



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs Rachel Walker

Respondent: Middlesbrough Borough Council

Heard at: Teesside **On:** 2, 3, 4, December 2019

Before: Employment Judge Beever
Miss Kirby
Mr Carter

Representation:

Claimant: Mrs Ball, Solicitor

Respondent: Mrs Hogben, Counsel

RESERVED JUDGMENT AND REASONS

1. The claimant's claim for unfair dismissal pursuant to s.98 ERA is well founded and succeeds
2. The claimant's claim for indirect sex discrimination is well founded and succeeds
3. The claimant's claim for victimisation is not well founded and is dismissed
4. The matter is to be listed for a telephone Preliminary Hearing on a date to be fixed for Case Management Directions and a listing of a Remedy Hearing

REASONS

1. By an ET1 presented on 23 May 2019 the claimant brought claims of unfair dismissal and unlawful indirect discrimination on grounds of sex and unlawful victimisation.
2. At a Preliminary Hearing on 29 July 2019, EJ Johnson helpfully set out a detailed statement of the law and issues. A further Preliminary Hearing took place on 5 October 2019 when the claims were clarified. As a result of those Hearings, the tribunal at the outset of this Hearing was able to identify the issues that the tribunal was required to determine.

The issues

3. The issues for the tribunal, as determined at the outset of the Hearing, are:

Unfair Dismissal – s.98(4)

- 3.1. Has the respondent established the reason for dismissal of the claimant? The claimant accepts that the principal reason for her dismissal was because her position was redundant
- 3.2. If so did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The claimant accepts that the process regarding consultation and selection was fair. The challenge that the claimant makes is that the respondent failed to properly and fairly consider the possibility of alternative employment. She was offered a position of “Deputy Head of Pensions, Governance and Support” (referred to herein for convenience as “the Deputy Role”) but only on a full time basis and she declined it because she needed to work part time.

Unlawful Indirect Sex Discrimination – s.19

- 3.3. Did the respondent apply a PCP to the claimant, and to persons with whom the claimant does not share the characteristic of her sex?
- 3.4. Did the PCP put (or would put) persons with whom the claimant shared the characteristic of sex at a particular disadvantage compared with persons who did not share the characteristic?
- 3.5. Did (or would) the PCP put the claimant at that disadvantage?
- 3.6. Can the respondent show the PCP to be a proportionate means of achieving a legitimate aim?

Unlawful Victimisation – s.27

- 3.7. Did the claimant do a protected act?
- 3.8. Did the respondent subject the claimant to a detriment?
- 3.9. Was the detriment that the respondent subjected the claimant to because the claimant had done a protected act?

Jurisdiction/Time – s.123

- 3.10. Has the claimant brought claims within the period (as extended by the ACAS Conciliation rules as appropriate) of 3 months starting with the date of the act to which the complaint relates in accordance with s.123 of the Equality Act 2010?
 - 3.11. If not, then do any of the alleged acts constitute a course of conduct extending over the relevant period?
 - 3.12. If not, would it be just and equitable to extend time?
4. Issues of remedy were deferred to the conclusion of the hearing. In the event, judgment on liability was reserved and no evidence or submissions were received in respect of remedy.

The Facts

5. The tribunal heard oral evidence from the respondent's witnesses: John Shiel, Nick Orton, Rebecca Thompson and James Bromiley. The claimant gave oral evidence. All witnesses were cross examined. Both the claimant and the respondent's representative made closing oral submissions. There was a bundle of documents contained within Tabs A-C but also including additional inserts that were placed before the tribunal.
6. The tribunal made its findings of fact having regard to all of the evidence and did so on a balance of probabilities.

Background

7. The respondent is a local authority and an employer of approximately 3500 people. The respondent is the Administering Authority for the Teesside Pension Fund (TPF).
8. The claimant had worked for the respondent since 1986 and was employed as an Administration Manager in the Loans and Investment Section for the TPF up until the termination of her employment on 31 March 2019.
9. The claimant described her role of Administration Manager as a back-office function within the TPF, requiring her to ensure that assets bought and sold by the front-office function were accurately accounted for. She managed contracts and relationships with external partners, such as the respondent's property agent's contracts and direct property assets. Her role as Manager involved providing training programmes and managing a team of staff.
10. Since 2008, the claimant worked part-time hours. The tribunal has not seen a written contract of employment but finds that since 2008 the claimant had worked 32 hours per week typically with Monday as a non-working day. Her line manager, Paul Campbell, was aware that the claimant did not work Mondays because she had caring responsibilities for her parents. Since 2015, the claimant's parents relocated and lived opposite to the claimant so that she could be better able to assist them. The claimant stated that she was unable to work full time as she would have been unable to support her parents. Although there was some physical caring need, the claimant described that she provided emotional care and support. The tribunal was

told that the claimant's mother passed away in August 2018 but that both before and after that time the claimant also had caring responsibilities for her father.

Caring Responsibilities

11. The claimant adduced evidence that it was more likely that women rather than men would have caring responsibilities for elderly parents and as a result would require part time working. This was a national picture. Mr Orton agreed with that national picture. The respondent has not attempted to rebut these figures. The information is at [B386-B440].
12. At the outset of the hearing, the respondent was invited to identify why the evidence (referred to in the preceding paragraph) was not sufficient to establish group disadvantage for indirect discrimination purposes. The respondent contended that the national pool was inappropriate; the respondent identified that an alternative appropriate pool for comparison should be the post-holders in the new structure: see Mr Orton's witness statement, at paragraph 16. The respondent did not dispute the suggestion that of the identified 7 post holders (3 female; 4 male), there was 1 female with caring responsibilities. If the claimant were to be a part of the relevant pool, there would be 2 females out of a pool of 8 with caring responsibilities. The pool of post-holders in the new structure were each selected on the basis that they would be required to undertake the respective roles on a full time basis.

Pension Fund Management

13. As a result of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016, all local government pension funds were required to "pool" investments with other funds. The respondent was therefore no longer able to continue to manage its own investments and was required to pool its resources and also outsource management to an alternative provider. The respondent joined the Border to Coast Pension Partnership (BCPP) which was made up of 12 local government pension funds. BCPP was based in Leeds.
14. It is common ground that this created a TUPE situation for staff within the Loans and Investments Section of the Respondent. At the same time, the respondent had to put in place a structure to ensure that it continued to administer the TPF, ensure the integrity of its residual assets, and to manage its relationship with BCPP.
15. The Teesside Pension Fund Committee was responsible for the TPF. It held a meeting on 21 December 2017, and the minutes of the meeting [B85A] establish that an officer's report was presented on the developments in setting up the BCPP structure.
16. The report is at [B53]. The report is owned by Mr. James Bromiley, Strategic Director Finance, Governance and Support although it was in reality devised and written by Mr. Paul Campbell, the then Head of Investments. The report identified that the proposed transfer date was 1 July 2018. The expectation was that following the setting up of BCPP, the assets of the Fund would substantially (and over a period of time) transfer to the management of BCPP. The report [B58] to the Committee

attached a presentation which set out the existing structure and defined the new structure (or target operating model) which was required within the respondent to manage the relationship with BCPP and maintain the safety of the residual (or “legacy”) assets.

17. The existing team structure as at December 2017 is described at [B68]. The Head of Section at that time was Mr Campbell. The claimant’s role was Administration Manager within the Administration Section. The Investment Team have been described as a “front office” function. This front office by and large did in fact transfer under TUPE arrangements to BCPP. In the event so too did Mr Campbell. The Administration Team have been described as a “back office” function. The back office employees were less inclined to transfer not least because of the prospect of a further imminent TUPE transfer out of BCPP in view of an outsourcing agenda. A full complement of the existing team structure as at December 2017 would be 17 members of staff but there were at that time 6.5 vacancies.
18. The transfer of assets to BCPP was expected to take place over a significant period of time. Mr Bromiley told the tribunal that transfer of some assets could only take place when advisable to do so and that the process may yet take many years to come. Notwithstanding the transfer therefore, the TPF still had responsibility for Direct Property as well as a substantial amount of residual assets and local investments. There was still a need for investment administration and accounting. The TPF would be required to continue to oversee the pension administration services provided by Kier and there was a continuing requirement for governance and leadership of the Fund. A table at [B72] identified what was required, including: increase scope of work, managing the BCPP relationship and procurement and the Keir service; increase resilience and mitigate key man risk; increase leadership of the Fund and to adapt to and manage the transfer process.
19. The proposed new structure is at [B73]. The full complement was identified as 9 FTE. It provided for 2 x Deputy roles: essentially, a front-office role and a back-office role respectively. The role which most closely matched the claimant’s existing position was Deputy Head of Pensions – Governance and Reporting Lead. This Deputy Role was one grade higher than the claimant’s existing position. The timescale for the new structure was set out at [B75] and envisaged the Committee’s approval in December 2017 and a period of staff feedback and job evaluation followed by a recruitment process and the new roles to be taken up by the time of the intended TUPE transfer date of 1 July 2018.
20. On 21 December 2017, the Committee noted [B85B] the proposed staffing structure and the timetable for recruitment. Mr Campbell was present at the Committee meeting. The Committee had been provided with the report prior to the meeting. The minutes suggest a lengthy agenda and do not indicate any discussion about the proposed staffing structure. There is no evidence that the Committee discussed the requirements of the individual roles within the proposed staffing structure and it is highly unlikely to have done so not least because the job roles were yet to be evaluated.
21. Mr Campbell has not given evidence to the tribunal. Further, although Mr Bromiley is the owner of the report, it was understandably his position that he relied on his

operational manager for the detail of the process. The tribunal finds that as at the date of the Committee's decision on 21 December 2017, there was unlikely to have been any discussion at Committee and no specific decision reached as to whether all the roles in the proposed staffing structure, and in particular the Deputy Head of Pensions – Governance and Reporting Lead, were necessarily to be full-time positions. The proposal for a structure of 9 FTE does not amount to a requirement that all roles were to be carried out on a full-time basis only.

22. A number of staff meetings had then taken place between December 2017 and April 2018 (these are identified at [B139]) and it is common ground that the respondent informed its staff of the developing situation concerning the TUPE of existing staff to BCPP and of an anticipated redundancy situation for colleagues arising from the relocation of the Investments service from Middlesbrough to Leeds. A formal 45-day consultation period commenced on 4 April 2018, the first meeting for which was set for 10 April 2018. Consultation included setting out the options, such as those set out at [B93] permitting affected staff to choose between a TUPE transfer to BCPP or staying within the respondent and (i) applying for a post in the proposed new structure as a ring-fenced application, or (ii) applying for voluntary redundancy, or (iii) redeployment in a compulsory redundancy situation. From early 2018, the possibility of an enhanced voluntary redundancy option was part of the discussion [B96].

The claimant's increase in hours

23. On 4 April 2018, the claimant and Mr Campbell discussed how this transition to BCPP was to be achieved. The management of this transition and the transfer of assets to BCPP was anticipated to create a significant increase in workload. The claimant agreed to increase her hours to assist in the transfer. On 5 April 2018 [B145], the claimant agreed to increase her hours following that discussion with Mr Campbell. The claimant's agreement was initially until the TUPE transfer date, a period of 3 months. The claimant's hours increased temporarily from 32 hours to 37 hours with effect from 1 April 2018. The claimant required 1 day off per week to be able to manage her caring responsibilities to her parents. She therefore worked compressed hours. The email refers to "personal circumstances" but the tribunal accepts the claimant's evidence that Mr Campbell was fully aware of the claimant's caring responsibilities.
24. The claimant worked 37 hours per week from April 2018. Although it remained temporary, it transpired that the claimant agreed to extend the arrangement from July 2018 to December 2018 because of the ongoing need to facilitate the transfer and the increased workload arising. That the claimant was prepared to do this was to her credit as it was principally for the assistance of the respondent (a fact acknowledged by the respondent's witnesses). However, it was not a sustainable situation and it was at the expense of the claimant's satisfactory discharge of her caring responsibilities.
25. As it transpired, the claimant was absent from work for a significant period between 3 August 2018 to 14 October 2018 and therefore a significant element of work was not achieved. The claimant agreed to extend further and did so up until the

termination of her employment on 31 March 2019. Her last day in the workplace was in mid-February 2019.

26. The claimant was at the same time seeking a quotation for a potential enhanced redundancy package. The claimant understandably wanted to know her options. No jobs in the new structure had yet been evaluated or made available for recruitment. The respondent's counsel in cross examination suggested that the claimant's increase in hours was motivated by a desire to increase her eventual redundancy payment. The claimant rejected this. The tribunal accepts the claimant's evidence which was further supported by the fact that the claimant did not accept enhanced redundancy at first opportunity and instead continued to assist the respondent over a significant period of time in the transfer of assets to BCPP.
27. The claimant was transparent in her intentions and in particular she stated in May 2018 in her 1-1 consultation that she was happy to stay in her current role as Administration Manager as long as her Voluntary Enhanced Redundancy was protected [B199]. At that same consultation meeting, the claimant suggested that she might undertake the new Deputy Role on an interim basis. Her reasons for this suggestion are set out in her notes following the consultation meeting on 10 May 2018 and the signed notes [B201] reinforced that the claimant was willing to work on an interim basis and that Mr Campbell did not reject the suggestion. The claimant made the suggestion to assist the respondent so that the new Head of Pensions would be able to form his/her own view of the situation and whether the claimant was the right person for the job. In the event Mr Bromiley rejected the proposal [B247] but stated, "if we are unable to fill the deputy role, the new Head may want to discuss your proposal at some point in the future". There was no later discussion with the claimant.

The claimant's application for the Deputy Role

28. The recruitment process to fill the positions in the proposed new structure began on about 21 May 2018 following completion of job evaluations [B202]. The Deputy Role is described on [B203] and its job description is at [B224]. The claimant was the only suitable and qualified person for the role within the respondent. The Deputy Role was in effect a back office role, as recognised by the respondent's witnesses. There was considerable similarity with the work of Administration Manager albeit that it amounted to a promotion for the claimant.
29. The claimant was the only applicant for the Deputy Role. The job advert for the role did not specify the hours of the post. The claimant applied for the role on a part-time basis and made that clear in her application form at [B231]. The claimant did not indicate in her application any preference as to the nature of the part-time arrangement. Her application sets out her skills and experience, including her responsibility for staff, her management skills and approach, procurement and project management of contracts experience together with governance/compliance of contracts.
30. In the meantime, Mr Campbell had elected to TUPE across to BCPP and the new management structure in place meant that Mr Campbell would act as Interim Head

reporting to Mr John Shiel until the new Head, Mr Nick Orton, commenced the role in October 2018.

31. The claimant's interview for the Deputy Role was held on 12 July 2018 when she was interviewed by Mr Shiel and Mr Campbell. The interview was an hour and half long involving a series of technical questions and a presentation. At no point during the process was there any discussion with the claimant about the fact that she had applied on a part time basis or about the hours for the post or the fact that the post was thought to be a full-time position only.
32. The claimant was successful and was offered the role on the same date. Mr Shiel required the claimant's response by the following day, which the claimant considered somewhat abrupt. In the event, the claimant approached Ms Rebecca Thompson, senior HR Business Partner, who facilitated an extension of time over the ensuing weekend for the claimant to consider the position. The claimant was at this time still considering it on a part-time basis.
33. On Monday 17 July 2018, the claimant came into the office (albeit Monday was a nonworking day for the claimant) and informed Mr Campbell that she would accept the role but would do so on a part-time basis. Mr Campbell had asked the claimant to identify how many hours, and the claimant responded that she would be happy to discuss this with the new Head. Mr Campbell proposed to the claimant that the claimant should "put the ball in their court" by suggesting a part-time arrangement and in that context the claimant suggested 3-days per week for discussion purposes. The claimant went home.
34. Unbeknown to the claimant Mr Campbell then discussed the matter the same day with Mr Shiel in the office at least to the extent that their conversation was overheard by colleagues. In a conversation lasting only a short time, Mr Shiel informed Mr Campbell that the Deputy Role could only be done on a full-time basis. Mr Shiel did not recall his conversation with Mr Campbell but acknowledged in evidence that it probably did happen because the decision had been made that the role needed to be full-time: it was, in his view, "always a full-time role".
35. On the following day, when the claimant came into work, Mr Campbell reported the outcome back to the claimant but did not provide a basis for the decision. In addition, a colleague asked the claimant if her "ears were burning" given the overheard conversation of the previous day. By email dated 18 July 2018 [B285], the claimant later put her position in writing as she had been unable to speak with Mr Shiel. In the email, the claimant described that she had applied for the role on a part-time basis and could not consider the role on a full-time basis but emphasised how she had worked in the interests of the respondent in the 8 years of working part-time up until that point. The claimant was upset, and worked at home for the remainder of the week.
36. A meeting took place on 25 July 2018 between the claimant and Mr Shiel, and a representative from HR, Nicola Finnegan. The claimant made preparation notes [B288] for that meeting. The claimant also brought a gov.uk leaflet [B291] which suggested that the claimant might have the right to a trial period in any alternative employment. No notes were taken of the meeting.

37. The claimant was told by Mr Shiel at the meeting on 25th of July 2018 that the Deputy Role could only be fulfilled on a full-time basis. The claimant recalls that she was not provided with reasons why she could not undertake the Deputy Role on a part time basis but in evidence she accepted that Mr Shiel did tell her that the role was a “new” role. Mr Shiel did give the claimant examples of aspects of the Deputy Role but he did not explain to her why the new role could not be done on a part time basis. The only example recalled by the claimant about which the claimant gave evidence to the tribunal was that member training was required to be undertaken by the new Deputy Role but the claimant asserted that she was already familiar with member training.
38. In evidence Mr Shiel referred to a “key facts” document, at [B328a]. Although undated, this document was written in January 2019. It was Mr Shiel’s later recollection of what had transpired at the 25 July meeting. Mr Shiel there recounts that, “Rachel had done some research on employment law and attempted to tell Nicola and I how things should be done”. The reference to research is most likely a reference to the gov.uk document that the claimant brought to the meeting. Mr Shiel and Ms Finnegan rebuffed the claimant’s suggestion of a trial period. Mr Shiel said in evidence that Nicola Finnegan explained to the claimant that Ms Finnegan “knew the rules and didn’t need to read” the document. Mr Shiel’s note also recounts that the claimant wanted the post on a trial basis, “to see if she liked the new Head” before accepting the post on a permanent basis. In evidence, Mr Shiel did not repeat that assertion. The tribunal rejects the suggestion that the claimant wanted to see if “she liked the new Head”. The claimant understood that the trial period option would have been a “2-way” process whereby the respondent could equally conclude that the trial was not working.
39. In cross-examination, Mr Shiel said that a trial period would not have been reasonable because the new post reflected “a huge area of council business” and a trial period would have given Mr Shiel no sufficient idea about whether the role could be done on a part time basis or not. Mr Shiel also said that he rebuffed the suggestion of a trial period because this was not a compulsory re-deployment situation, instead it was a brand new post in a new structure and a trial period was only an option if the claimant had taken compulsory redundancy. Further, in evidence Mr Shiel stated that the role was always a full-time role in particular because there were “so many uncertainties” and that Mr Shiel “didn’t know what requests a new manager would impose”. Mr Shiel accepted that his explanation in evidence before the tribunal was significantly more extensive than his key facts document.
40. Turning to the key facts document, Mr Shiel recorded that the Deputy Role was a “new” role in respect of which there were “many aspects that she was not experienced in” including “member training and development programme and preparation for the re-tendering of the pensions admin contract”. Secondly, that the new Head “could well have” additional tasks. Thirdly, that the Committee had “created the post as a full-time role and that [Mr Shiel] was not in a position to appoint to part-time, for it then not deliver and be accountable to the committee for allowing a part-time appointment to a post they had created as full-time”.

41. The tribunal finds that Mr Shiel had made up his mind already by the time of his meeting with Mr Campbell in July 2018. In cross examination, he accepted that he did not explore any part-time option with the claimant nor enquire why she wanted to work part-time. He said that he already, “had a good idea of the role and [he] was not confident that it could be done on a part-time basis”. When asked if in fact his mind was closed, he answered “all the [new] team was full time, they’d been appointed full-time”.
42. Given that it was apparent to Mr Shiel that the claimant was upset, at the end of July 2018, Mr Shiel gave the claimant a further week (since Mr Shiel himself was on leave for a week) to make up her mind.
43. As matters transpired, the claimant was absent from work shortly thereafter and until 14 October 2018. Mr Shiel called the claimant to a meeting on 29 October 2018 in order to discuss arrangements for the Deputy Role. Mr Shiel recalls that he had always believed that the position was full time and this is consistent with the claimant’s recollection of the meeting on 29 October 2018 when Mr Shiel said to her that “the more he heard about the role, this just supported his view that it was a full-time position” and there was no further discussion. There was no discussion about what the claimant’s caring requirements were or the nature of any part-time arrangement that she would seek or the offer of any alternative options available through the respondent’s policies, including flexible working or agile working options.
44. The claimant attended a return to work meeting with Mr Campbell and the incoming Head, Mr Orton. It was apparent that neither Mr Campbell nor Mr Orton could speak to the need for the Deputy Role to be full-time.
45. The claimant declined the Deputy Role on 1 November 2018 [B293]. She stated that her personal commitments did not afford her the ability to carry out the role on a full-time basis.
46. The claimant had been the only applicant and self-evidently was a satisfactory applicant as she was offered the role. The respondent accepted that this meant that she had the skills and experience (or would with a reasonable amount of training) to undertake the role. The tribunal finds that the claimant declined the role because of her caring responsibilities. The tribunal also finds that if the respondent had been open to a part-time arrangement even temporarily, the claimant would have accepted the Deputy Role. As it transpired, the Deputy Role remained vacant throughout the rest of the claimant’s employment. Mr Shiel described that as, “not satisfactory by any stretch of the imagination” and much of the required work was being “pushed up” i.e. undertaken by more senior officers. Despite the vacancy, there was no discussion with the claimant about the potential for her to take up the role even temporarily.
47. The claimant and the respondent agreed to extend the claimant’s existing role to March 2019 in order to continue to facilitate the process of transition and without impacting on the claimant’s entitlement to enhanced redundancy terms at the end of that period.

The claimant’s grievance

48. The claimant was dissatisfied with the outcome of her request for part-time work. She spoke to her union representative on 2 November 2018. The representative suggested a grievance route but the claimant felt it was “the last thing [she] wanted to do against her employer” and as a result tried to seek advice from the full-time union representative. She chased him because she did not want to submit a grievance without the benefit of advice and in particular whether there were other instances across the respondent that might assist. She did not receive that advice until January 2019.
49. The claimant spoke to Mr Orton on 21 January 2019 and informed him that she was intending to raise a grievance. Mr Orton replied that he was not sure the claimant would get the answers that she was looking for. Mr Orton explained in evidence that he was not discouraging the claimant but was asserting that the grievance process can often be seen as a less than satisfactory route to a resolution.
50. On 25 January 2019, the claimant submitted a written grievance to Mr Orton [B309] which alleged a failure of the interview process and procedures, indirect sex discrimination due to carers’ responsibilities and unfair treatment with regard to the flexible working policy.
51. A grievance hearing took place on 7 February 2019. There were no minutes from the meeting but Mr Orton provided the claimant with his notes which are at [B314e] which also record the claimant’s highlighted observations. Mr Orton did not undertake any other interviews but recalls that he would have spoken informally to Mr Shiel. Mr Orton also believes that he was provided with the “key facts” document and the tribunal considers that this was likely given the similarities that exist between the document and Mr Orton’s grievance outcome letter [B316].
52. The grievance outcome letter is dated 14 February 2019. In it, Mr Orton acknowledged procedural oversights in the recruitment procedure, namely the failure to specify the hours of the post in the advert and the failure to spot the part-time indication on the claimant’s application form. The grievance outcome rejected the claimant’s grievance about the role only being full-time and stated that “the decision that the role was full time was made on the grounds of business need: there is no evidence that you are subject to indirect sex discrimination due to carers responsibilities”. The letter addressed the claimant’s question, namely, “in the absence of an adequate explanation I would like a written explanation as to why this post could only be considered on a full-time basis”. The explanation provided by Mr Orton is taken directly from Mr Shiel’s key facts document.
53. The claimant appealed the grievance decision by letter dated 21 February 2019 [B322] to Mr Bromiley. A grievance appeal hearing took place on 21 March 2019. There are no notes from the meeting. It was a short meeting. Mr Bromiley took the view that the claimant was dissatisfied with Mr Orton’s conclusion, but “her grievance appeal did not raise anything new”.
54. The claimant was provided with an outcome letter dated 2 April 2019 [B329]. The claimant was informed that the grievance appeal sought to address any issues that the claimant had felt had been left unresolved from the grievance outcome. In fact

the view taken by Mr Bromiley was that he could not identify any specific issues which had not been covered by Mr Orton. Particularly in relation to the question of whether the role should be part-time, Mr Bromiley stated that it was at the discretion of the employer to determine whether a role was full-time or part-time and Mr Bromiley concluded that Mr Orton had already provided the claimant with a response. Mr Bromiley did not carry out any separate assessment of his own as to whether the role was necessarily only a full time role and instead confined himself to a conclusion that the assessment had in fact been carried out already by the respondent.

55. The claimant did not raise a Stage 3 appeal. She said that she was disenchanted by the entrenched view of the respondent and had no belief that any further process would be conducted fairly or without bias.

The respondent's rationale for full-time working

56. Mr Shiel in his witness statement (paragraph 11) refers to the fact that the TPF Committee had agreed that all of the posts in the new structure should be on a full-time basis. He states that he had no remit to fill any of those posts other than on that basis. He states that diverging from a decision made by the TPF Committee responsible for determining the structure would have serious consequences for doing so. Mr Shiel was not at the Committee meeting and in December 2017 he did not have responsibility for the TPF. He conceded that he did not know what if any discussions the TPF Committee had regarding the status of individuals' job roles and at the time of the Committee's decision in December 2017 there had been no job descriptions or meaningful descriptions of the roles.
57. Mr Shiel was not aware that the claimant wished to be considered part time until it was brought to his attention in July 2019. When he became aware, he did not take the issue back to the TPF Committee. He accepted that he had the opportunity to do so since the Committee met regularly. He did not do so because, as he said in evidence, "he did not need to because the officers responsible for the design of the structure felt that this was a full-time position and felt it was not suitable to part-time so I didn't intend to go back to the Committee simply to ask them to tailor the role to the individual".
58. Mr Shiel described the posts in the new structure as "new" and that expectations were high. In evidence, he explained that because the posts were new, there was uncertainty and risk. He conceded that there was always an element of uncertainty in any promoted position. He agreed that the claimant had shown flexibility in working and contributing when needed. There was uncertainty arising from the appointment of a new Head of Pensions and Mr Shiel explained that he, "didn't know what requests the new manager would make". Mr Orton was the new Head, taking over from Mr Campbell.
59. Mr Shiel identified specific requirements of the new Deputy Role. The role required member training. Mr Shiel in evidence accepted that the claimant had experience of providing training but that he believed that training to members was different: training

to members was periodic and sometimes there was a greater need for training where the make-up of the Committee changed for political reasons.

60. The Deputy Role would in due course require responsibility for the retendering of the pensions administration contract in the short to medium term. Mr Shiel agreed that the claimant had previous tendering experience. This is also evident from the claimant's application form [B238] describing being heavily involved in preparation and implementation of tenders for key contracts and project management of contracts. Mr Shiel described the tendering of the pension administration contract as "huge and daunting" and said it represented a "big step up" for the claimant. He accepted that the timescale allowed for training to be given to the claimant if needed. The size and scale of the procurement was both "big and demanding" and Mr Shiel stated that it could not be achieved except as a full time job. He agreed that the role of pensions officer was a role that would provide assistance to the Deputy Head.
61. In re-examination, Mr Shiel re-stated that it was the judgement of those who designed the structure that it was a whole new way of working, that it was "unchartered territory", which required new ways of working and a new structure going forward, and it was because of this that it was reasonable to expect that the Deputy Role should be on a full time basis.
62. Mr Bromiley in evidence said that it was not his decision as to whether the role could be a part time role. He said that it was a matter for his Head of Service (Mr Shiel). Mr Bromiley stated, "if my Head of service regards it as a necessary and its supported by [TPF] Committee, its not for me to say otherwise". In cross examination, Mr Bromiley said that it was his understanding that, "the expectation was always a full time position as it was responsible for the resilience of how the pension fund worked". The tribunal probed that answer. The document at [B40] referred to, "increase resilience and mitigate key-man risk". The Head of Pensions was a key-man position and Mr Bromiley described the consequences if the Head of Pensions was unable to perform his task. Mr Bromiley confirmed that it was not so much about increasing resilience but of "spreading" resilience such that the 2 x Deputy roles under the new structure would act up as necessary. Mr Bromiley also described the need to manage the ongoing relationship with BCPP as a "new" responsibility.

The claimant's request for a reference

63. On 25 January 2019, the same day that the claimant submitted a grievance to Mr Orton, the claimant had emailed Mr Orton to ask for a reference. In her email, she refers to a discussion a few days earlier. Following on from that earlier discussion, the claimant had asked for "an employers reference". Her email states, "I know our time working together has been short, but hopefully you have seen my professional capabilities and attributes". Mr Orton did not respond to that email. The claimant recalls that shortly before her final working day at the respondent (in mid-February 2019), she approached Mr Orton again and he said that he was not comfortable in providing a reference as he had not known the claimant long enough.
64. The claimant recalled that in the same conversation she then verbally requested a "basic" reference" which she felt was easily obtainable from HR, but which Mr Orton

declined as well. Mr Orton did not recall it being expressed as a basic reference and he agreed that the respondent's policy permitted a basic reference and that he would not have refused a basic reference. Basic, in this context, means a simple statement of the number of years of service and the role(s) held by the employee. Mr Orton stated that, "my reason for no reference was because the claimant was looking for a testimonial....how good she was at her job".

65. The tribunal was not directed to a written reference policy. However, Ms Thompson assisted the tribunal. It was the policy of the respondent not to provide open references, and instead will only provide a basic reference to a new employer. Ms Thompson could not recall any occasion when the respondent had offered a reference except directly to a new employer. At the time of the claimant's requests to Mr Orton, there was no new employer and the claimant was seeking the information to be provided directly to herself.

The Law

66. In relation to unfair dismissal, section 98(1) and (2) of the Employment Rights Act 1996 sets out the potentially fair reasons for dismissal. Section 98(2) states that a reason falls within this subsection, inter alia, if it relates to redundancy.

67. Section 98(4) then sets out what needs to be considered in order to determine whether or not the decision is fair. It states that determination of the question whether dismissal is fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.

68. For the purpose of section 98(1) and 98(2) the burden of proof is on the respondent. What matters is whether the respondent has established the operative reason for the dismissal: see Brady v ASLEF [2006] IRLR 576. The tribunal notes in this case that the claimant accepts that her dismissal was by reason of redundancy.

69. For the purpose of section 98(4) the burden of proof is neutral in applying section 98(4). The tribunal reminds itself that it does not stand in the shoes of the employer and decide what it would have done if it were the employer. Rather the tribunal has to ask whether the decision to dismiss fell within the range of reasonable responses open to the employer judged against the objective standards of a hypothetical and reasonable employer. The case of Sainsbury's Supermarket Ltd v Hitt [2002] EW CA Civ 1588 makes it clear that the range of reasonable responses applies throughout the process including to the dismissal decision. The tribunal is required to consider whether dismissal fell within the range of reasonable responses see Iceland Frozen Foods v Jones [1983] ICR. Here the question of whether an employer has acted reasonably in dismissing will depend upon the range of responses of reasonable employers. Some might dismiss others might not.

70. These cases have general application but “the touchstone would need to be section 98(4); the tribunal would keep in mind the need not to fall into the error of substitution, but would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses”. See Green v LB Barking UKEAT/0157/16, para 32-35 and 42. The tribunal has also expressly reminded itself of the cautionary words in TNS v Swainson UKEAT/0603/12 to similar effect. Finally, also the dicta in Williams v Compare Maxim [1982] ICR 156, setting out extremely useful guidance which the tribunal has no hesitation in adopting and in reflecting on the further guidance provided by HHJ Eady QC in Green.
71. The statutory framework in respect of indirect discrimination and victimisation is set out in the order of EJ Johnson and the tribunal has paid careful regard to those provisions and reminded itself of the essential questions posed in an indirect discrimination claim, see s.19(2)(a)-(d), and in a victimisation claim, see s.27.
72. In relation to indirect discrimination, by s.19 EqA:

19 Indirect discrimination

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

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

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

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

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

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

73. The tribunals has had regard to the submissions of both advocates. Guidance in respect of the identification of the correct pool for indirect discrimination purposes can also be found in British Airways plc v Stamer 2005 IRLR 863, EAT and University of Manchester v Jones [1993] ICR 474. As to the test of proportionality, the tribunal had regard to Hardys & Hansons plc v Lax [2005] EWCA Civ 846 and Chief Constable of West Yorkshire Police and anor v Homer 2012 ICR 704, SC. It is necessary that in order to be proportionate, an indirectly discriminatory PCP has to be both an appropriate means of achieving a legitimate aim and be ‘reasonably necessary’. This is a balancing exercise required of the tribunal. When considering the impact of the discriminatory measure as against the importance of the aim to the employer, the degree of the impact is to be balanced by the employer’s need for the measure, and might be disproportionate on that count. It remains for the tribunal to

decide whether justification has in fact been established. There may be other less discriminatory means of achieving the same aim.

74. In relation to victimisation, by s.19 EqA:

27 Victimisation

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

75. In relation to victimisation, there was no dispute that the claimant's grievance amounted to a protected act. The issues for the tribunal therefore were whether there was a refusal to provide a reference which amounted to a detriment and secondly, whether such detriment was caused by the fact that the claimant had done a protected act. If there are facts from which we could conclude that victimisation had occurred, the burden is on the respondent to show that its acts and/or omissions were in no way whatsoever caused by the protected act.

Discussion and Conclusions

76. Each advocate provided extremely helpful written submissions which the tribunal has considered in detail and each made further reference to them during oral submissions.

Unfair Dismissal

77. Has the respondent established the reason for dismissal? Mrs Ball put forward arguments for why the claimant's voluntary redundancy amounted to a dismissal. In any event, the respondent accepted that the claimant was dismissed. That concession was properly made because the claimant had accepted a voluntary redundancy package when firmly within the environment of a redundancy situation given that the respondent was proposing to make compulsory redundancies in respect of those who did not TUPE transfer across to BCPP.

78. Did the respondent act reasonably in treating that reason as sufficient to dismiss the claimant? The tribunal approached this question having regard to the principles set out above but always bearing in mind that it remained necessary to return to the central question which is posed by s.98(4).
79. The issues in dispute were the same as those aired before EJ Johnson at the preliminary hearing on 29 July 2019 [A40]. The Learned Judge recorded that the only challenge that the claimant makes to the fairness of her dismissal for redundancy related to the respondent's alleged failure to properly and fairly consider the possibility of alternative employment within its undertaking. This challenge has not required the tribunal to enquire into whether there were jobs available to the claimant more generally. The claimant put forward her case squarely on the basis that the skills and experience that she had gained over the years in the Investments team meant that her skill set was very specific and there was unlikely to be other suitable employment except within the Investments team. The respondent contested that and suggested that the claimant had transferable management skills, notwithstanding that the respondent did not make any other employment opportunities available to the claimant. In the event however the tribunal did not need to resolve the question because no complaint was made by the claimant about alternative employment more broadly.
80. The claimant was offered the Deputy Role following an application and interview process. She was the only applicant and the tribunal finds that the Deputy Role was a role with tasks and responsibilities that well-suited the claimant. The respondent accepted that the claimant had the relevant skills and experience (or would have with reasonable training) to undertake the role.
81. The claimant declined the role because she was required to undertake it on a full-time basis only. The reason that the claimant declined the role was because she was unable to manage a full-time role on a sustainable basis as well as discharge her caring responsibilities to her father.
82. The Deputy Role had been created subsequent to the TPF Committee noting the proposed new structure at its December 2017 meeting. The new structure proposed a combined resource requirement of 9 FTE. Within that, however, the tribunal is not satisfied that there was any active consideration when the structure was proposed as to whether any individual role within the new structure might or might not be susceptible to a part-time working arrangement. The TPF Committee did not specify that the new Deputy Role was required to be a full time role.
83. When the claimant applied for the Deputy Role, she clearly marked her application form to show that the basis of her application was that it would be part-time. The respondent failed to appreciate that fact. Further, the respondent failed to address the question at any stage during the application and interview process. This was a shortcoming but more critically it was indicative of the respondent's attitude towards the role. The respondent's witnesses have variously identified that it had "always been assumed" and that it "was always the case" that the role would be on a full-time basis. There is no evidence before the tribunal that the full-time nature of the role was actually considered either during the structure proposals or the job evaluation process or the advertisement and recruitment process. The reality is that

the respondent had not given it substantive if any consideration. The respondent says that the job advert by implication was for a full-time position because it did not say otherwise. That may be so but it reinforces the likelihood that the respondent had not considered the alternative.

84. The claimant informed Mr Campbell on 17 July 2018 that she would accept the Deputy Role on a part-time basis. She was to all intents and purposes requesting to work part-time. Mr Campbell, who was the author of the report to the TPF Committee, did not reject her position and instead advised the claimant to “put the ball back in their court” regarding the number of hours that she wanted. Mr Campbell reported the position to Mr Shiel. In turn, Mr Shiel became aware at that stage if not before that the claimant was unwilling or unable to work full-time in the new role. It was incumbent upon the respondent, and Mr Shiel in particular, to explore the feasibility of an alternative way of working.
85. A reasonable employer would have undertaken an open-minded enquiry into the feasibility of the Deputy Role being undertaken otherwise than in a full time basis and in addition would have done so in a manner which evidenced to the claimant that her request was being properly considered.
86. Instead, when Mr Campbell informed Mr Shiel on 18 July 2018 of the claimant’s decision to accept the role on a part time basis, following a short conversation (and one which was overheard by colleagues as adverse to the claimant albeit the tribunal has heard no evidence as to the content of that overheard conversation save that Mr Campbell reported back to the claimant that the job could only be considered on a full time basis), Mr Shiel closed his mind to the possibility of the claimant undertaking the role on anything other than a permanently full time basis.
87. Mr Shiel had two conversations with the claimant. The fact that Mr Shiel had a closed mind to the claimant’s request or to the alternatives to permanent full-time working is evidenced by the two conversations that he had with the claimant on the matter. On 25 July 2018, the meeting was a difficult one. Mr Shiel steadfastly asserted that the role was full-time only, but without any discussion. On 29 October 2018, after the claimant’s return to work following a substantial absence, there was no discussion or explanation given to the claimant. Mr Shiel did not recall the detail of that discussion but the claimant does recall that Mr Shiel simply asserted without explanation that, (or words to that effect), the more he heard about the role the more it supported full time working.
88. When the claimant formally declined the role on 1 November 2018 [B293], the respondent had not by that stage given proper or any consideration to the claimant’s request or to the feasibility of the role being other than permanently full time or any options put forward to enable the claimant work despite the full-time requirements of the role. It was a decision for Mr Shiel and he had not given it proper or open minded consideration. Mr Shiel had not had responsibilities in the TPF in December 2017 but had simply (and erroneously) proceeded on the basis that he was required to appoint the role as full time because that was what the TPF Committee had decided.

89. When asked in cross examination, whether he had a closed mind on the matter, he replied that, “all of the team was full time, they’d been appointed full-time”; when asked specifically about the 25 July 2018 meeting in cross examination, he said, “I set out that it was a post that was full time and that is the basis on which I was required to make the appointment”. The evidence of Ms Thompson was that she had discussed the claimant’s request with Mr Shiel prior to the 25 July 2018 meeting and that Mr Shiel was very clear that he believed the role should be a full-time role and that the TPF Committee had approved the new role on this basis.
90. The attitude of Mr Shiel towards the claimant was evident from his later recollection of the 25 July meeting, which he wrote in his key facts document. The claimant had quite reasonably brought with her a gov.uk document to support a proposal for a trial period. Notwithstanding, Mr Shiel dismissed the claimant’s proposal and later recounted in his document that the claimant had “attempted to tell Nicola and I how things should be done”. A key element of Mr Shiel’s recollection was that the TPF Committee had created the post as a full-time post and he was not in a position to appoint as part-time. His own witness statement provides the briefest of accounts (at paragraph 11) and he emphasised that the TPF Committee had agreed that, “these should all be appointed on a full-time basis” (a proposition which the Tribunal does not accept, but which in any event Mr Shiel did not reflect on) and, “I had no remit to fill any of those posts other than on that basis”. The tribunal finds that Mr Shiel did not properly consider the issue of whether the Deputy Role could be undertaken either in accordance with a request of the claimant or in a way other than on a permanently full-time basis and did not do so with an open mind.
91. The grievance process that the claimant subsequently undertook did not in fact improve the position because both Mr Orton and subsequently Mr Bromiley in effect simply adopted Mr Shiel’s response. Mr Orton did not interview Mr Shiel as part of the grievance investigation but it is likely that he spoke to Mr Shiel if only because of their proximity at work. It is apparent however that Mr Shiel provided the key facts document in January 2019. It is overwhelmingly likely to have been given to Mr Orton as Mr Orton purported to reach findings of fact (for example, “during your discussion with [Mr Shiel], you requested that you be allowed to accept the post on a trial basis to see if you liked the new Head of Governance and investments before you accepted the post...”) which simply replicated Mr Shiel’s key facts document and which does not evidence a meaningful independent assessment by Mr Orton.
92. The substantive outcome of the claimant’s request for, “a written explanation of why the post could only be full-time” is again a replication of Mr Shiel’s key facts document. The lack of transparency in the grievance process reinforces the conclusion that the respondent did not properly consider the issue of whether the Deputy Role could be undertaken either in accordance with the request of the claimant or in a way other than on a permanent full-time basis. Nor did Mr Bromiley’s involvement remedy the shortcoming because it was not part of his role to say otherwise if his officers, supported by the TPF Committee, regarding the role as necessarily a full-time role.
93. The tribunal has reminded itself of the dangers of substituting its views for those of the employer and also of the dangers of unduly focusing on one aspect of an overall

process. Nevertheless, in this case, the caring responsibilities undertaken by the claimant were both long-standing and known to her line management. The claimant had been working on a part-time basis for eight years prior to her temporary increase and was an established part-time worker. That was the operative reason why the claimant did not accept the offer of the Deputy Role and that fact was fully known to the respondent. A redundancy situation can exist by definition because an employee's role is removed and a reasonable employer would take steps to consider alternative employment such as might be suitable for the employee. The respondent was fully aware that the offer of alternative recruitment into a permanently full-time role was not suitable for the claimant. The respondent is a large employer with a dedicated HR function. A reasonable employer in the position of the respondent would have approached the claimant's request with an open mind and afforded her request and/or the feasibility of a working arrangement other than on a permanent full-time basis appropriate consideration.

94. Stepping back and considering the statutory question in s.98(4): did the respondent act reasonably in all the circumstances of the case in treating that reason as sufficient to dismiss the claimant? The answer is no. The tribunal therefore concludes that the claimant was unfairly dismissed.

Indirect Discrimination

95. Did the respondent apply (or would apply) a relevant PCP to persons with whom the claimant does not share the characteristic of sex? The respondent's requirement for the claimant to carry out the Deputy Role on a permanent full-time basis was a PCP and it was a PCP that was (or would have been) applied to any candidate for the role of Deputy Head. The fact that the claimant was the only applicant does not detract from that conclusion.
96. Did the PCP put, or would put, persons with whom the claimant shares the characteristic of sex at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic? In order to determine whether a particular disadvantage arises as necessary to compare the proportion of women who can comply with the PCP with the proportion of men who can comply with it. In turn it is necessary to determine the relevant total of men and women. The total refers to the number of men and women to whom the PCP applies or would apply.
97. The exercise cannot safely be undertaken by reference to the small selective group that happened to be currently employed under the new structure. The respondent contends that the group of 3 women and 4 men is the appropriate pool from which to make the comparison and such a pool would show that representation is broadly equal and no particular disadvantage arises. The proposed pool is too narrow and small in scope. It does not take into account for example those to whom the requirement would apply and further is liable to be disproportionately skewed. For example, with the inclusion of the claimant in the pool, then it would fairly be argued by the claimant that, instead of an apparently non-discriminatory pool, then 1 out of 4 women (25%) were disadvantaged whereas 0 out of 4 men (0%) were disadvantaged. The tribunal concludes that the unduly limited nature of the pool

relied on by the respondent does not permit the tribunal to identify particular disadvantage within s. 19(2)(b).

98. The claimant has produced evidence that women are more likely than men to have caring responsibilities for children. This is a national picture, which has not been rebutted by the respondent. The sources of evidence are varied and the tribunal accepts the premise that those with caring responsibilities, whether for children or the elderly, are subject to disadvantage in the workplace. In fact, two of the four females in the new structure (including for present purposes, the claimant) had caring responsibilities whereas none of the four men did. The Deputy role was advertised both internally and externally. The tribunal is satisfied that in looking for an appropriate total number of men and women that could be qualified for the role and thus be subject to the PCP, the statistics provided by the claimant are the best available to the tribunal and are sufficient in the tribunal's judgement to establish that particular disadvantage arises for women as compared to men.
99. Did the PCP put the claimant at that disadvantage? The claimant was offered the Deputy Role. The respondent was satisfied that she had evidenced the skills and experience necessary to undertake the role satisfactorily. The claimant accepted the Deputy Role subject to one qualification: that she needed to work on a part-time basis. The respondent would not alter its offer and the claimant refused the offer of the Deputy Role for the reason that she could not work permanently full-time on a sustainable basis.
100. The claimant was a part-time worker and had worked part-time for eight years prior to April 2018. The fact that she agreed on a temporary basis (albeit extended) to work full-time hours does not mean that she could not establish disadvantage. The claimant said that her agreement to work temporary full-time hours did not indicate that she was able to do so conveniently. She said that it was not sustainable and that is entirely consistent with her agreement to do so on a temporary basis and for the purpose of assisting the TPF.
101. The fact that the claimant declined the offer of a role which she was otherwise evidently willing and able to do is of itself persuasive evidence that the PCP put the claimant at a disadvantage. The tribunal accepts the claimant's evidence that an arrangement for full-time working was not sustainable and would have put her at a disadvantage and damage her ability to discharge her caring responsibilities.
102. Is the respondent required to show, and if so, can it show the PCP to be a proportionate means of achieving a legitimate aim? The tribunal concludes that the PCP was indirectly discriminatory and it is for the respondent to establish that it was a proportionate means of achieving a legitimate aim.
103. The respondent was entitled to seek to manage efficiently the TPF and to oversee the transition of assets to BCPP. This is a legitimate aim of the respondent.
104. The tribunal reminded itself that what is required is an objective balancing exercise between the discriminatory effect of the PCP and the reasonable needs of the respondent in applying the PCP. It is for the respondent to produce evidence where generalisations or assertion may not be sufficient.

105. The effect of the PCP on the claimant was the loss of her career at the respondent. She had developed a specialist role offering specific skills and experience. She applied for the Deputy Role as it matched her skills and experience. There was no other role which met her specialist skills and experience and although it was briefly suggested to her in cross examination that she could have used her management skills elsewhere within the respondent, the tribunal finds that it was not suggested to the claimant at any stage during her employment that she should have looked more broadly across the respondent for opportunities nor did the respondent propose any alternative.
106. The respondent has asserted that the Deputy Role needed to be a full-time position. The tribunal has rejected the proposition that the TPF Committee required the role to be a full-time role. The premise that the officers of the respondent did not have the remit to review the Deputy Role because the Committee had made the decision that the role needed to be full time is flawed: first, because the Committee had not in fact done so and instead confined its decision to the overall resource implications of the structure, and secondly, it was always open to revert to the Committee if circumstances merited it. The fact that no-one reverted to the Committee was because the Committee didn't design the structure and the officers of the respondent were not minded to reconsider the structure. Mr Campbell had designed it and he had not rejected the claimant's proposal of part time working in July 2018: yet his views were not obtained or if they were they were not put before the tribunal. Between December 2017 and July 2018, no consideration was actually given to the need for the Deputy Role specifically to be full time.
107. When the respondent was on notice in July 2018 (if not before) of the claimant's need to undertake the Deputy Role on a part-time basis, no consideration had by that time been given as to whether or how it might be feasible. Despite that lack of consideration, when it came to the express attention of the respondent, the feasibility of whether the Deputy Role could be undertaken otherwise than on a permanent full-time basis was dismissed by Mr Shiel without further or any consideration. His key objection, according to both his witness statement and the key facts document, was the fact that the TPF Committee had made its decision. This objection is, as set out above, flawed.
108. The respondent relies on the key facts document. This was written in January 2019. There were no minutes taken from Mr Shiel's meetings on 25 July 2018 or 29 October 2019. The tribunal finds that there is a significant element of justification after the event. That is not to say that the arguments put forward in the key facts documents are not arguments that are available to the respondent to rely upon. They plainly are but the tribunal finds that the subsequent document is evidence of a later attempt at justification and an earlier attitude betraying a closed mind towards the claimant's request and the claimant's established position as a part-time worker.
109. In the key facts document, the respondent asserts that the Deputy Role was "a completely new role" which many aspects that the claimant was not experienced at. The examples given to the tribunal were (i) member training and (ii) the pensions administration contract (Kier) including its re-tendering. Notwithstanding, the

claimant was experienced in delivering training including both to members and to her staff, and she was also experienced in contract management and in tendering. The tribunal rejects the assertion that the Deputy Role was anything like “completely new” and whilst it was represented a step-up for the claimant, it was nevertheless the case that the respondent had concluded that the claimant had the skills and experience to do the job and/or would be able to do so with a reasonable elements of training. The Deputy Role did not need to be full-time as a result of the respondent’s assertion that the claimant did not have the experience. Further, the Deputy Role did not need to be full-time simply because it was “new”. The fact that a role was “new” may well cause uncertainty but the respondent has not established to the satisfaction of the tribunal that there were “uncertainties” that necessitated a full-time only position. Mr Shiel asserted that the new Head of Pensions may well have “additional tasks for her”; but that does not evidence a need for full-time work or justify the respondent’s failure to consider why that the role could not be discharged otherwise on a permanent full-time basis.

110. Mr Shiel did not satisfy the tribunal that the responsibilities of the role necessitated a permanent full-time position only. Nor did Mr Orton. He did not provide a separate rationale. His involvement in the grievance amounted to a replication of the justification provided to him by Mr Shiel in the key facts document. Mr Bromiley in evidence said that it was not his decision as to whether the role could be a part time role. He said that it was a matter for his Head of Service (Mr Shiel). Mr Bromiley stated, “if my Head of service regards it as a necessary and its supported by [TPF] Committee, its not for me to say otherwise”. Mr Bromiley did however propose that the new structure was important because in cross examination, Mr Bromiley said that it was his understanding that the new Deputy Role would be part of a strategy to increase resilience and mitigate key-man risk. The Head of Pensions was a key-man position and Mr Bromiley described the consequences if the Head of Pensions was unable to perform his task. The new structure required that the new Deputy Role would be able to take on leadership and accountability. However, even taking into account that view, the tribunal ascertained from Mr Bromiley that it was not so much about increasing resilience but of “spreading” resilience across the new structure. Managing external relationships has fallen within the claimant’s role for a number of years and accountability for aspects of the TPF and for the ongoing relationship with BCPP do not in the tribunal’s judgment evidence a necessity for full-time only working.

111. Nor did the respondent engage in any meaningful discussion with the claimant or take into account how she might be able to discharge the responsibilities of the Deputy Role. The respondent simply did not discuss with the claimant how she might be able to work perhaps within the respondent’s existing flexible working policies and/or how that might impact on her request for part-time working for the Deputy Role. The tribunal has found that Mr Shiel did not the respondent did not properly consider the issue of whether the Deputy Role could be undertaken either in accordance with a request of the claimant or in a way other than on a permanently full-time basis and did not do so with an open mind. Nor did the grievance process improve the position because both Mr Orton and subsequently Mr Bromiley uncritically adopted Mr Shiel’s response.

112. Finally there were other less discriminatory means of achieving a resolution that had at least a prospect of avoiding the dismissal of the claimant. The respondent at no stage considered any job share arrangements. The respondent at no stage considered a trial period, instead dismissing the claimant's proposal by unjustifiably characterising it as a suggestion that she wanted the job on a trial period simply to see if she liked the new Head. Instead of considering the issue on its merit, or indeed reverting back to the claimant once it was apparent that the vacancy would not be filled, the respondent simply dismissed the notion of the claimant as being "unprecedented and is never afforded to anyone taking a new job and as such was unreasonable" [B328a]. The respondent failed to consider any reduction in hours other than full-time working and failed to review or to discuss the availability/usefulness of compressed hours. The claimant had not been prescriptive and in fact her then line manager did not appear to reject her request instead suggesting that the claimant might make a suggestion that puts the ball in the respondent's court.
113. The tribunal has scrutinised carefully the respondent's assertions and evidence that the Deputy Role was needed as a permanent full-time role only. The tribunal has balanced the respondent's needs and the impact on the claimant of being unable to take the Deputy Role and consequently her career at the respondent was ended. The tribunal finds that the respondent has failed to establish that the application of the PCP that the Deputy Role must be a permanent full-time position was a proportionate means of achieving a legitimate aim. The claimant's claim of unlawful indirect discrimination therefore succeeds.

Victimisation

114. The claimant did a protected act when she raised her grievance which she did on 25 January 2019 [B309]. Within the grievance the claimant complained of indirect discrimination due to carers responsibilities. She had also previously verbally indicated to Mr Orton that she was considering raising a grievance. It is likely that Mr Orton was made aware that the basis of the grievance was the claimant's dissatisfaction with the way in which the respondent was dealing with her need for part time working. The tribunal finds that both the written grievance and the prior verbal indication of a grievance arising from the claimant's need for part-time working amounted to protected acts.
115. At or about the same time as doing the protected acts, the claimant also requested a reference from Mr Orton [B308]. She had done so verbally on the previous Monday, and subsequent to that verbal conversation, she asked Mr Orton by email for an "employee's reference" which the claimant intended to use in the future in order to evidence her "capabilities and attributes" in respect of any prospective job applications that she would make.
116. Mr Orton did not respond to the email, so the claimant followed her written request up with Mr Orton. The claimant's final day in the workplace was in mid-February. Prior to that, in or about early February 2019, the claimant again approached Mr Orton seeking the reference. It is common ground that Mr Orton was

not comfortable in providing the reference because, “he had not known the claimant for long enough”. That is of course entirely consistent with the type of reference that the claimant had sought earlier. The conversation concluded with Mr Orton declining to provide the reference. No approach was made to HR by either Mr Orton or the claimant.

117. In the course of the February conversation, the claimant alleges that she went on to ask whether Mr Orton could simply provide a “basic” reference. This means a reference simply relating to date(s) of employment and role(s) undertaken. It is doubtful that the claimant did clearly ask for a basic reference as one would be of little use to her unless and until she had made and pursued an external job application and in any event the claimant would be free to request such a reference directly from HR. Even if the claimant did ask for a “basic” reference, the tribunal finds that it was at all times Mr Orton’s genuine belief was that he was being asked for a wider reference of the type that the claimant had initially requested. The tribunal accepts Mr Orton’s evidence that he declined to provide a reference because it was not the policy of the respondent to provide an “open” reference and also that he did not know the claimant sufficiently well to be able to provide a wider “employers reference”. The tribunal also accepts Mr Orton’s evidence that he would not have declined to provide a “basic” reference which would have been a simple matter of facilitating the same with HR. The tribunal notes that the policy of the respondent was to provide basic references only and in fact as is consistent with the tribunal’s understanding of employment references such references are provided directly to new employers and not to the employee concerned.

118. The detriment alleged by the claimant is the refusal to provide a reference. The tribunal finds that the respondent did decline to provide a reference relating to the claimant’s capabilities and attributes. However, such a reference is not within the respondent’s policies or practice and the tribunal finds in those circumstances that it was not a detriment to the claimant that she was declined such a reference. The tribunal finds that the respondent did not decline to provide a basic reference. The tribunal therefore concludes that the claimant was not subjected to a detriment.

119. In any event, on the alternative basis that the claimant was declined a reference and that the refusal amounted to a detriment, the tribunal is satisfied that the reason that Mr Orton declined any reference was his understanding that the reference sought was a wider reference dealing with the claimant’s professional capabilities and attributes which he believed was outside of the scope of the respondent’s reference policy. His decision was in no sense whatsoever connected with the claimant’s grievance or intimation that she would bring a grievance in relation to her working conditions.

120. The claim for victimisation therefore fails and is dismissed.

Time – Jurisdiction

121. The claimant commenced ACAS early conciliation on 14 April 2019. The certificate was issued on 13 May 2019 and the claimant commenced her claim on 23 May 2019.

122. The claimant's employment with the respondent terminated on 31 March 2019. The claim for unfair dismissal was commenced in time irrespective of any extension of time permitted by the early conciliation rules.
123. The claim of unlawful indirect discrimination arises from the discriminatory application of a PCP that required the Deputy role to be a permanent full-time position. The respondent refused to allow the claimant's part-time working request as communicated to her on 29 October 2018. The claimant rejected the Deputy role offer of employment on 1 November 2018. The claim arising from those facts alone would have required an early conciliation process to have commenced by the end of February 2019. By commencing the early conciliation process on 14 April 2019, the claimant's claim would be out of time.
124. The claimant contends that the subsequent grievance process which commenced on 25 January 2019 and which resulted in grievance outcomes on 14 February 2019 (stage 1) and 2 April 2019 (stage 2) amounts to continuing conduct extending over a period so that the act complained of should be treated as occurring until the end of that period. The claimant further contends that the grievance process was itself both brief and unreasonable. However the fact that the grievance process could have recommended a review of the decision of Mr Shiel on 29 October 2018 is not sufficient to justify a conclusion that there was continuing discriminatory conduct extending over a period. The claimant does not contend that the unreasonable grievance process was an act of discrimination.
125. The tribunal concludes that time for the purposes of the primary limitation period for the claimant's claim of indirect discrimination commenced by 1 November 2018. The claimant's claim of unlawful indirect discrimination is therefore out of time.
126. The tribunal then went on to consider whether it would be just and equitable in all circumstances to extend time. The claimant gave specific evidence that she took advice from her part-time union representative after 1 November 2018 in respect of her raising a grievance. The claimant was still grieving the unfortunate death of her mother and undoubtedly this impacted on her well-being and ability to act in what must have been a stressful situation for her.
127. The claimant and her representative then made persistent efforts to seek advice from the full-time union representative who would or might have a more informed view and be able to provide appropriate guidance to the claimant. She was not able to obtain that advice until January 2019 and thereafter promptly raised her grievance which she quite reasonably used to seek to persuade the respondent to review its decision. Throughout this period the respondent became well aware of the nature of the claimant's complaint and indeed she specifically referred to it in her grievance as a grievance of indirect discrimination due to carer's responsibilities.
128. The tribunal process discretion to extend time under the "just and equitable" formula similar to that given to the civil courts by section 33 of the Limitation Act

1984 extending time in personal injury cases. See British Coal Corporation v Keeble [1997] IRLR 336. Section 33 requires a court to consider the prejudice which each party would suffer as a result of granting or refusing an extension and to have regard to all of the circumstances including:

- 128.1. the length of and reasons for the delay
- 128.2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the defendant is likely to be less cogent than if the action had been brought within the time
- 128.3. the conduct of the respondent after the cause of action arose, including the extent to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant
- 128.4. the extent to which the claimant acted promptly and reasonably once he knew of the potential cause of action. Using internal proceedings is not in itself an excuse for not issuing in time but is a relevant factor
- 128.5. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

129. The claimant understandably did not want to take formal action following Mr Shiel's refusal of her request for part-time working on 29 October 2018 and she reasonably sought the advice of her trade union representative. The claimant has satisfactorily explained that she was still suffering the effects of bereavement and that she also persistently sought the advice of the appropriate full-time trade union representative but that she did not receive that advice until January 2019. The tribunal is satisfied that she promptly and reasonably thereafter commenced a grievance process with the transparent aim of seeking to persuade the respondent to review its decision. By this point the claimant's termination date had been extended again until March 2019 and she continued to hold a reasonable hope that she might remain in employment. She took steps to commence proceedings promptly upon receipt of the Stage 2 grievance outcome.

130. The tribunal is satisfied that this delay has not impacted on the cogency of the evidence that the claimant or the defendant could adduce. The period of the delay can be characterised fairly as a period during which the respondent through its different officers were aware of the specific nature of the claimant's complaint of indirect discrimination.

131. The tribunal concludes that it would be just and equitable to extend time to enable the tribunal to hear the claimant process complaint of unlawful indirect discrimination and to that extent extends time to 14 April 2019, following which the commencement of the early conciliation procedure permits the claimant to issue her claim on 23 May 2019.

132. The act complained of in respect of the claimant's claim of victimisation relates to the refusal of a request for a reference. This occurred subsequent to the claimant's email of 25 January 2019. The commencement of early conciliation on 14 April 2019 was therefore within a three month period of any date(s) of any refusal of a request for a reference which occurred subsequent to 25 January 2019. Thus, regardless of

the nature of the extension permitted as a result of the early conciliation rules, the claim in respect of victimisation was brought in time because the claim was commenced within a month after the certificate date.

EMPLOYMENT JUDGE BEEVER

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON**

17 January 2020

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