EMPLOYMENT TRIBUNALS

Claimant: Ms Denise Atkinson

Respondent: London Borough of Lewisham

Heard at: London South in public, in person **On:** 19-23 February 2024

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Mr M Wethers, Counsel
Respondent: Ms H Bell, Counsel

REASONS

These Reasons are provided at the request of the claimant. Oral Reasons were given on the last day of the hearing. They were provided in sufficient detail so as to allow the parties to understand the reasoning for my decision including the relevant findings as I proceeded so as to keep the recital to a minimum. These Reasons are in a fuller, more formal format but they do not materially differ from those given at the hearing. I must apologise for the delay in sending this document which unfortunately was due to oversight.

Background

1. By a claim form which was presented to the Employment Tribunal on 6 May 2021, Ms Atkinson, the claimant, originally brought complaints of disability discrimination and unfair dismissal against her ex-employer, the London Borough of Lewisham. The claimant has had Multiple Sclerosis since 2019.

2. In its response, the Respondent accepted that the claimant was disabled for the purposes of the Equality Act 2010 but otherwise denied her claim.

3. A private preliminary hearing on case management was conducted by Employment Judge ("EJ") Morton on 28 June 2022. At that hearing, EJ Morton identified the complaints and the issues arising in each, made a number of case management orders and set a date for a public preliminary hearing to determine the question of whether the complaints of disability

discrimination had been presented within the requisite time limits.

4. The respondent had made a request for further information and further and better particulars of the claimant's grounds of complaint on 11 July 2020 (this date is clearly wrong and more likely to have been 2021). The claimant was ordered to and did respond to these on 12 July 2022. Following that, the respondent presented amended grounds of resistance on 28 July 2022.

5. The public preliminary hearing was held on 18 July 2022 and was conducted by EJ Andrews. At that hearing EJ Andrews determined that the disability discrimination complaints had been submitted out of time and so those complaints were dismissed. EJ Andrews directed that the unfair dismissal complaint would continue and be listed for 5 days. She also set a date for a further private preliminary hearing on case management but, in the event, the parties agreed the remaining case management between themselves, including a revised list of issues, and so the hearing was not required.

6. The parties have agreed a list of issues which is at pages 100-101 of the bundle of documents but in any event sets out trite issues arising in redundancy unfair dismissal complaints.

Conduct of the hearing

7. The hearing took place in person between 19 and 23 February 2024. The claimant was represented by Mr Wethers of Counsel and the respondent was represented by Ms Bell of Counsel.

8. In view of the claimant's disability the following adjustments were made: during periods when the claimant was not giving evidence, she could sit at the back of the Tribunal room, so that she could move or adjust her position physically, standing, stretching out and elevating; during periods when she was not giving evidence, there would be set breaks in the morning, for lunch and the afternoon; and during periods when she was giving evidence, there would be more frequent breaks as and when she required them.

Documents and evidence

9. The respondent provided electronic and paper copies of the bundle of documents which initially ran to 779 pages (which I will refer to as "B" followed by the referenced page number) and a separate bundle containing the parties' witness statements. In addition, the respondent provided a case summary which included suggested reading. During the course of the hearing the claimant provided a transcript of a meeting held on 1 July 2020, which was added to the back of the bundle forming pages 780-810.

10. I heard evidence on behalf of the respondent from Mr Van Der Vliet-Firth and Ms Bernadette Sumner by way of written statements and in oral testimony. I heard evidence from the claimant and on her behalf from Mr Peter Walsh and Ms Laura Burley by way of written statements and in oral testimony.

11. At the end of the evidence, I was provided with an Authorities Bundle by Ms Bell and a Closing Note of Relevant Authorities On Behalf of Claimant by Mr Wethers. In addition, Mr Wethers sent electronic audio files of the meeting

held on 1 July 2020 and a further meeting held on 17 December 2020 between the claimant and Carol Colley (the transcript of which is at B773-779).

Findings of Fact

12. I decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that I failed to consider it.

13. I have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

14. The claimant was employed by the respondent from 12 April 2010 until 6 February 2021. At the time of her dismissal she was the Local Labour and Business Scheme Programme Manager within the Local Labour and Business Scheme ("LLBS") Team.

15. During the period relevant to the claim, the claimant's team was initially within the responsibility of the Director of Strategy, Fiona Colley, and her line manager was Fenella Beckman, the Service Group Manager, until 5 January 2020, whereupon Karen Fiagbe took over as acting Service Group Manager, seconded to the role temporarily for 6 months. She subsequently held (or returned to the role of) Head of Economy & Partnerships.

16. A Local Labour Scheme was created by the respondent relying on what was referred to as "section 106 funding"[1] in February 2005. That Scheme ran from 2006 until 2009 until the, then, Local Labour Coordinator left the post. The service was then reviewed and remodelled as a Local Labour and Business Scheme for delivery in 2010/11. This was created to use planning agreements to provide training and employment opportunities for unemployed residents as well as assisting local businesses to access business opportunities through the various construction developments taking place within the Borough. The Scheme was funded by a variety of external sources and section 106 planning contributions.

17. In 2015, due to the significant increase in the number of construction project starts within the Borough, the team expanded from one LLB Coordinator (paid at grade PO4), supported by an Economic Development Apprentice, to an LLBS Manager (at PO5), to LLBS Officers (at PO1) and a dedicated LLB Apprentice.

18. In April 2016, the respondent secured funding from the Greater London Authority ("GLA") to deliver the Transforming Construction Skills project over 3 years from 1 April 2017 to 31 March 2020. As part of that project, the LLBS team was further expanded and restructured to deliver, oversee and enable the delivery of the Lewisham Construction Hub Project, in addition to the

[1] Section 106 of the Town and Country Planning Act 1990, as amended. A definition of such funding is provided at B119.

existing Scheme. This included management of a number of significant external delivery contracts. At this time, the team structure was changed as follows: LLBS Programme Manager (at PO7); 3 LLBS Senior Project Officers (at PO5); LLBS Officer (at PO1); and an Apprentice. Save for the Programme Manager and the LLBS Officer, who were permanent employees, the other members of the team were employed on temporary contracts. The LLBS Team also continued to receive section 106 funding.

19. The claimant was initially employed as the LLBS Coordinator, then as the LLBS Manager and latterly as the LLBS Programme Manager from 23 January 2017.

20. It was apparent to those employed within the LLBS Team that the funding for their team was time-limited and would expire on 31 March 2020 and the Team would not continue (certainly not in its current form) unless further funding was secured.

21. Whilst it is not directly relevant to this claim, the claimant previously brought a complaint of disability discrimination over which the Tribunal ruled that it had no jurisdiction (as referred to in the above background to this claim). However, part of the issues in that claim related to grievances that the claimant brought against Ms Fiagbe and Ms Beckman. It is those grievances that are relevant to the claim before me, given the involvement of those two managers in the events subsequently leading to the claimant's dismissal and the claimant's assertion that she was not treated fairly by them as a result.

22. Ms Fiagbe produced a document entitled Proposed Lewisham Construction Hub/Local & Business Scheme – Exit Strategy Paper (at B119-127). In essence, this document recommended that the structure of the LLBS Team return to its previous structure given a downturn in the amount of construction work, the impending expiry of the GLA funding and limited opportunities to secure alternative funding. This document is undated and it is not clear when it was written or when and to whom it was circulated.

23. A number of meetings were held with members of the LLBS Team during January 2020. These are detailed at paragraph 3.10 of the later proposal document that was circulated to the team (at B130). The claimant's position is that these were not informal consultation meetings as they have been described by the respondent but were team meetings at which issues to do with the future of the LLBS Team were discussed. Her main point is that whilst it was common knowledge that the GLA grant was coming to an end and that there would have to be some changes, no end date was provided.

24. In March 2020, Ms Fiagbe and Ms Colley produced a document entitled Local Labour & Business Scheme Team Reorganisation (at B127-134). This document set out the detailed proposals for the future structure of the LLBS Team following the end of the Lewisham Construction Hub project and funding. The proposal was to return to the previous team structure of one LLBS Manager (paid at PO5), two LLBS Officers (at PO1) and an Apprentice.

25. This would mean that the claimant's post as LLBS Programme Manager and the three LLBS Senior Project Officer posts would be deleted.

26. The new post of LLBS Scheme Manager was identified as ring fenced recruitment opened to the claimant and the Senior Project Officers. One of the LLBS Officer posts was matched to the current post-holder and the other was ring-fenced to the affected staff. The Apprentice position was unaffected by the proposed change to the structure. The document also set out the selection process and timescales. The proposed timetable is at B133 although it was subsequently revised given the onset of the first Covid-19 lockdown (as B149 indicates).

27. The document contained an invitation to discuss any concerns with any member of staff and to meet with staff and Trade Union representatives as a whole at any time during the consultation process (at B133). Staff were invited to email the author to make an appointment as well as to make comments on the proposals (at B133).

28. The document attached the current and proposed new structures as well as the job descriptions and person specifications for the new posts.

29. On 1 July 2020, the Economy & Partnership Team moved to the Regeneration Department under Paul Moore, the then Interim Director.

30. Members of the LLBS Team including the claimant did exercise their right to make comments on the proposed restructure. These are included in the document entitled Management Response to staff feedback on proposed LLBS/LCH restructure dated 8 July 2020 at B150-165. This document is authored by Ms Fiagbe and Ms Colley. The staff questions and comments are shown in blueprint and the management responses in black print. The claimant acknowledged that a significant number of the staff comments were from her.

31. The claimant subsequently attended a DJCC meeting on 27 July 2020 and made a joint presentation with Lorna Burley, one of the LLBS Project Officers. I was referred to a document containing the presentation at B165-188. This shows the original staff questions and comments in blue, the management responses in black and a commentary from the claimant and others on each response.

32. Kevin Sheehan, the Executive Director, replied to these matters on 30 July 2020 at B521-522.

33. On 6 August 2020, the claimant, along with the other affected members of the LLBS Team were issued with notices of redundancy. The claimant's email letter from Florence Churchill, the Interim Programme Lead Economy and Jobs, is at B528-529. In essence, the letter confirmed that the claimant's post was to be deleted as part of the reorganisation of the LLBS Team structure. She was given 10 weeks' statutory notice, to end on 15 October 2020. She was invited to apply for redeployment and if this was not possible then she was advised that her employment would terminate on the grounds of redundancy. The claimant was invited to contact HR for notification of her redundancy benefits. She was also advised that because of her disability, the length of time that the respondent would seek alternative employment for her would be six months, if she wished to take up the option of redeployment.

34. Under the respondent's redeployment scheme, so as to assist disabled employees after a decision has been made to make them redundant, the redeployment process is extended to 6 months during which time they can apply for any vacancies whilst at the same time receiving their full salary and redeployment benefits.

35. The claimant did not apply for any of the roles within the new structure for which she was ring fenced. Ms Burley and Mr Walsh applied for the new PO5 manager post but were unsuccessful. Tunde Ikuejuyone had less than 2 years service and was not allowed to apply for the manager post in the first round. However, he applied during the second round of ring-fencing and he was successful in September 2020.

36. On 10 August 2020, the claimant was notified of the redeployment and outplacement process for disabled staff. This stated that the respondent had secured outplacement resources to support employees who had been issued with notice of redundancy. This programme covered employability skills training together with advice and support to help find alternative work. Documents were attached containing information on redeployment and redundancy; various benefits from Jobcentre Plus; Money Advice Service and Support services from Reed. The claimant was notified of the Council website where vacancies would be posted during redeployment.

37. The claimant elected to remain on fully paid disability redeployment for the additional 6 months.

38. From 3 August 2020, the claimant volunteered on a fully paid basis with the respondent's Public Health, Test and Trace team. Alongside training and looking for new employment whilst on redeployment, this accounted for 100% of her time during the redeployment period. During that time, the claimant's line management transferred to Helen Buttivant of Public Health.

39. On 1 September 2020, the claimant was informed by Ms Churchill that it was open to her to apply for the ring-fenced posts (mentioned above) in the restructure, namely, the LLBS Scheme at PO5 post as Manager or the LLBS Officer post at PO1.

40. On 8 September 2020, the deadline in which the claimant could apply for these posts was extended to 12 noon on 14 September 2020. The claimant has explained in her ET1 claim form that she chose not to apply for these posts despite having the opportunity to do so.

41. A second restructure was carried out by Mr Moore of his wider teams from August 2020 onwards to support the Borough's residents with employment in the recovery from the financial effects of the Covid-19 pandemic. This required new investment and further reorganisation to meet the needs arising from the pandemic. It was the subject of on-going discussions and decisions, given the huge financial effect of the pandemic on the respondent, as with all local authorities, and the huge additional cost demands placed on them.

42. The roles in the second restructure were new roles with new responsibilities. The restructure was initially timetabled to run from September to December 2020 with the five teams in Economy and Partnerships being reorganised and

new posts being created. The restructure proposed an investment of 9/10 staff – at a cost of around £500,000 – at a time when the respondent's budget was being aggressively hit by the pandemic. The respondent had to find around £20 million savings to balance its 2021/22 budget and this came to a head in December 2020 to March 2021. Elsewhere, the Places team was generating savings of almost £2 million per annum. This took time aligning the imperative for investment in new capacity within the EJP team and the broader strategic budget stabilisation position.

43. The claimant, along with other staff, was consulted on the second restructure and Mr Moore responded to her personally in this regard on 5 November 2020.

44. Further information was provided to staff, including the claimant, on 1 December 2020.

45. The intention at this point was to run a phased recruitment campaign with the post of Head of Economy, Jobs and Partnerships, the subject of a current recruitment process. This was being run by Reed Recruitment during November 2020 with the intention to interview and appoint potentially before the holiday break. Thereafter recruitment would be carried out to the other posts with an emphasis on the Jobs and Skills Pillar in the first instance. Anyone would be eligible to take part in the recruitment for the newly created posts, but members of the team who were under notice of redundancy, and as redeployees, would be given a four-day window at the beginning of the process during which their applications would be considered before any others.

46. The second restructure in fact was further delayed into 2021 and the claimant's 6 month period on redeployment from notification of her redundancy in the first restructure ended on 6 February 2021 and the claimant's employment came to an end.

47. Recruitment for the new roles in the second restructure took place during the period from March to June 2021.

48. The claimant brought her grievance against Ms Beckman and Ms Fiagbe on 21 February 2020 (at B344-349). A grievance hearing was conducted by Joan Hutton, the Director of Operations, Adult Social Care, on 13 July 2020. The claimant was present and represented by her trade union. The notes of that meeting are at B388-415. By a letter dated 3 August 2020, Ms Hutton wrote to the claimant partly upholding her grievance (at B523-526).

49. The claimant appealed against the outcome of her grievance on 17 August 2020 (at B534-552). The appeal hearing was conducted by Kevin Sheehan on 1 December 2020. The claimant was again represented by her trade union. By a letter dated 8 December 2020, Mr Sheehan wrote to the claimant effectively rejecting her appeal but making a series of recommendations for the future (at B689-691).

50. In essence, the claimant's grievance was about: a) her disability and the lack of support on her return to work and the provision of reasonable adjustments; b) insufficient handover of work streams affecting her ability to preform her

duties; and c) insufficient information provided to her about the closure of the Section and the pending restructure.

51. In essence, Ms Hutton reached the following conclusions: with regard to a) she partially upheld this element of the grievance; with regard to b) she upheld this element of the grievance; and with regard to c) she did not uphold this element of the grievance and in particular found that sufficient information was provided to the claimant albeit perhaps not effectively informally in discussions within 1:1 meetings but were clearly notified within the documentation and there was formal consultation within the Change guidelines.

52. On appeal, Mr Sheehan upheld the outcome of the grievance but made a number of recommendations: 1) training for managers in question to support them with the management of sensitive/challenges facing their staff; 2) training for managers in question in the implementation of the sickness absence policy including disability awareness guidance; and 3) refresher Change Management training for managers in question.

53. It was only this third point of the grievance and appeal that touched upon the issue of the restructuring and redundancy.

54. Mr Van Der -Firth, the Interim Head of Economy, Jobs and Partnership. At the relevant time he was an officer in and around the conversations relating to project delivery and the 2020 restructure consultation, which created the Jobs and Skill Programme Lead role which he secured.

55. His evidence (in the absence of evidence from the decision makers themselves) was that the way in which decisions are made by the respondent it was highly unlikely that any one person would have made such decisions notwithstanding their name appearing on a document. This is significant given the claimant's assertion that she was being singled out by Ms Fiagbe and/or Ms Beckman. His further evidence was that proposals, recommendations and decisions would effectively be collectively dealt with and would go through a number of hands including departmental managers, the Finance department, HR and then to Directorate level before being signed off. He had limited knowledge of the events in question but nevertheless I accepted his evidence.

56. I also heard evidence on behalf of the respondent from Ms Sumner, an HR adviser, as to policy and procedure. However, she candidly accepted that she had no involvement in the decision-making process and had not provided the decision-makers with any HR advice or assistance at the time.

57. Even though Mr Van Der Vliet-Firth, had limited knowledge of the events in question, he was able to give evidence from a more informed and experienced perspective and with knowledge of the policies and procedures involved.

Submissions

58. I heard oral submissions from both Counsel. I do not propose to set these out here unless appropriate to refer to them in my conclusions. However, I

would reassure both parties that they were fully taken into account in reaching my decision.

Essential Law

59. Section 98 of the Employment Rights Act 1996:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(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."

60. Section 139 of the Employment Rights Act 1996:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

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

(b) the fact that the requirements of that business—

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

Conclusions

61. This is a complaint of unfair dismissal arising for consideration under sections 94 and 98 of the Employment Rights Act 1996 ("ERA").

62. I first had to consider whether the respondent has shown a potentially fair reason for the claimant's dismissal within section 98 ERA. The Respondent avers that the claimant was dismissed by reason of redundancy.

63. Redundancy has a specific meaning ascribed to it within section 139 ERA. In broad terms, there are three main redundancy situations: closure of the business as a whole; closure of the particular workplace where the employee was employed; and a reduction in the size of the workforce. The case before me potentially falls within the latter of these under section 139(1)(b).

64. A dismissal is by reason of redundancy if it is "wholly or mainly attributable" to a number of factors. This includes at section 139(1)(b) where the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

65. In the case before me the respondent decided, given a number of factors, including a falling off in the particular work of the LLBS Team and specifically the ending of the GLA 3 year funding grant, that it did not require the work of the Team to continue in the way that it did and decided to revert to the pre-GLA funded structure. This diminution involved a reduction of the numbers in the team and a revision of the duties that the identify new posts were to undertake, their seniority and their pay grades. As a result the claimant's post was deleted.

66. I think there can be no doubt that what was proposed and what happened falls within the legal definition of redundancy. Indeed, whilst the claimant challenges the fairness of her dismissal, she accepts that it was a redundancy situation.

67. I therefore conclude that the respondent has shown that the potentially fair reason for dismissal is redundancy.

Test of reasonableness

68. I then turned to consider the reasonableness of the decision under section 98(4) ERA as it applies to the claimant's dismissal for the reason shown, that being redundancy.

69. In particular, I considered those matters which might render a dismissal for redundancy unfair as identified by the Employment Appeal Tribunal in *Williams v Compair Maxam Ltd* [1982] IRLR 83, EAT, as approved by *Robinson v Carrickfergus Borough Council* [1983] IRLR 122, NICA. These can be summarised as follows:

    a. That there was no genuine redundancy situation;
    b. That the employer failed to consult;
    c. The employee was unfairly selected; or
    d. That the employer failed to offer alternative employment.

70. I accept that these are not principles of law but rather standards of behaviour which may alter over time in accordance with the prevailing understanding of what constitutes good industrial relations practice (one obvious point being that they now often have to be applied to establishments with no trade union recognition).

71. In Polkey v A E Dayton Services Ltd [1987] IRLR 503, the House of Lords, as it then was, expressly referred to the relevant procedures required in a redundancy dismissal in the following terms:

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

Genuine redundancy

72. It is well established in case law that it is not open to an employee to challenge whether the employer acted reasonably in creating the redundancy situation and equally the Tribunal cannot investigate the commercial and economic reasons which prompted the situation or look into the rights and wrongs of the employer's decision (*James W Cook & Co (Wivenhoe) Ltd v Tipper and others* [1990] IRLR 386, CA; *Moon v Homeworthy Furniture (Northern) Ltd [1976]* IRLR 298, EAT.)

73. However, the Tribunal is entitled to investigate whether the redundancy situation is in fact genuine (James *W Cook & Co (Wivenhoe) Ltd v Tipper and others* [1990] IRLR 386, CA.)

74. Mr Withers also referred me to *Timex Corporation v Thompson* [1981] IRLR 522 in which Browne Wilkinson J, said giving judgment for the EAT:

> *"Even where there is a redundancy situation, it is possible for an employer to use such situation as a pretext for getting rid of an employee he wishes to dismiss. In such circumstances the reason for dismissal will not necessarily be redundancy. It is for the Industrial Tribunal in each case to see whether, on all the evidence, the employer has shown them what was the reason for dismissal, that being the burden cast on the employer by s.57(1) of the Act (as section 98 then was)."*

75. In addition, Mr Withers also referred me to Mefful v Merton and Lambeth Citizens Advice Bureau UKEAT/0160/18 at [42 & 51], in which HHJ Eady QC (as she then was) said as follows:

> *"For the dismissal to be by reason of redundancy, it was not sufficient for the ET to simply find there was a redundancy situation. It had to determine whether redundancy – as defined by section 139 ERA 1996 – was the real reason for the Claimant's dismissal. That is, whether his dismissal was wholly or principally by reason of the fact that the requirement of the Respondent's business for employees to carry out work of the particular kind he was employed to perform had ceased or diminished or was expected to do so.*
>
> *…*
>
> *"To determine that question, the ET will need to decide who made the decision and when."*

76. From the evidence before me, I reach the conclusion that the redundancy was driven by the falling off in the work of the LLBS Team and in particular the end of the GLA funding without there being any alternative replacement funding. Whilst there was section 106 funding, this in itself was insufficient to maintain the existing structure. Whilst the claimant believed the underspend in GLA funding could have been used, in fact it was used to continue to fund the existing posts until September 2020.

77. I am satisfied that such decisions are not necessarily down to one decision-maker, particularly in a bureaucracy such as a local authority. Whilst the names of Ms Fiagbe and Ms Beckman appeared on the restructuring

documents and they conducted or attended meetings to discuss the restructuring, I accept that it was unlikely that one or other or both would have had sole/joint decision-making power. As I have indicated I accepted Mr Van Der Vliet-Firth's evidence (in the absence of evidence from the decision makers) that it was highly unlikely that any one person would have made such decisions notwithstanding their name appearing on a document. Further, that proposals, recommendations and decisions would effectively be collectively dealt with and would go through a number of hands including departmental managers, the Finance department, HR and then to Directorate level before being signed off.

78. The claimant believes it was Ms Fiagbe and/or Ms Beckman who made the decision and that they acted in bad faith given the grievance that the claimant had brought against them. To an extent this extended to Ms Colley, given her alleged failure to deal with the ongoing behaviour she complained about.

79. In effect, the claimant is alleging that whilst the redundancy itself is genuine, it was engineered in such a way as to make her post redundant and not offer her alternative employment, and, from the efforts she made to raise challenges to the proposed restructure, I think it fair to say that she believed it was not necessary to undertake a restructuring.

80. I can understand believing this to be so, perhaps as a gut feeling, as I would call it. But in terms of tangible evidence, it is, with the deepest respect, purely conjecture. The only tangible evidence I had was from Mr Van Der Vliet-Firth, who from his experience stated that it was highly unlikely that any one person would have been able to reach such decisions alone, even if they were shown as the author on a document. He stated that this is because such proposals and decisions would have to go through a number of hands including Finance, HR and to a Director before being signed off. On balance of probability I also accepted this, as indicated above. There is no evidence to suggest that redundancy was not genuine or that this was not the reason for the claimant's dismissal.

81. I was concerned that the respondent did not call evidence from those said to be involved in the restructuring process. That is Ms Fiagbe and/or Ms Beckman and/or Ms Colley and/or those HR advisers involved at the time. They may have left the respondent's employment, as Mr Van Der Vliet-Firth also stated in evidence but it is of course possible to obtain witness orders if witnesses will not attend voluntarily. Although, I appreciate that there are practicalities securing attendance, even so. However, it is a matter for the respondent who they call to give evidence. I draw no inferences from the absence of any particular witness. My focus is on consideration of the evidence before me and whether the respondent discharges the burden of proof placed upon it and satisfies the test of reasonableness which is a neutral burden.

82. As it was, as I have indicated, I heard evidence on behalf of the respondent from Ms Sumner, an HR adviser, as to policy and procedure but she candidly accepted that she had no involvement in the decision-making process and had not provided the decision-makers with any HR advice or assistance at the time. Also I heard evidence from Mr Van Der Vliet-Firth, as I have said, who had limited knowledge of the events in question but came at it from more

of an informed and experienced perspective and with knowledge of the policies and procedures involved.

83. Nevertheless, I am satisfied that the respondent came to a business decision to restructure its LLBS Team given the downturn in the work it undertook and the loss of the bulk of its funding. This was a corporate decision made by a local authority, communicated to affected staff in the re-organisation document in March 2020, during the consultation process, the letter to the claimant confirming notice of redundancy/redeployment dated 6 August 2020 (at B529) and the letter to the claimant terminating her employment on grounds of redundancy dated 29 January 2021 with effect from 6 February 2021 (at B713).

84. Whilst the claimant suspects that this process was engineered to result in her redundancy because of her grievances against named individuals, which were to an extent running in tandem with this process, there is no evidence in support of this other than her conjecture and the temporal coincidence. I am bolstered in this conclusion by Mr Van Der Vliet-Firth's evidence that such decisions are in effect taken corporately and no one person would be in a position to sign them off.

85. Whilst an employee may not agree with a decision and it may appear to be short-sighted, wrong or not in the best interests of the service to be provided to the community or indeed they believe is taken in bad faith (the latter point there being no evidence to support), that does not mean it is open to challenge or that it does not amount to a genuine redundancy. There is a dividing line between the business decision and whether it is genuine or not.

86. I heard submissions from Mr Withers as to the timing of dismissal and the reasons for it. In essence he referred me to authorities which state that for the reason for dismissal to be admissible it must be constant through the process of dismissal which begins from notice and lasts through the period leading to the dismissal itself.

87. This issue arises because there was a long period of time between the confirmation of notice of redundancy and termination of employment on grounds of redundancy. This was to a large extent due to the onset of the Covid-19 pandemic from February/March 2020 and the period of the first lockdown. The claimant was also given an extended period of redeployment of 6 months under the respondent's policy in view of her disability status.

88. The claimant's position is as follows. By the point at which termination of employment was notified the situation had changed. At the meeting which the claimant attended with the two other affected employees held on 1 July 2020, Ms Colley said that there were no new jobs and no new money. However there was a subsequent wider reorganisation of the department/division which resulted in proposals being put forward in essence resulting in the creation of 9-10 new posts.

89. Mr Withers submits that by this point there was a change because there is new money and there are new jobs and that the respondent gave no consideration as to the impact on the claimant's redundancy as at February

2021 when her employment ended (notice of which was given on 29 January).

90. I would add that the only direct testimony was from Mr Van Der Vliet-Firth which pointed to the funding being sought at the point at which the reorganisation was notified and not becoming available until much later at the point at which the jobs were then to be recruited to.

91. To an extent, my ability to determine the matter was again hampered by the limited nature of the direct evidence (indeed neither from Ms Colley nor from Mr Moore).

92. However, the evidence indicates that there was a comprehensive reorganisation of the entire Economies & Partnerships Team which did not involve making any redundancies. The additional posts were envisaged to be recruited to by the end of the year but this was put back because of funding issues (B613). It was envisaged that recruitment to the new posts would be phased. This resulted in a delay in recruiting the new head of service post which was done first and thereafter a delay in recruiting the other posts until March 2021. I can see from the correspondence that the claimant was involved in the process of consultation about these changes.

93. But the simple fact of the matter is that the new post or posts which the claimant is suggesting she should have been considered for were not recruited to until after her employment had ended. The claimant and her witnesses were not able to give any direct evidence as to when these jobs would have become available.

94. The closest we had to direct evidence was Mr Van Der Vliet-Firth, given his involvement in applying for and successfully obtaining the post of Jobs Skills Manager (which would appear to be the specific job the claimant was referring to). He was not interviewed until April 2021 and did not commence in the role until May 2021. There is no reason to doubt this.

95. Ms Sumner said in evidence that in her general experience if a job was advertised say in March 2021 then it was likely it would be ready to advertise say in February 2021.

96. Mr Withers relies on this as evidence that the Respondent knew that there were available jobs that could have avoided the need for the claimant's redundancy.

97. Ms Bell submitted that even if one assumes that the adverts were ready in February that is not the same thing as the role being available because up until the point of advertising, the job the decision-makers could have decided not to proceed with the recruitment. She further submits that the job was not advertised until March 2021 and this was after the claimant had left and that whilst it is unfortunate and the Claimant may feel hard done by it does not make it unfair.

98. Ms Bell referred me to the case of *Octavius Atkinson & Sons Ltd v Morris* [1989] ICR 431, CA. This is a case with an even more acute timetable than the case before me. However, the principle it sets out is that alternative

employment arising after termination of employment does not give rise to an obligation upon an employer to offer it to the affected employee.

99. The difficulty for the claimant in the case before me is that, beyond the specific dates identified by Mr Van Der Vliet-Firth, there nothing concrete to determine this matter on. So what I am left with is the bald position that the claimant was given notice of termination on 29 January with effect from 6 February and additional jobs or his job at least were not advertised until March 2021, ie after her employment had come to an end. Anything further than this is conjecture.

Failure to consult

100. An employer should give as much warning as possible of impending redundancies to enable any recognised trade union and affected employees to consider possible alternative solutions and if necessary, find alternative employment (*Williams v Compare Maxam* Ltd [1982] IRLR 83, EAT).

101. Consultation is very important in redundancy situations and can take many forms. At one end of the spectrum it involves collective discussions and meetings with a recognised trade union; at the other end it will entail discussions with individual employees who are likely to be made redundant. Failure to consult individually may well make a dismissal unfair, although compensation may be limited if consultation would not have made any difference to the outcome.

102. Consultation requires the employer to consider options which would not involve making the employee redundant, including early retirement, seeking volunteers, alternative employment, lay-off and short-time working. The employees and their representatives should be involved in this process. Consultation means more than communicating a decision already made.

103. I am satisfied from the evidence that there was both informal and formal consultation with the affected employees including the claimant. There were a number of team meetings during January 2020 at which the issue of the expiry of the GLA funding was discussed. Whilst these were not labelled as consultation meetings, they were clearly discussions held on an informal level. Even if an end date for the loss of funding and any resultant changes may not have been identified, as the claimant states, she was the LLBS Manager and in particular would have been under no misapprehension as to the date on which the funding would come to an end, notwithstanding any underspend she referred to, and the likely impact on the LLBS Team if it was not possible to replace it and so ability its undertake the same level of work.

104. The reorganisation document was sent to staff in March 2020, setting out clearly the rationale, the proposals, identifying the affected employees, setting out the process and giving a timetable (which was subsequently extended in view of the lock down. The document attached the existing and proposed new structure and the job descriptions and person specifications for the new posts. The document also invited staff comments and in addition offered to deal with any concerns staff may have and invited them to get in contact to arrange an appointment. Thereafter, staff comments/questions, including those provided by the claimant, were incorporated into a document

containing management responses. There was then a DJCC meeting at which extraordinarily the claimant was allowed to attend, at which she made a joint presentation to the meeting and I was referred to the presentation document within the bundle. The claimant also attended with other affected members of her team a meeting with Ms Fiagbe and Ms Colley at which she had the opportunity to and did raise and comments as to the proposed restructuring.

105. Indeed much of this went further than simply querying the need to make redundancies but actually questioned to an extent the business decision that had been taken. Whilst this is understandable it was not within the claimant's or the other affected employees' remit.

106. The correspondence also indicates that the claimant was given a number of opportunities to approach the respondent if she had any queries or concerns about her redundancy. However she chose not to do so.

107. Whilst there may not have been one-to-one consultation as such, there was clearly consultation both informally and formally, with the affected employees, including the claimant and at which the trade unions were offered the opportunity to attend and at which the claimant had full opportunity to and did advance her own queries and concerns. I therefore find it somewhat disingenuous to assert that consultation somehow did not take place or was inadequate.

Selection

108. As Ms Bell submitted, the claimant's case on selection is unclear. It is blandly set out within the particulars of claim at paragraph 11 (B14). This led to further and better particulars and the replies at B69-70, at paragraphs 20 and 21.

109. With regard to paragraph 20, I do not accept that the claimant was never made aware of her selection for redundancy through consultation or otherwise. Whilst there may have been meetings with her team when she was absent from the office, she was clearly involved in the consultation process and aware of the restructuring proposals and participated in it. She was sent notice of possible redundancy.

110. With regard to paragraph 21, whilst it is asserted that the involvement of Ms Fiagbe and Ms Colley, who it is also said plainly disliked her, rendered the selection process unfair, as I have said this is pure conjecture not based on any tangible evidence beyond the raising of grievances which to an extent were extant at the time.

111. It is clear that the claimant was selected for redundancy because her post was deleted as a result of the restructuring. There is no wider pool to consider and it would not be reasonable to have expected the respondent to have done anything different. The claimant asserted that the revised manager post at PO 5 was in fact her previous position and so it should have simply been offered to her. However, I do not believe this and will deal with it later on in my judgment.

112. The claimant does appear also to assert that there should have been another process of selection for redundancy in July 2020 when Mr Moore undertook a wider reorganisation of the entire department/division. At this stage it is asserted that she should have been included in a wider pool. However, I accept Ms Bell's submissions that this is based on a fundamental misunderstanding of what happened at that stage. All that happened was that the top of the pyramid, as she called it, changed from Corporate Services to the Housing, Regeneration & Public Realm Directorate. The Jobs Skills and Employment Team did not come into existence until a later date and the issue of the new roles that then became apparent can only be relevant to alternative employment.

Alternative Employment

113. An employer must at least look for alternative employment and should offer any suitable available vacancies. The employer's duty is not limited to offering similar positions or positions in the same workplace and it should consider the availability of any vacancies with associated employers. When offering alternative employment, the employer must give sufficient detail of the vacancy and allow (unless the job functions are obvious) a trial period. Failure to do so could make a dismissal unfair (*Elliott v Richard Stump Ltd* [1987] IRLR 215, EAT.) It is up to the employee whether to accept the alternative employment, which might even involve demotion or a reduction in pay (*Avonmouth Construction Co v Shipway* [1979] IRLR 14, EAT.) Employers should consult about possibilities and not make assumptions about what jobs an employee would find acceptable. It can of course affect the employee's chances of succeeding in a claim of unfair dismissal if she unreasonably refuses a suitable alternative offer of employment or the amount of compensation awarded if they do win. It is also worth stressing, that one of the main purposes of consultation is to consider other employment as an alternative to dismissal.

114. The claimant was offered the opportunity to apply for the manager role at PO5 but did not do so. She was sent information regarding redeployment in the Redeployee Briefing (at B253-290). This made it clear the process to follow to find vacancies made it clear that the onus was upon her to do so. She was reminded of this in correspondence. The claimant did not apply for any positions of redeployment. Beyond stating that she had transferable skills and could have been offered alternative roles that were suitable for her she did not identify any beyond the LBBS Manager role at PO5.

115. There was a suggestion raised as an issue that bumping should have applied although I accept that this is not used in the true sense of the word but it was meant in the sense that the claimant should have automatically been slotted into the position of LLBS Manager on the basis that this was the job that she undertook prior to the restructuring arising from the receipt of GLA funding.

116. The Redeployee Briefing at B260 contains a definition of suitable alternatives for the purposes of redeployment. This states that a post of the same grade or one grade higher with relevant job skills amounts to a suitable alternative job offer, whereas if the job is one grade lower but with relevant job skills it amounts to offer alternative employment. This distinction appears to have been made because of course an unreasonable refusal of an offer of suitable

alternative employment can result in the loss of entitlement to a redundancy payment.

117. I find that it is not outside the range of reasonable responses for the respondent to choose not to match the claimant to that role given that it cannot amount to suitable alternative because it is not at the same grade or one grade higher than the claimant's existing position. Whilst the claimant was undertaking the role in the past, it was not the role that she was undertaking at the point of restructuring and her redundancy.

118. The claimant was made aware of the existence of the role and she was invited to apply for it. This is not an unreasonable position for the respondent to take and certainly fulfils in the very least the requirement to consider alternative employment. Whilst the claimant chose, perhaps for very understandable reasons, not to apply for this job or any other positions, that was her decision and cannot be attributed to the failing of the Respondent and place at the foot of their door.

119. If, and I am not sure that it was, suggested that Jobs Skills Manager post should have been offered to the claimant, of course it was not available to the claimant until it was advertised and that was in March 2021 after her employment had ended.

120. There is a need to look at the matter in the round so as to determine whether dismissal is within the band of reasonable responses (Grundy (Teddington) Ltd v Plummer and Salt [1983] IRLR 98, EAT).

121. The respondent was faced with the position where a substantial amount of funding had come to an end in respect of a project which had not necessitated the amount of work that had originally been envisaged. It decided to scale down the operation and this resulted in a number of posts being deleted, including the claimant's. She was not matched to the new manager role because it was at a lower rate of pay and did not fit within the respondent's definition of suitable alternative employment. She was ring-fenced at the initial stage to apply for that post, offered an extension of the time within which to apply, did not do so and then offered the opportunity at a second stage ring-fencing, which included at that stage the Apprentice and again did not do so. She was given a six-month period extended redeployment and invited to apply for vacancies within the respondent's organisation but did not do so. Whilst there was a wider restructuring of the entire department resulting in additional posts being created, these did not become available and were not advertised until after her employment. Whilst the claimant might not have agreed with the initial business decision, the resultant restructuring and the deletion of her post or that she should have not have been offered what she believe to have been her previous position, I find that her dismissal and the procedure followed reasonable and within the band of reasonable responses open to an employer in these circumstances.

122. In all of the circumstances I find her dismissal to have been fair. Her complaint is therefore unfounded and her claim is dismissed.

Employment Judge Tsamados
Date: 21 January 2025