EMPLOYMENT TRIBUNALS

Claimant: **Mrs Serona Rodrigues**

Respondent: **London Borough of Waltham Forest**

Heard at: **East London Hearing Centre**

On: **9, 10, 11, 12 July 2024 and 1 October 2024 and (in chambers) 2 and 3 October 2024**

Before: **Employment Judge B Elgot**

Members: **Mr L O'Callaghan**
Mr K Rose

Representation:
Claimant: Mr R Downey, counsel
Respondent: Mr D Gray Jones, counsel

The Tribunal gives judgment as follows:-

JUDGMENT

1. **The complaint of unfair dismissal does not succeed and is DISMISSED.**

2. **The claim for a statutory redundancy payment under section 135 Employment Rights Act 1996 SUCCEEDS and the Respondent is ordered to pay £3426.00 within 28 days**

3. **The complaint of direct race discrimination under section 13 Equality Act 2010 does not succeed and is DISMISSED**

4. **The claim of victimisation under section 27 Equality Act 2010 succeeds in part and a Remedy Hearing of three hours' duration will be listed to determine the remedy to which the Claimant is entitled.**

REASONS

1 The Claimant brings claims of unfair dismissal and for a statutory redundancy payment under section 135 Employment Rights Act 1996 ('the 1996 Act'). She also complains of direct race discrimination under section 13 Equality Act 2010 ('the 2010 Act') and victimisation under section 27 of the 2010 Act.

Her ET1 Claim was lodged with the Tribunal on 22 September 2022 following a period of early conciliation with ACAS from 13 July to 23 August 2022. Thus, the parties are agreed that claims arising from any events occurring prior to 14 April 2022 are prima facie out of time. We deal with the question of time limits below.

2. Witnesses and Documents

2.1 The Claimant gave evidence on her own behalf and wished to call a witness named Ms Fatima Silman who is now resident in Dubai. We established that Dubai does not permit the giving of evidence to courts and tribunals outside that state's jurisdiction and hence it was not possible to hear from Ms Silman by video or using any other type of media. Ms Silman is an Indian woman who worked with the Claimant as a Programme Manager from 2018 to 2022 and thereafter until 2024 under the same line management. We read her signed written statement.

2.2 The Respondent's witnesses were Ms Caroline Valentine (CV) who is now Head of Skills in the Adult Learning Service (ALS) of the Respondent and was previously, prior to 2021, the Head of Quality and Curriculum. She was the senior manager of the Claimant. Ms Valentine was also originally the Claimant's direct line manager prior to a minor restructure which substituted Ms Sindi Hearn (then Senior Programme Manager for Community Learning) as the Claimant's immediate line manager in March 2020.

Ms Valentine, together with Mr Alan Ollier-Thompson (CV's immediate senior manager), devised and implemented the later detailed proposals for a significant reorganisation of ALS beginning in January/ February 2022, which we describe below.

2.3 The second Respondent's witness was Ms Khalida Uddin, Human Resources (HR) People Partner who provided HR support in relation to the restructure of ALS from early 2022 onwards. Ms Uddin identifies as Asian, of Bangladeshi heritage.

2.4 Ms Iona McCardle was the third Respondent's witness. At the relevant time she was Head of Employment and Opportunities which was a division of a wider umbrella department called Employment, Business and Skills (EBS) under which the Claimant's team (ALS) also sat.

Ms McCardle heard the Appeal, using the Teams video facility on 8 June 2022, made by the Claimant against the result of the individual and collective redundancy consultation process under the Respondent's Managing Change Policy (MC). The note of the meeting which is at pages 575-585 of the agreed bundle incorrectly refers to this meeting taking place under the Fairness at Work Policy. Ms Mc Cardle confirmed in paragraph 5 of her witness statement that this is not the procedure under which she conducted a hearing of the Claimant's appeal. The MC outcome authored by Ms McCardle is dated 16 June 2022 and can be found at pages 671-676.

2.5 Ms Maureen Branch Davis was the fourth Respondent's witness. She states her ethnic group to be Black British with Caribbean heritage. She is the Head of the Business and Sector Growth Team and was not involved in the restructure of ALS or any of the other events cited in the Claimant's grievance dated 31 March 2022 which is at pages 329-337 of the bundle under a different policy called Fairness at Work (FAW). Ms Branch Davis investigated the FAW grievance and gave the outcome on 15 June 2022 under cover of the email with 14 attachments on pages 590-670.

2.6 Thus, in mid-June 2022 the Claimant received, within a day or two, the outcomes of her complaint under the FAW Policy and of her appeal under the MC Policy. At the same time she was participating in her second individual redundancy consultation meeting (ICM) on 15 June 2022 with Mr Ollier Thompson (pages 680-682 contain his notes) who did not give oral evidence or submit to cross examination; he is absent long term from work with illness.

2.7 Finally, we heard from Mr Craig Egglestone, the Respondent's Director of Capital Strategy and Portfolio Management who works in a completely different department from the Claimant and her colleagues and managers.

He eventually conducted the complex task of hearing a composite appeal in a meeting on 10 August 2022 at which he dealt with;

i) the Claimant's appeal against the outcome of her FAW grievance

ii) her separate victimisation complaint '*based on the protected characteristic of race'* dated 29 July 2022 contained in an email on pages 742-743.

iii) a review of the outcome of the MC Appeal adjudicated upon by Ms Branch Davis.

The composite response was sent by Mr Egglestone to the Claimant in a letter dated 18 August 2022 (pages 788-797) by which time the Claimant's employment had ended on 20 July 2022.

2.8 The Respondent obtained a signed written witness statement from Mr Alan Ollier-Thompson, Strategic Head of Employment and Skills in the ALS, which we read.

2.9 We explained to the parties that less weight can be given to the evidence contained in a written witness statement such as those provided by Ms Silman and Mr Ollier-Thompson when the witness cannot be challenged or cross examined in the proceedings.

2.10 There was an agreed bundle of documents in both paper and digital format consisting of 860 pages in two volumes.

2.11 It was not possible because of a lack of recording equipment, to record the proceedings on Day 2, 10th July 2024.

2.12 We had the benefit of submissions in writing from both counsel to which each of them spoke and answered questions in person on Day 5, 1 October 2024.

3. 3.1 The ET1 Claim lodged on 22 September 2022 has never been amended and stands as originally pleaded; there has been no application to amend. The Claimant has had some legal training and education. She has a first degree in Law and History and a postgraduate diploma from the College of Law awarded in 1997/8. She said in evidence that she defines herself as a lay person '*on the street'* but she agreed that she is aware of the time limits in the Employment Tribunal.

3.2 This information is relevant to her claims of direct race discrimination relating to incidents and events which occurred in April/May 2017 when the Claimant was unsuccessful in her application for the post of Senior Programme Manager (SPM) which job was instead given to Anna Ritchie, and in mid-March 2020 when the SPM Sindi Hearn was made the Claimant's line manager, and thirdly on 7 February 2022 when the Claimant , according to paragraph 3.3 of the List of Issues '*had a redundancy consultation'*.

Each of those matters set out at paragraphs 3.1-3.3 of the List of Issues (LOI) are out of time and we are required to determine whether all or any of those incidents are alleged acts of victimisation constituting conduct extending over a period such that the conduct can be treated as done at the end of the period, by reference to section 123(3) 2010 Act.

3.3 The Claimant does not specifically plead or submit when the 'end of the period' should be.

We also considered whether the relevant time limit should be extended by such period as we find to be just and equitable (section 123(1)).

4. There is a Case Management Order in these proceedings dated 1 February 2023 made by Employment Judge J S Burns following a video hearing attended by counsel for each party.

5. A List of Issues (LOI) is set out in the Schedule to that Order and this is the document from which we have worked. It supplies the fundamental structure of the case. There was and has been no application for amendment, correction, or

addition to the LOI from either party and, as we state above, there has been no application for amendment of any pleading.

We cannot agree and nor do the appellate authorities support the idea that the LOI is merely a 'management tool' as Mr Downey suggests on behalf of the Claimant. It is a comprehensive list of the questions the Tribunal is asked and required to answer in its findings about the facts in dispute between the parties. It answers those questions by reference to the evidence, both documentary and oral evidence of the witnesses when that evidence is given to the full panel at the final Hearing.

6. The Claimant, however, asked us to revert to additional questions and deal with unlisted issues. For example, at page 14 of the bundle in the Grounds of Claim the Claimant says that one element showing the unfairness of her redundancy dismissal is that , within a short period immediately before the formal redundancy consultation commenced on 11 February 2022 ,CV sent her details of external job vacancies, at pages 121-129, asking her if she was interested in applying. The Claimant states that this action by CV, who was a lead officer in the restructure and redundancy consultations in February 2022, demonstrates *'Caroline showing me her intent by sending the external vacancies*' i.e. that she had already decided to make the Claimant redundant.

No such specific allegation is in the un-contested LOI. We make brief findings of fact about this matter only on the basis that it can, at a stretch, be fitted within the boundaries of the issue at paragraph 2 'If the Claimant was dismissed because of redundancy was the dismissal fair?'.

7. Similarly, at page 16 of the bundle under the heading 'Victimisation and Unfair Dismissal' in the Particulars of Complaint on page 15 the Claimant says that it was a detriment amounting to victimisation that CV shortlisted for the post of Deputy Head of Skills on 21 July 2022 one day after the Claimant's dismissal on 20 July. (In fact, the Claimant was offered an interview which she declined). This is an allegation of victimisation, upon which the Claimant seeks to rely in this case, which is simply not listed anywhere in the LOI and we have made no findings of fact about it.

8. <u>What was the reason for dismissal? Has the Respondent shown that it was for the potentially fair reason of redundancy in s 98 (2) Employment Rights Act 1996?</u>

8.1 The Claimant was employed from 1 August 2017 until her dismissal on 20 July 2022 (four complete years) in the Respondent's Adult Learning Service (ALS) at local government grade PO5 as a Programme Manager (Arts, Crafts, Fashion and Horticulture).

8.2 There was an offer to extend her notice period until 31 August 2022. The relevant letter is at page 727 and is sent not from an individual manager but from the People and Organisational Development Team. The offer of extension was not accepted by the Claimant as she was asked to do and therefore not actioned. Nonetheless, the proposed extension of her employment is not, on its face, the action of an employer determined to end

the Claimant's employment as soon as possible because of her race, as an incident of victimisation, or for any other reason.

8.3 The Claimant identifies as a British Indian woman.

8.4. The ALS provides adult education services and work-based training to residents of the London Borough of Waltham Forest. In early 2022 the service had an academic teaching team of over 100 members of staff working on fractional contracts together with the support staff of whom the Claimant was one. She was one of two Programme Managers together with Ms Silman. There were three Senior Programme Managers (SPM) named Sindi Hearn, Anna Ritchie and a job-share between Loretta Pearce and Elisabeth McGovern. Ms McGovern took voluntary redundancy in April 2022 and Ms Pearce took up her hours.

8.5 At the time of her dismissal the Claimant worked part- time for 27 hours per week arranging courses in her specialist subject areas for grant funded community learning including some vocational qualification courses. At the effective date of termination of her employment her line manager was Sindi Hearn, the SPM who had overall responsibility for Community Learning (CL) and the funding for it. The structure chart at p 177 of the bundle shows Ms Hearn as SPM Community and the Claimant as Programme Manager (PM) Arts, Crafts, Horticulture.

8.6 Ms Hearn together with the Claimant and Ms Ritchie, Ms Silman, Ms Pearce and Ms McGovern were all put at risk of redundancy on 11 February 2022 (as can be seen, for example, from the redundancy consultation letter on page 159; the Claimant's letter is at page 143)

8.7 We are satisfied that in early February 2022 there were detailed proposals for reorganisation in the Employment Business and Skills department of which ALS is part, under the overarching Regeneration, Planning and Delivery Directorate. There is a 19-page Proposal for formal consultation beginning at page 165 which sets out the rationale for reorganisation and an account of the number and description of posts proposed for deletion. This involved over 100 staff including lecturers and managerial staff like the Claimant being exposed to a significant restructure and reorganisation the details of which we have not examined critically because we are not required, or indeed qualified, to analyse or re-make any decisions about the business rationale for most redundancy exercises of this straightforward type.

8.8 What is certain is that the Claimant's post was not the only one proposed for deletion as she contends. Pages 179-181 demonstrate this fact and page 182 lists the New Posts to be created.

8.9 The Claimant was placed at risk of redundancy. The situation is clearly described in paragraphs 23 -25 of Mr Ollier-Thompson's witness statement summarised as, '*the purpose of the reorganisation was to streamline the staffing structure of the Adult Learning service. It was designed to repurpose*

how it worked.' We find Mr Ollier- Thompson's description to be credible and convincing as follows:

'*The Adult Learning Service was a business unit with an academic team and a support services team. We decided that we needed to repurpose the academic team by reducing headcount. We considered that the academic team had too many people working on small fractions of hours to fulfil the timetable, meaning there were many members of staff teaching only a few hours per week. We considered that this meant students were getting less support than they could otherwise get and that line managers were spending a lot of time on supervising teaching staff which was stressful and distracting them from other areas of their jobs. We wanted to reduce the amount of time spent on supervision whilst maintaining its quality.*

One of the proposed changes in the restructure was the deletion of two Programme Manager roles, including the Claimant's, and three Senior Programme Manager roles. The staff in these roles would then be able to apply for four ring-fenced [closed ring fence] Programme Manager roles [later called Curriculum Managers]. The new roles would be more senior than the Programme Manager but not as senior as the Senior Programme Manager roles.

<u>All the staff in the Programme Manager and Senior Programme Managers' roles were placed at risk of redundancy and a redundancy consultation period was commenced in relation to each member of staff</u> [our emphasis].

It is therefore correct that the Claimant was placed at risk of redundancy and that a redundancy consultation was commenced about her role, but the same happened to the other Programme Manager and all the Senior Programme Managers. As there were only <u>four new</u> Programme Manager roles the outcome of the process, if all the staff placed at risk of redundancy applied for ringfenced roles, would be that one person would be dismissed by reason of redundancy unless they applied successfully for and succeeded in getting one of the four PM roles or an alternative role through the redeployment process.'

8.10 The Claimant failed to get one of the four new ringfenced PM or Curriculum Manager roles (she did not apply for one of these posts) and was not redeployed into an alternative role before her effective date of termination on 20 July 2022. Thereafter, she did not attend an interview for the Deputy Head of Skills post (DHOS) which she had previously sought. We find that she was therefore fairly dismissed by reason of redundancy (section 98 (2)(c) Employment Rights Act 1996) in accordance with the business rationale described by this senior witness. We give further reasons for this decision below.

8.11 Our finding of fact that the Claimant did have a redundancy consultation on or around 7 February 2022 but was not singled out or treated in any way less favourably during that process because of her race or for any other reason, because all her fellow PM and SPM colleagues (including the two she names as actual comparators- Loretta Pearce and Anna Ritchie) were involved equally and consistently in the same reorganisation and redundancy

process, means that the Claimant does not succeed in the claim of direct race discrimination set out in paragraph 3.3 of the LOI. She has not shown any evidence from which we could conclude that there was less favourable treatment of her in this respect and has failed to discharge the burden of proof in discrimination cases which can be found at section 136 of the 2010 Act

9. We found it useful to compare the structure charts on pages 177 and 178 of the bundle which show the ALS structure before and after reorganisation.

9.1 On page 177 the Claimant's 'old' role is shown as Programme Manager (Arts, Crafts, Horticulture) in a green box under the line management of the SPM Community who is Sindi Hearn. Anna Ritchie can be seen as SPM English, Maths, Digital, Business & Employability. The other job share SPM for ESOL is Loretta Pearce and Lisa McGovern. The fifth post /sixth person is Fatimah Silman, PM for Beauty/Childcare. CV is at the top as Head of Quality and Curriculum.

9.2 All these PM and SPM posts, contrary to what the Claimant says at paragraph 19 of her witness statement, were at risk of deletion. At the end of the redundancy process, only four out of the five remaining employees (the sixth, Ms McGovern having taken voluntary redundancy) would be given new posts.

9.3 On page 178 there is a purple box showing the four Curriculum Areas over which each of the new Curriculum Managers would assume responsibility. We find that it matters not, as was properly explained to the Claimant in the consultation period, that there is no specific Curriculum Area named 'Arts, Crafts and Horticulture in that purple box. Neither for that matter is there an Area named Beauty and Childcare (Ms Silman's speciality).

9.4 Sindi Hearn (SH) was not a witness in these proceedings but she did give a statement, signed and dated 25 May 2022, on pages 642-643 to Ms Branch-Davis on 16 May 2022 in connection with the FAW investigation, in which she commences by saying that she and the Claimant have a friendship out of work and work well together...*'she has been really supportive to me.*'

SH was the Claimant's line manager since 2020 therefore knowing her work, her skills, and her capabilities well. She says at page 644 that she has supported the Claimant in her leadership and development aspirations and that they have had conversations around job opportunities, mostly internal but occasionally external, which might further the Claimant's career development.

9.5 Therefore, so far as the Claimant's prospects of obtaining one of the four new Curriculum Manager posts is concerned (confusingly these posts are sometimes still called Programme Managers in the documents and by the witnesses), Ms Hearn says *'Serona is in a good position as she has expertise and skills and can go for at least three of the new roles…I was surprised*

when she said she was not going for it'. The Claimant could apply for the Community and Family, the Vocational Courses, and even for English and Maths, Digital, Employability and Business.

The latter curriculum area is the one in which the Claimant had competed for appointment in August 2017 against Anna Ritchie who was eventually appointed as SPM. The Claimant complained at the time and subsequently that she had significantly more experience in this area than Ms Ritchie. In fact, she now makes the case that the appointment of Ms Richie over her was an incident of direct race discrimination. We make findings below about the time limitation which applies to this complaint in paragraph 3.1 of the LOI.

9.6 SH goes on to say that she agrees with the Respondent's rationale for reorganisation.

9.7 SH further comments that there is a '*deputy assistant which was going to be advertised down the line.'* She is referring to the Deputy Head of Skills role (DHOS) and queries why that post was not available to the PMs and SPMs at the time of the initial redundancy consultation. This is a point made by the Claimant i.e. that there was*,' no opportunity for progression for any of us…we spoke about it in that context but never about colour'* to use SH's words. We have made findings about this situation below but do not conclude that it is evidence of unfair dismissal or race discrimination /victimisation.

9.8 Finally, SH was asked whether the Claimant ever spoke to her about feeling discriminated against because of her skin colour or as an Indian woman. SH replies' *No I never heard her say anything around discrimination or anything about being treated unfavourably due to her skin colour. The whole transition of moving to me as her line manager [2020] she felt was unfair and she was vocal about that.'*

9.9 We find that the Claimant knew that she was qualified to apply for and obtain one of the new Curriculum Manager roles in the structure on page 177 and it is incorrect for her to say that only her post on page 178 was 'deleted'. Five posts were deleted and four new opportunities were created in curriculum areas for which the Claimant, with the exception of ESOL (English for Speakers of Other Languages), was qualified to apply. She was not unsuccessful for one of those roles because of an unfair dismissal process and procedure or because of her race; she made her own decision not to apply.

9.10 Ms Valentine describes the 2022 Restructure in a way which we find to be accurate and correct in paragraphs 18-23 of her witness statement and then at paragraphs 28 -33. In paragraph 32 she states '*As a result of the Claimant's failure to apply for the ringfenced Programme Manager role she remained at risk of redundancy'.* Paragraph 42 of CV's statement confirms the same.

9.11 After the Claimant's dismissal on 27 April 2022 with 12 weeks' notice at page 385 of the bundle, she did not apply for the post of Programme Manager (grade PO5) in the closed ring-fenced pool and thereafter assumed the status of a redeployee. There are errors in that letter and it was sent late as we find below, but the core facts remain accurate.

9.12 The answer to the question posed by paragraph 1 in the LOI is that the Claimant was dismissed by reason of redundancy and not for any unfair reason. During the period of redeployment she did not apply for any other jobs except the DHOS post once it was advertised. She was offered an interview for that job but did not attend.

10 Was the dismissal fair under section 98(4) of the 1996 Act ?

We have asked ourselves the question posed by section 98(4) whether, taking into account the size and administrative resources of the Respondent, which is a medium sized local authority in London, and having regard to equity and the substantial merits of the case, the Respondent acted reasonably or unreasonably in treating her redundancy as a sufficient reason for dismissing the Claimant.

10.1 The Claimant received, we find, sufficient warning of her potential redundancy and participated in two individual consultation meetings (ICM) with Mr Ollier-Thompson. On page 134 in an email dated as early as 8 February 2022 he advised the Claimant that the final decisions would be taken not solely by Caroline Valentine but *'numerous colleagues across EBS and HR with senior managers (Stuart and Ian) making final decisions…the consultation document is out this Thursday so do please read it when it is online and do ask questions or make alternative proposals.'* The Claimant was assisted, appropriately advised, and consulted from the beginning of the process.

She had an ICM with Mr Ollier-Thompson (not CV as is recorded on page 327) on 31 March 2022 the nature and purpose of which is explained in a letter to her from CV on page 266. She was accompanied by Mr J Charles who was both a work colleague and a trade union representative although it appears that he was not acting in his union capacity when assisting the Claimant. At that meeting we find that the closed ring fencing for the four Curriculum Manager jobs was clearly explained. The Claimant told Mr Ollier-Thompson that she had '*notified EHRC-intends to raise a grievance'* which notification he acknowledged.

10.2 There was a second ICM on 15 June 2022 (page 680-682) in which Mr Ollier-Thompson told the Claimant that, although the appointments to the new Curriculum Manager posts had now been finalised and the Claimant had declined to apply for one of those jobs, she was still at risk of compulsory redundancy and should take all possible steps to access redeployment opportunities within the Council utilising the HR and other support available to her including information on the Respondent's intranet which is called Forest-hub. He says '*I really wanted to encourage Serona to apply for work at the council especially in view of her breadth of experience…Serona had*

done some fantastic work and developed some excellent programmes.' In other words, we find that the Claimant was sufficiently encouraged and supported to apply for redeployment opportunities as part of the redundancy consultation process. So far as we are informed, she made no applications save for the application for the DHOS role as we describe below. We find this part of the redundancy dismissal process and procedure to have been conducted fairly and reasonably.

10.3 Mr Ollier-Thompson's notes on pages 680-682 do not specifically record that he warned the Claimant that she could not be assimilated to, or ringfenced for, the DHOS role because it was provisionally (and eventually confirmed) at a pay grade more than one grade above her substantive PM role but we accept his witness evidence at paragraph 39 that they discussed this situation and he agreed to let her know as soon as the DHOS role was 'out for advert' so that she could apply in an open competition. In fact, the advert for DHOS went live on 14 June 2022, the Claimant was notified on 15 June and she applied on 20 June 2022 as can be seen from pages 689-690 of the bundle.

10.4 The alternative proposal made by the Claimant during the consultation process. This alternative proposal is set out on page 188-189 under the reference AP5.2022.005 where the Claimant suggests the creation of a new management job (for which she states she is well qualified) to act as '*the link person between Skills (Education and Training) and Employment and Business'.*

The Respondent did not ignore the alternative proposal and it did provide a response albeit in the negative to the Claimant's idea in the final column on pages 188 and 189. CV has also given an explanation for rejection of the Claimant's proposal at paragraphs 26 and 27 of her witness statement but it is unclear whether she gave that explanation to the Claimant at the time.

When the Claimant asked Mr Ollier-Thompson why her suggested role had already been recruited to, as she had been *'notified at a directorate meeting in March 2022',* he explained that this was only an '*internee (sic) doing work experience around links between emp and skills'*

10.5 We do not therefore agree that the Claimant was subjected to the detriment she alleges at paragraph 4.2.1 of the List of Issues. We do not accept the submission made by Mr Downey on behalf of the Claimant at paragraph 55 of his Closing Arguments that her proposal was '*subsequently implemented by the recruitment of a person (Oliver) to fulfil the role suggested by the Claimant.'* There is no evidence to support this argument beyond the Claimant's own assertion which she repeated to Mr Ollier-Thompson who gave a credible alternative explanation.

10.6 The relevant recognised trade unions listed at page 176 were also consulted in the 2022 reorganisation at an early stage and this continued up to and including 9 March 2022.

10.7 There is a 19-page detailed set of Proposals for Formal Consultation starting at page 165 of the bundle (duplicated at page 492) and containing what we find to be the necessary detailed information to properly warn and inform staff. The Claimant herself, at paragraph 16 of her witness statement, recognises that, '*there may have been a requirement for redundancies'* (whilst querying her own selection). At paragraph 20 she acknowledges, '*I was facing redundancy'* (whilst querying the financial reasons for the restructure) and at paragraph 23 she states that her invitation to an individual consultation meeting, '*did suggest that my role would be at risk.'* The Claimant was clearly informed and she herself appreciated the potential compulsory redundancy situation in which she found herself. She was properly warned and consulted as were the relevant trade unions.

Indeed, she sought a statutory redundancy payment in these proceedings.

10.8 Claimant's counsel's submission, which is not pleaded or set out in the in LOI nor as part of the Claimant's written witness statement, that no redundancy situation in February 2022 has been established and that the Respondent has shown no proper rationale for a business reorganisation involving a reduction in the number of PMs and SPMs does not reflect the evidence. It was not an argument made by the Claimant during the consultation process. There were proposals for 105 deleted posts (page 500), a need for much less supervision by the PMs and SPMs of a significantly reduced number of fractional lecturers and there was a need for financial saving. We reiterate that we are satisfied that the Claimant was dismissed for the potentially fair reason of redundancy.

10.9 The letter dated 27 April 2022 giving notice to 4 July 2022 is at page 385 and clearly states '*on the grounds of redundancy*'. The notice period was extended by agreement to 20 July 2022 which was the end of term. The parties are agreed that the effective date of termination is 20 July 2022. The Claimant was absent through sickness from 28 June to 12 July 2022.

10.10 In all these circumstances we are satisfied that the Respondent followed its own policies and procedures and acted reasonably in making the decision to dismiss the Claimant by reason of her redundancy.

11. The Claimant's FAW grievance dated 31 March 2022 was filed in accordance with her prior notification to Mr Ollier-Thompson. It begins on page 330 and identifies the incidents about which she complains.

The making of this grievance is pleaded as a protected act pursuant to section 27 of the 2010 Act as can be seen from paragraph 4.1 of the LOI.

11.1 The content of the FAW grievance demonstrates that, following receipt of a letter dated 14 March 2022 at page 266 of the bundle, the Claimant knew that trade union consultation had ended, that the Director of Regeneration, Growth and Housing (not just CV) had considered and approved the amended new structures which were available to be seen on the Forest-hub

intranet by 18 March 2022, and that the implementation of the reorganisation would proceed. We find that the Claimant thereafter knew the updated detail of the reorganisation proposals and how they would affect her existing role and her potential redundancy and she was able to discuss all those matters at her first ICM with Mr Ollier-Thompson on 31 March 2022 including how the closed ring fence would operate equally for her and her colleagues.

11.2 Surprisingly however, she once again makes the mistaken and inaccurate assertion in her FAW grievance that only her PM post (Arts, Crafts, Horticulture) has been '*permanently deleted… and not recreated in the restructure unlike the other PM posts which puts me at a disadvantage.'* We have already made findings above that this was not the case and that the Claimant was fairly placed in the pool of five PMs and SPMs who would compete equally for the four new Curriculum Manager posts. We refer again to the structure charts on pages 177 and 178 which demonstrate this situation.

11.3 We find the Claimant's evidence unreliable where she states in the FAW grievance that she still believes, in the face of all the information and consultation provided to her, that she had been treated wrongly and/or unfairly on 7 February 2022(when the consultation began) and on 18 March 2022 (when the final proposals were published).

11.4 Thus we find that the Claimant was not treated less favourably than her actual named comparators (Loretta Pearce and Anna Ritchie) because of her race or for any other reason as claimed in paragraphs 3.3 and 3.4 of the LOI. We have not been asked to consider a hypothetical comparator but if we had it would be a person not of Indian heritage but otherwise having the same or a not materially different role, pay grade, status, qualifications, skills, experience and expertise as the Claimant in the ALS field. We find that such a person would have been treated in the same way as the Claimant was in relation to this restructure and redundancy.

11.5 Redundancy selection does not work on the basis that those with outstanding accomplishments, in receipt of awards or who exceed targets are exempt from being placed in the pool . Once the candidates are equally exposed to the redundancy risk then those who have made outstanding contribution, achieving growth, additional funding and demonstrating excellent measurable progress are likely to score higher in assessment and interview during the ringfenced competitive process so long as proper, fair and appropriate evaluation criteria are used. The Claimant did not want to participate in selection from the pool and she therefore voluntarily missed the opportunity to demonstrate her skills and achievements in the ringfenced competition.

11.6 The successful candidates including Fatimah Silman (an Indian woman) were selected on 12 May 2022 as shown in additional document 854-855 although it took almost a month to send them their appointment letters. We note that the race discrimination which Ms Silman describes in her unsigned

written statement is alleged to have occurred after the 2022 reorganisation was completed.

12. Human Resources evidence from Ms K Uddin (KU)

12.1 At paragraph 17 of her witness statement KU confirms that the Claimant told her that she '*wasn't interested in the ringfenced role given her experience and length of service.'* The Claimant agrees that she said this and in her oral evidence she agreed with the suggestion of Respondent's counsel, Mr Gray-Jones that she was taking a risk, which she was willing to take, by declining to go for a new Curriculum Manager job and instead focussing her aspirations and energy on obtaining a different post i.e. a significant promotion to the PO7 graded role of Deputy Head of Skills (DHOS) where she would act as deputy to Caroline Valentine. This role can be seen on the new structure chart on page 178 with a provisional grading (later confirmed) but we find that it was not until 15 June 2022 made available for advertisement or application and appointment.

12.2 We have heard no evidence to suggest that the release of the DHOS role was intentionally delayed so that the Claimant would be '*timed out from applying'* as she claims in her witness statement at paragraph 34. We are satisfied that any delay was caused by the job evaluation procedure in grading this new job.

12.3 The argument made by Mr Downey at paragraph 55 of his submissions that this DHOS role should fairly have been open ring-fenced and made available to all the at-risk PMs and SPMs as an 'opportunity for promotion' at the commencement of the 2022 restructure is not a viable argument because of this timing.

12.4 It would also be in contradiction to the Respondent's HR Policy for Managing Change, a copy of which the Claimant was sent via a link in KU's email of 19 May 2022 on page 437. In that email KU reminds the Claimant of the limits applicable to priority status for redeployees by highlighting the applicable parts of Part 3 of the MC Policy.

The MC Policy starts at page 528 of the bundle, where open ringfencing is defined at page 538 as, '*grouping employees who currently undertake posts of a similar nature to the new posts but where there are significant or material differences'* but which goes on to state that '*whether or not vacant posts should be open ringfenced to specific groups of employees will be decided by the relevant manager in each case'* and provides for even internal applicants to complete a standard application form plus interview/ assessment as the Claimant was later asked to do.

There is no provision for the Claimant simply to be allowed to apply for the DHOS post because she felt she had the '*appropriate qualifications and experience'* as she says in paragraph 28 of her witness statement.

We are satisfied that it was a fair decision for the Respondent to decide that both internal and external candidates should be invited to apply for the new DHOS post in order to attract a broad range of suitable candidates to an important senior post, The MC policy permits this discretion where it states *'The selection process will be used to determine which employee will be appointed on merit to the new post on the basis of best meeting the needs of the Council in the provision of an effective and efficient service to the public.'* We find that the said discretion was not exercised against the Claimant or her colleagues in a perverse, unreasonable or discriminatory way.

12.5 The Claimant names CV as a comparator in paragraph 3.5 of the LOI and when this was queried she said that Ms Valentine had '*jumped*' four grades when moving from Head of Quality and Apprenticeships to Head of Quality and Curriculum (later re-titled Head of Skills with no change in grade) but gave no further evidence about this allegation. Claimant's counsel does not address this point in submissions. We have looked at page 445 of the bundle which shows the management response in brown type underneath the text of the Claimant's MC Appeal heard on 8 June 2022 with an outcome letter issued by Ms McCardle on 16 June at page 671. That text, which we have no reason to disbelieve, states that when CV was appointed as Head of Quality and Curriculum she applied, pre pandemic, for the advertised position on Jobs Go Public, was interviewed and appointed by an interview panel including an independent representative from *'sister service '*in Newham ALS, '*it was a unanimous decision to appoint.'* This is a credible account of CV undergoing and participating in the same or a very similar recruitment exercise to which the Claimant was opposed when it came to her interest in becoming DHOS.

We also make a clear finding that when CV became Head of Skills she remained on the same pay grade and contractual terms and had the same status but her job title was re-named from Head of Quality and Curriculum. The title of Head of Skills was agreed to be more consistent with the job titles of her fellow Heads of Service and of her immediate boss, Mr Ollier-Thompson, who was Strategic Head of Employment and Skills.

12.6 Ms Uddin gave us clear evidence about the fact that the Claimant received late formal notification, in a letter dated 27 April 2022 on page 385, that she was in a closed ring-fenced selection pool for the post of Programme Manager/Curriculum Manager and that she should submit an application form for the ring-fenced post. Unfortunately, the letter states the deadline for submission of the application forms as 19th April 2022, which is 8 calendar days earlier than the date of the letter.

The Claimant does not contend in the LOI (said by her at paragraph 9 of her witness statement to be '*an accurate summary of the claims pursued'*) that this mistake is an act of direct race discrimination or a detriment to which she was subjected because she did a protected act (victimisation).

12.7 We accept KU's evidence that the late despatch of this letter was an administrative error and that there had been similar delays in sending out letters to other employees not in her pool. The Claimant was not singled out. However, it is true to say that the other PMs and SPMs received their identical letters on 12 April 2022 and had a week in which to submit their applications to Ms Sharron Tassell in HR.

12.8 However, we find that the Claimant certainly did receive an email from Ms Tassell on 5 April 2022 which is on page 427 where she is shown as the first name in the list of addressees. In that email Ms Tassell (who was not a witness) attaches the advert, role profile and '*short'* application form for the role of the new Programme/Curriculum Managers. The Claimant acknowledges in her email to KU of 11 May 2022 on page 430 that she saw that correspondence from Ms Tassell. We find it more likely than not that Claimant also knew of date of closure for applications. She chose not to apply because she did not want one of the ring-fenced jobs.

At page 573 in her MC Appeal the Claimant refers to the deadline of 19 April 2022 and says that it was communicated to her on 5 April 2022 but complains that '*no options, such as suitable alternatives, redeployment or promotion were laid out for me'.* We have made relevant findings about those complaints.

12.9 For completeness we record that the letter of 27 April 2022 is one of several items of correspondence sent to the Claimant during the redundancy consultation process which states on page 387 that, '*employees who decline an offer to be assimilated, appointed to a ring fenced post or redeployed into suitable alternative employment do not have a right to a redundancy payment.*

We have made findings about the meaning of this paragraph in the section below headed 'Redundancy Payment.'

12.10 The Claimant was also given a chance to put in a late application as is confirmed in paragraph 17 of KU's statement, which is un-challenged evidence, where she says that she telephoned the Claimant to offer to ask 'the Service' if they would consider a late application. The Claimant said she was not interested in the ringfenced role given her experience and length of service and so KU took no further action.

12.11 Once the Claimant declined to apply or be interviewed for the Curriculum Manager role she assumed the status of a redeployee looking, with assistance and support from HR, for redeployment until her termination date of 20 July 2022. In the relevant section of the Managing Change Policy on page 541 it is made clear '*Employees who are unsuccessful in a closed ring fence will continue to be redeployees and at risk of redundancy.'* This also applies to those who choose not to participate in the closed ring fence opportunity.

13. Deputy Head of Skills

13.1 This is the job the Claimant wanted as a promotion and which she felt she deserved because of her contribution to the Respondent's ALS.

13.2 Her MC Appeal was dated 3 May 2022, by which time the Claimant was a redeployee under the MC Policy. The MC Appeal is an appeal against the original restructure decision. The document begins at page 414 in the bundle. The main text of the Management Response is in brown /orange text beginning on page 445

13.3 The main platform of the MC Appeal is that the Claimant contends that she should have been *'assimilated/offered the post of Deputy Head of Skills as a suitable alternative employment post at Waltham Forest ALS'*

It is unclear whether she contends that she should have been offered the DHOS role instead of, or as well as, the new Curriculum Manager closed ring fenced opportunity.

The Claimant goes on to say '*where is my opportunity for applying for promotion as a proven high achieving, award-winning manager? '*This is a confusing statement because the Claimant was not, so far as we can assess in these proceedings, actively prevented from applying for any post or promotion. Indeed, she was encouraged to do so by Mr Ollier-Thompson, as we record above.

What did happen is that she was not accorded the priority over other candidates to which she felt entitled and she was required to compete with internal and external candidates for the DHOS post. That is not a situation which amounts to unfair dismissal, race discrimination or victimisation.

Her contention is that not only was her eventual dismissal unfair because she was not assimilated to or offered the post of DHOS as suitable alternative employment but also that she was subjected to less favourable treatment, as a woman of Indian heritage, than others because, as stated in paragraph 3.5 of the LOI, *' the DHOS post was advertised to external staff rather than internal employees'.*

She also relies on the three detriments in paragraphs 4.2.3- 4.2.5 under the Victimisation heading.

We find that none of these claims can succeed ;-

13.4 The DHOS post was evaluated at grade PO7 which is two grades above the Claimant's substantive PM post at grade PO5.

In those circumstances a redeployee like the Claimant is not afforded priority for that vacancy over and above what is offered to any other candidates (both internal and external) but she can of course apply and compete for the post.

The relevant section of the MC Policy is in Part 3 headed 'Redeployment Policy' on page 548-549 which applies to the redeployment status the Claimant had in mid-June 2022. It provides for priority for staff under notice of redundancy ((and is intended to avoid compulsory redundancies) and states:

'*This priority applies even when a post has been advertised-redeployees **must** be considered in advance of any other candidates. In general, however, posts should not be advertised until they have been considered for redeployment'*

13.5 However, there is an important proviso which applied to the Claimant's aspiration to obtain the DHOS post:

'*For posts two or more grades higher…the normal open recruitment process applies' (our emphasis)*

In other words, there is no priority for redeployees where the job they want is graded two or more grades higher than their substantive post.

13.6 The Policy goes on to state that the Council may open ring fence posts for redeployees to be considered first but this is discretionary. We have already explained above why we do not find it to be unfair, discriminatory, or contrary to the Respondent's policies not to protect the Claimant or any internal candidate from having to compete with external applicants by any right and/or privilege to be assimilated or ring fenced (open or closed). It is axiomatic that the Respondent is entitled to exercise discretion to devise a recruitment exercise which is likely to attract the highest quality of candidates from both inside and outside the local authority organisation.

At page 701 the Claimant is reminded by KU in her email of 21 June 2022 that '*the service have decided to undertake an external recruitment exercise as this is a critical role within the service and to ensure that the successful candidate has the right level of experience for the role'*

13.7 The DHOS post, although part of the proposed draft reorganised structure in February 2022 as appears from page 178, was not finally evaluated or graded sufficiently to be put out to advertisement until 15 June 2022 when the Claimant was notified and encouraged to apply (See pages 689- 690). On 17 June 2022, the Claimant was given guidance by a Trainee HR Officer, Ms June-Ann Joseph, to ensure that in her redeployee profile form she elaborates on the skills and experience acquired in her previous role. She was advised by KU on page 700 that she should ensure that she submitted a detailed application for the DHOS on the Jobs Go Public site. These are

not the actions of an employer determined to prevent the Claimant from being appointed.

13.8 By 20 June 2022 the Claimant had submitted an application and sent it to KU with a query on pages 701-702 dated 21 June 2022 as to why the post was being advertised externally and '*why do I have to apply as an external candidate?'*

We find that the Claimant meant to enquire why she was obliged to apply on the same basis as other external and internal candidates in an open recruitment exercise. She wanted to have priority as a redeployee in a recruitment exercise which would initially exclude external competition. She was reminded by KU, in a response the same day, that she could only have that priority if the grade of the role advertised is the same or no more than one grade higher or lower than her substantive permanent grade.

She was reassured that she was entitled to apply for the role *'as anyone else is'* and she was reminded that Alan Ollier-Thompson had already told her that the DHOS job was not within the parameters of the previous closed ring fence.

13.9 We therefore find, by reference to paragraph 4.2.3 of the List of Issues setting out the detriments claimed, that in fact the Claimant was not informed by HR that she could not apply for the DHOS as an employee but had to apply as an external candidate. This is not an accurate statement of what happened.

13.10 Similarly the detriment claimed at paragraph 4.2.4 did not occur. The Claimant was not informed by HR that she could not apply for the DHOS role '*as it was two pay grades higher than her 'present position.'*

13.11 The Claimant was never prevented from applying for the post of DHOS and indeed she did so. On 26 July 2022 she was shortlisted and invited to an interview for the job on 5 August 2022 at the Queens Road Learning Centre in Walthamstow. The letter is at page 732 of the bundle signed by Sharon Tassell of HR and there is also an email invitation on page 738. The interviews were later postponed until 7 September 2022 and the Claimant re-invited. She did not attend and told us that she had by then lost all confidence and was too unwell to take up this opportunity.

13.12 We are aware that there is a perceived error and/or confusion in the outcome letter of the MC Appeal dated 16 June 2022 on pages 672- 676. The letter is signed by Ms McCardle who had HR advice from Wendy Jackson (who was not a decision maker and not a witness in this case). Under the heading **Decision: not upheld** on page 673 Ms McCardle concludes that the restructure of ALS was carried out following '*due process'* and finds that Alan Ollier-Thompson explained to the Claimant that she was entitled to apply for the DHOS role' '*as anyone else is, when it goes out to advert.'*

The confusion occurs where the outcome letter assures the Claimant that she has a '*window of 5 days to submit your application as a redeployee before the role[*DHOS*] goes to internal and external* advert' but fails to specifically state that the Claimant has no redeployee priority over any other candidate when applying for a role more than two grades higher.

The mistake was very quickly corrected and clarified in KU's email to the Claimant on page 708, 4 days later, and in KU's responses (in blue highlighted text) to the queries raised by the Claimant later the same day on 20 June 2022, also on page 708.

The Claimant cannot have been left in any doubt as to the correct position.

13.13 We are satisfied that, by reference to paragraph 3.5 in the LOI, the Claimant was not less favourably treated by reason of her race than either her comparator or any hypothetical comparator. She has failed to discharge her burden of proof by showing us any facts from which we could conclude that the DHOS post was advertised to external candidates rather than to internal redeployees. This is not what happened.

13.14 The Respondent's MC Policy was applied consistently and fairly. We agree with paragraph 23 of KU's witness statement which although not expressed in the 'technical' statutory language nonetheless sums up the 'reason why' the Claimant was asked to make the application in the way she did –

'*Nobody was treated more favourably than the Claimant in relation to this. She was not stopped from applying for the role although when she applied there was potentially a bigger pool of candidates for the role than there would have been had it been available for internal candidates only. However, this was the same for everybody applying for the role. It had nothing to do with the Claimant's race or the fact that she carried out a protected act*'

14. <u>Is the C entitled to a redundancy payment?</u>

14.1 The Claimant was told on several occasions that, in accordance with the MC Policy in section 13.1 which is at page 539 of the bundle, a failure to participate in a selection process where there is an open or closed ringfenced exercise '*could result in a loss of employment with no entitlement to redundancy or other compensatory payment.'*

We note the use of the word 'could' which indicates that there is no mandatory or certain loss of employment and/or entitlement.

14.2 CV and then KU advised the Claimant more than once, for example in emails at pages 418-420, that the Respondent's policy states ' *For the avoidance of doubt, employees who decline an <u>offer</u> to be assimilated, appointed to a ringfenced post or redeployed into suitable alternative employment do not have a right to a redundancy payment.'*

This wording is also quoted in the letter from People and Organisational Development Team to the Claimant dated 27 April 2022 on page 387.

Our emphasis is on the word ’offer’ which we have underlined. The Claimant was not finally or actually offered any of these options as she points out in an email to KU on 10 May 2022 (page 422). She was only offered an opportunity to participate in a closed ring fence where five employees would compete for four posts, and she declined to apply for one of those posts, as we record above.

In those circumstances the wording of the Respondent’s policy does not apply to her and we find she is entitled to a redundancy payment.

14.3 We are further persuaded by an examination of the wording of Section 135 of the 1996 Act. This statutory provision is the one which establishes entitlement, it actually says ‘*shall pay,’* to a redundancy payment to any employee if there is a dismissal by reason of redundancy.

s 141 of the 1996 Act establishes an exception. It applies where there is an offer of renewal of the contract of employment or an offer to re-engage under a new contract of employment. If such an offer is unreasonably refused, subject to conditions, then the employee is deprived of the redundancy payment.

14.4 s 141(3) goes on to stress the importance of a qualifying offer which must give details of the renewal or re-engagement which is offered in terms of duties, location, capacity and other terms and conditions thus emphasising that the offer should be specific and not consist of an undefined and vague opportunity.

14.5 We were helpfully referred by Mr Gray-Jones to the case of Seamus Watson v Sussex NHS Foundation Trust [2013] EWHC 4465 QB in which His Honour Judge Seymour makes a finding which supports our conclusion in this case, where he says,

‘what needs to be offered in order to disentitle someone, who is otherwise prima facie entitled to a redundancy payment, to that payment is something which is capable of acceptance by the offeree so as to give rise to an immediately binding contract.’

We find that there was no such offer made to the Claimant and she is not disentitled to her redundancy payment.

This means, of course, that an employee of the Respondent may, as the Claimant did, take up no opportunities offered to her in a redundancy situation and yet still obtain a redundancy payment. It may be that the Respondent will want to take advice as to the re-wording of its relevant policies.

14.6 The multiplier, based on the Claimant's age and her four complete years of service, is 6. We have looked at the Schedule of Loss on page 31 of the bundle and, accounting for the £571 weekly cap on wages which was applicable on the effective date of termination of the Claimant's employment, we have fixed the payable redundancy amount at £ 3426 payable within 28 days.

15 Direct Race Discrimination under section 13 Equality Act 2010

15.1 The alleged incidents of direct race discrimination are set out in paragraphs 3.1 - 3.5 of the LOI.

15.2 The statutory language and the law relating to direct race discrimination is helpfully set out in the written submissions of both counsel and we need not repeat that text at length in these Reasons.

15.3 We have already decided that the less favourable treatment alleged by the Claimant in paragraphs 3.4 and 3.5 of the LOI did not occur and we have made detailed findings of fact above.

15.4 So far as paragraph 3.3 is concerned, we find that the Claimant did have a fair redundancy consultation as did all her PM and SPM colleagues including Ms Pearce and Ms Ritchie who are named as actual comparators. We therefore find this complaint somewhat oblique and mystifying.

15.5 Mr Downey sought to persuade us on the Claimant's behalf that we should consider, in the context of this alleged incident of race discrimination, the facts around the sending to the Claimant by CV, in the period immediately leading up to the release of the reorganisation and consultation proposals, some details of job vacancies. In the hope that our findings may assist the parties to understand our decision to reject the contention that there is any race discrimination arising out of the circumstances set out in LOI paragraph 3.3 we have determined as follows:

15.6 The Claimant has failed to demonstrate that there is any evidence from which we could conclude that the sending of the information contained in those emails was because of the Claimant's race or to demonstrate that the sending of the emails showed a pre-determination of the decision whether the Claimant would retain a job within the reorganised structure once the redundancy process was completed. If we are wrong about this, we are certain that the Respondent has clearly shown an explanation entirely un-connected to the Claimant's race. We find that the Claimant has shown no evidence that, in the materially same circumstances, the emails would not equally have been sent to the named comparators (who are both white and non-Indian.)

15.7 The emails are at pages 121-129 of the bundle spanning the dates of 3-7 February 2022. Each short email is addressed to the Claimant and encloses details of job opportunities with a message '*may be of interest'* or '*I know you*

are keen to develop your leadership role and move forward, not sure if you are thinking within Adult Ed, but thought this may be of interest.' The Claimant responded by voicing her suspicions on page 130, '*I'm just wondering why you are sending me these opportunities now when you haven't done so previously. It just seems to tie in with the imminent consultation process… the opportunities you are sending me are external so that doesn't make sense?* She also writes, *'Are you hinting that I may be out of a job following the consultation?'*

15.8 The Claimant raised her concern with Mr Ollier-Thompson on 7 February 2022 in an email at page 136 and received the reassurance, said by the Claimant to be appreciated, which we have already quoted above, '*the process [*of redundancy selection] *is very robust and decision making is not in the hands of one person* [CV]*'*

15.9 We have particularly studied the account of this episode provided by CV on 27 April 2022 to Ms Branch-Davis's FAW Investigation where, on page 627, CV gives a cogent explanation of her actions in sending the emails in question. She says that she was on an interview panel for a job in the Business Team for which the Claimant had applied (but was not successful) and that thereafter they discussed the Claimant's wish to develop her career in other directions possibly outside education. Thus, CV said, she later forwarded vacancy details *'in good faith '*including those from a network called Holex, of which she is a member. CV agreed that it was '*perceived differently* [by the Claimant] *which in the light of the restructure I completely understand.'*

Ms Branch-Davis concluded that CV had acted insensitively but was sure that there was no evidence of any discrimination (see paragraph 19 of her witness statement)

15.10 In her witness statement at paragraph 24, CV also states that she had engaged in conversations with the Claimant's line manager, Sindi Hearn, who thought that the Claimant wanted to change role and was seeking progression. That is another reason why CV forwarded the information about vacancies.

15.11 We find that these actions of CV were not incidents of race discrimination.

16 <u>Paragraphs 3.1 and 3.2 of the List of Issues and time limit decisions</u>

16.1 <u>2017.</u> At paragraph 3.1 of the LOI the Claimant claims that it was an act of direct race discrimination when, in August 2017, she was unsuccessful in obtaining the post of SPM to which Anna Ritchie (who is white) was appointed instead. CV and Mr Ollier-Thompson together with another manager who has left the Respondent, Sarah Ward, constituted the interview panel who were all white.

In fact, the Claimant's application was strong enough to persuade the Respondent to offer her the alternative position as PM for Arts, Crafts, Fashion and Horticulture and that is when she began her work with the Council remaining in that post until her redundancy dismissal in July 2022.

16.2 The Claimant made no allegation of less favourable treatment because of her race/ race discrimination at the time or at any time until her FAW grievance on 31 March 2022 where she says on page 332 that she was told that Anna Ritchie (AR) was given the SPM role because she had more experience (it was Ms Ward who gave this feedback and she was not a witness in this case) whereas the Claimant contends that, having previously worked with AR at another organisation, she knew that AR did not have more experience than her.

The Claimant said in her oral evidence under cross-examination that she did not think, at the time in 2017, that she had been discriminated against because of her race.

16.3 We do not consider that the earlier complaint to Mr Ollier-Thompson in an email dated 6 March 2022 on page 257 refers to these events in 2017 even though there is use of the word 'discrimination'. It is clear in that email that the Claimant mentions generic '*discrimination from Caroline'* in the context of '*this process'* meaning the 2022 restructure.

We have made a finding below that the sending of this 6 March 2022 email is also not a protected act.

16.4 The 2017 allegation is almost five years out of time. We have decided that we now have no jurisdiction to hear it and it is struck out. The Claimant has given no evidence as to the reason for the delay in making any complaint within the time limit; she accepted the alternative job offered to her and remained within ALS working with AR until 2022.

By reference to section 123 (3) (a) of the 2010 Act we are satisfied that this decision by the 2017 interview panel is not conduct extending over a period of time which is to be treated as done at the end of a period which is within the time limit. The interview and appointment were a one-off recruitment exercise; there is no evidence, as Mr Gray Jones points out in his submission at paragraph 47, of any long term policy or practice of the Respondent to avoid the recruitment or appointment of staff of Indian heritage.

16.5 By reference to section 123(1)(b) we decline to extend time because it is not just and equitable to do so. The Claimant failed to make prompt objection to AR's appointment over her, she accepted a different role, and continued to work at ALS for almost five years without complaint about this episode until her job came into jeopardy by potential redundancy. We repeat that she has legal knowledge and training which might, within the time limits or within an equitable further period, have alerted her to make a claim but she did not.

16.6 Finally, we have taken account of the fact that the Claimant's allegation of less favourable treatment in relation to this 2017 recruitment process lacks any apparent merit. The interview panel asked consistent and identical questions of each of the candidates and scored independently with reference to their own notes. Other factors apart from 'experience' were accounted for; it was a multi-competency testing process including individual presentations. The Claimant scored 29, 29 and 30(from CV) totalling 88. AR scored a total of 102 (32,34 and 36). The scores of both strong candidates were close but AR performed better at interview on the day. The Claimant has provided no evidence (apart from the fact that the interviewers were all white) of prima facie race discrimination.

Paragraphs 1-11 of CV's witness statement contain a cogent and convincing account of the appointment of AR in 2017.

16.6 <u>March 2020</u>

The Claimant pleads no further act of alleged race discrimination until over two and a half years later as set out in paragraph 3.2 of the LOI which states that, on 18 March 2020, she was subjected to less favourable treatment because of her race when she was told by CV and Mr Ollier-Thompson that she would be '*provided with an extra tier of management.'*

16.7 This is a reference to a minor restructure and reorganisation at this time, in respect of which the Claimant was properly consulted on 18 March 2020. It was further explained to her in detail, as recorded in a series of questions and answers on pages 802-805 of the bundle, that as a result of her individual success in increasing the community learning outputs of ALS it was a logical step to place her immediate management under the supervision/ support of the fairly new SPM in Community Learning, Sindi Hearn(SH) and to align the Claimant's curriculum area with the growth of the community learning programmes under SH. SH joined the Respondent's employment in November 2019.

The Claimant's job role, pay, duties and other terms and conditions remained the same.

The rationale for this minor restructure was also to reduce the management span of control of CV as she explains in paragraph 13 of her witness statement.

16.8 Paragraphs 12-17 of CV's witness statement give a clear and cogent account of the rationale for this reorganisation which the Claimant has given us no reason to doubt. There is no evidence in the contemporaneous notes or documents of the discussions between the Claimant, CV or Alan Ollier-Thompson giving any indication that the reason for this change is because the Claimant is of Indian heritage or any evidence that a hypothetical comparator in the same or not materially different circumstances would not have been treated in the same way.

16.9 This allegation is also significantly out of time by two and a half years despite the Claimant's awareness of time limits. We note the statement on page 645 given by SH to the MC investigation carried out by Ms Branch-Davis in mid-May 2022 where SH agrees that the Claimant was *'vocal'* in her objection to being given a different and additional line management arrangement which she felt was *'unfair'* but '*I never heard her say anything around discrimination.'*

16.10 The Claimant told us that she anticipated at the time, and now believes, that the change in reporting to the effect that she was, in 2020, the only PM being directly managed by a SPM, would disadvantage her in terms of status and hierarchy in the upcoming larger reorganisation which took place in 2022. She believes that this state of affairs which commenced in March 2020 was just the beginning of less favourable treatment of her which continued and culminated in the redundancy exercise and her own individual redundancy dismissal. Accordingly, on balance, we consider it just and equitable to extend time for consideration of this allegation and time is extended to the date of filing of the ET1.

16.11 However, upon an examination of the evidence in relation to this issue, we find that the Claimant has not shown anything from which we could conclude that she was '*provided with an extra tier of management'* on 18 March 2022 because of anything to do with her race.

16.12 The Respondent has given a full non-discriminatory explanation, properly documented, of reasons for its actions in relation to the March 2020 reorganisation of the Claimant's reporting line.

16.13 The Claimant's named actual comparator is Sindi Hearn but SH was equally placed at risk of redundancy in February 2022 and the Claimant was not treated less favourably than SH in this respect. SH was not made redundant because she, unlike the Claimant, did apply for and was appointed to one of the four new Curriculum/Programme Manager roles in the new 2022 structure.

17. The claim of direct race discrimination does not succeed and is dismissed.

None of the allegations in paragraphs 3.1 to 3.5 of the LOI are proven as incidents or events of less favourable treatment of the Claimant because of her race.

18. <u>Victimisation-section 27 Equality Act 2010</u>

18.1 We have determined that the Claimant's FAW grievance dated 31 March 2022 (beginning at page 329) was a protected act as defined by section 27(2) of the 2010 Act because it makes allegations that the Respondent has contravened the Act. On page 333 the Claimant writes '*I have suffered a catalogue of direct discrimination…I feel the less favourable treatment that I have experienced is solely because of my race as there is no other*

explanation and therefore breaches the Equality Act 2010…I am an Indian woman who has been subjected to inequalities at work because of my race.'

Again, counsel for both parties have set out in submissions a summary of the statutory provisions and law relating to victimisation which we adopt and need not repeat in this Judgment and Reasons.

18.2 By reference to paragraph 4 of the LOI we find that the email on page 257 of the bundle, sent on 6 March 2022 by the Claimant to Mr Ollier-Thompson, in the context of their correspondence about the redundancy consultation process and his polite reluctance to meet her for a one-to-one meeting during the ongoing situation, is not a protected act.

It makes the broad generic accusation, lacking any detail, that '*I feel I have been treated very unfairly without justification in this process and have been subjected to discrimination by Caroline which I am seeking advice on. This is particularly highlighted after having participated in the Schwarz rounds'*

The Claimant does not refer specifically to her own ethnic or racial identity, the protected characteristic of race, or to race discrimination. She makes no reference to the Equality Act 2010.

18.3 The 'Schwarz Rounds' training is a structured self-reflective process and forum for the discussion of various emotional and social aspects of care and community work including diversity and equality but it is not an analysis of the statutory tort of discrimination nor is it focussed only on race.

18.4 In those circumstances the first protected act occurs on 31 March 2022 and the detriment in paragraph 4.2.1 pre-dates it and cannot therefore be an act of victimisation which has occurred because of a protected act. In any event, we have made findings above which conclude that no such detriment occurred.

18.5 No other protected act is identified in the LOI.

18.6 We are satisfied, as stated above, that the Claimant was not subjected to the alleged detriments in paragraphs 4.2.3 or 4.2.4.

18.7 For the avoidance of doubt, we reiterate, by reference to paragraph 4.2.5 in the LOI that the Claimant was made redundant on 20 July 2022 because she was fairly dismissed by reason of redundancy in all the circumstances described above. Her *'role*' was not made redundant because she did a protected act. She was not singled out. Her role as PM (Arts, Crafts, Fashion and Horticulture) was, as with the other four PM and SPM roles, restructured as part of a larger reorganisation which commenced in February 2022.

18.8 Paragraph 4.2.2 alleges that the Claimant suffered the detriment of delay to the outcome of her FAW grievance which was received by her after an 11-

week investigation by Ms Branch-Davis (MBD), whereas the Respondent's relevant policy provides for a response within four weeks. This type of delay, in our industrial and practical experience, both in the public and private sectors, is unfortunate but not unusual. This was a complex and serious employee grievance where there were four witnesses to interview including the Claimant herself and almost 80 pages of documents to obtain and study, going back to 2017. We find a seven week delay not to be unreasonable in all the circumstances but it was a detriment to the Claimant.

18.9 The question is whether that detriment occurred because the Claimant did the protected act of lodging the 31 March 2022 grievance. The Claimant must, in law, show a causal link. Apart from the obvious juxtaposition of the two matters of the detriment and the doing of the protected act we find no evidence that MBD, who was not involved with the ALS restructure, in any way subjected the Claimant to the detriment of delay as a 'punishment' for bringing the grievance in the first place. Instead, she gave a rational and understandable explanation for the delay where she says, at paragraph 1 of her witness statement, that she had not investigated a FAW complaint before and needed considerable HR support.

18.10 The Claimant did not object at the outset of the FAW investigation to MBD as potentially partial or taking a '*bias approach'* as she later asserts on page 721 in the grounds of her FAW Appeal. She only raised this objection when the FAW outcome was not as she wished it to be.

18.11 MBD also explains that she met with the Claimant early in the investigation on 8 April 2022 and they both agreed a formal meeting date of 25 April 2022 when Mr Jonathan Charles attended again as the Claimant's representative. Therefore, three and a half weeks had already elapsed, with the Claimant's consent, by the time that meeting took place. CV was interviewed on 27 April.

Thereafter MBD explains, in her witness statement in paragraphs 6 and 7, the further reasons for the length of the process which we find to be, in part, caused by the investigator's desire to do a conscientious and thorough job.

Further credible reasons are given by MBD to CE during the FAW Appeal at page 777 in box 49.

18.12 The Respondent has thus explained the detriment of delay and described 'the reason why' it occurred. It was not a delay caused by any connection between the protected act and action taken by the Respondent to react to that grievance by subjecting the Claimant to detriment. The investigator was not biased or unfair towards the Claimant. The complaint does not succeed.

19. Paragraph 4.2.2 LOI. Failures of Investigation.

Finally, we have considered the Claimant's contention that neither her FAW grievance, her FAW Appeal nor the victimisation grievance arising from her email of

29 July 2022 adjudicated by Mr Egglestone (CE) were *'investigated properly*' or *'properly responded to'*.

No further detail of those failures is set out in the LOI or indeed in Mr Downey's closing submission. Mr Gray Jones invites us to make no further finding because the basis of this claim is too unclear.

However, we have read and heard the evidence of the Claimant, Ms Branch-Davis (MBD) and Mr Egglestone in this respect, including their answers to cross examination, and drawn the following conclusions:

19.1 The 29 July 2022 grievance and the FAW Appeal dated 26 June 2022 on pages 719-725 are not in the LOI as protected acts under section 27.

19.2 The seven points of failure on which the Claimant relies in her FAW grounds of appeal on page 721 contain only one matter which we have not already addressed in these Reasons. It is at point 3 where she complains that MBD:

*'failed to interview other BAMEs [*Black, Asian and Minority Ethnic*] in ALS specifically those with Indian heritage. I mentioned another female who had been called racist names by the discriminating manager [*CV*] and has subsequently left…the line manager [*Ollier-Thompson*] was aware of this but he has not been asked any questions.'*

19.3 The reference to this complaint is at box 15 on page 620 which is MBD's interview with the Claimant on 25 April 2022. The Claimant suggests that there is a pattern of complaints raised by '*women of a BAME background'* against CV. Is this a matter which MBD should have investigated further? And is the failure to investigate properly a detriment to which the Claimant was subjected because she did a protected act in raising the FAW grievance on 31 March 2022?

19.4 This question is not dealt with in MBD's witness statement but she told us in her oral evidence that she did not take the matter further because this issue of a pattern of more widespread prejudice against other employees and particularly women of Indian/BAME heritage was brought up spontaneously by the Claimant 'out of the blue' and is not in the original FAW grievance on the final page at p.333.

MBD said she did closely question Sindi Hearn (page 645,boxes 38-39) and ascertained that the Claimant as an individual had made no past complaint of race discrimination to SH as her line manager.

19.5 CV was asked by MBD, as recorded at page 631 in boxes 31- 37, to reply to the Claimant's complaint that she has, *'faced a catalogue of direct discrimination and lack of career progression opportunities because she is an Indian woman'* and gave her answer:

'*I find it quite upsetting that she has made these claims, that she would say that, as far as I am concerned there has never been any indication of discrimination against her or anyone else due to race, religion or sexuality…In terms of being held back, she has requested to attend the leaders program and we have agreed for her to attend even though we are aware she wants to move on and is not applying for this role. The two things do not equate for me.'* (our emphasis)

19.6 Alan Ollier-Thompson was interviewed by MBD as recorded on page 638 and he was asked whether the Claimant had ever complained to him '*about unfair and unfavourable treatment and discrimination directed towards her.'* He responded by focussing only on the one complaint by the Claimant, which he found surprising in the context of her previously expressed wish to *'do something different,'* that she had been sent un-wanted details of other job vacancies by CV. He mentioned no other instance of alleged individual or group race discrimination brought to his attention by the Claimant.

19.7 Crucially, MBD told us, the names of other BAME complainants were not supplied to her by the Claimant and she could not investigate further by talking to them. She told CE about this obstacle when she attended the FAW Appeal meeting on 10 August 2022 (see page 782, box 95)

19.8 We find therefore that the Claimant was not victimised as set out in paragraph 4.2.2 of the LOI. We find that her FAW grievance was investigated properly in all aspects including the complaint that she and other un-named colleagues were discriminated against by the Respondent as she alleges at point 3 on page 721. MBD was not enabled to interview other BAME staff in ALS without being given their names or other details of their identity.

The Claimant has failed to discharge her burden of proof in relation to the issue in paragraph 4.2.2.

20. We mention that some very serious allegations concerning CV were made by the Claimant for the first time only in the Tribunal hearing and/or in Ms Silman's witness statement (about which she could not be questioned). Those allegations are robustly denied as untrue by CV. We do not intend to address those matters or make findings of fact about them.

21. We are however satisfied that, by reference to the issue in paragraph 4.2.6 of the LOI, the Claimant has shown evidence from which we could conclude that the Respondent did not properly respond to her FAW Appeal, chaired by CE, where, at 721
(repeated at page 728 in a summary letter sent by KU) she raises the omission of any exploration of her contention that other BAMEs in ALS, specifically those of Indian heritage, may have experienced or be experiencing the same discrimination she alleges herself.

21.1 By the time of the FAW Appeal the Claimant did provide the names of other Indian women and she was accompanied by Ms Smita Deol, a Learning

Support Co-ordinator of Indian heritage, who was her witness and suffered '*similar racial discrimination'* as alleged at page 772 of the FAW Appeal Hearing notes in box 10. In box 14 the Claimant mentions Smita Deol is her witness and says *'she has faced discrimination from CV and has complained about this. She also has an extra tier of management put over her very similar to SR [*the Claimant*]. She feels that all Indian women in ALS have that put over them. This is a recurring pattern and a common behaviour from CV.'*

21.2 Why did CE fail to investigate and respond to the allegations of 'recurring patterns' and 'common behaviour' which are made by the Claimant and Ms Deol? He was also told about Sakina Rasheed on page 775 and 781 and the Claimant said that she, Ms Rasheed and Ms Deol had all been to see Alan Ollier-Thompson and claimed they were '*being discriminated against based on race.'* The Claimant told CE that she expected to be told what Mr Ollier-Thompson said about these matters and '*'what was the outcome'* when MBD interviewed him. She said, '*something to think about is as to how many more complaints Alan has heard against Caroline as she knows there is more than one. Something to investigate as there is a pattern of discrimination'*

21.3 We do not find that CE acted out of any malice or deliberate discrimination including purposeful victimisation. Indeed, he makes helpful practical suggestions on page 796 for ways in which ALS might better deal with matters of equality and diversity via the Respondent's Big Conversation process which was due to commence across the Council in September 2022.

However, having been supplied with additional and relevant information about the Claimant's allegation of a pattern of race discrimination and supplied with the names of co-complainants he took no steps to properly expand the parameters of the appeal and undertake or commission any supplementary investigation. No reason has been given by the Respondent for this failure of action and CE was unable to explain it in his oral evidence. As a result, we hold that a contravention of section 27 in this respect did occur.

21.4 In the outcome letter on pages 788 -796 written by CE on 18 August and sent to the Claimant on 19 August 2022 he gives only a short response to the issue of more widespread discrimination raised by the Claimant which he inaccurately calls 'Victimisation during the FAW investigation' and records that he has spoken to Alan Ollier-Thompson who *'has confirmed that he has had written communication from both Serona and Smita stating discrimination towards Indian females. Alan disputes that Indian female (sic) are discriminated against within the ALS service and that there is a wide range of ethnicity across the ALS service.'*

CE accepts this inadequate generic response which does not address any specific communications received from any Indian women employees in ALS including the Claimant. He told us that he cannot remember why he did not do more.

21.5 The Claimant having discharged her burden of proof in section 136 of the 2010 Act the Respondent has not given any other explanation and we find that there has been a contravention of section 27 in relation to this limited allegation under paragraph 4.2.6 only.

21.6 The claim of victimisation succeeds in part and a remedy hearing to determine the compensation (including injury to feelings) will be listed for three hours by video (CVP) hearing. A Notice of Hearing and a Case Management Order will be sent out in due course. There is no need for a separate case management preliminary hearing (PH) for remedy given the limited scope of the issues to be decided.

Employment Judge B Elgot
Dated: 25 November 2024