made, was not (of itself) sufficient to show that the reason why she was made redundant was because of that ill health absence. The submissions made by Mr Brochwicz-Lewinski setting out the claimant's argument about why the burden had shifted have been set out at paragraph 112. Those submissions applied to the claim for discrimination arising from disability, in the he submitted that the Tribunal could and must conclude that the claimant's treatment was on the grounds of the something arising from her disability and her absence from work. For the same reasons as explained at paragraph 113 (but when considering the discrimination arising from disability claim rather than the direct discrimination claim) the Tribunal did not agree that it must conclude that the burden of proof had been reversed, nor did it in fact find that the claimant had proven facts on the balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent had committed the act of unlawful discrimination arising from disability as alleged. The dismissal certainly occurred in the context of the claimant being absent on ill health grounds (which was itself something arising from her disability), but the Tribunal did not find that the claimant had proved the something more required to shift the burden of proof, to show that the reason for the dismissal was because of her absence.

119. One document which the Tribunal considered carefully was the email from Ms Coombes of 23 July 2020 (288) (as addressed at paragraph 31 above) and its reference to protecting the claimant from any stress, which was a sentiment which might be thought to show that the claimant was treated differently because of her ill-health. The Tribunal had no doubt that the fact that the claimant was absent on sick leave meant that she was treated differently by the respondent in terms of information provided to her and her access to members of staff. Ms Coombes and the IT team did not provide the claimant with the access to the information about the reorganisation which she/they should have provided (and which Mr Silverwood believed the claimant would have been given access to). Nonetheless, the Tribunal concluded that whilst what Ms Coombes said in that email was indicative of the claimant's absence being a factor in the approach taken to communication with the claimant, nonetheless that still did not provide the something more required to shift the burden of proof, to show that the reason for her dismissal (as opposed to the reason for failings in communication) was because the claimant was absent on ill health grounds.

120. As is explained in the preceding paragraphs, the Tribunal determined the claimant's claim for discrimination arising from disability on its merits (and did not find that the claim succeeded). However, as was set out in the first paragraph of the list of issues and as was explained at paragraphs seven to nine of this Judgment, the Tribunal also needed to consider the respondent's contention that the claimant had not included a claim under section 15 of the Equality Act 2010 in her original claim form.

121. The Tribunal agreed with the contention that the claimant's case was not pleaded as a section 15 claim within the claim form originally presented to the Tribunal. The section 15 claim was first identified at the case management hearing

on 20 May 2022 and recorded in the appended list of issues by Employment Judge Ross. The case management order did not make it clear how that claim was identified, but there was no record of any objection from the respondent to the issues being identified as amongst those which needed to be determined. From 20 May 2022 the respondent was fully aware that part of the issues it would need to address included those identified in that Order as a discrimination arising from disability claim. The respondent did not object to that being an issue which needed to be determined following that hearing (at least prior to the start of this one), as a represented party would be expected to do if a case management order erroneously defined the issues which needed to be addressed.

122. In those circumstances, where the respondent was on notice that the section 15 claim would be one that would need to be determined from 20 May 2022, this Tribunal accepted that it was entirely appropriate for it to determine the section 15 claim (as well as the section 13 claim). It was not entirely clear whether the claimant required leave to amend its claim to include the section 15 claim. It appears likely that leave to amend the claim must have been given at the case management hearing but not recorded, as without such leave the section 15 claim could not otherwise have been included in the list of issues that needed to be determined. If leave was not given at that hearing, this Tribunal would have granted leave to amend the claim to include the section 15 claim as included in the list of issues, in the light of the fact that the respondent had been able to address and respond to the claim put forward (having known it would need to do so since 20 May 2022, without previously objecting).

123. The Tribunal accepted Mr Boyd's submission that the claim which the Tribunal needed to determine in respect of section 15, was only the claim which Employment Judge Ross had identified in the list of issues. It was not any claim under section 15 as developed and determined at this hearing. It was clear to the Tribunal that there might have been other claims under section 15 of the Equality Act 2010 which the claimant might have pursued, such as for example a claim alleging that the provision of information to her was unfavourable treatment. However, the Tribunal has restricted itself to determining the claim recorded in the list of issues, in relation to the claimant's dismissal. That was the section 15 claim as recorded in the agreed List of Issues (as included in the attached Appendix) and the claim which was identified by Employment Judge Ross at the case management hearing in May 2022.The Tribunal has not gone on to determine any other possible claims for unfavourable treatment arising from absence/disability.

The duty to make reasonable adjustments

124. Issue four set out the issues to be determined in the claim for breach of the duty to make reasonable adjustments. Issue 4.2 was whether the respondent had the PCP (provision criterion or practice) contended. The PCP alleged/relied upon was the Respondent's requirement for attendance at the workplace in order to receive information and/or enjoy effective engagement in the consultation processes, in respect of the Agenda for Change banding process, and the restructuring process. As identified above, the claimant did not pursue her allegations regarding the Agenda for Change banding process, the PCP upon which she relied concerned information about the restructuring process.

125. As is explained in relation to the law above, Mr Boyd highlighted that the PCP relied upon by the claimant appeared to run contrary to the case that the claimant in fact pursued at the hearing. It was Mr Brochwicz-Lewinski's primary submission (on the claimant's behalf) that the claimant was treated badly and uniquely by not being provided with information about the reorganisation and not being individually consulted about the proposed redundancies (in contradistinction to other staff). It was not his primary submission that the way she was treated was the standard practice of the respondent.

126. It was Mr Silverwood's clear evidence that his belief and expectation was that the managers and the IT team had been tasked with ensuring that all absent employees were kept informed and were provided with the relevant information and access to documents regarding the reorganisation. The Tribunal had only his evidence about whether that had in fact occurred for others, and his evidence was that he believed that it had. The Tribunal did not accept that what he asserted had occurred for the claimant in the light of the evidence heard (or the lack of evidence that the claimant had been fully informed and enabled to access the key documents), but there was no evidence that what he believed had not occurred for others. On that basis, the practice adopted by the respondent and (as far as the Tribunal could identify from the limited evidence available to it) undertaken by the respondent, was not the one asserted by the claimant (as recorded in the list of issues). The practice of the respondent was not to require attendance at the workplace in order to receive information or enjoy effective engagement in the consultation about the restructure process. The position was quite the contrary; the respondent's practice was to ensure that those who were absent from work were provided with information and the opportunity to be engaged in the process.

127. In its findings on the unfair dismissal claim, the Tribunal has already addressed the fact that that process of information, engagement and consultation fell short of what would have been reasonably expected for the claimant personally, and that the claimant was not informed, consulted and/or effectively engaged in the reorganisation process or the consultation about it. However, that one-off deviation from the intended process and the norm, did not of itself mean that what occurred for the claimant represented a practice applied by the respondent. The law on one-off events and PCPs has been addressed in the section on the law above. The Tribunal considered what was said in the cases of **Harvey** and **Ishola**. The respondent's approach to providing information to the claimant about the reorganisation and engaging her in the process, did not have the element of repetition required to be a PCP, it was a one-off failure applied uniquely to the claimant.

128. Accordingly, the Tribunal found that the respondent did not have the provision, criterion or practice asserted or relied upon, as it was recorded in the list of issues. The Tribunal found that the alleged practice relied upon was in fact applied uniquely to the claimant and therefore, as a one-off approach, was not a provision, criterion or practice as required for a claim under section 21 of the Equality Act 2010.

129. That decision meant that the claimant's claim for breach of the duty to make reasonable adjustments did not succeed. But for that decision, the Tribunal would have found that there had been a breach of the duty to make reasonable adjustments, as the other elements of the test were satisfied. The claimant was put at a substantial disadvantage compared to someone without her disability by the

failure to provide information and/or to undertake effective engagement with her (issue 4.3). The respondent did know that the claimant was likely to be placed at a disadvantage if she was not kept informed about and engaged in the reorganisation process (which is precisely why Mr Silverwood had endeavoured to ensure that those absent had been informed and engaged) (issue 4.4).The respondent could have taken the reasonable steps set out at issue 4.5 of: providing information regarding the restructuring proposal and potential redundancy to the claimant in writing to her home address by way of letter and email; telephoning the claimant to provide verbal updates regarding the restructuring proposal and potential redundancy; visiting the claimant at her home address to discuss the restructuring proposal and potential redundancy; inviting the claimant to attend at the respondent's site specifically for the purposes of information sharing in respect of the restructuring proposal and potential redundancy (far more frequently than they did so); and the respondent could and should have facilitated full and effective participation in the consultation processes via written communication, telephone calls, home visits, or invitations to site meetings. All of those things would have been reasonable steps for the respondent to have taken and would have removed or alleviated the disadvantage suffered. However, as a result of the finding confirmed at paragraph 128, the claim for breach of the duty to make reasonable adjustments did not succeed.

Holiday pay

130. Issue five related to holiday pay which had not been paid to the claimant. As already recorded earlier in the decision, the parties reached agreement about that issue. It was agreed that the claimant was entitled to be paid by the respondent for 13.77 days of holiday pay. It is understood that the precise amount depends upon the outcome of the claimant's equal pay claim. The respondent suggested that it would be able to make an interim payment to the claimant for the holiday due based upon her standard rate of pay for those days. That amount may need to be increased depending on the outcome of the equal value claim. Bearing in mind that the claimant has waited eleven years for payment of a sum which it is now acknowledged is due, the Tribunal would suggest that the respondent may wish to ensure that the "interim" payment of the sum that is clearly due to the claimant is made as soon as possible (even if a further sum may be identified as being due once the equal value claim is determined).

Conclusion

131. For the reasons explained, the Tribunal found that: the claimant was unfairly dismissed; the compensatory award for unfair dismissal should be reduced by 33% applying the principles from the case of **Polkey**; and the claimant's claims for discrimination did not succeed. Her claim for unpaid holiday pay was agreed. The equal value claim has been listed for a stage three hearing and that will need to be determined by the Tribunal panel listed for that hearing. The remedy to be awarded for unfair dismissal will be determined only after the equal value hearing. Unusually and in the context of that procedure, there is no requirement for this panel to also determine remedy issues (save for the decision on the **Polkey** issue which has already been determined alongside the liability issues, as explained in this Judgment).

Employment Judge Phil Allen
15 March 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
16 March 2023

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

APPENDIX - LIST OF ISSUES

1. The issues are set out in the orders made by Employment Judge Ross at a case management hearing on 20th May 2022, save that there is a difference of opinion between the parties as to whether this discrimination claim is a claim brought under section 13 of the Equality Act 2010, (as the claim form suggests), or one brought under Section 15 of the Equality Act 2010, (as the Judge's case management orders suggest). Both alternatives are set out below. It is suggested they are mutually exclusive.

2. Added to those issues are the clarification provided by the Claimant in respect of the PCP so far as the reasonable adjustments claim is concerned, and the more specific details of the claim for holiday, set out in a letter dated 9th January 2023.

3. What remains in issue is therefore the following:-

1. **Unfair dismissal**

1.1 Has the respondent shown the reason or principal reason for dismissal? Redundancy is a potentially fair reason under Section 98 Employment Rights Act 1996.

1.2 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

1.2.1 The respondent adequately warned and consulted the claimant;

1.2.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

1.2.3 The respondent took reasonable steps to find the claimant suitable alternative employment;

1.2.4 Dismissal was within the range of reasonable responses.

1.2.5 There should be a reduction in any award made on Polkey grounds.

2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

2.2 If so, did the respondent treat the claimant unfavourably in any of the following alleged respects:

2.2.1 The claimant's dismissal.

2.3 Did the following things arise in consequence of the claimant's disability:

2.3.1 The claimant's sickness absence.

2.3.2 Has the claimant proven facts from which the Tribunal could conclude that the unfavourable treatment, dismissal, was because of the claimant's sickness absence and that her sickness absence arose in consequence of her disability?

2.4 If so, can the respondent show that there was no unfavourable treatment because of something arising in consequence of disability?

2.5 If not, was the treatment a proportionate means of achieving a legitimate aim? What is the legitimate aim relied upon by the respondent?

2.6 The Tribunal will decide in particular:

2.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.6.2 could something less discriminatory have been done instead;

2.6.3 how should the needs of the claimant and the respondent be balanced?

3.Direct Discrimination (Equality Act 2010 section 13)

3.1 The Claimant contends, (paragraph 30 of the Amended Particulars of Claim), that she was treated less favourably than she would have been treated but for her disability. She relies on the following:-

3.1.1 Being selected for redundancy;

3.1.2 Being dismissed.

3.1.3 Failing to address her banding issues under Agenda for Change.

4. Reasonable Adjustments (Equality Act 2010 sections 20 & 21)

4.1 Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

4.2 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:

4.2.1 The PCP for the complaint of failure to make reasonable adjustments is the Respondents requirement for attendance at the workplace in order to receive information and/or enjoy effective engagement in the consultation processes in respect of the Agenda for Change banding process and the restructuring process. In respect of the restructuring process, this failure led to her selection for dismissal on the grounds of redundancy.

4.3 Did the PCP(s) put the claimant at a substantial disadvantage compared to someone without the claimant's disability? How?

4.4 Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

4.5 Did the respondent fail in its duty to take such steps as it would have been reasonable to have taken to avoid the disadvantage? The claimant says that the following adjustments to the PCP would have been reasonable:

4.5.1 provide information regarding the restructuring proposal and potential redundancy to her in writing to her home address by way of letter or email;

4.5.2 telephone her to provide verbal updates regarding the restructuring proposal and potential redundancy;

4.5.3 visit her at her home address to discuss the restructuring proposal and potential redundancy;

4.5.4 invite her to attend at the Respondent's site specifically for the purposes of information sharing in respect of the restructuring proposal and potential redundancy;

4.5.5 facilitate full and effective participation in the consultation processes via written communication, telephone calls, home visits or invitations to site meetings.

4.6 By what date should the respondent reasonably have taken those steps?

5. Holiday Pay (Working Time Regulations 1998)

5.1 What was the claimant's leave year?

5.2 How much of the leave year had passed when the claimant's employment ended?

5.3 How much leave had accrued for the year by that date?

5.4 How much paid leave had the claimant taken in the year?

5.5 Were any days carried over from previous holiday years?

5.6 How many days remain unpaid?

5.7 What is the relevant daily rate of pay?

5.8 The Claimant claims 65 days accrued but unpaid holiday pay referable to the period August 2009 to 23 September 2011 (based on an annual allowance of 30 days per annum).