EMPLOYMENT TRIBUNALS

Claimant: Mrs J A Healey

Respondents: 1. Lancashire County Council
2. Stephen Belbin
3. Helen Belbin

Heard at: Manchester **On:** 9 and 10 August 2021
16-20 August 2021
23-27 August 2021
6 December 2021

7, 8 and 29 December 2021
(in Chambers)

Before: Employment Judge Leach, Ms A Jackson, Mr I Taylor.

REPRESENTATION:

Claimant: Mr A Foden, Counsel
Respondents: Mr D Bunting, Counsel

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was unfairly dismissed by the first respondent.

2. The first respondent discriminated against the claimant as follows:-

    a. In breach of section 15 Equality Act 2010 (EqA) (discrimination arising from disability) by requiring the claimant to apply and be interviewed (in competition with a colleague) for a role which was substantially the same as her own role and one she had carried out since 2012. That competitive interview process amounted to unfavourable treatment because of something arising from the

claimant's disability. That something was her long absence from work and treatment for cancer.

b. It indirectly discriminated against the claimant contrary to s19 EqA, by applying a Provision, Criterion or Practice (PCP) of requiring employees, to use a competitive interview process when deciding who to appoint to a role during a restructure and where there is more than one suitable candidate for that role. The PCP put (or would put) persons with a disability at a substantial disadvantage and it put the claimant at that disadvantage.

c. In relation to the PCP identified at b. above, it failed in its duty (under s20 EqA) to take steps to make reasonable adjustments in order to avoid the substantial disadvantage to the claimant.

3. All other complaints under the Equality Act 2010 against the first respondent are dismissed.

4. All complaints against the second respondent are dismissed.

5. All complaints against the third respondent are dismissed.

REASONS

A. Introduction

1. The claimant was employed by the first respondent in its schools improvement service as an early years' specialist. The claimant is a qualified teacher.

2. The third respondent was the claimant's line manager. The second respondent was a senior manager in the first respondent's school improvement service. He is the husband of the third respondent.

3. In November 2014, the claimant was diagnosed with cancer. She needed to take long periods of sickness absence so that her cancer could be treated. She was absent from work for the whole of 2015 when she endured operations and a strong course of chemotherapy. She returned to work in May 2016. Unfortunately, in 2017 it was discovered that the cancer had returned and the claimant required more treatment. The claimant was again absent due to sickness relating to cancer which continued until early 2019.

4. In 2018 the first respondent undertook a restructure of its early years team. The claimant is unhappy with the outcome of this restructure as it affected her. She believes that she was treated unfairly and discriminated against.

5. The claimant appealed against the restructure outcome and also raised grievances. The claimant believes that she was subjected to more discriminatory treatment throughout these processes. None of the claimant's appeals and grievances was upheld.

6. In April 2021, the claimant was given notice of dismissal having not accepted employment into the role identified for her in the restructure. The claimant claims that this dismissal is unfair and further discriminatory treatment.

7. The claimant makes an allegation of harassment (protected characteristic, disability) against the second respondent arising from a comment she alleges he made at a meeting in 2016. She makes an allegation of discrimination against the third respondent arising from her management of a return to work process in 2018.

8. References below to the "respondent" are to the first respondent. We refer to the second respondent as Stephen Belbin or SB and the third respondent as Helen Belbin or HB. When we refer to the "respondents" we mean all 3 respondents.

B. The Hearing

9. This case was listed for a hearing over 15 days beginning 9 August 2021. Unfortunately, on the eve of the first day of the hearing, the claimant's partner became suddenly ill. Understandably the claimant was unable to start the hearing. The Tribunal spent time reading into the case on days one and two. On day two, following an update from Mr Foden as to the position of the claimant and her partner (and with the agreement of the respondents) we decided not to begin hearing the evidence until the following Monday, 16 August 2021.

10. Case Management Orders required the parties to provide an agreed List of Issues and chronology. The parties had unable to agree either a chronology or, more importantly, a list of complaints and issues. The Tribunal hoped that the parties would be able to agree these documents by the morning of Monday 16 August and it was disappointing (and unhelpful) that they did not. We discussed the type and number of complaints raised by the claimant and asked Mr Foden particularly that he review the complaints which had been listed in a draft list of issues by the claimant and her representatives.

11. Further work was carried out on a list of issues and directions were issued by the Tribunal. An agreed list of issues was eventually drafted and agreed although this was not finalised until after the evidence had been heard.

12. We are satisfied that the late production of an agreed List of Issues had no impact on the fairness of the hearing. However, given the number of complaints raised by the claimant, it was essential to provide a structured process to our decision making and to provide both counsel with clarity and certainty about the issues well in advance of their preparations for submissions.

13. We started to hear the evidence of the parties and witnesses on Monday 16 August 2021. The claimant's evidence was heard over 16,17 and 18 August 2021.

14. The Tribunal was unable to sit on Tuesday 24 August 2021 due to an error in listing this case and other commitments. .

15. We finished hearing the evidence late of 27 August 2021 but without time for submissions. These were heard on 6 December 2021 following which we required another 3 days to consider and reach our decision.

16. A bundle of documents had been prepared comprising some 1900 pages. Some additions were made to this bundle during the course of the hearing and page numbers allocated. References below to page numbers are to this bundle.

C. The claim forms

17. The claimant issued her first claim form on 4 December 2018. This was issued whilst internal processes were continuing and more complaints being made by the claimant up to and including the decision to dismiss her in 2021.

18. In February 2021 the claimant applied to amend her claim. The application to amend was made shortly before the final hearing which was then listed for 10 days beginning on 17 May 2021. This is at pages 67-71.

19. A further preliminary hearing (case management) was held on 20 April 2021. At that hearing it was established that the claimant had decided not to proceed with the application to amend her claim but had instead issued a second claim on 25 March 2021.

20. As late as June 2021 an application to amend the second claim was made. This amendment application referred to a complaint of unfair dismissal and additional complaints under the Equality Act 2010, all of which arose in or after March 2021. Breach of contract was also referred to in the amendment application on the basis that the claimant had not received her salary or pension contributions from 2020.

21. On 2 August 2021, claimant's solicitors provided a draft list of issues. This draft included (in red) additional complaints which the claimant wanted adding to her claim by way of amendment. These were, in the main, complaints relating to the first respondent's decision to dismiss the claimant. At the start of the hearing, Mr Bunting, on behalf of the respondents confirmed there was no objection to increasing the issues to include those relating to the claimant's dismissal.

22. The breach of contract complaints listed in June 2021 by way of proposed amendment to the second claim were not included in the draft list of issues referred to above or subsequent drafts or the final, agreed list. We have not considered or reached decisions on any breach of contract complaints, an amendment having been proposed but not pursued and such complaints having not been brought.

D. Findings of Fact

<u>The claimant's career prior to March 2012</u>

23. The claimant is a qualified schoolteacher, whose employment with the respondent began in 1995.

24. In January 2002, the claimant moved from a teaching role to a role as an early years' consultant, based in the respondent's School Improvement Service. In broad terms, early years consultants provide advice and expertise to a range of schools and other early years providers (such as private nurseries) in Lancashire.

25. Early years' consultants are employed on School Teachers Conditions for service, commonly referred to as "Burgundy Book."

26. From 2004 the claimant's role was an Early Years Consultant Area Team Leader. One part of her role required her to be the leader for inclusion across the whole of the respondent's Early Years Team and to act as the equalities champion for the whole team. Another part of the role was to manage a geographic area (called Area North) for School Improvement. The role was therefore in part defined by the geographical area that the claimant was responsible for and in part by the County wide responsibilities for inclusion and equality. The inclusion role especially, required the claimant to work with other early years consultants in sourcing and obtaining funding for appropriate projects and initiatives and then bringing leadership to ensure delivery of the required outcomes. This role was confirmed as permanent in 2008.

27. The claimant's senior responsibilities were reflected in her pay grade and conditions. Within primary and secondary education, there is a pay structure called the Leadership Pay Range (LPR). In a school setting, this pay range applies to head teachers as well as assistant and deputy head teachers. Within the respondent's early years team, it applies to some posts with relevant Leadership responsibilities.

28. The role held by the claimant between 2004 and March 2012 was graded and paid at Leadership Pay Range (LPR) 8. The LPR rates range from LPR1 to LPR 43. The LPR pay and grading system is separate from the pay and grading system which is applicable to teachers who are graded and paid under one of 2 scales, called the Main Pay Scale ("MPS") or Upper Pay Scale ("UPS"). A classroom teacher in their first role will usually start at or near the minimum of the MPS and then progress through this and on to the UPS. These arrangements are set out in the first respondent's "Whole School Pay Policy" ("Pay Policy"). The Pay Policy is closely based on pay arrangements nationally negotiated and agreed between relevant employers' negotiating bodies and the main teaching unions. The Pay Policy is drafted to be applicable to the Governing Body of a school although, as noted above, it applies to employees within the respondent's School Improvement Service.

29. In addition to salary paid according to their MPS or UPS grade, a teacher can be provided with an additional payment called a Teaching and Learning Responsibility Payment ("TLR"). The circumstances in which a TLR payment may be paid are set out in the Pay Policy (particularly at pages 265-266). A TLR payment should only be paid where the circumstances require it. Where for example a teacher has significant line management responsibilities then s/he may receive a high TLR supplement to their pay but in the event those responsibilities do not continue then the TLR payment should stop and the teacher's salary should be on the basis of the MPS/UPS only.

30. In 2010 there were some changes to the structure of the Early Years team. The claimant was required to work more strategically across the team. Her role continued as an L8 grade as did the role of her colleague, Heather Holden. In addition to the claimant and Heather Holden, 4 area team leader roles were created focussing on operational early years support in different geographical areas. These were temporary roles and less senior than the roles carried out by the claimant and HH. One of these temporary roles was held by Annette Shepherd ("AS").

31. The structure which was formed on the creation of these temporary roles was short lived. At the end of 2010, 3 of the 4 temporary team leaders were asked to move back to their substantive roles. Annette Shepherd however was confirmed as a permanent early years' area team leader.

32. From the end of 2010/start of 2011 therefore there were 3 people who occupied posts with the job title of "Senior Early Years Consultant Area Team Leader." These were:-

a. The claimant;

b. Heather Holden;

c. Annette Shepherd.

33. The claimant and Heather Holden maintained their grade and pay as LPR8. Annette Shepherd maintained her grade and pay under UPS (she was paid at UPS3). However, she received a TLR payment (at a level called TLR1.2). This TLR payment was a significant component of her overall pay. In monetary terms there was little or no difference between the salary under LPR8 and the salary under UPS3 with TLR1.2 supplement.

34. By this stage the Early Years team had moved into the respondent's School Improvement (SI) Team and the geographical areas matched the 3 geographical areas in which the SI team was organised, being North, Central and South.

35. Each of the 3 Senior Early Years Consultant Area Team Leaders reported to an area lead for SI. The claimant reported into Paul Duckworth (PD). Annette Shepherd ("AS") reported in to the second respondent (SB).

36. The claimant continued in this role until March 2012. However, AS agreed to a secondment as an assistant head teacher at a local school and so left this role (temporarily) in 2011, returning in early 2013.

37. During the short time that these 3 individuals operated at the same time in these Senior Early Years roles (following the move into the School improvement Team) each had responsibility for different activities as well as operational responsibility for their own areas.

38. AS was responsible for introducing a quality award initiative. She had been asked to do this by a previous manager. A Quality award system was in operation in Yorkshire and the aim was to introduce a similar arrangement in Lancashire, for nurseries and other early year providers. She also assumed responsibility for a resource centre which had been set up in Leyland (in her area but which provided resources available to other areas).

39. The claimant already led on quality and improvement, working on these with early years consultants across the whole county. She was provided with and required to manage funding, taking decisions on the allocation of funds to initiatives across the county as a whole.

<u>Differences between the role of the claimant and the role of AS in the period 2010/2011.</u>

40. There is an obvious difference in that the claimant had been graded as an LPR Grade 8 whereas AS was on a UPS grade. The addition of the TLR payment meant that in salary terms there was little or no difference in the pay received. However, the claimant notes the Leadership Standards (page 1787) by which the claimant was assessed and the "Post

Threshold Standards" (those standards applicable to progression in the UPS) (page 316) applicable to AS. We note the following extracts relating to the management of colleagues:

Post Threshold Standards

Contribute significantly, where appropriate, to implementing workplace policies and practice and to promoting collective responsibility for their implementation.

Promote collaboration and work effectively as a team member.

Contribute to the professional development of colleagues through coaching and mentoring, demonstrating effective practice, and providing advice and feedback.

Leadership Standards

Shaping the Future, in particular:

- *Strategic thinking and planning that builds, communicates and carries forward a coherent and shared vision*
- *Leading innovation, creativity and change*

Developing Self and Working with Others, in particular:

- *The significance of interpersonal relationships and strategies for promoting individual and team development*
- *Promoting an open, fair and equitable culture*
- *The relationships between self-evaluation, performance management and continuing professional development*
- *The impact of change and different leadership styles on individuals and organisations.*

Managing the Organisation, in particular:

- *Distribution and delegation of leadership responsibilities and management tasks as appropriate, and monitoring their implementation*
- *Establishing and sustaining effective organisational structures, systems, policy and practice*
- *Strategic financial planning, budgetary management and principles of best value, including evaluating the use of resources in relation to their contribution to pupil achievement.*

41. Both Post Threshold Standards and Leadership standards are drafted to be appropriate to a school setting. However, the standards applicable to an employee operating under an LPR grade require leadership behaviours.

42. We accept the claimant's evidence that the appraisal process assessed the claimant's performance against these leadership standards. We have evidence that these were applied in 2012 and in 2014 (after the changes we note below) and we accept the claimant's evidence that she was also assessed against Leadership standards before 2012. AS was not assessed against these more exacting leadership standards.

43. As well as evidence from the claimant and AS we also heard evidence from Stephanie Davies (SD), another Early Years' consultant. SD worked in the first respondent's early years' consultant team between 2003 and 2014. It was clear from SD's evidence that SD had a high regard for the work carried out by claimant and less regard for the work carried out by AS. We accept SD's evidence that the claimant (as well as HH, the other L8 consultant) led on planning and consistency of approach to quality improvement across all areas of Lancashire and that the claimant worked alongside other teams within the first respondent, supporting schools with vulnerable children, again across all areas of Lancashire.

44. SD accepted that, should she have queries or need support on the Quality award being developed and/or the resource centre that had been set up in Leyland she would contact AS, just as she would contact the claimant with queries and support needs in those over-arching areas led by the claimant. Whilst we have noted the different standards by which employees on Leadership grades are assessed, we find the job roles carried out by the claimant, HH and AS were broadly the same in this period. Each had their own areas of focus but they were all Senior Early Years consultants operating at the same levels within the early years team. As noted above however the claimant worked under and was subject to the more exacting Leadership standards.

<u>The claimant's appointment into the role of Lead Senior Early Years Consultant – March and December 2012</u>

45. In March 2012 the claimant successfully applied for a new role of Lead Senior Early Years Consultant (we refer to this as the "Lead Role"). Although the claimant was the only applicant, the application process included an interview, following which it was determined that the claimant was a suitable candidate for the Lead role. The Lead Role added a management level to the structure.

46. The claimant accepts that the post was temporary, pending a restructure of the early years team although disputes the respondent's position, that she was acting up into the role

47. The claimant's previous post did not remain available and vacant. The claimant was not "acting up" . The Lead role included many duties that the claimant had already been doing but also included more senior duties and provided an additional level of seniority within the structure of the SI team.

48. The term "acting up" has been used at various stages in the respondent's evidence and submissions to describe the claimant's employment in this role. It is not an accurate

description of the claimant's position. This finding is supported by reference to the respondent's acting up policy. This is at pages 1871-1875. We note the following about this policy:-

a. It states that it is not applicable to teachers *"whose pay is determined by reference to the "School Teachers Pay and Conditions Document."* It was however applicable to the claimant (or would have been, had she "*acted up*" into a role).

b. The policy sets out what is meant by acting up

> *An acting up is where an employee undertakes the full duties and responsibilities of an established higher-level post and is physically moved into the higher graded post in order to be paid the rate for the post.*
>
> *The higher graded post in this case is situated within the employee's team/service and the acting up opportunity is ring-fenced to either a specific employee who has the required skills and experience to act up into the role, where one is identifiable within the management hierarchy as determined by the service, or more widely to appropriate members of the team/service.*
>
> *At the end of the acting up arrangement, the employee will return to (and undertake the duties and responsibilities of) their substantive post.*

c. The procedure set out in the policy, includes that *"an end/review date must be communicated to the employee concerned."* It also requires the completion of a "*change form*" to be sent to payroll service where the acting up arrangement is to continue beyond the set end/review date; it requires the payment of an honorarium (calculated in accordance with the policy) on top of the salary paid to the employee in their substantive role which they continue to undertake.

49. The acting up policy was not applicable. The new lead role was not an "established" post; it was brand new. There was no set end/review date; there was no honorarium payment calculated. Instead the new Lead role was assessed to be at a leadership grade (L5-9) and the claimant was paid in accordance with this at L9 on the leadership salary spine. She moved on to grade L9, from her previous grade of L8.

50. When provided the new Lead Role was a temporary one. The primary reason that it was temporary was because there was an intention to restructure the early years team at some stage in the near future. There was also some uncertainty around funding. There was a reluctance to make permanent appointments at the time due to funding concerns. There were at the time (in and around 2012) significant cuts being made to local authority funding. There were only some functions of the early years team that supported statutory duties that local authorities were legally obliged to provide. Given the need for savings, other functions (and therefore budgets) were at some risk. HB provided this evidence which we accept.

51. The intended restructure did not happen until 2018 (see below) and so the claimant held this post for just over 6 years prior to the restructure.

52. It is relevant to note that the claimant held her previous role (area team leader) on an initial temporary basis but over 4 years, from 2004 to 2008. The position was analogous, an initial reluctance to confirm permanence because of funding and organisational reasons but with no indication that the claimant was merely acting up.

53. The respondent invited applications for the Lead Role a second time, in December 2012 (after the claimant had been in post for 8 months or so). This was because AS had returned to the early years team following a schools-based secondment. In fact, AS chose not to apply. She already regarded the Lead Role as the claimants. The claimant remained in the Lead Role, having been successful at interview for a second time.

54. The job description for the Lead Role is at page 374. The first of the core tasks identified is as follows *"Undertake overall lead of the early years consultant team, including direct supervision of the Senior Early Years Consultants, an area team and the administrative officer based at the Early Years Professional Centre."*

55. The senior early years consultants were HH and AS. From March 2012, the claimant had management responsibilities for them (or, in the case of AS, from the date she returned from her schools-based secondment, later in 2012).

The claimant's absence from and return to work January 2015 – end 2016

56. The claimant was diagnosed with cancer at the end of 2014 and began a long period of sickness absence from 1 January 2015. She was absent for the whole of 2015 when she received various treatments for her cancer, including operations and chemotherapy.

57. The claimant reported to Paul Duckworth (PD), (senior adviser in the SI Service) and line manager for consultants within the SI Service (including the early years team). He was assisted in these line management responsibilities by other senior advisers. In 2015, Helen Belbin (HB) was a deputy area team leader within the SI Service and she deputised for PD in some operational management duties concerning the claimant.

58. In short, both HB and PD had responsibilities for managing the claimant during her long period of sickness absence.

59. During her absence in 2015 and early 2016, the claimant's roles and responsibilities were covered by informal arrangements; principally by PD asking AS to cover some of the duties but without any formal acting up or similar arrangement being put in place.

60. By February 2016 the claimant wanted to put in place arrangements for a return to work. She met with PD and a return to work plan was agreed commencing early April 2016 with a phased return, increasing her working hours over a period and building back to full time hours.

61. The claimant and HB met on 5 April 2016. This was a "return to work" discussion as part of the respondent's sickness absence policy. A form was completed (pages 414-416). The form noted that the absence was such that "Trigger Levels" in the respondent's policy had been exceeded. Whilst it also noted that *"the formal process would be invoked"* should further absence result, the narrative on the form was generally supportive of the claimant.

62. Even though the claimant had returned to work, she continued to receive treatment for her cancer and in October 2016 commenced a course of chemotherapy treatment as part of a clinical trial. The claimant wanted to continue with her work. She did not want to take time off due to sickness and did not want to relinquish any of her responsibilities. She

believed that the new chemotherapy treatment would not have a such a significant physical effect on her.

63. The claimant and PD agreed that she would continue with her role and that the days on which she attended for the trial chemotherapy treatment would not be regarded as sickness absence. She would use other time, outside of normal working hours, to stay on top of her work.

64. There was some confusion in the communication of this between PD, HB and the claimant. Some of the time that the claimant spent away from work receiving treatment was recorded as sickness absence even though the claimant was fulfilling her agreement with PD and keeping up with her responsibilities by working outside of usual working hours.

65. HB also tried to put in place an informal "back fill" or acting up arrangement that the team could draw on as and when it became necessary to ask someone (most likely AS) to cover the claimant's responsibilities whilst the claimant was absent and receiving or recovering from treatment. The claimant did not want this to happen and told HB (email of 18 November 2016 at 423).

> "*I do very much appreciate your support and the offer of backfill in case my condition is impacted negatively throughout the duration of my treatment programme. I know I've said thank you for your offer but no thank you to any backup at the moment so I will confirm that is how I feel. I am sure if I am off or struggling in the future this arrangement will be helpful to have already been set up but for now I am fine and especially having resolved the teething problems in the first three I won't even need to take anytime out for the chemo sessions as these will be delivered outside my core hours as the centre is open late into Thursday evening.*

<u>Senior management meeting – November 2016</u>

66. We are required to make a finding about a comment attributed to SB in November 2016. The claimant was told by a former colleague called Alison Kenny that SB had made a comment in a senior management meeting along the lines of *"the claimant won't be here in another 6 months."* Alison Kenny told the claimant about this in October 2018, some 2 years after the comment is alleged to have been made and during a time when the claimant was putting in her grievance. AK told the claimant that the comment was made in a petulant manner and that she had challenged SB about the comment during the meeting. At the time that AK told the claimant this:-

> (1) AK was in dispute with the respondent, which later became the subject of Employment Tribunal proceedings.
>
> (2) The claimant was also in dispute with the respondent as we detail further below.

67. In his evidence SB responded to this allegation. He accepted that he may have made such a comment but that was in response to a possibility being raised that the claimant may be subject to a formal absence management procedure.

68. The claimant in her evidence explained why she considers the comment was not made in a supportive way as (1) it was made at a stage of the meeting when SB had been told that the claimant's role should not be backfilled (going against the view of HB, his wife)

and (2) concerns about taking the claimant through a formal absence management process had already been addressed. The claimant was not at that meeting. She considered these arguments, having been told about the comment some 2 years later.

69. In 2019, the comment was investigated as a grievance, the outcome of which is recorded in the grievance decision letter dated 27 November 2019 (at page 1096 and 1097). It was investigated again in 2020 as part of a grievance appeal (see outcome of this at pages 1193-1198).

70. We find as follows:-

a. A comment was made by SB.

b. The comment was a clumsily worded one but was said in the claimant's interests and made in a supportive way.

71. These findings are supported by the evidence of SB himself and our review of the outcome of grievance investigations carried out in 2019 and 2020.

72. We note here our discomfort about making a finding of fact in relation to a comment made in a meeting in 2016, that had not been noted or reported to anyone until 2018, that it was only then reported verbally by an employee who was in dispute with the respondent (and whose evidence could not be tested) and received by another employee (the claimant) then in dispute with the respondent.

Further absence from May 2017

73. The claimant began a second, long period of sickness absence from May 2017. On this occasion (from the end of June 2017) more formal arrangements were put in place for AS to cover some of the claimant's responsibilities. We have seen a document called a "workflow reassignment form" (page 456) which gives permission for AS to receive what the form calls "Workflow/Notifications" of the claimant. We find that this means that the person to whom the Workflow/Notifications are directed, would receive redirected emails and other IT system-based messages and workflow tasks and permissions. These would enable AS to pick up responsibilities, particularly line management responsibilities (approving holidays, managing sickness etc).

74. There was no formal acting up agreement in place. AS was not formally appointed to the Lead Role under the respondent's Acting Up policy (see above) . What she did was cover some of the responsibilities that went with his position.

75. The claimant hoped to be well enough to return to work at the end of 2017 but unfortunately her health did not allow this and she did not meet up with HB until January 2018 to discuss a return to work.

76. By this stage HB had secured a new position as Head of Early Years and had become the claimant's line manager in place of Paul Duckworth.

77. The claimant and HB met on the 2 February 2018 in order to discuss the claimant's return to work. HB informed the claimant of her new role as Head of Early Years.

78. There was a discussion about the claimant coming back into the office for "Keeping in Touch" (KIT) days. The claimant needed to come into the office at some stage to update her work laptop. HB suggested to the claimant that she may wish to attend for occasional KIT days before returning to work. There was poor communication between the claimant and HB on this issue. HB had not thought through adequately her KIT day proposal; particularly in relation to payment, liability (if the claimant was still too ill to attend work, should she be "working" during a KIT day?) and whether the proposal had medical approval.

79. As for the claimant it is clear from her evidence at the Tribunal and from an extract from her diary that she disclosed, that she was upset and frustrated at the suggestion; yet she did not in any adequate way communicate her frustration to HB. The claimant (mistakenly) decided that HB was putting forward KIT days in place of a phased return. That was never said and we accept HB's evidence that, once the claimant was ready to return to work then she would have been able to do so on a phased return basis. As a further indication of poor communication between the 2, HB finished the meeting on 2 February 2018, thinking it had gone well. We accept HB's evidence on this point (that she genuinely thought the meeting had gone well) although also note (and accept) that as far as the claimant was concerned, it had not.

80. HB proposed KIT days in an effort to help the claimant. She was however a little too single minded about the proposal. She reached the view that it would be helpful to the claimant yet hadn't asked the claimant what she thought would assist her return to work. As noted above, the communication between the 2 on this issue was poor.

81. As for the claimant's wish to return on a phased basis, we accept HB's evidence that she would have approved it when the claimant was ready to return. The claimant's position is that she was ready to return in early 2018 on a phased basis. This was not the opinion of her doctor in the fit note dated 18 January 2018 (covering 2 months absence) or 9 April 2018 (covering a month). In these, the GP specifically ruled out the option of a phased return. The bundle does not include a fit note for March 2018.

<u>The restructure of the respondent's School Improvement Team (including the Early Years team) in 2018 – Part One – Prior to restructure and policy applicable.</u>

82. It was not until 2018 that the first respondent implemented the restructure that had been anticipated when the claimant was promoted to the Lead Role back in 2012.

83. Whilst the claimant was hoping to be well enough to return to work in early 2018, she was unable to do so and remained absent due to sickness for the whole of 2018. The claimant was absent due to sickness therefore throughout the restructure exercise. The claimant continued to hold the Lead Role although had not worked in the role since her second period of long absence began in May 2017.

84. Staff and union consultation about the restructure started on 16 May 2018 when SB emailed relevant members of the team, inviting them to a staff consultation briefing on 4 June. The claimant was also informed that the restructure was underway and invited to attend the briefing on 4 June 2018. HB expected the claimant would attend this meeting.

85. Our focus has been on 2 posts before the restructure and what happened to those posts in the restructure. These are the posts that were held by AS and by the claimant.

86. As already noted, the post held by AS was a senior early years' consultant post, at UPS grade 3 and with a TLR of 1.2. The claimant's post was the Lead Role. This was graded as L5-9 and the claimant was being paid at the top of that grade, paid as L9 (the Lead Role).

87. The first respondent has a Restructure and Reorganisation Policy (Restructure Policy) which is at page 234-246. We note below relevant extracts from this policy with comments/findings:

> *"Scope.*
>
> *The policy applies to all employees of the Council excluding:*
>
> *Teachers, whose pay is determined by reference to the School Teachers Pay and Conditions Document*
>
> *Non-teaching employees in schools*
>
> *The Chief Executive. Executive Directors or Directors.*

(We have already noted that the claimant (and other employees within the same team) is/are employed on School Teacher Pay and Conditions. However, she and her colleagues are not employed as teachers. This exclusion did not apply. The policy was applicable.)

> *Appropriate consultation must be carried out with the relevant employees and employee representatives in respect of any restructuring proposals as soon as practicable and as fully as possible. Consultation must include those employees who are absent due to sickness or maternity/paternity/adoption leave and any employee temporarily working elsewhere but hold a substantive post within the structure. This may entail special arrangements being made to ensure notification and consultation are undertaken.*
>
> *Where it is likely that employees will remain displaced following the implementation of the restructure, the Redundancy Procedure should be applied as appropriate. The Corporate HR Team should be notified of employees who are likely to be at risk of redundancy and access to the Vacancy Management System should be granted (see point 7 below).*
>
> *……..*
>
> *4. Populate the new structure*
>
> *<u>Redeployment rights will only apply in relation to an employee's substantive post.</u>*
>
> *When deciding how to populate the new structure. the Designated Officer should take into account the following to ensure the suitability of the post and employee:*

The employee's:

- present duties and responsibilities

- current grade

- suitability for continuing employment in the service concerned. taking into account the duties and responsibilities that need to be undertaken

- qualifications and experience '

- present conditions of service including hours of work

- the location of the present post

- any relevant medical advice provided by the Council's Occupational Health Service (where appropriate).

Where a further restructuring exercise takes place within 12 months of a previous exercise. the Designated Officer should take account of any further drop in grading level when determining the suitability of a further new role.

88. The sentence underlined above (our emphasis) is key to the outcome for the claimant. We have already noted our finding that the claimant was not seconded or assigned to the Lead Role. It was her substantive post and she had held it for 6 years. She had no other post.

89. Part 4 of the Restructure Policy continues as follows:-

When deciding how to populate the new structure. the Designated Officer should

take into account the following to ensure the suitability of the post and employee:

The employee's:

- present duties and responsibilities

- current grade

- suitability for continuing employment in the service concerned. taking into account the duties and responsibilities that need to be undertaken

- qualifications and experience '

- present conditions of service including hours of work

- the location of the present post

- any relevant medical advice provided by the Council's Occupational Health Service (where appropriate).

Where a further restructuring exercise takes place within 12 months of a previous exercise. the Designated Officer should take account of any further drop in grading level when determining the suitability of a further new role.

5. Offer posts within the new structure

Offers made to employees will be effective from a date determined by the Designated Officer.

The restructure of the respondent's School Improvement Team (including the Early Years team) in 2018 – Part 2 – the position up to 7 June 2018

90. Senior managers put in place a plan for restructure before the details were sent to affected employees on 7 June. SB and HB had key roles in planning this restructure.

91. As noted above, the claimant was invited to attend the consultation briefing on 4 June 2018 and HB hoped she would attend. The claimant was still absent due to sickness and did not attend. No separate discussion took place with the claimant at this time.

92. A consultation paper was sent out to affected employees after the meeting on 4 June 2018. We note as follows:-

a. A new role called "Early Years Quality Improvement Lead (we refer to this role as "QI Lead") (L7-11)

b. The continuation of 1 existing role of senior early years consultant (as before).

93. The consultation paper (at p500) simply states the existence of the Senior Early Years Consultant role (UPS3 + TLR1.2) (with no narrative as none is required) and provides a narrative about the new QI Lead post.

94. The claimant received the consultation paper on 7 June 2018. This was sent by HB to the claimant's personal email account. The respondent stated that there would be a 14-day consultation period, ending on 21 June 2018.

95. On 7 June 2018 (but before the consultation paper was sent to the claimant) there was a significant change to the proposal to fill the QI Lead post. SB sent an email to PG at 09.32 on 7 June 2018 stating as follows:-

> *"We are also going to have to change the ring fence for EY post (Anne Healey) to include Annette Shepherd. Previously they were both on the same grade. This has to be done., I'd have thought?"*

96. Prior to that email, the respondent's intention had been for the claimant to be the only person ringfenced for the QI lead post and for AS to be slotted in (i.e. to continue in) her senior EY consultant post. SB confirmed this in his evidence.

97. SB's email to PG was prompted by an email earlier that morning, from an employee called Mel Foster (who we did not hear from)

> *Hu Helen ive just text you and Steve if one of you could give me quick ring please as its just dawned on me whether or not we should also be including Annette in the ring fence with Anne. I know Anne has been doing the senior role for about 5 years but it's on an acting basis, and her and Annette's substantive posts were the same (is there were 3 of them at the time as we had Heather Holden too) so in effect we now have only 1 of these plus the senior so should they not both be considered in a ring fence for the 2 jobs on new structure?*

98. HB's recollection is that both MF and AS separately challenged the proposal to ringfence the QI Lead post for the claimant only. When giving evidence, AS denied that she had any input at this stage; she denied that she challenged the initial proposal. We prefer the evidence of HB. AS and MF's challenges were made after the presentation on 4 June 2018 when it had been identified that the QI Lead post had a ring fence of one. Although the claimant's name was not put against that post, it was obvious to all that she was that one person who had been ringfenced against the post. The claimant had not attended that presentation and so did not know that the intention had been just to include her in the ringfence for the QI Lead post.

99. The email from MF was disclosed during the Tribunal hearing (not before). In their witness statements neither SB nor HB mention any involvement by MF. We also note in grievance meetings held in late 2019, that no mention was made of any involvement by MF in this issue either. (pages 1073-1077 and 1088-1091). At the grievance stage, the only person mentioned by HB as raising a query about the ringfencing of the QI role was AS. The information from SB (at grievance investigation meeting and in his witness statement) was that it was the involvement of HR (SB used this term generically rather than identifying any individual) (page 1089). We do not accept either account. Both MF and AS pushed for the ringfencing to be widened to include AS.

100. There are key errors in the 2 emails referred to above:-

a. Mel Foster's email. The claimant was not in the Lead Role in an acting up capacity (see earlier findings). Nor had AS been appointed in an acting up capacity in accordance with the respondent's Acting Up policy although she had been covering some of the claimant's duties whilst the claimant had been absent due to sickness.
b. SB's email. The claimant and AS were not previously on the same grade (see earlier findings).

101. The intervention by MF and AS was opportunistic. Had the claimant not been absent whilst being treated for (and suffering from) cancer, they would not have been in a position to intervene. AS would not have taken on some of the claimant's duties and the claimant would have been a continuing presence in the role and the Service. Further, had they attempted to intervene, the claimant would have been in the workplace, aware of the information provided at the briefing on 4 June 2018 and in a position to challenge any change proposed to the exercise of populating the new structure. This intervention ultimately had devastating consequences for the claimant. The respondent did not, to any sufficient extent, check or challenge the position put in MF's email. When SB sent his email, he raised a question with HR but HR did not consider and answer it. It was taken as an instruction from SB and acted on.

102. The consultation paper was amended showing the QI Lead was ringfenced to 2 (the claimant and AS) and the senior consultant role was also ringfenced to 2 (the claimant and AS). Later on 7 June 2018, it was sent out to relevant employees including the claimant and AS. As we note below, the claimant and AS then discussed the consultation paper. AS did not inform the claimant during this discussion or at any other time that, initially the QI Lead role had only been ringfenced to one person (the claimant) but that she and MF had intervened to widen this to include AS.

103. On 12 June 2018 the claimant and AS spoke about (and agreed) a joint response to the consultation.

104. One comment made by both AS and the claimant in their joint response to the consultation is as follows:-

> *"Could you please provide further details of the Early Years Quality Improvement post* [i.e. the QI Lead] *and what the job will involve as the rationale is unclear and sounds to be the same as the Lead Senior Consultant post at the moment."*

105. Another comment provided as part of the consultation exercise was as follows:-

> *The details of the Early Years Quality Improvement post and what the job will involve is unclear as the rationale is written the same as for the existing post and what the job role will involve is unclear as the rationale is written the same as for the existing post of the Lead Senior Consultant. One senior consultant has applied for, been interviewed and been appointed for the leadership of the team twice since the transformation process began. Although this post has been a temporary arrangement, this colleague remains the only colleague in the service who will have had to go through the process three times. Is there a limit to how many times this needs to happen?*

106. In her evidence to the Tribunal, AS said that the "senior" post in the new structure was the same as the Lead post that AH had been carrying out. We do not accept this (we note that she was the only witness who said this). We find:-

a. the senior consultant role in the new structure was the same as the role that was being carried out by AS.

b. The QI Lead role was very similar– not identical – to the Lead role the claimant had held since March 2012.

107. We have compared the job description of the new QI Lead role with the role that the claimant had been carrying out since 2012, as has the claimant (comparing job descriptions at pages 376 and 528). We agree with the claimant's analysis that the only significant difference between the 2 jobs was having management responsibility for an additional team – the quality childcare team. That team itself had its own manager. The QI Lead would gain overall management responsibility, but not day to day responsibility. All 14 of the core tasks/responsibilities of the Lead role (created in 2012) fell within the new QI Lead role.

108. As at 6 June 2018 therefore the restructure proposal, as far as these 2 roles were concerned had been very straightforward – AS would remain in the Senior role. The claimant would be in a ringfence of one as far as the QI role is concerned. As the role had been graded slightly higher than the claimant's current role (L7-11 rather than L5-9) then her

suitability for the role would have been assessed through a process including an interview. However, we find that this would have been a formality. No witness expressed any doubt about the claimant's capabilities. HB particularly was very complementary about the claimant's abilities, dedication and professionalism. No one has said or even suggested that the claimant would have been unable to carry out the QI Lead role.

The restructure of the respondent's School Improvement Team (including the Early Years team) in 2018 – Part 4 – selecting for the QI Lead from the ringfence of 2 (the claimant and AS)

109. On 18 July 2018 the claimant received an email inviting her to express interest in roles in the new structure. She was provided with details of the 2 roles she had been ringfenced for. She was required to respond by Friday 20 July 2018. The claimant was in hospital at the time that the email was received.

110. AS received an email dated 18 July 2018 on similar terms. Both emails inform the recipient that there are "*no changes to the proposals regarding the Early Years Quality Improvement Lead or the Senior Early Years Consultant positions and you need to be aware that the ring fence interviews for these positions have been arranged for …"* The intervention of AS and MF on or before the morning of 7 August 2018 therefore were not treated as feedback in the consultation process. These employees were able to successfully influence the position (prior to consultation exercise) that was sent out for consultation purposes. The claimant was not aware of this at the time.

111. Before the claimant replied to the email of 18 July 2018, she telephoned and spoke with PG. She asked what might happen if she was unfit to attend the interview, noting that she would be attending a medical procedure and would be on strong medication at that time. The claimant was told that she should inform SB of any unavailable dates in that week and that, should she be unfit to attend interview, the interview may be moved. The claimant asked if she could be assisted at the interview by providing a presentation. PG said that she could not. The claimant's request and PG's response prompted PG to comment on the point when writing to the claimant and AS in advance of the interview:-

> "*Please note regarding the ring fencing interview, you will not be required to complete an application form or personal statement, nor will you be required to prepare presentations or take part in tests."* (pages 625 and 627).

112. The claimant complied with the given deadline and submitted her expression of interest late on the evening of 19 July 2018. She only expressed an interest in the QI Lead role. In turn, PG asked the claimant to complete what is described as an *"options form."*

113. The claimant's completed form is at 651. One question asked by the form is:-

> *Please specify any special circumstances that may impact on your ability to attend an interview, e. g. access arrangements, interview arrangements, maternity leave, long term sickness.*

The claimant's response:

> *I am currently on long term sick leave. My health status or treatment appointments may impact on my ability to attend.*

114. When providing her expression of interest response, the claimant informed SB that she was available for interview week of 20 August but that she was attending a medical appointment on the morning of 20 August 2018.

115. The claimant was not asked what reasonable adjustments or arrangements may assist her in interview. However, the claimant did make clear the special circumstances which may impact on her ability to attend. That is the information she was asked for and which she provided.

116. HB and SB were both unsure that an interview process was appropriate, given the claimant's long-term absence and her disability. They expressed concern and sought clarification from HR and were told that was there was a requirement to select candidates using an interview process and that no other option was available.

117. At the beginning of the claimant's interview, reasonable adjustments were briefly referred to by SB. He assumed that any adjustments would relate to time. He offered the claimant an opportunity to request a break (time out) and he offered the claimant a glass of water. Nothing else was asked or said about reasonable adjustments.

118. SB and HB were also unsure about whether the claimant was still absent due to sickness. They could not find a current fit note from the claimant. However, they consciously decided not to query this at the interview as they thought it would be inappropriate to do so.

119. When questioned at the Tribunal, HB also confirmed that she was aware that the claimant had memory issues at the time because of extensive chemotherapy.

120. The interview process comprised a series of pre-determined questions put together by HB, SB and PD. We have seen sheets containing these questions and handwritten comments (a sheet relevant to the claimant is for example at 663-665).

121. The claimant was at a significant disadvantage in this process. She had been absent due to sickness since May 2017 and was still absent due to ongoing cancer treatment. She also had an earlier long-term absence for the whole of 2015.

122. The respondent's position is that the questions were framed in order to ensure that the claimant was not disadvantaged. We do not agree: for example, question 7:

> "*What are the most pressing challenges facing the Early Years sector? Please give us some examples of how you have supported the sector in addressing some of its challenges to date?*

123. In her evidence, HB accepted that Early Years was a fast-changing environment and there would be some disadvantage to a candidate in responding to this if they had been absent from the workplace. HB explained that her score was based on the answer given even though she knew that the claimant would have had much more to say on the topic. The claimant was only scored 1 by SB and 2 by HB (out of 5)

124. We also note that SB recorded in his notes that the claimant needed a prompt for an answer to question 9. (page 665). The question was about Ofsted's assessment of educational establishments and particularly how establishments might avoid an assessment of *"requires improvement."* SB explained that his prompt was to give the claimant a chance to explain, because he knew she was good at this. He described the topic of this question to be *"the team's meat and drink"* and that he was disappointed with the claimant's answer because there were so many other aspects that he knew the claimant knew . The claimant did not answer the question well. Again, the claimant was scored 1 by SB and 2 by HB, SB confirmed that his score was solely on the claimant's response on the day, not on the knowledge and skills that he knew the claimant possessed.

125. Question 6 was *"what is already going well in Early Years improvement? How can you capitalise on this success?"* We do not accept the evidence from respondent's witnesses that this was a generic question regarding EY nationally and the claimant would have been able to draw on the national picture rather than the challenges faced with locally and local practices to overcome those challenges. Yet again, the claimant was severely disadvantaged by her absence. SB scored her 2 and HB scored her 2. AS received scores of 3 and 4.

126. HB and SB were aware that the claimant was performing poorly in this interview and yet persisted, taking some steps to assist her (for example by prompting). The respondent has noted the gulf in scores between the claimant (84 out of 155) and AS (132 out of 155). A big difference in scores in an exercise such as this can indicate that one candidate is far better than the other and one or 2 elements of potential unfairness made no difference to the outcome. We do not see the big difference in scores in this way. We find that it demonstrates how disadvantaged the claimant was in this interview selection process, caused by a combination of her long-term absence from the workplace and her sickness due to ongoing cancer treatment.

127. SB confirmed, on being questioned, that he had always been trained to reach conclusions on a competitive interview process based on what candidates say on the day. He (and the rest of the panel) applied that approach, knowing that the claimant was at a disadvantage in the process, by reason of her disability.

<u>The offer of the senior EY consultant role.</u>

128. On 29 August 2018 HB wrote to the claimant in the following terms:

> *"It was so lovely to see you on Friday but I understand how disappointing the outcome must have been. With regards to the restructure, the post that was also in the ring fence: Senior Early Years Consultant [UPS3 +TLR1.2] is the offer of appointment that we would now wish to make you. We will, of course, ensure this is done formally but I wanted to let you know as soon as possible and also enable you to think about any queries you may have about this. In this regard, Pauline Gleave from HR is happy to talk anything through with you in the first instance at your convenience. Pauline can be contacted on 07717730298 or you can email her to arrange a time for her to call you."*

129. The claimant was being offered AS's role as the decision had been made to appoint AS into a role which was almost identical to the one the claimant had held over the previous 6 years.

130. The claimant replied to HB asking for a job description. HB emailed the claimant on 4 September 2018, to tell her that the description for the senior consultant role would the same as it had been but that (1) the management line would be to the QI Lead rather than the Lead Role and (2) the claimant's salary would be changed from a Leadership pay grade to a UPR grade with a TLR supplement (page 696).

131. Whilst there was no updated job description, she was provided with an updated person specification (page 703) and service specification.

132. The claimant was then provided with a formal offer of the senior EY consultant role by email dated 28 September 2018 (page 717) with a request for a response by the 12 October 2018. The offer was stated to be a *"redeployment."* Offering this as a redeployment is inconsistent with the respondent's position at Tribunal – that this was the claimant's substantive post – but is consistent with our finding, that the claimant's substantive post was the Lead post she had been recruited in to in 2012. She respondent attempted to redeploy the claimant from her post to a more junior post.

133. A job description was provided by email dated 3 October 2018 (page 743). It was as HB had told the claimant the same job description that had been in place for the senior consultant position in place before the restructure (i.e. the post that had been held by AS).

134. This email also informed the claimant of her right of appeal under the respondent's Restructure and Reorganisation Policy. The claimant exercised that right on 5 October 2018

The claimant's ongoing sickness absence

135. The claimant continued to be absent from work due to sickness. On 6 August 2018 the claimant was provided with a fit note by her doctor covering a further 3 month's absence due to ongoing cancer treatment.

136. There was some confusion about whether the claimant was still absent due to sickness in August 2018. We find she was and that the respondent's confusion was caused by its own systems. The claimant had delivered the fit note dated 6 August 2018, referred to above. HB told the claimant she had not received it and on 13 September 2018 the claimant sent a copy to HB, by WhatsApp (page 709). She sent the note by WhatsApp as the respondent's secure email system would not let her attach the fit note. In the WhatsApp message, the claimant told HB (and we accept) that this was her third attempt to deliver the fit note.

The claimant's request for feedback

137. Following the claimant's unsuccessful interview, she was told by HR that she would receive feedback. As she had not heard anything, she emailed SB on 25 October 2018 to chase this. SB and the claimant then exchanged a series of emails. SB stated that he would generally only provide verbal feedback but the claimant asked for written feedback to help inform her appeal against the decision not to appoint her.

138. SB asked for advice from HR. He made clear from the email which he sent requesting advice, that he did not want to provide detailed written feedback. In his email dated 29 October 2018 he included the following comments:-

"We don't normally give feedback in writing. We certainly don't provide information about .someone else's interview, that actually points out that the other candidate was better."

And

"I presume any feedback will then be used in the grievance. This would then be like supplying the bullets to the shotgun that is the grievance. Is that normal?

139. SB received the following advice from the Head of Schools HR Team:-

There is no obligation to provide written feedback. Most interview feedback is provided verbally and if that is your usual procedure, then this should be what is applied here. In terms of the timescale. there is no limit set in stone, but obviously the passage of time means that you will only be able to feedback from your written notes. She has no right to the feedback of others. only her own.

140. PG also advised SB as follows:-

It's purely the interview feedback that you need to deal with as the grievance will be submitted separately so there's no need for you to acknowledge Obviously don't know what the grievance will be stating nor what Anne may use but you will need to provide the feedback as you would for any unsuccessful candidate The other matter of grievance mentioned I'm understanding as relating to the appeal against the redeployment offer which you're aware of

141. SB emailed the claimant to inform her that he had been told he should provide *"brief factual information about areas of strength and areas for development*" and that he should not provide information about the performance of the other candidate.

142. SB then set out what he saw as strengths and development areas. We find these were based on the claimant's performance at the interview, not an assessment of her in carrying out her leadership role over the years that she had done so.

143. The claimant was also told that she scored 84 out of a possible 165 at interview.

144. The claimant was not satisfied with the extent of detail provided and asked for a comprehensive breakdown of her performance against scores rather than the brief factual information provided.

145. We find that SB's approach to feedback was guided by advice from HR. He was told that he should not provide feedback relating to the other candidate and that he should provide feedback as he would for any other unsuccessful candidate. We also find that generally, feedback would be given verbally by SB (and that is the usual practice at the respondent); that SB would avoid putting feedback in writing, that he would feedback on areas of strength and areas for development but no more detailed than this.

<u>The claimant's appeal under the restructure and reorganisation policy (up to October 2018)</u>

146. The claimant sent an appeal on 8 October 2018 (page 845)

> *"I write to appeal against the decision of the designated officer to remove me from my leadership role in the early years consultant team – leadership and management post scale 9 (substantive scale 8) which has been given to Annette Shepherd who reports directly to me, this appointment having been made during my absence on sick leave arising from my disability, cancer.*
>
> *No reasonable adjustments were put in place at interview for my own role, now allocated to Annette Shepherd. The reluctance of the Council and in particular those with influence in this particular decision (Mr and Mrs Belbin) to allow me back to work has compounded my position and are similarly discriminatory.*
>
> *The role I have been offered/ allotted is clearly a demotion, is on less favourable terms and is not acceptable.*
>
> *The reallocation of my role to someone other than me is also an act of discrimination and a pre-determined decision, and, as I understand it, the entire procedure/restructure is outside of the usual transformation process as represented in the draft structure outlined in January 2017."*

147. The claimant also made clear that she wanted her redeployment appeal dealt with quickly.

148. The claimant's position is that her covering email also provided a short summary of a grievance; that the respondent should have recognised this and thus followed 2 processes, an appeal and a grievance. The claimant's sent a document headed appeal letter and also narrative in a covering email. The covering email included the words *"my issues are wider than this and I feel I have faced targeted discrimination"* It was not clear to the respondent at the time that the claimant submitted both appeal and grievance. One process was followed, namely the redeployment appeal.

149. The claimant is also critical of the respondent informing SB of the content of the covering email in which she raises complaints about SB. She asked for the documents to be sent as follows:-

> *Please find attached a copy of my appeal. Could you confirm your receipt of the same and forward on for Steve Belbin's attention.*
>
> *I would also appreciate it if you could forward a copy of my appeal onto Steve Belbin's current line manager, whom I understand to be John Readman alongside the email message outlined below.*

150. The appeal letter and covering email were sent to John Readman and SB. We have seen emails between PG in HR and Heather Warburton (HW), the senior manager to whom the claimant sent the documents. It was HW who sent both documents to JR. We do not find any sinister motive here.

151. There was some confusion over what was to be sent to who. We note that whilst C did not want SB to receive her email at some point in dealing with the grievance SB would need to understand the detail of the claimant's concerns/complaints in order to be able to comment and respond to them.

152. The respondent replied on 12 October 2018 to note that she would have the opportunity to raise her concerns as part of her appeal and to tell her that an independent senior manager had been identified to deal with the appeal. The independent manager Dave

Carr (DC) a Head of Service. On 18 October 2018 the respondent wrote to the claimant inviting her to a redeployment appeal meeting on 29 October 2018.

153. On 24 October 2018 the claimant emailed DC (page 873). She informed him that she would soon be submitting a detailed grievance, that the grievance would need to be dealt with first and that therefore the appeal should not go ahead. DC replied to say he would postpone the meeting and seek advice as to whether the appeal could take place before the grievance is considered.

154. Unfortunately, this opportunity to quickly consider and correct errors in the redeployment process was missed. The redeployment appeal was then put on hold pending the outcome of the claimant's grievance and not heard for another 2 years, in November 2020.

The claimant's grievance

155. The claimant instructed solicitors who wrote to the respondent on 23 November 2018 setting out a detailed grievance (925-929). This is referred to as the second grievance (the first one being the email attaching the redeployment appeal).

156. Part of this second grievance was a grievance that the earlier grievance had not been dealt with. We have no criticism in the respondent initially looking to follow one process. The respondent had not ignored the concerns/complaints in the claimant's earlier email. DC expected to discuss these as part of the redeployment appeal process. Whilst an outcome of the appeal might then have been for allegations of discrimination to be considered separately (either through grievance process or possibly by them being investigated as allegations of misconduct) having the redeployment appeal dealt with quickly (but thoroughly) taking all relevant circumstances in to account would have met the claimant's wishes. Unfortunately, a combination of the claimant's refusal/reluctance to deal with the redeployment appeal until the outcome of a separate grievance and appeal process, the respondent's willingness to agree to this and the frustratingly slow pace of these processes meant that delays were considerable.

157. The detailed grievance from the claimant's solicitors raised many of the complaints now being considered by this Tribunal. In terms of allegations of victimisation, there were at the time far fewer than in the List of Issues.

158. The harassment allegation was the same as the current allegation – comment by SB in 2016 in management meeting.

159. The two victimisation allegations at the time were:-

a. That HB had appointed colleagues on a temporary basis to carry out the claimant's role (or aspects of it), even though the claimant had disputed the need for this. This related to the period in the latter half of 2016 (see para 65 above)

b. That HB had proposed the claimant attend KIT days whilst absent due to sickness.

160. The direct discrimination allegation was that the decision had been taken not to appoint the claimant to her role/the QI Lead role because she was regarded as *"a disposable and less capable individual"* and this was because of her disability.

161. The indirect discrimination allegation was that the respondent had put in place a requirement that an employee had to be *"up to speed and fully conversant with her caseload*" or not be in work. A phased return option therefore was not provided to her.

162. A complaint of disability arising from dismissal was also made. It referred to "*persistent requests"* to attend KIT days and forcing the claimant through the process of applying for her own job.

163. The grievance also raised complaints of failures to make reasonable adjustments in the application and interview process.

164. Separate to the allegations of discrimination the grievance raised complaints that the reorganisation was not carried out in accordance with the respondent's own policy *"including such failures as failing to provide job descriptions for roles and supplying only person specifications."*

165. The claimant continued to be absent due to sickness. Her sick notes referred to both cancer treatment and work-related stress. On 5 December 2018, the claimant was informed by HB that AS was her line manager and she would deal with sickness absence issues from there onwards.

166. The claimant's solicitors wrote to the respondent on 14 January 2019 expressing concern that the claimant had not heard from the respondent with an invite to a grievance hearing (or with any update as to progress of the grievance).

167. Dates for a grievance hearing do not appear to have been discussed until June/July 2019. Attempts were made by the parties in the first half of 2019 to find a resolution (including a mediation day in July 2019). Neither party has provided the Tribunal with any details of these steps and we assume that these discussions were under cover of without prejudice. Unfortunately, there was no resolution and so the parties continued with the internal processes.

168. A grievance meeting was eventually held on 13 September 2019. Notes of the meeting are at pages 1033-1035. The meeting was chaired by Sarah Callaghan (SC) the respondent's Director of Education. SC had only just been appointed to the post (August 2019) and had not been employed by the respondent prior to then.

169. The respondent's grievance procedure is at pages 229-232. It includes the following in relation to timescales:-

> *Upon receipt of the written statement of grievance, the manager must write to the employee inviting him/her to attend a meeting to discuss the grievance. This meeting will normally be held within 10 working days. Where it is not possible to arrange the grievance meeting within this timescale the employee will be notified of the reasons for the delay.*

170. The claimant had hoped to prepare for the grievance meeting by accessing the respondent's work systems. The claimant was still an employee of the respondent but her absence had been so long that by that stage her work laptop required updates in order to enable her access to the respondent's secure email and other systems. She requested this by email (she was at this stage using her personal email account) but it was not resolved in time for the grievance meeting.

171. Following the grievance meeting the claimant provided SC with a detailed document headed "*Further detail as to why I felt my re-appointment was highly unlikely"*

172. The claimant provided this additional written detail. in part because of a concern that SC had only recently been appointed to her post and also to ensure that she had provided all information.

173. SC's grievance outcome decision was provided to the claimant by letter dated 27 November 2019 (pages 1096-1105). None of the grievances was upheld.

174. The grievance outcome included the following response to the allegations of victimisation:

> *The appointment of a junior staff member to support your role. On this point, during my investigation, I met with key members of staff involved in this decision to better understand the rationale for the decision. I understand from these meetings that the junior member of staff you refer to (Joanne Holden) was actually backfilling for a more senior member of staff (Annette Shepherd) who was in turn covering some of your work whilst you were off work. Having spoken to Helen Belbin. Paul Duckworth and Annette Shepherd, they all said separately that the backfill was to support you not to undermine you and that it was in addition to the work you were responsible for; it was also for genuine service continuity and capacity reasons and that it was done in a way that was designed to be flexible so that, when you felt well enough to work at full capacity, it would have not continued. They also all stated that the junior post covered Annette Shepherd's role, rather than your own. On this grievance point, I have therefore concluded that this was not done to victimise you and I don't uphold this grievance point.*
>
> *You also raise the point that you specifically asked Helen Belbin not to progress the business case to support the backfill arrangements. On this point, it was agreed by Paul Duckworth and Helen Belbin that your wishes not to progress the business case were acknowledged but the business case was presented at the Senior Management Team where it was not agreed by the Director.*
>
> *It is my understanding, based on what I have been told, that the Director didn't agree this for budgetary reasons and not specifically because you had raised objections to it. On this point and given the circumstances. although, I believe it was appropriate for the service to consider any impact on continuity and capacity, the communication with you regarding the purpose of the backfill and the process to support it could have been managed more sensitively. To conclude. I do not find that this was intended to victimise you but I can understand that because you were unclear about the purpose of the backfill and had expressed that in advance of the business case being*

presented. you have drawn that conclusion. I have concluded on this specific point that there is some learning for the service with regard to communication but to be clear, I believe the intention was correct.

In terms of the reference to the KIT days, my understanding of your fear in relation to your current position is that attending for KIT days when medically unfit to do so may have impacted on your health, treatment and recovery. I further understand that it is your view that Helen Belbin was attempting to place you at a disadvantage within the service restructure by denying you a phased return to work and suggesting the KIT days, in order to achieve her preferred structure. On this point, I have not found anything within my investigation that would support your view that you were being denied the opportunity to return to work in a phased way, that the KIT days were designed to place you at any disadvantage or that this was an attempt to place you at a disadvantage within the service restructure.

I have heard from Helen Belbin that the discussions around that time with regards to a return to work were, from her perspective. entirely designed to support you. Helen Belbin denies that she would not agree to a phased return to work and states that this was part of the discussions and would have taken place when you were able and ready to return to work. Helen Belbin further states that the KIT days were suggested as a way to help ease you back into the workplace gently to help build up your confidence and stamina, that they were only a suggestion and there was no pressure from her for you to take up that offer. I am therefore unable to uphold this element of your grievance.

175. Whilst the claimant's complaints of indirect discrimination were not upheld, the following was noted:-

I understand that you felt the way you wanted to manage your return to work was not how you perceived it. From my investigation. I believe every attempt was made to accommodate your wishes and I can find no evidence to support your view that you were prevented from returning to work at all or on a phased basis by Helen Belbin. I do believe however, that owing to the close relationship you had previously had with Helen Belbin that perhaps the professional and friendship boundaries became blurred and this may have added to the way this has impacted on you and on this point I think there is some learning for the service.

176. This element of the grievance outcome is to a large extent consistent with our own findings on this issue except that we are more critical of HB. See paras 77-80 above.

177. The grievance outcome also included comment on the decision not to appoint the claimant to the QI Lead role including comments on the interview process. Comments included:-

I do accept, that having been absent from work, you may have felt less confident and prepared for the interview process, however I have reviewed the interview feedback and the scores and it is clear that you performed well, albeit the other candidate performed better and was therefore appointed on merit.

I am also satisfied that through my investigation I have heard that the interview questions were based on the essential requirements of the post and that they were as general and open as possible. I am therefore satisfied that with your experience, knowledge and ability to research relevant subject areas that you would not have been disadvantaged in that respect.

I also understand that consideration was given during the interview to you with respect to how the process may impact on you. i.e. regular breaks during the interview if required and that you did not request any specific adjustments.

178. It is difficult to reconcile scores of 1 or 2 out of 5, together with the huge gulf in scores between candidates, with SC's comment that the claimant performed well at interview. However, we also note that this was not the redeployment appeal process.

179. As for the comments about adjustments, we find (1) the claimant did request an adjustment of being allowed to make a presentation (2) those running the restructure knew that the claimant would be at a disadvantage in this interview process but persisted with selection by interview anyway. In her grievance decision SC also acknowledged that the length of time taken to hear and decide on the grievance was not acceptable and she apologised to the claimant for this (see comments at page 1104).

Meeting with Kate Armstrong – October 2019.

180. By October 2019 responsibility for the claimant's line management had moved to Kate Armstrong, business manager in the respondent's Learning Services and Skills team. A meeting took place between KA and the claimant on 15 October 2019. A number of issues were raised and action points agreed. These included:-

a. agreement that the outstanding grievance needed to be resolved before a return to work
b. a request by the claimant for further information about priorities of the early years support team and how the role offered to the claimant first in with these.
c. More information and reassurance around line management responsibilities
d. A concern raised by the claimant that a "private nursery owner" was aware of the claimant's outstanding grievances. The claimant told KA that she had recently bumped into this person. The claimant did not provide the name of the person or the nursery.

181. It is apparent from the documents that the issue on confidentiality was passed to SC who continued to carry out a grievance investigation. We see reference to this for example in SC's interview with SB.

182. We note this because the claimant has included in her complaints of victimisation a complaint that *" the first respondent failed to address the breaches of confidentiality around this whole process and informed wider service users/early years providers of the claimant's grievance."* To be clear, our findings of fact are:-

a. The claimant raised this concern in October 2019 but without providing any further details.
b. KA passed that concern to SC who was investigating the grievance

c. SC added the concern and included it in her investigations.
d. SC did not specifically address the issue in her grievance outcome letter.
e. The claimant raised breach of confidentiality in her grievance appeal letter (see below) but in wide and unspecific terms: *"LCC breach of confidentiality around this whole process and wider service users/early year provider knowledge of my grievance."*
f. SC was not questioned about this element of the grievance at the Tribunal. On the basis of the evidence received, we have decided that the issue was missed off SC's grievance conclusion amidst the long list of matters then being investigated and decided on. This was an oversight on SC's part.

Grievance Appeal

183. The claimant appealed the grievance outcome. Her letter of appeal is dated 3 December 20919 (page 1108-1114). Not only did the claimant appeal but she made further allegations. The parties were yet further apart. For example, not only did the claimant disagree with the outcome but she called in to question the trustworthiness of colleagues who had been spoken to (particularly in relation to the harassment allegation going back to 2016).

184. She also said this in relation to HB

> *Her denial that she would not agree to a phased return to work is insulting. I can provide an in-depth report from my psychologist at the Rosemere Cancer Centre discussing, at the time, my experience after Mrs Belbin refused to allow the phased return and describing how 'uncomfortable' she was with my wanting to repeat the successful phased plan that I had undertaken with Paul Duckworth after my primary cancer treatment. If needed, I can release these notes which provide an accurate depiction of events at the time. I would question why Mrs Belbin has been believed over me when she failed to keep any records of communication with me and to the contrary, given that I was refused the phased return to work I have not returned to the service. Mrs Belbin refusing to action a phased return to work subsequently kept me out of the workplace and placed me at a significant disadvantage when attending for interview.*

and

> *"…. it is my view that Helen Belbin perceived me, as a result of my illness, as disposable and less capable. The refusal to permit a phased return, trying to fill my position whilst I was in it and clearly having an individual in mind to replace me was all as a result of my disability.*

185. We note from our earlier findings of fact that we disagree with the claimant on this aspect. HB did not refuse to allow the claimant a phased return to work. Our own findings are supported by the grievance decision noted at paras 175/6 above.

186. The claimant was invited to a grievance appeal meeting on 14 January 2020 (page 1120). The appeal was heard by Edwina Grant, Executive Director of Education and Children's Services. The appeal was heard over 3 dates; 14 and 27 January 2020 and also 3 March 2020. In dealing with the appeal, EG directed SC to consider additional evidence particularly about the allegation of harassment. This direction was given after EG had

received a document from the claimant in which she analysed and commented on aspects of the grievance investigation and outcome.

187. EG wrote to the claimant with the appeal outcome on 21 April 2018 (page 1193). The appeal was not upheld. EG made recommendations about some operational issues; spouses working together, strengthening disability awareness training including about people living and working with cancer (and advancements in drug technology enabling this), methods of contact during sickness absence and using different pay scales (specifically here the different teacher pay scales). SC had also reviewed her decisions in the light of additional information provided by the claimant and her revised decision was attached to EG's appeal outcome letter. Whilst acknowledging that some communications could have been handled better, effectively her decisions on the various grievance points did not change.

Second restructure

188. The claimant's appeal against redeployment was considered and determined at the same time as consultation took place about a second restructure affecting the respondent's education directorate. On 29 March 2020 the claimant was provided with information about the restructure (1203-1216). On 24 June 2020 the claimant was told by Suzanne Edwards, (one of the respondent's Heads of Service and the person who had taken on-line management responsibilities for the claimant in March 2020) (SE)that the role envisaged for the claimant arising out of the restructure was the senior consultant role (i.e. the role held by AS until the restructure in 2018 and then offered to the claimant). This is what SE said:-

> "*with regard to your proposed position in the restructure, this is in line with what has previously been offered to you-the only difference is your proposed line manager, the primary MIT Senior Adviser."*

189. The claimant remained absent from work throughout the second restructure. On 2 July 2020, she wrote to SE. Her email included the following:-

> "*I requested details of the position I am being offered. I haven't received any response to this request. I have no knowledge of what role you are referring to hence my request. I'm sure you understand that if I am offered a role, it would be ill advised if I were not to ask for details of a position that I am being offered*
>
> *In addition, your email assumes my involvement, indeed makes reference to, some sort of discussions regarding this role. Unfortunately, I have no idea what you are referring to. I have had no discussions with anyone. Please could you let me know what discussions you think have taken place?*
>
> *I have little understanding regarding the implications of the new information that you provide that the post that your role is now proposed to report into is the curriculum and assessment coordinator. Obviously I was conversant with the context, brief and parameters of the MIT team however I have no idea what the implications are, if any, of moving the role you refer to and which I have no knowledge of, under a different strand of the service as this isn't communicated in your correspondence.*

190. On 6 July 2020, SE replied to the claimant (1228). Her response included the following:-

> *The post that you're proposed to move in to is that of an Early Years consultan t. That isn't a full and detailed job description compiled for this post but I envisage the role to focus on improving quality in reception and early years, primarily in schools, which I believe will enable you to showcase your strengths. I'd also propose that the role includes some involvement in projects and research work. I hope that this gives you an idea of what would be expected, but if this is still a concern for you I'd be happy to look to schedule a telephone conversation for us to talk about this in more detail and agree the finer details collaboratively.*
>
> *With regards to how the role aligns with the early years team, I anticipate that the role will continue to provide support and challenge to school and settings within agreed localities, the details of which will be agreed in discussion with you moving forward. Your role will contribute both to the EY team Strategic development of EY provision as well as to the localities- based evaluation of proficient, targeted support and practise development.*
>
> *Similarly, the role is now proposed to sit under the curriculum and assessment coordinator because of the expertise you will be able to bring to that wider team regarding statutory requirements and best practise in the early years sector. This links to a key priority within the Lancashire education strategy in terms of improving outcomes in early years. This post is held by a senior advisor and has a Lancashire wide remit across all ages and stages.*
>
> *You have been provided with all of the relevant consultation documents, and the consultation process has now concluded. We are hoping to be able to move forward with this early next week and consequently if you do have any thoughts about this management proposal please let me know by the end of the day on Tuesday at the latest to enable me to consider this*

191. The claimant considered she was being rushed into decisions at short notice and without being provided with sufficient information to enable her to make informed decisions.

192. SE responded on 20 July 2020:-

> *"Thank you for your email of July 16th. I have noted the points you have raised with regards to the job description with HR and am awaiting advice. I do recognise the uncertainties but would reiterate the point made in my email that it was our intention to refine the specific duties of the role in a way that would be supportive of a return to work."*

193. Specifically, in relation to a job description relevant to the second restructure, in email of 2 October 2020, the claimant stated this:-

> *"How is it that I still have not been provided with a job description other than the one appertaining to the demotion offered, since September 2018."*

194. The job description for the senior consultant role had not changed following the first restructure. As SE had noted in June 2020, the proposed outcome of the second restructure was to keep the senior consultant role as it was (see SEs email of 24 June 2020 – above) but subject to review and discussion with the claimant (SE's email of 6 July 2020). We find that there was no other job description provided at that time and, further, that there was not requirement for a new job description at that stage.

Further Grievance

195. On 14 July 2020, the claimant raised a further grievance (pages 1217-1226) in a detailed, 10-page document. The majority of the points had already been raised in the previous grievance and on 24 July 2020, the respondent (SE) wrote to the claimant to state this but to acknowledge that she had raised 2 new grievances, one about the length of time to deal with the previous grievance and the delay (which was continuing) to hear her redeployment appeal. The other was about a failure to engage in a process to assist the claimant's return to work.

196. In relation to the grievance about a failure to engage in the claimant's return to work, the claimant noted that no one had been in contact with her after the grievance appeal, to discuss a return to work, that she was being unfairly treated in the second restructure, in terms of deadlines and a lack of detail (including no job description being provided).

197. The claimant's email of 16 July 2020 prompted Kate Armstrong (KA) (a business manager within the respondent's Learning Services and Skills Team) team to contact her by email of 20 July 2020. Whilst KA's email of 20 July does not state that it was prompted by the claimant's email of 16 July 2020 we find on balance that it was; the dates are too proximate to be coincidental, particularly having regard to the grievance appeal being sent 2 months earlier.

198. KA asked for a catch-up call and for the claimant to attend an occupational health appointment.

Occupational Health assessment

199. The claimant attended a telephone appointment on or shortly before 2 September 2020 which resulted in a report dated 2 September 2020 (pages1240-1242). We note the following from the report:-

a. That the claimant informed OH she had completed her chemotherapy in 2018 and that the GP signed her as fit to return to work in February 2019.

b. That the OH adviser reported the claimant to be fit to work with some adjustments.

c. The recommended adjustments were a workplace assessment to ensure that she has a workstation which did not aggravate pain following surgery and to resolve her internal appeal quickly.

d. That the claimant has had a remarkable recovery and with appropriate adjustments, a full and effective return to service was expected.

Review meeting

200. SE wrote to the claimant to ask her to attend a review meeting. There were some technical difficulties in arranging for this meeting. It was now September 2020 and meetings were taking place remotely due to the coronavirus pandemic; the claimant did not have a functioning work laptop and was being asked to attend by Skype. Those technical issues took a while to resolve. The meeting took place on 5 October 2020

201. The following issues were discussed:-

a. The restructure;

b. The redeployment appeal;

c. The claimant's outstanding grievance of 16 July 2020.

202. Hayley Duckworth, an HR adviser and attendee at the review meeting, sent an email to the claimant on 5 October 2020 (shortly after the meeting). A copy is at pages 1267-1272. It is apparent from this email that the claimant's redeployment appeal may have been forgotten by the respondent. She was asked whether she wished to pursue it and if so, what steps to take. At no stage had the claimant withdrawn her redeployment appeal, nor had she acted in any way to suggest that she had.

203. Another topic of discussion at the review meeting was the claimant's position in the second restructure. The claimant raised a possibility of moving her from the line of management/chain of command that involved the second and third respondents and those under their influence/management chain. HD's email included a structure chart showing that for line management areas (holidays, sickness etc) the claimant would report to a manager outside of that chain of command.

204. HD also stated in her email that she attached a job description for the role. She did not. She attached a role profile and a person specification. She also however noted that the job was the same as the one offered to the claimant in 2018. The claimant was therefore aware of what was being offered to her.

205. The email of 5 October 2020 also gave the claimant a choice, to accept the role being offered to her in the second restructure or to proceed with her redeployment appeal. It asked for a reply within 7 days.

Redeployment Appeal

206. The claimant's redeployment appeal (her appeal against the first redeployment exercise in 2018) was finally heard on 19 November 2020.

207. Prior to the appeal the claimant made a request for IT equipment/access. For example, on 5 November 2020 she wrote to the respondent:

Mindful of the fact that you managed to secure my access login details and email access previously. I am writing to ask if you have any way of resolving my lack of access to my desktop system. The request comes this at this point in time as I would appreciate being able to gain access to documents that I have saved there in preparation for my redeployment appeal submission on the 17th of November 2020.

The problem remains the same. My login details work to some degree but then I cannot access my desktop or any documents stored there. The last conversation I had with ICT it was left with the colleague noted in this email attachment.

As I don't have a functioning laptop I still am using my surface pro tablet and wondered with him in that last conversation if this was a source of difficulty.

Any help would be very much appreciated.

208. The claimant's stated IT issues were not resolved in advance of the appeal hearing which took place on the "Zoom" platform. As this was during the pandemic this was not an unusual way to proceed.

209. The respondent had provided the claimant with a chronology and documentation (1306) in advance of the appeal hearing. Shortly before the appeal hearing the claimant also sent a file containing 46 documents (the list is at 1315-6). The claimant was well prepared for her appeal.

210. The appeal was heard by Barbara Bath (BB) (Head of Service for fostering and adoption) and supported by Mhairi Brown (MB) (HR Business Partner). We heard from MB but not BB. MB's evidence at the Tribunal was essentially a chronological account. She noted that the decision had been taken by BB. She did not, in any adequate way, explain or justify BB's decision to reject the claimant's appeal.

211. The claimant provided additional information following the appeal hearing (to help inform BB's decision) summarising her strategic work. This was an area that she was marked down for at interview and which had featured in SB's feedback as an area for her development.

212. The appeal outcome letter is at 1387- 1398. The claimant's appeal was unsuccessful. We have a number of comments on the decision:-

213. Of "*Jane went on to add that in 2018, the Education Improvement service restructured again and confirmed that you were off sick at the time. This involved the removal of both your substantive role and the act-up role that you had occupied. Jane confirmed in place of this a new, higher graded L7-11 leadership post was proposed titled "Early Years Quality Improvement Lead". Jane explained this post was paid more than the post that both yourself and Annette had been seconded /acted up in to.*

This part of the decision made no reference to the fact that the senior consultant role in the new 2018 structure was the same as before – the one which AS held on a permanent basis. Nor did it refer to the QI Lead role being almost identical to the previous role held by the claimant. Further, BB was not aware that, until 6 June 2018,

the intention was for AS to retain her senior consultant role and for there to have been a ringfence of one (the claimant) for the QI Lead role.

No reference was made to the respondent's acting up policy, in case any confirmation was required that the claimant did not hold the post of Lead on an acting up basis.

Whilst BB was right o refer to this as a higher graded post (as the post had a pay scale up to 11 on the Leadership scale) there was no acknowledgement that the claimant was on Leadership scale, at grade 9 which was well within the L7-L11 grade range.

214. Of *"Jane stated that only one post remained in the new structure that was comparable to both Annette and your substantive positions - this was the role of Senior Early Years Consultant, paid UPS3 plus TLR 1.2 – the equivalent terms and conditions of the role Annette had occupied, but with the same duties as the substantive role that both yourself and Annette had held (i.e. the teachers and HLTAs reported into this role).*

The decision made no reference to the fact that the claimant had held the Lead Role for 6 years; that she had not been appointed on an acting up basis and that, under the structure pre 2018 there was only one senior consultant role- being the post held by AS.

Whilst reference was made to the fact that the post offered to the claimant was on a UPS scale with a TLR payment, there was no recognition of the impact of this on the claimant in terms of it being reasonably regarded as a demotion and the temporary nature of TLR payments. There was no recognition of the fact that the claimant was on a Leadership pay scale.

215. Of *"Jane explained that rather than face a redundancy situation whereby both Annette and yourself would be ring-fenced to this one remaining post and the higher graded post be advertised externally, the decision was taken to ring-fence both Annette and yourself to the new Early Years Quality Improvement Lead and the Senior Early Years Consultant position. This would mean that if one you interviewed successfully for the higher graded post, the other could occupy the substantively similar role thereby retaining expertise within the Service and avoiding a redundancy.*

We refer to the comments above.

216. Of *"Jane acknowledges that some of the same duties are part of both the L5-9 role and the L7-11, however states there were also a number of additional duties around awareness of* national *policy changes, providing advice to key internal stakeholder groups around the strategy for EY, as well as implementing and driving new policies and processes. Jane explained that these additional duties quantifies the additional salary, and differentiates the two roles.* (see top of page 1390).

We find the similarities between the posts to be far greater than the impression given by this comment. See earlier.

217. Of *"Jane concluded that you were not automatically slotted into the Early Years Quality Improvement Lead role, as ring-fence arrangements are based on substantive positions and neither Annette nor you had occupied the L5-9 position on a substantial basis. The policy confirms that only substantive roles will be taken into account when ring-fencing*

for positions. Furthermore, Jane confirmed that the L7-11 was a new role that was created to bolster the leadership within Early Years Service and that having a relationship with another team did not compare to the management responsibility of the 7-11 position. Jane highlighted that the role you were seconded into was not comparable to the new L7-11 position.

This part takes no account of the fact that the claimant had "occupied" the post since March 2012; that she was not seconded; that she had not held this post on an acting up basis; that the only reason AS had "occupied " the post was on an acting up basis to cover the claimant's absence whilst she was being treated for cancer.

No reference was made to (and no account taken of) the respondent's procedure for assisting employees who become disabled (pages 1876- 1885) which we note further below.

No sufficient account was taken of the respondent's restructure and reorganisation policy, particularly the section on populating the new structure (see para 87 above).

218. The decision also disputes a point raised by the claimant that she was being demoted. It notes that under the grading arrangements she was paid slightly more and reiterates the respondent's position that the was not being demoted from her substantive post. We have already noted our disagreement that the claimant's substantive post was a senior consultant post she had not held since 2012.

219. As for the issue of pay:-

(1) As already noted, the claimant had been employed on a leadership pay structure.

(2) The senior role provided slightly higher pay than the pay received by the claimant when paid at Leadership grade 9.

(3) The QI Lead role had a pay range of between L7 and L11, therefore provided headroom for higher pay.

(4) The only reason that the senior role paid more was because of the addition of the TLR payment. This amounted to nearly £10,000 per year. A TLR 1.2 payment requires the recipient to have line management responsibility. A TLR payment needs to be kept under review. This became a significant concern for the claimant shortly before her dismissal as we note below.

<u>The respondent's procedure for assisting employees who become disabled.</u>

220. Although this procedure refers to the Disability Discrimination Act 1995, it has been provided to us as a current procedure in operation at the respondent. We note the following extracts:-

(5) At page 1876: *A condition of the County Council's use of the Employment Service Disability Symbol is:*

"To make every effort when employees become disabled, (or where their disability worsens), to make sure they stay in employment".

(6) Also, at page 1876: *an emphasis on continued employment within the original employing Directorate/Service, ideally in the same post with revised work arrangements and the provision of any technical aids as necessary;*

Request for IT support

221. The claimant was asked to attend an occupational health appointment again at the end of 2020. The recommendations made in the report that resulted from this (30/12/20) included (1) the provision of suitable IT equipment to enable the claimant to participate in internal meetings (2) breaks every 45 minutes.

222. A laptop was made available to the claimant. MB in HR took steps for the respondent to approve the procurement of one for the claimant. She understood the respondent's IT team were going to deliver this to the claimant. Unfortunately, the claimant had not received this by the end of February. MB asked the IT Department about this and was told that as it needed to be configured with the respondent's systems the recipient would need to attend the respondent's premises in order to receive it.

223. The claimant objected strongly to this request to attend the respondent's premises and it led to a further grievance (submitted on 15 March 2021). We accept that, prior to the claimant's objections, it had not occurred to either the respondent's IT department or MB, that the claimant would be unable to safely attend the respondent's premises to collect the laptop. After the claimant raised her objection, MB spoke with the IT department and arrangements were made for the laptop to be collected by someone on the claimant's behalf and delivered to the claimant.

224. The strength of the claimant's grievance indicates the breakdown in relations that had by then occurred. The claimant did not see the events concerning the delayed provision of a laptop as an unintentional procedural one. It was, according to the claimant's grievance, direct and/or indirect discrimination. We find that the delay was procedural. No one intended to delay the delivery of the laptop to the claimant. No one in It could (and should) have happened more quickly and without a request made for the claimant to attend the workplace. However, this was not intentional. Further, there is no evidence that the IT department requesting the claimant's attendance, were aware of the claimant's particular vulnerability in attending a place which exposed her to an increased risk of contracting coronavirus.

225. The IT issues requiring her attendance were resolved and the laptop was finally delivered to the claimant at her home on 22 March 2021. The delay in providing this laptop resulted in delay to the internal processes. The delay was detrimental to both claimant and respondent.

Offer of post to Claimant

226. Following the determination of the claimant's redeployment appeal, the respondent wrote to the claimant to inform her that she had been offered a post which was considered to be suitable alternative employment and if she refused to accept this post then the

respondent would need to consider possible ways forward including the claimant's dismissal.

227. Due mainly to the time taken to resolve the claimant's IT issues (above) this meeting did not take place until 13 April 2021. It was chaired by Delyth Matthieson (DM) who gave evidence at the Tribunal. DM had only recently commenced employment with the respondent. Notes of the meeting are at 1463-1471.

228. In this meeting,

a. The claimant noted a reluctance to return to work for an employer that she considered had not dealt with her grievances in any adequate way.

b. She acknowledged DM's recent employment with the respondent and therefore her recent involvement

c. That whilst the respondent may consider the Senior consultant role to be reasonable offer, the claimant had to consider it in the context of the way she had been treated over the previous three years.

I don't consider it to be reasonable because I went from having a run of 5 -6 years, having a very very successful time and doing some really challenging things and got struck down with cancer twice. During the second recovery, whilst I was recovering from my second chemotherapy program, I was put thru a competitive interview and was replaced by a girl who I had line managed 5-6 years prior to that. Now offering me the role I managed beforehand.

Now, understand if I had been back at work and had access to all my documents etc and things were a level playing field but it's not legal to put somebody who has a disability thru that process. So, in summary it's a demotion.

229. By the stage of her involvement, DM wanted to know whether the claimant was willing to accept the Senior Consultant role; she was not willing to re-run the redeployment appeal.

230. The meeting ended with the claimant being given more time to consider her position, even though she had made it clear in that meeting that she was not willing to accept a role that she considered to be a demotion.

231. The claimant also raised in this meeting her concerns that:-

a. Her grievances had still not been properly dealt with;

b. Her doctor had confirmed in February 2019 that she was fit to return to work but that delays in the respondent's processes prevented this. She wanted back pay.

232. DM told the claimant that she would be given time to reach her decision but urged her not to delay too long. She was also told that assistance would be provided to mend broken relationships.

233. Whilst the respondent wanted a decision from the claimant about whether she would accept the senior consultant's role; the claimants focus was on continuing with her grievances. By email dated 16 April 2021, she raised various points that she said were unresolved

234. The respondent provided the claimant with more details about the role being offered. The claimant rightly pointed out that it appeared to include two management lines, one to the QI Lead and another (for the purpose of managing sickness, holidays and so on) to a post called curriculum and assessment coordinator.

235. On 22 April 2021 the claimant emailed the respondent to state that until the points raised by her in relation to unresolved grievances, she was unable to reach a decision about whether to accept the role offered to her.

236. Further information provided by the respondent indicated that the new role may not have any management responsibilities. This was significant for the claimant (1) from a career perspective and (2) from a financial perspective. The salary level for the role being offered was dependant on a TLR 1.2 payment supplement. A teacher only qualified for this supplement if they had line management responsibilities for a significant number of people. The claimant was now being told that she would not.

237. The only response to these concerns was by email dated 22 April 2021 from MB where she stated *"I can reassure you that Lancashire County Council is satisfied that the salary and grading of this post is commensurate with duties and responsibilities of this role."* This broad response did not in any adequate way address the valid concerns raised by the claimant.

238. The claimant had involved her union, National Education Union (NEU). Ian Watkinson (IW) of NEU wrote to MB of the respondent:-

a. Supporting the claimants concerns and suggesting that discussions take place with another senior officer about the TLR payment;

b. Reminding MB that the claimant had raised the issue of back pay;

c. Asking that the respondent provide the claimant with access to all information she had requested.

239. DM's response was that any further grievance the claimant had would be outside of the considerations by her (DM); that the backpay issue had been addressed and she required a decision from the claimant about whether she was going to accept the role.

240. That led the claimant to raise further questions and to note that it was unreasonable to require her to reach a decision without them being resolved. (page 1596)

241. As the claimant had not said that she was willing to accept the role, on 28 April 2021, the respondent issued notice of dismissal providing the clamant with 12 weeks' notice (page 1601-1603). In this letter the respondent noted:-

a. Whilst they considered the claimant had been provided with an offer of suitable alternative employment (and so they were not obliged to make a redundancy payment) the claimant would receive her statutory redundancy entitlement.
b. The offer of suitable alternative employment would remain open to the claimant during the notice period.
c. 12 weeks' notice of dismissal was given, ending on 22 July 2021.

242. The 12 weeks' notice did not accord with the claimant's terms of employment (Burgundy Book) as those terms require a period of notice to end on a specific date broadly correlating with school term dates. The claimant's notice should have ended on 31 August 2021. This was an error on DM's part. However, having heard from DM and MB (who advised her at the time) we find this to have been an unintentional error by the respondent and it was corrected on appeal.

243. During the notice period, the respondent informed the claimant that she would need to provide sick notes if she "continued to be poorly."

244. The claimant was also provided with access to the respondent's vacancy management system so she could be made aware of vacancies that she would want to apply for.

Appeal against dismissal

245. The claimant appealed against her dismissal. Her letter of appeal is dated 4 May 2021 (1605-1607). In summary, the appeal was on the basis that the dismissal was unfair, discriminatory and amounted to victimisation.

246. In relation to the unfairness of the redundancy process the points raised by the claimant included:-

(1) That the QI Lead role was already in place before the 2018 restructure – as it was the same as the Lead role the claimant had been carrying out since 2012. The grade was effectively the same (L9 which was within the L7-L11 band attributed to the QI Lead post.
(2) That the Senior consultant post that the claimant had held up to 2012 was not the same as the one held by AS. The claimant's senior consultant post included strategic leadership responsibilities whereas the post held by AS and graded as a UPS post, did not.

247. Phil Durnell (PD) the respondent's director of highways heard and decided on the claimant's appeal. PD did not give evidence at the Tribunal.

248. An appeal hearing took place on 23 June 2021. Notes of the meeting are at 1648-1655. The claimant's appeal was not upheld.

The claimant's fitness to attend work from February 2019

249. The claimant provided a fit note in early December 2018 dated 29 November 2018 for a 7 week period (therefore up to mid January 2019). A copy is at page 936. The claimant's GP stated that she was not fit for work.

250. A further fit note, also stating the claimant was not fit to work was provided for the 6 weeks following (therefore to about the end of February 2019).

251. The next (and most recent fit note in the bundle flows next. It is dated 28 February 2019 and states that the claimant "may be fit for work taking account of the following advice."

252. The advice that followed was *"from cancer point of view is fit to return to work. From work related stress point of view would be fit to return if the grievance procedure was activated as per the grievance she has submitted and a return to work plan made in liaison with the Occupational health dept."*

253. As at the end of February 2019 therefore the claimant was not fit to return to work, due to a stress condition and would need the grievances resolved before a return to work plan is then implemented.

254. That is the last fit note contained in the bundle and the last fit note provided by the claimant to the respondent. The claimant had by then exhausted her entitlement to contractual and statutory sick pay and the advice from the GP was clear – the grievances needed to be resolved before the claimant could return. In the months following this, the respondent sought advice from Occupational health advisers. Their reports were consistent with this last fit note. The claimant's disability was not preventing a return. Her stress related condition and the absence of a resolution to her grievances were preventing a return.

255. The OH report of August 2019 records that the claimant was declared by her GP to have been fit to return to work as from February 2019, but qualified this to say that resolution of *"her workplace perceptions*" was required *"to a degree that suits individual and business needs."*

256. An OH report dated 2 September 2020 stated that she was fit to return to work, although also noted that she was suffering with *"anxiety due to work related issues which are still unresolved."* It recommended a stress risk assessment and for her appeal to be resolved *"in a timely manner."* It also recommended a workplace assessment to ensure that the workstation would not aggravate pain for the claimant at the site of her surgery. (page 1240)

257. The OH report in December 2020 was consistent with the earlier reports, noting that the claimant was fit for a return to work dependant on the outcome of the internal processes.

258. We find that the position remained the same as noted above; that the claimant was fit to return to work from February 2019, pending satisfactory conclusion to the internal processes.

E. Submissions

259. Both parties provided us with written submissions and also had an opportunity to add to these at the reconvened hearing on 6 December 2021.

260. We noted that 60 pages or so of Mr Foden's document was his/the claimant's detailed account of the claimant's evidence. We noted that we have our own note of the evidence as well as the claimant's witness statement and these would be our primary sources when considering the evidence.

261. It was important that the List of Issues was finalised well in advance of the representatives being required to make submissions. Mr Bunting's submissions took us through the agreed, final list of issues. We have adopted the same approach in our section below in which we record our findings.

262. Both parties made submissions on the relevant law. Mr Foden particularly provided very detailed submissions on this. Although we do not include every case reference provided, we have taken account of both submissions when putting together our own legal summary in the section that now follows. We also refer to the submissions in our conclusions at part F.

F. The Law

Claims under the Equality Act 2010 (EqA)

Time limits

263. Section 123 EqA provides that complaints may not be brought after the end of 3 months "*starting with the date of the act to which the complaint relates"* (s123(1)(a) EqA. This is modified by section 140B – providing for early conciliation.

264. Section 123(1)(b) provides that claims may be considered out of time, provided that the claim is presented within *"such other period as the employment tribunal thinks just and equitable."*

265. We note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre 2003 IRLR 434**:-

> *"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so."* (para 23)
>
> *"…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."* (para 25 of the Judgment)

266. The EqA itself does not set out what Tribunals should take into account when considering whether a claim, which is presented out of time, has been presented within a period which it thinks is just and equitable. We note the following:-

a. **British Coal v. Keeble EAT 496/96** in which the EAT advised, when considering whether to allow an extension of time on just and equitable grounds, adopting as a checklist the factors referred to in s33 of the Limitation Act 1980. These are listed below:-

- the length of and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the party sued had co-operated with any requests for information.
- the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action.
- the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

b. Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283, EAT. This case noted that the issue of the balance of prejudice and the potential merits of the (in that case) reasonable adjustments claim were relevant considerations to whether to grant an extension of time.

Harassment– section 26 Equality Act 2010 ("EqA")

267. Section 26 (1) states:

" *A person (A) harasses another (B) if –*

(a) A engages in unwanted conduct relating to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of

(i) Violating B's dignity, or

(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B

268. The EAT decision in **Richmond Pharmacology Limited v. Dhaliwal [2009] IRLR 336** emphasised the need for Employment Tribunals when deciding allegations of harassment to look at three steps, namely:-

a. Whether the respondent had engaged in unwanted conduct

b. Whether the conduct had the purpose or effect of violating the claimant's dignity or creating an adverse environment

c. Whether the conduct was on the grounds of the applicable protected characteristic?

269. We have applied these three steps.

Direct Discrimination – section 13 Equality Act 2010 ("EqA")

270. Section 13 states:

> *"A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably7 than A treats or would treat others."*

271. An important question for us is whether the claimant's disability was an effective cause of the respondent's treatment of the claimant. As was made clear in the case of **O'Neill v. St Thomas More Roman Catholic School [1996] IRLR 372** the relevant protected characteristic need not be the only cause of the treatment in question.

272. We also note the following:-

a. the House of Lords in **Nagarajan v London Regional Transport [1999] ICR 877, HL**, held *"discrimination may be on racial grounds even if it is not the sole ground for the decision……..If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out."* (judgment of Lord Nicholls)

b. Paragraph 3.11 of the EHRC Employment Code which states that *'the characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'*

273. Section 13 provides that direct discrimination occurs where an individual is treated "less favourably" than another. It is generally necessary therefore to identify a comparator who does not share the claimant's protected characteristic, although claimants can rely on a hypothetical comparator (the term "or would treat others" within the wording of section 13 makes this clear).

274. Section 23(1) EqA requires that there is "no material difference" between the claimant's position and his/her comparators position. Case law makes clear that the comparators circumstances does not have to be the same in all respects; rather they have to be the same (or nearly the same) in those circumstances which are relevant to the claimant's claim. (see for example the decisions of the House of Lords in **Shamoon v. Chief Constable of the Royal Ulster Constabulary 2003 ICR 337** and **MacDonald v. MOD; Peace v. Mayfield School 2003 ICR 937**).

275. The judgment of the Court of Appeal in **Stockton on Tees Borough Council v. Aylott 2010 EWCA 910,** provides guidance on comparators in direct discrimination claims where disability is the protected characteristic relied on. This includes guidance that a hypothetical comparator is not required to be a "clone" of the claimant except for the protected characteristic (disability) although a Tribunal must attribute the same abilities and other relevant circumstances to the hypothetical comparator. (See particularly paras 38-50).

s.15 EqA Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

276. Subsection 2 above does not apply to this case. The respondent accepts it knew that the claimant had the disability.

277. In **Secretary of State for Justice and anr v Dunn EAT 0234/16** the Employment Appeal Tribunal ("EAT") noted 4 findings to be made, for the claimant to succeed in a section 15 claim:-

a. there must be *unfavourable treatment;*

b. there must be *something* that arises in consequence of the claimant's disability;

c. the unfavourable treatment must be *because of* (i.e. caused by) the something that arises in consequence of the disability; and

d. the alleged discriminator cannot show that the unfavourable treatment is *a* proportionate *means of achieving a legitimate aim*.

278. In **Paisner v.NHS England (UKEAT/0137/15/LA)** the EAT provided guidance to Employment Tribunals when considering these claims which we summarise below.

a. The Tribunal should decide what caused the treatment complained of – or what the reason for that treatment was.

b. There may be more than one cause. The "something" might not be the sole or main cause but it must have a significant impact.

c. Motives are irrelevant.

d. The Tribunal should decide whether the/a cause is "*something arising in consequence of*" the claimant's disability. There could be a range of causal links under the expression *"something arising in consequence of…"*

279. When deciding whether a measure is proportionate in the context of the legitimate aim being pursued (s15(1)(b) EqA above) a tribunal must weigh the real needs of the employer against the discriminatory effect of the proposal. (see most recently, **DWP v. Boyers UKEAT/0282/19).**

Indirect Discrimination

280. We note the definition of indirect discrimination at section 19 EQA.

Section 19 EqA Indirect discrimination –

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

281. All 4 conditions set out in s19(2) above must be met in order for a claim to be successful.

282. In Homer v. Chief Constable of West Yorkshire Police [2012 UKSC 15, Baroness Hale noted the following about indirect discrimination (at para 17):

The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic.

283. We comment below on the issue of PCPs.

Objective justification

284. Unlike direct discrimination, there is a potential defence to an indirect discrimination claim – where the employer can show that the application of the PCP was a proportionate means of achieving a legitimate aim. It is often the main focus of indirect discrimination claims.

285. The EHRC Code of Practice on Employment 2011 (Code) provides guidance and comment. In short, the aim pursued should be legal, should not be discriminatory in itself and must represent a real, objective consideration (see para 4.28 of the Code).

286. Although business needs and economic efficiency may be legitimate aims, the Code states that an employer simply trying to reduce costs cannot expect to satisfy the test (para 4.29).

287. As to proportionality, the Code notes that the measure adopted by the employer does not have to be the only possible way of achieving the legitimate aim; it is sufficient that the same aim could not have been achieved by less discriminatory means — para 4.31.

288. The following is stated at paragraph 4.30 of the Code

> *'Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision, criterion or practice as against the employer's reasons for applying it, taking into account all the relevant facts'*

289. A PCP will not be proportionate if it is not an appropriate means of achieving the legitimate aim.

Duty to Make Reasonable Adjustments

290. The claimant raises claims under s20(3) EqA. This imposes a duty on an employer *"where a provision* criterion *or practice of [the employer] puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage."*

291. We note that, for the duty to make reasonable adjustments to apply, a claimant needs to show that s/he has been put to a substantial disadvantage in relation to a relevant matter in comparison to persons who are not disabled.

PCPs

292. For a provision criterion or practice to be a valid PCP for the purposes of s19 and 20 of the EQA, it must be more widely applied (or would be more widely applied).

293. Chapter 4 of the EHRC Code of practice on Employment 2011 concerns indirect discrimination. Paragraph 4.5 says this in relation to PCPs:-

> *"The first stage in establishing indirect discrimination is to identify the relevant provision criterion or practice. The phrase provision criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies rules practices arrangements criteria conditions prerequisites qualifications or provisions. A provision criterion or practice may also include decisions to do something in the future - such as a policy or criterion that has not yet been applied - as well as a one off or discretionary decision."*

294. Whilst PCPs should be construed widely, there are limits. The word "practice" indicates some degree of repetition and where a PCP was identified from what happened

on a single occasion, there must be some evidence of a more general practice. Paragraph 59 of the judgment in **Gan Menachem Hendon Limited v Ms Zelda De Groen UKEAT/0059/18:-**

> *So, while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred.*

295. Mr Foden also referred us to the case of **Nottingham City Transport Limited v. Harvey UKEAT/0032/12** on this same point. We note particularly paragraph 18 of this judgment and we agree with Mr Foden's summary of the judgment – that the EAT decided *"that a procedurally-flawed disciplinary investigation which disadvantaged a disabled employee was not a practice as there was no evidence that investigations conducted by the respondent were generally inadequate:".*

296. The judgment in **Charles Ishola v. Transport for London [2020] EWCA Civ.112** is a recent authority on this point. We note particularly the following paragraphs of the judgment:

> *"35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the Statutory Code of Practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words and did not use the words "act" or "decision" in addition or instead. As a matter of ordinary language, I find it difficult to see what the word "practice" adds to the words if all one-off decisions and acts necessarily qualify as PCPs, as Mr Jones submits. Mr Jones' response that practice just means "done in practice" begs the question and provides no satisfactory answer. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.*
>
> *36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test*

whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course (as Mr Jones submits) that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP."

297. It does not matter why a particular group of persons is disadvantaged by a PCP. What is important it that they are; that there is a causal link between the PCP and the particular disadvantage suffered (**Essop and others v. Home Office (UK Border Agency and others) [2017] UKSC 27**.

Victimisation – section 27 Equality Act 2010.

298. Section 27 states

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

(a) B does a protected act all;

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

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

(i) bringing proceedings under this act;

(ii) giving evidence or information in connection with this Act;

(iii) doing any other thing for the purposes of or in connection with this Act;

(iv) making an allegation (whether or not express) that A or another person has contravened the act.

299. The word "because" used in s27(1) appears to allow for multiple causes of the detrimental treatment. We note here para 9.10 of the Code:

Detrimental treatment amounts to victimisation if a "protected act" is one of the reasons for the treatment but it need not be the only reason."

300. We also note Underhill LJ's explanation of the term "because of" at paragraph 12 of the judgment in Chief Constable of Greater Manchester Police v. Bailey 2017 EWCA 425.

This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [1999] UKHL 36, [2000] 1 AC 501 , referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well-established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan , at p. 513B.

301. We have also considered the judgment of Langstaff J in the case of A v. Chief Constable of West Midlands Police UKEAT 0313/14. One of the complaints in that claim was that the respondent employer had victimised the claimant in the way that it conducted the grievance investigation into the claimant's internal complaints of discrimination. We set out below paragraphs 21-23 of that Judgment:

21. The context is this. The right to complain of victimisation is designed to protect those who genuinely make complaints. They may not be made in bad faith. The act has to relate to a protected characteristic once such an act is done. The effect of the section is, as it were, to place complainants in a protective bubble. They may not be penalised. The response of the person to whom the complaint is made may not be such as to treat the person adversely. Though the wording of section 27 suggests that "subjecting to a detriment" may be by positive act, Miss Banton submits, and I accept, that it may also arise by an omission to act. But omissions to act must be carefully scrutinised in this regard. The purpose of the victimisation provision is protective. It is not intended to confer a privilege upon the person within the hypothetical bubble I have postulated, for instance by enabling them to require a particular outcome of a grievance or, where there has been a complaint, a particular speed with which that particular complaint will be resolved. It cannot in itself create a duty to act nor an expectation of action where that does not otherwise exist.

22. It follows that in some cases — and I emphasise that the context will be highly significant — a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly

embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases.

23. Here, therefore, there was significant work to be done, one might think, to get a victimisation claim off the ground where the essential complaint was that the Force narrowed the scope of the complaint because the Claimant had made a complaint. Put that way, it is not very promising. It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation. But it has to be said that regard to the section and words itself suggests that this is likely to be a rare event, for it postulates no particular adverse response to the making of a complaint apart from the fact of simply failing to deal with it. That, however, is not this case. The allegation is that the Force narrowed the complaint, and the suggestion has to be that it did so because the complaint itself had been made in the form that it was.

Burden of Proof

302. We are required to apply the burden of proof provisions under section 136 EqA when considering complaints raised under the EqA.

303. Section 136 states:

This section applies to any proceedings relating to a contravention of this Act.

(1) If there are any facts from which a court could decide in the absence of any other explanation, that a person (A) has contravened the provision concerned, the court must hold that the contravention occurred.

(2) But subsection 2 does not apply if A shows that A did not contravene the provision."

304. We have also considered the guidance contained in the Court of Appeal's decision in **Wong v. Igen Limited [2005] EWCA 142**. This case concerned the test as set out in discrimination legislation that pre-dated the EqA but the guidance provided in there remains relevant. The annex to the judgment sets out guidance. (the amended Barton guidance)

305. We are also clear that the wording of the statute itself – s136 EqA - is the key reference in relation to burden of proof when reaching decisions about whether there has been a contravention of the EqA.

306. Finally, on the issue of burden of proof, we are mindful of guidance from case law indicating that something more than less favourable treatment may be required in order to establish a prima facie case of discrimination; see for example **Madarassey v. Nomura International [2007] ICR 867,** where the following was noted in the judgment:

> "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

Unfair dismissal, redundancy

307. Section 98 (1) and (2) of the Employment Rights Act 1996 (ERA) provides that redundancy is a potentially fair reason for dismissal.

308. Redundancy, for the purposes of the ERA, is defined by s139 ERA.

> *(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.*
>
> *(6) In subsection 1 "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.'*

309. As the employee disputes that redundancy is the reason for dismissal the statutory presumption of redundancy (s162(2) ERA) does not apply and the respondent bears the burden of proving, on the balance of probabilities, the reason why it dismissed the claimant and that the reason for dismissal was one of the potentially fair reasons stated in s98(1) and (2) ERA.

310. If the respondent does persuade the tribunal that the reason was a potentially fair reason, consideration must then be given to the general reasonableness of that dismissal, applying section 98 (4) ERA.

311. Section 98 (4) ERA provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing him. This should be determined in accordance with equity and the substantial merits of the case.

312. Procedure is an integral part of the reasonableness test under s98(4) in redundancy dismissals (**Polkey v AE Dayton Services Ltd [1988] ICR 142, HL***).* In this case, the Hose of Lords decided that a failure to follow correct procedures would make a dismissal to be dismissal unfair unless, exceptionally, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. It is what the employer did that employment tribunals must consider when deciding whether a dismissal was fair or unfair.

313. As for the steps that should be taken in a redundancy dismissal in order for the dismissal to be fair in accordance with s98(4) will depend on the circumstances of the case including the size of the employer and number of proposed redundancies, whether it is necessary to select employees to be made redundant from a pool of similar employees, whether there is a recognised trade union, agreed redundancy procedures and so on.

G. Analysis and Conclusions

A. Time limits

Were all of the claimant's complaints made under the Equality Act 2010 (EQA)presented within the time limits set out in sections 123(1((a) and (b) of the EQA? Dealing with this issue may involve consideration of whether time should be extended on a just and equitable basis.

Decision- A

314. The claim form was received on 4 December 2018 which is the same date that the ACAS EC certificate was issued in respect of the second and third respondents . Any complaints which pre-date 5 September 2018 are therefore out of time.

315. The ACAS EC certificate was issued on 5 October 2018 in respect of the first respondent. Any complaints which predate 6 July 2018 are therefore out of time.

316. We note our conclusions below on those complaints which predate these dates.

.

B. Claims presented

Are all of the complaints as set out below in this list of issues, included in the claim forms under case number 2417254/18 and/or 2402589/21?

Decision- B.

317. the respondent's position is that those complaints of victimisation under issues 7.1.2 to 7.1.6 are not included in the claim forms. The claimant's submissions (either oral or written) do not make any specific comment on this. Again, we note our conclusions below under those issues.

C. Harassment (R1/R3?)

1 Did the third respondent, as an employee of the first respondent, make a comment relating to the Claimant not being with the first respondent in 6 months, and if so, when was that comment made?

Decision - 1.

318. As noted in our finding of fact we have considered the evidence available to us on this issue and have found that SB made a comment concerning the claimant; along the lines of the claimant may not be around in 6 months' time. The comment was made at a management meeting on 23 November 2016.

Decision - 2 - 5.

2 Did that conduct, if made out, breach the provisions of S.26 (1)(b) (i) or (ii) EQA, namely:-

2.1 was it unwanted;

319. We find that the comment was made in a supportive way about the claimant. The claimant was not aware of the comment. Had she been aware of the true intention of the comment then it would not have been unwanted. The comment was inaccurately reported to the claimant by AK.

2.2 did it relate to the protected characteristic of disability;

320. Yes

2.3 did the conduct have the purpose or (taking into account whether it is reasonable for the conduct to have that effect) effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

321. No. It would have had that effect had the report that the claimant claims she received from AK been accurate but we find that report was not accurate.

3 When was the Claimant made aware of the comment?

322. October 2018

4 Is this claim of harassment brought in time?

323. No. the alleged harassment occurred on or about 23 November 2016.

5 If the claim is out of time would it be just and equitable to extend time allowing this claim to proceed?

324. Our decision is that it is. We note as follows:-

a. Whilst the claimant issued the claim soon after she had learned of the comment by AK, the comment had by that stage been made 2 years earlier.

b. According to the claimant's evidence, her colleague AK was aware of the comment and considered it to have been a derogatory comment about the claimant. AK chose not to inform the claimant of the comment at the time (November 2016, not to ensure the comment was recorded in meeting notes, not to otherwise follow up her apparent outrage about the comment, not to put her evidence in writing even in late 2018.

c. However, AK did not report matters to the claimant until late 2018 and the claimant could not have issued proceedings before then. On that basis it would be just and equitable to allow the extension of time.

d. It is also relevant to note here that the delay and the lack of a written report from AK or contemporaneous record of the comment made (for example in an attendee's hearing notes) has created significant evidential difficulties for the claimant on whom the burden of proof lies. We have made our finding of fact on the basis of the evidence before us.

D. <u>Victimisation</u>

6 Did the claimant do a protected act? The claimant asserts 12 protected acts as follows:-

6.1 She complained by letter to John Readman dated 23 November 2018 (page 927) about the proposal that she attend "KIT" days whilst off sick.

6.2 She complained about the lack of due process in the grievance process by letter dated 16 July 2020, wherein the claimant complained about aspects of the grievance that had not been dealt with, to Suzanne Edwards. 'My first grievance has not been dealt with, I have however focussed solely on the interview for my post and background as I feel this is key. This was not looked into in detail and the impact of the panel on the outcome was not considered. (page a).

6.3 She complained about inordinate delay in dealing with her grievances and appeal by letter to John Readman dated 14th January 2019 wherein C's legal representative stated: 'the council has failed to deal with our clients grievance' (page 979) and letter to Suzanne Edwards dated 16 July 2020, she appealed against the delay in arranging her redeployment appeal (page 1217)

6.4 She appealed against the grievance outcome by letter dated 13 December 2019 (page 1108)

6.5 She complained in a meeting with Kate Armstrong on 15th October 2019 that R1 had continued to treat her as off sick when she was in fact waiting for the grievance process to be activated as stated in her GP note of 28th February 2019 and also by letter dated 16 July 2020 to Suzanne Edwards, that 'I have been willing and able to return to work since spring 2019. My GP clearly informed LCC that I was able to return to work,' (page 1217) and accordingly that the first respondent had continued to treat the claimant as "off sick" when she was physically fit to return to work in February 2019.

6.6 She complained to Suzanne Edwards,(page 1217) about the inordinate delay by the first respondent in facilitating the claimant's return to work?

6.7 She complained by letter dated 15th March 2021 to Head of Service Delyth Mathieson that ' the council have not responded in a timely manner to recommendations specified in my occupational health reports (point 11 - page 1448)?

6.8 She complained by letter dated 15 March 2021 to DM that despite repeated requests the council have failed to provided her with access to a suitable device or full access to the first respondent's IT system to enable her to engage adequately in any formal process including grievance, appeal, case review and redeployment meeting (page 1447, point 7)

6.9 She complained about the lack of access to the first respondent's IT Intranet system?

6.10 She submitted her initial claim to the Employment Tribunal in which she raised various complaints that the respondents were in breach of the Equality Act 2010 (page 18).

6.11 By email dated 5 October 2018, she appealed against the outcome of the first respondent's redeployment process as it affected her, raising complaints of discrimination and a failure to make reasonable adjustments (page 845).

6.12 By letter dated 4 May 2021, she appealed against her dismissal in which she raises allegations of discrimination (page 1605)

Note: The respondents accept that the claimant undertook protected acts (for the purposes of s27 EQA) in the circumstances at 6.1; 6.10; 6.11; 6.12.

The respondents' position that the only protected act which appears to be specifically pleaded as such is the claimant's grievance dated 23 November 2018 (see page 33, which appears to refer to the grievance at page 925). However, the respondents accept that this issue is probably academic, as it is common ground that the claimant did at least one protected act and the respondents do not object to the claimant relying upon the matters above.

325. The list of protected acts in the agreed List of Issues is that put together by the claimant. We asked the claimant throughout the hearing, to review this list with an eye on the case as pleaded.

326. We also asked the parties to consider whether the protected acts accepted by the respondent might be capable of agreement as being sufficient for the claimant to rely on for the purposes of her complaints of victimisation. The claimant would not move and continued to rely on 12 separate protected acts listed as drafted by her/her counsel.

327. We identify 2 protected acts referred to by the claimant in her claim form (page 33). *"The first such act was that the claimant challenged the proposal to promote a junior staff member to her role whilst she was in the middle of receiving chemotherapy treatment."* (para 22) and, at para 26: *"The second such act was when the claimant complained about the proposal by Helen Belbin that she attend "KIT" days whilst off sick, that absence arising direct from her disability."* The claimant does not provide a date for this act and has not included it in her long list of protected acts as set out above. We have not considered it further.

328. As for the first act referred to in the claim form. this is included at 6.11. Some of the other protected acts relied on by the claimant really follow on from this as they form part of the grievance and redeployment appeal processes. We include here 6.1-6.4. Other alleged protected acts (6.5,6.6, 6.7, 6.8, 6.9, 6.10, 6.12) do not appear in the pleadings and not linked to the protected act of raising the grievance/redeployment appeal in October 2018.

329. In his closing submissions, Mr Bunting puts forward a pragmatic approach which is that the protected acts admitted by the respondent and included in the pleadings should be sufficient to provide the claimant a "gateway" to her victimisation complaints under s27 EqA. We agree. None of the detriments listed in paragraph 7 of the list of issues is tied to/reliant on a particular protected act. We agree. That is the approach we have taken.

330. The protected act alleged at 6.11 is a protected act within the meaning of s27 EqA.

7 Did the first respondent subject the claimant to any detriments as follows:-

7.1 failing to actively address all the issues raised in the claimant's initial grievance and appeal, despite agreeing to do so, until very recently. More specifically:

7.1.1 the first respondent did not address the claimant's complaints about being left without any absence management for significant periods and failed to keep the claimant informed about the same.

7.1.2 the first respondent failed to address the breaches of confidentiality around this whole process and informed wider service users / early years providers of the claimant's grievance.

7.1.3 the first respondent failed to address the claimant's issues to the effect the first respondent undertook an inadequate grievance investigation and then relied on incorrect information during the course of the grievance.

7.1.4 the first respondent did not address the claimant's complaint that little or no adequate attention has been afforded to the information provided during the process that the 'new' post did in fact have only one change in terms of the responsibilities from the post that the claimant had been carrying out for six years.

7.1.5 the first respondent did not address the claimant's complaints of the failure to provide a 'backfill' business case in advance of C's appeal.

7.1.6 the first respondent did not address the claimant's complaint that the information provided by the third respondent was either inaccurate or indeed raises a further grievance that the detail of the claimant's disability was shared and discussed with a wide demographic.

7.1.7 the first respondent did not fully or adequately address the claimant's complaints centring upon the unreasonable time delay in following through the grievance procedure which has led to extending the length of time staff members have to apply their recall skills (see Page 1107).

Note: The respondents suggest that the matter listed at 7.1.2 to 7.1.6, above, are not pleaded, factually or otherwise, by the claimant.

7.2 requiring the claimant to make repeated requests to be provided with a full, accurate and reflective job description relevant to the redeployment consultation, for the position being offered to Claimant. Requests were made to the second respondent, on 4th September 2018 (page 697) and Heather Warburton in a telephone call on 2nd October 2018 (728 14.59). Also, requests were made to Suzanne Edwards from 18th June 2020 {page 1199), 2July 2020 (page 1202), 16 July 2020 (page 1217), 2 October (page 1263) and again by asking Suzanne Edwards during the case review meeting on 5th October 2020.

7.3 failing to deal with the claimant's request made by letter dated 15th March 2021 to Head of Service, Delyth Mathieson wherein the claimant complained that 'despite repeated requests the council have failed to provide me with access to a suitable device or full access to the county system to enable me to engage adequately in any of the formal processes including grievance, appeal case review and redeployment meeting'. (point 7 - page 1447) for a suitable device to enable the claimant to access the first respondent's IT system

8 If so, were any of these because the claimant did a protected act?

Decision - 7.1 and 8.

331. As with the list of protected acts, the list of victimisation complaints at 7 and 8 bear little resemblance to the matters pleaded at paragraphs 21-26 of the first claim (page 33) and paragraphs 75a to 75h of the second claim (page 81). There are further difficulties:

a. the victimisation allegations pleaded in both the first and second claim are imprecisely described.

b. The allegations of victimisation in the first claim all relate to matters which pre-date any of the protected acts now relied on.

332. We agree with the respondent, that matters at 7.1.2 to 7.1.6 have not been included in either claim form. We would go further as the complaint at 7.1.1 is not raised in either claim form either. The claimant was aware in advance of making submissions, that this was the respondent's position. The claimant's submissions did not dispute it.

333. However, we have considered and reached our conclusions about the complaint at 7.1 in the round. It is a complaint about the delay in addressing the claimant's redeployment appeal and grievances. We have decided that this is included in the second claim at paragraphs 74 and 75. Whilst these paragraphs do not specifically refer to the grievance raised in late 2018, we have applied a wide interpretation of the wording and decided that it is included. We have focussed on the initial grievance and appeal when considering 7.1 which is what the claimant has asked us to do.

334. The delay to the redeployment appeal was 2 years. That delay was detrimental to the claimant.

335. The delay to the grievance (taking the date the grievance was raised as 23 November 2018) was one year. That delay was also detrimental particularly given that the respondent had agreed with the claimant's request to first determine her grievances before the redeployment appeal.

336. There are various reasons for these delays. We note particularly:

a. The respondent's intention in 2018 to deal relatively quickly with the redeployment appeal and the claimant's complaints in her covering email. An officer had been appointed and a meeting with the claimant had been set to take place on 29 October 2018. It was the claimant's insistence that a grievance process should first be followed and that the meeting should not take place.
b. The complex grievance that was then filed.
c. The without prejudice negotiations and mediation which resulted in no action being taken on the internal processes from about January to July 2019.
d. The grievance hearing that took place on 13 September 2019

337. The delays to the grievance and redeployment appeal processes were unsatisfactory and detrimental to all those involved. However, those delays were not because the claimant raised the appeal and grievances or complained about the processes being followed or issued her Tribunal claim.

338. The claimant is dissatisfied with the outcomes. As noted above, we are also critical of aspects of the outcomes which are relevant to findings in relation to other complaints made. However, the outcomes were not reached because the claimant did protected acts. The decision to reject the claimant's redeployment appeal was due almost entirely to the decision that the claimant had been "acting up" in the Lead Role. Whilst we disagree with this, we do not find this outcome to have been reached because the claimant raised her appeal and/or grievance and/or complained about the processes being followed. Indeed, the mistake about the nature of the claimant's employment between 2012 and 2018 predated any of the protected acts – see our findings of fact about the actions taken on 7 June 2018.

339. Our conclusions on other specific aspects of 7.1 are below:

a. 7.1.1. Failing to address complaints about absence management process. This is a vague allegation and one which had not been included in the claim form but appeared on an unagreed list of issues provided on (or shortly before) day one of the final hearing. We are also critical of the absence management process. However, the absence was a result of the delay to the internal grievance and appeal processes – see our findings above. The occupational health reports reviewed by us make clear that the claimant would have been fit to return to work when the processes had been resolved. We have concluded that the delay in resolving the processes did not amount to victimisation.

b. 7.1.2 Failure to address breaches of confidentiality. This is also a vague allegation and not one which had been included in either claim form but appeared on a list of issues provided on (or shortly before) day one of the final hearing.

   As this is not a complaint that was raised by the claimant in her claim forms, we do not make findings on it.

c. 7.1.3 Inadequate grievance investigation. Again, this is another vague allegation and not one which had been included in either claim form but appeared on a list of issues filed on (or shortly before) day one of the final hearing. Mr Foden did not refer to this in his submissions

   As this is not a complaint that was raised by the claimant in her claim forms, we do not make findings on it.

d. 7.1.4 insufficient focus on the fact that the "new" post only had one change. We agree. However, we do not agree that the insufficient focus was because the claimant had done one or more protected acts. Our decision at para 338 above also applies here.

e. 7.1.5 Failure to address the complaint not to provide a backfill business case. See f. below

f. 7.1.6 Failure to address a complaint that the third respondent provided inaccurate information and/or shared the detail of the claimant's disability. Neither 7.1.5 nor 7.1.6 were included in the claimant's claim forms as allegations of victimisation. They appeared on an unagreed list of issues provided on (or shortly before) day one of the final hearing.

g. 7.1.7 failure to fully or adequately address the claimant's complaints about unreasonable time delay in following through the grievance procedure. We find this was addressed by SC in her grievance outcome. She accepted on behalf of the respondent, that the delay was unacceptable. See para 177 above.

<u>Decision - 7.2 and 8.</u>

340. The claimant asked for a copy of the job description on various occasions. As far as the period up to second restructure is concerned (July 2020) the claimant was aware that the job description for the senior consultant role was the same as that which had predated the 2018 restructure (in other words, it was the role held by AS between 2012 and 2018). She was told this by HB on (and then sent the job description) on 3 October 2018. See para 130 above.

341. As for the requests in 2020, the claimant was again told that the job description for the senior consultancy post remained the same, the only difference being a change in reporting line (email from SE dated 24 June 2020 at page 1199) .

342. As for the claimant's email dated 2 October 2020 referred to by the claimant, she acknowledged in that email that she had received a job description for the senior consultancy role. We also note that the claimant was informed of the proposed position at the time of the second restructure (see para 188 above)

343. The claimant had the relevant job description – and knew she had. What she did not accept was that she was being offered a role which was (reasonably) regarded by her as a demotion.

344. However, her repeated requests for job descriptions in 2018 and/or 2020 did not amount to detrimental treatment by the respondent.

Decision -7.3 and 8.

345. The claimant was subjected to a detriment by the delay to a laptop being provided to her.

346. However, that detriment was not because the claimant did one of more protected acts. See our findings of fact at 221-225 above.

E. Direct Discrimination – protected characteristic, disability

347. Direct discrimination requires a comparator. The claimant relies on a hypothetical comparator. Mr Foden noted the following in his submissions (page 30):-

> *The identification of such a comparator has, as its purpose, the test of whether or not that comparator would have been treated any differently than the complainant has been treated. S.23 of EQA provides that where a comparison is to be made, there must be no material difference between the circumstances relating to each case.*

348. Neither Mr Foden nor Mr Bunting proposed a hypothetical comparator. We have considered and reached conclusions on the direct discrimination complaints, by considering a hypothetical comparator who did not have the claimant's disability and who had been absent from work for the same periods up to the date of the alleged direct discrimination and (in relation to complaints 9.5 to 9.11) was at the same stage as the claimant in the internal processes. The hypothetical compactor has the same abilities as the claimant (applying section 23(2)(a) EqA).

349. Our conclusions below are to issues 9, 10 and 11.

9 Has the first respondent (and, in relation to 9.1 only – have the first and second respondent) subjected the claimant to the following treatment?

9.1 the substitution of the claimant's role by the second respondent (as an employee of the first respondent) to a more junior individual as an outcome to the redeployment process in August 2018;

Decision - 9.1.

350. It was an organisational decision and action by the first respondent to appoint AS to the QI Lead role as part of the 2018 restructure. The second respondent (SB) did not appoint AS to the QI Lead role. That was the outcome to a process which many employees had influenced.

351. As a result of a restructure, AS was placed into the QI Lead role which was almost identical to the role held by the claimant since 2012.

352. The treatment arose from:-

a. The claimant's long absences from the workplace
b. The acting up work carried out by AS during those long absences.

353. A hypothetical comparator would not have been treated differently/more favourably.

354. Specifically, we do not find (as the claimant alleges) that a decision had been made that the claimant was effectively written off as an employee because of her cancer diagnosis. That is an allegation that the claimant makes against HB and SB We heard evidence from both and we do not find that they were so motivated. We note particularly here:-

a. HB's invitation to the restructure consultation meeting on 4 June 2018. Had the claimant attended that meeting (as HB hoped) she would have been informed that the QI Lead role had been ringfenced to just one employee.

b. That the proposal to widen the ringfence did not originate from either SB or HB

9.2 the selection process utilised during the restructure in June – August 2018 i.e. the decision to adopt a solely interview based approach;

355. Decision - 9.2. Whilst we are critical of this decision, we do not find that it amounted to direct discrimination. The same process would have been applied to the hypothetical comparator.

9.3 the line of questioning adopted during the interview process

356. Decision - 9.3. As above, the same treatment would have applied to the hypothetical comparator

9.4 the removal of the claimant from her post of Lead Senior Early Years Consultant (grade L9);

357. Decision - 9.4. The same treatment would have applied to the hypothetical comparator (see above)

9.5 the refusal to provide detailed feedback following the interview and the refusal to provide anonymised comparative detail in relation to the interview process in August 2018;

358. Decision - 9.5. We accept the evidence of SB that this was the way that feedback was applied. The hypothetical comparator would not have been treated differently.

> *9.6 The failure to treat the claimant as an active employee during the period February 2019 – March 2021, specifically, failing to provide the claimant with access to the first respondent's IT system;*
>
> *9.7 The failure to treat the claimant as an active employee during the period February 2019 – March 2021, specifically by failing to provide the claimant with a suitable device to enable the claimant to work from home, and or participate in meetings concerning the claimant's complaints and return to work;*

359. Decisions - 9.6 and 9.7. The difficulties in accessing IT systems were caused by the claimant's long-term absence, not because of her disability. The hypothetical comparator would not have been treated differently.

> *9.8 By requiring the claimant to attend the first respondent's premises to collect a suitable device, without undertaking any risk assessment associated with C's disability;*

360. Decision - 9.8. The hypothetical comparator would also have initially been asked to attend the first respondent's premises.

> *9.9 Continued failure to deal fully with the issues raised by the claimant in her grievance dated 23 November 2018 (page 925) and her grievance appeal dated 13 December 2019 (page 1108);*
>
> *9.10 The continued failure to deal with C's redeployment matter in a timely manner resulting in inordinate absence from the workplace;*

361. Decision – 9.9 And 9.10. The hypothetical comparator would not have been treated differently. It was not the claimant's disability that caused delay in the processes or any inadequacies in the outcomes.

> *9.11 The selection for dismissal;*

362. Decision- 9.11. The claimant was dismissed because she refused to accept the role offered to her. The hypothetical comparator who had also rejected the role offered, would have been dismissed. The claimant was not dismissed because of her disability.

> *9.12 The failure (initially) to apply the correct redundancy policy to the claimant when dismissing her on 28 April 2021 by failing (initially) to state that her dismissal date was 31 August 2021 as provided by the terms and conditions applicable to the claimant's employment.*

363. This was a mistake that was quickly corrected. See our finding of fact at para 242. The mistake was not made because of the claimant's disability. The hypothetical comparator would not have been treated any differently.

10 Was that treatment less favourable treatment i.e. did the first respondent (and, in relation to 9.1 only, the first and second respondent) treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The claimant relies on hypothetical comparators.

11 If so, was this because of the claimant's disability?

See decisions above.

F. Discrimination arising from Disability (s15 EQA)?

12 Did the following thing arise in consequence of the claimant's disability?

- *The claimant's absence from work for significant periods from December 2014 to end 2018.*

364. Decision- 12. Yes it did.

13 Did the first respondent treat the claimant unfavourably as follows?

13.1 Refusing to allow her a phased return to work;

365. No. the claimant was not refused a phased return to work. See our findings of fact.

13.2 Requesting her to attend KIT days;

366. No. The claimant was not treated unfavourably by being given an option of KIT days. She was not at any stage required to attend KIT days (which would have been unfavourable treatment/ The claimant understood that she was being treated unfavourably but this perception was caused by poor communication between the claimant and HB. See our findings of fact.

13.3 Requiring her to apply and be interviewed for the position which the claimant alleges was the same (or substantially the same) as the one she had carried out from March 2012.

367. Yes it did.

13.4 Refusing to pay the claimant her salary, after the claimant had been declared as fit to work.

368. The claimant was not paid for the significant periods that she did not work after the expiry of contractual sick pay. Not paying an employee is unfavourable treatment. However, the claimant was not declared as fit to return to work in February 2019. Her GP stated that the claimant's disability (cancer) was not preventing a return but a stress related condition was and that she may be fit to return to work when the grievances were resolved.

14 Did the first respondent treat the claimant unfavourably because of any of those things arising in consequence of the claimant's disability?

Decision -14.

369. Given our conclusions noted above, we need to consider and reach conclusions on issue 14, in relation to 13.3 and 13.4 above.

370. Dealing with 13.3:

> Yes. The respondent would not have pursued the competitive interview process had the claimant not been absent during the long periods when she received cancer treatment. The respondent would have proceeded as it had expected to before the morning of 7 June 2018. The QI Lead role would have been ringfenced to the claimant only and she would have been appointed without interview given that the role is almost the same as the post held by the claimant from March 2012.

371. Dealing with 13.4.

> No. the first respondent did not pay the claimant because she did not return to work after February 2019, not because she had been absent for significant periods between December 2014 and December 2018.

15 If so, has R1 shown the treatment was a reasonable means of achieving a legitimate aim? R1 relies upon the following aims:

15.1 R's case is that it did not refuse to allow C a phased return to work unless she did KIT days. However, if the tribunal finds otherwise, R will say its legitimate aim was the reintegration of C into the workplace before any phased return began to assist her return and/or ensure she was ready [to get ready] to return.

15.2 R's suggestion that C attend KIT days before returning to work had the legitimate aim of the reintegration of C into the workplace and/or seeking to ensure she was ready [to get ready] to return.

Decision 15.1 and 15.2 - No decision required

15.3 R's requirement for C to competitively apply for a role which was similar to hers had the legitimate aim of ensuring the EY QI Lead role was open to appropriate candidates and was filled by the best candidate.

Decision – 15.3.

372. On the basis that the reference to "appropriate candidates" means candidates identified in accordance with and subject to the respondent's existing policies (including the restructure and reorganisation policy) and obligations under the Equality Act 2010 then we accept it is a legitimate aim to ensure that the QI Lead Role is filled by the most appropriate candidate.

373. We do not accept that the decision made on the morning of 7 June 2018 to widen the ringfence and subject the claimant to a competitive interview process was a proportionate means of achieving the legitimate aim. These are our reasons:-

a. As is clear from our findings of fact, had the respondent applied its own policies, the claimant would have been in a ringfence of one. No reasonable adjustments were required. She was the most appropriate candidate.

b. Had the claimant been placed in a ringfence of one then it would have been a reasonable adjustment to have either (1) delayed the interview – even though little more than a formality – until the claimant was fit to return to work; or (2) forego the interview process and simply appoint the claimant to the role.

c. Had we decided that it was appropriate to have included AS in the ringfence, then reasonable adjustments to the selection process would have been required. The competitive interview process put the claimant at a significant disadvantage over AS because of her long-term absence from the workplace and the impact of her treatment. A less discriminatory method of selection should have been used so that the claimant was not disadvantaged. Both candidates have long employment histories with the respondent and there would have been sufficient organisational knowledge of relevant matters such as skills, experience, commitment, to have made a fair decision without the competitive interview process that was used.

15.4 R's case is that C was not declared fit for work as she alleges [from around February 2019 or otherwise] and that C was not paid because she had exhausted her sick pay and she had not returned to work. However, if the tribunal finds R refused to pay C her salary after she had been declared fit for work, R will seek to rely upon the legitimate aim of the efficient and cost-effective management of its workforce [by not paying staff, beyond the awarding sick pay for a reasonable period, who were unable to perform their job].

Decision 15.4 - No decision required.

G. Indirect Discrimination (s19 EQA)

16 A PCP is a Provision Criterion or Practice. Did the first respondent have the following PCPs?

16.1 A requirement to attend unpaid "keeping in touch" (KIT) days before allowing the claimant to return to work? (PCP 1)

Decision 16.1

374. No. See findings of fact and our decision under 13.2. The respondent did not require the claimant to attend KIT days.

16.2 A requirement for internal job candidates to be interviewed when competing for an internal role. (PCP2)

Decision – 16.2.

375. Yes. Both SB and HB were told by the respondent's HR team (specifically PG) that this was the respondent's practice and they were required to undertake selection by competitive interview.

16.3 A requirement to be actively engaged in work before being provided with access to the first respondents intranet and IT systems? (PCP 3)

Decision – 16.3

376. No. The claimant did encounter difficulties in accessing the respondent s IT systems during her long absences (particularly) but this was down to IT failures rather than a refusal to reconnect the claimant whilst she remained absent from work. Ultimately the claimant was provided with a laptop and connection

17 Did the first respondent apply the PCPs to the claimant at any relevant time?

Decision – 17.

377. Yes – the requirement to be interviewed (16.2 above).

18 Did the first respondent apply (or would the first respondent have applied) the PCPs to persons without a disability?

Decision -18

378. Yes.

19 Did the PCPs put persons with a disability at one or more particular disadvantages when compared with persons without a disability? If so, how? The claimant asserts that:-

19.1 Regarding PCP 1 - the first respondent's refusal to provide an incremental and flexible return to work plan in the claimant's reengagement back to work had a negative impact on the claimant's health and ultimate capacity to return. This had a substantial impact on the claimant's future prospects and career path. This resulted in significant financial distress.

Not applicable; no decision required

19.2 Regarding PCP 2 – the first respondent's requirement did not allow for the full consideration of the claimant's prior achievements, experience and impact in the workplace. The claimant was at a substantial disadvantage in the assessment of her capacity to fulfil the requirements of the role.

This led to the claimant's ultimate loss of her post and her position in the workforce. The respondent's reliance on this method placed the claimant in both a stressful and competitive position which have had adverse effects on the claimant's physical and mental health. This resulted in the claimant suffering financial difficulties and emotional harm.

Decision 19.2

379. Yes. Persons whose disability required them to have a long term absence from the workplace whilst suffering from and/or being treated for their disability would be at a substantial disadvantage. As for the specific disadvantage to the claimant. we agree with all that is said in the first paragraph above. As SB confirmed in cross examination, the candidates were marked only on the information provided at interview.

380. As for the second paragraph, these are outcomes the claimant claims were caused by the disadvantage she was subjected to. We reserve consideration of these points to the remedy hearing.

19.3 Regarding PCP 3 – the first respondent's requirement denied the claimant the right to return to her post in a dignified and supported manner. The impact on the claimant in challenging this course of action was detrimental to her mental and physical health. The first respondent's requirement created barriers to the claimant's return to her post and ultimately contributed significantly to the loss of her job. The claimant was unable to resume her career pathway and resulted in an extended period of time out of

19.4 her field of work. The claimant does not feel she has the energy, capacity or good health to resume this after the resulting extended period of time.

Decision -19.3 and 19.4

381. Not applicable. No decisions required.

20 Did the PCPs put the claimant at those disadvantages at any relevant time?

Decision 20.

382. Regarding the PCP at 13.3 above, yes it did. See para 378 above.

21 If so, has the first respondent shown the PCPs to be a proportionate means of achieving a legitimate aim?

21.1 Regarding PCP 1, R's suggestion that C attend KIT days had the legitimate aim of the reintegration of C into the workplace and/or seeking to ensure she was ready [to get ready] to return.

21.2 Regarding PCP 2, R's requirement for C to competitively apply for a role which was similar to hers had the legitimate aim of ensuring the EY QI Lead role was open to appropriate candidates and was filled by the best candidate.

21.3 Regarding PCP 3, R did not have a PCP of requiring staff to be actively engaged in work before being provided with access to its intranet and IT systems and it does not rely upon a legitimate aim.

Decision – 21

383. No decision is required in relation to 21.1 and 21.3.

384. As for 21.2, we refer to our decision under issue 15.3 above.

H. Failure to make reasonable adjustments

385. In this section the claimant has provided a long list of claimed PCPs. We asked Mr Foden to review these with the claimant, given concerns that some of them may not be valid having regard to case law guidance (see for example the **Ishola** decision referred to above). The long list of claimed PCPs was not reduced and it has therefore been necessary for the respondents and ourselves to consider and respond each of them. Many of the claimed PCPs describe something that was done to the claimant but not something that the respondent did (or would have done) in practice. Those things done to the claimant may well have been unfair – and we explain below where we consider the claimant has been treated unfairly – but they do not amount to PCPs for the purposes of the complaints of failures to make reasonable adjustments.

22 Did the first respondent have the following PCPs?

22.1 The requirement for the completion of KIT days before allowing for a return to work;

22.2 the requirement to return to work on full time basis following a period of sickness absence, in particular in the absence of completing KIT days beforehand;

Decision -22.1 and 22.2

386. No. See findings of fact and our decisions to issues 13.1 and 13.2 above.

22.3 the short timescale allowed for the return of an expression of interest in relation to the claimant's previously held, relabelled position;

Decision – 22.3

387. No. We note that the timescale applicable to the claimant was short, particularly as she was in hospital receiving treatment when the expression of interest request was sent.

388. We have received no evidence about timescales applied more generally by the respondent in restructures. Whilst there was a short timescale applied to the claimant, we do not find that it was a PCP.

22.4 the failure to allow for / present an option for postponement of the claimant's interview;

Decision – 22.4.

389. No. We have not been provided with any evidence that there was a PCP generally applied that postponements were not allowed and would not have been granted if requested.

22.5 the use of an interview only based selection process as opposed to the usual process for posts of similar level to the claimant's own; i.e. utilising a detailed expression of interest and presentation;

Decision 22.5

390. The claimant's drafting here points to the respondent having a PCP of utilising a detailed expression of interest and presentation and NOT a PCP of an interview based selection process. This contradicts the PCP claimed by the claimant at 16.2 above and also our decision on issue 16.2.

391. We find that the claimant did not have a PCP of utilising a detailed expression of interest and presentation. We do find that the respondent applied a PCP of selecting by competitive interview.

22.6 the inclusion and weighting of lines of questioning during the interview process which related to specific events and/or changes which had taken place in the preceding 12 months (i.e. during the claimant's sickness absence);

Decision-22.6

392. We have found that the claimant was disadvantaged by the questions asked of her during the interview process. However there is no evidence that there was a PCP generally applied of weightings of lines of questioning related to specific events and/or changes which had taken place in the preceding 12 months. It is perhaps inevitable that the PCP of a competitive interview process would include questions about recent practices and changes within whichever sector was relevant to the post being filled, but we have not received evidence that other competitive interviews did include such questions and weighting or would have done.

22.7 the continued failure to deal with the claimant's grievance submitted on 5th October 2018 and 23rd November 2018;

Decision-22.7

393. No. The time taken to deal with the claimant's grievance was unreasonable. However there is no evidence that the respondent generally applied unreasonable time limits when dealing with grievances. Indeed, the respondent's grievance procedure sets out much shorter timescales (see para 167).

22.8 the failure to include the claimant in correspondence relating to the changes in management within R1's organisation;

22.9 the failure to include the claimant in ongoing restructures within R1's organisation;

Decision – 22.8 and 22.9

394. No. We are not clear what these refer to and the Mr Foden did not address us on the issues in his submissions. However, once again these claimed PCPs describe something specifically done to the claimant, rather than a practice more widely applied. .

22.10 the failure to provide the claimant with a suitable device to enable the claimant to actively participate in work related meetings;

22.11 the failure to provide the claimant with a suitable device to facilitate and thereafter provide access to R1's Intranet IT systems.

Decision -22.10 and 22.11

395. No. These are other claimed PCPs which describe circumstances specific to the claimant. There is no evidence that these were PCPs applied by the respondent.

23 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled at any relevant time, in that :-

23.1 The requirement for the completion of KIT days before allowing for a return to work – The first respondent's refusal to provide an incremental and flexible return to work plan in C's re engagement back to work had a negative impact on C's health and ultimate capacity to return. This has had a substantial impact on C's future prospects and career path.

No decision required.

23.2 the requirement to return to work on full time basis following a period of sickness absence, in particular in the absence of completing KIT days beforehand - the claimant provides no comment.

No decision required.

23.3 the short timescale allowed for the return of an expression of interest in relation to C's previously held, relabelled position - the first respondent's short timescale imposed whilst the claimant was suffering the effects of a medical procedure during those 48 hours disadvantaged the claimant in being able to make a clear informed decision about her future and without time to question the job description impacted C's ability to perform at interview and secure the same leadership terms and conditions of employment .

No decision required.

23.4 the failure to allow for / present an option for postponement of C's interview - the claimant provides no comment.

No decision required.

23.5 the use of an interview only based selection process as opposed to the usual process for posts of similar level to C's own; i.e. utilising a detailed expression of interest and presentation - the first respondent's failure to provide alternative methods to assess the claimant's capacity to perform the role impacted negatively on the claimant's ability to

fully represent her experience and skillset. The claimant was disadvantaged in the scoring, selection and appointment process and unable to score higher in the selection process. The effects of two substantial programmes of chemotherapy from 2015 to 2017 had left the claimant with side effects of brain function often referred to as 'chemo fog'. The first respondent's inability to take account of the claimant's cancer treatment side effects and the interview process prevented the claimant from engaging effectively and retain her leadership career pathway.

Decision – 23.5

396. The PCP of requiring candidates to go through a competitive interview process did put the claimant at a substantial disadvantage. We adopt the claimant's wording in paragraph one of issue 19.2:

> *"the first respondent's requirement did not allow for the full consideration of the claimant's prior achievements, experience and impact in the workplace. The claimant was at a substantial disadvantage in the assessment of her capacity to fulfil the requirements of the role."*

23.6 the inclusion and weighting of lines of questioning during the interview process which related to specific events and/or changes which had taken place in the preceding 12 months (i.e. during the Claimant's sickness absence) - the questioning and the first respondent's failure to provide significant information to the claimant led to her inability to secure the Lead position at interview. The weighting and line of questioning impacted negatively on the claimant's performance at interview and this did not fully reflect her skillset? The claimant was unable to provide breadth and depth to her answers and was unaware of the changed context and information required to answer fully and therefore retain her leadership role.

No decision required.

23.7 the continued failure to deal with the claimant's grievance submitted on 5th October 2018 and 23rd November 2018 - the failure resulted in significant financial distress. The failure resulted in significant damage to the relationship and trust with the first respondent which placed the claimant at a disadvantage in moving forward with the first respondent. The claimant felt isolated and began to suffer from depression, anxiety and mental health challenges which have continued to date.

No decision required.

23.8 The failure to include the claimant in correspondence relating to the changes in management within the first respondent's organisation - the first respondent's failure regarding line management changes and the reasons for these caused the claimant distress and significant mental health difficulties. the claimant experienced an increasing sense of isolation and became very withdrawn. The failure to inform the claimant of the change to Suzanne Edwards in March 2020 was also substantially disadvantageous as it was the start of the pandemic and the claimant was further isolated and unable to engage in any return to work. this has negatively impacted on C's future career prospects.

No decision required.

23.9 The failure to include the Claimant in ongoing restructures within the first respondent's organisation - the failure to enable the claimant to engage fully in the planning and sharing of the direction of travel for proposals in 2018 was exacerbated by the lack good faith shown when the claimant was not supported during the consultation and feedback process for 2018 restructure. The claimant was not able to acquire the information or knowledge the claimant needed to retain her career pathway on the leadership scale. The lack of communication, delays and being excluded from access to key documents in the 2020 restructure caused the claimant continued distress and mental health challenges. This has also had a negative impact on the claimant's health and the health of the claimant's long-term partner and family members.

No decision required.

23.10 The failure to provide the claimant with a suitable device to enable the claimant to actively participate in work related meetings - trying to stay connected to formal meetings was impossible for the claimant and frustrating. The claimant was not able to engage effectively in formal processes and this led to further physical, emotional and mental health difficulties

No decision required.

23.11 The failure to provide the claimant with a suitable device to facilitate and thereafter provide access to R1's Intranet IT systems - the lack of consistent access to the intranet resulted in the claimant not being able to receive staff updates or read about what was going on in the workplace, the claimant was unable to remain connected to changes or became conversant with ongoing developments at work. The Claimant couldn't access key documents which placed her at a disadvantage in communicating effectively in the grievance, appeal and dismissal processes.

No decision required.

24 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

397. Decision - regarding the Interview process (PCP at 16.2/22.4). Yes. The respondent knew that the claimant was likely to be placed at a significant disadvantage in being required to participate in a competitive interview process. SB was concerned about the process in advance and, further, it was clear to both SB and HB in the interview itself.

25 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant but it is helpful to know what steps the claimant alleges should have been taken and she identifies the following:-

25.1 allowing for a phased return to work by the claimant and foregoing the requirement for the claimant to participate in KIT days;

No decision required.

25.2 allowing for a phased return to work having heeded medical advice on the same;

No decision required.

25.3 providing additional time for the claimant to submit an expression of interest and having set clear expectations for the same from the outset;

No decision required.

25.4 allow for the postponement of the interview to ensure that the claimant was fit to attend and able to properly engage in the process and/or present an alternative option for participation in the selection process i.e. written submissions;

No decision required.

25.5 Utilise alternative selection methods commonly adopted by the first respondent i.e. relying on a detailed expression of interest and presentation, both of which could be prepared in advance or, given the claimant's history in the same/similar role the removal of the competitive process in its entirety;

Decision 25.5

398. We have considered the reasonable adjustment proposed by the claimant. However, our decision goes further as we note in response to issue 15.3 (see paras 370 and 371 above):-

25.6 Adopting an alternative line of questioning for the claimant, thereby removing the requirement for knowledge of specific events and/or changes which had taken place in the preceding 12 months; and

No decision required.

25.7 Dealing expeditiously with the claimant's grievance;

No decision required.

25.8 Including the claimant in correspondence relating to the changes in management within the first respondent's organisation.

No decision required.

25.9 Notifying the claimant about ongoing restructures within R1's organisation;

No decision required.

25.10 Providing the claimant with a suitable device to enable her to actively participate in work related meetings;

No decision required.

25.11 Providing the claimant with access to R1's Intranet IT systems.

No decision required.

26 Taking into account the matters above, did R1 fail to take such steps as were reasonable to have to take to avoid the disadvantages?

Yes. See decisions above.

I. Unfair Dismissal

27 Has the first respondent shown the reason or principal reason for dismissal?

399. In submissions, Mr Bunting commented as follows:

> *"realistically in the present case it appears that C's unfair dismissal claim rises or falls with her discrimination complaints."*

400. A finding of unfair dismissal would not be an inevitable consequence of any finding of discrimination. The discrimination complaints raised are many and varied and we have rejected most of them. However, the findings we have made in the claimant's favour, do lead to a finding of unfair dismissal. The claimant should have been selected as the QI Lead in 2018. Her employment should not have been at risk of dismissal.

401. The length of time between the decision made in 2018 not to appoint the claimant to the QI Lead role and her dismissal in 2021 was taken up with the respondent's internal processes. Even though there was some 3 years between the 2 decisions, they are directly connected.

402. Applying the statutory definition of redundancy at s139 ERA, the requirement for employees to carry out work of a particular kind did not cease or diminish. The Lead role and QI Lead role were so similar that they were almost identical. The senior consultant role (the other relevant role) was identical before and after the restructure.

403. The principal reason for the claimant's dismissal was her refusal to accept the alternative employment offered to her.

28 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

404. No. The claimant should not have been offered the alternative employment of senior consultant (either in the first or second restructure). She should have been provided with the QI Lead role.

29 If so, applying the test of fairness in section 98(4), did the first respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

No decision required

405. For completeness we consider it is appropriate to note that if we are wrong in our conclusion to issue 27 and the statutory definition of redundancy was met by the deletion of the Lead post (even though the QI Lead was an almost identical replacement) then:-

a. Our decision on issue 28 would be that the respondent has shown a potentially fair reason for dismissal
b. Our decision on issue 29 would be that the first respondent did not act reasonably in treating redundancy as a sufficient reason for dismissal. The claimant should have been provided with the QI Lead post and she was not.

J. Remedy – Issues to be identified if required.

Employment Judge Leach
Date: 24 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
27 January 2022

FOR THE TRIBUNAL OFFICE

SCHEDULE
Agreed List of issues

A. Time limits

Were all of the claimant's complaints made under the Equality Act 2010 (EQA)presented within the time limits set out in sections 123(1((a) and (b) of the EQA? Dealing with this issue may involve consideration of whether time should be extended on a just and equitable basis.

B. Claims presented

Are all of the complaints as set out below in this list of issues, included in the claim forms under case number 2417254/18 and/or 2402589/21?

C. Harassment (R1/R3?)

1. Did the third respondent, as an employee of the first respondent, make a comment relating to the claimant not being with the first respondent in 6 months, and if so, when was that comment made?

2. Did that conduct, if made out, breach the provisions of S.26 (1)(b) (I) or (ii) EQA, namely:-

    4.1 was it unwanted;

    4.2 did it relate to the protected characteristic of disability;

    4.3 did the conduct have the purpose or (taking into account whether it is reasonable for the conduct to have that effect) effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3. When was the claimant made aware of the comment?

4. Is this claim of harassment brought in time?

5. If the claim is out of time would it be just and equitable to extend time allowing this claim to proceed?

D. Victimisation

6. Did the claimant do a protected act? The claimant asserts 12 protected acts as follows:-

6.1 She complained by letter to John Readman dated 23 November 2018 (page 927) about the proposal that she attend “KIT” days whilst off sick.

6.2 She complained about the lack of due process in the grievance process by letter dated 16 July 2020, wherein the claimant complained about aspects of the grievance that had not been dealt with, to Suzanne Edwards. 'My first grievance has not been dealt with, I have however focussed solely on the interview for my post and background as I feel this is key. This was not looked into in detail and the impact of the panel on the outcome was not considered (page a).

6.3 She complained about inordinate delay in dealing with her grievances and appeal by letter to John Readman dated 14th January 2019 wherein C’s legal representative stated: 'the council has failed to deal with our clients grievance' (page 979) and letter to Suzanne Edwards dated 16 July 2020, she appealed against the delay in arranging her redeployment appeal (page 1217).

6.4 She appealed against the grievance outcome by letter dated 13 December 2019 (page 1108).

6.5 She complained in a meeting with Kate Armstrong on 15th October 2019 that R1 had continued to treat her as off sick when she was in fact waiting for the grievance process to be activated as stated in her GP note of 28th February 2019 and also by letter dated 16 July 2020 to Suzanne Edwards, that 'I have been willing and able to return to work since spring 2019. My GP clearly informed LCC that I was able to return to work,' (page 1217and accordingly that the first respondent had continued to treat the claimant as “off sick” when she was physically fit to return to work in February 2019.

6.6 She complained to Suzanne Edwards (page 1217) about the inordinate delay by the first respondent in facilitating the claimant’s return to work?

6.7 She complained by letter dated 15th March 2021 to Head of Service Delyth Mathieson that *' the council have not responded in a timely manner to recommendations specified in my occupational health reports* (point 11 - page 1448)?

6.8 She complained by letter dated 15 March 2021 to DM that despite repeated requests the council have failed to provided her with access to a suitable decide or full access to the first respondent’s IT system to enable her to engage adequately in any formal process including grievance, appeal, case review and redeployment meeting (page 1447, point 7).

6.9 She complained about the lack of access to the first respondent’s IT Intranet system?

6.10 She submitted her initial claim to the Employment Tribunal in which she raised various complaints that the respondents were in breach of the Equality Act 2010 (page 18).

6.11 By email dated 5 October 2018, she appealed against the outcome of the first respondent's redeployment process as it affected her, raising complaints of discrimination and a failure to make reasonable adjustments (page 845).

6.12 By letter dated 4 May 2021, she appealed against her dismissal in which she raises allegations of discrimination (page 1605)

Note: The respondents accept that the claimant undertook protected acts (for the purposes of s27 EQA) in the circumstances at 6.1; 6.10; 6.11; 6.12.

The respondents' position that the only protected act which appears to be specifically pleaded as such is the claimant's grievance dated 23 November 2018 (see page 33, which appears to refer to the grievance at page 925). However, the respondents accept that this issue is probably academic, as it is common ground that the claimant did at least one protected act and the respondents do not object to the claimant relying upon the matters above.

7. Did the first respondent subject the claimant to any detriments as follows:-

7.1 failing to actively address all the issues raised in the claimant's initial grievance and appeal, despite agreeing to do so, until very recently. More specifically:

7.1.1 the first respondent did not address the claimant's complaints about being left without any absence management for significant periods and failed to keep the claimant informed about the same.

7.1.2 the first respondent failed to address the breaches of confidentiality around this whole process and informed wider service users / early years providers of the claimant's grievance.

7.1.3 the first respondent failed to address the claimant's issues to the effect the first respondent undertook an inadequate grievance investigation and then relied on incorrect information during the course of the grievance.

7.1.4 the first respondent did not address the claimant's complaint that little or no adequate attention has been afforded to the information provided during the process that the 'new' post did in fact have only one change in terms of the responsibilities from the post that the claimant had been carrying out for six years.

7.1.5 the first respondent did not address the claimant's complaints of the failure to provide a 'backfill' business case in advance of C's appeal.

7.1.6 the first respondent did not address the claimant's complaint that the information provided by the third respondent was either inaccurate

or indeed raises a further grievance that the detail of the claimant's disability was shared and discussed with a wide demographic.

7.1.7 the first respondent did not fully or adequately address the claimant's complaints centring upon the unreasonable time delay in following through the grievance procedure which has led to extending the length of time staff members have to apply their recall skills (see Page 1107)

Note: The respondents suggest that the matter listed at 9.1.2 to 9.1.6, above, are not pleaded, factually otherwise, by the claimant.

7.2 requiring the claimant to make repeated requests to be provided with a full, accurate and reflective job description relevant to the redeployment consultation, for the position being offered to Claimant. Requests were made to the second respondent, on 4th September 2018 (page 697) and Heather Warburton in a telephone call on 2nd October 2018 (728 14.59). Also, requests were made to Suzanne Edwards from 18th June 2020 {page 1199), 2July 2020 (page 1202), 16 July 2020 (page 1217), 2 October (page 1263) and again by asking Suzanne Edwards during the case review meeting on 5th October 2020.

7.3 failing to deal with the claimant's request made by letter dated 15th March 2021 to Head of Service, Delyth Mathieson wherein the claimant complained that *'despite repeated requests the council have failed to provide me with access to a suitable device or full access to the county system to enable me to engage adequately in any of the formal processes including grievance, appeal case review and redeployment meeting'.* (point 7 - page 1447) for a suitable device to enable the claimant to access the first respondent's IT system

8. If so, were any of these because the claimant did a protected act?

E. Direct Discrimination – protected characteristic, disability

9. Has the first respondent (and, in relation to 11.1 only – have the first and second respondent) subjected the claimant to the following treatment?

9.1 the substitution of the claimant's role by the second respondent (as an employee of the first respondent) to a more junior individual as an outcome to the redeployment process in August 2018;

9.2 the selection process utilised during the restructure in June – August 2018 i.e. the decision to adopt a solely interview based approach;

9.3 the line of questioning adopted during the interview process;

9.4 the removal of the claimant from her post of Lead Senior Early Years Consultant (grade L9);

9.5 the refusal to provide detailed feedback following the interview and the refusal to provide anonymised comparative detail in relation to the interview process in August 2018;

9.6 The failure to treat the claimant as an active employee during the period February 2019 – March 2021, specifically, failing to provide the claimant with access to the first respondent's IT system;

9.7 The failure to treat the claimant as an active employee during the period February 2019 – March 2021, specifically by failing to provide the claimant with a suitable device to enable the claimant to work from home, and or participate in meetings concerning the claimant's complaints and return to work;

9.8 By requiring the claimant to attend the first respondent's premises to collect a suitable device, without undertaking any risk assessment associated with C's disability;

9.9 Continued failure to deal fully with the issues raised by the claimant ion her grievance dated 23 November 2018 (page 925) and her grievance appeal dated 13 December 2019 (page 1108);

9.10 The continued failure to deal with C's redeployment matter in a timely manner resulting in inordinate absence from the workplace;

9.11 The selection for dismissal;

9.12 The failure (initially) to apply the correct redundancy policy to the claimant when dismissing her on 28 April 2021 by failing (initially) to state that her dismissal date was 31 August 2021 as provided by the terms and conditions applicable to the claimant's employment.

10. Was that treatment less favourable treatment i.e. did the first respondent (and, in relation to 9.1 only, the first and second respondent) treat the claimant less favourably than it treated or would have treated others (comparators) in not materially different circumstances? The claimant relies on hypothetical comparators.

11. If so, was this because of the claimant's disability?

F. Discrimination arising from Disability (s15 EQA)?

12. Did the following thing arise in consequence of the claimant's disability?

- The claimant's absence from work for significant periods from December 2014 to end 2018.

13. Did the first respondent treat the claimant unfavourably as follows?

13.1 Refusing to allow her a phased return to work;

13.2 Requesting her to attend KIT days;

13.3 Requiring her to apply and be interviewed for the position which the claimant alleges was the same (or substantially the same) as the one she had carried out from March 2012.

13.4 Refusing to pay the claimant her salary, after the claimant had been declared as fit to work.

14. Did the first respondent treat the claimant unfavourably because of any of those things arising in consequence of the claimant's disability?

15. If so, has R1 shown the treatment was a reasonable means of achieving a legitimate aim? R1 relies upon the following aims:

a. R's case is that it did not refuse to allow C a phased return to work unless she did KIT days. However, if the tribunal finds otherwise, R will say its legitimate aim was *the reintegration of C into the workplace before any phased return began to assist her return and/or ensure she was ready [to get ready] to return*.

b. R's suggestion that C attend KIT days before returning to work had the legitimate aim of *the reintegration of C into the workplace and/or seeking to ensure she was ready [to get ready] to return*.

c. R's requirement for C to competitively apply for a role which was similar to hers had the legitimate aim of *ensuring the EY QI Lead role was open to appropriate candidates and was filled by the best candidate*.

d. R's case is that C was not declared fit for work as she alleges [from around February 2019 or otherwise] and that C was not paid because she had exhausted her sick pay and she had not returned to work. However, if the tribunal finds R refused to pay C her salary after she had been declared fit for work, R will seek to rely upon the legitimate aim of *the efficient and cost-effective management of its workforce [by not paying staff, beyond the awarding sick pay for a reasonable period, who were unable to perform their job]*.

G. Indirect Discrimination (s19 EQA)

16. A PCP is a Provision Criterion or Practice. Did the first respondent have the following PCPs?

16.1 A requirement to attend unpaid "keeping in touch" (KIT) days before allowing the claimant to return to work? (PCP 1)

16.2 A requirement for internal job candidates to be interviewed when competing for an internal role. (PCP2)

16.3 A requirement to be actively engaged in work before being provided with access to the first respondents intranet and IT systems? (PCP 3)

17 Did the first respondent apply the PCPs to the claimant at any relevant time?

18 Did the first respondent apply (or would the first respondent have applied) the PCPs to persons without a disability?

19 Did the PCPs put persons with a disability at one or more particular disadvantages when compared with persons without a disability? If so, how? The claimant asserts that:-

19.1 Regarding PCP 1 - the first respondent's refusal to provide an incremental and flexible return to work plan in the claimant's reengagement back to work had a negative impact on the claimant's health and ultimate capacity to return. This had a substantial impact on the claimant's future prospects and career path. This resulted in significant financial distress.

19.2 Regarding PCP 2 – the first respondent's requirement did not allow for the full consideration of the claimant's prior achievements, experience and impact in the workplace. The claimant was at a substantial disadvantage in the assessment of her capacity to fulfil the requirements of the role. this led to the claimant's ultimate loss of her post and her position in the workforce. The respondent's reliance on this method placed the claimant in both a stressful and competitive position which have had adverse effects on the claimant's physical and mental health. This resulted in the claimant suffering financial difficulties and emotional harm.

19.3 Regarding PCP 3 – the first respondent's requirement denied the claimant the right to return to her post in a dignified and supported manner. The impact on the claimant in challenging this course of action was detrimental to her mental and physical health. The first respondent's requirement created barriers to the claimant's return to her post and ultimately contributed significantly to the loss of her job. The claimant was unable to resume her career pathway and resulted in an extended period of time out of her field of work. The claimant does not feel she has the energy, capacity or good health to resume this after the resulting extended period of time.

20 Did the PCPs put the claimant at those disadvantages at any relevant time?

21 If so, has the first respondent shown the PCPs to be a proportionate means of achieving a legitimate aim?

21.1 Regarding PCP 1, respondent's suggestion that claimant attend KIT days had the legitimate aim of the reintegration of claimant into the workplace and/or seeking to ensure she was ready [to get ready] to return.

21.2 Regarding PCP 2, respondent's requirement for claimant to competitively apply for a role which was similar to hers had the legitimate aim of ensuring the QI Lead role was open to appropriate candidates and was filled by the best candidate.

21.3 Regarding PCP 3, respondent did not have a PCP of requiring staff to be actively engaged in work before being provided with access to its intranet and IT systems and it does not rely upon a legitimate aim.

H. Failure to make reasonable adjustments

22 Did the first respondent have the following PCPs?

22.1 The requirement for the completion of KIT days before allowing for a return to work;

22.2 the requirement to return to work on full time basis following a period of sickness absence, in particular in the absence of completing KIT days beforehand;

22.3 the short timescale allowed for the return of an expression of interest in relation to the claimant's previously held, relabelled position;

22.4 the failure to allow for / present an option for postponement of the claimant's interview;

22.5 the use of an interview only based selection process as opposed to the usual process for posts of similar level to the claimant's own; i.e. utilising a detailed expression of interest and presentation;

22.6 the inclusion and weighting of lines of questioning during the interview process which related to specific events and/or changes which had taken place in the preceding 12 months (i.e. during the claimant's sickness absence);

22.7 the continued failure to deal with the claimant's grievance submitted on 5th October 2018 and 23rd November 2018;

22.8 the failure to include the claimant in correspondence relating to the changes in management within R1's organisation;

22.9 the failure to include the claimant in ongoing restructures within R1's organisation;

22.10 the failure to provide the claimant with a suitable device to enable the claimant to actively participate in work related meetings;

22.11 the failure to provide the claimant with a suitable device to facilitate and thereafter provide access to R1's Intranet IT systems.

23 Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled at any relevant time, in that :-

23.1 The requirement for the completion of KIT days before allowing for a return to work – The first respondent's refusal to provide an incremental and flexible return to work plan in C's re engagement back to work had a negative impact on C's health and ultimate capacity to return. This has had a substantial impact on C's future prospects and career path.

23.2 the requirement to return to work on full time basis following a period of sickness absence, in particular in the absence of completing KIT days beforehand - the claimant provides no comment.

23.3 the short timescale allowed for the return of an expression of interest in relation to C's previously held, relabelled position - the first respondent's short timescale imposed whilst the claimant was suffering the effects of a medical procedure during those 48 hours disadvantaged the claimant in being able to make a clear informed decision about her future and without time to question the job description impacted C's ability to perform at interview and secure the same leadership terms and conditions of employment .

23.4 the failure to allow for / present an option for postponement of C's interview - the claimant provides no comment.

23.5 the use of an interview only based selection process as opposed to the usual process for posts of similar level to C's own; i.e. utilising a detailed expression of interest and presentation - the first respondent's failure to provide alternative methods to assess the claimant's capacity to perform the role impacted negatively on the claimant's ability to fully represent her experience and skillset. The claimant was disadvantaged in the scoring, selection and appointment process and unable to score higher in the selection process. The effects of two substantial programmes of chemotherapy from 2015 to 2017 had left the claimant with side effects of brain function often referred to as 'chemo fog'. The first respondent's inability to take account of the claimant's cancer treatment side effects and the interview process prevented the claimant from engaging effectively and retain her leadership career pathway.

23.6 the inclusion and weighting of lines of questioning during the interview process which related to specific events and/or changes which had taken place in the preceding 12 months (i.e. during the Claimant's sickness absence) - the questioning and the first respondent's failure to provide significant information to the claimant led to her inability to secure the Lead position at interview. The weighting and line of questioning impacted negatively on the claimant's performance at interview and this did not fully reflect her skillset? The claimant was unable to provide breadth and depth to her answers and was unaware of the changed context and information required to answer fully and therefore retain her leadership role.

23.7 the continued failure to deal with the claimant's grievance submitted on 5th October 2018 and 23rd November 2018 - the failure resulted in significant financial distress. The failure resulted in significant damage to the relationship and trust with the first respondent which placed the claimant at a disadvantage in moving forward with the first respondent. The claimant felt isolated and began

to suffer from depression, anxiety and mental health challenges which have continued to date.

23.8 The failure to include the claimant in correspondence relating to the changes in management within the first respondent's organisation - the first respondent's failure regarding line management changes and the reasons for these caused the claimant distress and significant mental health difficulties. the claimant experienced an increasing sense of isolation and became very withdrawn. The failure to inform the claimant of the change to Suzanne Edwards in March 2020 was also substantially disadvantageous as it was the start of the pandemic and the claimant was further isolated and unable to engage in any return to work. this has negatively impacted on C's future career prospects.

23.9 The failure to include the Claimant in ongoing restructures within the first respondent's organisation - the failure to enable the claimant to engage fully in the planning and sharing of the direction of travel for proposals in 2018 was exacerbated by the lack good faith shown when the claimant was not supported during the consultation and feedback process for 2018 restructure. The claimant was not able to acquire the information or knowledge the claimant needed to retain her career pathway on the leadership scale. The lack of communication, delays and being excluded from access to key documents in the 2020 restructure caused the claimant continued distress and mental health challenges. This has also had a negative impact on the claimant's health and the health of the claimant's long-term partner and family members.

23.10 The failure to provide the claimant with a suitable device to enable the claimant to actively participate in work related meetings - trying to stay connected to formal meetings was impossible for the claimant and frustrating. The claimant was not able to engage effectively in formal processes and this led to further physical, emotional and mental health difficulties

23.11 The failure to provide the claimant with a suitable device to facilitate and thereafter provide access to R1's Intranet IT systems - the lack of consistent access to the intranet resulted in the claimant not being able to receive staff updates or read about what was going on in the workplace, the claimant was unable to remain connected to changes or became conversant with ongoing developments at work. The Claimant couldn't access key documents which placed her at a disadvantage in communicating effectively in the grievance, appeal and dismissal processes.

24 If so, did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at any such disadvantage?

25 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant but it is helpful to know what steps the claimant alleges should have been taken and she identifies the following:-

25.1 allowing for a phased return to work by the claimant and foregoing the requirement for the claimant to participate in KIT days;

25.2 allowing for a phased return to work having heeded medical advice on the same;

25.3 providing additional time for the claimant to submit an expression of interest and having set clear expectations for the same from the outset;

25.4 allow for the postponement of the interview to ensure that the claimant was fit to attend and able to properly engage in the process and/or present an alternative option for participation in the selection process i.e. written submissions;

25.5 Utilise alternative selection methods commonly adopted by the first respondent i.e. relying on a detailed expression of interest and presentation, both of which could be prepared in advance or, given the claimant's history in the same/similar role the removal of the competitive process in its entirety;

25.6 Adopting an alternative line of questioning for the claimant, thereby removing the requirement for knowledge of specific events and/or changes which had taken place in the preceding 12 months; and

25.7 Dealing expeditiously with the claimant's grievance;

25.8 Including the claimant in correspondence relating to the changes in management within the first respondent's organisation.

25.9 Notifying the claimant about ongoing restructures within first respondent's organisation;

25.10 Providing the claimant with a suitable device to enable her to actively participate in work related meetings;

25.11 Providing the claimant with access to first respondent's Intranet IT systems.

26 Taking into account the matters above, did first respondent fail to take such steps as were reasonable to have to take to avoid the disadvantages?

I. Unfair Dismissal

27 Has the first respondent shown the reason or principal reason for dismissal?

28 Was it a potentially fair reason under section 98 Employment Rights Act 1996?

29 If so, applying the test of fairness in section 98(4), did the first respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

J. Remedy – Issues to be identified if required.

END