



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case Nos: S/4105348/17; S/4105406/17 & S/4105409/17

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Held in Edinburgh on 13th to 19th November 2018 and 7th January 2019

**Employment Judge: Jane M Porter
Members: Mrs M Taylor
Mr J Terry**

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Ms C Waterloo

Claimant
In Person

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National Library of Scotland

Respondent
Represented by:-
Mr Turnbull, Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the Judgment of the Employment Tribunal to dismiss the claimant's claims of age discrimination and unfair dismissal.

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Introduction

1. In these conjoined cases the claimant brings claims of age discrimination and unfair dismissal. The claims are defended and there were Preliminary Hearings in the matter on the 12th January 2018, the 4th April 2018, the 17th May 2018 and the 8th August 2018.

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2. At the PH on the 8th August 2018 the case was set down for a full Hearing on the Merits on the 13th, 14th, 15th, 16th, 19th and 20th November 2018. At the Hearing on the Merits the claimant represented herself, and the respondents were represented by Mr Turnbull, Solicitor.

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3. The parties referred to a Joint Bundle of Productions which was numbered 1 to 1937. The majority of the productions were not referenced in evidence. A Joint List of Issues was also produced. The parties attempted to agree a Chronology but found this impossible to achieve.

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4. The parties agreed that the hearing should be a hearing on liability only.

5. In accordance with an Order at the PH on the 8th August 2018, witness statements were produced. In advance of the full Hearing on the Merits the claimant requested that the Tribunal make an Order for timetabling under Rule 45 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 Schedule 1. At the outset of the proceedings it was agreed that the witness statement should be taken as read; and that the claimant would be allowed 3 hours to cross examine Stuart Lewis, Associate Director of Digital; 1½ hours to cross examine Innes Byrne, Digital Transition Manager (DTM); 1½ hours to cross examine Anthony Gillespie, Director of Business Support and 1 hour to cross examine Pamela Evans, HR Business Partner and Dr John Scally, National Librarian and Chief Executive. For their part, the respondents submitted that they would cross examine the claimant for no longer than 2½ hours and submitted that their cross examination of the claimant's two witnesses, Martin Shatwell and William Alexander would be confined to one to two questions. The timetabling agreed was adhered to and the case concluded on the afternoon of the 19th November 2018.

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6. The claimant introduced a claim of unfair dismissal timeously in September 2018.
7. At the outset of proceedings the claimant presented an amendment to include a claim of victimisation under section 27 of the Equality Act 2010 in respect of her dismissal. The amendment was unopposed and was allowed by the Employment Judge, subject to the issue of jurisdiction.
8. In the course of the proceedings the claimant withdrew her claims of harassment.
9. In the course of submissions, the claimant confirmed that, after hearing the evidence, her claims were confined to claims of direct discrimination on the grounds of age under section 13 of the Equality Act 2010; breaches of sections 111 and 112 of the Equality Act 2010; victimisation in respect of her dismissal under section 27 of the Equality Act 2010 and unfair dismissal under section 98 of the Employment Rights Act 1996. The claimant's other claims were withdrawn.
10. The Tribunal heard extensive factual evidence. All of the facts heard are not replicated in this Judgment; instead, from the evidence and the submissions the Tribunal made the undernoted essential Findings in Fact.

FINDINGS IN FACT

11. The claimant was employed by the respondents on the 14th April 2014 as a Digitisation Programme Coordinator, which is a Grade H post. After the appointment of Stuart Lewis on 19th September 2016 the claimant was one of seven Managers who reported directly to him.
12. The claimant line managed three employees of the respondents and supervised others. In the course of her employment her job title changed from Digitisation Programme Coordinator to Digitisation Programme Manager to reflect her management responsibilities; however she remained a Grade H post **(158)**.

13. The Tribunal accepted the evidence of Robin Smith that the claimant's job description did not accord with what she actually did as her job description implied that she was responsible for the whole of digitisation which was incorrect. In Robin Smith's view, the claimant's responsibilities were confined to 'digital capture' which involved being in charge of making sure the digitisation of items identified by the curators was identified. This view was reinforced by her meetings with the claimant in which the claimant focussed on the capture process. Stuart Lewis also gave evidence that the claimant's day to day duties were confined to 'digital capture'.
14. In or around August 2016 the respondents instigated a voluntary exit scheme. The claimant's position was that this was a scheme which was initiated to exit older staff members. However, the Tribunal accepted the clear and uncontradicted evidence of Dr Scally and Anthony Gillespie that the voluntary exit scheme had attracted a lot of young applicants and that as a matter of fact accepting applications from older applicants to this scheme rendered it an expensive exercise.
15. The Tribunal accepted the evidence of Stuart Lewis that the overall digitisation process within the respondents was not coordinated well. Stuart Lewis commented on this in a report of December 2016 headed "Digital Department: Initial Review" (416 onwards). At paragraph 3.4.3 (423) Stuart Lewis commented: "*The Digitisation Programme Manager is perhaps performing a wider role than the job title suggests ... it is not totally clear how the Digital Collections Specialist fits into the service as a whole and where roles and responsibilities lay.*" Ines Byrne at that time was the Digital Collections Specialist which was a Grade I post. Within the respondents' structure , a Grade I post is one level higher than a Grade H post.
16. The claimant's position was that Ines Byrne had influenced Stuart Lewis in his perception of the claimant's role and indeed had diluted her role to Stuart Lewis. Aside from the claimant's own evidence that it was her perception that this was the case, the Tribunal found no other evidence to support this view.
17. There was uncontradicted evidence from Stuart Lewis and Dr Scally that the claimant was a valued employee, that her role was 'crucial' to the delivery of the

respondents' digitisation programme and that indeed since the claimant's departure considerable resources have been deployed within her department by way of financial resources including manpower .

- 5 18. As a result of Stuart Lewis's observation in his report of December 2016, there was discussion on the lack of oversight in the field of digitisation activity at the Library Leadership Team (LLT) meetings. These meetings take place once a month and the Chief Executive of the Library and all the Heads of Team attend. On 7th March 2017 a business case was put forward to the Library Leadership Team for the post
10 of Digital Third Programme Manager, subsequently retitled "Digital Transition Manager" ("DTM"). It was anticipated that the role would coordinate and pull together the strands of the One Third Digital Programme, which is an ambitious programme to make available one third of the Library's collections in a digital format by 2025. In the business case (540) it was proposed that the role be an initial
15 secondment of 12 months. The business case was approved by the LLT. Ines Byrne was initially suggested as someone who could be seconded to the role. At the meeting on the 7th March the LLT explored whether Ines Byrne's role would still be needed within her Department if she was seconded and whether the secondment created in itself a risk of her role being made redundant. At the LLT meeting it was
20 determined that rather than a secondment the DTM role needed to be permanent to achieve its stated aim.
19. Following on from the meeting, Robin Smith, Associate Director for Collections and Research conducted discussions with HR regarding the potential redundancy of Ines
25 Byrne's role as Digital Collections Specialist and what process was needed for that. In the course of those discussions there was devised a more defined draft business case and job description for the proposed role of DTM.
20. The claimant was potentially affected if the new plan was implemented in that it was
30 proposed the new appointment to DTM would line manage the claimant. To this end, Stuart Lewis had a meeting with the claimant on the 17th of May 2017. The Tribunal accepted the evidence of Stuart Lewis that the claimant saw the new proposed role of DTM as introducing a Line Manager above her. At that meeting

the claimant was clearly unhappy at this possibility. In her own evidence (para **245** of her witness statement) she stated (about the meeting on the 17th May 2017): “I told Mr Lewis that it was my job Mrs Byrne was being moved in, that now the encroachment was complete and that it was “a slap in the face.” I excused myself. I felt disgusted and was very worried. I could not work under Mrs Byrne and Mr Lewis knew that. It was unfair to remove my responsibilities because Mrs Byrne thought she could do my job better. This new role would remove my key responsibilities and demote me to capture. There was no objective reason to do that.”

10 21. On 23rd May 2017 there was an informal meeting between the claimant, Stuart Lewis and Pamela Evans of HR. Notes of this meeting are to be found at **665 to 666**. The meeting opened with Stuart Lewis stating that he wanted to go through the claimant’s concerns regarding aspects of her job being included in the proposed new job description of the DTM role. In the course of the meeting the claimant stated that
15 Ines Byrne was incompetent, had failed to carry out the duties of her existing role, was now going to take the claimant’s role, had no qualifications and in any event was constantly interfering in the claimant’s role. In the meeting, Pamela Evans put to the claimant whether the real problem was her relationship with Ines Byrne as opposed to the creation of the DTM role itself. The claimant confirmed that it was, but stated that she was not interested in engaging in mediation with Ines Byrne to
20 resolve matters. The claimant stated that she had no intention of working under the line management of Ines Byrne, going forward.

22. After the meeting on the 23rd of May 2017 the claimant was absent on sick leave. In
25 June 2017, while she was absent, the job description for the DTM job was finalised. It was graded as a Grade I post, a grade higher than the claimant’s post. At the same time, Robin Smith consulted with Ines Byrne about her role as Digital Collections Manager being made redundant. As Ines Byrne’s role was at risk of redundancy she was put on the Redeployment Register as a Grade I being her grade
30 in her former role as Digital Collections Manager. As the proposed new DTM role was also a Grade I the post was offered to Ines Byrne without being advertised and Ines Byrne accepted the role.

23. The Tribunal accepted the rationale given in evidence by the respondents for the appointment of Ines Byrne to this role, namely that her role was being made redundant, she was at the same grade as the new DTM role and the DTM role was a new role with little cross over with other roles. To this end, the proposed structure for the DTM role is found at page **1379** of the productions.
24. The Tribunal accepted the evidence of Stuart Lewis that the new role's remit was threefold: namely to coordinate the implementation of the one third Digital Programme across the Library's collections, to act as a Curator for the digitised collections and to develop services for the new digital collections to be exploited in the future. As such Stuart Lewis gave evidence that only around a ninth of the role was a cross over to the claimant's role.
25. The claimant's position in evidence was that she should have been promoted to the DTM role. Her position in evidence was that her skills and qualifications were far superior to those of Ines Byrne. Against this there was uncontradicted evidence from Robin Smith that the claimant did not have the skills for the DTM role as she did not easily get to grips with the overall digitisation process which involved interfaces across a wide range of units, had no knowledge about 'born' digital and non print legal deposit which were required for the new role and, further, needed to improve her skills on reporting and budgeting.
26. On the 26th of May 2017 the claimant raised a grievance (**687**). The grievance centred around the creation of a DTM post and the fact that it was, in the claimant's view, a move to control and remove her responsibilities. Also contained within her grievance was the issue of her proposal to digitise the collection held in Edinburgh City Council Central Library being discounted by Ines Byrne, the issue of the claimant not being permitted to lead in extending negotiated agreements, licences and contracts as these matters were being addressed by Ines Byrne and the proposal that Ines Byrne was to be the claimant's Line Manager. The claimant did not allege any issues of discrimination in her grievance.

27. Following the grievance, there was an investigation report carried out by Isobel Griffin (**793 to 795**) and a Grievance Hearing thereafter, heard by Anthony Gillespie on the 28th June 2017 (**805 to 810**). At the Grievance Hearing the claimant confirmed that there were two essential elements to her grievance in that she felt that her position was not respected because of the proposal for her to be line managed by Ines Byrne and that she felt her position as Digitisation Programme Manager had been undermined because “job creep” had been allowed to happen.
28. The claimant was advised of the outcome of her grievance by letter of 30th June 2017. Her grievance was partially upheld in that Anthony Gillespie found that there was confusion about the identity of the lead person in the Library’s Digitisation Programmes. Anthony Gillespie did not find, however, that the claimant’s specific position had been undermined. In conclusion, the recommendations were that the claimant meet with her Head of Department to discuss the DTM job description, that job descriptions for staff doing the digitisation activities were reviewed and updated to ensure staff roles were clearer and more concise and that HR should put into place support mechanisms such as mediation to deal with what were clearly significant personal issues between various individuals involved in dealing with digital change.
29. The claimant was off sick with stress between 3rd July and 15th July 2017. An OH Report was commissioned by the respondents and is to be found at page **1010** of the Bundle. A follow up OH Report was later commissioned on 4th December 2017 (**1150**). Both reports stated that a return to work date depended on resolution of the claimant’s perceived areas of work difficulty.
30. The claimant lodged an appeal against the grievance outcome (**885 to 886**). There was a grievance appeal meeting on 26th July 2017 heard by Dr Scally, National Librarian and Chief Executive. The minutes of the appeal meeting are to be found at page **917** onwards. On 1st August 2017 Dr Scally wrote to the claimant with the outcome of the Grievance Appeal Hearing (**966 to 967**). Dr Scally did not uphold the claimant’s grievance in his letter and suggested that the claimant have a conversation with Stuart Lewis to discuss moving forward in a positive and

constructive manner. Mediation with regard to the claimant's relationship issues with Ines Byrne was also suggested.

- 5 31. From the 2nd August 2017 the claimant was absent again on sick leave. She did not return to her employment with the respondents.
32. On 14th August 2017 Ines Byrne was formally appointed to the DTM role. The claimant was informed of this on 26th September 2017.
- 10 33. Meantime, Janet Stewart Head of HR with the respondents emailed the claimant on 10th August 2017 and 15th August 2017 offering her a meeting with Robin Smith to go over the rationale for the creation of the DTM role. The claimant did not agree to this meeting.
- 15 34. The claimant had email correspondence with Stuart Lewis on the 25th and 29th August 2017 (**1016 to 1023**). The claimant's email correspondence raised the issue of age discrimination for the first time. In his response, Stuart Lewis invited the claimant to meet with Robin Smith to go over the process of the appointment of the DTM role. The claimant never took up that offer.
- 20 35. Stuart Lewis met with the claimant on the 14th September 2017 at the National Galleries of Scotland. Minutes of that meeting are to be found at pages **1031 to 1036**. The purpose of the meeting was to explain the difference between the claimant's role and the new role of DTM. The Tribunal accepted the evidence of
- 25 Stuart Lewis that he considered that by the end of the meeting the claimant still didn't seem to understand the difference between the DTM role and her role.
- 30 36. On 5th October 2017 the claimant lodged another grievance. That grievance is to be found at page **1068** onwards. The claimant's grievance was that she had been bullied and harassed – in her own words "*In short, IB has bullied me to allow her to take up my role and responsibilities and Stuart Lewis and Robin Smith have collaborated with IB in her attempt to take over my role by stealth.*" (**1068**). In terms of the bullying allegations, the claimant said that she had been undermined and her

work had been deliberately impeded and that she had been intimidated and that her dignity had been violated. In her grievance the claimant did not raise issues of discrimination.

5 37. John Coll, Head of Access, was appointed to investigate the grievance.

38. On the 23rd of October 2017 the claimant's ET1 raising claims of age discrimination against the respondents was accepted by the Employment Tribunal Service.

10 39. By letter dated 22nd December 2017 with attachments (**1242**) the claimant's grievance was rejected on the basis that there was no evidence to support the claimant's allegations. The claimant did not appeal this decision.

15 40. In evidence, the claimant clarified that the issues around the ambit of her own role and the new proposed DTM role carried out by Ines Byrne lay at the heart of her claims before this Tribunal. However, the claimant raised other specific allegations to support her claim of age discrimination. In particular, the claimant alleged that at the Digital Manager's meeting on the 21st December 2016 in a presentation based on the "Digital Department: Initial Review" Report Stuart Lewis made a reference to the infrastructure and telephone system being past the point of maintenance. The Tribunal accepted the explanation of Stuart Lewis that his comment simply related to the factually correct statement that the telephone system was over 30 years old and was past its usual life span.

20 41. The claimant also alleged that in December 2016 Stuart Lewis accepted without question the statement of Ines Byrne that the claimant was performing a wider role than her job title suggested. Again the Tribunal found no basis for this assertion and indeed for the assertion that Stuart Lewis preferred Ines Byrne's views any more than he did the views of the claimant.

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42. The claimant also asserted that Stuart Lewis gave the youngest staff member in Digital, Rachel Nimmo advancement by exposure across the organisation by making her the coordinator of a "workshop". The Tribunal accepted the evidence of Stuart

Lewis that this opportunity was given simply because Rachel Nimmo was seeking development opportunities.

5 43. The claimant also alleged that Stuart Lewis denied her request for a chance of promotion on the grounds of her age. The Tribunal accepted Stuart Lewis's explanation that the respondents have a procedure whereby an invite is sent to all staff in October of each year to invite staff who believe there have been significant changes to their post in the previous 12 months to request that these changes be considered for re-evaluation. The submissions must be supported by the individual's
10 Line Manager or Head of Department and if accepted the post is re-evaluated by a member of HR and TU representatives. As a matter of fact the claimant never submitted such a re-evaluation request.

15 44. The claimant also alleged that in February 2017 Stuart Lewis chose Ines Byrne over herself to give a presentation on digitisation at an external event called SCURL (The Scottish Consortium of University and Research Libraries). The Tribunal accepted the evidence of Stuart Lewis that he asked Ines Byrne to present simply because he took the view that she was best placed to explain how the respondents were approaching its "One Third Digital" strategic aim.
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25 45. The claimant also alleged that the respondents use of partial retirement and voluntary exit schemes were evidence of age discrimination. The evidence from the claimant's witness William Alexander did not support this as he was dismissed for gross misconduct. Likewise, Ian Anderson was mentioned by the claimant as an example of the respondents' use of voluntary exit schemes. There was no evidence to verify the circumstances surrounding the termination of the employment of Ian Anderson.

30 46. The Tribunal accepted the evidence from Stuart Lewis, Ines Byrne and Robin Smith that they were all unaware of the claimant's age until the instigation of these proceedings. Indeed, Ines Byrne gave unchallenged evidence that she thought that the claimant was around her age and certainly not older than 45. The Tribunal also accepted the evidence of Stuart Lewis when he said that he was not aware from his

observations of Ines Byrne and the claimant that Ines Byrne was younger than the claimant.

5 47. By 2nd February 2018 the claimant remained absent from her employment. On 2nd February 2018 Janet Stewart, Head of HR wrote to the claimant advising her that a meeting had been arranged with Anthony Gillespie on Wednesday 7th February 2018 to discuss the ongoing issues in relation to her return to work. Janet Stewart advised that she would also be in attendance to take a note of the meeting and advise of the claimant's right to be accompanied. (1257). The claimant was then 10 told that she would be placed on special leave from 2nd February 2018 pending an outcome from the meeting.

15 48. The meeting took place on 7th February 2018. At the meeting there was a discussion regarding the claimant's ongoing allegations of bullying and harassment by Ines Byrne and Stuart Lewis. The claimant raised an issue about working under the line management of Graham Forbes, Associate Director of Collections Management to enable her to return to work. This option was investigated by Anthony Gillespie who was advised by Graham Forbes that he felt he didn't have the skills to line manage the claimant and felt indeed that his involvement would hold the whole One Third 20 Digital programme back. Anthony Gillespie also asked Stuart Lewis's view on Graham Forbes line managing the claimant. Stuart Lewis advised that he did not consider this to be practical or appropriate for a number of reasons including the specialist work which the claimant carried out which he considered would require someone working closely with himself and Ines Byrne – not someone in another 25 department, such as Graham Forbes, which would result in extended reporting lines.

30 49. There was also a discussion regarding alternative roles which the claimant could undertake within the respondents. To this end, the claimant made it clear that she would only undertake roles of the equivalent grade or higher.

50. The Tribunal accepted the evidence of Anthony Gillespie that the meeting concluded with no real resolution to resolve the claimant's issues with regard to returning to her employment.

51. On 12th March 2018 Janet Stewart sent further correspondence to the claimant inviting her to another meeting on the 27th March 2018 at 9.30am (**1271 to 1272**). That letter stated: *“In relation to your allegations , the evidence does not justify removing management responsibilities or taking other action against Miss Byrne; you are unwilling to return to work on the arrangements currently available; it appears that amending the arrangements to fit your requirements may not be practical or appropriate; no alternative vacancies have arisen; you have made statements that indicate your trust in the Library has broken down; mediation has been ruled out by you as a possibility; and there is no reason to believe that your position will change in the foreseeable future. It is necessary to consider whether your continued employment remains appropriate.”*
52. The meeting took place on the 5th April 2018. Present at the meeting were Anthony Gillespie, Janet Stewart, the claimant and Cat Boyd as the claimant’s Union representative. Notes of the meeting are to be found at **1285 to 1291**. The Tribunal accepted the evidence of Anthony Gillespie that this meeting did not progress matters. Certainly, the Tribunal found it significant to note that in the course of the meeting the claimant submitted that there had been a breach of trust and confidence on the part of the respondents due to false representations allegedly made by Stuart Lewis (**1288**).
53. In the period April 2018 to June 2018 there were ongoing emails and correspondence between Anthony Gillespie and the claimant regarding possible mediation and other posts to which the claimant could be redeployed. By this stage the claimant had made allegations regarding most of the Library Leadership Team.
54. By letter dated 14th June 2018 (**1292 to 1296**) Anthony Gillespie dismissed the claimant. The Tribunal accepted the respondents’ reasons for the dismissal which were: (i) the claimant was unwilling to return to work on the arrangements currently available; (ii) the respondents could not get mediation to work; (iii) there were no other suitable vacancies within the respondents; and (iv) there were no alternative ways of performing the claimant’s role.

55. In respect of the issue of mediation, the claimant's position latterly was that the only mediation she was willing to have was with Dr Scally. Anthony Gillespie considered the claimant's reasons to mediate with Dr Scally would amount to no more than lobbying and did not consider that such a mediation would be fruitful. Further and in any event by the time of dismissal both Stuart Lewis and Ines Byrne were unwilling to enter into the mediation process.
56. In reaching the decision to dismiss, Anthony Gillespie considered a number of options including taking action against Ines Byrne, Robin Smith and or Stuart Lewis in light of the claimant's allegations against them. Anthony Gillespie concluded, however, that the evidence against them did not demonstrate that there was a case of misconduct to answer. The possibility of the claimant being managed through another department or individual was also explored and in evidence the feasibility of this request by the claimant was explored. To this end, the claimant was of the view that she should be managed by either Graham Forbes or Lee Hibbard, Digital Preservation Manager. However, in practice both of these individuals would have had to liaise with Stuart Lewis and Ines Byrne in the line management of the claimant given her discrete and important role within the respondents and given the knowledge required to manage that role.
57. In deliberating the issue of dismissal, Anthony Gillespie also looked at the question of alternative employment for the claimant. In her absence the claimant had contacted Janet Stewart regarding the post of Animator in Residence. This request was, however, rejected on the basis that the claimant has no qualifications or experience to fulfil the role. The claimant also enquired about a vacancy for Exhibitions and Public Programmes Manager. Again, this was found not to be a suitable role for the claimant as she lacked any knowledge and experience of the development and production of exhibitions and of current trends in museum exhibition, design and production and it was determined that this experience could not be acquired by training.

58. There was also a discussion regarding playing a role in the induction and training of Reference Service Assistants with a Reader Services Manager. The Tribunal, however, accepted the evidence of Anthony Gillespie that there was no vacancy in that area.

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59. In summary, Anthony Gillespie advised the claimant that: *"I have summarised my view of the current circumstances as follows:- your initial grievance the hearing that followed and the subsequent appeal which was not upheld; there has been no case to answer in relation to your allegations of bullying and harassment following another investigation; action taken against those who you have raised concerns about is not justified; you are unwilling to return to work on the arrangements currently available; you have continued to refuse to mediate with Stuart and Ines and Stuart and Ines now refuse to mediate with you; there are no alternative vacancies; and there are no alternative ways of you performing your role that would be practical and appropriate. Given the length of your absence from the Library considerable delays in meeting the objectives of the team and other related areas have arisen. This is causing strain on the digitisation programme staff and those trying to manage the situation. With that in mind it is all the more important that this matter be resolved. I have decided that it is not appropriate for your employment to continue. The Digitisation Programme Manager role will now be advertised in order to allow the Library to meet the objectives it has been failing to meet in your absence. However, even were it the case that there was no particular urgency in filling your post the evidence indicates that the position is unlikely to change in the foreseeable future."* (1296)

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60. The letter of dismissal concluded with providing the claimant with the right to appeal the decision within 14 days to Dr John Scally.

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61. Anthony Gillespie was pressed by the Tribunal on whether the claimant's Tribunal proceedings for age discrimination had played any part in his decision to dismiss. The Tribunal accepted his evidence that he was aware of the proceedings but had put them to the back of his mind in deliberating on his decision making process. To this end, he was aware that Stuart Lewis was involved in the complaint before the

Tribunal and that the complaint was one of age discrimination but was aware of little else.

5 62. The claimant appealed the decision to dismiss her by letter dated 2nd July 2018 (1305). The Appeal Hearing was held on the 12th of September 2018. The reason that the Appeal Hearing wasn't heard until then was because of the claimant's own availability. The Appeal Hearing was chaired by Dr Scally and the claimant was accompanied by her Trade Union representative Cat Boyd. Notes of the Appeal Hearing are to be found at 1838.

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63. The Tribunal accepted Dr Scally's evidence that the central theme of the claimant's appeal was that her role had been undermined and she ought to have been given the DTM role. The Tribunal also accepted Dr Scally's evidence that the DTM role was a new post which was not what the claimant had been doing already as it was more strategic and involved interfacing with a number of areas within the Library.

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64. In reaching his decision to refuse the appeal, the Tribunal accepted that Dr Scally had regard to the fact that the issues causing the breakdown in relationship between the claimant and the respondents remained. These were the claimants personal relationship issues, lack of trust and lack of agreement about her role. To this end, the claimant's own appeal letter stated: "*The working environment will be toxic to my mental health because the bullying and the deceit around my job role and jobs description are not being addressed and the health damaging treatment of me can and would continue.*"

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65. The Tribunal also accepted the evidence of Dr John Scally that by the time of appeal the claimant was refusing to engage in any meaningful mediation process and Ines Byrne and Stuart Lewis had already made it clear that they considered that mediation would be futile.

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66. Prior to a decision being taken in the claimant's appeal it came to the attention of the respondents that someone with the claimant's name had contacted the Royal Philharmonic Orchestra in London seeking information about a member of the

respondents' staff. At the Appeal Hearing the claimant initially denied making contact with the Royal Philharmonic Orchestra on this basis but then admitted to making such a call (paragraph 52 page **1844**). The claimant explained at the Appeal Hearing that the purpose of the call was for "due diligence" in respect of Ines Byrne as according to the claimant Innes Byrne had a lack of skills and experience and the claimant wanted to know how Ines Byrne fitted into her role with the Royal Philharmonic Orchestra. At the material time the claimant had been dismissed by the respondents but represented herself as still being an employee of the respondents to the Royal Philharmonic Orchestra.

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67. By letter dated 27th September 2018 (**1739**) Dr Scally advised the claimant that her appeal was refused. The Tribunal accepted the evidence that in reaching the decision Dr Scally concluded that the respondents no longer had trust and confidence in the claimant. The Tribunal also accepted the evidence of Dr Scally that the claimant had reached the conclusion that she could not trust the respondents on the basis of her repeated derogatory and unfounded statements about Ines Byrne, her unfounded comments about Stuart Lewis's capability and performance and her repeated assertion that the respondents had breached the duty of mutual trust and confidence in her dealings with her.

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68. In conclusion of his letter rejecting the claimant's appeal against her dismissal Dr Scally stated: (**1868**) "*My conclusion is that you will not be reinstated because: (1) your appeal has no merit; (2) even if your appeal had merit any reinstatement would have been futile because disciplinary proceedings would have resulted in your dismissal either for gross misconduct or if it did not result in a finding of misconduct because you were not an employee at the relevant time the conduct was evidence that the relationship between you and the Library had broken down; and (3) the relationship has broken down both in terms of your own view and the organisation's view of you. I do not uphold your appeal and your dismissal stands. I can confirm that my decision is final and concludes the Library procedure.*"

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69. In evidence, the claimant accepted that the relationship between herself and key members of the respondents had broken down by the point of dismissal.

OBSERVATIONS ON THE EVIDENCE

- 5 70. In the course of proceedings the claimant was reminded by the Employment Judge to concentrate on the relevant areas of her evidence and in particular the need to put all material parts of her case in cross examination to the respondents' witnesses. The claimant failed to do so and for this reason did not insist upon her cases of automatically unfair dismissal for health and safety reasons, and whistleblowing.
- 10 71. Throughout the entire proceedings, the claimant stated that her dismissal was unfair because Stuart Lewis had refused to acknowledge that her job with the respondents was the same as the new DTM position. Insofar as the remaining cases of age discrimination and victimisation on the grounds of dismissal before the Tribunal were concerned the claimant repeatedly returned to her central theme that she should
15 have been appointed the new role of DTM instead of Ines Byrne as she had the skills and qualifications for that job and indeed had already been performing the DTM role prior to its creation. The Tribunal understood this to be at the core of the case in its entirety that she presented before the Tribunal and judged it accordingly.
- 20 72. The claimant gave no evidence as to why she raised her claims of age discrimination when she did (ie in October 2017) when the acts complained of by her in these proceedings took place in excess of three months from that date.
- 25 73. In cross examination the claimant did not challenge the process leading to her dismissal nor did she challenge any element of the appeal process.
- 30 74. The Tribunal found the claimant to be completely disingenuous in her explanation of her call to the Royal Philharmonic Orchestra. In evidence, the claimant tried to explain that it was a call that she made not to the Royal Philharmonic Orchestra but to the Berlin Philharmonic Orchestra. Her explanation, despite questioning under cross examination, made no sense and was neither credible nor reliable as an account of her version of facts.

Both parties submitted written submissions by email attachment which are replicated below:

Submissions for the Respondents

5 **Introduction**

The Respondent invites the Tribunal to dismiss the claims.

Witness evidence

10 In my submission, the Respondent's witnesses gave their evidence truthfully and sought to assist the Tribunal as far as possible. The Claimant's evidence was not credible, confused and she said what she believed would be helpful to her claim rather than what was in fact true. Mr Alexander's and Mr Shatwell's evidence added very little to help determine the issues that the Tribunal has to address. Mr Shatwell did not know what process was taken in relation to the DTM role so his view on matters should
15 be given little weight.

To the extent that there is any inconsistency between her testimony and the evidence of the Respondents' witnesses, the Tribunal is respectively moved to prefer the latter.

20 **Unfair dismissal**

It is submitted that the Claimant was dismissed for a fair reason under section 98(1) of the ERA. That reason was some other substantial reason and/or capability. Mr Gillespie dismissed the Claimant essentially because of the unresolvable relationship breakdown between the Claimant and those she would be required to work with as part of her role which was the cause of her absence, and that there had
25 been a breakdown in trust from the perspective of the Library and the Claimant.

The Respondent's decision, investigation, and procedure by which the decision was reached fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted in accordance with section 98(4) of ERA 1996. There was a genuine belief that there was no appropriate way to get the Claimant back to work and that the relationship had broken down.

Mr Gillespie reasonably came to the view that:

i. The Claimant's relationship with Robin Smith, Stuart Lewis and Ines Byrne had irretrievably broken down

ii. If the Claimant returned to her role with the relationship issues unresolved, it would make her ill

iii. there was no appropriate way to get the Claimant back to work

iv. the relationship of trust and confidence had broken down from both the Claimant's and Respondent's perspective (Mr Gillespie's evidence on this point went uncontested and therefore must be accepted as being the case.)

That belief was held on reasonable grounds following a reasonable investigation and consultation. Even the Claimant accepted that the relationship of trust had broken down. All reasonable alternatives to dismissal were considered. These included action against employees, continuing the Claimant's employment, mediation, using a different manager, and alternative roles.

The Tribunal would be going beyond its ambit to scrutinise the decisions surrounding the DTM role in considering the fairness of the dismissal. That process was so far removed from the process that Mr Gillespie found himself deciding on. But in any case, those decisions were within the range of reasonable responses.

The process followed was fair in all the circumstances. It used a combination of its policies that were most aligned to these unusual circumstances. An initial investigation look place before a final hearing was held. The Respondent has shown that it sought to investigate and it took reasonable steps to consult with the Claimant. The Claimant has not suggested or put to the Respondent's witnesses a fairer process that would have been appropriate for the Respondent to have followed.

Information which is revealed in the course of a dismissal process, including the appeal, which relates to the original reason for dismissal **should** be taken into account in considering the fairness of the dismissal (*West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192 (HL)*). By the appeal decision, *Dr Scally reasonably believed that:*

- *the Claimant had made the call to RPO to illegally obtain information to discredit Ines Byrne for the Claimant's own gain*
- *the Claimant had misrepresented herself as working for the Respondent during the call to RPO*
- *the Claimant had lied to him twice about the RPO call*
- *the Claimant was no apologetic or remorseful about the conduct; and*
- *that he could not trust the Claimant again.*

Even if there were merit in the appeal, any procedural fairness up to that stage, or fairness in respect of any other matter, which the Respondent denies, the Claimant would have been dismissed. That is relevant when deciding the overall fairness of the dismissal in all the circumstances.

Therefore this claim ought to be dismissed.

Direct age discrimination

The Tribunal has no jurisdiction to hear any act or omission said to have occurred prior to 18 July 2017. In the event that the Tribunal does have jurisdiction, there has been no comparator identified whose circumstances are not materially different from the Claimant and the Claimant was treated less favourably. Ms Byrne held a different role (Digital Collections Specialist) to the Claimant. Her role was also of a different grade. Ms Byrne was in a separate department. She had a different line manager. Their circumstances are “materially different”. The Claimant accepted this during cross examination. If the Tribunal is not with the Respondent on this, there was no less favourable treatment. In the event that the Tribunal disagrees, on the balance of probabilities, none of what the Claimant alleges as the unfavourable treatment was because of age. The evidence was clear that those who made decisions or those involved in the alleged discrimination had not even considered the ages of Ms Byrne and the Claimant. None of them actually knew the actual age of them until the claim was brought – it was not something that had crossed their minds. The Claimant has in not established the burden of proof for this.

Contravention of section 111

The Tribunal has no jurisdiction to hear any act or omission said to have occurred prior to 18 July 2017. In the event that the Tribunal does have jurisdiction, none of what the Claimant alleges related to age so section 39(2) was not contravened for the same reasons as above. Further, it cannot be said that Ms Byrne knowingly helped Mr Lewis or caused him to do so. These claims ought to be dismissed.

Victimisation

The Tribunal has no jurisdiction to consider, in terms of section 123(1)(a) and (3) which failing section 123(1)(b) of the Equality Act 2010. This claim was only brought on 13 November 2018, which is significantly over the 3 months limitation period from the act complained of, which was on 14 June 2018. Again, there is no evidence to support that it would be just and equitable to extend the time. The Claimant had access to legal advice, knew the process for an amendment, had made an amendment after 14 June

2018, but has provided no reason not to have included in her earlier amendment or brought this claim earlier than she did.

In the event that it does have jurisdiction, the dismissal was not because the Claimant brought proceedings under the Equality Act and/or for making allegations of direct age discrimination by Stuart Lewis. Her assertions in this regard are illustrative of a grossly erroneous perception on her part.

CLAIMANTS SUBMISSIONS

Submissions for the Claimant

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The claim of age discrimination is in time. The first act of age discrimination occurred at the end of December 2016 and the last incident was on 1 August 2017.

15

The question is if there was a comparator whose circumstances were not materially different from the Claimant.

20

There is good reason to believe that Mrs Byrne did not consider her circumstances to be materially different from the Claimant. The difference in their circumstances was, as Mrs Byrne has admitted herself, that she did digitisation from a collections perspective. In her witness statement Mrs Byrne correctly describes the role purpose for both the post of Digital Collections Specialist and Digitisation Programme Coordinator. From other evidence it is also clear that Mrs Byrne must have known what the scope and the ambit of the Claimant's role was. When giving witness she admitted that she did not explain in the "Lessons Learned" meeting on 21 November 2016 to the staff of the General Collections unit that the Claimant had the particular responsibility of oversight of digitisation. Mrs Byrne gave the excuse for not disclosing that fact that it was not her responsibility.

25

30

Mr Lewis did not consider the Claimant to be materially different from Mrs Byrne because one of the reasons to create the new post was to deal with overlaps in job descriptions.

Mr Lewis furthermore did not consider the Claimant to be materially different from Mrs Byrne because the Tribunal heard that he does not think the Claimant has unique skills. The Tribunal has been shown that the Claimant's skills, qualifications and experience compared to Mrs Byrne can be considered unique in these circumstances.

5

The Chief Executive Dr John Scally mentioned two matters in which the Claimant and Mrs Byrne were materially different and that was 1) grade (Mrs Byrne was one grade higher) and 2) that the Claimant's job description was from 2014 while the new post's job description was current.

10

The Tribunal has heard that the Claimant's job description was emailed to Mr Lewis on or soon after 11 November 2016. This is within the Library's yearly window for job evaluation i.e. November/December. Mr Lewis had said to the Claimant "Bet you want a pay rise" and as a result she emailed him her job description. Mr Lewis replied on 8 December 2016 that he did not want to make staffing decision in Digital because he knew the Digitisation Programme would have to grow. Mr Lewis did not discuss the Claimant's job description with her and did not update her job description to take into account the additional line management responsibility and growth of the programme. Mr Lewis failure to do this with her i.e. re-evaluating her job role, as the Claimant's line-manager, was the reason why her job description was from 2014 and that she was still on a lower grade. In this context Dr Scally reasons seem frivolous.

The Tribunal heard that the Voluntary Exit Scheme was launched in August 2016 to achieve efficiency savings. The Claimant asserts that it is common knowledge that a Voluntary Exit scheme is more likely to be taken up by those staff members with the longest employment record and those close to retirement. In addition the Claimant was made aware of the fact that the Library wanted to encourage applications from younger people and reduce the turnover amongst younger staff. The Claimant experienced the effect of this within the workplace.

30

We have established that the Claimant's view of her job role as Digitisation Programme Coordinator can be substantiated by facts. In particular by looking at her post's job description and job capsule. It is also clear that digitisation is considered the complete

digitisation process from point of selection to access by authoritative organisations such as FADGI and CILIP. It is also clear from the evidence that the Claimant's performance in her post was more than satisfactory. The Claimant's Digitisation Review paper she wrote in 2014/2015 clearly sets out the scope of the Claimant's job role. The Claimant's
5 line manager signed off on the report and there was never a question about whether the Claimant understood her role.

Mr Lewis gave witness that he knew about the issues the Claimant had raised with him but that he did not care who was right or wrong. Mr Lewis wrote in his witness statement
10 that he wanted to form his own opinion and never took sides. Mr Lewis formed the opinion in December 2016 about the Claimant. He formed the opinion that the Claimant was performing a wider role than her job title suggested. The evidence strongly suggests that Mr Lewis was incorrect in forming this opinion. Mr Lewis had formed his opinion on the basis of Mrs Byrne's incorrect clarification of the Claimant's job role on 9 December 2016.
15 Mr Lewis took Mrs Byrne's side because she was younger than the Claimant. The Library wanted to encourage younger staff to consider their current performance as the basis for the evidence that will help them compete for promotion. Mrs Byrne's covert bullying of the Claimant and encroaching on her role together with the fact that she failed to inform her colleagues, including her line manager Mrs Smith, of the ambit of the Digitisation
20 Programme Coordinator post was the basis for Mrs Byrne's evidence for 'promotion'. Mr Lewis never questioned Mrs Byrne's motivation or why she was criticising the Claimant's work. Mr Lewis accepted Mrs Byrne's evidence without question and started to look toward Mrs Byrne to inform him on digitisation.

25 From January 2017 onward younger staff were given responsibilities for 'challenging tasks' outwith their own post's duties in favour of older more senior staff. This was to give them development opportunities. This was the case with Ms Nimmo in January 2017 as stated in the Respondent's **Response dated July 2017**. The Tribunal heard that when the Claimant asked to give a presentation at the SCURL event on digitisation, her area of
30 expertise, as a development opportunity Mr Lewis rejected her proposal in preference of Mrs Byrne the Digital Collections Specialist.

From the email Mr Lewis sent to Mrs Smith on 16 March 2017 it clear that Mr Lewis favoured Mr Byrne to be the in charge of overall Digital Production instead of the Claimant. Mr Lewis instructed the Claimant to focus on capture but at the same time he did not trust her to make the right decisions. The evidence strongly suggests this is the case when for
5 example Mr Lewis delayed by 4 months his authorisation of the Claimant as decisionmaker for the CB-renewed Level 6 Digitisation studio implementation. Event then Mr Lewis attached conditions to the Claimant's decision-making powers and wrote to the programme manager Mrs MacMillan that he was going to be attend all meetings with me if possible.

10

As part of Mr Lewis' structure change in May 2017 three members of his department, which is 10 % of the staff, were affected. In May 2017 Mr Alexander was summarily dismissed for gross-misconduct under the pretext of "fiddling Etarmis" (i.e. the clocking in system) and Mr Iain Anderson suddenly retired early. The Claimant will provide evidence
15 that strongly suggests that Mr Anderson was given a choice of dismissal under the performance management policy or retire early on an exit package. The Claimant asserts that she has demonstrated to the Tribunal that Mr Lewis violated her dignity on purpose by not giving her recognition in her legitimate job role, by not being open and candid about his intentions and by not showing interest in her work. This came out during Mr Lewis
20 witness statement when he said that the Claimant had no unique skills and was easily replaced.

25

The Tribunal heard that Mrs Byrne caused confusion across the Collections & Research department by failing to inform the staff that were new to digitisation of the particular
responsibility of the Digitisation Programme Manager post of digitisation and for
coordinating the discrete work packages under the digitisation programme. Mrs Byrne created confusion about who does what and created the perception that there was nobody to oversee over Digital Production.

30

The Tribunal was provided with evidence that Mrs Smith's interpretation of the Claimant's responsibilities was incorrect. Mrs Smith could not explain who ensured that digital collections were being published to high quality standards if it was not the Claimant that was managing this. Mrs Smith's incorrect interpretation of the Claimant's job role could

only have come from Mrs Byrne. Mrs Byrne had re-enforced this interpretation by failing to disclose the Claimant's oversight of overall digitisation. Mrs Byrne relied in her deception on the fact that "digitisation" was re-coined "digital production" by Mrs Hamilton under Mrs Byrne's guidance in April 2016 two years into the Claimant's post. This term
5 change held no lawful basis for changing the Claimant's job role accordingly.

Mrs Byrne caused Mr Lewis to discriminate against the Claimant because of her age. Mr Lewis knew better but he did not want to address the issues between them. It was confirmed that Mr Lewis met up with Mrs Stewart to discuss equality activities/tasks on
10 9 March 2016. Mr Lewis formed his own opinion in tasks that involved him and he came to the conclusion on 16 March 2017 that he felt it looked better to have Mrs Byrne in overall charge of Digital Production. It served the HR-plan to achieve a more balanced age demographic. Mr Lewis did not care who was right or wrong.

Mrs Byrne aided Mr Lewis to discriminate against the Claimant because of her age by making it appear that the Claimant was unable to let go of her assumptions and align herself with the thinking of the group therefore making the Claimant appear inflexible and re-enforcing Mr Lewis' prejudice. The fact was that the Claimant did not align herself with the thinking of the group because of her superior knowledge of the complete digitisation
20 process.

*It was also made clear to the Tribunal that Mrs Byrne was responsible for the three strands of digital acquisition as the Digital Collections Specialist, was made redundant because there was no longer a need for someone to pull them together and was then appointed to
25 an important new post in Digital which is described to have as one of its main responsibilities to coordinate the three different strands of digital acquisition.*

Mr Lewis refused to admit that he left the Claimant with no dignity by his conduct and less favourable treatment of the Claimant. Mr Lewis had purposely not told the Claimant why
30 he considered a new role was needed to oversee everything and what this was that needed oversight. Mr Lewis had purposely instructed the Claimant to focus on capture to enable Mrs Byrne to take control of more and more of the Claimant's duties. Mr Lewis continued the deceit around the Claimant's job role and all Senior Managers have agreed

to uphold the pretence that the Claimant's role did not change by the creation of the new post. What Senior Management was stating did not add up with the reality. That is the reason why publication of digital collections has significantly decreased since the absence of the Claimant.

5

In addition the claimant made verbal submissions a summary of which follows:

The claimant submitted that on 16th March 2017 Stuart Lewis had informed her by email that Robin Smith was changing Ines Byrne's position to put her in overall charge of digital production. She submitted that this was for the reason it would look better for the respondents who wished to promote younger people. She submitted that there was an HR plan to provide young people with development opportunities and push them to the front of the organisation.

10
15 The claimant submitted that the respondents' voluntary exit plan was to encourage older employees to leave the employment of the respondents.

The claimant submitted that Stuart Lewis did not recognise her talents and achievements. To this end, she highlighted the fact that Stuart Lewis gave her no recognition despite the fact she had reached all her targets.

20
25 The claimant referred to her meeting with Stuart Lewis on the 17th of May regarding the new DTM post. The claimant referred to her grievance and appeal following on this discussion. She submitted that she considered it to be very unfair that Ines Byrne should be put into a new role. This was essentially her role.

The claimant submitted that she had been treated unfairly because all through the process Stuart Lewis refused to admit that her existing employment responsibilities were the same as the new DTM role to which Ines Byrne was to be appointed.

30

The claimant referred to her second grievance in November 2017 the essence of which she saw as being an abuse of power by Stuart Lewis and Ines Byrne. She submitted that

the second grievance was an attempt on her part to resolve matters internally as she wished to deal with everything and return to her employment.

In submissions the claimant stated that at the time of the second grievance her
5 relationship had broken down with Stuart Lewis and Ines Byrne but had not broken down with the respondents altogether in that Dr Scally had been misinformed by Stuart Lewis and Ines Byrne.

Insofar as her dismissal is concerned the claimant submitted that by that point mediation
10 was inappropriate as the relationships had broken down irretrievably. In her view she was dismissed because the respondents refused to admit they knew about the ambit and extent of her existing job title prior to the DTM role. She submitted that her dismissal was unfair because the Library did not want her or could not admit that they significantly changed her job role in order to accommodate the new DTM role to which Miss Ines
15 Byrne was appointed.

The claimant submitted with regard to her claims of age discrimination that since
November 2016 Ines Byrne had been positioning herself to taking overall charge of digitisation. To this end, she submitted that Ines Byrne had coloured Stuart Lewis's view
20 on the claimant's own existing job title and ambit. She submitted that Stuart Lewis did not make his own enquiries as to her own job title and responsibilities.

Insofar as her case under section 111(2) of the Equality Act 2010 was concerned the
claimant submitted that Ines Byrne induced Stuart Lewis to contravene the Equality Act
25 2010 in respect of the claimant.

As regards the claimant's claim of victimisation and dismissal was concerned, the
claimant submitted that the respondents could not dismiss her on the grounds of capability
or conduct. She submitted that the respondents anticipated her to resign and claim
30 constructive dismissal but she did not and therefore the only alternative they had was to dismiss her on the pretext of some other substantial reason whereas in fact they dismissed her as she raised issues of age discrimination.

The claimant submitted that after her dismissal she had made enquiries as to a previous employer of Ines Byrne but that she had made such enquiries of the Berlin Philharmonic Orchestra and not the Royal Philharmonic Orchestra.

5 **THE LAW**

Time Limits

75. Section 123 of the Equality Act 2010 states:

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“(1) Proceedings on a complaint within section 120 must not be brought after the end of –

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(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable. ...

20

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period; and

25

(b) failure to do something is to be treated as occurring when the person in question decided on it.”

30

76. The Employment Tribunal has a wide discretion to allow claims of discrimination to proceed out of time in respect of which there is limited scope to challenge an appeal. Insofar as the exercise of the discretion is concerned, the Tribunal had regard to the case of **Lincolnshire Police v Caston 2010 IRLR 327 CA** in which the Court of Appeal stated that the essential question is whether there is material from which the Tribunal can properly exercise their discretion. To this end, the onus remains on the

claimant to convince the Tribunal that it is just and equitable to extend the time limit. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434 CA**, the Court of Appeal stated that when Employment Tribunals consider exercising their “just and equitable” discretion there is no presumption that they should do so unless they can justify failure to exercise the discretion. It was then stated that the situation is quite the reverse in that a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. The exercise of the discretion remains the exception therefore rather than the rule.

10 **Direct Discrimination**

77. Section 13 of the Equality Act 2010 provides:

“13 *Direct Discrimination*

15 (1) *A person (A) discriminates against another (B) if because of her protected characteristic A treats B less favourably than A treats or would treat others ...*

20 (2) *If the protected characteristic is age A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim”*

25 In these proceedings the respondents did not seek to rely upon s 13 (2) of the Equality Act 2010.

78. Section 23 of the Equality Act 2010 states:

“23 *Comparison by reference to circumstances*

30 (1) *On a comparison of cases for the purposes of section 13, 14 and 19 there must be no material difference between the circumstances relating to each case.”*

79. In the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337 House of Lords** (a sex discrimination case), Lord Scott stated that:

5 *“The comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he or she is not a member of the protected class.”*

10 80. It is not necessary to point to an actual person who has been more favourably treated, although how others have in fact been treated may be relevant evidence from which an inference of discrimination may be drawn. The Tribunal should construct, if necessary, a hypothetical comparator whose relevant circumstances are not materially different to the claimant’s except for the protected characteristic.

15

81. Tribunals do not have to construct a hypothetical comparator if they are able to make findings as to the ‘reason why’ the less favourable treatment occurred. This was recently illustrated in the Supreme Court decision of **Lee v Ashers Baking Company Limited and others (2018) UKSC49**. In these proceedings the claimant claimed in respect of the respondents’ failure to provide him with a cake that was supportive of gay marriage. For their part, the respondents stated that their refusal to make the cake was due to their deeply held Christian beliefs.

20

82. The Supreme Court rejected Mr Lee’s claim, and critical to their decision making process were findings by the Employment Tribunal that the respondents had not discriminated on the grounds of sexual orientation or any other prohibited ground in the past; that they had employed and served gay people and treated them in a non-discriminatory way in the past and that indeed they had not refused to make the cake for the claimant due to his perceived association with the gay community. The sole reason for the respondents’ refusal to make the case was their own Christian beliefs.

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In these circumstances, it could not be said that the protected characteristic (sexual orientation) was the reason why the claimant suffered the less favourable treatment alleged as it was the respondents’ own religious beliefs not the claimant’s sexual

orientation that was the reason why a cake supportive of gay marriage was not baked.

- 5 83. In cases of direct discrimination, aside from proof of a comparator and proof that the protected characteristic was the reason for the claimant's less favourable treatment, the claimant also has to lead evidence of less favourable treatment in comparison with his or her comparator.

10 **Contraventions of Section 111 and s112 of the Equality Act 2010**

84. Section 111(2) of the Equality Act 2010 provides:

"111 Instructing, Causing or Inducing Contraventions ...

- 15 (1) *A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3,4,5,6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention)*
- (2) *A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.*
- 20 (3) *A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention;"*

S112 of the Equality Act 2010 provides:

"Aiding contraventions

- 25 (1) *A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4,5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention)*

- 30 85. The Tribunal understood from the claimant's evidence in submissions her reliance on these sections was in respect of Ines Byrne's alleged persuasion and influence over Stuart Lewis on the issue of the ambit of the claimant's job role and her abilities to carry out that role.

Victimisation

86. The claimant also claims victimisation in terms of section 27 of the Equality Act 2010 which provides:

5

“27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

10

(a) B does a protected act or

(b) A believes that B has done or may do a protected act

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(2) Each of the following is a protected act –

(a) bringing proceedings under the Act;

20

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purpose of or in connection with this Act; and

25

(d) making an allegation (whether or not expressed) that A or another person has contravened this Act.”

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87. Section 39(4) provides:

“(4) An employer (A) must not victimise an employee of A’s (B) – (C) by dismissing B.”

5 88. To succeed in a claim of victimisation the claimant must show that he or she was subject to a detriment (in this case dismissal) because he or she did a protected act or because the employer believed that he or she had done or might do a protected act.

Unfair Dismissal

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89. Section 98 of the Employment Rights Act 1996 provides:

“98 General

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(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 –

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

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(b) that it is either a reason falling within sub-section (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. ...

30

(4) Where the employer has fulfilled the requirements of sub-section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by their 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.”

5

90. In these proceedings the claimant was dismissed on the grounds of “some other substantial reason” in terms of section 98(1)(b) of the Employment Rights Act 1996. In such circumstances the employer is required only to show that the substantial reason for dismissal was a potentially fair one. Once the reason has been established it is then up to the Tribunal to decide whether the employer acted reasonably under section 98(4) in dismissing for that reason. As in all unfair dismissal claims a Tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt.

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91. On the issue of “reasonableness” the Tribunal was, as ever, guided by the dicta in **Iceland Frozen Foods Limited v Jones (1982) IRLR 439 EAT** which provided clear guidelines for the correct approach for an Employment Tribunal to adopt in answering the questions posed by section 98(4). These guidelines are:

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“(i) that the starting point should always be the words of section 98(4) themselves;

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(ii) that in implying the section an Employment Tribunal must consider the reasonableness of the employer’s conduct not simply whether they consider the dismissal to be fair;

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(iii) that in judging the reasonableness of the employer’s conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

- (iv) *that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another quite reasonably take another;*
- 5 (v) *the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal*
- 10 *falls outside the band it is unfair."*

DISCUSSION AND DECISION

15 **TIME BAR**

(i) Direct Discrimination-s 13 of the Equality Act 2010

92. The Tribunal considered firstly the issue of time bar insofar as the claimant's claim
20 of direct discrimination is concerned. To this end, the Tribunal reflected upon the fact that the core of the claimant's allegations of direct discrimination related to the failure of the respondents to appoint the claimant to the role of Digital Transitions Manager. The Tribunal reflected on the fact that on the one hand, the claimant's concerns over age discrimination in the new DTM role appointment had crystallised
25 by the time of her meeting with Stuart Lewis on the 17th May 2017 as by then she had formed the opinion that Ines Byrne was to be introduced as a Line Manager over and above her as she was younger than her. On the other hand, in point of fact Ines Byrne was not formally appointed to the DTM role until the 14th August 2017. In these circumstances, the Tribunal concluded that it was certainly arguable that time
30 did not begin to run until the 14th of August 2017 and therefore concluded that the claimant's claim of direct age discrimination was not time barred.

(ii) Contravention of s111 and s112 of the Equality Act 2010

93. The Tribunal then proceeded to consider the issue of time bar in respect of the claimant's claims of breaches of section 111 and section 112 of the Equality Act 2010 and in particular the claimant's claim that Ines Byrne caused, induced or helped Stuart Lewis to contravene the Equality Act 2010 in respect of the claimant. To this end, the claimant was clear that her case was that Ines Byrne had misrepresented the nature and extent of the claimant's existing role and responsibilities to Stuart Lewis by misrepresenting that she undertook a number of the claimant's work responsibilities and thus caused or induced him to contravene the Equality Act by promoting herself over the claimant.

94. In considering this issue, the Tribunal had regard to the fact that the claimant's evidence was that Ines Byrne misrepresented her role and responsibilities to Stuart Lewis from the commencement of his employment with the respondents on 19th September 2016, and, further, misrepresented her own role as carrying out tasks within the claimant's remit. The claimant's position was that at meeting with Stuart Lewis on the 17th of May 2017 *"I told Mr Lewis that it was my job Mrs Byrne was being moved in, that now the encroachment was complete"* (job encroachment), that it was *"a slap in the face"* and that *"this new role (DTM) would remove my key responsibilities and demote me to capture."* (para 245 of the claimant's witness statement). In these circumstances the Tribunal concluded that *esto* there was a contravention on the part of Ines Byrne to cause or induce Stuart Lewis to contravene the Equality Act 2010 in respect of the claimant, such contravention took place prior to 17 May 2017. In these circumstances the Tribunal concluded that this claim is time barred.

95. The Tribunal then considered whether or not it is just and equitable to extend time in this claim under and in terms of section 123 of the Equality Act 2010. To this end, the Tribunal had regard to the fact that whilst it has a wide discretion to extend time under the "just and equitable" test, it does not necessarily follow that the exercise of the discretion is a foregone conclusion.

96. In deliberating the issue of the extension of time under the “just and equitable” discretion the Tribunal had regard to the fact that the claimant led no evidence nor made no submissions to support the extension of time in respect of her claims under section 111 and s112 of the Equality Act 2010. The Tribunal also had regard to the fact that the claimant is a highly educated woman; that at all material times the claimant had access to resources including all resources on the internet; and that the claimant had recourse to assistance and support from her Trade Union, the PCS. After taking these factors into account the Tribunal refused to exercise its discretion under s123 of the Equality Act 2010.

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97. In these circumstances, it is the decision of the Tribunal that they have no jurisdiction to hear the claimant’s claims under section 111 and section 112 of the Equality Act 2010.

15 **(iii) Victimisation-s27 of the Equality Act 2010**

98. The Tribunal then proceeded to consider whether or not it had jurisdiction to hear the claimant’s claim of victimisation in respect of her dismissal which was introduced by an amendment at the beginning of the proceedings.

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99. To this end, the claimant’s claims of unfair dismissal were added timeously by amendment dated 14th September 2018. At that time the claimant had been conducting Employment Tribunal proceedings since October 2017; she had access to the internet; and she had recourse to assistance from her Union and indeed her Union representative had attended key meetings throughout her unfair dismissal process.

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100. The claimant gave no evidence nor made any submissions in respect of an extension of the just and equitable extension of time in respect of this claim of victimisation.

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101. The Tribunal reminded itself that it cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time and that whilst the just and

equitable extension is a wide discretion open to the Tribunal it remains the exception rather than the rule.

102. In all of these circumstances, it is the decision of the Tribunal that it does not have
5 jurisdiction to hear the claimant's claims of victimisation arising from her dismissal.

Direct Discrimination

103. The Tribunal then proceeded to consider the merits of claimant's claim of direct
10 discrimination on the grounds of age. To this end, the Tribunal had regard to the requirement of a comparator, the words of section 23(1) of the Equality Act 2010 and the words of Lord Scott in **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337**.

15 104. The claimant's comparator at all material times was Ines Byrne, a younger woman who was appointed to the position of DTM which the claimant considered was her role. In determining this issue the Tribunal looked carefully at the facts of the claim. At all material times the claimant was a Grade H. At all material times Ines Byrne was a Grade I, being the grade above Grade H. Ines Byrne's role of Digital
20 Collections Manager (a Grade I) was made redundant so she was placed on the Redeployment Register and was automatically appointed to the role of DTM as this role was also a Grade I. For the claimant to have been appointed to the role of DTM would have required promotion. When this issue was put to the claimant in evidence, she responded by stating that she should have been promoted in the
25 circumstances.

105. The fact that Ines Byrne already held a Grade I position was material to her selection and appointment in the new DTM role. In these circumstances, the Tribunal considered that there were material differences between the claimant and Ines
30 Byrne and that Ines Byrne could not be relied upon as a comparator in the circumstances of the claimant's claim of direct age discrimination.

106. Further and in any event the Tribunal heard clear evidence from Ines Byrne, Stuart Lewis and Robin Smith that they were unaware of the claimant's age until these proceedings. Ines Byrne gave evidence that she considered the claimant to be around her own age or slightly older.

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107. Section 13 of the Equality Act 2010 specify that there is discrimination if "**because of a protected characteristic**". In the light of the evidence the Tribunal finds that this essential requirement of the claimant's case of direct age discrimination has not been fulfilled. On the evidence, the Tribunal simply could not conclude that the 'reason why' the respondents acted as they did was because of the claimant's age.

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108. Further and in any event it remained unclear what the less favourable treatment was that the claimant alleged. To this end it appeared from the evidence and submissions of the claimant that the unfair treatment relied upon was the appointment of Ines Byrne to the new DTM role. However, the evidence demonstrated that the appointment of Ines Byrne to the DTM role was a sideways move as she was already a Grade I post. The claimant would have had to be promoted to be appointed to the new DTM role. In these circumstances the Tribunal concluded that the claimant had not established less favourable treatment, in terms of s13 of the Equality Act 2010.

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109. For these reasons, it is the decision of the Tribunal that the claimant's claim of direct discrimination must fail on the basis of the evidence heard at the full Hearing on the Merits.

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Unfair Dismissal

110. The Tribunal then proceeded to consider the claimant's remaining claim of unfair dismissal. To this end, the Tribunal observed that there was no challenge taken by the claimant to the process followed by the respondents, aside from querying whether she could have been managed by different Managers or whether she could have been appointed to different roles within the respondents. There was no challenge whatsoever made by the claimant to the appeal process in her cross examination of Dr John Scally.

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111. In deliberating this issue, the Tribunal considered firstly as to whether the respondents had demonstrated the reason for the dismissal. To this end, the reason given was "Some Other Substantial Reason" (SOSR) under and in terms of section 5 98(1)(b) of the Employment Rights Act 1996. In this respect, the Tribunal was satisfied that the reason put forward by the respondents was truly the reason for their dismissal of the claimant and was not a pretext to conceal another reason for the claimant's dismissal.

10 112. The respondents' reliance on SOSR was substantially due to the breakdown in working relations between themselves and the claimant and in particular the loss of trust and confidence on the part of both parties. The claimant's own evidence and her submissions were clear that she herself took the position that relations had broken down and that there was a loss of trust and confidence on both sides.

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113. In deliberating whether or not the respondents acted within the band of reasonable responses in dismissing the claimant in circumstances where trust and confidence had been lost on both sides, the Tribunal had regard to the reasons given by the respondents for the claimant's dismissal set out in the dismissal letter (**1292**). As 20 stated by Anthony Gillespie in evidence, these reasons were: (i) the claimant was unwilling to return to work on the arrangements currently available; (ii) the respondents couldn't get mediation to work; (iii) there were no other suitable vacancies; and (iv) there were no alternative ways of performing the claimant's role that would be practical and appropriate.

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114. In considering these reasons, the Tribunal firstly had regard to the fact that the claimant would not return to work on the basis of the existing arrangements. To this end, the Tribunal had particular regard to the possibilities of the claimant being managed by a different Manager other than Stuart Lewis and Ines Byrne, and 30 alternative employment within the respondents as both of these issues were raised by the claimant herself. However, the evidence was clear that because of the specialised nature of digitisation any other Manager would have to defer to Ines

Byrne or Stuart Lewis in their management of the claimant. The Tribunal concluded that this would defeat the purpose of having an alternative manager.

5 115. Insofar as alternative employment was concerned, the Tribunal was satisfied that for the reasons given in evidence by Anthony Gillespie and set out in the letter of dismissal (**1295**) other options were explored but no vacancies that matched the claimant's conditions (being a role of the same status and grade on a short term basis) were available that matched the claimant's skills sets.

10 116. In deliberating the issue of reasonableness of the dismissal of the claimant, the Tribunal also had regard to the fact that there was no case for disciplinary action to be taken against Ines Byrne, Robin Smith or Stuart Lewis and no case for demotion of these individuals; and that the option of mediation had by the time of the dismissal broken down as the claimant was only willing to mediate with Dr Scally and Stuart
15 Lewis and Ines Byrne were no longer willing to mediate.

117. The Tribunal also had regard to the process followed by the respondents in the termination of the claimant's employment. To this end, the Tribunal observed that there were meetings with the claimant on 7th February 2018 and 5th April 2018; that
20 at the latter meeting the claimant herself mentioned that there had been a breach of trust and confidence by the respondents; and that there was ongoing contact between the claimant and the respondents between April and June 2018. The Tribunal also had regard to the fact that the ongoing contact had resulted in the claimant making allegations against most of the Library Leadership Team.

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118. The Tribunal was satisfied that at all material times the claimant was provided with all the information that was before the respondents in reaching their decision.

119. In all of these circumstances, and in view of the fact that both parties stated in
30 evidence that there had been a breakdown in working relations due to a breakdown in trust and confidence, it is the decision of the Tribunal that the dismissal of the claimant did fall within the band of reasonable responses open to the respondents in all the circumstances of this case.

120. It is for all these reasons that the Tribunal dismisses all the claimant's claims in these proceedings.

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Employment Judge: Porter
Judgment Date: 07 January 2019
Entered into the Register: 08 January 2019
And Copied to Parties