Case No: 2201145/2015

EMPLOYMENT TRIBUNALS

Claimant: Ms C Ramos Alvarez

Respondent: The Royal Borough of Kensington & Chelsea

Heard at: London Central **On:** 9 and 10 March 2017

Before: Employment Judge H Grewal

Representation

Claimant: Mr V Khanna, The Law Clinic

Respondent: Mr T Walker, Counsel

JUDGMENT

1 The Tribunal orders that the Claimant is to be reinstated to her role of Legal Secretary (Scale 6) in the Respondent's tri-borough shared Legal Services by 28 July 2017.

2 The Respondent is to pay to the Claimant a lump sum to reflect the wages that she would have received as a Scale 6 Legal Secretary between 10 December 2014 and 28 July 2017 less the redundancy payment made to the Claimant. If the parties cannot agree the amount, the Tribunal will determine the amount to be paid.

3 The Respondent is to restore all the Claimant's pension rights and seniority by taking the necessary steps to ensure that that her service is preserved for the period between 10 December 2014 and 28 July 2017 and by making any payments that need to be made into the pension fund for that purpose.

REASONS

1 In a claim form presented on 2 April 2015 the Claimant complained of unfair dismissal and race and disability discrimination.

2 At a preliminary hearing on 29 July 2015 the case was listed for a preliminary hearing on 18 and 19 November 2015 to determine whether the Claimant was disabled and whether it was just and equitable to consider a large number of her race and disability discrimination complaints which had not been presented within the prescribed time limit. That hearing had to be adjourned, mainly because the Claimant had not complied with the orders made at the hearing on 29 July 2015.

3 At a preliminary hearing on 3 December 2015 further orders were made for the Claimant to comply with the original orders and it was made clear that failure to do so would lead to her discrimination claims being struck out. On 22 January 2016 the Claimant clarified that the only complaints of discrimination being pursued were of direct disability discrimination, discrimination arising from disability and disability-related harassment. At that stage the Claimant abandoned all complaints of race discrimination, indirect disability discrimination and victimisation.

4 At a preliminary hearing on 29 February 2016 the Claimant clarified that the only complaints that she was pursuing were the complaints of unfair dismissal and discrimination arising from disability in connection with her dismissal. The case was listed for a hearing (five days) starting on 16 May 2016. That hearing was adjourned at the request of both parties.

5 A further preliminary hearing took place on 21 October 2016. At that hearing the Respondent was permitted to withdraw the concession that it had made in January 2016 about the Claimant's disability. The reason for the withdrawal was that a recent report from a jointly instructed expert had cast doubt on whether the Claimant had been disabled at the material time. The Respondent also applied for a deposit order in respect of the disability discrimination claim. The order was made. The case was listed for a hearing to start on 24 April 2017.

6 On 10 November 2016 the Claimant withdrew the disability discrimination claim. That only left the unfair dismissal claim before the Tribunal.

7 On 29 November 2016 the Respondent conceded that the Claimant had been unfairly dismissed and asked the Tribunal to list the case for a remedy hearing. The remedy hearing was ultimately listed for 9 and 10 March.

The issues

8 The Respondent conceded before me that the Claimant should be awarded the maximum compensation for unfair dismissal, which it said was £26,508. The Claimant did not dispute that figure. The Claimant sought an order for reinstatement or, in the alternative, re-engagement. The Respondent argued that it was not practicable for it to comply with an order for either reinstatement or re-engagement. The sole issue that I had to determine was whether it was practicable for the Respondent to comply with either of those orders.

The Law

9 Section 116 of the Employment Rights Act 1996 ("ERA 1996") provides that in exercising its discretion as to whether the to make an order for reinstatement or re-engagement, the Tribunal should first consider whether to make an order for reinstatement. In considering whether to make either order, it should take into account, among other things, whether it is practicable for the employer to comply with the order in question. Section 116(5) ERA 1996 provides,

> "*Where in any case an employer has engaged a permanent replacement for the dismissed employee, the tribunal shall not take that fact into account in determining … whether it is practicable to comply with an order for reinstatement or re-engagement."*

However, section 116(5) does not apply where the employer shows that it was not practicable for him to arrange for the dismissed employee's work to done without engaging a permanent replacement (116(6)(a) ERA 1996).

10 Section 114(1) ERA 1996 provides,

> "*An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed".*

The effect of an order for reinstatement is to put the employee back in the role that he or she had before dismissal.

Section 115(1) ERA 1996 provides,

> "*An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that form which he was dismissed or other suitable employment."*

On making an order for re-engagement the Tribunal must specify the terms on which re-engagement is to take place, including among other things, the nature of the employment (section 115(2)(b)).

11 In **Lincolnshire County Council v Lupton (EAT/0328/15)** Simler J in the EAT stated at paragraph 18,

> " *"Practicable" in this context means more than merely possible but "capable of being carried into effect with success" (see Coleman and Anor v Magnet Joinery Ltd [1975] ICR 46 at page 52). Re-engagement is not to be used as a means of imposing a duty to search for and find a generally suitable place within the ranks for dismissed employee irrespective of actual vacancies. That, as the Council, contends puts the duty too high. An employer does not necessarily have a duty to create space for a dismissed employee to be re-engaged. The question at the end of the day is one of fact and degree by reference to what is capable of being carried into effect with success."*

In considering the meaning of practicable Neill LJ in **Port of London Authority v Payne [1994] IRLR 9** expressed it as follows –

"*The standard must not be set too high. The employer cannot be expected to explore every possible avenue which ingenuity might suggest. The employer does not have to show that reinstatement or re-engagement is impossible. It is a matter of what is practicable in the circumstances of the employer's business at the relevant time.*"

12 The courts have held that tribunals would be justified in refusing to order re-employment in the following circumstances –

- If the employee distrusts or lacks confidence in the employer, for example, because he/she believes that there has been a long-standing conspiracy against him/her by her employers; such an employee is unlikely to be a satisfactory employee if he/she were to be re-employed (**Nothman v London Borough of Barnet [1980] IRLR 65**.

- If the manner in which a dismissed employee has pursued his/her successful complaint of unfair dismissal has so soured his relationship with those with whom he/she would have to work that reinstatement or re-engagement is impracticable, even though the damage done might have been the inevitable result of fighting his/her case (**Oasis Community Learning v Wolff EAT/0364/12**).

13 The requirement to identify the nature of the employment under section 115(2) ERA 1996 is mandatory and the failure to identify it with any degree of detail and precision is an error of law – **Lincolnshire County Council v Lupton**.

The Evidence

14 The Claimant gave evidence in support of her claim. Joyce Golder (Principal Solicitor for Litigation) and Leverne Parker (Chief Solicitor and Monitoring Officer) gave evidence on behalf of the Respondent. Having considered all the oral and documentary evidence the Tribunal makes the following findings of fact.

Findings of Fact

15 The Claimant commenced employment with the Respondent on 23 August 2003 as a legal secretary in its Legal Services Department. She worked in the Litigation section. Joyce Golder was appointed Principal Solicitor for Litigation in March 2010.

16 On 7 July 2010 Ms Golder gave the Claimant an informal verbal warning (which was not recorded as a formal warning or on her personnel file) for speaking loudly about Toro (a colleague with whom the Claimant was annoyed because she had not answered her telephone while she was not at her desk) to two other colleagues. Ms Golder said that if she had concerns about any of her colleagues they should be raised with her or another manager. Ms Golder also said that she had had heard that the Claimant had made disrespectful comments about colleagues and managers on the telephone and in the hallway where they could be heard by others. She told the Claimant that that kind of conduct had to stop. She praised the Claimant's professionalism as a secretary and her excellent work. The verbal warning was recorded in an email to the Claimant.

17 On 22 November 2010 Louise Edwards, an Executive Officer in the Business Support section in the Legal Services Department, complained to Joyce Golder about an email which the Claimant had sent to Leela and which Ms Edwards had read because she was working at Leela's computer when the email arrived. She said that the Claimant had made disparaging comments about her and had questioned her professionalism and the reason for her employment. She said that she had found the comments to be highly offensive and distressing.

18 Ms Golder discussed the matter with the Claimant on 1 December 2010. The Claimant said that the email had not been intended for public distribution and that it was not right for Louise to have gone into Leela's inbox and read an email that was addressed to Leela. Ms Golder told the Claimant that she had not been right to use to the Council's email facilities to distribute derogatory comments about another. She gave the Claimant another informal verbal warning which would sit on a file which she held. This was also recorded in an email to the Claimant.

19 On 1 March 2011 the Claimant made a formal complaint against Louise Edwards in respect of the same matter. She said that under the Respondent's email usage policy only a manager was entitled to read other employees' emails, and that as Louise was not a manager she did not have the right to read Leela's email. The Claimant said that Joyce Golder had been wrong to give her a verbal warning, and asked for her verbal warning to be removed from her file and for Louise to offer her a written apology. She also gave examples of other occasions when she said that Louise Edwards had not been helpful.

20 On 4 March 2011 Leverne Parker, Chief Solicitor, advised the Claimant that there was no power for her to review the informal verbal warning given by Ms Golder and it would, therefore, remain. She passed the Claimant's complaint against Louise Edwards to Don Pitts, Ms Edwards' line manager, to investigate.

21 Mr Pitts spoke to Louise Edwards about the complaint. She said that Leela had left her inbox open and she had seen the email when it arrived. The subject heading referred to the IT problem that she was investigating and she opened it because she believed that it related to that. Mr Pitts dealt with the matter informally by reminding Ms Edwards and others in the team to be mindful of their responsibilities when working on their colleagues' PCs.

22 On 24 March 2011 Mr Pitts informed Leverne Parker of how he had dealt with the Claimant's complaint. He also said that the Claimant had used her complaint to make a number of unconnected and disparaging remarks about Business Support in general and Louise Edwards in particular and that he found her comments to be offensive and unacceptable. He copied his email to her to Joyce Golder so that she could take appropriate action.

23 On 25 March Mr Pitts sent the Claimant his response to her complaint and informed her how he had dealt with it.

24 On 5 July 2011 the Claimant complained in writing to Leverne Parker about Don Pitts. The essence of her complaint was that Business Support did not carry out tasks that were its responsibility and she had to carry them out and that the additional work and pressure had a negative impact upon her health. Mr Pitts' reaction on seeing the complaint was that it was unwarranted, without merit and highly offensive.

He did not think that anything short of formal disciplinary action would have any effect on the Claimant's behavior. On 27 July 2011 Ms Parker responded to the Claimant's complaint. She concluded that the tasks about which the Claimant was complaining were those which legal secretaries could reasonably be expected to do. She apologised for the fact that the Claimant had felt that she was put under unacceptable stress on one particular day, but concluded that Mr Pitts was not to blame for that. She continued that since then the Respondent had received a report from Occupational Health that the Claimant's stress levels increased when she was under pressure. She had, therefore, given managers in the Litigation team an instruction that the Claimant should not be asked to make any more deliveries.

25 On 28 November 2011 Rea Holbrook, an office junior, in the Business Support team complained to Louise Edwards (her manager) about the Claimant "huffing and puffing" and "muttering under her breath" when she told the Claimant that she could not go to the Post Room to check something out. Ms Edwards and Mr Pitts brought the matter to the attention of Joyce Golder. Joyce Golder spoke to the Claimant about it on 30 November. The Claimant disagreed with the account given by Ms Holbrook and felt that the incident was just another example of Business Support staff not supporting her. At the meeting the Claimant raised her voice and was clearly upset. She accused Ms Golder of twisting her words and said that she had had a conversation with other lawyers at her level about how Ms Golder twisted words. Ms Golder told her that if she had any complaint about her she should raise the matter with Leverne Parker. The Claimant rolled her eyes and said "ha" and explained that she had an issue with her as well.

26 Ms Golder discussed the matter with Mr Pitts in early January 2012 and considered dealing with it by way of another informal verbal warning. Mr Pitts' view was that that was not appropriate as it had been tried in in the past but the Claimant's unpleasant and offensive behavior had continued.

27 On 23 January 2012 Ms Golder invited the Claimant to a disciplinary hearing on 31 January to answer two allegations of misconduct. The first was that her behavior to a colleague on 28 November had been offensive and upsetting to a colleague. The second was that on 30 November she had been unprofessional and offensive about the Business Support team, insubordinate and offensive toward her and Leverne Parker.

28 The disciplinary hearing took place on 31 January 2012 and Ms Parker was the disciplining officer. The outcome was communicated to the Claimant on 6 February 2012. Ms Parker found the allegations to be proven and concluded that they were part of a pattern of continuing behavior about which the Claimant had been warned in the past. She issued the Claimant with a written warning which was to be placed on her file for 12 months.

29 The Claimant appealed against the written warning. The appeal was heard by Michael Coghler, Director of Legal Services, and the decision, conveyed to the Claimant on 19 March 2012, was to uphold the written warning. Mr Coghler's conclusion was that the Claimant's right to hold and express views did not extend to rudeness and insubordination in the workplace and that such behavior infringed the rights of other employees whom the Respondent had a duty to protect. He urged the Claimant to moderate her behavior and warned her that repetition of that behavior would put her at risk of further disciplinary action.

30 In July 2012 Louise Edwards and the Claimant exchanged emails in order to arrange a meeting to discuss the Claimant's Occupational Health report. In an email on 25 July Ms Edwards told the Claimant that she found the tone of her last email to be discourteous, rude and uncivil and said that if she did not conduct herself in a courteous and professional manner she would consider further disciplinary action against her. The Claimant responded that she considered Ms Edwards' email to be "*bullying and harassment"* and asked her to refrain from harassing her any more. On 8 August Don Pitt wrote to the Claimant that he needed to investigate her allegations of bullying and harassment and asked her to confirm whether they related solely to Ms Edwards' email or she was saying that the email was symptomatic of a wider pattern of bullying and harassment by Ms Edwards.

31 The Claimant responded to that email on 12 September by sending Mr Pitts a written complaint against Louise Edwards. In that document she complained of Ms Edwards having been appointed to manage secretaries when she did not have the experience to do so, not arranging a meeting to discuss her Occupational Health report until some five weeks after she had received the report, threatening, in an email copied to Ms Parker and Mr Pitts, to consider further disciplinary action against her and calling her discourteous, rude and uncivil. She felt that the last matter was insulting and that the threat of disciplinary action amounted to bullying and harassment. She also complained of having been treated less favourably than Ms Edwards in respect of the email which the Claimant had sent to Leela in November 2010 and which Ms Edwards had read.

32 Mr Pitts met with the Claimant on 4 October to discuss her complaint. He sent her his decision on 9 October 2012. He concluded that Ms Edwards' email of 25 July and her conduct in general towards the Claimant did not amount to bullying and harassment, the Claimant's email had been rude, discourteous and uncivil and that the Claimant had not been the victim of race discrimination in respect of the way she and Ms Edwards were dealt with in relation to the emails she sent in November 2010.

33 On 23 November 2012 Mr Pitts invited the Claimant to a disciplinary hearing on 5 December to answer allegations of misconduct, namely that she had made unjustified and unsubstantiated allegations of bullying, harassment, discrimination, and personal injury against Louise Edwards and of discrimination against Leverne Parker. Mr Pitts conducted the disciplinary hearing and conveyed his decision in a letter dated 7 December 2012. He concluded that the allegations had been made out and gave the Claimant a further written warning that was to remain on her file for twelve months.

34 On 28 February 2013 the Claimant requested a change in her working hours. In her application she said that her health had deteriorated considerably over the previous two years because of the bullying, harassment and racial discrimination to which she had been subjected. She gave as examples of this the fact that she had been given an informal verbal warning in December 2010 and a written warning in January 2012. Mr Pitts responded to that by saying that he was disappointed that she had repeated allegations that she had been subjected to bullying, harassment and discrimination at work. He said that those allegations had been investigated and found to be unjustified in every respect. He warned her that repeating them amounted to insubordination.

35 In April 2013 some of the Respondent's Services, including Legal Services, merged with those of the London Borough of Hammersmith and Fulham. In January 2014 a reorganisation of the Bi-Borough Legal Services took place, as a result of which the number of Legal Secretaries was reduced from eight to three. There was a competitive selection process for the three posts. It consisted of the candidates supplying a supporting statement, which accounted for 15% of the overall marks, and a panel interview, which accounted for the remaining 85% of the marks.

36 Ultimately, six Legal Secretaries (three from the Respondent and three from Hammersmith and Fulham) were interested in the three posts available and they were interviewed on 31 March and 1 April 2014. The Claimant was one of them. The interview panel comprised Don Pitts, Janet Mullins (Principal Solicitor) and Jacque Jellow (HR Consultant). Each member of the panel individually scored all the candidates on their personal statement and their interview. The Claimant received the fourth highest score and was, therefore, not selected.

37 The candidates were informed verbally of the outcome of the selection process on 11 April and in writing on 17 April. The letters to those who had not been successful (including the Claimant) confirmed their redundancy and gave them notice of the termination of their employment. The Claimant was advised of her right to appeal against her selection for redundancy within two weeks. At the same time the Respondent confirmed to those who had been successful that they had not been selected for redundancy and that their services would be retained. They were Sheila Leathes, Jacqueline Hutchings and Sallie Langley. Ms Leathes was employed by the Respondent while the other two were Hammersmith and Fulham employees. On the same day Mr Pitts informed everybody in Legal Services of the new structure and where the three secretaries being retained were to be placed in that structure. Ms Hutchings was placed in the Regeneration team and Ms Leathes and Ms Langley were placed in the Social care and Litigation team. There was a fourth Legal Secretary, Geraldine James, who was TUPE transferred to Hammersmith and Fulham from an external firm of solicitors. She was also placed in the Social Care and Litigation team.

38 On 30 April 2014 the Claimant appealed against her selection for redundancy.

39 On closer inspection of the selection process, Jonathan Bore (who had been appointed to hear the Claimant's appeal) realised that an error had been made in the calculations. The error was that all the panel members had multiplied their scores for the supporting statement by 15% and their scores for the interview by 85%. The total achievable for the interview was 30 and for the personal statement 15. It was felt that the correct approach would have been to determine 85% and 15% of 45 (the total score available). That came to 38.25 and 6.75 respectively. Then the candidate's score for the interview should have been divided by 30 and multiplied by 38.5 and the score for the statement should have been divided by 15 and multiplied by 6.75. The result of applying the correct calculation was that the Claimant received the third highest score and Sallie Langley, who was previously third, moved into the fourth position. It did not result in any other changes in the ranking of the candidates. The result was that the Claimant should have been retained and Sallie Langley should have been selected for redundancy.

40 On 6 June 2014 (before the Claimant's appeal was heard) Tasnim Shawkat, Bi-Borough Director of Law, wrote to the Claimant about the calculation error and the

result of the recalculation. She said that it was "*a most unfortunate situation"* as Ms Langley had already been confirmed in post. She agreed with Jonathan Bore that it had been an innocent error of calculation applied by all the panel members to all the candidates and that there had not been any discrimination of any kind. She said that she felt that the fairest approach going forward would be for the Claimant and Ms Langley to be interviewed again and scored again by a different panel.

41 The Claimant, quite understandably, objected to the course being proposed by Ms Shawkat. Her view was that as it had been established that she had received the third highest score she should be retained and should not have to submit to a further selection process. She also made the point that no final decision should have been made until appeal process had been exhausted or, at the very least, the time limit for appealing had expired.

42 The Claimant's appeal was heard on 18 August 2014. At the appeal hearing Mr Bore asked Ms Shawkat several times whether if the calculation had been done properly the Claimant would have been appointed. Ms Shawkat was not prepared to accept that and kept saying that she could not answer that. It appeared obvious to Mr Bore that if the Claimant had been correctly scored she would have been retained and not selected for redundancy. The Claimant was understandably shocked by Ms Shawkat's response.

43 Mr Bore upheld the Claimant's appeal on 19 August 2014. He noted that it was common ground that the Claimant would have been third in the ranking if the correct weighting had been applied and he could see no reason as to why she would not have been appointed in those circumstances. It was clear to him that she had wrongly been served with a redundancy notice. The appointment of Ms Langley was a management decision taken prior to the outcome of the appeal and, although there were understandable reasons for it (keeping delay and uncertainty to a minimum), it carried the risk that an appeal might bring to light a mistake. He concluded that the approach taken to resolve matters, the invitation to a second interview, was not appropriate for two reasons: firstly, because the Claimant ought to have been appointed as a result of the first selection process and should not have needed to go through an interview again; secondly, because there was a strong possibility that the new panel's selection process would have been tainted by knowledge of the circumstances, carrying the perception of inherent bias regardless of the composition of the panel.

44 On 24 September 2014, in spite of the Claimant's appeal having been upheld, Ms Shawkat confirmed her redundancy and gave her notice that her employment would terminate 3 December 2014. Notwithstanding Mr Bore's conclusions about the inappropriateness of a second interview, she said that she believed that it was the most appropriate and fair course of action in difficult circumstances. She also said that as the Claimant had already appealed against the decision to select her for redundancy, a further appeal was not available to her.

45 The Claimant's employment terminated on 10 December 2014. She was 56 years old at the time.

46 Prior to the Claimant's dismissal approval was given to merge the Bi-Borough Legal Services with Westminster Legal Services to create a new Tri-Borough shared service. The merger took place after the Claimant's dismissal. Although the three

boroughs operate a shared legal services function, each of the three boroughs operates with a degree of autonomy, particularly in respect of staff employment and recruitment.

47 Having gone through Early Conciliation, the Claimant presented her claim to this Tribunal on 2 April 2015. In that claim the Claimant complained that her dismissal was unfair, an act of direct race and/or disability discrimination or unfavourable treatment because of something arising in consequence of her disability. She described herself as being of Spanish race and nationality and ethnicity and said that she was disabled by reason of depression and anxiety, diabetes and hypertension. She also complained of race and disability discrimination in respect of Joyce Golder's handling of the incident in July 2010, the Respondent threatening her with or subjecting her to disciplinary action on 31 January 2012, 6 February 2012, 25 July 2012, 5 December 2012, and 5 March 2013, Mr Pitts incorrectly scoring her in the redundancy selection process, Sally Langley being appointed in preference to her on 1 May 2014 and Don Pitts describing her conduct as "unpleasant and offensive" and encouraging his superior to take formal disciplinary action against her on 22 November 2010, 24 March 2011 and 10 January 2012. She also complained of victimisation.

48 By the end of February 2016 the Claimant had withdrawn all her claims other than that her dismissal was unfair and unfavourable treatment arising from something in consequence of her disability. In March 2016 the Respondent conceded that the Claimant was disabled in April 2012 and July 2015 by reason of severe anxiety-depressive disorder.

49 The parties jointly instructed Dr Horsford, a Consultant Psychologist, to prepare an expert psychological assessment report on the Claimant. He was asked to give his opinion on whether she was suffering from any recognised medical illness and, if she was, when it started, the impact that it had upon her behavior and her normal day to day activities, how long the condition persisted, whether it was constant in its severity and whether the Claimant's behavior, of which the Respondent had complained, arose in consequence of her medical condition. He was provided with the Claimant's medical records, which included two reports (dated April 2012 and August 2015) from Dr Cabaeiro Febeiro, an expert in Neurology and Psychiatry in Spain who had diagnosed the Claimant as suffering from severe mixed anxiety-depressive disorder. He was also provided with her impact statement. Dr Horsford carried out two clinical interviews with the Claimant in July 2016 lasting a total of about eight hours and used a variety of scales to evaluate her reported symptoms and her scores on various tests.

50 Dr Horsford produced his report on 17 August 2016. He concluded that the Claimant was likely to have experienced a mild depressive illness with anxious features (or anxiety and mixed depressive disorder, as it was called previously) from about February to June 2012. That was a single incident which would have been resolved within 12 to 15 weeks. The clinical interviews and the medical documents supported the conclusion that the Claimant had exaggerated or fabricated her condition of anxiety and mixed depressive disorder during the period July 2012 to 10 December 2014. It was improbable that her conduct during that period could be explained by anxiety and mixed depressive disorder. During the period when she had such a condition, it was likely to have had a minimal impact.

51 At a preliminary hearing on 21 October 2016 a deposit order was made in respect of the claim of discrimination arising from something in consequence of a disability. The reasons for making the order were that the Employment Judge considered that the Claimant would have difficulty showing the initial weighting error was related to disability as it applied to all the candidates and not just her, she would have difficulty establishing that she was disabled in light of Dr Horsford's report and, if she was disabled, she would have to establish that the Respondent had knowledge of it or could reasonably have been expected to have had that knowledge. For all those reasons, the Employment Judge considered that that claim had little reasonable prospect of success. That claim was withdrawn on 10 November 2016.

52 On 23 October 2016 the London Borough of Hammersmith and Fulham advertised a vacancy for a Legal Secretary to work in the Tri-Borough Legal Service was advertised. The vacancy arose as a result of Geraldine James leaving her post. That vacancy has not been filled.

53 The Respondent maintained from 21 May 2015 until 29 November 2016 that the Claimant had been fairly dismissed for redundancy. Only on 29 November 2016, some two years after her dismissal, did the Respondent finally concede that her dismissal was unfair.

54 At the time of the remedy hearing there were four Legal Secretary roles in the Tri-Borough Legal Services department. One of these roles (the one vacated by Geraldine James) was vacant. The other three roles were stilled filled by the persons who were appointed to those roles in April 2014.

55 The Respondent produced a list of its vacancies as at the date of the remedy hearing. None of them was comparable to the Claimant's old role or suitable for her, and she did not express a desire to be re-engaged into any of those roles.

<u>Conclusions</u>

56 The Respondent argued that neither reinstatement nor re-engagement was practicable because:

(a) The Claimant's old role no longer existed and the Respondent did not have vacancies for any other role that was suitable for the Claimant;

(b) The Claimant had destroyed the relationship of trust and confidence that is required between employer and employee by:

- Making and then withdrawing unjustified allegations of direct race and disability discrimination, harassment and victimisation, relating to matters that occurred as long ago as 2010, against various managers; and
- Deliberately exaggerating her medical condition in order to mount an unmeritorious claim in disability discrimination.

57 I do not accept that the Claimant's old role no longer exists. Prior to her dismissal the Claimant was a Legal Secretary in the shared Legal Services function. That role continued to exist after the April 2014 re-organisation and still exists after the merger with a third borough. The number of Legal Secretaries working in the

shared Legal Services function has decreased, but the role of Legal Secretary in the shared legal Services continues to exist.

58 I then considered whether it would be practicable for the Respondent to comply with an order to reinstate the Claimant to a Legal Secretary role in the tri-borough shared Legal Services department. I accept that it would generally not be practicable for an employer to reinstate a dismissed employee if the reinstatement would lead to overstaffing or the need to make other employees redundant. However, I do not consider that it would in this case lead to overstaffing or the need to make redundancies. It is clear that the tri-Borough Legal Services department needs four Legal Secretaries. There were four Legal Secretaries working in the shared Legal Services department from April 2014 to October 2016. When Ms James left in October 2016 Hammersmith and Fulham advertised for a Legal Secretary to work in the tri-borough Legal Services department. It would not have done that if there had not been the need for a fourth Legal Secretary in the tri-borough shared Legal Services department. Therefore, reinstating the Claimant to the position of Legal Secretary will not lead to overstaffing in the tri-borough shared Legal Services department. It will not necessitate any redundancies. The employment of the Claimant by the Respondent into that role will obviate the need for Hammersmith and Fulham to recruit another Legal Secretary.

59 Even if I am wrong in that analysis and it does lead to overstaffing and the need to make someone redundant, that would not arise from reinstating the Claimant to a role from which she ought never to have been dismissed, but from the failure of the Respondent and Hammersmith and Fulham to dismiss the employee who ought to have been dismissed as a result of the selection exercise. For all the above reasons, I concluded that the fact that the Respondent was not seeking to recruit a Legal Secretary did not mean that it would not be practicable for it to comply with an order for reinstatement.

60 I then considered whether it would not be practicable for the Respondent to comply with an order for reinstatement because of the Claimant's conduct in the course of this litigation. I accept that in the course of this litigation the Claimant has made allegations of race and disability discrimination against a number of managers, the majority of them against Don Pitts. However, it is significant to note that the Claimant made allegations of bullying, harassment and race discrimination while employed in 2012 and early 2013. It was not suggested by the Respondent that that had led to loss of trust and confidence which made her employment thereafter untenable. She continued to be employed by the Respondent until 10 December 2014, and it was not in dispute that she was a good Legal Secretary. It is also significant that all the complaints of discrimination, bar one relating to the Claimant's dismissal, were withdrawn in January and February 2016, several months before the hearing that was initially scheduled to start in May 2016. The claims were withdrawn before witness statements were exchanged. The allegations of discrimination were not pursued in witness statements or at protracted hearing in the Tribunal. In those circumstances, it appears to me that the damage done to the employment relationship by the Claimant bringing those claims must be limited.

61 It was also submitted that the Claimant had failed to accept that there had been a genuine mistake in the scoring in the selection exercise and that she had impugned the integrity of Mr Pitts and Tasnim Shawkat. The Claimant had had a difficult relationship with Mr Pitts and, in those circumstances, it was not entirely surprising

that she was suspicious as to whether the miscalculation had been a genuine error on his part. That suspicion was then compounded by the Respondent's conduct once it acknowledged that the scores were incorrect. The Claimant had reason to question Ms Shawkat's conduct – she was unwilling to admit at the appeal hearing that had the Claimant been correctly scored she would have been retained, she insisted that a second interview would have been the most appropriate way to deal with the matter even though Mr Bore, who heard the appeal, concluded that it was not and she dismissed the Claimant for redundancy in spite of her appeal against her selection for redundancy having been upheld.

62 Don Pitts and Louise Edwards are no longer employed by the Respondent. Joyce Golder and Leverne Parker were able to work with the Claimant previously after she made allegations of discrimination against them in the course of her employment. It is not uncommon for claimants, both those who are still in employment and those who are no longer in employment, to make allegations of discrimination. That fact in itself is not sufficient to destroy trust and confidence between employer and employee. If it were, no existing employee would dare bring a claim of discrimination for fear that the employer would dismiss him or her thereafter on the grounds that trust and confidence had been destroyed. As the allegations were withdrawn I have not heard all the evidence in respect of them. I cannot say on the basis of the evidence put before me that the allegations were unfounded and unjustified.

63 The Respondent's conduct in this matter has not helped and might well have given the Claimant cause to think that there might be some ulterior motive for not treating her fairly. Once the mistake had been drawn to its attention, the Respondent did not immediately rectify the matter by retaining the Claimant (which was the only right and fair thing to do) and, if it thought it necessary, dismissing Ms Langley. It ignored the conclusions of the appeal officer. It must have known, when it dismissed the Claimant, that the dismissal was bound to be unfair. It did not concede unfair dismissal until 29 November 2016 – nearly two years after the Claimant's employment terminated and some 19 months after she presented her claim.

64 I accept that Dr Horsford's opinion was that the Claimant's mental illness was less severe and of shorter duration than she had claimed and that she fabricated or exaggerated her condition in her impact statement and in the assessment with him. That opinion, however, does not accord with Dr Cabaleiro Fabeiro's opinion that the Claimant had severe mixed anxiety-depressive disorder. Dr Horsford's explanation for that was that Dr Cabaleiro Fabeiro could have mistakenly reached the conclusion which he did. It would, in my view, be unsafe to draw any conclusions about the honesty and trustworthiness of the Claimant from the contradictory medical evidence before the Tribunal.

65 Having considered and taken into account all the above matters I consider that it is practicable for the Respondent to comply with an order for reinstatement. The Claimant wishes to be reinstated and she did not cause or contribute to her dismissal. In all the circumstances of this case, I considered that it would be appropriate to make an order for reinstatement.

Employment Judge Grewal
29 June 2017