

5749/11

Case Number: 1200970/2009



EMPLOYMENT TRIBUNALS

Claimant Mrs J Harper

Respondent Moulton College

HEARD AT: BEDFORD

ON: 29 November 2010
10 December 2010

BEFORE: Employment Judge Adamson

MEMBERS: Mr S Orman
Mrs P Tobin

REPRESENTATION

For the Claimant: Ms B Zeitler - Counsel

For the Respondent: Mr J Gibney - Counsel

RESERVED REMEDY JUDGMENT

1. The Respondent is not ordered to make a payment to the Claimant in respect of the holiday pay claim that sum outstanding having now been paid.
2. In respect of the unfair dismissal complaint, the Claimant is awarded the sum of £9,870 (comprising a basic award of £9,570 and a compensatory award of £300 in respect of loss of statutory employment rights).
3. In respect of the unlawful age discrimination complaint, the Respondent is order to pay to the Claimant the sum of £144,099.89 comprising of:
 - a) injury to feelings £15000
 - b) interest on a) at half a percent £161.92
 - c) financial loss £118,428.78
 - d) interest on c) £639.19

Note: We do not make any reduction from the award because of any advance or early payment. The reason being that although the Claimant will be able to earn interest on these sums that she receives pursuant to the judgment, had she remained in employment it is highly likely that she would have gained increases in salary, even allowing for the restrictions on public expenditure currently pertaining, which would have increased the amount of her earnings and potential pension.

Note: We have made our judgment on the basis of the evidence before us. We note that the Claimant's schedule of loss was put forward as subject to a grossing up exercise at the appropriate marginal rate of tax with the exception of the award for injury to feelings. We did not hear any evidence on that rate or the calculation. If the parties seek to apply for a review of this judgment to take into account of that matter, they should apply within three weeks from the date this judgment is sent to them.

REASONS

- 1 We heard evidence on oath for affirmation from both the Claimant and Mrs Karen Sanders. We had regard to those documents within the bundle to which we were referred. We had regard to the submissions from both parties. There was appreciable agreement in respect of the figures to be used in the calculations for financial remedy and no dispute in respect of the method of calculation for pension loss. In dispute was the amount of the remedy and in particular the duration of the period for which the Claimant should be compensated for loss of earnings.
- 2 In respect of the three complaints which the Claimant is entitled to compensation, there can of course be no double recovery.
- 3 In respect of the unfair dismissal complaint, the Claimant is potentially entitled to a basic award and compensatory award calculated pursuant to Sections 118 to 124A Employment Rights Act 1996.
4. Direct Age Discrimination
 - 4.1 In respect of the complaint of Direct Age Discrimination, the Claimant is entitled to a remedy pursuant to Regulation 38 Employment Equality (Age) Regulations 2006. The Claimant seeks compensation.
 - 4.2 In respect of the compensation to which the Claimant is entitled pursuant to the complaint found, we had regard to the judgment in *Armitage, Marsden & HM Prison Service v Johnson* 1997 IRLR 162 where the Employment Appeal Tribunal summarized a general principle that underlie awards for injury to feelings as follows:
 - *Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty person*

- *An award should not be inflated by feelings of indignation at the guilty party's conduct*
 - *Awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches*
 - *Awards should be broadly similar to the range of awards in personal injury cases*
 - *Tribunals should bear in mind the value in everyday life of the sum they are contemplating*
 - *Tribunals should bear in mind the need for public respect for the level of the awards made*
- 4.3 We also have regard to the Court of Appeals' decision in *Vento v Chief Constable of West Yorkshire Police (number 2) 2003 ICL318* which gave guidance that there should be a top band of between £15000 and £25000, a middle band of between £5000 and £10000 and a lower band of between £500 and £5000. Those figures are of course subject to inflation.
- 4.4 The Claimant is also entitled to loss of financial earnings in respect of the unlawful age discrimination – subject to the double recovery point referred to before.
- 4.5 Interest is payable on the remedy and discrimination claims at the statutory rate.
- 5 In respect of the holiday pay claim, the parties accepted that this sum had been paid, albeit it was paid as part of the Claimant's wages for the period after the Claimant had resigned and before the Respondent accepted that fact. There is no remedy for that complaint.
- 6 We refer to our findings at the earlier Hearing and have regard to those. In particular we have regard to the Claimant's former employment with the Respondent and its predecessor and the various transferor employers the Claimant had been employed by prior to her employment with the Respondent.
- 7 The Claimant obtained a Certificate of Education from the University of Nottingham in 1971 in Arts & Craft. The Claimant taught for two and a half years thereafter but has not taught since. The Respondent's position was that the Claimant could revert to teaching: the Claimant's claim that she could not because her qualification was no longer valid. We were informed that to be a teacher now the Claimant would need a degree qualification and that she would also need a qualification in mathematics which she did not have. In addition, the Claimant did not have current qualified teacher status or a DCSF number. Further, the Claimant had been out of teaching for over 30 years and thus the courses potentially available for returners were not open to her. We were referred to a document from TAP who recommended that teachers who had been out of the profession for ten years undertake a

course before attempting a return to teaching for those teachers of necessity having qualified teacher status with a DCSF number.

- 8 We accept the Claimant's evidence that she was unable to seek employment as a qualified teacher, without undergoing considerable further training, the practicality of which would be unreasonable always assuming the Claimant would be eligible for any relevant courses. In addition there would be the need to pay for relevant course fees.
- 9 The Respondent's position was that the Claimant could seek employment as an NVQ Assessor. The Claimant did not have an NVQ Assessor's qualification or experience in any particular subject that we were referred to such as nursing. Although there was a dispute between the parties, we accept the Claimant's evidence that to be an Assessor, a qualification is necessary
- 10 There was a dispute in respect of whether experience was essential, the Respondent's evidence being that Assessors could gain both their qualification and experience of the subject they were assessing whilst working in that role. We have some difficulty with how a person without an Assessor qualification or experience of a subject they were required to assess could properly carry out their role but we accept the Respondent's evidence that it employed some people in that situation. We accept that the Claimant was not able to sensibly apply for NVQ Assessor positions.
- 11 The Respondent's oral evidence was that the Claimant had an IT qualification, namely CLAIT 1 and 2. This qualification was not identified by the Claimant on her application for employment with the Respondent, the application form referring to a typing qualification. No evidence was produced to support the Respondent's evidence and in that situation we prefer the evidence of the Claimant. We do not find that the Claimant had an IT qualification.
- 12 The Claimant is able to drive. The Claimant obtained a BTEC Certificate of Management Studies in 1988 and has a Foundation Certificate in Health & Safety in the Work Place from the Chartered Institute of Environmental Health gained in 2004.
- 13 We refer to paragraphs 14 to 19 of our earlier reasons in respect of the Claimant's employment history between 12 May 1986 and her dismissal.
- 14 We refer to our earlier reasons at paragraph 33 and the events which led to the Claimant being absent from work.
- 15 Following the Claimant's resignation, she visited the Job Centre on 15 October that year and was subsequently declared entitled to incapacity benefit from 16 of that month. The Claimant received benefit in the sum of £63.75. We were referred to the Claimant's medical records which record visits to her GP from 02 October 2008 to 22 May 2009 and the reasons for these visits. During that period the Claimant received a number of medical certificates, reflecting the events leading to the Claimant's resignation

although for a short while within that period the Claimant also suffered with a frozen shoulder. The Claimant's incapacity benefit ceased on 22 May 2009.

- 16 Beginning on 23 May, the Claimant made efforts to find suitable, alternative employment. The Tribunal was shown a copy of a record the Claimant had kept for the Job Centre which demonstrated the steps she had taken which included searching for jobs online with:
 - a) local newspapers
 - b) local colleges
 - c) the Job Centre
 - d) the web site directgov.co.uk
 - e) registering with totaljobs.com and searching that site
 - f) searching the internet through web sites such as Monster.co.uk, jobstoday.co.uk and reed-recruitment-online.
- 17 The Claimant also attended the Job Centre regularly to undertake an intensive job search using the Job Centre's job matching service. The Claimant, we accept, sought work within a fifteen to twenty miles radius of her home. The Claimant spent about four and a half hours per week searching for jobs. The Claimant's record of job seeking was up to 24 September 2009. We accept the Claimant's evidence that she continued job searching in this manner until May 2010 although the Claimant's visits to the Job Centre between her 60th birthday in September 2009 and May 2010 reduced to fortnightly and then monthly. In May 2010 the Claimant stopped physically visiting the Job Centre but continued to search its web site as before.
- 18 Since the last Hearing in this claim, the Claimant has, we accept, checked local newspapers online each week, checked local college web sites online about once a week until December 2009 but since then once per month until June 2010 but more regularly between June and October 2010, visited the Job Centre and checked its web site approximately twice per week, checked directgov.co.uk web site once per week, continued to visit other web sites and those she was registered with, registered with CVLibrary web site in November 2009, checking that company's site on a regular basis.
- 19 The Claimant has applied for a total of four jobs, three of which were through her searches with CVLibrary. Of those three jobs, one was for an Operations Manager – E-Learning Blended Learning with a salary of £35000 to £40000 plus benefits in Northamptonshire, applying on 30 March 2010, another was a Project Manager - work-based learning (warehouse and storage) based in Northampton and Corby at a salary of between £30000 and £35000 plus bonus applying on 29 April 2010 and a Project Manager – work-based learning in Northampton at a salary of £30000 to £35000 plus bonus. The Claimant did not receive a reply to any of those three applications.
- 20 The Claimant's evidence was that she had looked at jobs which paid less than she was earning and further than she would normally wish to travel without success) but that she had not looked for temporary or part-time work. Further, the Claimant had never been a pure administrator albeit she had carried out administration and clerical work within her previous employments.

Although the Claimant's evidence was that she had looked at employment that paid less than she had previously been earning, we were not taken to any vacancies for such employment that she considered.

- 21 The Claimant was referred to a number of vacancies for positions advertised on various web sites. The Claimant had applied for one of those vacancies but had been unsuccessful and the rest she considered herself to be unsuitable for. For example, the Claimant had not applied for
 - a) an Office Manager position as the advert informed that the successful candidate would need to *'possess a strong PA/Secretarial background and skills'*. The Claimant's evidence was that she did not have that background, which evidence we accept.
 - b) An NVQ Assessor role which the Claimant did not have the appropriate qualification for
 - c) an NVQ Assessor which asked for qualified NVQ Assessors with experience
 - d) an NVQ Assessor role, page 84 of the bundle, which informed that applicants should not apply if they could not demonstrate experience as an NVQ Assessor but have experience of working within the Retail sector and hold either an *'A1 or D32 Certificate'*.
- 22 The Claimant was taken to a number of other positions, none of which she considered she had the appropriate qualifications or experience for. Of those positions which the Claimant was referred, we accept the Claimant's evidence that she did not have the necessary qualifications or experience. The Claimant remains unemployed.
- 23 In respect of the Claimant's illness immediately before and following her dismissal, there being no evidence other than that of the Claimant and the GP records, we find that the illness was caused by the Respondent's unlawful discriminatory actions namely the steps it took in attempting to impose the transfer on her. We are satisfied that the Claimant was unable to work during the period until 22 May 2009, that inability being caused by the Respondent's actions and their impact on her. We do not consider that so far as the complaint of unlawful age discrimination is concerned that there should be any reduction in the remedy to the Claimant because of her illness during that period.
- 24 In respect of the Claimant's unfair dismissal, there was no dispute between the parties that the basic award should be £9,570 the relevant facts being that the Claimant was born on 30 September 1949, had continuous employment between 12 May 1986 and 12 October 2008 thus having 22 full years of service and being aged 59 at the effective date of termination. The Claimant's average net pay was £386.24. The calculation for basic award is based on the gross pay but subject to the statutory maximum then in force provided for in Section 227 Employment Rights Act 1996, i.e. £330.

Thus the calculation is

| | | |
|----------------------|-------------|-----------|
| 18 x 1.5 x £330 | £8910 | 00 |
| 2 years x 1 x £330 | £660 | 00 |
| Total of basic award | <u>9570</u> | <u>00</u> |

- 25 In respect of the Claimant's loss of earnings, we will provide for the Respondent to compensate the Claimant for this pursuant to the age discrimination complaint alongside the injury to feelings complaint. We thus calculate the compensatory award payable to the Claimant for the unfair dismissal excluding that claims. We did not hear any evidence regarding specific expenditure although we did hear that the Claimant purchased newspapers and visited the Job Centre; the Claimant has sought expense of £250. We do not find that sum substantiated and do not make any award for expenses. In so doing we are mindful that the overwhelming majority of the Claimant's job searching was carried out online. We do, however, make an award to the Claimant for the loss of statutory employment rights and agree with the Claimant's assessment that the appropriate sum is £300. Thus the compensatory award is £300.
- 26 We consider the remedy for the claim for unlawful age discrimination. Firstly we consider injury to feelings. The Respondent has categorized its actions as a one-off event. The event took place over a period of just over three weeks (we refer to our findings in our earlier reasons paragraphs 22 to 38). We refer also to our findings regarding the Claimant's illness beginning in October 2008 and continuing until late May 2009 and the cause of it. We accept the Claimant's evidence that she felt like she was being '*put out to pasture*'. The Claimant had enjoyed her work and continued to enjoy it. The Claimant was deprived of that experience by the Respondent's unlawful actions. We assess the appropriate compensation of injury to feelings to be near the top end of the middle range of the Vento guidelines. We consider the sum of £15000 to be the correct compensation for the Respondent's injury to the Claimant's feelings.
- 27 We consider the loss of earnings caused by the Respondent's unlawful discrimination. By earnings we include salary and pension.
- 27.1 In respect of the loss of earnings, we have found that it was the Respondent's actions which caused the Claimant to be unable to work until 22 May 2009. We find that the Respondent should compensate the Claimant for the loss of earnings for that period. We are satisfied that the Claimant did seek to mitigate her loss thereafter as found but, as also found, only considered full-time permanent positions. The Claimant was employed in the education and training sector and as such would have knowledge of employments available and how to apply for employment. The Claimant would have knowledge from her background and from her job searching of the employment potentially available. The Claimant was aged 59 at the time of her dismissal and thus we, as an Employment Jury would recognize, would face some difficulty in the employment market irrespective of anti-discrimination legislation. We consider that the Claimant should be compensated fully for her loss of pay until 31 December 2009 but thereafter between 01 January 2010 and 30 June 2010 at half her previous pay. The

reason for this is that we readily accept that the Claimant was entitled to seek permanent alternative employment to replace that which she had previously enjoyed but that by the end of December 2010 it should have been abundantly clear to her that she was unlikely to do so. The Claimant readily accepted to the Tribunal that she had not looked for any employment other than permanent full time employment. If she had we consider it more likely than not that she would have gained some employment albeit possibly temporary or on a part-time basis or contract. It is an imprecise calculation as to when the Claimant would have gained such employment or what she would have earned during that period. The best estimate we arrive at is the one we have identified.

27.2 The Claimant's loss of earnings for that period are calculated as follows:

| | | | |
|---|--|-----------------------------|------------------|
| 1 | £386.24 between 13 October 2008 and 31 December 2009 | | |
| | = 63 weeks £386.24 per week | 24,333 | 12 |
| | 3 days (or 3 fifths of a week) | 231 | 74 |
| | | Total | 24,564 86 |
| 2 | 26 weeks x half pay | 5,021 | 12 |
| | | Total | 29,585 98 |
| 3 | Less paid holiday entitlement | 329 | 43 |
| 4 | | Final Loss of Earning total | <u>29,256 55</u> |

*1 This sum is calculated from a basis that the period 13 October 2008 to 31 December 2009 is 63 weeks and three working days.

*2 These two sums when added together produce the sum of £29,585.98.

*3 From this sum must be deducted the Respondent paid the Claimant (having taken from that the holiday pay entitlement. Thus we deduct the sum of £329.43

*4 The final figure for loss of earnings is £29,256.55.

27.3 There was no dispute between the parties as to the pension's calculations; the dispute was as referred to before. The parties had calculated the potential pension loss in accordance with 2003 Guidelines (Compensation for Loss of Pension Rights) adopting the '*substantial loss*' approach. The Claimant had the benefit of a final salary pension, by which the Claimant received one eightieth of her salary for her service until 31 March 2008 and from 01 April 2008, one sixtieth of her salary.

27.4 The Claimant's position was that she intended to retire on 29 September 2014 at the current statutory retirement age of 65. At the date of the Claimant's retirement the Claimant would be entitled to a lump sum of three years' pension. The Claimant had 22 years of service at the date of her dismissal. The relevant formulae produces compensation sums of:

| | | |
|--------------------------|----------------|-----------|
| Loss of pension | £65,605 | 62 |
| Loss of lump sum | £499 | 28 |
| Loss of Widowers Pension | £23,067 | 33 |
| Total loss | <u>£89,172</u> | <u>23</u> |

27.5 As an Employment Tribunal, we readily accept that if or had the Claimant been successful in gaining suitable alternative employment it is more likely than not that she would not be entitled to a pension in that new employment and certainly not one of the same magnitude as that she previously enjoyed entitlement to. The Claimant's evidence to the Tribunal was that although she intended to work till she was 65, she would not necessarily doggedly soldier on to that age. The Respondent's evidence was that the Claimant would have been made redundant in any event and that there was no work for her to do. We were referred to figures showing a reduction in the number of apprentices at the Daventry branch of the Respondent college which showed a reduction in apprentices from the date of the transfer of the function from Daventry District Council to the Respondent. We were informed, orally, there was no documentary evidence to support this, that there were now no apprentices there. That said, the Respondent's business is not simply in respect of apprentices at the Daventry site and we refer to the previous evidence referred to us in the bundle and referred to in our earlier reasons showing the number of apprentices the Respondent dealt with. Amanda Lane, referred to in our earlier judgment, remains employed by the Respondent, albeit carrying out different duties but having an involvement with apprentices. Another manager involved, who had returned from maternity leave was now no longer involved in dealing with apprentices.

27.6 The Respondent has made redundant an IT Team since the Claimant's dismissal. The Respondent's evidence to the Tribunal, the earlier Hearing was that it sought not to make employees redundant but to re-allocate them to alternative work where possible. We are not persuaded that the Claimant would necessarily have been made redundant had she remained in her employment.

27.7 The Respondent's position was that the Claimant's health may have caused her to retire earlier than she otherwise would. There was no evidence to the Tribunal to lead us to conclude that the Claimant, who had previously been diagnosed as suffering from the adverse effects of blood pressure (but that this matter had now been resolved) would have caused her to retire before she was 65. That said, we recognize that there are many factors that can occur between now and the Claimant's 65th birthday. We could only speculate as to whether events would conspire to cause the Claimant to resign or possibly be dismissed prior to her normal retirement age. There is nothing to lead us to conclude that it is likely that the Claimant would have been dismissed or retire early and we do not reduce the calculation of £89,171.23 for pension loss.

27.8 The financial loss to the Claimant by virtue of the Respondent's discrimination is the sum of these two amounts:

| | | |
|----------------------|----------|----|
| Loss of earnings | £29,256 | 55 |
| Loss of Pension | £89,171 | 23 |
| Total Financial Loss | £118,428 | 28 |

28 We calculate the interest on the injury to feelings and the financial loss. The appropriate statutory rate is half a percent.

28.1 In respect of the injury to feelings, this is calculated from the date of the injury to today's date, i.e. 10 December 2010.

Half a percent of £15000 is £75.00.

Between 13 December 2008 and today there are 788 days.

£75.00 divided by 365 produces a figure of 0.205 etc.

When multiplying this figure by 788, the interest on the injury to feelings sum is £161.92.

28.2 We calculate the interest on the financial award.

This is calculated from the mid-point, i.e. half of 788 namely 394 days.

Half a percent of £118,428.78 = £592.143 etc.

That sum divided by 365 to identify the daily rate = 1.622 etc.

Multiplying this sum for 394 produces the figure for the interest of £639.19


29.12.10

Employment Judge, Bedford

JUDGMENT SENT TO THE PARTIES ON

30th December 2010


FOR THE SECRETARY TO THE TRIBUNALS



EMPLOYMENT TRIBUNALS

Claimant Mrs J. Harper

Respondent Moulton College

HEARD AT: BEDFORD

ON: 16th, 17th, 18th
September & (17th
December 2009 –
Discussion)

BEFORE: Employment Judge Adamson

MEMBERS: Mrs Tobin
Mr Orman

REPRESENTATION

For the Claimant: Mrs B Zeitler, Counsel

For the Respondent: Mr J Gidney, Counsel

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant.
2. The Respondent unfairly discriminated against the Claimant on the grounds of her age.
3. The complaint of breach of contract in respect of notice pay is not well founded.
4. The complaint in respect of unpaid holiday pay will be determined at the remedy Hearing.
5. There is no uplift pursuant to section 31 Employment Act 2002.
6. A Hearing will be fixed to determine remedy

REASONS

1. By a claim presented to the Tribunal on 8th April 2009 the Claimant complained of constructive unfair dismissal, unlawful direct age discrimination, unpaid holiday pay, and breach of contract in respect of notice pay by the Respondent. The Respondent presented a response disputing the entirety of the claim. Specifically the Respondent disputed dismissal or if there was a dismissal that the reason was redundancy but asserted that if it had done so, the reason was Some Other Substantial Reason, or, if the Tribunal found the reason was redundancy the Claimant was offered suitable alternative employment which she refused. Within the response the Respondent asserted that if the Claimant had been discriminated against in respect of her age, that discrimination was justified, without giving any details of that justification. The Respondent was required, by a note attached to conventional case management orders sent on 18th May 2009, to provide the Tribunal with full details of the justification it relied on by 1st June 2009. The Respondent did not do so at that date or any other.
2. The relevant legislation upon which the complaints within the claim are brought are: Sections 94, 95(1)(c) and 98 Employment Rights Act 1996 (in respect of the unfair dismissal complaint), Regulations 3(1)(a), 7 and 37 Employment Equality (Age) Regulations 2006 (2006 Regulations) in respect of the age discrimination complaint; part 2 Employment Rights Act 1996, Working Time Regulations 1998 and Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, (1994 Order) (in respect of the unpaid holiday complaint); and Section 86 Employment Rights Act 1996 and the 1994 order in respect of the breach of contract complaint (notice pay).
3. Within the claim form the Claimant describes the start of her employment as being 12th May 1986 and ending on 10th October 2008. Within the response the Respondent disputed this and gave the respective dates as 1st August 2006 and 7th November 2008. During the period between presentation of the response and the Hearing beginning the Respondent accepted the Claimant's start date was correct. We make findings of fact in that respect Effective Date of Termination later in these reasons.
4. Within the response the Respondent had denied any entitlement to any unpaid holiday pay. Within written submissions, about which more below, the Respondent conceded the Claimant's potential entitlement to the numbered days holiday pay claimed but disputed an entitlement in fact based on an assertion that as she had been paid until 7 November 2008, thus she had been deemed to have taken her entitlement.
5. The issues within the claim are whether the Respondent's actions amounted to a (constructive) dismissal of the Claimant. The Claimant asserts a breach of both express terms and the implied contractual term of

mutual trust and confidence. The expenses terms alleged to exist and been broken are:

- i) The Claimant was employed as a Work Based Learning Schemes Assistant Manager as stated in her contract of employment dated 14 July 2006. The Claimant's job title was unilaterally changed to that of, "Services to Business Programmes Co-ordinator.
- ii) The Respondent allocated various bands and points to different jobs. In her contract of employment dated 14 July 2006 the Claimant was informed that she had been placed on Business Support band 9 and on a spinal point of 35. Incremental increases had also been made to the spinal point meaning that this had increased from the spinal point of 35. The Claimant was informed that she was being placed on a lower grade job, again expressly breaching her contract of employment.
- iii) The Claimant had worked at the Daventry site of the Respondent and was then informed it had been decided that her place of work had changed and that she would in the future be working from the main site of the college, which was based in Northampton.
- iv) The Claimant was also informed that her hours of work had changed from 9am – 5pm to 8am – 5pm. The Claimant was therefore working longer hours for the same salary.
- v) The Claimant was not consulted about any of the changes that had been made to her contract of employment.

If that is established, the issue then becomes whether the Claimant resigned in consequence, without having waived the breach. The Respondent asserts that the Claimant waited too long before doing so.

6. In respect of the complaint of unlawful age discrimination the Claimant asserts that her age, (58) at the date the Respondent's decision was made, was a factor in the Respondent's decision which caused her to resign (by then aged 59). The Respondent disputes this. The issue is whether the Claimant's age was a factor in the Respondent's decision to move the Claimant from fulfilling the role she had prior to 17th September 2008 to a different role and if so, whether that was less favourable treatment and to her detriment. The Claimant asserts that it was and the Respondent that it did not.
7. In respect of the complaint of unpaid holiday pay the Claimant asserts entitlement to holiday pay accrued but not taken. The Respondent's position is as referred to above.
8. In respect of damages for breach of contract in respect of notice pay the Claimant asserts an entitlement to the (balance) of notice pay to which she was entitled but not paid. The Respondent disputes any entitlement to

notice pay, the Claimant having resigned without notice. That is the issue in that claim to be determined.

- 9.1 In respect of the implied contractual term of mutual trust and confidence we remind ourselves of the definition given in *Malik v Bank of Credit and Commerce International SA* 1997 of IRLR 462, i.e. "the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".
- 9.2 In respect of the complaint of unlawful age discrimination we had regard to the guidance given in the annex to *Igen Ltd v Wong* 2005 of IRLR 269, we do not recite it here.
10. The effect of the legislation to which we have referred is as follows: (i) in respect of constructive unfair dismissal, if the employer breaks a fundamental contractual term, (mutual trust and confidence is a fundamental term) that is a breach of contract and an employee is entitled to treat themselves as dismissed by that breach. If the employee does so and resigns from their employment because of that breach without having waived the breach or affirmed any variation to the contract, If there was no fair reason for dismissal the dismissal would be unfair; (ii) in respect of the potentially fair reason for dismissal pleaded in the Response, it is for the Respondent to establish that was the reason or principal reason for any dismissal. In respect of unlawful age discrimination if the employer acts less favourably towards an employee than it otherwise does or would to other employees, in respect of any of those matters set out in regulation 7(2) (a) – (d) of the 2006 regulations and does so wholly or in part (ignoring trivialities) on account of the employee's age, that amounts to unlawful (direct) age discrimination. (iii) If there was a dismissal the burden is neutral in respect of whether the dismissal was fair within the meaning of Section 98(4).
11. The Tribunal heard evidence on oath or affirmation from: the Claimant; Gerald Davies, a Deputy Principal, Resources and Development with the Respondent, previously an Assistant Principal, Resources with the Respondent; Karen Sanders, Human Resources Director with the Respondent; and Robin Chapman, Deputy Principal with the Respondent. The Tribunal had presented to it a bundle of documents and had regard to those documents in it to which we were referred. At the conclusion of the time allocated for the Hearing no time was available for submissions, deliberations, decision and, if appropriate, remedy. For that reason orders were made that the parties prepare written submissions and any reply. The parties complied with those orders and the Tribunal had before it when it deliberated the following documents in addition to the bundle and witness statements: Respondent's closing submissions (thirteen pages including cover), Claimant's written submissions (seventy three pages); Respondent's submissions in response (five pages including cover); and Claimant's reply (five pages including cover). The Tribunal also had the benefit of the Respondent's skeleton argument provided to the Tribunal at the start of the Hearing. All those submissions were helpful to the Tribunal.

12. The Respondent is a college providing education and training in the natural, built, and recreational environments, from pre-entry to post graduate degree level. As of 12th May 2009 the Respondent employed five hundred and fifty eight people, including five hundred and seventeen at the place where the Claimant worked. We heard nothing to suggest that those figures, which are contained in the Respondent's response form, were appreciably different to the numbers employed by it at the time of the events which gave rise to these proceedings.
13. The Respondent has a written grievance procedure applicable to the Claimant (there was no difference between the January 2005 version and the 2008 revision that is material to these proceedings). The procedure provides for three stages, namely – stage 1 – informal discussions, stage 2 – formal grievance procedure, and stage 3 – appeal. Stage 1 enables an employee to raise a matter informally and orally with their line manager. If the employee is dissatisfied with the decision at that stage they may progress the grievance to stage 2. The stage 2 procedure is applicable in respect of those grievances which have been raised pursuant to stage 1, or, other situations where the employee "...believes the grievance to be of such a serious nature that it is not appropriate to raise the grievance informally...." in which case the employee may refer their grievance to the Respondent's Deputy Principal or their nominee by obtaining and completing a grievance form. A grievance form is attached as part of the grievance procedure and is available on the Respondent's intranet. If an employee is dissatisfied at the end of the stage 2 procedure the employee may appeal to the Principal. A decision of the Principal is final. Nothing in that procedure can of course disapply the statutory procedure then in force contained in the Employment Act 2002.
14. On 12th May 1986 the Claimant began employment with Northampton Borough Council as a Project Co-ordinator, for tourism, history, and community service projects. In April 1989 the Claimant's role changed to Senior Training Officer for youth training. On 1st January 1991 the youth training contract was taken over by Daventry District Council and pursuant to the TUPE Regulations then in force the Claimant's employment was transferred to that authority.
15. While employed by Daventry District Council the department in which the Claimant was employed was engaged mainly in arranging, monitoring, and overseeing apprenticeship schemes. The authority had a contract with the Learning and Skills Council to provide training to apprentices in Northamptonshire. In line with annually agreed targets the department would recruit apprentices seeking to achieve a qualification together with the necessary employers to offer apprenticeship places. It was necessary for the apprentice to also undertake training provided by a training provider. The authority was one such provider but only in the areas of: business administration, IT, and customer service. The authority secured external training providers e.g. a college, for apprenticeship programmes in: engineering; construction; retail; accountancy; care; warehouse; and distribution. The authority entered into contracts with those sub-contracted learning providers, securing and passing on the necessary funding from

government. The department in which the Claimant worked was responsible for managing and overseeing the delivery of this process.

16. The Claimant was Daventry District Council's Training and Development Officer (company training) (reporting to a Training and Employment Service manager). In her role the Claimant was responsible for overseeing all of the authority's apprenticeship programmes. To do this the Claimant had the support of five staff reporting to her, namely two training advisors, an administrator, a quality/training advisor and administrative apprentice, together with financial budgets of about £223,000 for expenditure and £90,000 for sub-contracted training.
17. On 1st August 2006 the Respondent took over all the Learning and Skills Council contracts which had been delivered by Daventry Council and pursuant to TUPE Regulations the Claimant's employment transferred to the Respondent albeit no one else in her team did so. The Claimant's terms and conditions of employment, together with job role remained the same albeit her job title was changed to Apprenticeship Schemes Assistant Manager. The Respondent recruited and appointed a Training Advisor and an Administrative assistant to replace those staff who had not transferred. The Administrative Advisor and Administrative Assistant initially reported to the Claimant. Prior to the transfer the Respondent had overseen the training advisors, who each had a case load, but subsequent to it the Claimant had to take over a case load herself, in addition to her other duties. The Claimant moved office within Daventry.
18. At the time of the transfer the Respondent had one other Apprenticeship Schemes Assistant Manager, namely Amanda Lane. The Respondent's plan was to have the Claimant and Ms Lane each manage half of the Respondent's training advisors. As such the Claimant would be overseeing training advisors working on apprenticeship programmes with learning delivered by the Respondent, known as "infil" contracts and also sub-contracts. In the event the plan did not come to fruition and the Claimant remained responsible for overseeing sub-contract apprenticeship programmes.
19. Following the Claimant's transfer and office move in Daventry, in addition to the Claimant and the Training Advisor and Administrative Assistant appointed as referred to above, an Administrative Assistant, was provided who initially reported to the Claimant. In September 2007 however that Administrative Assistant was moved to another location and the administrative support she provided was reduced such that in March 2008, on the Respondent's instructions, it stopped. The Training Advisor and Administrative Assistant both left in Autumn 2007. A further Training Advisor (Anna Townrose) was recruited in about March 2008, who took over the electrotechnical apprenticeship case load (being part of the former Training Advisor's case load), the Claimant continued to look after the remainder of the former Training Advisor's work load. The Claimant's responsibility for Ms Townrose was limited to her electrotechnical case load as that was sub-contracted.

20. The Respondent provided the Claimant with a job description (at pages 52 and 53 of the bundle) which set out her duties. The job description accurately reflected the work the Claimant carried out other than: (i) the responsibility at 2.4 for elements of infill contracts was never applied, the Claimant only working on sub-contracted contracts; (ii) 3.4 similarly refers to infill contracts, which the Claimant did not deal with but the Claimant dealt with sub-contracts and thus it was necessary for the Claimant to be responsible for drafting and negotiating agreements between the Respondent and the learning provider and reviewing compliance with those contracts; (iii) 3.5 similarly dealt with infill contracts, however the Claimant dealt with invoices relating to each apprentice and thus of necessity negotiate refunds when appropriate; and at (iv) 3.9 the Claimant would additionally carry out assessments of apprentices as part of their interview to assess their suitability for a course.
21. Without advanced warning on 24th July 2008 the Claimant was informed that she was to be relocated to the Respondent's main site in Northampton in order that she could be fully integrated into the work of the Respondent's Work Based Learning Department to assist her carry out her role more fully. This was to take place as soon as possible though no date was fixed. At that time it was the Respondent's stated intention that the Claimant manage more Training Advisors, as proposed two years earlier. The Claimant was informed by her line manager, Ms Rebecca Kinnear, that she was to be placed in the Respondent's Work Based Learning office on its Holcot site. The Claimant was not against the move but expressed her concern about the physical capacity of the office to accommodate her.
22. On 17th September 2008 the Claimant received a telephone call from Ms Kinnear asking her to attend a meeting that day with Ms Sanders, the purpose of which was to discuss office relocation. The Claimant attended the meeting without any warning or notice of what else was to be discussed. Unbeknown to the Claimant, the previous day the Respondent's senior management team had decided that she was to be transferred into its Management Centre and take up the role of Services to Business Programmes Co-ordinator in substitution for her existing role as soon as possible. The Respondent's Management Centre is a separate unit operating within the Respondent's organisation providing publicly funded courses and is seen by the Respondent as a very important initiative. The Management Centre's management, however, was failing and the administration was poor. Although the senior management team made the decision, and takes as it must, full responsibility for it, we were not shown any report to it or given any indication or shown how any meaningful consideration had been given to whether the Claimant's existing role and that of the Services to Business Programmes Co-ordinator role, about which the Respondent intended the Claimant to be moved, were commensurate or permitted by the employment contract between the parties.
23. During the meeting Ms Sanders informed the Claimant that, as the Claimant had previously pointed out there was insufficient room for her in the Work Based Learning office and thus she was to be based at the

Dicks being unaware that her move to the post was a temporary one, Mr Chapman was unable to give any indication of how long the Respondent would require the Claimant to stay in the post. There was considerable dispute about the nature of the role. The Claimant asserted that her position was being made redundant which Mr Chapman denied but informed that there was not enough work in her area at the moment so the Respondent needed to utilize her skills elsewhere as per her job specification. Mr Chapman informed the Claimant that she was not seeing the opportunity in the position. Mr Chapman asserted that the Claimant's skills were matched to where she would fit best at that moment in time. The Claimant expressly asked Mr Chapman what the consequences would be if she did not comply with the instruction to move to the co-ordinator job to which Ms Clare Law, from the Respondent's HR Department, informed that disciplinary action could be taken against her and Mr Chapman informed that it would be considered misconduct and a breach of contract, further that the Claimant was expected to carry out the move later in the following day after her appointments. Although not in the recorded minutes, but in the Claimant's subsequent resignation letter, dated 10th October 2008, the Claimant recites that Mr Chapman informed her, in an attempt to sell the job to her, that she would be a personal assistant to Richard Dicks albeit he did not see her as a PA. This, was also recorded by the Claimant in her own notes albeit all such documents must be treated with some caution. The Claimant we find to have been an open and truthful witness, the Respondents neither open and to have, at best, vacillated. We accept that Mr Chapman did make that statement.

33. During the evening of 1st October the Claimant was distraught and felt unwell. The following morning the Claimant's husband telephoned the Respondent's office and informed that the Claimant was unwell and would be unable to attend work that day or the next. That day the Claimant visited her doctor who provided a sick note for her in the standard format signing her off work and informing that she should refrain from work for two weeks diagnosing the reason as stress. This the Claimant sent to the Respondent by post the same day. In the event the Claimant never returned to work receiving a number of sick notes over the following months.
34. On 3rd October the Claimant logged into her emails from home to put on an out of office autoreply. In doing so she noted that a payroll administrator for the Respondent had sent her an email asking "I was just seeing if you were back at work today?". The Claimant had never received such an email in the past when she had been absent from work through ill health and had never met the sender of this particular email.
35. At 9.10am on 6th October the payroll administrator telephoned the Claimant at home inquiring as to her whereabouts. The Claimant informed him and the reason why, referring to the sick note provided by her doctor for two weeks which had been sent to Mr Chapman.
36. By a letter dated 6th October, received by the Claimant on 9th the Claimant was informed of Mr Chapman's decision on her grievance. Mr Chapman introduced his reply by referring to the Claimant's absence from work and

hoping that she was recovering and would be returning to work that week. Mr Chapman informed the Claimant that *"the purpose of the meeting was to discuss with you, informally, the matters you have raised under the colleges' grievance procedure to enable me to determine whether there were sufficient grounds for a grievance hearing to be convened under Stage 2 of the procedure. Having listened to your concerns in detail at some length I would advise you that I do not consider there are grounds to proceed for the following reasons"*, which he gave. It is clear that despite the reference to the Employment Act 2002 Dispute Resolution Regulations and the description of the grievance as a grievance the Respondent had not regarded the Claimant's grievance as such and further had decided it would not follow its own stage 2 procedure. That, said Mr Chapman, did reply to the points the Claimant had raised as follows:

"a) You considered that the content of the email sent to you by the Director of Human Resources to be threatening and an attempt to bully you. I do not consider either the tone of the email or the words used demonstrate any actions which could be perceived in this way. In all communications it is important that both the sender and receiver of emails should consider the terminology used and having read the communication in its entirety I consider the response sent to you to be both professional and appropriate.

b) A job specification represents the major tasks to be carried out by the post holder and identifies the level of responsibility at which the post holder will be required to work. In line with our practice and in the interests of effective working, the major tasks are reviewed from time to time to reflect the changing needs and circumstances of the business. All employees are appointed to the College as a whole and can reasonably be expected to undertake the same or broadly similar duties at any of the College's locations. You were notified in July 2008 of the intention to relocate you to the Moulton Campus. I would point out that the last sentence in your letter could be perceived as a refusal to carry out or perform duties as defined in your job specification, or to follow reasonable instructions, or to comply with College rules.

c) You stated in your letter and also during the meeting that you consider your post to be redundant. You were informed on two separate occasions that this is not the case. In the event that the College needs to consider such actions documented procedures and processes are in place and are adhered to at all times".

Mr Chapman informed the Claimant that any remaining case work must be completed so that she could concentrate fully on the programmes co-ordinator activities.

37. We were shown two sets of the minutes of the grievance meeting on 1 October 2008 both prepared by the Respondent, one of which described the meeting as "Grievance Hearing" while the other "Grievance Meeting – Informal". There were no other differences.

38. On 10th October 2008 the Claimant wrote to the Respondent resigning her employment with immediate effect informing that she would be claiming constructive unfair dismissal. Within that letter the Claimant recited the matters which had occurred, as she perceived them, since joining the Respondent in 2006 and particularly from 24 July 2008. Specifically the Claimant addressed the reduction in work load and while admitting that she had less of a personal caseload than the Training Advisors, compared herself to the other Assistant Manager who had the same job as her and who had twenty-four learners whereas the Claimant herself had twenty-seven (and also referred to others she was due to sign up). Part of the Claimant's conclusion was that she was no longer seen as a valid team member with years ahead to develop her role in the Work Based Learning Department whereas the younger team in the Department had a longer career on their side. The Claimant concluded with her opinion that the Respondent's decision that the other Assistant Manager take on the Claimant's workload leaving her to see out her final years in a lower graded office administrative role with less responsibility and no career opportunities amounted to age discrimination and had resulted in the loss of her job. The Claimant reiterated that she was raising a grievance.
39. Although the Claimant had informed the Respondent that she was resigning with immediate effect, it wrote to her on 21st informing her that, subject to any further negotiation, her last date of employment would be on November 7th that year: the Claimant was, however, relieved from performing any duties during that period. There followed an exchange of correspondence between the Claimant and the Respondent in which they both reasserted their respective positions on the effective date of termination of employment.
40. We were not provided with evidence as to when the Respondent received the letter, but allowing for two days post the Respondent would have received the letter on 12th October and we find that to be the Effective Date of Termination of the Claimant's employment with the Respondent.
41. In the Claimant's resignation letter she informed the Respondent that she was doing so to protect her position and she was agreeable to the modified grievance procedure being followed, albeit she also considered that she had complied with the standard (statutory) procedure. There was then some written communication between the parties, the Respondent initially seeking to treat the grievance as an appeal against the earlier decision of Mr Chapman, the Claimant referring to the fact that Mr Chapman had informed her that there had not been a grievance meeting, simply a meeting to decide whether she had a grievance, that Mr Chapman had concluded that she did not and asserting her position that the modified grievance procedure was appropriate and should be followed. The communications concluded with the Respondent agreeing to follow the modified procedure.
42. By a letter dated 24th November Mr Gerald Davies wrote to the Claimant with the Respondent's decision on her grievance. Mr Davies concluded, amongst other things,;

- a) the Claimant was employed on a business support staff contract and no change to either her salary or conditions of service had been made,
 - b) that the post at the Management Centre was responsible for co-ordination of services provided to commercial clients and was key to the effective delivery of those services;
 - c) there was no breach of contract;
 - d) he was satisfied that the reason for the change of the Claimant's office and the manner in which she was advised was appropriate;
 - e) he did not consider the physical location of the Claimant's desk space relevant to the Claimant's grievance, while he accepted that in July the Claimant had not been informed of any possible change to her duties;
 - f) that the Claimant was not redundant;
 - g) referred to the Respondent's disciplinary sanctions in particular that misconduct would include – "the refusal to perform duties in his or her Job Specification or to follow reasonable instructions or to comply with College rules". The Respondent did not uphold any part of the Claimant's grievance.
43. In arriving at his decision on the Claimant's grievance Mr Davies examined the papers but did not speak to Ms Sanders or Mr Chapman or anyone else. During evidence to the Tribunal Ms Sanders informed that if the Claimant had not wished to transfer, she could have stayed working in her job in the Work Based Learning Department. The Senior Management Team had decided to move the Claimant before she was informed of it. Ms Sanders informed the Claimant that any career decision was for the Claimant. During the grievance process whilst still an employee of the Respondent the Claimant was warned of disciplinary action being taken against her if she did not move to the new post and in Mr Davies' decision letter on the appeal, he referred to the use of the disciplinary procedure as the "ultimate sanction.". Against all the Claimant's previous experience the Claimant's attendance was checked twice by the Respondent's payroll administrator. There was pressure put on the Claimant to move to the Co-ordinator post without delay, even by Mr Chapman in his outcome letter on her grievance and while she was on certificated sick leave. We find Ms Sanders' statement to be untrue.
44. During the period leading up to the Claimant's meeting with Ms Sanders on 17th September 2008 the Respondent was finalising its plans for the forthcoming academic year. Those plans included: staff office moves; course timetabling; training and development activities; physical and human resources planning; curriculum planning; and student recruitment. Student recruitment, curriculum, and resource planning naturally change during the late summer months prior to the start of the new academic year. The Respondent must of necessity make adjustments depending on the level of business it has. It was the Respondent's case that the numbers of new and returning apprentices in the Claimant's case load had reduced significantly. Further, the construction industry was experiencing a significant downturn which was set to have a major impact on apprentice numbers. The Respondent's experience was that this reduction in apprentices would be likely to last between four to six months and that other initiatives such as

the government's "Train to Gain" and other initiatives should help the Respondent reach its targets in Spring 2009. In addition, the Respondent experiences peak workloads in different operational areas at different times of the year. To meet this need it moves administrative and technical staff across the college. Management and supervisory staff have also been moved. It was the Respondent's belief that this practice provides excellent career development opportunities, has been of particular benefit in developing career paths for staff members and also aids strategic succession planning. The list of such moves provided by Ms Sanders at paragraph 11 of her witness statement generally supports that position.

45. Ms Sanders gave evidence to support the Respondent's contention of a reduction in work by reference to documents within the Tribunal bundle at pages 110 -11 and 156-7. An application by the Respondent objected to by the Claimant, to introduce further documentation, not previously disclosed, upon which Ms Sanders informed the Tribunal the Respondent had had regard to was refused by the Tribunal, the application being made after Ms Sanders had concluded her evidence and at the start of the third and final day of the Hearing. Reasons for the refusal were given orally at the time.
46. The Respondent's position was that the number of apprentices for which the Claimant was responsible was decreasing from 72 in October 2007 to 58 in October 2008 with a further expectation of reduction in the area of electrical installation. The evidence we heard however and supported by the documentation we received showed that the total number of apprentices dealt with by the Respondent for the week ending 5 October 2007 was 517 and for the week ending 3 October 2008 was 585, i.e. an increase of 79. At the time, 17th September 2008 the Respondent employed two Apprentice Scheme Assistant Managers, namely the Claimant, then aged fifty eight. and Amanda Lane, then aged thirty four. The Claimant and Ms Lane reported to the Apprentice Scheme Manager and had reporting to them a number of Training Advisors of varying ages between twenty eight and fifty four. As an Assistant Manager the Claimant had a lower personal caseload of apprentices than Training Advisors to reflect the fact that she had other duties and responsibilities than they. One Training Advisor, Vikas Vijem, had responsibility for eighty six apprentices, Michelle Roddick, a Training Advisor, had responsibility for forty apprentices, Ms Lane had responsibility for twenty-four and the Claimant twenty-seven albeit that that was expected, on reasonable grounds, to increase to thirty-six within the next few weeks.
47. In evidence the Respondent referred to areas for which the Claimant was responsible being reduced, namely the level 2 electrical installation being discontinued, level 3 electrical installation being withdrawn along with motor vehicle apprenticeships. However the Tribunal was not provided with any documentation to substantiate that this had been the reason at the time of the Respondent's decision to move the Claimant other than Ms Sander's e-mail of 26 September 2008. In the context of an increasing number of apprentices overall it does not explain why the Claimant was selected for the position at the Management Centre.

48. There was considerable dispute between the parties as to whether the post of Work Based Learning Schemes Assistant Manager was a more senior one to that of Services to Business Programmes Co-ordinator. We remind ourselves that job titles, and indeed job descriptions, are not always accurate. On this occasion however the Claimant's job description was recent as was that of the Services to Business Programmes Co-ordinator as the Claimant had been put into her position in 2006 and the Business Programmes Co-ordinator had not been in that position for many years. The Claimant's existing position had within the job title the phrase "Assistant Manager" whereas the other did not and was of a higher grade to the other. The Claimant's existing job was outward facing involving both professional and managerial tasks. The role of Programmes Co-ordinator was office based, included some managerial tasks, but on the facts we have found principally an administrative function. We refer to our earlier findings of fact about inaccuracies in the two job descriptions. Subject to those findings we accept the two job descriptions as being broadly accurate. We find that the two positions were of different grades because of the different levels of responsibilities and that the role of Services to Business Programmes Co-ordinator was of lower value (in the sense of being graded lower) than that of the Claimant's post. We are supported in that finding by Mr Chapman's statement that the Co-ordinator post was like a PA to the Centre Manager. We would have made that finding irrespective of Mr Chapman's statement.
49. Ms Sanders' evidence was that the Claimant was to be moved to the position at the Management Centre as her experience was needed there and that Ms Lane was not at that point the most appropriate person, further that the Claimant had good staff supervisory administration and organisational skills and better communication skills than her colleagues. Mr Chapman's evidence was that Ms Lane did not have appropriate skills for the position in the area of sub-contracting. Sub-contracting was not referred to in the Co-ordinator job description.
50. The Respondent has denied dismissal and specifically denied that the Claimant's post was redundant. The Respondent has not refilled the Claimant's post.
51. We find that the position of Services to Business Programmes Co-ordinator was a different and more junior role to that which the Claimant was employed in. The Respondent instructed the Claimant to move to that position without warning albeit on a salary protected for an uncertain length of time. Although the Respondent informed the Claimant that the move was temporary, it did not give her any indication when she might return. The Claimant was neither warned nor consulted about the move. Once the Respondent had informed the Claimant of its decision it required her to move almost immediately leaving no doubt that if she did not she would be subject to a disciplinary procedure.
52. The job of Co-ordinator would be a new job for the Claimant, not simply a change of duties. Not only were the duties and status different, but the nature of the tasks were different and the hours considerably longer, at the

least an additional five hours a week but as the Claimant had to "meet and greet at 7.50am and secure the premises at 5.00pm six hours would be a better estimate.

53. The Respondent has provided different reasons for its decision to move the Claimant. The Claimant does not dispute that the Respondent had an urgent need at the management centre for a full time Programmes Co-ordinator. It was the Respondent's decision to relocate the Claimant from the office in which she was based. The Respondent was clearly aware when it decided to relocate the Claimant that there was insufficient space at the Holcot Centre, (the Claimant had pointed out to it and Ms Sanders referred to it in her written communication on 26th September). On that occasion the Respondent informed the Claimant that her case load of trainees was significantly lower than equivalent colleagues workloads thus leaving her available to undertake the co-ordinator role. In terms of the personal case load of trainees that was wrong as Ms Lane had less than the Claimant and managerially the two had the same job titles and role. The Claimant's workload could not be compared with those of Training Advisors as they carried out a different role. In any event in respect of one particular Training Advisor, Ms Roddick, the Claimant's personal work load was not significantly different.
54. On 17th September 2008 Ms Sanders had informed the Claimant the reason for her relocation and for the new job as occupation levels for apprentices was low and the Respondent had decided that it no longer needed two Apprenticeship Scheme Managers at that time. Whatever the management team's decision, the figures provided to the Tribunal show an overall increase of sixty eight apprentices rather than any reduction.
55. Ms Sanders did not refer the Claimant to any development opportunities or to the Respondent's policy or practice of moving staff to provide the relevant opportunities for career development. There was no explanation provided at any time as to how this policy or practice could apply to the Claimant. Insofar as Ms Lane is concerned although it is not apparent how "sub-contracting" was a particular skill required for the position of co-ordinator, if that was a skill which she needed to develop, then the post of Training Co-ordinator could have been an opportunity for her to do so, that, however, being a consideration for the Respondent and not this Tribunal.
56. When the Claimant, very clearly exercised her right to raise a grievance, referring to the statutory procedure the Respondent misapplied its own internal grievance procedure by treating it informally, despite the grievance having been addressed to the Deputy Principal in accordance with the Respondent's scheme. Although the Respondent replied to the grievance, its misapplication of its own procedure, together with language it used informing the Claimant that the grievance could not be proceeded with, together also with the comments made regarding disciplinary action should the Claimant not comply with the Respondent's instruction lead the Tribunal to conclude that the grievance was not meaningfully considered. This is supported by the fact that the Respondent's senior management team,

without any consultation with the Claimant, had previously made a decision as to the Claimant's future employment with it.

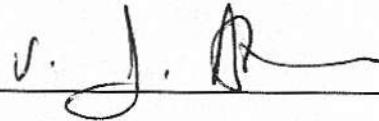
57. We find that the Respondent's attempted imposition on the Claimant of an additional five hours work a week, at least, was a fundamental breach of contract as was the requirement, (without warning or consultation, let alone agreement) to perform a different and more junior job.
58. For all the facts previously found, we find that the Respondent broke the implied contractual term of mutual trust and confidence.
59. The Respondent, in its response to the Tribunal, asserts that the Claimant waited too long before resigning. We are perplexed at that assertion as the Claimant was in communication, as referred to in our findings and as was known by the Respondent with the Respondent until her resignation. We find the Claimant did not waive any breach of contract nor affirm any purported variation to it. The Respondent in fact denied redundancy. As it is for the Respondent to establish the reason, we accept that the Claimant was not dismissed for redundancy. In any event, the mere fact that a post was not filled when the overall workload was increasing does not support a finding that that was the Respondent's reason for acting as it did. In respect of the Some Other Substantial Reason - being a business reorganization or the need to fill another post, the Respondent in evidence gave a number of reasons why the Claimant was moved. The facts found do not lead us to find that there was any business reorganization or that the Respondent had the contractual ability to simply move the Claimant from her post to that of Co-ordinator. We find the Respondents did not establish Some Other Substantial Reason (as defined in Section 98(1)(b) Employment Rights Act of 1996. We find the Respondent dismissed the Claimant unfairly.
60. In respect of age discrimination complaint we do not consider the Training Advisors to be in a comparable situation to that of the Claimant, Ms Lane, however, was. The fact that there was a difference of age and difference of treatment is insufficient to enable the Tribunal to conclude that the Respondent's decision was based, either wholly or in part, on age. The Claimant relies on the fact Ms Sanders moved the Claimant because of her experience and that experience by its very nature is linked to age. We do not accept that assertion that experience and age are so simply linked. Ms Lane at thirty four could have sufficient experience to do the Co-ordinator role as an alternative to her own as could the Claimant. Ms Sanders informed the Tribunal that it was not appropriate for Ms Lane at that time to occupy the role of Services to Business Programmes Co-ordinator. Other than the reference to "sub-contracting" made by Mr Chapman we do not understand why she was not.
61. The proposed move was seen by Mr Dicks as a permanent move and the Claimant was never given any indication when she might return. Based on one of the reasons given by the Respondent at the time, namely that the department's work was reducing when in fact it was increasing, we find the

move was more likely than not to be for an indefinite to permanent period of time.

62. Within the response to the Tribunal (ET-3) the Respondent's reason for proposing to move the Claimant was that the level of work handled by the Claimant could be handled by her colleagues and that the Respondent had an urgent need for assistance in providing managerial/administrative cover for the commercial training and service to business manager. These reasons apply equally to Ms Lane as does the reference by Ms Sanders on 17 and 26 September to lack of desk space.
63. On the facts we have found we find that the proposed move was not a career development move but was a backwards step for either of the Assistant Managers if moved to it particularly if for more than a short period, as we have found it was to be.
64. We do not accept any of the Respondent's reasons why Ms Lane was not suitable for the role of Co-ordinator. To the contrary, if the only reason (given by Mr Chapman) was lack of sub-contracting experience and if that was relevant to the post of Co-ordinator (and her post as it was part of the Claimant's duty), it would provide a development opportunity for her.
65. We have found that there was an increase in overall apprentice numbers and that the Respondent has not replaced the Claimant. We consider that the Respondent has been disingenuous in the reasons it gave to the Tribunal as to why it chose to move the Claimant to the Co-ordinator role. Disingenuity in itself is not a reason to infer unlawful discrimination, we must look to the reason for that behaviour.
66. The Claimant was approaching the final years of her career and working life (in conventional terms) whereas Ms Lane has considerably more years ahead of her. On the facts found before we find that we could conclude that the reason the Respondent chose to impose a transfer on the Claimant to the Co-ordinator role was as the Claimant surmised in her resignation letter. The move was clearly to the Claimant's detriment. (We arrive at the finding recognising that during a grievance meeting with Mr Chapman, the Claimant expressed the view that she may wish to stay in the Co-ordinator role if moved to it. We accept her evidence to the Tribunal that she was, at that time, exploring the options available to her, which evidence was supported by all her other actions). We have not accepted the Respondent's purported reasons for the move.
67. We find that the Respondent unlawfully discriminated against the Claimant (by attempting to impose transfer on her) on the grounds of her age.
68. In respect of the complaint of breach of pay in respect of notice pay, as the Claimant elected to resign without notice, as she is entitled to do, she is not entitled to notice pay and that complaint is not well founded.
69. In respect of the complaint of unpaid holiday pay . As the Claimant's employment ended on 12 October 2008 she could not have taken leave

after that date. The remaining facts in respect of that complaint will be dealt with when remedy in respect of the other complaints are considered.

- 70. In respect of the statutory grievance procedures, while the Respondent mishandled its own grievance procedure it managed to carry out the actions required by Steps 1 and 2 of the standard statutory procedure. The Claimant did not appeal against the decision on that grievance but sought to pursue the modified grievance procedure. This the Respondent, ultimately, agreed to and performed the obligation on its part. We do not find that the Respondent breached the statutory grievance procedure and thus there is no uplift pursuant to Section 31 Employment Act 2002.
- 71. A Hearing will be fixed to determine remedy, one day being allowed. The Case Management orders previously made continue to apply.



Employment Judge, Bedford

Date 18 Feb 2010

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY TO THE TRIBUNALS