# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms Joanne Peck**

**Respondent:** **Staffordshire County Council**

**Heard at:** **Birmingham** **On:** **6,7,8 & 9 November 2023**

**Before:** **Employment Judge Gilroy KC**
**Members: Mrs Wendy Ellis & Mr David Faulconbridge**

**Representation**

Claimant: In person
Respondent: Mr S. Peacock, Solicitor

# JUDGMENT

The unanimous judgment of the Tribunal is that the Respondent did not subject the Claimant to direct sex discrimination, contrary to s.13 of the Equality Act 2010.

# REASONS

## Introduction

1. This is a claim of direct sex discrimination contrary to s.13 of the Equality Act 2010, "EqA". The Claimant is employed by the Respondent in its Archives and Heritage Service as a History Centre Assistant.

## Evidence before the Tribunal

2. The Tribunal heard oral evidence from the Claimant, and oral evidence was given on her behalf by Mr Michael Vaughan, full time Branch Secretary of Staffordshire General Unison and, prior to that, Assistant Branch Secretary. The Tribunal also heard oral evidence from the principal witness for the Respondent, Ms Joanna Terry, Head of Archives and Heritage, who is based at the Respondent's Staffordshire Record Office in Stafford. The Tribunal also heard brief oral evidence on behalf of the Respondent from a former colleague of the Claimant, Mr Timothy Groom, now retired, who was formerly a Senior Archivist based at the Staffordshire Record Office. The Employment Tribunal received signed witness statements from each of the

witnesses who gave oral evidence.

3. The Tribunal was also provided with a bundle of documents running to 955 pages, a chronology, a cast list, a Schedule of Loss prepared by the Claimant and a skeleton argument prepared by Mr Peacock on behalf of the Respondent, in addition to a diagram setting out the Respondent's position with regard to the various comparators the Claimant based her case upon. In addition, at the beginning of the hearing, the Claimant sent an email to the Tribunal setting out a number of observations she wished to make with particular regard to the Respondent's comparator diagram, and the Tribunal was provided with a copy of that email in written form.

4. At the conclusion of the evidence, the Tribunal was also provided with a short written submission document from the Claimant. Mr Peacock did not supplement his skeleton argument in writing, rather he made oral submissions, as indeed did the Claimant.

## Background

5. The case arises by reason of a reorganisation exercise conducted by the Respondent in October 2020. The Claimant was highly aggrieved as a result of the outcome of that process and certain matters which occurred during the course of that process. She remained dissatisfied following the conclusion of a grievance, and in due course she issued these proceedings. As stated above, she remains employed by the Respondent.

6. It is the Claimant's case that she was subjected by the Respondent to direct sex discrimination as a result of the restructure. She points to four specific named comparators. and one hypothetical. The named comparators are Howard Dixon, Ben Cunliffe, Stephen Cunniffe and Kevin Briggs. The specific basis upon which the Claimant puts her case is set out in the List of Issues contained within paragraph 15 below.

## The Law

7. There are two elements which fall for consideration in all direct discrimination cases, namely (1) less favourable treatment, and (2) the reason for that treatment, and a tribunal has to analyse and answer both of those questions. In the final analysis, whilst s.13 of the EqA requires an answer to be given to a single question (namely has the complainant been treated less favourably than others on the ground of the relevant protected characteristic?), it is convenient to split that question into two parts, namely (1) less favourable treatment, and (2) on grounds of that protected characteristic. To be treated less favourably necessarily implies some element of comparison. The Claimant must have been treated differently to a comparator or comparators, be it or they actual or hypothetical. A claimant must have been treated less favourably than the comparator. Whether the treatment in question is capable of amounting to less favourable treatment is a question for the tribunal to decide, albeit the case law does suggest that the test for determining what constitutes less favourable treatment should not be too onerous and should not disregard the perception of the Claimant.

That aspect is of particular importance in a case such as this, which concerns complaints arising from a restructure, and a claimant who has very long service and can therefore be regarded as someone with a sound understanding of the workplace which was subject to that restructure.

8. Direct discrimination assumes a comparison as between the treatment of different individuals, different individuals who do not share the protected characteristic in issue, which is sex in this case. The position concerning the complainant and the comparator must be such that there is *"no material difference between the circumstances relating to each case"* (s.23 of the EqA). It is essential to ensure that all the relevant circumstances are the same as between the Claimant and the comparator. That is why the hypothetical comparator can often be an extremely useful means of testing a case of direct discrimination.

9. A claimant may invite a tribunal to draw inferences from the relevant circumstances, but it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn, so for example, in this case, a generic allegation that women are treated less favourably than men (an allegation made in this case) is not something that the tribunal can have regard to without some evidential support. If there is evidential support for such a proposition, that may form the basis of material upon which the tribunal can draw inferences that have a bearing on its ultimate conclusions.

10. The tribunal has to compare like with like. ***Shamoon v Chief Constable of Royal Ulster Constabulary 2003 [IRLR 285]*** is authority for the proposition that *"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he or she is not a member of the protected class"*.

11. It is long established in this field that the mere fact that a woman is, for example, not successful in applying for a vacancy but a man is, will not be enough to raise an inference of discrimination that has to be rebutted by the employer, lest it could be shown that she was as well qualified.

12. The tribunal has to look at all of the facts and decide, as a question of fact, and degree, whether the comparison is made out. That is, effectively, the "starting gate" for a claim of direct discrimination. If the comparison is not made out, that claim does not get out of the starting gate.

**Burden of Proof**

13. The reversal of the burden of proof, which is to be found in s.136 of the EqA, has its origins in the Burden of Proof Directive There is substantial guidance in the case law as to how the reversed burden should be treated. The Tribunal had regard to the guidance given by the Court of Appeal in ***Igen Limited (formerly Leeds Careers Guidance) & Others v Wong; Chamberlin Solicitors v Emokpae; Brunel University v Webster [2005] IRLR 258***, where "the Barton Guidelines" previously given by the

Employment Appeal Tribunal in ***Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332*** were (largely) adopted. The position on the law in this area has been settled now for some 18 years. In essence, where a Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably on the ground of here, sex, the burden of proof moves to the Respondent, it is then for the Respondent to prove that he or it did not commit, or as the case may be is not to be treated as having committed that act. In order to discharge that burden, it is necessary for the Respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex since no discrimination whatsoever is compatible with the Burden of Proof Directive.

14. Care must be taken when determining whether and if so when the burden of proof shifts (***Madarassy v Nomura international Plc [2007] IRLR 246***). It is not sufficient for the claimant simply to prove facts from which the tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. "Could conclude" must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage, the tribunal will need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the Complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the Complainant were of like with like and available evidence of the reasons for the differential treatment. The absence of an adequate explanation for differential treatment of the Complainant is not, however, relevant to whether there is a prima facie case of discrimination by the Respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the Complainant. The consideration of the tribunal then moves to the second stage. The burden is on the Respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the claimant. If it or he does not, the tribunal must uphold the discrimination claim.

**The Issues**

15. The Respondent originally pursued a number of jurisdictional issues by reference to time limits. Mr Peacock for the Respondent indicated at the beginning of the hearing that those issues were no longer pursued. The parties were therefore agreed that the Tribunal was required to address the following substantive issues:

*(1) Did the following acts occur:*

*(a) The claimant was placed in the wrong pool at the outset of the restructuring exercise;*

*(b) On 26 February 2021 Joanna Terry asked the claimant to forfeit redundancy on one role so that she could be given redundancy or a suitable alternative role on the other (Grade 9 role);*

*(c) On 12 February 2021, Joanna Terry made a new role available after preference forms had been submitted on 10 February 2021;*

*(d) The claimant was not provided with a suitable alternative role under the restructuring exercise;*

*(e) Joanna Terry afforded no flexibility to the claimant in relation to the role(s) that were offered to her;*

*(f) The claimant was not offered redundancy under the restructuring exercise even though one of her posts was deleted and the other was 4 grades above the post she was placed in;*

*(g) The claimant's fixed term contract was not terminated properly by HR and Joanna Terry;*

*(h) Joanna Terry breached the HR92 policy by placing the claimant in a role that was more than 3 grades below her seconded role; The claimant has not been provided with an adequate explanation for the treatment alleged above, by Joanna Terry;*

*(i) Joanna Terry breached the Public Sector Equality Duty in relation to the following:*

*(i) advancing equality of opportunity;*

*(ii) fostering good relations between people with a protected characteristic and those who have not; and*

*(iii) eliminating unlawful discrimination.*

*(j) If so, did that amount to less favourable treatment than the respondent treated or would treat others?*

*(k) If so, was it because of the claimant's sex?*

*(l) Who is the correct comparator for the purposes of the claim?*

*The Claimant relies on:*

*Howard Dixon (for allegations (1)(e), (1)(f), (1)(j)[1], and (1)(i).*

*Ben Cunliffe (for allegations (1)(a), (1)(c), (1)(d), (1)(e) and (1)(i).*

*Stephen Cunniffe (for allegations (1)(a), (1)(d), (1)(e), (1)(g), (1)(h) and (1)(i).*

*Kevin Briggs (for allegations (1)(a), (1)(b), (1)(d), (1)(f), and (1)(i).*

*A hypothetical comparator for all allegations.*

**Findings of Fact**

16. The Tribunal made the following findings of fact:

16.1. The Respondent is a substantial local authority for the non-metropolitan county of Staffordshire in the West Midlands. The Claimant is a long-serving employee, having commenced employment with the Respondent on 22 April 1996. The Claimant is employed as a History Centre Assistant in the Archives and Heritage Service.

16.2. Prior to the October 2020 restructure, the Claimant held a Grade 6 Archive Assistant role (at 15 hours per week) (role 1) and a Grade 5 Archive Assistant role (at 18½ hours per week) (role 2). Her contracted hours were, therefore, 33½ per week.

16.3. She obtained a secondment on 5 January 2019 for a fixed term which was due to expire on 30 April 2021, at Grade 9 for 18½ hours per week. Essentially, the secondment supplanted the 18½ hours per week she had worked in role 2. She was still on secondment when the October 2020 restructure commenced.

16.4. It is not necessary for the purposes of this judgment to set out the fine detail of the consultation process, or indeed the grievance pursued by the Claimant, (save that the grievance is mentioned in the context of one of the allegations made by the Claimant - see paragraph 36 below) for the simple reason that her claims before the Tribunal are directed against the substantive decisions which were ultimately made during the consultation process as opposed to aspects of the consultation or the grievance process per se.

16.5. In the consultation period, the Claimant was placed into Pool 20, a pool comprising 8 Grade 5 and Grade 6 Archive Assistants.

16.6. As will be seen below, Issue (1)(b) is framed in these terms: *"On 26*

[1] The reference to Issue (1)(j) is an error. This was not picked up at the hearing.

*February 2021, Joanna Terry asked the Claimant to forfeit redundancy on one role so that she would be given redundancy or a suitable alternative role on the other (Grade 9 role)"*. This was a very important factual matter as far as the Claimant was concerned. The Tribunal was offered two alternative scenarios. it was agreed between the parties that there was a conversation along the above lines between Joanna Terry and the Claimant. Where the parties differed was that, on the one hand, the Claimant put matters on the basis of Ms Terry having given her an assurance, possibly a categorical assurance, or at least a contractual assurance, that if she was prepared to forfeit redundancy in relation to one role, she would be given redundancy or a suitable alternative role at Grade 9. On the other hand, Ms Terry put the matter on the basis that she had given an indication of the likelihood of an outcome with no guarantee being offered as far as that outcome was concerned. It was the position of Ms. Terry that she said words to the effect "*if you'd be prepared to give up hours on one role and not claim redundancy, those hours can go into the pot to avoid someone else being redundant and if you do, we can try and get you Grade 9 redundancy"*. It was not suggested by Ms Terry that those were the specific words she used. The Tribunal concluded that Ms Terry did not give a categorical assurance in the manner suggested by the Claimant. At no stage was Ms Terry in a position to give such a guarantee. It would have been quite wrong and unprofessional for her to do so, which is not to say that she did not do it, but the Tribunal formed the view from the evidence of Ms Terry, taking account of the responsibilities she had to discharge in this exercise as Head of Service, conducting a very difficult exercise, trying to keep as many people happy as possible, or trying to keep the number of unhappy people as low as possible, that she was doing her level best to conduct the exercise in a way that resulted in the optimal result for as many participants as possible, that on the balance of probabilities she gave an indication of the likelihood of an outcome with no guarantee being offered as far as that outcome was concerned.

16.7. The Claimant was allocated two roles as History Centre Assistant on a total of 33½ hours per week, the same total number of hours as previously. The roles were to be for 18 ½ hours per week and 15 hours per week respectively. Both posts were at Grade 5, and both were to be pay protected for up to 3 years, with redeployment mileage payable for 4 years as the location of work for both roles was going to be in Stafford (the Claimant having previously split her time between Lichfield and Stafford). The details of the new roles were confirmed to the Claimant by letter dated 22 March 2021.

16.8. Having reflected on matters, the Claimant resigned from the 18½ hour per week post by giving one month's notice on 31 March 2021. Her last day in that role, therefore, was 30 April 2021. As indicated, the Claimant continues in the other role.

16.9. Prior to the restructure, Mr Howard Dixon held the post of Digitalisation Officer (at Grade 5). He was not placed in Pool 20 with the Grade 5 and Grade 6 Archive Assistants. He was matched to the role of Digital Officer. That role was substantially the same as the role he had held before the restructure. It was at the same grade, but his weekly hours were to reduce significantly, from 37 to 22½. Mr Dixon was not prepared to accept that reduction in hours which made the role an unsuitable alternative. This was accepted by the Respondent which meant that he was made compulsorily redundant.

16.10. It is correct to say that Mr Dixon was not consistent in his preferences. He was given certain flexibility, not just in terms of changing his mind about those preferences, but also by being able to avail himself of the Respondent's policy on flexible retirement. (It was originally intended that the reduction in his hours would be to 25 hours per week but to qualify for flexible retirement the hours needed to be reduced to 22½ per week. The Claimant did not qualify for flexible retirement, on age grounds.

16.11. The Tribunal was told by Mr Vaughan that he had never previously known an employee of the Respondent to have accepted a position in a restructure, only then to withdraw such acceptance, without the Respondent treating the matter as a resignation (and therefore a termination of employment without any redundancy payment being made). The Tribunal placed little weight on this evidence, for the reasons canvassed at paragraph 18 below.

16.12. Before the restructure, Mr Ben Cunliffe held the same substantive role as the Claimant. He was therefore placed into the same selection pool as her, namely Pool 20. His post-restructure position would probably have been the same as the Claimant, namely History Care Assistant, had he not successfully applied for another post, that is the 22½ hour Digital Officer role that was made vacant as a result of Mr Dixon's redundancy. Mr Cunliffe applied for that position and his application was accepted.

16.13. Pre-restructure, Mr Stephen Cunniffe was employed in the role of Archive Assistant. He had a fixed term contract, working on "Case for the Ordinary" (a specialised archive service dealing with the history of asylums). He was placed in Pool 24 based on his grade 5 Archive Assistant Case for the Ordinary fixed term contract. HR made a mistake on whether he should be placed in Pool 20 or not. This was corrected and he remained in pool 24. However, he was later also matched to a role in Pool 20 in attempt to fill History Centre Assistant vacancies. He declined this role and took up a position at Leek Library which he later resigned from. His resignation is not relevant to the present discussion.

16.14. Pre-restructure, Mr Kevin Briggs, was, like the Claimant, an Archive Assistant. He was placed into Pool 20. Both the Claimant and Mr

Briggs expressed a preference for voluntary redundancy and in both cases this was not granted. Both were offered a comparable History Care Assistant role at their substantive grade with pay protection, and both were offered their full contractual hours, albeit Mr Briggs later resigned. Again, that resignation is not relevant as far as this case is concerned.

## Discussion

Howard Dixon as a comparator

17. Testing the case that is put in relation to Mr Dixon as a comparator, first of all, the Claimant relies upon issue (1)(e) which is framed in this way: *"Joanna Terry offered no flexibility to the Claimant in relation to the role(s) that were offered to her"*. The Tribunal has to look at this through the lens of Mr Dixon's circumstances. He was matched to a role. He was given substantially the same role, but on less hours. He was given certain flexibility not just in terms of changing his mind, but also with regard to the Respondent's policy of flexible retirement. The Claimant was not of the right age to have flexible retirement. The Respondent's case is that had the Claimant been in the same factual position as Mr Dixon, she would have received the same consideration as him. The Tribunal accepted that contention.

18. As stated above, on the question of changing minds and changing preferences, the Tribunal was told by Mr Vaughan that he had never previously known an employee of the Respondent to have accepted a position in a restructure, only then to withdraw such acceptance, without the Respondent treating the matter as a resignation. This was put in a slightly different way by the Claimant in her closing written submissions where she said that Mr Vaughan had said that to his knowledge *"no employee of Mr Dixon's grade had been able to withdraw agreement after accepting the offer of a role"* (emphasis added). The Tribunal would find it highly surprising that an employer of the size of the Respondent would impose an inviolable rule in matters of redundancy consultation that those affected by that consultation exercise were simply not permitted to change their minds as to what their preferences were, at any stage prior to final decisions being made. That would be likely to result in very unfortunate consequences in any redundancy consultation exercise.

19. The Tribunal concluded that had the Claimant been in the same position as Mr Dixon, someone who held his role pre-restructure, and was the right age for consideration of flexible retirement, there would have been no restrictions on her changing her mind. If she had come back and said: *"I've changed my preferences"*, on the balance of probabilities, she would have been allowed to do so, alternatively nothing turns on this, in that there was not another role she would have wanted to apply for. The Claimant did not inform the Respondent that she had changed her mind. She made a mature and reflective decision ultimately not to go forward with one of the two roles that she had been allocated, which was entirely a matter for her.

20. Issue (1)(f) applies to Mr Dixon: *"The Claimant was not offered redundancy under the restructuring exercise even though one of her posts was deleted and the other was 4 grades above the post she was placed in".* Once again, it has to be remembered that at this stage of the analysis, the Tribunal is concerned with a specific named comparator, Mr Dixon. Mr Dixon was not "offered" redundancy. He was matched to a role and, as stated, the Respondent accepted that, applying the usual tests for matters of this nature, what he had ended up with was not a suitable alternative role because of the reduction in hours. That is a different situation to the position facing Claimant. In the Claimant's case, the Respondent believed and in the Tribunal's view with justification, that she had been offered a suitable alternative role. Mr Dixon became entitled to his redundancy payment through the compulsory route.

21. Issue (1)(i) is raised by the Claimant in relation to Mr Dixon and each of her other comparators: *"Joanna Terry breached the Public Sector Equality duty in relation to the following:*

    *i. advancing equality of opportunity;*

    *ii. fostering good relations between people with a protected characteristic and those who have not;*

    *iii. eliminating unlawful discrimination".*

22. If the Respondent discriminated against the Claimant in terms of the substantive allegations of direct discrimination she has made by reference to any of her comparators, it may have been a useful exercise to consider the Public Sector Equality Duty under s.149 of the EqA, but in the absence of substantive findings under s.13, unless the Tribunal turned this hearing into a substantially greater hearing, greater in terms of length of hearing, the extent of the documentation reviewed and the amount of oral witnesses, the Tribunal considered that it could make no assessment in relation to the allegation of breach of the Public Sector Equality Duty. No evidence was led to support that allegation in any event. This issue adds nothing to the case if, on the bare facts of the case, in relation to the claims under s.13, the case is not factually made out on each of the individual cases.

23. The Tribunal reached this conclusion in relation to the raising by the Claimant of Issue (1)(i) in relation to each of the Claimant's comparators.

<u>Ben Cunliffe as a comparator</u>

24. The Claimant could have applied for the Digital Officer vacancy or any other vacant role, had she wished to do so. The Tribunal perfectly understands why she would not necessarily have seen this as a good career move, but equally, given the circumstances in which these matters are being scrutinised, namely within the framework of a series of complaints of sex discrimination relating to the restructure exercise, it is only fair to point out that she could have applied for the role that Mr Cunliffe successfully applied for. The fact that she did not apply, and the fact that Mr Cunliffe did and he

was successful, does introduce an element of difference here in terms of the factual circumstances of the Claimant and a chosen comparator. The role involved a substantial reduction in hours for Mr Cunliffe, but he still went ahead with his application and he obtained that post.

25. The Tribunal considered Issue (1)(a) in the context of the comparison with Ben Cunliffe: *"The Claimant was placed in the wrong pool at the outset of the restructuring exercise"*. The Claimant was an Archive Assistant. At her grade, she was, in the judgment of the Tribunal, treated in terms of her selection pool in exactly the same way as Mr Cunliffe. The fact that he ended up where he did is explained by the factual circumstances outlined above. In the Tribunal's judgment, it was appropriate for the Claimant to go into Pool 20.

26. The Tribunal considered Issue (1)(c) in the context of the comparison with Ben Cunliffe: *"Joanna Terry made a new role available after preference forms had been submitted on the 10 February 2021"*. This, of course, was the making available of the Digital Officer role and, as stated, the Claimant did not want that role. The Tribunal in its discussions about this aspect, reflected and concluded that restructures are intended to be progressive and that is the very nature of consultation with regard to a reorganisation. The greater the number of moving parts, the more likely it is that there is going to be the need for employer and employees to react to the circumstances as they appear in order to reach the optimum result, and the optimum result is usually achieved by trying to make sure that as many people as possible remain in employment. It was a striking feature of this case that in certain cases the candidates, the employees, the comparators, however they were described, were all striving to be made redundant rather than to stay in the organisation, and again, the Tribunal understands that in certain circumstances the financial value of a redundancy payment can be more attractive than the offer of a particular role in a restructure. Returning to Issue (1)(c) in the context of Mr Cunliffe, however, what happened to him, in the view of the Tribunal, is precisely the kind of thing that can and will happen where restructures take place. Vacancies suddenly become available and the employer moves to slot people in to positions in order to preserve employment and in the Tribunal's view, that is what happened in this case. Ms Terry did make the new role available. It was entirely understandable that she did and the Tribunal sees nothing untoward in the fact that she did.

27. The Tribunal considered Issue (1)(d) in the context of the comparison with Ben Cunliffe: *"The Claimant was not provided with a suitable alternative role under the restructuring exercise"*. Having considered this very carefully and with all due respect to the arguments raised very forcefully by the Claimant, the Tribunal does not agree. The roles to which she was matched were at her substantive grade. The roles and responsibilities and the content of the roles were materially the same or were sufficient to call them a match, and the location was not objectionable. The secondment job she had done was based at Stafford; her other role was at Lichfield. The new post was to be in Stafford and she had mileage protection, and in the circumstances the Tribunal saw nothing untoward about the matching of the Claimant with that

position.

28. As an aside, the Tribunal should address the fact that the Claimant raised in the course of evidence that she would have been delighted with being matched to a Grade 9 role. Her secondment was at grade 9 but she could have had no realistic expectation that she would obtain a Grade 9 role. More importantly, none of her chosen comparators was given a role at a grade 3 or 4 grades higher than their existing grade, and there was no Grade 9 role to apply for. Curiously, there was a Grade 10 role to apply for, but that is obviously a red herring. The Claimant operating at Grade 9 level was through the vehicle of her secondment, and that had a definite end date in April 2021.

29. The Tribunal considered Issue (1)(e) in the context of the comparison with Ben Cunliffe: *"Joanna Terry afforded no flexibility to the Claimant in relation to the roles that were offered to her*". Again, this issue must be seen in the context of a comparison with Ben Cunliffe. He applied for a job and got it; the Claimant did not apply for the job, and the Tribunal concluded that there was no unlawful conduct resulting from that state of affairs by reference to Issue (1)(e) in the context of the comparison between the Claimant and Mr Cunliffe.

30. The Claimant also raised her Public Sector Equality Duty argument in relation to Mr Cunliffe (Issue(1)(i)). The Tribunal repeats paragraph 22 above.

<u>Stephen Cunniffe as a comparator</u>

31. The position is that Mr Cunniffe was not treated in a materially different way to the Claimant, but in any event, his circumstances were materially different and one can test that case by reference to the issues raised by the Claimant in relation to the purported comparison with Mr Cunniffe.

32. The Tribunal considered Issue (1)(a) in the context of the comparison with Stephen Cunniffe: *"The Claimant was placed in the wrong pool at the outset of the restructuring exercise*". As stated at paragraph 25 above, the Tribunal concluded that the Claimant was placed in the correct pool, namely Pool 20.

33. The Tribunal considered Issue (1)(d) in the context of the comparison with Stephen Cunniffe: "*The Claimant was not provided with a suitable alternative role under the restructuring exercise"*. As stated at paragraph 27 above, the Tribunal respectfully disagrees with that proposition. Stephen Cunniffe was matched to a suitable role, he later resigned and the Claimant was matched to a role that was deemed suitable and the Tribunal does not have cause to disagree with the Respondent's view that that was a suitable alternative.

34. The Tribunal considered Issue (1)(e) in the context of the comparison with Stephen Cunniffe: *"Joanna Terry afforded no flexibility to the Claimant in relation to the roles that were offered to her"*. This raises issues already covered in terms of the topic of flexibility and the Tribunal has nothing to

add.

35. The Tribunal considered Issue (1)(g) in the context of the comparison with Stephen Cunniffe: *"The Claimant's fixed term contract was not terminated properly by HR and Joanna Terry"*. The Claimant was on secondment at the higher grade. Mr Cunliffe was on a fixed term contract. He continued at his substantive grade and there is not necessarily similarity or factual equivalence between a fixed term contract and a secondment.

36. The Tribunal considered Issue (1)(h) in the context of the comparison with Stephen Cunniffe: *"Joanna Terry breached the HR 92 Policy by placing the Claimant in a role that was more than 3 grades below her seconded role. The Claimant has not been provided with an adequate explanation for the treatment alleged above by Joanna Terry"*. There are two elements in this issue. First of all, there is an allegation of breach of policy. Secondly, there is an allegation of a failure to give an adequate explanation. The Tribunal's conclusion is that there is no proper comparison with Mr Cunniffe here, on either count. The Claimant was on secondment. Mr Cunniffe was on a fixed term contract. Both of those arrangements came to an end, or were due to come to an end. Both individuals were matched to suitable alternative roles. Being on secondment at Grade 9 did not entitle the Claimant to be matched to a Grade 9 role. It is of note that the Claimant could have applied for a Grade 10 role but did not do so. As far as not being given an adequate explanation is concerned, the Tribunal is satisfied that in fact explanations were given to the Claimant on numerous occasions. Whenever an allegation involves the element of "adequacy", this introduces a certain element of subjectivity: *"what is "adequate"*? The Tribunal has considered the documents and has noted that there was fairly substantial email correspondence in which the Respondent was providing explanations in relation to questions raised by the Claimant throughout the process. The Tribunal has also seen the grievance documentation, in particular, the grievance outcomes from Stages 2 and 3. The Tribunal has done what it does in all such cases as these, which is to stand back and take a view of the landscape, and it has concluded that there was considerable engagement on the part of the Respondent with the Claimant. There were 1 to 1's, there were illustrative documents produced in terms of FAQ's as the matter progressed, and there were general day-to-day emails. There is a further aspect here. There was no evidence that Mr Cunniffe, in contrast with the Claimant, was being treated more favourably than the Claimant in terms of the provision of explanations as to his treatment in the restructure.

37. Issue (1)(i) in the context of Stephen Cunniffe is, again, the argument that the Respondent acted in breach of the Public Sector Equality Duty. The Tribunal has nothing to add to paragraph 22 above.

<u>Kevin Briggs as a comparator</u>

38. In the judgment of the Tribunal, Mr Briggs was, for all material purposes, treated in the same way as the Claimant. It is noteworthy that he was seen to express himself (contemporaneously) as probably being about as unhappy about the restructure as the Claimant. The Tribunal was taken, in

particular, to an email from Joanna Terry to various on the 17 March 2021 where she referred to having spoken to Mr Briggs and the Claimant to give them *"what was not good news"*, and an indication of the level of dissatisfaction expressed at that time by both Mr Briggs and the Claimant is self-evident from that email. The Claimant and Mr Briggs were put in the same selection pool, they underwent the same matching exercise, and they both exhibited a level of dissatisfaction with the process. The Tribunal's conclusion here was that whilst this is the closest the Claimant got to, in terms of identifying a a proper comparator, the treatment of the Claimant and that comparator was, for all material purposes, the same.

39. The Tribunal considered Issue (1)(a) in the context of the comparison with Kevin Briggs: *"The Claimant was placed in the wrong pool at the outset of the restructuring exercise".* The Tribunal repeats paragraph 25 above.

40. The Tribunal considered Issue (1)(b) in the context of the comparison with Kevin Briggs: *"On 26 February 2021, Joanna Terry asked the Claimant to forfeit redundancy on one role so that she would be given redundancy or a suitable alternative role on the other (Grade 9 role)"*. The Tribunal has dealt with this in its findings of fact and repeats paragraph 16.6 above.

41. Mr Briggs was given an interview to stay. That was part of the consultation exercise. He and another employee, Anita Caithness, were competing to see who would get a role at the History Centre and who would be made redundant. Again, this is a demonstration of the unusual aspect of this case which is that there seems to have been a play off to see who could avoid getting appointed. Anita Caithness was "successful" in her application. She was matched on the then available hours. Mr Briggs was made redundant and then Anita Caithness resigned. This released about 25 hours into "the pot" in the same way that Mr Dixon's departure left more hours to be put back in. The result of all of this was that Ms Terry had to go back to inform Mr Briggs that he was not going to be made redundant. The Respondent maintains that if the Claimant had been interviewed, she would have been treated exactly the same. The Tribunal has no evidential basis upon which to reject that proposition.

42. The Tribunal considered Issue (1)(d) in the context of the comparison with Kevin Briggs: *"The Claimant was not provided with a suitable alternative role under the restructuring exercise"*. The Tribunal has nothing to add to what it has said about Issue (1)(d) in the context of the comparison with Messrs Cunliffe and Cunniffe. The Tribunal repeats paragraphs 27 and 33 above.

43. The Tribunal considered Issue (1)(f) in the context of the comparison with Kevin Briggs: *"The Claimant was not offered redundancy under the restructuring exercise even though one of her posts was deleted and the other was 4 grades about the post she was placed in"*. Again, all of this must be seen through the lens of the comparison between the Claimant and Mr Briggs. He was not "offered" redundancy. He was matched. He ended up resigning because of the route that he took as outlined above in terms of the facts of his case.

44. The Tribunal considered Issue (1)(i) in the context of the comparison with Kevin Briggs. This is the allegation of breach of the Public Sector Equality Duty. The Tribunal has nothing to what it has said in relation to this aspect concerning Howard Dixon, Ben Cunliffe and Stephen Cunniffe. The Tribunal repeats paragraph 22 above. The Respondent ran a positive case on the Public Sector Equality Duty, but for the reasons already given, it is not necessary to analyse those arguments.

Hypothetical comparator

45. The Claimant relies on a hypothetical comparator as well as named comparators The Claimant did not actually construct the elements of a hypothetical comparator. The Respondent did. The hypothetical comparator constructed by the Respondent was someone who was an Archive Assistant or similar at substantive Grade 5 or 6, who was undertaking a part-role secondment at a higher grade, but who, unlike the Claimant, either (a) was offered a redundancy payment at the end of the secondment at the higher grade rate in circumstances where there were nevertheless vacant roles available at his substantive grade, or (b) was offered a role at the higher grade despite having a lower substantive grade, or (c) was "offered" redundancy from his substantive grade role in circumstances where there were nevertheless vacant roles available at his substantive grade.

46. The Respondent's position is that the hypothetical comparator as described above, which the Tribunal accepts as a proper hypothesis, would have been treated in exactly the same way as the Claimant. The Respondent puts the matter in three ways. The Respondent suggests that that person would not have been offered a redundancy payment at the end of secondment at the higher grade rate in circumstances where there were vacant roles available at that person's substantive grade. Alternatively, that person would not have been offered a role at the higher secondment grade without having to apply for it ie: matched to a higher grade role. Alternatively, the hypothetical comparator would not have been "offered" redundancy payment from his substantive grade role in circumstances where there were nevertheless vacant roles available at his substantive grade.

47. In short, the Tribunal accepted the construct of the hypothetical comparator put forward by the Respondent, and accepts that on the basis of the hypothetical comparator so constructed, there would have been no difference in treatment between the Claimant and that hypothetical comparator for the purposes of this claim and therefore for the purposes of any potential discrimination contrary to s.13 of the EqA.

Is the reversed burden of proof engaged?

48. In all of the circumstances of this case and applying the Barton guidelines as adopted and endorsed by the Court of Appeal in ***Igen v Wong***, it is the unanimous conclusion of the Tribunal that the reversed burden of proof is not engaged.

## Conclusions

49. For all of the above reasons, the Tribunal concluded that the Claimant's claims of direct sex discrimination made in the various ways they were, by reference to the issues in the case, were not made out and therefore this claim must be dismissed.

50. The Tribunal was struck by the efficient, indeed resilient way the Claimant conducted her case. The Tribunal was equally struck by the clear impact these events have had upon her. There is absolutely no question that she is nothing other than a highly valued, long serving and loyal employee who deserves support. She is still in employment with the Respondent, and she is still under the line management responsibility of the Respondent's principal witness in this case, Joanna Terry. The Tribunal was pleased to hear from Mr Peacock that the Respondent is already proactively taking steps to look after the Claimant's welfare. If there is any mediation process that is available, that should be explored and pursued. The Tribunal also needs to mention the position of Ms Terry. She faced some fairly serious allegations in this case, and had the Tribunal concluded other than it did, she would have been fixed with findings of unlawful discrimination because the case was really put on the basis that she was at the vanguard of the exercise that the Tribunal was concerned with. The Tribunal found that Ms Terry acted in a straightforward manner in a very difficult situation, trying to please a very great number of people whilst conducting a very difficult exercise, and that she performed that task to the best of her ability, free of unlawful discrimination.

51. The unanimous judgment of the Tribunal is that the Respondent did not subject the Claimant to direct sex discrimination contrary to s.13 of the Equality Act 2010.

**Employment Judge Gilroy KC**
19 November 2023