EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs J Ware	v	(1) London Borough of Ealing (2) The Governing Body of Horsenden Primary School

Heard at: Watford Employment Tribunal

On: 2-4 October 2023
(with deliberations in private on 13 November 2023)

Before: Employment Judge Smeaton, Ms S Morgan, Ms L Durrant

Appearances:
For the Claimant: Ms L Redman (counsel)
For the Respondent: Mr M Lansman (counsel)

RESERVED JUDGMENT

1. The claim of unfair dismissal is well-founded and succeeds.
2. The claims of direct age discrimination at paragraphs 3.2.1 and 3.2.5 of the list of issues are well-founded and succeed.
3. The remaining claims of direct age discrimination (paragraphs 3.2.2, 3.2.3 and 3.2.4 of the list of issues) are not well-founded and are dismissed.

REASONS

Introduction

1. The Claimant, Ms Ware, was employed at Horsenden Primary School ('the School') from 15 July 2013 until 31 May 2022. She was employed in three part-

time roles: (i) Attendance/Medical Officer (ii) Pool Plant Operator and (iii) 'Seahorse' Swim School Co-ordinator.

2. The School is funded and located in the London Borough of Ealing ('the local authority). The parties agree that pursuant to Articles 3 and 6 of the Education Modification of Enactments etc) (England) Order 2003, the Second Respondent is the Claimant's employer.

3. Unless necessary in any particular sentence to distinguish between the two, the Respondents will be referred to together throughout this judgment.

4. By a claim form dated 3 October 2022, following a period of early conciliation between 4 August 2023 and 15 September 2022, the Claimant brings complaints of unfair dismissal (contrary to s.94(1) Employment Rights Act 1996 ('ERA 1996')) and direct discrimination (contrary to s.13 Equality Act 2010 ('EqA 2010')). The Claimant's claim, in summary, is that there was a push, spearheaded by the School's headteacher, to remove her from her role because of her age and assumed proximity to retirement.

5. The Respondents deny the claims. They maintain that the Claimant was dismissed for Some Other Substantial Reason ('SOSR'), namely a reorganisation. They deny any discriminatory conduct.

Issues

6. The issues which fall to be determined were initially set out in the Case Management Order of Employment Judge ('EJ') Daley dated 1 March 2023 (as amended on 15 May 2023). They were further discussed on the first day of the hearing and agreed as follows:

(1) Time

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 5 May 2022 may not have been brought in time. The parties accept that the unfair dismissal complaint was brought in time.

1.2 Were the discrimination complaints made within the time limit in s.123 EqA 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
1.2.2 If not, was there conduct extending over a period?
1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

(2) Unfair dismissal

3.1 What was the reason or principal reason for dismissal? The Respondents say the reason was a substantial reason capable of justifying dismissal, namely a business reorganisation. The Claimant does not accept that that was the real reason for dismissal and says that the real reason was age discrimination.

3.2 Was it a potentially fair reason?

3.3 Did the Respondents act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant? The Claimant says that, if a business reorganisation was a sufficient reason to dismiss the Claimant, the correct process was not followed.

(3) Direct age discrimination

3.1 The Claimant's age group is those who are 70 and older and she compares herself with those in the age group less than 50.

3.2 Did the following occur?

3.2.1 On 24 November 2021, Ms Appelby said to the Claimant '*Well you can't go on forever Jackie'* (or words to that effect)
3.2.2 The School failed to allow the Claimant to update her First Aid Certificate
3.2.3 The School failed to install software on the Claimant's device that was relevant to the proper performance of her roles
3.2.4 The Claimant was subjected to a disciplinary investigation including suspension
3.2.5 The Claimant was dismissed.

3.3 Was that less favourable treatment? The Claimant relies on those currently employed in the role of Pool Plant Operator and Attendance/Welfare Officer roles as actual comparators. Alternatively she relies on a hypothetical comparator, namely someone employed in the same roles as the Claimant and in the same circumstances but who is under 50 years old.

3.4 If so, was it because of age?

3.5 Was the treatment a proportionate means of achieving a legitimate aim? The Respondents say that their aims were:

3.5.1 To ensure a good level of pool quality
3.5.2 To expand the swim school

3.5.3 To meet the reducing needs of the School.

7. When discussing the issues at the beginning of the hearing, the Respondents maintained that the allegation of age discrimination at paragraph 3.2.4 was not pleaded. The Tribunal heard submissions from both parties as to whether the Claimant was required to amend her claim to pursue that allegation and, if so, whether permission ought to be granted. The Tribunal unanimously concluded that the Claimant did require permission to amend but that permission would be given. Oral reasons for that decision were given at the hearing and are not repeated here.

Hearing and preliminary discussions

8. The Claimant was represented by Ms Redman. The Respondents were represented by Mr Lansman. The hearing took place over three days, with further deliberations taking place in chambers on 13 November 2023.

9. The Tribunal was provided with an agreed hearing bundle of 487 pages (including additional disclosure provided during the hearing), an agreed chronology, an agreed cast list, a list of key documents and a bundle of witness statements (four for the Respondents and two for the Claimant).

10. We heard evidence from Ms Plummer (the chair of governors), Miss Stock (an HR leading practitioner employed by the First Respondent), Ms Carver (Ms Appelby's personal assistant) and Ms Appelby (the School's headteacher) on behalf of the Respondent. We heard evidence from the Claimant and Ms Metcalf (the Senior School Administrator) on behalf of the Claimant.

11. Both parties made closing submissions, a detailed note of which has been taken. A summary of those submissions is as follows:

12. Mr Lansman submitted that, save as to the dismissal, the other allegations of discrimination are out of time. No grounds had been identified which would make it just and equitable to extend time. The allegations cannot form part of a continuing act. The central argument made by the Claimant is that Ms Appelby was spearheading a campaign to get rid of the Claimant, but she was not responsible for booking the Claimant onto the first aid course or for installing software on the Claimant's device. There was no evidence of an organisation-wide conspiracy between Ms Appelby, Ms Carver and Ms Bradley, nor was any such allegation put to the witnesses.

13. He maintained that the comparators had not properly been pleaded and, in any event, were not in the same or not materially different circumstances as the Claimant because they were not employed at the relevant time. Other comparators (Lisa McCormark, Chris O-Connor and Lisa Metcalf) were raised for the first time during cross-examination and insufficient evidence had been produced to demonstrate that they were in the same or not materially different circumstances as the Claimant.

14. Mr Lansman accepted that, if the Tribunal were to find that Ms Appelby made the comment '*Well you can't go on forever Jackie'* it could properly make a finding of

age discrimination but denied that the comment had been made. Even if it had been made, it was not evidence of a broader discriminatory scheme to dismiss the Claimant.

15. As to the claim of unfair dismissal, Mr Lansman submitted that irrespective of the mix-match of terminology used throughout the process, the Claimant's role was not in fact redundant but there was a reorganisation and that was the reason for her dismissal. The key factual dispute for the Tribunal, he submitted, is whether the Claimant was sufficiently clear in the meeting on 2 February 2022 (and subsequently) that she did not want either of the two full-time roles proposed in the reorganisation and did not want to come back to work in any capacity. If she was, it was reasonable for the Respondent not to follow a full consultation process.

16. Mr Lansman accepted that it was not the Respondents' position that there were no possible alternatives to the proposals submitted to the governors. The Respondents' position is that the Claimant would not have agreed to any alternatives. He suggested that the Claimant did not wish to return to the workplace because the suspension and disciplinary process had been embarrassing for her.

17. Mr Lansman submitted that, if there was an unfair dismissal, there ought to be a 100% reduction in the Claimant's compensation applying *Polkey v AE Dayton Services Ltd* [1998] ICT 142. If the Tribunal consider that there ought to be a lesser reduction, that should be considered at a remedy hearing.

18. Mr Lansman accepted that, as a matter of law, if the Tribunal were to accept that the reason for dismissal was SOSR but that the process that was adopted and that led to the dismissal was discriminatory, the dismissal itself would be an act of discrimination.

19. Ms Redman made submissions in response. She submitted that, irrespective of the label applied (redundancy or reorganisation), the dismissal was unfair. The failure by Ms Appelby to understand which process she was following fed into the unfairness of the process. The Respondents ignored their own policies and the legal requirements.

20. If the dismissal was for redundancy, Ms Redman rejected the Respondents' suggestion that the meeting on 2 February 2022 was the beginning of the redundancy consultation process. There was no invite letter to that meeting, no notes were produced and no summary of the meeting was sent out. The proposal had already been formulated and was, in effect, a *fait accompli*. There was no room for influence by the Claimant and there was no time or opportunity for her to have any meaningful contribution or consultation.

21. Two full-time job roles were created without the Claimant's input. The job descriptions for those roles were not given to the Claimant and there was no opportunity for her to consider what the roles would look like. Accordingly, she could not make a meaningful decision about how she wished to proceed. There was no discussion about part-time roles or job shares notwithstanding that Ms Stock's evidence was that job-shares were common.

22. If the dismissal was due to reorganisation, that was not a substantial reason justifying the dismissal. Had the Claimant been spoken to earlier and consulted in a meaningful way, her dismissal could have been avoided. The Claimant had not refused a new role in a reorganisation (unlike e.g. the claimant in *Copsey v WBB Devon Clays Ltd* [2005] ICR 1790 at paragraph 18). At best, there was an informal conversation which was not minuted, in which the Claimant was unsure as to her future position.

23. Ms Redman submitted that there should be no reduction on *Polkey* grounds. She agreed with Mr Lansman that, if the Tribunal considered there ought to be a reduction which was less than 100%, further evidence would need to be considered at a remedy hearing.

24. Turning to the claims for discrimination, Ms Redman submitted that the allegations were all connected. There was no real redundancy or real reorganisation and, in any event, the reason a fair process was not followed is because the Respondents wanted the Claimant to leave. The reason for that was, at least in part, her age. The Claimant made clear as early as 26 November 2021 that she did not wish to retire. She also raised concerns about the alleged comment by Ms Appelby. Ms Appelby did not engage with or respond to that email. If she had not made the comment as alleged, she would have responded to make that clear. The Claimant was not booked onto the first aid course or provided with the Operoo training because Ms Appelby did not see the Claimant as an investment.

25. Ms Redman accepted the difficulties with the comparators as set out in the list of issues given that they were not employed at the same time as the Claimant and were employed in different roles. She also acknowledged that, as a result of raising other comparators for the first time in cross-examination, the Respondents were not in a position to properly address them. Accordingly, she relied on those individuals as background evidence only. She relied, mainly, on a hypothetical comparator, specifically someone carrying out the Claimant's roles who was under the age of 50.

26. Mr Lansman made brief reply submissions.

27. We reserved our decision.

The law

(1) Unfair dismissal

28. The law relating to unfair dismissal is contained in s. 98 ERA 1996. In order to show that a dismissal was fair, the employer must prove that the dismissal was for a potentially fair reason (s.98(1) and (2) ERA 1996). "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee"* (Abernethy v Mott Hay and Anderson [1974] IRLR 213).

29. Redundancy is a potentially fair reason for dismissal (s.98(2)(c) ERA 1996. Under s.139(1) ERA 1996:

'…*an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*
(a) The fact that his employer has ceased or intends to cease –

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

(b) The fact that the requirements of that business –

(i) For employees to carry out work of a particular kind, or
(ii) For employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

30. If the reason for dismissal does not fall within s.98(2) it may nevertheless be fair if it is for SOSR of a kind such as to justify the dismissal of an employee holding the position(s) which the employee held.

31. To establish SOSR as the reason for dismissal where there has been a business reorganisation, the employer does not have to show that a reorganisation or rearrangement of working patterns was essential. In *Hollister v National Farmers' Union* [1979] ICR 542, CA, the Court of Appeal said that a '*sound, good business reason'* for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. This reason is not one the tribunal considers sound but one '*which management thinks on reasonable grounds is sound' — Scott and Co v Richardson* EAT 0074/04.

32. It is not for the Tribunal to make its own assessment of the advantages of the employer's business decision to reorganise or to change employees' working patterns. They need only show that there were clear advantages in introducing a particular change to pass the hurdle of showing SOSR for dismissal. The employer does not need to show any particular quantum of improvement achieved (*Kerry Foods Ltd v Lynch* [2005[IRLR 680, EAT).

33. The fact that an employer acts opportunistically in dismissing an employee does not preclude the potentially fair reason from being the true reason for the dismissal. An employer may have a potentially fair reason for dismissing, such as SOSR, and at the same time welcome the opportunity to dismiss for that reason because it is keen to get rid of the employee. If, however, the employer makes the fair reason an excuse to dismiss the employee in circumstances where it would not have treated others in a similar way, the reason for the dismissal will not be the misconduct at all (*Associated Society of Locomotive Engineers and Fireman v Brady* [2006] IRLR 576, EAT).

34. If an employee wishes to cast doubt on an employer's seemingly fair reason for dismissal, he or she must adduce some evidence in this regard (*London Borough of Brent v Finch* EAT 0418/11).

35. If satisfied that the dismissal was for a potentially fair reason, the Tribunal will consider whether the dismissal was fair or unfair within the meaning of s.98(4) ERA 1996. The burden of proof in consideration s.98(4) is neutral. S.98(4) ERA 1996 provides*:*

    'the determination of the question whether the dismissal is fair or unfair (having regards to the reason shown by the employer) –

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

36. For redundancy cases, the steps an employer might reasonably be expected to follow are laid down in guidance provided by the EAT in *Williams and others v Compare Mazam Ltd* [1982] ICR 156, EAT as follows:

    (a) whether the selection criteria were objectively chosen and fairly applied
    (b) whether employees were warned and consulted about the redundancy
    (c) whether, if there was a union, the union's view was sought, and
    (d) whether any alternative work was available.

37. For SOSR dismissals based on a reorganisation, similar considerations are potentially relevant under s.98(4) ERA 1996.

38. In determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead, it has to ask whether '*the dismissal lay within the range of conduct which a reasonable employer could have adopted'* (*Frozen Foods v Jones* [1982] IRLR 439 EAT). The band of reasonable responses test is also applicable to the procedural steps taken by the employer.

39. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award (applying *Polkey*). This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the employee in any event had the unfairness not occurred.

(2) <u>Direct discrimination</u>

40. In order to succeed in a claim under s.13 EqA 2010, the employee must establish:

    (a) less favourable treatment than an actual or a hypothetical comparator;
    (b) which was done because of (here) the employee's age.

41. 'Less favourable treatment' necessarily implies an element of comparison: the employee must have been treated differently to a comparator (actual or hypothetical).

42. The treatment must be disadvantageous, not just different. It will not be enough for the employee to say that she sees a particular treatment as disadvantageous. Whether it is capable of amounting to 'less favourable treatment' is a question for the Tribunal to decide.

43. The burden is on the employee to establish facts from which the Tribunal could infer, on the balance of probabilities and absent any explanation, that the alleged discrimination occurred. In considering whether the employee has established a *prima facie* case of discrimination, the Tribunal must examine all the evidence provided by the parties (*Madarassy v Nomura International Plc* [2006] IRLR 246).

44. The burden of proof rules need not be applied in an '*overly mechanistic or schematic way' Khan v Home Office* [2008] EWCA Civ 578, CA). '*The process of drawing an inference of discrimination…is a matter for factual assessment and…*[is] *situation-specific'* (*Laing v Manchester City Council and another* [2006] ICT 1519, EAT). The focus must be on whether the tribunal can properly and fairly infer discrimination.

45. If the employee is able to establish a *prima facie* case of discrimination, the burden will shift to the employer to provide a non-discriminatory reason for the treatment (*Efobi v Royal Mail Group Limited* [2019] ICR 750). The burden is not shifted simply by showing that the employee has suffered less favourable treatment and has a protected characteristic.

46. In contrast to all other protected characteristics, an employer can seek to justify direct act discrimination s9.13(2) EqA 2010) if it can show its treatment of the employee to be a proportionate means of achieving a legitimate aim.

47. It is for the Tribunal to conduct a balancing exercise based on all the facts and circumstances of the case as to whether the legitimate aim relied upon justifies the unfavourable treatment. The aim relied on should be legal, not discriminatory in itself, and must represent a real, objective consideration. Because the claim is of direct age discrimination, the legitimate aims must be social policy objectives, such as those related to employment policy or the labour market. These are of a public interest nature, distinguishable from purely individual reasons particular to the employer's situation (*Seldon v Clarkson Wright and Jakes (a Partnership)* [2012] ICR 716, SC).

Findings of fact

48. Following deliberations, we have reached the following unanimous findings of fact.

(a) The Claimant's roles

49. The Claimant commenced employment with the Second Respondent in 2013 when she was 62 years old. She was initially employed in the role of Attendance and

Medical Assistant (as it was then referred to) on a part-time basis working 27.5 hours per week.

50. In May 2014, the Claimant commenced a second role, as Swim School Coordinator, employed on a zero hours basis. By the time of her dismissal, she was working between 16-25 hours per month in that second role.

51. In September 2014, the Claimant commenced a third role, as Pool Plant Operator. She was employed on a flat rate of £425 per month, irrespective of hours worked. The work she undertook amounted to, on average, 2.5 hours per week (30 minutes per day).

52. When the three roles are considered together, the Claimant was undertaking almost a full-time role.

53. The Claimant was a committed member of staff. She had no disciplinary record of note and often worked beyond her normal hours of work, including during the Covid-19 pandemic. Her commitment continued after her husband became unwell in April 2020.

54. Having heard the evidence and having considered the documents before us, we found the Claimant to be a broadly credible witness. Whilst not accepting everything she said, on key issues we found her evidence to be detailed and consistent. Her evidence was, on key points, supported by contemporaneous documents.

55. In July 2018, Ms Appelby took over as headteacher of the School and Ms Donaghey took over as deputy headteacher. The Claimant makes various allegations about the relationship between staff following Ms Appelby's arrival and the performance of the School, which we do not consider necessary to determine.

56. After the Covid-19 lockdowns, in a bid to boost its income, the School started to increase external bookings for its swimming pool. The increase in users negatively affected the water quality. At the same time, a decision was taken to replace the boiler system and pool boiler which meant that the temperature controls were removed from the plant room. That made it more difficult for the Claimant to control the temperature of the water. There were a number of pool closures during this period of time some of which, but not all, were due to water quality issues. The parties agree, and we accept, that more time needed to be devoted to the pool itself (as opposed to the Swim School) given the increase in usage. Given the limited time available to her, the Claimant was not able to devote that additional time to the pool.

(b) <u>First aid training</u>

57. In September 2021, the Claimant indicated to her colleague, Ms Metcalf, that her first aid qualification was due to expire. There was some confusion at the hearing about whether the Claimant's first aid certificate was, in fact, due to expire. The Claimant held two different qualifications. Her first aid paediatrics certificate was

not due to run out until March 2022. Her first aid at work certificate was due to run out in October or November 2021.

58. The Claimant says that Ms Metcalf had to obtain authorisation from Ms Appelby to book the Claimant onto the required course but that that authorisation was refused. The Claimant says that three other members of the admin team were sent on the course during the Autumn term, notwithstanding that it was not a requirement of their role to have that qualification. The Claimant believes that Ms Appelby was deliberately blocking her from attending the course because she expected the Claimant to retire and did not want to pay for her attendance.

59. In her evidence, Ms Metcalf agreed that she was required to obtain authorisation from the Senior Leadership Team to book staff onto the first aid course. She said, however, that she was required to seek approval from Mrs Bradley (assistant head for inclusion), not Ms Appelby. She says that her requests regarding the Claimant were not responded to by Mrs Bradley. There is nothing before us to suggest that Ms Metcalf chased Mrs Bradley at the time or raised concerns that the Claimant was being deliberately missed off the list.

60. Ms Appelby's evidence, which was consistent with Ms Metcalf's, was that no request was made of her for the Claimant to be booked onto the first aid course. We accept that it is unlikely any such request was made of Ms Appelby.

61. Although Mrs Bradley did not given evidence at the hearing, Ms Appelby offered a potential, non-discriminatory, explanation for why the Claimant's attendance on the course may not have been prioritised by her. She explained that many certificates had expired during the Covid-19 pandemic. All certificates had been given an extension to allow organisations to catch up with training and there were lots of staff who needed to be sent on the course. The Claimant's paediatrics first aid certificate (which remained valid) was sufficient for her to carry out her Attendance/Medical Officer role so it is unlikely that she was on the priority list. The Claimant, by contrast, said that she was often called upon to administer first aid to adults if she was working in the first aid room or the playground. Whilst that may be right, the Claimant was not the designated first aider for adults. Ms Metcalf (who was sent on the course) was.

62. Ms O'Connor and Ms McCormack, who the Claimant referred to in her evidence, were members of the admin team who did attend the course. Ms Appelby was (justifiably given that the Claimant had not identified them as comparators until cross-examination had commenced) unable to explain whether they received first aid training in priority ahead of the Claimant and, if so, why. We did not feel able to conclude that either Ms O'Connor or Ms McCormack were in the same or not materially different circumstances as the Claimant.

63. Taking all the evidence into account, we accept that at the material time, the Claimant had the necessary first aid certificate to carry out her role. The Claimant has not established that Ms Appelby, or anyone else, deliberately decided not to book her onto the first aid at work course in September 2021 because they did not want to invest in her, believing that she would leave the School shortly thereafter.

It is more likely, in our view, that Ms Brady was working through a priority list and that the Claimant was not on it.

(c) The Operoo system

64. The Claimant, in her role of Attendance/Medical Officer, was required to communicate with parents of absent children. She used the 'SchoolComms' system and email to do so. The School also used 'Parentmail'. a one-way communication system for parents to send messages to the School.

65. In the Autumn term of 2021, the School was introducing a new system called 'Operoo' for home to school communication. That system was to replace Parentmail.

66. The Claimant's evidence was, at least initially, that training on Operoo took place on an inset day at the end of July 2021 which was a day on which she had booked leave. She says that thereafter she made numerous requests of Ms Carver for the training to be booked. She says that it was remote training and that it could have been done in her own time. She also says that, because she had not been trained on the system, she was forced to rely on her colleagues to forward any communication received on Operoo from September 2021 onwards.

67. The Claimant accepted in evidence that, in fact, the Operoo system was not introduced at the School until October 2021. Training was offered to all admin staff but the Claimant was on holiday that day so could not attend. The pupil absence reporting part of the software, which was relevant to the Claimant's role, was not introduced until December 2021.

68. We find that the Claimant was able to carry out her Attendance/Medical Officer role without using Operoo. She was able to rely on others in the office to pass on messages received on Operoo. Not having it on her computer did not place her at a substantial disadvantage, although it would have made her role easier.

69. Ms Carver's evidence, which was not challenged, was that she had booked the Claimant onto do the course during the next training day in January 2022.

70. In her statement, Ms Appelby said that the Claimant, having missed the October training session, was told she would need to undertake the training in her own time. That is reflected in the Claimant's absence record. In oral evidence, however, she agreed with Ms Carver that the next opportunity for the Claimant to do the course was January 2022 and that, contrary to the Claimant's assertion and absence record (and contrary to what she had said in her statement) it was not something that could be done in the Claimant's own time. It needed to be done during an inset day.

71. No evidence has been provided by the Respondents to support the contention that the course could not be done remotely. That evidence, if it does exist, could easily have been provided. We accept the Claimant's evidence that she was told in October 2021 that she could do the course in her own time and that, despite asking for it, she was not sent the necessary details to do the training.

72. The Claimant has not, however, identified any actual comparators for this allegation of discrimination. Nor do we accept that a hypothetical comparator would have been treated differently. Other staff who required the training received it in October when the Claimant was on holiday. Had the Claimant not been on holiday, she would have also done the training course that day.

73. Accordingly, we do not accept that the Claimant has established a *prima facie* case of discrimination. The burden does not shift to the Respondent to provide a non-discriminatory reason for the conduct.

74. Even if we are wrong about that, we find the most likely explanation to be that as the Claimant missed the training course in October, and as it was not necessary for her to use the software before the end of 2021, organising for her to do the course (even in her own time) before the next inset day was simply not a priority for the Respondents. We do not accept that Ms Appelby was deliberately blocking the Claimant's access to the training, as alleged, or that that the reason she did so was the Claimant's age.

(d) <u>The 24 November 2021 meeting</u>

75. On 24 November 2021, the Claimant was called into a meeting with Ms Appelby. She had not been given any notice of that meeting nor had she been told what to expect at it. No notes were taken of the meeting. The Claimant did, however, send an email two days after the meeting summarising what she says took place. We accept that that email broadly summarises the discussions. It is the best evidence before us and (and as discussed below) was not disputed at the time by Ms Appelby.

76. Ms Appelby noted that the Welfare Officer was retiring at Christmas and indicated that she was considering combining the Claimant's Attendance/Medical Officer role with the Welfare Officer role. The Claimant initially understood Ms Appelby to be suggesting that she take on that role on a full-time basis before Ms Appelby proceeded to indicate that she had in mind that the Claimant would relinquish her Attendance/Medical Officer role in order to focus on the Swim School. The Claimant raised various concerns about that idea, including that the Swim School role was, at best, 30 hours a month and that relinquishing her other role would result in a significant drop in her income. She made clear that she was willing to discuss a different contract for the Swim School.

77. We find that, during this meeting, Ms Appelby said to the Claimant "*We're not all going to be here forever*". Although that is not the precise wording used in the list of issues, it is the wording used in the Claimant's email dated 26 November 2021 and in her Further and Better Particulars. It is also the wording responded to the in the Amended Grounds of Resistance and in Ms Appelby's witness statement. There is, accordingly, no prejudice caused to the Respondents by considering this slightly alternative form of wording to that reflected in the list of issues above. The minor difference in wording does not, given the passage of time and the consistency of the allegation originally made, undermine the Claimant's credibility.

78. The Claimant's evidence on this issue was credible. She referred to the comment for the first time on 26 November 2021, shortly after the meeting. She sent an email to Ms Appelby setting out the comment in quotation marks. Her oral evidence about the comment was broadly (save for the exact wording discussed above) consistent.

79. By comparison, Ms Appleby's evidence, that the comment was not made, was not credible. Significantly, she did not respond to the allegation made in the Claimant's email. We do not accept her explanation for this, namely that she considered the email to be for information only or that it did not require a response. Ms Appelby would clearly have appreciated the significance of such a comment and the risk of a discrimination allegation in light of it. In those circumstances, had she not made the comment as alleged, we would have expected her to respond to the email denying it. Ms Appelby did not respond to the email at all and did not deny having made the comment as alleged.

80. Following the meeting, the Claimant sent the email referred to above, making clear that she had no intention of retiring and raising her concerns about the merging of the Attendance and Welfare roles. She said that if the zero hours Swim School role was posing a problem for the School she would be willing to discuss that further. Ms Appelby's evidence was that the Claimant made clear in her email that she did not want to change her roles. That is not what the email says.

(e) <u>The disciplinary investigation</u>

81. In December 2021, very shortly after the meeting on 24 November 2021, Ms Appelby decided to commence an investigation into the number of closures of the swimming pool. She says that she was prompted to do so by the number of closures and complaints from staff. Ms Appelby refers to two emails in support of that position. The first is an email from Mr Hill on 30 November 2023 indicating that he had cancelled two swimming lessons that day due to high chlorine levels. The second is an email sent on 2 December 2023 listing the various causes for pool closures over the last year. The email presupposes an earlier conversation between Mr Hill and Ms Appelby about pool closures which we have not been told about.

82. In cross-examination, the Claimant was also taken to an email from November 2021 from a parent indicating that she was removing her child from swimming lessons because the chlorine was aggravating her asthma and eczema. It was suggested to the Claimant that Ms Appelby had this in mind when she spoke to her in November 2021. We do not accept that. The email does not raise any complaint about the level of chlorine or suggest that there is anything wrong with the way the pool is operated. The email is about the adverse effects of swimming on one particular child with specific health concerns. The internal response from the School, far from suggesting a problem with the pool, is a suggestion that the parent is nervous about illnesses and Covid more generally.

83. There is no record of any other 'complaints'.

84. Ms Appelby spoke to various other members of staff and requested an independent report on the pool plant operation. It may well be, as Ms Appelby said, that others

initially came to her (rather than the other way around) but she chose to formalise those discussions into written documents headed ‘investigation’ and ‘interview’. She also chose, surprisingly given that she considered the Claimant to have overall responsibility for the quality of the pool water, not to speak to the Claimant. Save for a ten-minute discussion with the author of the report, the Claimant was excluded from any meaningful input into the independent investigation report.

85. When asked why she did not speak to the Claimant, Ms Appelby said that she thought there was negligence and potential gross misconduct involved so did not feel it was appropriate to speak to the Claimant without a formal representative present.

86. Taken together, we conclude that even before the investigation had properly commenced, Ms Appelby had formed a view that the Claimant was probably guilty of gross misconduct.

87. On 5 January 2022, Ms Appelby called the Claimant into a meeting and informed her that a disciplinary investigation had been commenced against her due to the pool closures. She handed the Claimant a letter inviting her to a disciplinary investigation meeting. Understandably, the Claimant was distressed upon receiving this information, particularly when she read that the allegations were serious, amounted to gross misconduct, and may result in dismissal. The Claimant had been given no prior indication of such a serious allegation of misconduct.

88. We accept that, by this point, Ms Appelby genuinely considered there to be real concerns about the pool management and operation and that she genuinely, but mistakenly, believed the Claimant to be responsible for those failings. Ms Appelby mistakenly believed the Claimant to be contracted to work 6.5 hours on the pool, as opposed to 2.5 hours and so believed that she spent more time on the pool than she was in fact able to do.

89. That error and mistaken belief, rather than the Claimant’s age, is the reason we find for the investigation being commenced. The Clamiant has not identified an actual comparator in the same or not materially different circumstances as her who was not investigation in such circumstances. Although Ms Appelby may well have been looking for an opportunity to dismiss the Claimant by that stage, that was not her motivation in commencing the investigation. It could and should have been handled in a different, more sensitive and professional, way but that is not enough to draw an inference of discrimination.

90. The Claimant returned to School the following day and asked Ms Brady for a list of the dates the pool had been closed. The Claimant was obviously concerned to clear her name and wanted to collect any information relevant to the allegations being made against her so that she could properly defend herself.

91. Ms Appelby claims that Ms Brady approached her in her office shortly thereafter visibly upset and shaken, saying that she felt threatened by the Claimant and that the Claimant was trying to influence the outcome of the investigation. Ms Appelby says that she was concerned that other staff would also be threatened by the Claimant and that, after consulting with Ms Stock, she decided it was appropriate

to suspend the Claimant pending an investigation. She handed the Claimant a letter suspending her the same day.

92. We do not, at least not in full, accept Ms Appelby's evidence on this issue. We accept that Ms Brady went to see her. The Claimant says the same thing. We also accept that the Claimant was very angry and loud. We can accept that the Claimant was likely feeling attacked by this point, was defensive, and came across as forthright in her interactions with Ms Brady. That is supported by Ms Brady's email which Ms Appelby asked her to write outlining her interaction with the Claimant that morning.

93. We do not accept, however, that Ms Brady felt threatened by the Claimant or was upset and shaken by the Claimant's conduct. There is nothing in Ms Brady's email to suggest that that is so. In fact, Ms Brady's email is broadly reflective of the Claimant's account. The Claimant was trying to gather evidence to defend herself against serious, potentially employment-ending allegations. The suspension letter makes no reference to threatening or abusive behaviour, saying that the Claimant is suspended because she had made several attempts to discuss the matter with other staff. Further, when the Claimant left the School after her suspension, Ms Brady sent Ms Metcalf out to check she was okay before driving. If Ms Brady had been visibly upset, shaken and threatened by the Claimant, as is now alleged, that would be a surprising thing for her to have done.

94. The suspension was wholly unjustified. The Claimant had not been told that the allegations were to be treated confidentially. Ms Appelby relied here on the invite to the investigation meeting. That letter says nothing about confidentiality. The heading, albeit likely in error, says 'private and conditional' (sic). There is nothing in the letter making the clear the confidential nature of the investigation and warning the Claimant that, if she speaks to others about it, she could be suspended. Even if it could be said that the Claimant ought to have understood the confidential nature of the investigation, any concerns Ms Appelby had could have been dealt with by meeting the Claimant and reassuring her that all evidence would be provided to her and that she would have the opportunity to obtain any other evidence she felt necessary to defend herself. In all the circumstances, suspension was disproportionate.

95. No actual comparator has been identified in resect of this allegation of discrimination and there is nothing to suggest that a hypothetical comparator would have been treated differently. We do not consider it appropriate to draw an inference of discrimination from the fact that the suspension was a disproportionate overreaction and that Ms Appelby had only recently made a comment impliedly referring to the Claimant's age. Ms Appelby took advice from Ms Stock who suggested suspension was an option. Suspension was, in our view, a misjudgement taken on the basis of poor HR advice.

96. On 19 January 2022, the Claimant attended an investigation meeting, accompanied by her trade union representative Mr Mullen. She was given the opportunity to respond to the concerns raised and explained herself clearly and articulately. Notes were taken of that meeting but were not sent to the Claimant for her to comment on or approve. No explanation has been provided for that. The

notes have been referred to as an 'investigation report' but they do not amount to such. They are notes of the meeting annotated by Ms Appelby.

97. As a result of that meeting and the evidence collected, it became clear to Ms Appelby that in fact the Claimant had only 30 minutes per day to devote to the pool and that her previous understanding (that she was contracted to work 6.5 hours per week) was wrong. Had she spoken to the Claimant earlier, the entire disciplinary investigation could have been avoided. It is worth noting that many of the concerns in the independent report were about matters that lay beyond the Claimant's responsibility.

98. Ms Appelby concluded that there was no case to answer and further disciplinary action was not justified. We agree entirely with that conclusion. The Claimant was informed of the outcome on 31 January 2022 and asked to attend a meeting on 2 February 2022. She was not told clearly what that meeting was to be about and assumed, wrongly but justifiably, that it was to be a formal conclusion to the disciplinary process.

(f) <u>The reorganisation</u>

99. On 23 January 2023, Ms Appelby presented a formal report to the Second Respondent titled 'Report to the Governors re proposed reorganisation of the Swimming pool management and attendance welfare roles'. The purpose of the proposed restructure was said to identify 'major failings in how the swimming pool is currently managed', to make the roles more cost effective and to provide clarity on the roles and responsibilities for better management of the pool. It was said that the report would be used as a consultation document for the governors, staff and unions. In fact, the report was never shown to anyone other than the governors.

100. At that point, the only discussion that had taken place with the Claimant about a potential restructure was the very brief, informal discussion on 24 November 2021. There had been no meaningful discussion with her about the potential roles or what they might look like.

101. Within the report, Ms Appelby proposed that the Attendance role (held by the Claimant) and Welfare Officer role be merged to create one full-time role and that the Pool Plant Manager (which in fact ought to have been referred to as Pool Plant Operator) and Swim School Coordinator roles (both held by the Claimant) be merged to create another full-time role. She proposed that the formal consultation period take place between January and March 2022.

102. An Extraordinary General Meeting ('EGM') was held on 27 January 2022 to discuss the proposal. Within the minutes of EGM, Ms Appelby is recorded as saying that the two new positions would be advertised and all applicants interviewed. There is no suggestion that the Claimant would be offered either role on a priority basis. The proposal was adopted by the governors.

103. On 2 February 2022, the Claimant attended a meeting with Ms Appelby, as requested. The Claimant was unaware, until she got to the meeting, that the governors had already voted to approve Ms Appelby's plans to delete her role. Ms

Plummer, the chair of governors, was also present at the meeting. The Claimant had not been warned of her attendance.

104. This was a meeting at which the Respondents ought to have taken formal notes but did not do so. The only notes we have been provided with were taken by Ms Metcalf who attended in support of the Claimant. She is still employed by the Respondents. We found Ms Metcalf to be an honest and straightforward witness. We reject the suggestion made by Mr Lansman that there was anything odd about Ms Metcalf taking and signing notes of the meeting. She was there in the capacity of the Claimant's representative. The Claimant had been suspended and investigated for gross misconduct and believed this meeting was about that disciplinary process. The Tribunal members, in particular, noted that they would routinely expect a employee's representative to take notes in such meetings.

105. Although the handwritten notes written at the time by Ms Metcalf do not record the sentence that appears in the subsequently typed notes that '*Emma started the meeting saying that there was no evidence that Jackie had done anything wrong in the running of the plant room but there was a concern with the number of pool closures that had happened recently'* we agreed that, whatever precise words were used, the implication and message conveyed to the Claimant was that she was no longer under investigation, she had been cleared of wrongdoing, and that the problem was about management resources, not about the Claimant's capability. We do not accept that Ms Metcalf deliberately and wrongly added that sentence at a later date in a bid to skew the notes in the Claimant's favour.

106. It is not in dispute that the Claimant was told that a decision had been taken to restructure her roles. It is not in dispute that the Claimant was not asked to comment on those proposals. The Claimant was not told that a consultation period would take place with staff and the unions or that she would have the opportunity to consider and make proposals on the restructure.

107. Consistent with what she had said to the governors in the EGM, Ms Appelby told the Claimant that she would be able to apply for the roles once the job descriptions had been created. The Claimant was not given any indication that she would be entitled to one of those roles or that she would be given priority in any application process. She was told that both roles would be advertised externally.

108. There was no discussion about potential job shares, flexible working arrangements or the possibility of a trial period.

109. We do not accept Ms Appelby's evidence that the reason there was no consultation after 2 February 2022, and the reason why the restructuring policy was not followed after that date, was '*because the Claimant had asked to be made redundant*'. We do not accept that the Claimant made any such request nor do we accept that the Claimant gave any clear indication at that meeting (or at all) that she was not interested at all in either of the new roles, that she did not want to work full-time, or that she did not want to return to work at all.

110. In her evidence, Ms Plummer said that if the Claimant had indicated any interest in the roles, the process would have gone forward to consultation, but that the

Claimant rejected '*out of hand any alternatives'*. We do not accept that. No alternatives were given to the Claimant for her to reject. Ms Appelby's evidence was that the Claimant said she did not want to work full-time and asked what plan B was, to which she was told that redundancy could be considered. She was not told that alternatives to the full-time roles could be discussed. Ms Appelby's evidence was that discussions about alternatives could have happened if the Claimant had raised them.

111. The Claimant had not seen the job descriptions at that point. She did not know what the roles would entail. She did not know the salaries on offer. She did not know the exact hours on offer. We accept that she likely expressed some uncertainty about how the roles would work (as she had done in November 2021) and whether it would work for her to be in one full-time role but she had already made clear that she did not want to retire. She had also made clear in November 2021 that she was willing to discuss alternatives to the current Swim School Co-ordinator role.

112. We do not accept that the Claimant was embarrassed about returning to work in light of her suspension. She had been cleared of any wrongdoing and wanted to return to a job that she loved.

113. Even if we are wrong about that, and the Claimant did say that she did not want to work full-time, we do not accept that in circumstances where the Claimant was told for the first time in that meeting that her roles were going to be deleted, an initial negative response to the proposal could reasonably have been relied upon by the Respondents as a reason not to take any steps to explore alternatives to dismissal. If the Claimant had clearly said that she would not work full-time (which we do not accept) the next step would have been to consider whether any of the jobs could be done on an alternative basis (part-time, flexible hours, job-sharing). Ms Stock acknowledged in her evidence that jobs were routinely offered at the School on a job share basis.

114. The Claimant was informed at this meeting that her suspension had been lifted but that she was to refrain from her Pool Plant Operator role on her return to work. No justification was given to the Claimant for that. This is, in our view, a clear example of the Claimant being treated unfairly. It in indicates to us that, notwithstanding the absence of any established case of gross misconduct, Ms Appelby did not think the Claimant was 'up to the job' and did not want her to return to the role. That is also supported by the reluctance at the hearing to accept Ms Metcalf's evidence, that at the outset of the meeting Ms Appelby expressly 'exonerated' the Claimant.

115. We accept that the Claimant was told by Ms Plummer that she could stay at home pending receipt of the job descriptions and her decision on how to proceed. The Claimant's evidence on this was clear. It is supported by the notes made by Ms Metcalf of the meeting. Although that reference does not appear in Ms Metcalfe's handwritten notes we accept, from the format of the notes, that it is most likely that the second page of the handwritten notes was lost. Ms Appelby and Ms Plummer did not take any notes to support their assertions to the contrary.

116. The Claimant remained at home from February until May 2022. We accept that she believed she was awaiting further information from the School about the new roles. Although she did not personally send any emails chasing the job descriptions, her union representative (Dean Mullen) sent an email on 23 February 2022 to Ms Stock confirming the Claimant's understanding of the meeting on 2 February 2023, asking for Ms Stock to confirm in writing that the Claimant was told to take 'garden leave' (his words) until the new job descriptions were available, and asking when the consultation process for the proposed restructure was going to start. Ms Stock says she never received that email. We accept that it was sent and that it accurately reflects the Claimant's understanding at the time. It supports our finding that the Claimant had not made clear in the meeting on 2 February 2022 that she wanted to take redundancy.

117. Surprisingly, the Claimant did not receive any further communication from the School for the remainder of February 2022. This is, in our view, a further example of unfair and disrespectful treatment of her. We conclude that the expectation from Ms Appelby and others was that the Claimant would eventually 'give in' and retire.

118. We acknowledge that the majority of the correspondence from the Claimant during this time was about her wages and redundancy pay. That was because the Respondents had made errors in her pay slips and, in order to understand all of her options, the Claimant needed to have an accurate indication of her likely redundancy pay, were she to proceed down that route. Without that, she could not assess whether she could afford to retire or compare the likely redundancy pay with any new potential salary. Requesting redundancy figures is not the same as saying you are only interested in redundancy. Nor do we accept that the Claimant's lack of reference to the job descriptions in emails could or should have been taken as an indication that she was only interested in taking redundancy.

119. We accept that there were some telephone conversations between the Claimant and Ms Carver during this period of time about pay and figures. The evidence on this did not, in our view, take matters further. We do not accept Ms Carver's evidence that the Claimant said during those conversations that she did not want to work full-time. We accept that the Claimant may have expressed some uncertainty about returning to one of the new roles, but she was still without the job descriptions so not in a position to make clear comments about the future.

120. On 5 May 2022, having heard nothing further about the job descriptions, Ms Carver sent the Claimant an email with an ultimatum; either she accept the revised redundancy figure or return to work on 9 May 2022 in her Attendance/Medical Officer and Swim School roles. No mention was made of the restructure or the Claimant's Pool Plant Operator role. The Claimant, we accept, felt under extreme pressure and reluctantly accepted the redundancy package, feeling very uncertain about her future options. Her last day of employment was 31 May 2022.

121. The job descriptions for the two new roles were created in May 2022, very shortly after the Claimant accepted the redundancy payment. We do not accept Ms Appelby's evidence that the delay in creating those roles was due to work pressures. We accept that she was under work pressure but the Claimant had been awaiting the job descriptions for approximately three months when she accepted

the redundancy package. The job descriptions are not particularly complex and could and should have been prepared earlier.

122. We also accept that, if the job description and advert for the role of Swimming Pool Manager had been created and offered to the Claimant before 5 May 2022, it is likely she would have accepted it. She held all of the desired experience, qualifications and training for the role. The salary was significantly higher than she had been paid to do the roles of Pool Plant Operator and Swim School Coordinator. The role was not offered to the Claimant.

Conclusions

123. Applying our findings of fact to the law as set out above, we reach the following unanimous conclusions:

(1) Unfair dismissal

124. We accept that the Claimant was dismissed for a potentially fair reason, namely SOSR. The parties agree that there was a real need for change in the way the pool was managed and the retirement of the Welfare Officer created an opportunity for a new structure to be implemented. The Claimant herself had been raising concerns about the quality of the pool water. 30 minutes a day was not enough time for someone to address the issues. There were no overall lines of responsibility for running the pool and that was creating problems. This was a substantial reason capable of justifying dismissal.

125. We do not accept, however, that the Respondents acted reasonably in treating that as a sufficient reason for dismissing the Claimant or that they followed a fair process in doing so.

126. The Respondents did not follow their own restructuring policy. The new roles were not discussed in any detail with the Claimant or her Trade Union. The Claimant was not provided with the job descriptions in order to consider them. Alternatives such as part-time working, job-sharing or flexible working were not discussed. The Claimant was told that she would have to apply for any role she wanted, and that the roles would be advertised externally. The 'lift and drop' process was not considered. A trial period was not considered. The Respondents did not engage in any meaningful consultation. Instead, they presented the Claimant with a binary choice: accept redundancy or return to work and apply, on a competitive basis, for an undefined role. The Claimant was left at home waiting for clarification for approximately three months before she concluded that she had no option but to accept the offer of redundancy.

127. These failings were the responsibility of the Respondents. We reject the suggestion that it was not necessary to follow a reasonable process because the Claimant had been sufficiently clear in the meeting on 2 February 2022 and subsequently that she did not want either of the two full time roles. We do not accept she gave that clear indication and, even if we are wrong about, we do not accept that any such indication absolved the Respondent from engaging in meaningful consultation with the Claimant about alternatives.

128. In all the circumstances, we find that the Claimant was unfairly dismissed, both substantively and procedurally.

129. Consideration of a Polkey reduction is not necessary given our findings that the Claimant was substantively and procedurally unfairly dismissed.

(2) Age discrimination

130. We accept that, on 24 November 2021, Ms Appelby said to the Claimant *We're not all going to be here forever".* No actual comparator was identified but we accept that the comment would not have been made to a hypothetical compactor (namely someone carrying out the Claimant's roles, in the same circumstances, but who was under 50 or approaching retirement age). The comment was clearly a reference to the fact that the Claimant had surpassed retirement age and was unlikely (in Ms Appelby's view) to work much longer. The comment is inherently ageist. The Claimant was 71 at the time. We find that the reason for the less favourable treatment was the Claimant's age, without needing to resort to a mechanistic application of the shifting burden of proof.

131. Even if we are wrong about that, and we apply the shifting burden of poof in a more mechanistic way, the Claimant has (for the reasons identified) established a prima facie case of discrimination such that the burden of proof shifts to the Respondents to provide a non-discriminatory explanation for the conduct. No explanation has been given. Ms Appelby's position was that no such comment had been made. Accordingly, the Respondents have not shown that age played no part in the reasons for that treatment of the Claimant.

132. The discrimination is not capable of being objectively justified. The Respondent has not shown any grounds for concluding that the comment was necessary to ensure a good level of pool quality, to expand the swim school or to meet the reducing needs of the School. Those aims are not, in any event, social policy objectives.

133. The allegation at paragraph 3.2.1 of the list of issues succeeds, although it is *prima facie* out of time. It can only be brought in time if is forms part of a continuing course of conduct or if we accept that it is just and equitable to extend time. This is addressed below.

134. It is not in dispute that the School failed to allow the Claimant to update her First Aid certificate. We are not satisfied that this was less favourable treatment than an actual comparator. Insufficient evidence was produced to demonstrate that other staff who were sent on the first aid course were in the same or not materially different circumstances as the Claimant. We do not accept that a hypothetical comparator would have been treated differently. We find it more likely than not that the Claimant was not prioritised because she was not an adult first aider and she had a valid paediatric first aid certificate in place.

135. It is not in dispute that the School failed to install software on the Claimant's device that was relevant (although not crucial) to the proper performance of her roles. We are not satisfied that this was less favourable treatment than an actual comparator or that a hypothetical comparator would have been treated differently. Had the Claimant been at work on the October 2021 inset day, she would have had the Operoo training and would have had the software installed on her computer. The Claimant did not identify any other employees who were unable to attend the October training but who were given access to the software and the training on another occasion. We find it more likely than not that the reason the Claimant was not given access to the software was because she had not been trained on it and the School were waiting for the next inset day to provide her with that training. That never happened because the Claimant was not at work in January 2022.

136. It is not in dispute that the School subjected the Claimant to a disciplinary investigation including suspension. We had significant concerns about whether this might be discrimination given that it was, in our view, disproportionate and unjustified. Ms Appelby's concerns about the pool ought to have been dealt with initially by way of informal discussions with the Claimant as well as others who had involvement in the management of the pool. Ms Appelby did not have sufficient evidence before her to justify a disciplinary (or indeed a capability) process. The suspension was, for the reasons set out above, completely unnecessary.

137. We are not satisfied, however, that the Claimant has established a prima facie case of discrimination such as to shift the burden to the Respondent. No actual comparator has been identified. Those employed after the Claimant's dismissal in the roles of Pool Plant Operator and Attendance/Welfare Officer are not in the same or not materially different circumstances the Claimant. They were employed after her and in different roles. Nor are we satisfied that a hypothetical comparator (someone employed in the same roles as the Claimant at a time when concerns were raised about the quality of the water, but who was under 50) would have been treated differently. The disproportionate nature of the disciplinary action, even when considered together with the comment we have found to be age discrimination, is not enough to justify the drawing of an inference.

138. Accordingly the allegations at 3.2.2, 3.2.3 and 3.2.4 of the list of issues fail.

139. It is not in dispute that the Claimant was dismissed. As set out above, we accept that Ms Appelby had justifiable concerns about the pool and the way it was managed/operated and that she had a genuine desire to restructure a number of roles within the School. We have also found, however, that the Claimant was unfairly dismissed because the Respondents did not act reasonably in treating the reorganisation as a sufficient reason for dismissing the Claimant and did not follow a fair process in dismissing her. The Claimant says that this was, itself, an act of discrimination and that a hypothetical comparator (namely someone carrying out the Claimant's roles, who had recently been cleared of any wrongdoing in those roles but who was affected by a restructure and who was under 50 or approaching the age of retirement) would not have been dismissed. The Claimant has not identified an actual comparator.

140. We accept that the Claimant has proved facts from which, in the absence of a non-discriminatory explanation, the Tribunal could infer that a hypothetical comparator would have been treated differently and that the reason for the treatment was her age. The findings which, taken as a whole, could properly lead to that conclusion are as follows:

(a) By 21 November 2021 at the latest, Ms Appelby had formed the view that the Claimant would be (or ought to be) considering retirement given her age. She had already made an inherently ageist comment in this respect
(b) On 2 February 2022, the new structure had been decided on and was presented to the Claimant as a fait accompli. No steps were taken in the meeting on 2 February 2022 to engage with the Claimant about what a new role might look like for her. She was simply told that she, together with any internal or external candidates, would need to apply for the new role
(c) The Claimant was then left at home for almost three months awaiting further information which did not materialise. We find that there was a hope or expectation that she would simply retire
(d) No steps were taken to meet with the Claimant thereafter to discuss which role, if any, she would be interested in doing, whether either of the roles could be carried out on a part-time/job-share or flexi-time basis or even to discuss any concerns or questions she had about her position
(e) No attempt was taken to follow the restructure policy
(f) The Claimant was put under pressure to either accept a redundancy or return to work in only two out of three of her employed roles with no explanation as to the next steps in the restructuring process
(g) The job descriptions were only drawn up (very shortly) after the Claimant accepted the offer of redundancy
(h) One of the job roles was something that the Claimant was qualified and able to do and would likely have wanted to do.

141. Taking those findings together, the Tribunal could conclude that a hypothetical comparator would not have been treated in the same way as the Claimant and that the reason for the treatment (i.e. the matters rendering the dismissal unfair) is that Ms Appelby believed that the Claimant, given her age, would or should retire instead of taking up a new role within the new structure. The Claimant has accordingly demonstrated facts from which the Tribunal could infer discrimination.

142. The burden therefore shifts to the Respondents to provide a non-discriminatory explanation for the treatment. Given that we have rejected the only explanation put forward by the Respondents for treating the Claimant in the way they did (namely that the Claimant indicated in the meeting on 2 February 2022 that she did not want a full-time role) that burden has not been discharged.

143. As above, the discrimination is not capable of being objectively justified. The Respondent has not shown any grounds for concluding that the Claimant's dismissal was necessary to ensure a good level of pool quality, to expand the swim school or to meet the reducing needs of the School. Those aims are not, in any event, social policy objectives.

144. The claim of age discrimination at paragraph 3.2.5 therefore succeeds.

145. We accept that the comment made on 24 November 2021 (paragraph 3.2.1 of the list of issues) and the dismissal (paragraph 3.2.5) form a continuing act of discrimination (applying the approach in *Hale v Brighton and Sussex University Hospitals NHS Trust* EAT 0342/16 and s.123(3)(a) EqA 2010). Ms Appelby made the comment on 24 November 2021 because she was contemplating a reorganisation and expected the Claimant to retire due to her age. Ms Appelby did not engage in meaningful consultation (etc) for the same reasons. They are not isolated, specific acts but part of an ongoing state of affairs which started with Ms Appelby's first approach to the Claimant about the new structure and ended with the Claimant's dismissal. Accordingly, as the allegation of discrimination in respect of the dismissal is in time, the earlier act of discrimination is also in time.

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Employment Judge Smeaton

Date: 7 February 2024

Sent to the parties on: 8 February 2024

For the Tribunal Office

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