Case Number: 2300537/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS N CHRISTOFI
MS S KHAWAJA

BETWEEN:

Ms R Harris

Claimant

AND

London Borough of Hounslow

Respondent

ON: 5, 6, 7, 8 and 19 February 2018
IN CHAMBERS ON: 26 February and 19 March 2018
Appearances:
For the Claimant: Mr M Egan, counsel
For the Respondent: Ms M Tether, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims succeed and proceed to a remedy hearing.

REASONS

1. By a claim form presented on 16 February 2017 the claimant Ms Rosaline Harris claims unfair dismissal, discrimination arising from disability and failure to make reasonable adjustments.

2. The claimant worked for the respondent local authority in an administrative support role.

The issues

3. A case management hearing took place before Employment Judge Sage on 20 April 2017. The parties were ordered to produce an Agreed List of

Issues by 4 May 2017. We used this to confirm the issues with the parties at the outset of the hearing as follows:

Unfair dismissal

4. What was the reason for dismissal? The respondent relies upon the reason of redundancy which is a potentially fair reason under section 98(2)(c) of the Employment Rights Act 1996 (ERA).

5. In the alternative the respondent relies on some other substantial reason under section 98(1)(b) ERA by reason of business reorganisation. The claimant informed us on day 3 of the hearing that it was accepted that the reason for dismissal was redundancy.

6. If the reason for dismissal was redundancy, has the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant? The tribunal has to consider:

   - Was the claimant given appropriate warning of her redundancy?
   - Did the respondent sufficiently consult with the claimant?
   - Did the respondent give reasonable consideration to whether suitable alternative roles existed so as to avoid redundancy? In particular should the respondent have offered the claimant the role of Children's Centre Services Co-ordinator?
   - Should the claimant have been offered a right of appeal on the decision that she had failed the trial period? The respondent says there was no right of appeal.

7. The claimant does not dispute that there was a genuine redundancy situation and confirmed that fair selection was not in issue.

8. If the claimant succeeds in this claim, should compensation be reduced by way of a Polkey reduction?

Disability

9. Was the claimant a disabled person at the material time within the meaning of section 6 of the Equality Act 2010 in respect of any of the following conditions: (a) Rheumatoid Arthritis; (b) Osteoarthritis; (c) Carpal Tunnel Syndrome/Repetitive Strain Injury; (d) Post-Traumatic Stress Disorder?

10. Disability was admitted by the respondent in respect of the condition of rheumatoid arthritis. At the start of this hearing the respondent also admitted disability in relation to osteoarthritis.

11. Disability was not admitted in respect of the conditions of Post-Traumatic Stress Disorder (PTSD) and / or Carpal Tunnel Syndrome/Repetitive Strain Injury (RSI).

Failure to make reasonable adjustments between 26 and 28 September 2016

12. Did the respondent apply the following provisions, criteria and/or practices ('the PCP's') generally, namely:

    - Not providing sufficiently large desks at its Children's Centres to accommodate a roller mouse.
    - Providing reception staff with ordinary office chairs at its Children's Centres. The respondent accepted in submissions that this PCP was applied.
    - Not offering a workplace assessment to assess what reasonable adjustments were required.
    - Locating receptionists' chairs at Children's Centres in positions where they could be approached from behind.
    - Reception staff being required to start work at a fixed time each day - the respondent admitted applying this PCP.
    - Requiring employees undergoing trial periods for the Children's Centre Services Coordinator role to perform reception duties at Children's Centres - the respondent admitted applying this PCP.
    - Not permitting a flexible one-hour lunch break when performing reception duties.

13. Did the application of any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled in that:

    - In relation to not providing sufficiently large desks at its Children's Centres to accommodate a roller mouse – the substantial disadvantage relied upon is significant pain and discomfort.
    - In relation to the chair, the substantial disadvantage relied upon is significant pain and discomfort.
    - In relation to the location of chairs in positions where they could be approached from behind, the substantial disadvantage is that by reason of her PTSD the prospect and the reality of being approached from behind caused her substantial anxiety.
    - In relation to the fixed start times, the substantial disadvantage relied upon because of her osteoarthritis and rheumatoid arthritis and RSI is that she was often severely fatigued. The claimant's case is that the fixed start time prevented her from managing her working hours so as to minimise her fatigue and this led to her becoming more fatigued.
    - In relation to the lunch break, the substantial disadvantage relied upon is that in relation to her osteoarthritis, rheumatoid arthritis and RSI she was often severely fatigue and increasing the level of fatigue. Her case is that the practice of not permitting a flexible one-hour lunch break for employees to undergoing trial periods for the CCSC role was that she suffered severe pain and discomfort and anxiety.

14. Did the respondent take such steps as were reasonable to avoid the disadvantage? The burden of proof does not lie on the claimant, however the adjustments asserted as reasonably required are identified as follows:

    i. Moving the claimant's work position to allow her to work with her back to the wall.
    ii. Allowing the claimant to fix her own start and finish times.
    iii. Building in a flexible one-hour lunch break into the claimant's working pattern.
    iv. An ergonomic chair, a roller mouser and a sufficiently large desk.

15. Did the respondent not know, or could the respondent not be reasonably expected to know that the claimant had a disability or was likely to be placed at the disadvantage set out above? On day five (submissions) the respondent accepted that it had knowledge of the condition of rheumatoid arthritis. Although the respondent said they did not know that osteoarthritis was a separate condition, it was accepted that there was no relevant distinction because the substantial disadvantages were the same.

16. Was the location of receptionist's chairs in positions where they could be approached from behind, a physical feature under section 20(4) Equality Act 2010? Did it put the claimant at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantage relied upon is anxiety.

17. If so, did the respondent take such steps as were reasonable to take to avoid the disadvantage?

<u>Discrimination arising from disability</u>

18. The allegation of unfavourable treatment as "something arising in consequence of the claimant's disability" falling within section 39 Equality Act is a trial period of carrying out reception duties leading her to fail the trial period which in turn resulted in her dismissal. No comparator is needed.

19. Does the claimant prove that the respondent treated the claimant as set out above?

20. Did the respondent treat the claimant as aforesaid because of the "something arising" in consequence of the disability? What arose from the claimant's disabilities was her poor performance of the reception duties because of severe physical pain and discomfort and anxiety.

21. Alternatively, has the respondent shown that it did not know, and could not reasonably have been expected to know, that the claimant had a disability?

22. The respondent does not rely on a "legitimate aim" defence.

23. Should there be any reduction of compensation (if applicable) taking account of the decision in ***Chagger*** (below)?

Witnesses and documents

24. The tribunal heard from the claimant.

25. For the respondent the tribunal heard from five witnesses: (i) Mr Mark Brown, Principal HR Adviser, (ii) Ms Chrissie Elam, Head of Early Years and Childcare Services (iii) Ms Sandra Jones, Children's Centre Group Manager and the claimant's line manager during the redeployment trial period (iv) Ms Jayne Skelton HR Manager with responsibility for Children's and Adults' Directorate and (v) Ms Sandra Morrison, Interim Head, Early Intervention Services and Troubled Families.

26. There was a statement from Mr Michael Marks, Director of Education and Early Intervention Services. His evidence was agreed and he was not called.

27. A set of documents ran to three lever arch files and over 1100 pages.

28. We also had an agreed Chronology and Cast List.

29. On day 5 we had written submissions from both parties to which they spoke. We were provided, most helpfully, with a combined bundle of authorities. The written submissions are not replicated here. All submissions and authorities were fully considered, even if not expressly referred to below.

Findings of fact

30. The claimant initially commenced work with the respondent on 15 December 2008 as a Partnership Support Officer. This was her second period of service with the respondent having worked for them from 1993 to 1999.

31. In 2012 the claimant's job title was changed to Early Intervention Support Officer. In May 2015 she was seconded to work as a Project Support Officer within the respondent's service which became known as "Brighter Futures for Under-Fives". The claimant thought that the funding for her role came from the Children's Centre Budget. Mr Brown said it came from a General Fund. The claimant was asked in cross-examination how she knew that her post was funded from the Children's Centre Budget, she replied "*I wouldn't know*". We find that she did not know how her post was funded, her only knowledge of this came from managers at the respondent.

32. The claimant worked at a number of different locations during the course

of her employment. She worked at Smallberry Green Primary School, Ashley House on Hounslow High Street, Hounslow Education Centre and Hounslow Civic Centre. Since October 2000 the claimant has had a Blue Badge issued by the London Borough of Hounslow to allow her access to disabled parking bays.

33. In 1998 the claimant was diagnosed with rheumatoid arthritis and osteoarthritis. She had knee replacement surgery on both knees, in August 2010 and February 2011 and walked with a stick. Disability is admitted in relation to these two conditions.

34. In March 2011 the claimant was diagnosed with carpal tunnel syndrome in both wrists and repetitive strain injury (RSI).

35. The claimant said she was diagnosed with Post-Traumatic Stress Disorder (PTSD) in 2006 which she said followed being assaulted by the police outside her home. The claimant's evidence was that she was approached from behind, knocked to the ground and handcuffed. As a result she says she is anxious whenever there is the prospect of being approached from behind.

36. The claimant's role was desk-based involving use of the computer and telephone. Adjustments were put in place to allow her to perform her role. These adjustments were:

- a roller mouse
- a desk which accommodated the roller mouse
- a permanent fixed computer on the desk in addition to a laptop so that she did not have to transport the laptop
- an ergonomic chair
- a desk position so that she always had her back to the wall
- flexible working so long as she worked 36 hours per week and was in the office during core hours of 10am to 4pm
- A guaranteed one hour lunch break

37. These adjustments remained in place until September 2016 including on occasions when the claimant's place of work changed.

38. The claimant worked in her secondment as a Project Support Officer in the Brighter Futures project from May 2015 until the project closed in September 2016. The offer of the secondment was set out in an email from Ms Sandra Morrison Interim Head, Early Intervention Services, on 8 June 2015 (page 194). The claimant accepted the terms by email on 12 June 2015.

<u>The Children's Centres restructure</u>

39. In January 2016 the respondent Council commenced a consultation into the restructure of the Children's Centres or Brighter Futures for Under Fives. The consultation document was at page 226-234. The respondent

was seeking to make savings of £1.7million due to Central Government cuts. Mr Mark Brown was the HR Adviser for this restructure.

40. The proposed changes to the staffing structure were set out at page 227. It involved the deletion of front line posts, namely staff who worked directly with the public and the creation of a full time Children's Centre Service Coordinator post. It was accepted by the respondent's witness Ms Morrison that this new post was not a front line role but an administrative role to support the front line staff.

41. The outcome of this exercise was the closure of certain Children's Centres and the decision to use Children's Centres to provide childcare places. The claimant does not dispute that there was a genuine redundancy situation.

The EIS Restructure

42. In May 2016 this was followed by a second restructure; that of the Early Intervention Service (EIS). We saw the consultation document dated 16 May 2016 at pages 248-274. The proposal was to disband the EIS and to move the various services it performed to other departments. The Children's Centre programme was to be moved to the Early Years and Childcare Service. Mr Brown was also the HR Adviser for this restructure.

43. As a result of the second restructure, the EIS was disbanded and the claimant's substantive role was to be deleted.

44. On 3 May 2016 Ms Judy Matthews, an Area Manager, sent an email to Ms Morrison, copied to the claimant, to say that the role of Children's Centre Service Coordinator ("CCSC") was going out to internal advert on the intranet for a period of 10 days from 25 May to 3 June 2016 (email at page 245). This was grade PO1 and one grade higher than the claimant's current role. In her witness statement the claimant said Ms Matthews emailed the details of this role on 10 May 2016 but we find, based on the copy of the email, that this date was incorrect, it was 3 May. This post was created within the first consultation exercise.

Consultation with the claimant

45. On 16 May 2016 the respondent commenced the second staff consultation on the EIS. The consultation document was at pages 248-274 of the bundle. This was with a view to disbanding the EIS and a "lift and shift" of its services to other departments. On 16 May 2016, at the start of the process, the claimant attended a staff consultation meeting. Her signature of attendance was at page 274(a). At the meeting on 16 May 2016 Ms Morrison made a power point presentation which we saw at page 374b to 374(v) of the bundle.

46. The claimant's substantive role was EIS Support Officer and she was working in the seconded role of Project Support Officer in the Brighter

Futures for Under Fives Project.

47. On 18 May 2016 the claimant attended a meeting with HR Adviser Mr Brown and Ms Morrison. At that meeting the claimant was told for the first time that her substantive post of EIS Support Officer was being deleted. The claimant said that Ms Morrison told her at that meeting that her post was being deleted because it was being funded from the Children's Centre Budget. Neither Ms Morrison nor Mr Brown could recall saying that. They did not deny saying it.

48. On 20 May 2016 the claimant sent an email to Ms Morrison (page 279) saying that as her post was funded by the Children's Centre Budget she thought that she should be assimilated into the new CCSC role. The claimant asked that the role not be advertised internally pending a response.

49. Mr Brown advised Ms Morrison on her response (page 277) saying that as the CCSC role did not form part of the EIS consultation exercise "*assimilation will not be considered by the panel"*. Mr Brown advised Ms Morrison on two options (page 278); firstly, that the recruitment to CCSC be delayed until after the closure of the consultation and then it could be a possible option for redeployment. Secondly, CCSC could be made available to those staff who were displaced and expressed an interest in being interviewed. Assimilation was not made available to the claimant. She was given the opportunity to apply for redeployment into the role, which was one grade higher than her own. No-one within the remit of the first consultation exercise expressed interest in the CCSC role.

50. Neither Ms Morrison nor Mr Brown corrected the claimant on her understanding that her post was funded from the Children's Centre Budget. We find that it is not surprising the that claimant held the view that her substantive post was funded from the Children's Centre Budget. We find on a balance of probabilities that she was informed of this by two managers who, if she was wrong about it, did not correct the position when she put it in writing on 20 May 2016.

51. On 1 June 2016 Ms Morrison replied to the claimant (page 283) saying that they could not consider her for assimilation at that stage because the CCSC role was not part of the EIS review, but they acknowledged that there were elements of the role that were similar. It was agreed that recruitment to the role be postponed so that it could be aligned with the timescale for the EIS review. This was the last day of the formal consultation process for the EIS review. Ms Morrison said nothing in that email to dispel the claimant's understanding that her role was funded from the Children's Centre Budget.

52. It is part of the respondent's Redundancy and Redeployment Policy (page 127, clause 6.10): "*Employees would not normally be assimilated into higher graded posts, although this may be appropriate having considered the actual duties of the new post".* Clause 6.12 says "*Employees on*

secondments or acting up into a post will be considered for assimilation only against their substantive post".

The assimilation panel

53. On 5 July 2016 the assimilation panel met on the EIS review. The panel members were Ms Morrison, Mr Brown, Ms Penny Stephen, a Senior Advisor for Vulnerable Groups, and Ms Esther Rey, the union representative.

54. The following day, on 6 July 2016, Mr Brown wrote to the claimant to inform her that her current post was not substantially similar to any post within the new structure and she had not been assimilated into any post (letter page 287). The claimant received this letter via her work email on 11 July 2016 when she returned from a short period of sick leave.

55. On 11 July 2016 the claimant attended an end of consultation feedback session. The "End of Consultation Feedback" document was at page 303. The claimant's attendance was shown by her signature on an attendance sheet at page 323(a). The new structure was to come into effect on 31 October 2016.

56. On 13 July 2016 Mr Brown wrote to the claimant setting out interview dates for redeployment opportunities (page 325). The claimant was sent a Redeployment Employee Profile Form to complete which was to be used to match her to suitable jobs (form at page 337). He mentioned two roles in that letter, (i) Manager – The Hub Multi-Functional Centre grade SO2 part-time and (ii) Senior Education Welfare Officer at grade PO2. The claimant was told that redeployees are not normally matched to higher graded roles (page 327).

57. On 13 July 2016 the claimant wrote to Ms Jayne Skelton, HR Manager, to appeal the decision of the Assimilation Panel (page 340). The claimant's view was that the role of CCSC should be compared to her substantive post and she should have been assimilated into that post.

58. On 1 August 2016 Mr Michael Marks, the respondent's Director of Education and EIS, wrote to the claimant informing her that she was dismissed by reason of redundancy with effect from 16 September 2016 (letter page 381). The claimant was offered a right of appeal. She received this letter on 11 August 2016 on her return from holiday.

59. On 25 August 2016 the claimant completed the Redeployment Profile Form and sent this to Mr Brown (page 405). The claimant had met with Mr Brown a few days earlier on 22 August 2016, to discuss the form. There is a dispute as to exactly what was said by Mr Brown regarding the disability section on the form. Mr Brown said he told the claimant that this was her opportunity to explain her health conditions and she replied that she did not want to limit her opportunities by mentioning her conditions. The claimant said Mr Brown told her that she only need detail the

equipment she had in place to accommodate her disabilities.

60. In the Redeployment Profile Form the claimant said "*yes*" she had a disability and stated the following "*The reasonable adjustments I need; Roller mouse, iGel, telephone, chair and seating position are in place for my current role.*" (page 406). From this we find that the respondent clearly knew the adjustments that she already had in place. The form did not ask the claimant to specify her disabilities and we find that she did what was required of her by correctly answering the question with the word "yes" and stating the adjustments that she already had in place in her current role. It is not in dispute that the claimant did not mention lunch breaks in that document. From this Form we find that the respondent was aware of the sort of adjustments needed by the claimant.

<u>The CCSC role</u>

61. The claimant formally expressed her interest in the CCSC role. It was one of four posts brought to her attention by Mr Brown; she did not consider any of the other posts to be suitable. On 26 August 2016 Mr Brown informed Ms Morrison and Ms Chrissie Elam, Head of Early Years and Childcare Services, by email, that the claimant had expressed interest in the CCSC role and he attached her Redeployment Profile and the Job Description (pages 420-429). He said that a matching exercise should take place to see whether the claimant should be offered what he described as a "meeting" to see whether she met the base line skills and abilities. The post was moving into Ms Elam's area.

62. On 2 September 2016 Mr Brown emailed the claimant (page 435) informing her that she would be given an opportunity to attend "a meeting" in relation to her expression of interest in this role and that the panel members were being confirmed. The claimant replied asking what the meeting entailed. The claimant was concerned that this amounted to an interview as in a telephone conversation with Mr Brown he had used the word "interview" and there was reference to a "panel" for the meeting.

63. On 5 September 2016 Ms Jones and Ms Elam agreed a list of interview questions. Prior to formulating these questions, Ms Elam had not considered the possibility of the claimant covering reception at the Children's Centres (statement paragraph 12).

64. On 9 September 2016 the claimant attended the interview for redeployment into the CCSC role. The interviewers were Ms Elam and Ms Sandra Jones, Acting Children's Centre Group Manager. The claimant was offered a four-week trial period commencing on Monday 26 September 2016. We find that it was very much an interview, with Ms Jones and Ms Elam conducting it against job criteria and filling in forms (for example page 451) headed "Children's Centre Services Co-ordinator: Redeployment Interview". We find that the respondent should have made clear to the claimant that she was attending an interview, with the implications this held, rather than a straightforward meeting. We find that

this was an example of poor communication from the respondent.

65. At the end of that interview the claimant was asked if she was prepared to carry out duties outside the job description such as covering a Children's Centre reception. The claimant agreed in evidence that in the interview she replied yes to this and it is shown for example in Ms Elam's handwritten notes at page 456. She said she would "*give it a go*". The claimant was given very little information as to how often these duties would be required of her.

66. On 12 September 2016 Mr Brown advised Ms Elam and Ms Morrison by email that the line manager needed to support and monitor the claimant's progress, establish any training needs and put those in place and complete the redeployment monitoring form on a weekly basis with regular feedback to the claimant (page 503).

67. The formal offer letter for the trial dated 15 September 2016 was at page 509-510. The claimant was told in that letter that during the four week trial she would receive on the job training and have regular meetings with her manager to discuss her progress and review any training needs she might have. The letter made no mention of covering the Children's Centre reception. The claimant did not know at this point how often she would be called upon to carry out reception duties.

<u>The Work Programme and the meeting of 23 September 2016</u>

68. On Friday 23 September 2016 the claimant attended a meeting with Ms Elam and Ms Jones to discuss her work duties in the trial period. The work duties were set out in a lengthy document at pages 629-647. On the first page of the Monitoring Form in bold and capitals (page 629) it says "*Reminder, trial periods are intended to test those areas that are not fully met in the matching exercise".* We find therefore that the trial period was only intended to test the parts of the CCSC role which went beyond the claimant's existing job duties and job description. The matching exercise was the 9 September 2016 interview.

69. Prior to the meeting, on 20 September 2016 there was an email from Ms Nathalie Ballard, the Children's Centre Group Manager for the West area, saying to Ms Jones and Ms Elam that it would be helpful for the claimant to provide reception cover in the West whilst they recruited a new receptionist (page 513). She said that weeks 1 and 2 of the trial period were particularly crucial. Ms Jones was identified as the line manager for the post during the trial period. Ms Ballard also said that her other receptionist had been signed off work and they may potentially need more support ad hoc. We find that the claimant was being utilised to fill a gap in receptionist cover. This was in a trial for a role that did not include those duties in the job description.

70. Also prior to the 23 September meeting, by an email dated 19 September 2016 (page 514) Ms Elam informed the Children's Centre managers that

flexibility and operating in various locations was part of the role but that moving a chair around the Borough was "*not a reasonable expectation*". She also said that the same was true for hours of work, that if the post-holder was required to be available from a given time then that was "*an acceptable expectation*".

71. Ms Elam had taken HR advice from Mr Brown who advised that it would not be reasonable to move the claimant's ergonomic chair around the Borough. Mr Brown's evidence was that he did not consider it feasible to move the claimant's chair around the Children's Centres during the trial (for reception cover), but had the claimant been successful they would then have "looked at" whether the claimant needed to be "set up" in one of the Children's Centres. In other words, had the claimant been successful they would have looked at making the necessary adjustments but they would not do so for the trial. Mr Brown also advised Ms Elam that as it was required by the Job Description (page 426, point 5), it was reasonable to ask the claimant to start work at 8am.

72. We had no evidence as to the way in which Mr Brown had reached the decision that it was not feasible to move the claimant's chair around the Borough. We had no evidence as to what he had considered in terms of the feasibility or cost. Mr Brown was asked why he did not carry out a workplace assessment and he said that the process was moving fast and the claimant was in agreement with taking on the duties. We find that when she gave this agreement she did not understand the extent to which she was going to be asked to cover reception duties.

73. The claimant said that in the meeting on 23 September she only glanced at the first page (which we find was page 630) and the first thing she noticed was the start time of 08:15am which she said would give her difficulty because of her disabilities. She said she did not get a chance to look at the remainder of the document. The claimant explained to Ms Elam and Ms Jones that she usually arrived at the Civic Centre at around 09:30 to 10am as due to her arthritis it took her a long time to get ready in the morning. It was the claimant who made the suggestion of aiming to start at 08:45 and this was agreed.

74. Ms Elam had formed the view on advice from Mr Brown, that it was reasonable to ask the claimant to start at 8am because it was in the Job Description. The Job Description at point 1 on page 332 refers to "working flexibly". At point 5 (page 333) it said to work weekends and out of hours as required and as directed by the Children's Centre Lead Officer. It did not specify an 08:00am or 08:15am start time. The claimant's understanding of working flexibly came from her knowledge of the respondent's Scheme of Flexible Working Hours (page 135a) which set out core hours when the employee must be at work (10:00-12:00 and 14:00-16:00) and a clause 5 on lunch breaks that there was no set time for lunch but a break of 30 minutes must be taken between 12:00 and 14:00.

75. There was poor communication from the respondent as to what they required in terms of flexible working on the early start time. We were not told how Ms Elam or Mr Brown arrived at their conclusion that it was "*an acceptable expectation"* to require this claimant to start at 08:15am. The claimant and the respondent had a different understanding on the meaning of flexibility in this respect. The claimant understood this from the perspective of the policy and the respondent approached it from the needs of the service. The respondent did not consider the claimant's disability status.

76. There was a dispute of fact as to the duration of this meeting on Friday afternoon 23 September 2016. The claimant agreed with the respondent that it started at about 2:30pm. The claimant's evidence was that it lasted 10 minutes. Ms Elam and Ms Jones both said it lasted an hour and a half and that much more was discussed. The claimant said very little about this meeting in her witness statement (paragraphs 48 and 49) concentrating on the duties and the adjustments she needed rather than the discussion at the meeting. We saw the electronic diary invitation for the meeting at page 569. This showed Ms Elam as the organiser of the meeting and that it had been scheduled to last from 2:30pm to 4pm. Ms Elam and Ms Jones dealt with the meeting in more detail in their statements. We were not taken to any meeting notes despite the importance of this meeting.

77. The claimant considered that reception duties were not within the job description for the role. The Job Description did not include reception duties. The claimant had concerns about her ability to cover the reception. Ms Jones' evidence was that the claimant "*seemed a little reticent at the meeting".* Ms Jones and Ms Elam asked the claimant if covering reception would cause her any difficulties. There was a dispute as to whether the claimant said she would bring her roller mouse to the Children's Centre. The claimant was adamant in evidence that she did not say this. Ms Elam's and Ms Jones' evidence was that the claimant said she would bring it with her in her handbag. We took account of an email from Ms Ballard to Ms Jones on 28 September 2016 (page 602) where Ms Ballard said that she understood the claimant would be bringing her own mouse to use. This leads us to find that it had been discussed at the 23 September meeting and that Ms Jones and Ms Elam conveyed the information to Ms Ballard. In paragraph 52 of her statement the claimant said she brought the roller mouse with her on day 1 of the trial. We find on a balance of probabilities that the claimant told Ms Jones and Ms Elam that she would bring her roller mouse with her.

78. This meeting took place on the afternoon of the working day before the trial period commenced, so that there was little or no time to make any adjustments when the claimant raised matters in connection with her disability and needs.

The trial period

79. The claimant started the trial in the CCSC role on Monday 26 September 2016 by doing reception cover at the Alf King Children's Centre (AKCC). She worked at the Cranford Children's Centre on Tuesday 27 September and back at the AKCC on Wednesday 28 September 2016.

80. The claimant was late for work on the first day. Ms Elam had wanted the claimant to start at 08:15 on day 1 but it had been agreed that due to the claimant's disabilities she would start at 08:45. It is not in dispute that the claimant did not arrive until 09:15 and that she had not informed anyone that she was running late. She says that this was because she was stuck in traffic and it was not safe to call.

81. The claimant complains that the respondent failed to provide sufficiently large desks at its Children's Centres to accommodate a roller mouse. We saw a photograph of the desk at AKCC at page 1108. It was a fitted desk rather than a free standing piece of furniture. The claimant described it as a "ledge". We find it was a fitted desk. The claimant's evidence was that there was insufficient room on the desk to use her roller mouse due to the built in nature of the desk and the fact that it was angular in shape and not straight across. The claimant needed space not just for the roller mouse but for the positioning of her forearm, to use the roller mouse.

82. We had photographs of other desks at other Children's Centres. The claimant could not comment on the suitability of these desks as she had not worked at any of these Children's Centres since at least 2014. The only desks of which she had first-hand knowledge in 2016 were AKCC and Cranford.

83. The manager for the AKCC, Ms Ballard, sent an email to Ms Jones at 14:56 hours on 26 September 2016 (page 591). This was sent at a time when the claimant was still present at the Centre. The email was critical of the claimant. Ms Ballard complained about the claimant's late arrival and said that the claimant had not explained why she was late. Ms Ballard said that the claimant was unhappy at being "left" on reception.

84. There was also an issue regarding the claimant's lunch break. Ms Ballard's email said that at 12:45 she explained to the claimant that this would be the best time for her to eat her lunch as the next session started at 1:30pm. Ms Ballard told the claimant that they ate at their desks or in the play room (page 591). Ms Ballard concluded the email by saying that she had popped in from time to time to ask if the claimant was OK and "she says yes".

85. We find that at AKCC there was no flexible lunch break because Ms Ballard imposed a requirement as to when the lunch break should be taken. It was limited to 45 minutes on that day because the "next session" started at 1:30pm. We find that it was understandable that Ms Ballard was governed by service need. The claimant's understanding was that she

should have flexibility as per the Scheme of Flexible Working Hours (page 135a). She had not been told otherwise when she commenced the trial. We find that as the claimant's understanding of lunch breaks was based on the respondent's policy, this is the reason she made no mention of it in her Redeployment Form at page 406.

86. On 27 September 2016 the claimant worked at the Cranford Children's Centre. She agreed that on that day she was able to take a lunch break between 11:30 and 1pm (pages 609-610, monitoring form). This is not the same as the period covered by the Scheme of Flexible Working Hours (which was from 12:00-2:00). She said she was unable to use the roller mouse with the computer because of the lack of space on the desk. She used a standard mouse which left her in pain, because her wrist was not supported. She also said she could not "settle" (statement paragraph 54) because her back was to the door, this was a complaint related to her condition of PTSD. She also complained about the chairs in both AKCC and Cranford because they were not as adjustable as the chair that had been provided for her during her employment. She felt worn out by the additional travelling time to the Children's Centres.

87. We had a photograph at page 1132 of a desk at Cranford but the claimant said that this was not the desk at which she worked on 27 September. She said another member of staff was using that desk and computer on 27 September.

88. On 28 September 2016 the claimant was back at the AKCC. On that date the claimant phoned Ms Jones to say that she was finding it difficult to work at the Children's Centres due to her disabilities.

89. Ms Jones sent an email to Ms Elam on 28 September at 11:10am (page 597) saying that she had spoken to the claimant by telephone and she was finding it difficult to work in the children's centres, finding the travelling time hard as this was making her arthritis worse. She also told Ms Jones that her desk was too narrow to use her specialist mouse. On 28 September Ms Jones returned a telephone call from the claimant from 27 September and we find that the claimant had attempted to raise these matters with Ms Jones on 27 September.

90. Ms Jones reported to Ms Elam the various complaints raised with her by the claimant.

91. On 28 September 2016 the claimant spoke to Ms Jones to say that due to the pain she was experiencing she could not continue performing the receptionist duties for the remaining three weeks of the trial. She said that the reasonable adjustments which she had had in place at the Civic Centre were not available to her at any of the Children's Centres across the Borough. The claimant was immediately taken off the Children's Centre duties.

92. The claimant worked on 29 and 30 September either at the Civic Centre

or remotely from home. She did so for the remainder of the time she worked in the trial.

93. We find that the claimant consistently raised with Ms Jones and/or Ms Ballard the problems she was experiencing either at AKCC and Cranford Children's Centres. These complaints were contemporaneous. Ms Jones and Ms Elam accepted the complaints and took action to remove the claimant from the reception duties with effect from day 4 of her trial. We find that the complaints about the desk, the chair, the start times and the lunch breaks were legitimate complaints experienced by the claimant in connection with her disabilities and this is why the respondent removed her from those duties.

Trial period reviews

94. There were two meetings between the claimant and Ms Jones to review the trial period. The first took place on Friday 30 September 2016 and the second on Monday 10 October 2016 at 3pm at the Brentford Children's Centre.

95. On Friday 14 October at 14:27 hours, following the second review meeting, Ms Jones sent the claimant an email setting out her record of their discussion (page 765-766). Ms Jones said that after taking advice from HR she considered it was reasonable to ask the claimant to carry out reception duties during the trial and that the claimant had raised her conditions of PTSD and RSI. Ms Jones asked why the claimant had not raised these matters at the meeting on 23 September. Ms Jones also set out from the Redeployment Monitoring Form the tasks she considered that the claimant had not completed in weeks 1 and 2.

96. The claimant's appeal against the lack of assimilation into the CCSC role was due to take place on 13 October 2016 at 1pm. The claimant informed Mr Brown by email on that day at 11:21 hours that she would not be pursuing her appeal (page 753(b) and (c)).

97. On 14 October 2016 at 15:54 the claimant sent her responses to Ms Jones email of 14:27 hours. The claimant considered (page 790) that she had been "set up to fail". At the end of that email the claimant added a very late request for annual leave on the next working day, Monday, 17 October 2016. She said: "*Please note I requested Monday as annual leave via ESS, apologies for the late submission I have a last minute appointment I must attend*". ESS is the electronic system for requesting annual leave.

98. The claimant took the annual leave on 17 October. She had not received approval before she took this leave and said that Ms Jones approved it retrospectively. All staff, including the claimant, had been asked by Ms Elam to attend the First Full Service Meeting on 14 October between 3:30pm and 5pm. The claimant had accepted the invitation. Ms Jones emailed her at 6:30pm on 14 October to say that she was concerned when the claimant had not arrived, but was relieved to see her at 4:30pm (an

hour late). The claimant had been busy replying to Ms Jones' email.

99. Despite Ms Jones being at the meeting, the claimant made no attempt to speak to her to obtain authorisation for her annual leave on the next working day. The claimant's explanation for this was that there were a lot of people in the room, she was tired and exhausted and Ms Jones did not approach her. We find that it was incumbent upon the claimant to approach Ms Jones to seek the approval for her leave.

100. The claimant was asked why she attended the meeting late. She said that this was because she had received Ms Jones email, this had upset her and she wanted to reply to it. We find that this was an example of the claimant, during the trial period, failing to prioritise the tasks which were important. The claimant knew of the importance of the meeting on 14 October 2016 because she had been tasked with distributing the email to all members of the team in which Ms Elam had asked everyone to prioritise time for this event because of its importance (page 691a).

101. On 17 October 2016 Ms Elam replied point by point to the 14 October email.

<u>The meeting of 19 October 2016</u>

102. The claimant returned to work on Tuesday 18 October, after her day off. She was invited to a meeting with Ms Elam to take place on 19 October at 2:30pm. The claimant expected the meeting to be with Ms Elam and Ms Jones as her line manager. When she arrived, she found Ms Elam together with Ms Jayne Skelton from HR.

103. The claimant understood that the purpose of the meeting was to review the trial period. She was not aware that it was a meeting that could result in the termination of her employment on that day. The trial period had a short time still to run as it did not end until Monday 24 October 2016. It is not in dispute that the claimant was not accompanied at this meeting. Ms Skelton said that this was because it was "*along the lines of a supervision type meeting*" (statement paragraph 23). For reasons set out below we find that it was not a "supervision" meeting. Apart from anything else, the claimant's line manager Ms Jones was not present to provide "supervision".

104. Ms Elam went through the tasks and aspects or the trial that she considered the claimant had not completed or successfully completed. Examples were:

- She had taken unauthorised annual leave on Monday 17 October
- She had failed to prioritise attending the 14 October First Full Service Meeting despite its importance
- She had not been able to carry out the reception duties
- Ms Elam contended that the claimant had not contacted the Family Services Director as per the Work Plan for week 3 (page 779), the

claimant said that she had

- Ms Elam considered that the claimant had not done the relevant work around a new booking system including contacting Ms Matthews and preparing a short report for the 3 Area Managers; Ms Ballard, Mr Conisbee and Ms Jones. The claimant had done some of the work on this but had not prepared a report.
- She had not put together a comprehensive email distribution list of Children's Centre staff.

105. The claimant's consistent explanation for failing to complete any of the tasks was that no completion date had been provided. The claimant was in a four-week trial to assess her suitability for the CCSC role. These were tasks she was expected to accomplish during the trial to show her suitability. We find that they were not tasks simply to be commenced during the period. After 28 September they were tasks that she was to complete in her normal workplace environment where her adjustments were in place.

106. In some parts of the Monitoring Form (eg pages 773 and 777) there were examples of when particular tasks should be completed, (eg "*This task should be started in week 1 and completed by week 4"*). This gives more guidance but does not detract on our finding that the tasks in that Monitoring Form were to be completed for assessment during the trial period. The absence of a completion date did not, on our finding, mean that the task could be left incomplete, without good reason, during the trial.

107. Ms Elam told the claimant that she had made a decision not to confirm her in post.

108. Ms Skelton brought to the meeting a COT3 form for the claimant to sign (page 859) and handed it to her once Ms Elam had conveyed the decision not to confirm her in post. There had been some discussion between the parties on 22 August 2016 regarding the possibility of a COT3, but the parties were now two months further down the line and the claimant had signified her interest in the CCSC role and taken part in the trial. The claimant did not agree to sign the COT3.

109. Ms Skelton also told the claimant that there was no right of appeal against the decision at that meeting. The claimant was told that the right to appeal against her dismissal flowed from her dismissal letter of 1 August 2016 and that time for appeal had now expired.

110. Ms Elam also informed the claimant that her IT access would be discontinued immediately. At 15:14 hours on 19 October Ms Elam informed Ms Jones that the claimant's email account had been disabled.

111. In addition to being told that there was no right of appeal, the claimant was also told that there were no further redeployment opportunities. She was told she was not required to attend work for the remainder of her trial period and that she would be paid until Monday 24 October.

The decision making

112. Ms Skelton's evidence was that the meeting of 19 October was to review how the claimant had performed and then to make a decision as to what would happen next. Both Ms Skelton and Ms Elam were keen to emphasise to the tribunal their very distinct roles. Ms Skelton said she was there to provide HR advice but she was not the decision maker. Ms Elam said that she was there to review the outcome of the trial and took no responsibility for what flowed from that. Ms Elam said that once she had reviewed the trial period with the claimant and informed her that she had not been successful, she handed over to Ms Skelton. In answer to tribunal questions Ms Elam said that she had "*no idea*" that at the end of the meeting the claimant's employment might be terminated. She said that she thought there might be more to the process, such as an appeal or some further redeployment.

113. There was no opportunity given in that meeting for the claimant to respond properly to what she had been told by Ms Elam. There was also no break in the meeting for Ms Elam to communicate to Ms Skelton that she had made a decision that the claimant had not passed her trial period, notwithstanding that it had a few days left to run. Ms Skelton simply handed the COT3 over to the claimant.

114. Ms Elam said that the decision that the claimant had not passed her trial period had not been made prior to the meeting although she accepts that this was the view she was tending towards.

115. We find that the decision to terminate the claimant's employment had been made prior to the meeting on 19 October 2016 and this is why Ms Elam did not need to communicate the decision to Ms Skelton. We also took account of Ms Skelton's evidence at paragraph 18 of her witness statement when she refers to a meeting she had with Ms Elam and Ms Jones on 18 October. She said: "*during our meeting on 18 October 2016, Chrissie [Elam] informed me that both her and Sandra Jones….did not want to confirm Rosaline [the claimant] in post because they did not consider her suitable. Chrissie seemed concerned mainly about Rosaline's attitude to work and her behaviour during the trial period.*" Ms Skelton role was to provide HR advice, for example at paragraph 22 of her statement she refers to advising Ms Elam.

116. Ms Skelton advised Ms Elam that "*following the meeting*" they could either terminate the claimant's employment or consider ways of assisting her to achieve the requirements within an extended trial period. Her evidence was that Ms Elam found it difficult to see what more support they could provide. We find that Ms Elam clearly knew what the outcome of the meeting was going to be and that she and Ms Skelton had made the decision in advance. We do not accept their evidence, particularly given the meeting they had on 18 October, that there was such a disconnect between them that neither of them knew in advance what the other

intended to do at the meeting or that the outcome would be the termination of employment.

117. Immediately disabling the claimant's IT access meant that she had no access to internally advertised roles. Ms Skelton said that that the claimant would have had access to external roles on the internet and that they had "*very, very few*" internally advertised roles. The CCSC role itself was due to be advertised internally for just over a week (email page 245) and provided an opportunity for staff who were otherwise potentially redundant to apply. The claimant was closed out of any such opportunities across the organisation, even if it was a limited opportunity.

118. The claimant also had no opportunity to benefit from potential roles across the organisation, for example if queries with other managers might have revealed posts that were about to go out to advert and could be ringfenced.

119. Despite the fact that this was a meeting at which the claimant's employment was terminated, she was not given the right to be accompanied at that meeting. This was not a claim pursued by the claimant.

The reasons for the termination of employment

120. It is not in dispute that Ms Elam and Ms Skelton did not make notes during the meeting on 19 October, but made notes shortly afterwards (page 870).

121. On Monday 17 October 2016 Ms Elam sent a preparatory email to Ms Jones stating that she was due to have a meeting with Ms Skelton the following day to discuss the outcome for the redeployment for the claimant (page 811). Ms Elam set out her reasons as to why she thought the claimant was not suitable for the post (statement paragraph 41). These reasons were (page 811):

- *Inability to fulfil the function of Reception cover at CCs*
- *Inability to be available at times required to fulfil functions i.e. 8:00 start at CCs*
- *Failing to complete tasks to the deadline*
- *Attention to detail when completing tasks (distribution list inaccurate and caused issues for H o S and Group Managers*
- *Failing to prioritise correctly – dealing with email rather than attending Full Service [meeting]*
- *Failure to demonstrate some professional competencies – relationships, initiative = reporting safeguarding issue, – decision making – prioritising time, communicating – how communicated not attending meeting with SJ.*

122. It was put to Ms Elam that her first two bullet points related to the claimant's disabilities and that they were the most important in her mind because she had put them at the top of the list. Ms Elam said that the list was not in order of priority. Ms Elam said at paragraph 41 of her witness statement that she thought it was necessary to consider the reception duties as this was part of the Work Programme.

123. Ms Elam's email set out her reasons why she considered the claimant

unsuitable for the post and asked Ms Jones to set out in bullet points "*any other issues that may determine unsuitability for the post*". Ms Elam specifically asked Ms Jones for reasons of unsuitability and not of suitability.

124. We also saw at page 842 a document prepared by Ms Elam in advance of 19 October meeting titled "*Assessment of suitability for the task*". The same two points, regarding reception cover and availability to start work at 8am, appeared at points 7 and 8 of that document.

125. Ms Elam also accepts that she took account of the claimant's "behaviour". In her Assessment document at page 842 she sets out at point 5: "*Ability to for[ge] good working relationships with colleagues and service users. Deameanour [sic] at CC [Children's Centres] not conducive to effective service delivery".* At point 7 she noted that the claimant could not fulfil the reception function "*even with reasona[b]le adjustments. Have been asked to provide further detail of disabilities – 10th October, have not yet done so".* We find that this is incorrect, Ms Elam was not awaiting further information about the claimant's disabilities.

126. At point 8 Ms Elam noted that an 8am start would not be unusual at a Children's Centre and the claimant had informed them that she was not able to do this. Ms Elam's document is notable in that, consistent with her email to Ms Jones on 17 October, it focused on the claimant's unsuitability for the role and not on any aspects that made her suitable. Ms Skelton's evidence (statement paragraph 15) was: *"Chrissie [Elam] seemed concerned mainly about Rosaline's attitude to work and her behaviour during the trial period."*

127. Concerns about the claimant's behaviour and working relationships were taken into account by Ms Elam and Ms Skelton (pages 811 and 842) yet this issue was never put to the claimant for her to deal with or answer. Ms Jones, as the line manager, accepted that she did not put these matters to the claimant because she had not seen them for herself. She relied on what she had been told by Ms Ballard. Ms Elam and Ms Skelton nevertheless relied upon this as part of their decision as to the claimant's unsuitability for the role. No consideration was given as to whether the effects of the claimant's disabilities might have given rise to her "demeanour" (to use Ms Elam's word).

128. Ms Elam suggested in evidence that we need not rely too greatly on these documents (pages 811 and 842) as they were simply an "aide memoir" to herself. We find that they provide the best contemporaneous evidence of what was in her mind at the time. She included within those documents the claimant's inability to do reception cover as part of her reasoning for considering the claimant unsuitable for the role of CCSC.

129. Ms Elam sent an email to Ms Skelton after the meeting on 19 October by way of notes after the event (sent at 16:45 hours page 870). She included in that document (page 871) the claimant's inability to cover reception

duties:

> *"…RH [the claimant] has not been able to work in the CC's since. RH felt this function was not in the JD and therefore shouldn't be a requirement. Whilst she may be able to cover the odd day she couldn't do lots of cover and certainly not all week. CE [Ms Elam] advised that as this was about covering when staff were absent it was not possible to determine the level of cover., it may not be at all or it could be all week in different centres. CE asked now that RH was aware of this did she feel that the post was suitable for her. RH said it was not in the JD and should not be a function of the role. RH also pointed out that she could not work the hours that were expected. She could not get to a centre before 9.30 to 10.00am.*
>
> *This served to demonstrate that RH could not meet the requirements of the role".*

130. We find that although it was not the only factor in her mind, Ms Elam made a direct connection between the claimant's inability to cover the reception duties and her unsuitability for the CCSC role.

131. A letter confirming the outcome of the 19 October meeting was sent by Ms Elam to the claimant on 24 October 2016 (page 892). It included thanking the claimant for her honesty in recognising the functions of the role that she was not able to fulfil, most specifically the requirement to start work on occasion before 09.30am. This start time was in relation to reception duties.

<u>Right of appeal</u>

132. At 16:19 hours on 24 October 2016, the claimant, via her solicitors, attempted to raise a grievance or appeal relating to the end of her redeployment trial. This was sent to Mr John Walsh, Director of Transformation (at page 889-891). Ms Skelton replied on 26 October (page 905) saying that the claimant had not appealed against her redundancy dismissal within the dismissal process and she was out of time to do this, as her dismissal letter was dated 1 August 2016. She was told that redundancy dismissals could not be considered under the Grievance Policy.

133. Ms Skelton was taken to the respondent's Redundancy and Redeployment Policy that started at page 101 of the bundle. Under the heading Appeals at page 103, point 1.11, it said:

> *An employee who wishes to appeal against their selection for redundancy, or who feels that the Redundancy and Redeployment Policy has been inappropriately applied, should use the appeals mechanism set out in this Policy,,,*

134. Ms Skelton agreed in cross-examination that this provided the claimant with a right of appeal, even though she said that she had never, in the whole time she had worked at the respondent, experienced anyone appealing against a redeployment. We find nevertheless that the right to an appeal clearly applied under the terms of the policy and the claimant was not afforded this.

135. Paragraph 2.20 of the same policy (at page 107) states:

> *Throughout the notice period there will continue to be discussion between the employee and their line manager regarding the individual's situation. Efforts will continue to be made to redeploy the employee up until the date of dismissal.*

136. The claimant's effective date of termination was 24 October 2016. We had no evidence from the respondent that there were any further efforts made between 19 and 24 October 2016 to redeploy her. We find that no such efforts were made.

137. Ms Skelton informed her colleagues Mr Marks, Ms Morrison, Ms Elam and Mr Brown by email on 26 October 2016 (page 907) that "*This matter will proceed to an ET…"* and asked them to keep their emails in relation to any discussions with the claimant in particular if they related to her disabilities and asked them to make notes in relation to any such interactions with the claimant.

138. On 3 November 2016 Ms Skelton sent an email to Ms Judy Matthews (page 914) about the claimant's working hours and asked if Ms Matthews had any timesheets relating to the claimant. Ms Skelton was enquiring as to whether the claimant actually worked her full-time hours. Ms Skelton was asked in cross-examination why she did this and she said she "*could not recall*". It was put to Ms Skelton that she was retrospectively seeking to justify the termination of the claimant's employment. As she could not recall the reason why she did this, we find that Ms Skelton was seeking retrospectively to justify the decision to dismiss. Time sheets had never previously been in issue with the claimant.

139. On 5 December 2016 the claimant, via her solicitors, submitted to the respondent a statement (pages 921 – 925). In submissions she relied upon this as the grounds of any appeal against dismissal which she would have raised, had she been permitted to do so.

Disability

140. Disability is admitted in respect of rheumatoid arthritis and osteoarthritis. The clamant also relies on PTSD and carpal tunnel syndrome/RSI. The claimant was asked if in relation to carpal tunnel/RSI she relied on one or two conditions. She said it was carpal tunnel syndrome caused by RSI from "typing etc". We therefore considered this as one condition.

PTSD

141. The claimant's case on PTSD was that it was brought on due to an incident with the police occurring in 2006. The medical records that she had disclosed commenced on 1 October 2008. The claimant was asked if there was anywhere within her medical records where reference was made to PTSD. She said she was "not sure". We could not find such a reference.

142. The claimant was not offered any counselling or therapy for her PTSD.

She gave conflicting answers when questioned as to whether she had asked her GP for counselling or therapy. Initially she said she had asked for this in about December 2006. She later said that she had asked her GP for help but had not specifically asked for therapy or counselling. It was not suggested by her doctor.

143. Once these proceedings were ongoing, the claimant's GP wrote to her solicitors on 20 July 2017 (page 1078b). The GP Dr W Badgett said he did not seek specialist advice as the diagnosis was "so obvious". He described an incident reported to him by the claimant where someone came up behind her unexpectedly and "*she nearly jumped out of the chair she was sitting in".* The claimant said that she did not repeat her request for help at any stage later than December 2006. In re-examination the claimant was taken to an earlier letter from her GP to her solicitors (13 April 2017 at page 1078a) making reference to PTSD from July 2006. Again this was a letter which post-dated the issue of these proceedings on 16 February 2017.

144. The claimant did raise the issue with the respondent during her employment and said that this was an adjustment that she required.

145. The claimant's evidence was that one of the effects this condition had upon her is that she was very jumpy and nervous if approached from behind. This meant, on her evidence, that she could not be seated where she could be approached from behind, in particular she did not want a door behind her so she could not see who was approaching. Ideally she wanted to sit with her back to a wall or a partition.

146. In her disability impact statement she described the condition as making her "wary" when going to and from the staff car park or when going to a meeting and she "could not totally relax" (paragraphs 4 and 5). She did not say that the condition prevented her from doing such things. She said that when she was at work she felt safe and comfortable when she had her back to a partition or wall.

Carpal tunnel/RSI

147. In 2010 the claimant's GP referred her to Charing Cross Hospital in relation to "potential carpal tunnel". At page 1027 there was a letter dated 1 April 2011 from Mr M Pearse, a Consultant Orthopaedic Surgeon at the Carpal Tunnel Service at Imperial College Healthcare NHS Trust, to the claimant's GP, with a diagnosis of bilateral carpal tunnel. It was based on a clinic date of 12 March 2011.

148. The claimant accepts that after April 2011 there is no reference in her medical records or in her GP notes or in various letters from medical specialists to carpal tunnel syndrome. There is also no reference in the claimant's medical records to her having RSI or to this having caused carpal tunnel syndrome.

149. It was taken into account in a workplace assessment in 2014 by Mr Adam Stonely, a health and safety advisor.

150. In her disability impact statement she said that the direct impact of the condition was shooting pains in her wrists and it was compounded by the osteoarthritis. She said she found it difficult to grip an ordinary roller mouse and needed one called a whale mouse which she found immensely beneficial. The claimant's unchallenged evidence (disability impact statement paragraph 7) was that it was compounded by the osteoarthritis.

Knowledge of disability

151. As stated above (under heading "The Issues") the respondent accepted that it had knowledge of the condition of rheumatoid arthritis. Although the respondent said they did not know that osteoarthritis was a separate condition, it was accepted that there was no relevant distinction because the substantial disadvantages were the same. We therefore find that the respondent had knowledge at all material times of these two conditions.

152. The condition of carpal tunnel/RSI is one which was compounded by and overlapped with the condition of arthritis. We therefore find that at all material times the respondent had the necessary knowledge of this condition.

The law

Unfair dismissal

153. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996. Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.

154. The leading case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** establishes the principles for a fair redundancy dismissal and the and these are:

- Whether selection criteria for redundancy were objectively chosen and fairly applied.

- Whether the claimant was warned and consulted about the impending redundancy and whether there was consultation with any recognised trade union.

- Whether instead of dismissing the claimant, the respondent offered any suitable alternative employment.

155. In ***Morgan v Welsh Rugby Union 2011 IRLR 376*** the EAT held that where two coaching positions were being amalgamated into one, the correct approach for the tribunal in a case where there is an amalgamation of posts and interviews for the new posts; is to apply the test in section 98(4). These are the tests of reasonableness, equity and substantial merits in relation to the eventual redundancy dismissal. Where an employer has to appoint to new roles after a reorganisation, that employer's decision must of necessity be forward-looking. It is something much more like an interview process than a straight redundancy selection and that the question is one of fact for the tribunal as to whether the selection process is acceptable. It will consider for example whether an appointment was made capriciously, or out of favouritism or on personal grounds.

156. ***Morgan*** was applied in ***Samsung Electronics (UK) Ltd v Monte-D'Cruz EAT/0039/11*** in which it was held that an ET had erred in holding that a dismissal was unfair because the criteria applied in interviewing for a potential alternative role were unsatisfactory, in particular because they were "subjective". In relation to the use of subjective criteria Underhill P said: ""*Subjectivity" is often used in this and similar contexts as a dirty word. But the fact is that not all aspects of the performance or value of an employee lend themselves to objective measurement, and there is no obligation on an employer always to use criteria which are capable of such measurement, and certainly not in the context of an interview for alternative employment*". The EAT found nothing objectionable in principle to an assessment on subjective criteria.

Disability discrimination

157. Section 6 of the Equality Act provides that a person has a disability if that person has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

158. Under section 212(1) of the Equality Act 2010 "substantial" means more than minor or trivial.

159. This was considered by the EAT in ***Aderemi v London and South Eastern Railway Ltd 2013 ICR 591*** by Langstaff P who said at paragraph 14:

> *It is clear first from the definition in section 6(1)(b) of the Equality Act 2010, that what a Tribunal has to consider is an adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day*

activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.

160. Discrimination arising from disability is found in section 15 Equality Act 2010:

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

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

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

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

161. The approach to be taken in section 15 claims is set out in ***Pnaiser v NHS England 2016 IRLR 170 (EAT)*** by Simler P at paragraph 31. This case also addresses the burden of proof in section 15 cases. Under section 136, once a claimant has proved facts from which a tribunal could conclude that an unlawful act of discrimination has taken place, the burden shifts to the respondent to provide a non-discriminatory explanation. In order to prove a prima facie case of discrimination and shift the burden to the employer, the claimant needs to show:

a. that he or she has been subjected to unfavourable treatment;

b. that he or she is disabled and that the employer had actual or constructive knowledge of this;

c. a link between the disability and the 'something' that is said to be the ground for the unfavourable treatment;

d. some evidence from which it can be inferred that the 'something' was the reason for the treatment.

162. If the prima facie case is established and the burden shifts, the employer can defeat the claim by proving either:

a. that the reason or reasons for the unfavourable treatment was not in fact the 'something' that is relied upon as arising in consequence of the claimant's disability; or

b. that the treatment, although meted out because of something arising in consequence of the disability, was justified as a proportionate means of achieving a legitimate aim.

163. The something that causes the unfavourable treatment need not be the main or sole reason but must have at least a significant or more than trivial influence on the unfavourable treatment and so amount to an effective reason for or cause of it (judgment paragraph 31b).

164. The duty to make reasonable adjustments is found under section 20 Equality Act 2010.

> *(2) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
>
> *(3) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

165. The EAT in ***Royal Bank of Scotland v Ashton 2011 ICR 632*** held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment.

166. This case was considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

167. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

168. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*

(c) the identity of non-disabled comparators (where appropriate); and

(d) the nature and extent of the substantial disadvantage suffered by the claimant.

169. The above guidance was approved by the Court of Appeal in ***Newham Sixth Form College v Sanders 2014 EWCA Civ 734.***

170. On the burden of proof, the EAT in ***Project Management Institute v Latif 2007 IRLR 579*** (Elias P as he then was) held that the claimant must not only establish that the duty to make reasonable adjustments has arisen, but also that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made. It is necessary for the respondent to understand the broad nature of the adjustment proposed and to be given sufficient detail to enable him to engage with the question of whether it could reasonably be achieved or not.

171. The Court of Appeal said in ***Burke v College of Law 2012 EWCA Civ 37*** that in circumstances where a number of adjustments had been made, it was "*perfectly natural and entirely appropriate*" to consider the adjustments as a whole.

172. We are required to take into account any part of the ***Equality and Human Rights Commission Statutory Code of Practice on Employment (2011)*** that appears to us to be relevant to any questions arising in proceedings. Paragraph 6:10 states in relation to reasonable adjustments:

> *"The phrase 'provision, criterion or practice' is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."*

173. In relation to knowledge of disability and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

174. Section 136 of the Equality Act deals with the burden of proof and provides that 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.

175. In ***Abbey National plc v Chagger 2009 IRLR 86*** the EAT and CA (***2010 IRLR 47***) confirmed that the ***Polkey*** principle may apply in discrimination cases. The burden is on the respondent to prove that it is appropriate to make a ***Polkey/Chagger*** deduction.

Conclusions

Disability

176. As disability was conceded in respect of both rheumatoid and osteoarthritis, the remaining issues for us were whether the claimant was disabled with the condition of PTSD and the condition of carpal tunnel syndrome/RSI.

PTSD:

177. In relation to PTSD the claimant says she was diagnosed with this in 2006. She had disclosed her medical records only from 1 October 2008. The claimant was "not sure" if there was any reference to PTSD in the medical records before us and we were not taken to any such reference. We find that were no reference to this condition in the claimant's medical records.

178. The claimant accepts that she was not treated for the condition by her GP. She gave conflicting answers as to whether she had asked for counselling. We find on a balance of probabilities that she did not as there is no reference to this in her medical records. In any event even on her own evidence, the condition was not affecting her sufficiently to prompt her to seek help from her GP at any point after December 2006.

179. In her disability impact statement she described the effect of the condition upon her as making her "wary" or unable to totally relax. She said that when she was at work she felt safe and comfortable when she had her back to a partition or wall.

180. We have taken account of the fact that this condition has not been serious enough to appear in the medical records disclosed by the claimant from October 2008 onwards. The burden is on the claimant to prove disability. She has not been in receipt of any treatment for the condition. There is no evidence of the condition other than what she says and the reference to it in her GP's recent letters to her solicitors, sent after the issue of these proceedings, confirming that that the GP did not seek specialist advice. Dr Badgett does not say that he offered any treatment for the condition. He confirmed that he did not seek specialist advice.

181. The claimant relies on PTSD as a condition that is substantial enough to amount to a disability under section 6 of the Equality Act. The absence of any reference to it at all in the claimant's medical records leads us to a finding that even if the claimant had or has the condition, she has not

discharged the burden of proving that it amounts to a disability having a substantial and long-term adverse effect on her ability to carry out normal day to day activities.

182. The fact that the claimant has mentioned this condition to some of her managers and they have made adjustments does not go to discharging the burden of proof. We find that the claimant was not at the material time a disabled person with the condition of PTSD.

Carpal tunnel syndrome / RSI

183. The other condition relied upon is carpal tunnel syndrome which the claimant says was brought on by RSI. The claimant had a diagnosis of this condition on 1 April 2011 from a Consultant Orthopaedic Surgeon, Mr Pearse.

184. There is no reference to carpal tunnel syndrome in the claimant's medical records after 2011. It was taken into account in a workplace assessment in 2014.

185. The claimant made reference to shooting pains in her wrists in her disability impact statement. It was compounded by her osteoarthritis.

186. On the evidence we had, it is difficult to differentiate between the effects of carpal tunnel and her osteoarthritis. We find on the claimant's evidence that one condition compounded the other. The existence of the condition is not disputed. We find that given the symptoms described by the claimant and the medical evidence from a consultant orthopaedic surgeon that she was disabled with this condition at the material time.

Failure to make reasonable adjustments between 26 and 28 September 2016

187. The claimant relied upon seven PCP's set out below. At the start of the hearing the respondent admitted that it applied PCP's (e) and (f) below and on day 5 (submissions) the respondent admitted applying PCP (b) below.

a) Not providing sufficiently large desks at its Children's Centres to accommodate a roller mouse.
b) Providing reception staff with ordinary office chairs at its Children's Centres.
c) Not offering a workplace assessment to assess what reasonable adjustments were required.
d) Locating receptionist's chairs at Children's Centres in positions where they could be approached from behind
e) Reception staff being required to start work at a fixed time each day - the respondent admitted applying this PCP.
f) Requiring employees undergoing trial periods for the Children's Centre Services Coordinator role to perform reception duties at Children's Centres - the respondent admitted applying this PCP.

g) Not permitting a flexible one-hour lunch break when performing reception duties.

188. In the light of our finding that the claimant was not disabled with the condition of PTSD, the claim for disability discrimination in relation to that condition falls away. We therefore make no finding as to whether the respondent applied PCP (d) above.

189. The claimant conceded in submissions, in relation to PCP (c), that the failure to provide a workplace assessment is not necessarily a failure to make a reasonable adjustment. The claimant relied on the failure to make a workplace assessment as an evidential factor on the duty to make reasonable adjustments.

190. The PCP's upon which we are therefore required to make findings, as to whether they were applied by the respondent, are therefore (a) and (g).

191. We find that the respondent applied PCP (a), that of providing insufficiently large desks at its Children's Centres to accommodate a roller mouse. Although we were not given specific measurements, we saw the photographs to which we refer in our findings above and we also found that the size of the desk needed by the claimant was not just to accommodate the mouse but also to accommodate the position of her forearm in order to use the mouse. The desks appeared to us from the photographs to be relatively small and space was needed not just to place the mouse but for the claimant's forearm and wrist to be supported. We find that the PCP of providing insufficiently large desks for this purpose was applied by the respondent.

192. We find that the respondent applied PCP (g), that of not permitting a flexible one-hour lunch break when performing reception duties. We make this finding based on the claimant's evidence which we find is supported by Ms Ballard's email of 26 September 2016. Our finding above was that Ms Ballard imposed a requirement as to when the lunch break should be taken and limited it to 45 minutes because the "next session" started at 1:30pm. We found this understandable because Ms Ballard was governed by service need. This did not give the claimant the flexibility she otherwise enjoyed under the respondent's Scheme of Flexible Working Hours. We find that this PCP was applied.

193. We have gone on to consider whether the application of those PCP's placed the claimant at a substantial disadvantage in comparison with persons who are not disabled.

194. The claimant was not challenged on the substantial disadvantage of the significant pain and discomfort she experienced when not being able to use her roller mouse in the Children's Centres. We find that she established that substantial disadvantage. The same applies in relation to the lack of her ergonomic chair. In relation to the chair, the respondent conceded substantial disadvantage (submissions paragraph 36).

195. In relation to the inability to take a flexible one-hour lunch break the claimant was again not challenged on her evidence that her disabilities caused her severe fatigue and the lack of the flexible one hour lunch break increased her fatigue and she also suffered severe pain and discomfort. The fixed and early start times at the Children's Centres also prevented her from managing her working hours so as to minimise her fatigue and this led to her becoming more fatigued.

196. We find that the claimant has therefore established the substantial disadvantages relied upon.

197. We have considered whether the respondent took such steps as it was reasonable to have to take to avoid the disadvantage.

198. It is not in dispute that in relation to the chair, they did not provide this at AKCC or Cranford on 26, 27 or 28 September 2016. Was it reasonable for them not to have done so? Mr Brown and Ms Elam considered that moving a chair around the Borough was "*not a reasonable expectation*". They gave no evidence as to how they formed this conclusion or what they had considered, such as the ease or difficulty of moving the chair, the cost of moving it or anything else that they might have considered. Mr Brown's evidence was that if the claimant had been successful in the trial they would have "looked at" making the necessary adjustments. However, for the trial period itself, we find they did not consider it.

199. Based on the claimant's disabilities, she should not have been asked to carry out reception duties at different locations when the adjustments which she was normally afforded, could not be made. We find on Ms Ballard's emails, that the claimant was being asked to fill a gap due to a vacancy and/or an employee being off sick. This was not part of the CCSC role under the terms of the job description.

200. We find that the reasonable adjustment was not to ask the claimant to cover these duties at different locations without the equipment with which she was normally provided. The respondent made this adjustment by 29 September 2016.

201. The same applies to the other adjustments sought by the claimant. In relation to her start time, she sought only the application of the respondent's Scheme of Flexible Working Hours (page 135a). This gave her the flexibility she needed to accommodate her disabilities. We do not criticise the respondent for having a fixed start time for receptionist duties. Our finding is that it would have been a reasonable adjustment not to have asked the claimant to carry out the receptionist duties, thus removing the flexibility she normally enjoyed. We make the same finding in relation to a fixed or flexible lunch break.

202. The claimant needed and was provided with certain equipment within her existing role. Her large desk accommodated this equipment. Again we

find that it would have been a reasonable adjustment not to have asked the claimant to carry out the receptionist duties thus removing the equipment and size of desk she reasonably needed to do her job.

203. As we have found above, the adjustment was made by 29 September 2016. We find that there was a failure to make reasonable adjustments from 26 to 28 September 2016.

Discrimination arising from disability

204. It is not in dispute that the claimant was placed in a trial period that included carrying out reception duties, that she failed the trial period and that in turn resulted in her dismissal. The dismissal is the unfavourable treatment relied upon.

205. The claimant's case is that her poor performance in the trial was as a result of severe physical pain, discomfort and anxiety arising from her disabilities. The pain and discomfort she experienced was not challenged.

206. We have found above that the respondent failed to make reasonable adjustments during the period 26-28 September 2016.

207. We have considered the reasons why the respondent decided that the claimant had failed the trial.

208. We find that the claimant's poor performance during 26 to 28 September when covering reception at Children's Centres was a material consideration by Ms Elam and Ms Jones for the claimant's failure of the trial. We find that Ms Elam's email of 17 October 2016 at page 811 and her "Assessment of suitability for the task" document at page 842 show us contemporaneous evidence of what was in her mind when she made the decision that the claimant was not suitable. In both documents, although the order is changed around, she relies upon the inability to cover the reception duties and the ability to start at a fixed and earlier time of the morning.

209. Ms Elam also relied upon the claimant's "demeanour" in both documents and we have found above that she relied upon Ms Ballard's view of the claimant at the Children's Centres. This was never put to the claimant herself. We find that no consideration was given to the extent to which the claimant's "demeanour" was linked to her disabilities whilst covering the reception duties.

210. We find that the consideration given to the claimant's inability to cover reception duties, her inability to start at 8am or 8:15am or even 8:45am and her "demeanour" during the period 26-28 September (on Ms Ballard's emails) sufficiently influenced the decision that the claimant was unsuitable as to amount to discrimination arising from disability under section 15. The consideration of these factors was significant and

more than trivial so as to amount to an effective cause of her failure of the trial.

211. There were other reasons why the claimant failed the trial and these are also set out in Ms Elam's documents at pages 811 and 842. For example, the claimant had not completed tasks set out for her in the Work Programme, she failed to prioritise attending the First Full Service meeting despite its importance, she failed to put together the correct email distribution list and failed to produce a booking system report she had been asked to do.

212. Nevertheless we find that the consideration of disability related matters was significant and more than trivial thus amounting to an effective cause of the claimant's failure of the trial period. This therefore leads to our finding that there was discrimination arising from disability.

213. No defence was relied upon under section 15(1)(b) Equality Act.

<u>Chagger</u>

214. We have gone on to consider whether the claimant would have been considered unsuitable for the role if there had been no breach of section 15 of the Equality Act. It is analogous to the question of a ***Polkey*** reduction.

215. The claimant was in a trial period for a job at a higher grade. She did not perform well. For example, she failed to complete tasks, she failed to prioritise a very important meeting on 14 October 2016 preferring to deal with her own email correspondence with Ms Jones, she failed to put together the correct email distribution list, she took unauthorised leave (approved retrospectively) and failed to produce a booking system report.

216. At the same time, we find that the respondent did not provide the level of support and feedback that was envisaged by Mr Brown in his email of 12 September 2016 (namely on a weekly basis) to help the claimant understand whether she was meeting the criteria set for the trial. There were only two review meetings, one on 30 September and one on 10 October 2016. No training needs were identified or implemented. The claimant was not given feedback on ways in which she was not meeting the criteria of the role. The final review meeting was a dismissal meeting on 19 October, just prior to the end of the trial period, when the decision had already been made and the claimant had no opportunity to improve.

217. At the same time, the claimant did not perform well and she did not show the respondent that she was committed to the role in terms of completing tasks or prioritising what was important.

218. We find that even with more feedback and support from the respondent there is only a 30% chance that the claimant would have been successful

in securing the CCSC role. It was a higher graded role so that she was seeking not just an assimiliation but a promotion. She did not acquit herself well in the trial and absent the discrimination and even with more feedback from the respondent we find that her prospects of securing this role were not high. We put this at 30%.

Unfair dismissal

219. The claimant accepts that there was a genuine redundancy situation and the reason for dismissal was redundancy. There is also no issue for us to decide on selection for redundancy.

220. The matters in issue for us were:

- Did the respondent sufficiently consult with the claimant?
- Did the respondent give reasonable consideration to whether suitable alternative roles existed so as to avoid redundancy? In particular should the respondent have offered the claimant the role of CCSC?
- Should the claimant have been offered a right of appeal on the decision that she had failed the trial period? The respondent says there was no right of appeal.

221. In submissions the claimant described these issues in short form as (i) consultation (ii) assimilation and (iii) appeal.

222. On consultation, the claimant's submission was that meaningful consultation did not take place, because the claimant was not aware of the correct reason as to why her post was being made redundant. She understood that her post was redundant because it was funded from the Children's Centre Budget. She was told this by Ms Morrison and Mr Brown and the position was not corrected in answer to her email of 20 May 2016.

223. We find that knowing where her funding came from and being consulted on this, would not ultimately have made any difference to the decision to make her role redundant. The two restructures carried out by the respondent led to the same outcome, which was the deletion of the claimant's role. We find that the incorrect identification of the source of the funding made no material difference to the respondent's requirements for the work and the decision to make the claimant's role redundant.

224. The claimant submits that any reasonable employer would have created the CCSC role within the same restructuring as the one involving the role which it most closely matched (the claimant's role in the EIS restructuring). The respondent submits that the claimant's role was to provide administrative support to the EIS management team and not to the Children's Centre Service and that it did not fall outside the range of reasonable responses for the respondent to consider the claimant's

substantive EIS role within that restructure and not the earlier restructure.

225. It is not for us to decide how employers should carry out their restructuring. This is a managerial decision and we find that it was not an unreasonable decision to create the role within the Children's Centre restructure.

226. If claimant's role had been included in the Children's Centre restructure, we find that she would not have been automatically assimilated in any event, because it was a post one grade higher than her own. The policy provides at clause 6.10 (page 127) that employees are not normally assimilated into higher graded posts. In support of this we have taken into account the fact that the claimant withdrew her assimilation appeal.

227. We also find that the respondent acted reasonably in that they kept the CCSC role "alive" so that employees in the EIS restructure could express interest in it.

228. The claimant was not given a right of appeal against the decision that she had failed the redeployment trial and was not suitable for the CCSC role. We found as a fact that she was entitled, under the Redundancy and Redeployment Policy, to a right of appeal under clause 1.11.

229. The claimant was offered four other roles within the redundancy process but her case and contention was that it was the CCSC role into which she should have been assimilated. The respondent submitted that the decision that the claimant was not suitable for the role on interview was a reasonable decision. The purpose of the trial period was to assess whether she was suitable for the role. It was a higher graded role and the claimant did not perform well.

230. For unfair dismissal purposes we have taken account of the decisions in ***Morgan v Welsh Rugby*** and ***Samsung Electronics*** that an element of subjectivity is involved when assessing how a candidate will perform in a newly created role.

231. There is more scope for employers in a forward-looking selection exercise. However, in this case we find that the respondent did not provide the feedback and support that they envisaged at the outset and the claimant was denied a right of appeal under the respondent's own procedure.

232. We have also considered that between 19 and 24 October 2016 the respondent made no further search for any alternative employment and deprived the claimant of access to any internally advertised roles. We find based on the respondent's evidence, that the possibility of such vacancies existing was very small.

233. Based on the respondent's procedural failings of the lack of feedback and support, failure to provide weekly review meetings, the lack of an

internal appeal and the failure to look for vacancies at the very end of the trial period, we find the dismissal to be unfair.

234. Even if the respondent had dealt fairly with these procedural matters, we find that there is nevertheless only a 30% chance that the claimant would have remained in the respondent's employment. We repeat our findings on the ***Chagger*** point above; the claimant had not performed well in a role in which she was seeking a promotion. We accepted the respondent's evidence that the likelihood of any further alternative roles being available was very small. We therefore make ***Polkey*** reduction of 70%.

235. The parties consented to us making findings on ***Polkey*** and ***Chagger*** at this stage and the result of our findings is that the remedy to which the claimant is entitled is to be reduced by 70% under these headings.

236. A remedy hearing will be listed after taking account of the parties' availability. The parties are encouraged to explore areas of agreement in relation to remedy.

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Employment Judge Elliott
Date: 19 March 2018