EMPLOYMENT TRIBUNALS

Claimant: **Ms J Bryan**

Respondent: **London Borough of Redbridge**

Heard at: **East London Hearing Centre**

On: **24, 25 and 26 January 2023**

Before: **Employment Judge Gardiner**

Members: **Mr Williams**
Mr Webb

Representation

Claimant: In person
Respondent: Mr Theo Lester, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant's unfair dismissal complaint succeeds.

2. The Claimant's unfair dismissal remedy will be assessed on the basis that the Claimant would inevitably have been dismissed four weeks after she was dismissed had a fair process been followed.

3. There is to be no reduction in the Claimant's compensation for contributory conduct under Section 123(6) Employment Rights Act 1996.

4. The remainder of the Claimant's complaints are not well founded and are therefore dismissed.

5. If the parties are unable to agree the remedy due to the Claimant, they are to request a one-day remedy hearing within eight weeks of the date on which this Judgment is sent to the parties.

REASONS

1. The Claimant is currently aged 64. Her date of birth is 20 October 1958. She was employed by the Respondent local authority, latterly as a Housing Options Advisor from 1 November 2000 until she was dismissed with effect from 17 August 2021. Her case is that this was an unfair dismissal and an act of direct age discrimination or harassment related to age. She also makes complaints of direct age discrimination and harassment in relation to particular aspects of the restructuring process that led to the deletion of the role of Housing Options Advisor and her subsequent redundancy. The precise allegations had been identified at a Preliminary Hearing held in July 2022. At the outset of this Final Hearing, the Claimant confirmed that there was no change to the allegations recorded in the written record of the Preliminary Hearing. Those are the allegations we need to determine.

2. We indicated if we found that the dismissal was procedurally unfair, we would go on to decide the chance that the Claimant had been dismissed had a fair procedure been followed. We would also decide the issue of contributory fault. The issue of remedy would be considered, if the Claimant won to any extent, at a subsequent hearing.

3. All allegations are disputed by the Respondent. In addition, at the outset of the hearing the Respondent contended that the Tribunal had no jurisdiction to determine the unfair dismissal claim. This was because, it was argued, the effective date of termination occurred more than three months before the date on which ET1 was presented, even allowing for the pause in the three-month time limit during Early Conciliation. In the light of oral evidence from the Claimant as to her family circumstances following the dismissal, the Respondent accepted that it was not reasonably practicable for the Claimant to have issued proceedings within the primary three- month limitation period. There is therefore no jurisdictional issue in relation to the unfair dismissal claim.

4. The Respondent also argued that the Tribunal does not have jurisdiction to consider the pre-dismissal allegations of age discrimination, although accepted it was just and equitable to extend time in relation to the act of dismissal for the same reason. Given our conclusions on the merits of the age discrimination allegations, we do not need to consider the application of statutory time limits to these allegations further.

5. The hearing was conducted over three days, from 24 January 2023 until 26 January 2023. The Claimant was assisted by Mr Reid as her lay representative. The Respondent was represented by Mr Theo Lester of counsel. The Claimant gave evidence and was cross examined. In addition, she relied on the unsigned witness statements of Denis Watson, Roland Smith and Stephanie Barker. They were not called to give oral evidence and no explanation was given for their absence. That significantly affects the weight we can give to their evidence.

6. The following witnesses confirmed the truth of their witness statements on oath or affirmation and were crossed examined by Mr Reid:

    (1) Julian Ellerby
    (2) Darren Fairclough
    (3) Emeran Saigol
    (4) Nicola Wawrzewski

7. At the conclusion of the evidence, both Mr Lester and Mr Reid made oral closing submissions.

Findings of fact

8. The Claimant started work in November 2000 as a housing advisor, although she had worked on a temporary basis since 1998.

9. She attended a group meeting in 2017 which was conducted by Karen Shaw, the Head of Housing Needs. During this meeting Ms Shaw discussed the age profile of the Housing Needs Service and its potential future impact on the Service, given the large proportion of older employees. The Claimant perceived she was saying that there were too many over 50s at the Respondent. There was subsequently a grievance brought against Karen Shaw in relation to what was said. It was investigated but rejected. Neither the Claimant nor the Respondent has led any witness evidence about this incident, nor referred us to any documents. We are therefore unable to make any further findings of fact.

10. By 2018, the Claimant's job title had become that of Housing Options Advisor. In April 2018, there was a change in the legislative framework which applied to local authorities with responsibilities to house the homeless. This was the result of the enactment of the Homelessness Reduction Act 2017, which came into force in April 2018. The Claimant and others continued to work in their roles for about a year from April 2018, despite the change in the legislative framework.

11. In April 2019, the Respondent published a Business Case to restructure the Housing Needs Service. The report was dated 25 April 2019 and was authored by Darren Fairclough, the Operational Head of Housing Needs. It was distributed to all employed staff on 1 May 2019. The report identified problems with frontline customer contact. In particular it was noted that "contact across the housing needs service was addressed inconsistently with high levels of call abandonments and customer centre walk offs". There was inconsistent advice and poor handoffs. The proposal was to dissolve the existing teams within the Housing Needs Service and replace them with different teams. There were seven key deliverables which it was hoped would be achieved by the restructure. For the Claimant, this meant it was proposed that there would no longer be a Housing Options team. Instead, there would be a Housing Solutions team. The role of Housing Options Advisor would be replaced by the role of Housing Solutions Advisor.

12. The Respondent proposed that there would be formal consultation with staff and Trade Union Representatives, in accordance with the Council's Reorganisation, Redeployment and Redundancy Policy and Procedure. This would take place over 30 days from 1 May 2019 to 30 May 2019. The milestone plan at the end of the report envisaged that the proposals would be finalised by about 24 June 2019, followed by individual consultation meetings. There would be a competitive selection process during July 2019 for roles not deemed to sufficiently match existing roles. The new structure would go live in August 2019.

13. The Respondent had the following additional policies relevant to this reorganisation – Reorganisation, Redeployment & Redundancy Policy (known as the 3Rs Policy); Restructuring & Organisation Change Guidelines, Grievance Procedure, 3Rs Selection Guidelines & Procedure; and the Draft Homelessness Strategy. Of particular relevance to the Claimant's situation was the requirement at paragraph 5.13 of the Restructuring & Organisational Change Guidelines that employees who were absent through ill health or secondment must be kept consistently informed by their managers.

14. On 1 May 2019 there was a group meeting for staff affected by the reorganisation. This was an opportunity to ask questions about the impact of reorganisation. It is unclear whether the Claimant attended the meeting. On 3 May 2019, the Claimant was sent a letter confirming her role was at risk of potential redundancy. The letter told her that there may be a competitive selection procedure requiring her to apply for roles in the new organisational structure.

15. The impact of the restructure was discussed in the Housing Options Team on 3 May 2019. The Claimant was present at this meeting. There was a question about whether the current job descriptions reflected what the team actually did in practice. Mr Fairclough replied that if individual staff were not happy with the accuracy of their job descriptions, then they needed to raise this in their 1-2-1 meetings. Someone asked: "What does the selection process involve?". The answer was "Expressions of Interest, Interview and Assessment".

16. The job description for the role of Housing Solutions Officer was a six-page long document containing detailed bullet points as to the overall role purpose. This included working with customers to develop, update and review Personalised Housing Plans in the light of the Homelessness Reduction Act 2017; as well as working with customers to implement these plans to ensure that homelessness is prevented or relieved through active interventions and pursuit of effective housing options. The job description stated: "where possible, use influencing and problem solving skills to negotiate with householders, landlords and accommodation providers in order to ensure that accommodation remains open to those threatened with homelessness for the maximum period of time". It also said: "where possible, use influence and problem solving skills to negotiate the withdrawal of the threat of homelessness". The job description for the new role contrasted with a much shorter equivalent document for the Housing Options role, which extended to just over two pages.

17. On 28 May 2019, the Claimant had a 1-2-1 meeting with Darren Fairclough. The meeting was attended by her union representative. She was asked whether voluntary redundancy was something she was considering. She replied that she did not like the idea of interviews. This indicates to the Tribunal that she was aware at that point that she may well have to have a competitive interview to secure a role in the new structure. She added that she had not done an interview for "so long nearly 20 years – that is the worry" [B58]. It was suggested by Darren Fairclough that she should try to do some practice with someone – a mock interview. The Claimant did not raise any question about the accuracy of her job description during this meeting.

18. The 3Rs Selection Guidance and Procedure contains a section headed "Matching Roles". It says that there will be a panel comprising an appropriate manager from the service and a manager outside of the service area who would undertake the matching process. The Guidance goes on to set out the criteria to be considered when determining whether the old and new roles are "substantially the same". If there is considered to be a less than substantial match, then employees would be entered into a selection pool, known as ring fencing.

19. The Guidance indicates that competitive interviews are used as part of the selection process for those in the ring-fenced pool of employees. It says that the purpose of the interview is to match the right person to the most appropriate job depending on skills, knowledge and behaviour. It goes on:

> "To determine this, the selection process (competitive interview) will be based on the following factors:
> - Fit against behavioural requirements
> - Skills/knowledge
> - Performance reviews
> - Qualifications ie statutory requirements
> - Interview outcomes
> - Attendance record
> - Active disciplinary/capability record"

20. A matching exercise was undertaken comparing the job description for the existing Housing Options Advisor role with the job description for the new Housing Solutions Officer role. The matching exercise was carried out on 24 June 2019 by one internal manager and one external manager. The outcome was that it was decided that there was no match between the roles. The comments on the form record that whilst "there are similarities between the posts they are not substantially the same." It went on to say:

> "The Housing Solutions Officer is required to work to a higher level than the JD requires for the Housing Options Officer. The JD of the Housing Solutions Officer now has focus on the Homelessness Reduction Act 2017 requirements with new statutory duties of homelessness prevention and relief and the preparation of Personal Housing Plans. None of these

statutory requirements were in existence at the time the Housing Options Officer JD was developed so do not feature in the Housing Options Officer JD. The Homelessness Reduction Act requires more intensive work with customers and requires enhanced skills to do this".

21. The Claimant criticises this matching process, arguing that the two managers assessing the roles were not suitable. She argues that Alex Szantai was a temporary worker, and Jane Franklin was not actually doing the job so she could not actually match the roles.

22. In advance of the competitive interview process an agreement was reached with the trade unions that the assessment would not consider prior performance, management feedback or any other information relevant to the staff. It would be assumed that all staff performance was of a good standard. The Claimant was invited for interview on 30 July 2019. When answering the second question, the Claimant became anxious and exhibited symptoms of asthma. She was struggling to focus on the question. As a result, the interview was suspended. It was reconvened on 11 September 2019. The Claimant scored poorly during the interview. She claims that she was not given sufficient notice of the interview and alleges that some people were given extra help because the Respondent wanted to develop them to be managers.

23. The following day, 12 September 2019 she was given written notice of termination on grounds of redundancy. She was told that if the search for suitable alternative employment was not successful, her last day of service would be 13 December 2019.

24. There were two equality impact assessment prepared during the restructuring process. The first was prepared as part of the design of the restructure process, although the version in the bundle was signed in August 2019. It was therefore carried out before any request and response for voluntary redundancies and before any competitive interviews had been held. It was assumed at that point, if all who were interviewed were successful and there were no applications for voluntary redundancies, that there would be 87 members of staff in the new structure compared to 70 before the changes. The document gave a breakdown by age and recognised that 47.2% of the existing staff were aged 55 or over. It was anticipated that this figure would drop slightly to 46% following the changes.

25. The second equality impact assessment was carried out in November 2019 after all voluntary redundancies had been accepted and following the competitive interviews. It was now anticipated that there would be only 48 employees in the current structure, even though they still hoped to have 87 employees. The large fall in the number of staff is explicable by a large number of voluntary redundancies and also by the numbers who were unsuccessful at competitive interviews. The numbers of voluntary redundancies in the age category 55-64 was 8 and in the category 65+ was 2. The percentage of those aged 55 and over had fallen to 33.3%.

26. The Claimant chose to appeal against her dismissal. The first ground of appeal was that her current job of Housing Options Officer was substantially the same as the role of Housing Solutions Officer. She also referred to her skills and the knowledge and benefits that she would bring to the Housing Solutions Officer role. She claimed that there had been a failure to follow the redeployment policy.

27. Her appeal was listed to heard on the same date as four of her colleagues, who were also appealing. The appeals brought by others were heard first by Mr Emeran Saigol. The appeal meetings overran. As a result, there was insufficient time to hear the Claimant's appeal. The Claimant was told that her appeal meeting would be rescheduled in January 2020. It seems a date was subsequently scheduled for 9 February 2020 but the appeal did not proceed because the Claimant's union representative had not been notified. It was never rescheduled.

28. On 13 December 2019, Mr Saigol received advice from an HR advisor that the two job roles are substantially the same and the appeals should be upheld as a result. He subsequently spoke to Darren Fairclough and to other managers. There are no notes in the bundle recording what was discussed in these meetings.

29. In a letter dated 20 December 2019 Mr Saigol told all of those appealing (including the Claimant) that their appeals had been successful. Mr Saigol said that taking "the job descriptions at face value" he was of the opinion that the old and new roles were not substantially the same.

30. He went on to make the following comment:

> "I do not feel that staff were sufficiently prepared to demonstrate an understanding of what management deemed as an acceptable level of competence in assessing and scoring the respective interviews … I am satisfied that staff were technically competent in their knowledge of this legislation … I do not believe that staff were effectively developed and trained to be able to competently apply that knowledge within the context of an interview process"

31. He decided that all staff affected, including the Claimant "should be temporarily reinstated with immediate effect and taken through a process of training and development". He recommended that the training and development process should span at least 10 weeks "to ensure that there was sufficient time for staff to go through a development process". The ten-week period would begin once the training plan is finalised and shared, with interviews to be held at the end. He asked to see and go through the detail of any prospective training plan to ensure that it met the specific needs.

32. He ended his letter by noting that each of the appellants had specific points of appeal. He said he intended on writing to each of the appellants addressing the specific points raised outside of the two areas he had addressed in the outcome letter.

33. We find that there was no further letter sent to the Claimant in relation to the appeal process. There is no such letter in the bundle. As a result, the proposed January appeal hearing was not held. In evidence, Mr Saigol accepted that this should have been reconvened if the Claimant wanted to pursue the appeal. In particular, if she wanted to persuade him that the old and new roles sufficiently matched so that she could be slotted into the new role without a competitive interview. He could not provide a convincing explanation for why this was not done.

34. Mr Saigol did devise a training and support plan. He envisaged that there would be four courses of training in the following areas – Effective communication; Motivational Interviewing in housing and homeless assessment; Assessment and support planning skills; reflective practice and resilience. This would be in-person training. His plan envisaged that there would be a fortnightly 1-2-1 with the Team Leader to review the progress of training courses and discuss learning, to provide opportunities to discuss any further support needed, and to identify further opportunities to practice techniques if needed.

35. It does not appear that this training and support plan was ever shared with the Claimant**.** It is also unclear to what extent it was shared with Darren Fairclough, although Mr Saigol had discussed the details of this plan with him before it was finalised.

36. Shortly after this had been done, Mr Saigol moved to another role and ceased to have any further ongoing involvement with the Claimant and her place in the restructure.

37. After the Claimant had been reinstated, she performed the Housing Options Adviser role for about two months following her return to work. During this period, we find that the Claimant (as well as the other successful appellants) was invited to attend various training courses provided by Homeless Link and due to take place in March and April 2020. This training was cancelled as a result of the national lockdown imposed to deal with the Covid-19 pandemic.

38. On 7 March 2020, the Claimant started a period of long-term sickness absence for depression, around about the time of her mother's death.

39. On 11 August 2020, whilst the Claimant was on sick leave, Mr Fairclough wrote to the Claimant to provide an "update". He said:

> "As part of the outcome it was agreed that various training courses would be provided to help prepare you for a further interview that was due to take place earlier in the year. As you know you were invited to attend various training courses provided by Homeless Link in March and April. However, due to Covid-19 this had to be cancelled and the Council moved to work on critical service provision only. Regrettably this has resulted in delay in resolving your situation.

> Now that the service has started to move towards a more normalised position we are now able to progress with some of the training courses identified. Following further consultation with external providers we have arranged the following training, delivered remotely with Homeless Link in August.
>
> Trauma Informed Care – 17 August
> Motivational Interviewing – 21 August
> Reflective practice and resilience – 25 August
>
> You will be sent a separate invitation to these training sessions which will include other Housing Needs colleagues. If you are unable to make the training we will make the training materials available to you.
>
> Following completion of the training, your further interview process will be scheduled for the WC 31 August"

40. He warned the Claimant that one potential outcome, if her interview was unsuccessful, was that her employment would end on grounds of redundancy and her last date of employment would be 30 September 2020. This was standard wording which was sent to each of the reinstated employees as well as the Claimant.

41. The email made no reference to the ten weeks of training and development which had been identified by Mr Saigol. Because it was standard wording sent to each of those whose appeals had been allowed, it made no reference to the Claimant's current sick leave. Mr Saigol accepted in evidence that this email was not consistent with the ten-week training plan he had devised as an outcome to the appeal.

42. On 14 August 2020, the Claimant responded, indicating that she could not attend the training as she was still not well. She referred to the unfair and discriminatory way in which she felt that she had been treated. She said it was very concerning to be informed whilst she was on sick leave that she was due to attend a training course, which she considered was not fair or right. She added:

> "It would seem that the London Borough of Redbridge is determined to see me fail and not giving me the proper opportunity to be appointed to a role that I am able to undertake".

43. She asked for clarification that he had fully implemented Mr Saigol's recommendations of training and development spanning at least 10 weeks. She ended by saying that she considered that the treatment she had received was grossly unfair.

44. In his response on 9 September 2020, Mr Fairclough said that the 10-week period was from the date the support and training was agreed, which was back in January,

rather than from the date the training was delivered. Even though the training had already been provided to others by that point, he ended his email in this way:

> "Therefore whilst I note your concerns we do need to proceed with the interview that will take place in the 2nd half of next week. An invite will be sent shortly. As previously if there is any way in which we can support you with the interview process itself, such as the time of day or preference for either face to face or virtual please let us know".

45. In her reply dated 18 September 2020, the Claimant alleged that Mr Fairclough's recent email amounted to harassment. She added "Why can't you give me the opportunity to get well, return to work to do the training and then arrange the interview for me?"

46. It is unclear whether an interview date was diarised and sent to the Claimant. There is no such communication in the bundle of documents. Around this time, there was a change of HR Advisor. The new HR Advisor considered that the Claimant should be referred to Occupational Health.

47. The first Occupational Health report was dated 3 November 2020. It stated that the Claimant was likely to return to work within eight weeks. This would ultimately depend on her symptoms and her response to treatment.

48. On 12 November 2020, the Claimant sent a detailed email to Nicky Fielder. The email complained about the lack of an appeal hearing. It mentioned that she and others in her situation had raised age discrimination as part of her appeal. That related to an alleged comment made by Karen Shaw in one of the centre meetings that "Housing had too many over 50s". This related to the disputed comment made by Karen Shaw in 2017, to which the Tribunal has made reference above. The Claimant said she and others were alleging as part of the appeal that her dismissal was an act of age discrimination. She alleged that Darren Fairclough's conduct in writing to her asking to attend training whilst she was on sick leave before undergoing a further competitive interview was harassment. That section appeared under a heading "Harassment". The following section included the title "Grievance against Deborah Wickham". It noted that she had previously taken a grievance out against Deborah Wickham which she claimed had never been dealt with satisfactorily. She asked how it was that Ms Wickham was on her interview panel for the competitive interview. At the conclusion of the email, she said this:

> "I am also requesting you to ask for an investigation into the unfair treatment and harassment that I have suffered and has been ongoing since last year 2019. I have suffered at the hands of one of your managers and can no longer tolerate this unreasonable and unfair treatment"

49. Although this email was not headed "grievance" it was treated as being a formal grievance. Brian Casson prepared a detailed investigation report dated 16 February 2021 running to thirty- six pages. This report was to be considered by a Hearing Officer who would then decide whether to uphold or dismiss the Claimant's

grievance. Manjeet Gill decided to reject the grievance in an outcome letter dated 6 April 2021.

50. A follow up Occupational Health report on 31 December 2020 concluded that the Claimant remained unfit for work. The occupational health advisor recommended that the case be closed because her prognosis for the Claimant had worsened. She said that a further referral could be made when there was a positive change in her health status.

51. On 4 March 2021, the Claimant obtained a Fit Note from her GP indicating that she was fit to return to work on a phased return basis. She had a meeting via Teams with Nicola Wawrzewski to discuss her return to work. She returned to work on 8 March 2021 and was re-referred to Occupational Health. In their report dated 10 March 2021 they recommended that the Claimant undergo a phased return to work, gradually building up her hours from 25% to 100% over a period of several weeks. The OH advisor recommended that the competitive interview be scheduled after the phased return to work plan, "as this would benefit her in settling into her role". A stress risk assessment was also recommended. The OH report noted that the Claimant was awaiting counselling for her mental health issues. Whilst the Claimant was apparently well enough to return to work, and felt a lot better than before, the indication given by the report was that she had not fully recovered from her depression.

52. The suggested stress risk assessment was carried out. The Claimant continued to work for three days a week from Monday to Wednesday for several weeks beyond the initial month of her phased return to work, using her accrued annual leave to reduce the total number of weekly hours worked.

53. She returned to work on 8 March 2021. Initially she was on light duties, in that she was not allocated any clients. She received training by video and with written materials. This training took place over three days on 23 March, 24 March and 29 March 2021. After each of the training modules had been undertaken there was a review session with Nicola Wawrzewski. It is clear from the contemporaneous typed notes that the Claimant was struggling with the content of the training. On 23 March she told Ms Wawrzewski that she found all the material confusing and difficult to understand and said that she did not know how to put it into practice. Ms Wawrzewski's impression on that date was that the Claimant had not understood the principle behind motivational interviewing. On 24 March she told her line manager she enjoyed the reflective practice training she had received on that date. She said that she would like support in preparing for the competitive interview. She was told that she should get a friend or family member to do a mock interview to help her with her nerves.

54. On 29 March 2021 she was given training in trauma informed care and found it strange. She did not enjoy this material. She requested more training. She asked for more training on trauma informed care. She again told Ms Wawrzewski how stressful she found the prospect of attending a competitive interview. At that point

she had not yet done a full interview with a client but had done a practice interview with a colleague and asked her questions.

55. On 14 April 2021, the Claimant's six-week phased return to work ended. She continued to work on a three day a week basis taking accrued annual leave to reduce the number of days each week.

56. On 14 April 2021 she received training in time management. The same day she was allocated her first client. She had telephone contact with that client. She was struggling to provide the service required by that client. As a result, she was not allocated any further clients thereafter. Instead, she was put on telephone duty. Even here, there were calls that were not answered by the Claimant and they were complaints that there had been a lack of callbacks.

57. On 16 April 2021 she had training in dealing with persons from abroad.

58. The Claimant had a further 1-2-1 with Ms Wawrzewski on 21 April 2021. It was noted that she had been experiencing difficulties in accessing relevant records on the Respondent's computer systems**.**

59. The Claimant was invited to an interview to be held on 11 May 2021 for the role of Housing Solutions Officer. An assessment was scheduled to start at 9.45am that morning, followed by an interview at 10.30am. The Claimant stated that she first knew of the existence of the interview when she arrived at work on 10 May 2021. We find that she had been sent an invite to the meeting on 11 May 2021 by email on 5 May 2021. This was sent to the Claimant's personal email address. It is unclear when she chose to open and read this email.

60. On 10 May 2021 she was told that she could take the rest of the day to prepare for the interview. She said that she should have been given six months following her return to work to get sufficiently familiar with the role given the extent of her time off work on sick leave. She said that the only option would be to pursue legal action. She declined to attend the interview. She was warned that failure to attend the interview would result in the interview being deemed unsuccessful.

61. On 17 May 2021 she received a notice of dismissal from Karen Shaw, the Head of Housing Needs. The letter stated that if her search for suitable alternative employment was not successful she would be dismissed on 17 August 2021. This was 12 weeks notice after receiving the letter of dismissal. She was offered a right of appeal to Carol Hinvest.

62. On 20 May 2021, the Claimant attended an appeal hearing appealing against the outcome of her grievance. This was the week after the week in which her competitive interview was scheduled. She received an outcome to that grievance appeal on 3 June 2021. The outcome of the grievance appeal was that her grievance was not upheld.

63. On 14 July 2021, an appeal meeting was held to hear her appeal against her dismissal. She attended the appeal meeting. It was held by Julian Ellerby. Mr Ellerby sent the Claimant an outcome letter on 21 July 2021. The letter told her he had decided not to uphold the appeal.

Legal principles

Direct Discrimination

64. Section 13 of the Equality Act 2010 is worded as follows:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

65. The focus is on the mental processes of the person taking the decision in issue. The comparison is with how a person was treated or would have been treated who is in all other respects in the same situation apart from the protected characteristic in issue, which here is age. The Claimant does not allege that there was an actual comparator. Rather she relies on how a hypothetical comparator would have been treated.

66. It is sufficient to establish direct discrimination if part of the reason for the less favourable treatment is age. It not necessary for the treatment to have been influenced the Claimant's own age so long as any age-related considerations form part of the mental processes of the decision maker. Here, the Respondent is not seeking to rely on Section 13(2) to show that any discrimination was justified. Rather its position is that no part of the reason for any of the decisions which are challenged in these proceedings was influenced by considerations of age.

Harassment related to age

67. So far as is material, section 26 of the Equality Act 2010 is worded as follows:

> (1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related 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.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

68. In relation to a claim for harassment under Section 26, it is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

> "7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.
>
> 7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not meant that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

69. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).

70. In assessing whether the conduct met the proscribed threshold, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said:

> "Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Burden of proof

71. Sections 136(2) and (3) of the Equality Act 2010 are worded as follows:

> (2) If there are facts from which the Court could decide in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred;
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

72. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32).

73. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that her treatment was in part the result of his nationality.

74. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). To shift the burden of proof a Claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between her disability and her treatment, in the absence of a non-discriminatory explanation.

75. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the Claimant's treatment.

Unfair dismissal

76. The Tribunal must first decide on the reason or the principal reason for the Claimant's dismissal. Next it must see whether this reason is a potentially fair reason. If it is, then a Tribunal must consider whether the Respondent acted reasonably or unreasonably in treating this reason as a sufficient reason for the Claimant's dismissal. This is because Section 98(4) Employment Rights Act 1996 is worded as follows:

> "…the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

> (b) shall be determined in accordance with equity and the substantial merits of the case."

77. The Tribunal must be careful not to substitute its view of the decision itself and the procedure following in reaching that decision. Rather it is to review the decision and procedure and ask itself whether it fell within the bad of reasonable decisions or procedures which would be taken by a reasonable employer.

78. Redundancy is a potentially fair reason for dismissal. An employer must follow a reasonable procedure when deciding who should stay and who should be dismissed. This requires the use of suitable selection criteria and sufficient information and consultation with affected employees. Where there is a restructuring, it is potentially fair to ask existing employees to engage in a competitive selection procedure to secure a role in the new structure. In *Morgan v Wales Rugby Union* [2011] IRLR 376 HHJ Richardson gave the following guidance:

> "29. There are some redundancy cases, of which this is one, where redundancy arises in consequence of a re-organisation and there are new, different, roles to be filled. The criteria set out in *Williams* did not seek to address the process by which such roles were to be filled.
>
> 30. We shall turn in a moment to the authorities which support this proposition. But it is, we think, an obvious proposition. Where an employer has to decide which employees from a pool of existing employees are to be made redundant, the criteria will reflect a known job, performed by known employees over a period. Where, however, an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward-looking. It is likely to centre upon an assessment of the ability of the individual to perform in the new role. Thus, for example, whereas *Williams* type selection will involve consultation and meeting, appointment to a new role is likely to involve, as it did here, something much more like an interview process. These considerations may well apply with particular force where the new role is at a high level and where it involves promotion.
>
> …
>
> 36. To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)."

ISSUES TO BE DECIDED

79. The issues to be decided were set out in the record of the Preliminary Hearing dated 15 July 2022. In summary, the Claimant alleged that various incidents up to and including her dismissal amounted to harassment related to age. In the alternative she argued that the same incidents amounted to direct age discrimination. The incidents are set out in turn in the Conclusion section below. In addition, she alleged that her dismissal was an unfair dismissal contrary to Section 94 Employment Rights Act 1996.

CONCLUSIONS

Age Discrimination

80. We first deal with the significance of the equality impact assessments carried out at the time of the reorganisation. We do so because the Claimant places significant weight on these documents to support her age discrimination claim. As this is a direct age discrimination complaint or one of harassment related to age, rather than an indirect discrimination claim, the data in these documents is only of potential assistance to the Claimant insofar as it is capable of supporting an inference that the relevant decision makers in relation to each impugned decision were influenced by considerations of age. Properly analysed, we do not consider that they provide any such support.

81. These documents summarise the age profile within the Housing Needs Service before the reorganisation is carried out, and the age profile of remaining staff whilst the reorganisation was in progress. What they show is that older employees formed a substantial part of the total number of employees before the reorganisation; and that the effect of the reorganisation was there was a substantial reduction in the number of older employees remaining. A significant factor in the reduction in the number of older employees in this service area was the number who chose to take voluntary redundancy. This was a total of ten employees aged over 55. These were people who had chosen to leave, rather than those who had failed a competitive interview.

82. By the time of the second equalities impact assessment, the proportion of those aged over 55 as a percentage of all employees within the service was roughly the same as it had been before the reorganisation. But even if it had substantially reduced, this would not be a sufficiently cogent basis for inferring that any of the particular decisions in issue here were tainted by bias against older employees. There needs to be some more direct link between the decision makers and age-related considerations.

Harassment related to age

83. We need to consider whether the incidents alleged to amount to harassment related to age, contrary to Section 26 Equality Act 2010. We consider this before going on to consider direct age discrimination. This is because if we find

harassment, then the same incidents cannot amount to detriments and therefore cannot form the basis of a direct age discrimination claim. We consider each of the individual allegations of harassment in turn, applying the statutory definition of harassment in Section 26.

(a) Refusing the Claimant an appeal hearing

84. We accept that the Claimant was not permitted an appeal hearing against the decision that her role was redundant. She had been verbally told that her appeal hearing was to be rescheduled, and even subsequently given an appeal hearing date in February 2020. This hearing was ineffective because the Claimant's union representative was not notified of the date. No attempt was made to reschedule the appeal hearing. She was the only person not to receive an appeal hearing. There is no evidence that the Claimant pressed for the appeal hearing to be relisted after the proposed date in February 2020.

85. We accept that the failure to hold an appeal hearing was unwanted conduct. She specifically referred to this failure in the lengthy email of 12 November 2020 that was treated as a grievance.

86. We do not accept that this was related to age. There are no facts from which we could infer that at least part of the reason for the treatment was age, so as to shift the burden of proof to the Respondent. We note that the Claimant's witness statement does not indicate any age-related matters that create any potential inference that Mr Saigol was influenced by considerations of age. The Claimant told the Tribunal that others who appealed the dismissal decision were in the same age category as herself. They were granted an appeal hearing.

87. Even if the burden of proof did shift, we accept the non-discriminatory explanation provided by Mr Saigol, namely that there was insufficient time for an appeal hearing in the Claimant's case to take place on the same day as the other appeal hearing, given that the other appeals had overrun. Attempts were made to reconvene the Claimant's appeal, but it could not take place due to the non-availability of the Claimant's union representative. The failure to subsequently reschedule this appeal was an oversight. By February 2020, the Claimant had been reinstated to her role. A plan had been devised to train and support the Claimant and her successful fellow appellants in advance of a competitive interview. It was hoped by Mr Saigol that this plan would enable the individuals to secure a role in the new structure. The only potential additional benefit to the Claimant from a successful appeal in her case was to match her existing role with the new role of Housing Solutions Officer. However, Mr Saigol had already concluded that the two roles were not substantially the same and announced this in his outcome letter of 19 December 2020. From Mr Saigol's point of view, there was limited point in holding a hearing to consider the Claimant's appeal.

88. In any event, we do not find that the denial of an appeal hearing violated the Claimant's dignity or had the purpose or the effect of creating an intimidating,

hostile, degrading, humiliating or offensive environment. The Claimant did not complain about the failure to hold an appeal hearing at the time. She had been reinstated. To that extent, her appeal had been allowed. She did not press for another appeal hearing date to be offered. Whilst she still needed to undergo a competitive interview, she had been promised at least ten weeks of training and support to prepare her for that interview.

89. Therefore, this allegation of harassment related to age fails.

(b) Failing to offer the Claimant training in January 2020

90. We find that the Claimant was not offered training in January 2020. Whilst the appeal outcome letter had promised a ten-week programme of training and support to each of the five individuals appealing their dismissal, the same letter had not promised a start date. As a result, the fact that the Claimant was not offered training in January 2020 was not itself contrary to the appeal outcome letter. Training was originally scheduled for March and April 2020 but postponed due to Covid.

91. We accept that the Claimant wanted training to start shortly after her reinstatement. As this did not happen, we accept that this was unwanted conduct.

92. We do not accept that this was related to age. The Claimant has not proved facts from which the Tribunal could conclude, in the absence of a non-discriminatory explanation, that at least part of the reason was related to the Claimant's age. Again, the Claimant's witness statement is silent on the point; this issue was not put in cross-examination; and no potential basis for an inference was advanced in closing submissions.

93. Even if the burden of proof had transferred to the Respondent, we would have found that the Respondent had discharge the burden. The obvious explanation for the failure to provide training in January 2020 was that the Respondent had not promised to start the training within a particular timescale. Appropriate training had to be identified and sourced. We have found that it was initially hoped that the training could take place in March and April 2020 but this was postponed because of Covid.

94. In any event, we do not find that the failure to provide training in January 2020 violated the Claimant's dignity or had the purpose or effect of creating the proscribed environment defined in Section 26(1)(b)(ii). There is no evidence that the Claimant complained about the lack of training at any point from when she was reinstated to when she went off sick in March 2021. She was able to continue to work in her existing role of Housing Options Advisor.

95. Therefore, this allegation of harassment related to age fails.

(c) Darren Fairclough asking the Claimant to attend training whilst she was on sick leave; threatening her with dismissal if she did not attend

96. We have found that Darren Fairclough did ask the Claimant to attend training at a point when she was on long term sick leave. Although this request is alleged to have been made in September 2020, we have found the email was sent on 11 August 2020 although there were subsequent emails in September 2020. Throughout this time, the Claimant was on long term sick leave. The email of 11 August 2020 told the Claimant she would have a competitive interview in week commencing 31 August 2020 and if she was unsuccessful her employment would end on grounds of redundancy. It did not threaten her with dismissal if she did not attend the training. Rather it said that if she was unable to make the training, the training materials would be made available to her. However, it was implicit that she would be dismissed if she did not attend the competitive interview.

97. Even after the Claimant replied saying she was not well enough to attend the training, Mr Fairclough still insisted that the process needed to proceed with a competitive interview.

98. We find that this conduct was unwanted. This is clear from her email responses.

99. We find that Mr Fairclough's emails in August and September 2020 did create an intimidating environment for the Claimant. We have regard to her perception as shown by her contemporaneous emails. It was reasonable for it to have that effect on her. Despite being on long term sick leave with mental health symptoms, she was being told she needed to go through a competitive interview in the near future, even if she had not received any training. No reason was given in the email for why it was necessary for the interview to be held according to Mr Fairclough's timescale, and why it could not be delayed until the Claimant was fit enough to return. A change in HR advisor led to a change in approach and an indefinite delay in convening a competitive interview for the Claimant. This change in approach did not have any apparently significant consequences for the Respondent.

100. However, we do not find that the treatment was related to the Claimant's age. The Claimant has not proved any facts from which we could infer that Mr Fairclough's treatment of the Claimant was influenced by considerations of age in the absence of a satisfactory explanation from the Respondent. Mr Fairclough had sent the same email on 11 August 2020 to all those who had previously been promised further training, regardless of their ages. Whilst the contents of Mr Fairclough's further email on 9 September 2020 were specific to the Claimant, that email maintained the same broad timescale for the competitive interviews set out in his earlier email.

101. In any event, we accept Mr Fairclough's non-discriminatory explanation given in evidence. He adopted the stance he did by following the advice of the HR advisor at the time. When the HR advisor changed, so did the advice, and this is what prompted a different approach which involved the Claimant being referred to occupational health.

(d) Treating the Claimant's email of 12 November 2020 as a grievance

102. We have found that the Claimant's email dated 12 November 2020 in which she complained she was harassed by Darren Fairclough was treated as a grievance. We accept it was appropriate for the Respondent to treat this as a grievance given the nature of the issues raised, which was described as harassment, and her request at the end that the contents of the email be considered in an investigation. She did not complain about this email being treated as a formal grievance when the grievance process was started.

103. Therefore, we do not this treatment as unwanted conduct. As a result, it is not necessary for us to consider the further statutory requirements in order to establish harassment related to age.

(e) Failing to support the Claimant following her return to work in March 2021

104. The Claimant was offered a phased return to work in accordance with the occupational health recommendations. She was given light duties and an opportunity to re-orientate herself to the working environment. A detailed stress risk assessment was carried out shortly after her return. She had three review meetings to discuss what she had learned in her training and a further 1-2-1 meeting on 21 April 2021. She was only allocated one client to look after, after she had been back for a month. When she was struggling with this task, she was allocated other potentially easier duties. She was permitted to continue to work on a part time basis after the initial six weeks, by using her annual leave. All in all, we find that the Respondent took reasonable steps to support her given her return after a long period of sickness absence.

105. This support continued for several weeks up to the point where she was summoned to attend a competitive interview. Therefore, the Claimant's criticism is factually misconceived. This allegation therefore fails.

(f) Claimant should have been slotted into any suitably vacant position when she returned from sick leave in March 2021

106. We do not consider that this treatment of the Claimant was required, given the decisions already taken earlier in the re-organisation process. A matching exercise had been carried out comparing the Housing Options Officer role with the Housing Solutions Officer role. It had been decided that the roles were not substantially the same. Although this decision had been challenged by way of appeal by those who had been dismissed, Mr Saigol had rejected their appeal on this ground. This meant that the Respondent had reached a clear and considered view that someone in the Housing Options role should not be slotted into the Housing Solutions role.

107. Therefore, when she returned from long term sickness absence, there was no procedural basis for treating the Claimant any differently from others who had been

performing the Housing Options Officer role. They had not been slotted into the Housing Solutions Officer role. The same approach was properly applied to the Claimant. It was not suggested that the Claimant should have been slotted into any other role.

108. Therefore, this allegation is factually misconceived and therefore fails.

(g) The Claimant was given insufficient notice of the date and time of her competitive interview

109. We have found that the Claimant had six days' notice of the date of her competitive interview for the role of Housing Solutions Officer. Notification was sent to the Claimant's home email address. This was a reasonable step to take to ensure that the Claimant had maximum notice given the potential significance of the competitive interview for her future employment.

110. As this was a work matter, with hindsight, notification should also have been sent to the Claimant's work email address. However, we do not consider that the period of notice actually given by the Respondent was unduly short.

111. Therefore, this allegation is factually misconceived and the allegation fails.

(h) Claimant's dismissal

112. There is no dispute that the Claimant was dismissed and was notified of this in the dismissal letter dated 17 May 2021. She had not attended the competitive interview listed on 11 May 2021. As a result, she was not offered the role of Housing Solutions Officer which was the role to which the interview related.

113. Her dismissal was unwanted treatment.

114. We do not consider, viewed objectively, that it violated her dignity or had the purpose or effect of creating the proscribed environment.

115. We do not consider that the Claimant has proved facts from which it could be inferred that the treatment was related to age. The panel consisted of three individuals who would decide whether to offer the Claimant the role. Although the Claimant had previously made a complaint of age discrimination against Karen Shaw, that complaint was dismissed. We are not persuaded on the evidence before us that there was any merit in the complaint. The existence of a prior unsuccessful complaint of age discrimination against Karen Shaw, without more, is not sufficient to raise an arguable case that the panel considering whether to offer the Claimant the role of Housing Solutions Officer was influenced by the Claimant's age or considerations of age more generally.

116. In any event, even if the burden of proof had transferred to the Respondent, we accept the Respondent's non-discriminatory explanation as set out in the letter of

17 May 2021. The Claimant had not attended the competitive interview for the role of Housing Solutions Officer. As a result, she had not been selected for this role in the new structure. Consistent with the treatment of all others who had failed to secure a role in the new structure through a competitive interview, she was dismissed because her existing role was redundant.

Direct age discrimination

117. The Claimant argues in the alternative that each of the allegations of harassment are acts of direct age discrimination.

118. Where we have found that there was unwanted conduct, we need to consider whether this unwanted conduct was unfavourable treatment because of age. If we have found that the allegation is factually misconceived, or was not unwanted conduct, there is no detriment and therefore there can be no successful direct age discrimination claim.

119. In relation to each allegation the Claimant relies on a hypothetical comparator rather than an actual comparator. This involves a comparison between the treatment received by the Claimant and the treatment that a hypothetical comparator would have received. As set out in the list of issues, the comparison is with the treatment of an equivalent employee who was under the age of 60.

120. We repeat the same exercise in relation to the application of the burden of proof for each of those factual allegations held to be unwanted conduct. For the same reasons we do not consider that the claimant has proved facts from which an inference of age discrimination could be drawn in the absence of a non-discriminatory explanation. Furthermore, we have accepted the non-discriminatory explanations for the treatment advanced by the Respondent.

121. The direct age discrimination allegations therefore fail.

Unfair dismissal

122. We accept that the reason for the Claimant's dismissal was redundancy. Her role of Housing Options Officer was being deleted as part of the reorganisation of the business needs team. She had not succeeded in obtaining the role of Housing Solutions Officer because she had chosen not to attend the scheduled competitive interview.

123. We do not consider that the consultation with the Claimant was inadequate. She had been sent the Business Plan setting out the rationale for the restructure on 1 May 2019. Two days later, on 3 May 2019, she was sent a letter warning her that her role was at risk of redundancy and that she may need to attend a competitive interview for a role in the new structure. The restructure was discussed at a Team Meeting on 3 May 2019 and at a 1-2-1 meeting with Mr Fairclough on 28 May 2019. At the latter meeting, she was accompanied by her trade union representative. In

addition, there was collective consultation with the Claimant's union. This included discussion and agreement about the process whereby employees would be considered for roles in the new organisational structure. We consider that the extent of the consultation carried out was within the band of reasonable approaches to take to consultation.

124. We consider that the selection criteria adopted were within the band of reasonable approached to take to select those who should be in the role of Housing Solutions Officers. In circumstances where new roles are created as part of a restructure, requiring an employer to be confident that employees meet the requirements of those roles, it is generally reasonable for an employer to require existing employees to apply for new roles through a competitive interview. Here it had been agreed with the trade unions that selection for new roles, in circumstances where there was not a sufficient match to existing roles to required slotting in, should focus on employee's abilities to demonstrate the required skills at an interview. To that end, it was agreed that the Respondent would not distinguish between employees on the basis of how they had performed in the past. In that sense, a level playing field was created for all candidates.

125. The Claimant objects to the composition of the panel that was to consider whether she was to be offered a role in the new structure. In particular she objects to the presence of Karen Shaw on the panel given that she had previously brought a grievance against her alleging age discrimination. We do not consider that it was outwith the band of reasonable procedures for Karen Shaw to be on the panel. She was the Head of Housing Needs. In that role she headed up the section in which the new role was placed. The grievance against her had been rejected and this related to events several years earlier. She had not objected to Karen Shaw being on the competitive interview panel when she was first interviewed for the role of Housing Solutions Officer in 2019. She had not objected to her being on the selection panel on 11 May 2020 in advance of the start of the interview. In any event, the decision to dismiss the Claimant on grounds of redundancy was inevitable when she did not attend the interview for the role.

126. The Claimant argues that her dismissal was procedurally unfair in several respects, which we deal with in turn.

127. Firstly, the Claimant argues that the Respondent did not follow the required procedure in the 3Rs policy. It is rather unclear in what respect it is argued this was the case. However, we do not accept that it was outside the band of reasonable procedures to use one interview to select candidates for several potential new roles in the new organisational structure. In any event, the Claimant was only applying for the role of Housing Solutions Officer. Nor given the large number of candidates who needed to go through a competitive interview process was it outside the band of reasonable procedures to have candidates selected by one of two different interview panels. The same questions were asked of candidates by both panels and their answers were scored against the same model answers.

128. Secondly, the Claimant argues it was unfair not to provide her with the training necessary for her to undertake the new role, so that she could have been slotted into the new role without a competitive interview. We do not consider it was outside the band of reasonable procedures to decide that there was no sufficient match with an existing role and instead to require the Claimant to undergo a competitive interview. A reasonable employer, based on the new legislation and the proposals set out in the Business Plan, was entitled to regard the roles of Housing Options Officer and Housing Solutions Officer as different. We accept the evidence of the Respondent that the emphasis of the new role was on taking a holistic approach to the circumstances of each of their clients. It involved building relationships and winning their trust in order to help them make better choices and so reduce the risk that they would become homeless or maximise the chances that new accommodation offered would be sustainable. As such, it required a new skillset that was not necessarily present to a sufficient extent amongst those in the Housing Options Officer role.

129. Thirdly, the Claimant's argues that the Respondent's approach to redeployment fell outside the band of reasonable responses. We disagree. Those who had not been successful in their competitive interviews, including the Claimant, were considered for redeployment. However, it was necessary for the Claimant to express an interest in alternative roles within the council. She failed to do so. She could access a list of internal vacancies, such as the role of Support and Resettlement Officer. We accept that this was the only potentially suitable vacancy that was available in the Respondent's employment. She could have applied for this but chose not to do so.

130. Next, we consider whether the training offered to the Claimant following her return to work on 8 March 2021 was compatible with the training offered in the appeal outcome letter dated 19 December 2019 and the subsequent training plan. The Respondent recognises that it was not the same, although argues that circumstances had changed by the time of the Claimant's return to work. The training plan had been devised by Mr Saigol after a careful analysis of the particular training that it was hoped might enable candidates to succeed at a competitive interview for the Housing Solutions Officer role.

131. The training offered was not the same in the following respects. Firstly, the entire period from the start of the Claimant's return to work on 8 March 2021 to the invitation letter inviting her to a competitive interview was approximately eight weeks. It was not a period of at least ten weeks for training as Mr Saigol had envisaged. Secondly, the training plan envisaged that the training sessions would be spread out through the ten-week period, with the Claimant having the opportunity to practice and reflect on what she was being taught at fortnightly 1-2-1s. Instead, she was asked to undergo remote training on three days all carried out within a six calendar day period. Although each was followed by a review session with her line manager and there was a further 1-2-1 on 21 April 2021, there was not the opportunity to practice the skills that were being communicated.

132. We recognise that a failure to offer training in the particular way Mr Saigol envisaged before a competitive interview was scheduled does not necessarily render the procedure unfair. The period or the extent of the training originally envisaged may have been unnecessary or there may be good reason why providing training in this way was no longer practical. Again, the touchstone is whether the failure to do so was outside the band of reasonable responses, such that no reasonable employer would have failed to have provided this training with the particular requirements envisaged.

133. We consider that the failure to adhere to the promised training here did take the Respondent's procedure outside the band of reasonable responses. Firstly, what was envisaged by the new role required a different approach to clients. The training necessary for this new approach had been carefully considered by Mr Saigol. Neither he nor other witnesses from the Respondent suggested this type of training was no longer necessary by the time of the Claimant's return from sick leave. Secondly, the very basis on which the Claimant (and four of her colleagues) had been reinstated was that she had not been provided with a fair opportunity to demonstrate she had the skills required for the new role. Mr Saigol had promised her she would receive at least ten weeks of training. Thirdly, although the Claimant's training had started around fifteen months after the original training proposal had been made, this delay was not a basis for truncating the total training time offered to the Claimant. No good reason has been provided for why this should be the case or why it was necessary to convene a competitive interview as soon as it was. In fact, the length of the Claimant's absence from work and her return to work on a phased basis were reasons why it was important to provide at least what had been promised. She returned on light duties only working three days a week. It had been envisaged that employees receiving the training would be working full time and would embed the training in their working practices over that ten week period. The Claimant did not take on a client until about five weeks after her return. This was over two weeks after the last of the three training sessions, which themselves took place within a six calendar day period. As a result, she had very limited opportunities to practice and reflect on how she could implement the techniques taught in the training. We recognise that the nature of the training provided may have evolved in the light of the Covid-19 pandemic. The training originally proposed, pre pandemic, is likely to have been in person rather than the remote training the Claimant received. We recognise too that the Claimant herself struggled with this training and found it difficult. However, these factors do not justify holding the competitive interview as soon as the Respondent did, without further engagement with appropriate training.

134. Therefore, we find that the Claimant's dismissal was procedurally unfair for failing to follow the training and support plan envisaged following the Claimant's successful appeal.

What would have happened if a fair procedure had taken place?

135. We find that an employer acting fairly would have permitted the Claimant at least twelve weeks following her return to engage in the promised training and support before inviting her to a competitive interview. This period reflects the fact that the Claimant initially returned to work following sick leave on light duties, gradually building up her hours over a period of six weeks. The proposal that the training should take place over at least ten weeks assumed that employees were working full time and were fully up to speed with their existing duties. That is why a reasonable employer would have allowed the Claimant an additional period over and above ten weeks.

136. Therefore, the Claimant's competitive interview should have been delayed by four weeks beyond when it was.

137. We have carefully considered what would have happened in relation to a competitive interview had the Claimant been offered a further period of four weeks. We have had regard to the Claimant's actual responses to the training that was provided. Our conclusion is that the Claimant would inevitably have not attended such an interview even at that later point in time. We have had regard to the Claimant's state of health as set out in the most recent occupational health report. We have also had regard to the Claimant's engagement with the training that took place on 23, 24 and 29 March 2021. She was very nervous about the prospect of a competitive interview, given what had happened in the competitive interviews previously. Her susceptibility to stress was confirmed by the stress risk assessment. We find that the Claimant would have maintained her view that she did not need to apply for a competitive interview because she ought to have been slotted into a new role.

138. The result, so far as the Claimant's unfair dismissal claim is concerned, is that the Claimant would have inevitably been dismissed four weeks later than she was.

Should there be a reduction for contributory conduct?

139. We have reminded ourselves that the test for deciding whether to make a reduction for contributory conduct is whether the Claimant's conduct was morally blameworthy. We do not consider that it was. We have considered the best contemporaneous evidence about the Claimant's state of health as evidenced by the occupational health reports. The most recent occupational health report suggests that there were lingering symptoms of depression even if the Claimant is judged to be fit for work. This is confirmed by the reference in the occupational health report to her awaiting counselling. In that context, we do not criticise the Claimant for finding it hard to engage with online and written training, particularly when the format and much of the content of the training would have been new to her. By that point, she had not yet been allocated any clients to provide a practical context to practice the skills taught. She had the prospect of a competitive interview in the near future which would have made the training all the more stressful for her. Furthermore, we do not consider that the Claimant was morally culpable for failing to attend the competitive interview in circumstances where she had not been

provided with the extent and duration of the training she had previously been promised.

140. We therefore make no reduction for contributory conduct under Section 123(6) Employment Rights Act 1996.

Remedy hearing

141. We informed the parties at the outset of the Final Hearing that we would not consider the issue of remedy. If the Claimant was successful, this would be decided at a future hearing. In the light of our findings on what would have happened in any event, we hope that the parties will be able to agree the appropriate remedy without the need for a remedy hearing to be listed. If the Claimant has already received a redundancy payment, she may not be entitled to any basic award. The compensatory award is likely to be limited to a period of four weeks loss of earnings, and any impact on the Claimant's pension as a result of this slightly shorter period of service.

142. The parties are asked to contact the Tribunal within eight weeks of the date on which this judgment is sent to the parties either to confirm that settlement has been reached or to request a remedy hearing.

Employment Judge Gardiner
Dated: 13 February 2023