Case No: 2415967/2021

EMPLOYMENT TRIBUNALS

Claimant: Mrs Caroline Law

Respondent: The University of Cumbria

Heard at: Manchester Employment Tribunal **On:** 15, 16, 17 and 18 March 2022

Before: Employment Judge Dunlop
Mr TD Wilson
Mr J Murdie

Representation

Claimant: In person
Respondent: Ms Steed, solicitor

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is well-founded. That means it succeeds.

2. The claimant's claim of discrimination on grounds of pregnancy (s.18 Equality Act 2010) is well-founded in part. That means that it succeeds in part. Specifically, the matters set out at points 2.1, 2.2.3-2.2.6 and 2.2.8-2.2.9 of the List of Issues are found to be acts of discrimination.

3. The claimant's claims under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 are not-well founded. That means they do not succeed.

4. The claimant's claim under s.93 Employment Rights Act 1996 (written statement of reasons for dismissal) is not well-founded. That means it does not succeed.

5. The claims which are not well-founded are dismissed.

6. The appropriate compensation in respect of the successful claims will be determined at a remedy hearing at a future date.

REASONS

Introduction

1. Mrs Law is an academic. She was employed by the respondent University under a series of fixed term contracts, as more fully described below. She was dismissed on the expiry of her fixed-term contract on 31 July 2020. At that time she was pregnant. She brought various claims, as more fully detailed below, arising out of the dismissal and the process surrounding it.

The Hearing

2. The case was heard over four days on 15-18 March 2022. At a case management hearing, it was agreed that the case was to be heard by video. The appropriate notice of hearing was sent out and the parties prepared accordingly. For some reason, however, when the cause list was being prepared it was mistakenly thought to be an in-person hearing. This confusion led to a delay in the case being ready to start whilst arrangements were made for the Judge and members to join the video hearing. There were some further delays caused by technical difficulties with the video hearing platform during the evidence of the respondent's witnesses. Aside from this, the hearing proceeded smoothly.

3. We heard witness evidence from the claimant and, on behalf of the respondent from Mrs Lowthian, who was the claimant's line manager, and Mrs Knox-Davis, the respondent's Head of HR. We had regard to an agreed bundle of documents totaling 605 pages. The parties had helpfully prepared an agreed cast list, chronology, summary of agreed facts and list of key documents. We read the documents highlighted in that agreed list, and the other documents which were referred to during witness evidence.

4. During the case, three further sets of documents were introduced:

R1	A table and two supporting excel spreadsheets prepared by the respondent for the purpose of the proceedings.
R2	Three email chains involving Mrs Lowthian, which came to light during her evidence and were disclosed by the respondent during the course of the hearing.
R3	Two more email chains which came to light during Mrs Lowthian's evidence and were disclosed by the respondent during the course of the hearing.

   After some discussion, the documents were admitted by agreement. Ms Steed indicated that she might apply to have Mrs Law re-called to ask her questions about them, but in the end she did not make this application.

5. We concluded the evidence at the end of day 3. The start of the hearing on day 4 was delayed slightly to enable the parties to prepare and exchange written submissions. We are grateful to both Ms Steed and Mrs Law for those submissions. Each then gave oral submissions to complement what they had put in writing.

6. We adjourned and informed the parties that, due to the complexity of the issues, the Judgment would be reserved.

The Issues

7. The issues in the case were identified at a case management hearing before Employment Judge Warren on 18 March 2021. They were recorded as set out in the Annex to this Judgment. The parties confirmed at the start of the hearing that that list of issues accurately reflected the claims being brought and the matters in dispute between the parties.

Findings of Fact

Background

8. Mrs Law completed a BSc in Marine Biology in 2010. She followed this with an MRes in Applied Marine and Fisheries Ecology completed in 2011. Subsequently, she worked at Blackpool and Fylde College delivering undergraduate teaching on courses affiliated to the University of Central Lancashire before obtaining a series of Research Assistant and post-graduate researcher roles in her chosen field of Marine Science between 2012-2014. She then became a Student Liaison Officer at Lancaster and Morecambe College before obtaining the first of her roles with the University of Cumbria in 2015 as Collaborative Outreach Officer. She held this role, on a fixed term contract, from November 2015 to January 2017, when she moved into a role as a Data and Evaluation Manager, until March 2019. In March 2019 she took up her final role as Academic Lead for STEM Outreach.

9. In 2016 the university had successfully applied for funding from the John Fisher Foundation (a charitable trust) to support development of STEM subjects and outreach work. There was some delay in setting up the project, but in September 2017 Nigel Smith, an existing Senior Lecturer within the Department of Science, Natural Resources and Outdoor Studies ("SNROS") was appointed to the role of "STEM Co-ordinator" for the project. His letter of appointment stated "*as the post is externally funded, you will return to your substantive Senior Lecturer role on 1 September 2019 and we can discuss nearer the time specific areas of responsibility that will be associated with this."*

10. In January 2019, the role of "Academic Lead for STEM Outreach" was created and opened for recruitment. This role was funded by the JFF grant. It was offered as a fixed-term contract until 31 July 2019 when the secured funding would expire. The university envisaged being able to secure a second tranche of funding, but the contract term reflected the initial period of secured funding. Mrs Law was invited to apply for the role and was successful. The contract of employment she was issued with stated that the role sat within SNROS. The job description listed eight principal duties/key objectives, number eight was "Contribute to teaching within the Higher Education curriculum." The job was a Grade 7 role within the university structure. Mr Smith's role was a Grade 8 role i.e. one grade higher.

11. Although the contract, and the majority of the work, fell within SNROS, both Mrs Laws and Mr Smith[1] were line managed by first Robin Casson and then Paul Armstrong, who were managers within the Growth and Partnerships team, which sat within the Institute of Business, Industry and Leadership (IBIL). The reflected the fact that responsibility for the relationship with JFF law within that department. Mrs Laws also had a 'dotted' reporting line to the marketing team, as some of her outreach work involved working collaboratively with that department.

12. Ultimately, there were three other employees whose roles were also funded by the JFF funding. Steven Mullen and Dimitrios Kontziampasis were employed as Senior Lecturers in Engineering (within IBIL). They joined in early 2019. Later, Chloe Wood was employed as a Graduate Ambassador, reporting to Mrs Laws.

13. As the end of Mrs Law's contract term approached, the university was in discussions to release the second tranche of funding. She initially received a one-month extension to her contract whilst these discussions were on-going, and then later received a contract extension until 31 July 2020.

14. During her employment, Mrs Laws secured a place on the University's PgC teaching qualification course with a fee-waiver approved by the University. This reflected her contractual obligation to secure this qualification and the expectation that she would undertake teaching within the University. The fee-waiver application required the support of her department head, Ms Elspeth Lees. In the documentation Ms Lees stated that it was "*important that Caroline is seen as a member of academic team within SNROS*" and that the department "*seek[s] to support Caroline to support her in an academic role in [Higher Education]*." Mrs Law gave unchallenged evidence that Ms Lees assured her, in the context of these discussions, that her work was not considered temporary and that there was every intention of retaining her in the department beyond the expiry of the JFF funding.

15. We accept the evidence given by Mrs Laws that at the start of the 2019 academic year she had detailed discussions about her teaching responsibilities for the forthcoming year with Ms Lees and Ashleigh Hunt (Principal Lecturer/Lead for teaching, Learning & Student Experience SNROS) and was asked to assume responsibility for the Biology of Forensic Science full-year module. Through the year, she was allocated further teaching duties across other modules within the department.

16. The respondent did not lead evidence from any witness with direct knowledge of teaching within SNROS. Belatedly, it attempted to introduce evidence as to Mrs Law's teaching responsibilities via the documents we designated 'R1' which were produced mid-way through cross examination of Mrs Laws. These were documents produced for the purpose of the case (so not undisclosed contemporaneous documents) and comprised a table which purported to show Mrs Law's teaching responsibilities, a pair of excel spreadsheets detailing her teaching load in comparison to a 'typical' full time

---

[1]Note: we have referred to most of the people in this case who did not give evidence as 'Ms' or 'Mr'. Occasionally, where an individual was regularly referred to by witnesses, or in the papers as 'Dr' we have adopted that title. No discourtesy us intended to anyone whom we may inadvertently have deprived of their proper academic title.

lecturer's teaching load and a covering email with various questions asked by Mrs Knox-Davies with answers apparently given by Ms Hunt and Elizabeth Mallebon (another senior staff member in SNROS). To reiterate, neither Ms Hunt nor Ms Mallebon was giving evidence in the case.

17. Sometimes, where information such as working hours can be collated from a respondent's IT systems and accepted by both sides as being robust and accurate, it might be appropriate to introduce it into documentary evidence without requiring a witness to attest to it. The late introduction in this case meant that Mrs Laws was put 'on the back foot' in considering whether it was accurate. Further, it was not so simple as 'pulling hours' from the IT system. The email itself indicated that Ms Hunt and Ms Mallebon were not able to account for all the teaching work done by Mrs Laws. Mrs Laws gave evidence, which we accept, that she accurately recorded teaching work until she reached the minimum required for her PgC qualification, but there was work she undertook after she had exceeded that threshold that was not recorded, and therefore did not appear on the table produced by Ms Hunt and Ms Mallebon. We find that she completed around 120 hours of direct contact teaching time in this academic year. Taking into account the non-contact time (at the university's deemed rate of 1.5 hours for each hour of teaching, this would amount to 300 hours of work, approximately one-fifth of a full-time role).

18. In November 2019 Mrs Law achieved four years' continuous service with the University. Mrs Knox-Davies gave evidence that the HR department reviewed her service at this point with a view to converting her to permanent status under regulation 8 Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("the FTE Regulations") but decided that it would not be appropriate to convert the contract to a permanent one as there were "objective grounds" for it remaining a fixed-term contract, namely the fact that the role was externally funded by JFF.

19. Mrs Knox-Davis's evidence was that this decision was taken in the HR department without seeking any input from Mrs Law, nor her line manager, nor Ms Lees, nor any other manager within SNROS. Further, Mrs Laws was not notified either that such a review was taking place, not that it had concluded that she should not be given permanent status. The review was not documented in any form. We reject Mrs Knox-Davis' evidence on this point and find that, in fact, no such review took place and that the HR department simply overlooked it. We base this on the lack of any communication at the time about the review, but also on the fact that when Mrs Law later queried the point she was initially told (wrongly) that she had not reached the required continuity of service. She was only later told about the review that had supposedly taken place. We also find, generally, that there is a theme of disorganisation and misunderstandings within the HR department (certainly in relation to matters pertaining to Mrs Law) which make the conclusion that this review was overlooked easier for us to reach than might otherwise have been the case.

20. In November 2019, a full-time, permanent zoology lecturer left the University. A recruitment process was carried out, but no suitable candidate was identified. Mrs Law did not apply for the role. We accept Mrs Law's

evidence that Alex Dittrich, Senior Lecturer in Zoology, suggested to her that she should apply as and when it was re-advertised.

21. Also around this time, Ms Lees left the University. There was a restructure with academic departments becoming Institutes. SNROS remained intact but the position of head of the department was vacant. Ms Hunt and Ms Mallebon (whose job titles had slightly changed) took responsibility for the day-to-day leadership of the department as the second-tier of academic leaders.

22. We find that during her previous roles with the University and, particularly, whilst undertaking the role as STEM Outreach Academic Lead, Mrs Law was very well-thought of. She demonstrated flexibility in taking on different types of tasks, including teaching, and received a wealth of positive feedback. There was an expectation shared by her and managers within SNROS that she would seek to pursue the next stages in her academic career within that department, and that the department would support her in doing so.

23. Over winter in 2019-2020 Mrs Law was considering what the future might hold for her after that academic year. She had, for example, considered PhD proposals. There were also discussions around other projects which it was believed JFF might be persuaded to fund. Some of those proposals were in-line with Mrs Law's interests, but the university was also considering other options for JFF funded projects which it would not have been feasible for her to be involved in.

Early 2020

24. On 9 January 2020, Mrs Law met with Ms Hunt and Ms Mallebon. They discussed Mrs Law's concerns about continuing with another JFF project which would again 'sit between' different departments in the University. The discussion moved to the shortfall in Zoology teaching capability and Mrs Law was encouraged to take up some teaching on those courses in the short term. She was advised it was likely that the role would be re-advertised in March on an internal recruitment basis and that she would be in a strong position to secure it. Following this, Mrs Law took on shared leadership of the Vertebrate Zoology and Ecology for Zoology modules with Mr Dittrich.

25. Around the same time, Mrs Law discovered she was pregnant and told her line manager, Mr Armstong. Following a midwife appointment on 3 February, Mrs Law was told that she had low PAPP-A which was linked to an increased risk of pre-eclampsia. Pre-eclampsia was subsequently recorded in the pregnancy risk assessment undertaken by Ms Hunt and it was noted that the condition could be brought on by stress. The measures suggested were *"Identify stress-inducing situations (e.g. long hours, clustered deadlines and teaching sessions, new scenarios) and maintain regular dialogue with line manager to manage these in advance."*

26. In March 2020 Dr Helen Manns was appointed as the new Director of SNROS. She joined on the cusp of the first national lockdown precipitated by the Covid-19 pandemic. It goes without saying that this was a very difficult and uncertain time. All in-person activities conducted by the

university came to a sudden halt, and staff at all levels had to adapt to remote working and (insofar as possible) remote delivery of the university's services and functions. Another effect of covid, which became apparent over the subsequent few weeks, was that any possibility of the university receiving more funding from JFF to support the STEM Outreach work or any similar project vanished as the Trust wished to direct its resources into covid-related relief work.

27. Also around this time, Mr Armstrong moved to a different role which meant that he gave up his line management responsibility for Mrs Laws and Mr Smith. Mr Smith was informed that his manager would be Ms Hunt. Mrs Law, on the other hand, was informed that she would continue to be line managed outwith SNROS. Specifically, from 1 May 2020, her manager was to be Mrs Lowthian. Mrs Lowthian is a manager within the university's Growth and Partnerships team who was responsible for the university's relationship with JFF. Mrs Law and Mrs Lothian knew each other a little having collaborated on the JFF funding and associated meetings. Mrs Lowthian had limited knowledge of Mrs Law's day-to-day work and how this intersected with the broader work of the department. She had no managerial or budgetary responsibility within SNROS. No one giving evidence seemed entirely clear why the line management responsibilities for Mr Smith and Mrs Laws, who had up until this point had the same manager, were now split. Mrs Knox-Davis speculated that this might reflect the upcoming end of the JFF funding and the expectation that Mr Smith would return to a substantive role within SNROS whereas Mrs Law would not.

28. At this time Mrs Lowthian had direct line management responsibility for around eight individuals. It is also appropriate to note that she herself was balancing working from home with caring for her own young children during lockdown. Where we refer to "meetings" in the rest of these findings of facts it should be noted that those meetings took place by video conference. That had become the university's standard practice at this time due to the pandemic and Mrs Law did not take any issue with that, nor does the Tribunal consider that any other approach would have been practicable.

29. Mrs Law and Mrs Lowthian had an initial catch-up meeting on 5 May. Mrs Lowthian was aware of Mrs Law's pregnancy at this stage. A proposed maternity start date of 31 August 2020 had been recorded.

HR13 process and dismissal

30. On 19 May 2020, the HR department sent a standard email to Mrs Lowthian noting that Mrs Law's fixed term contract was due to expire on 31 July and asking her to inform them if there was to be an application to extend the role, or if it was envisaged that it would be ending. If the latter, it reminded the manager that a formal meeting was required and there was a specific form to be used ("HR13"). The email asked for the form to be returned by 10 July 2020.

31. Mrs Lowthian replied to the email one minute after it was sent saying, simply "This role will be ending." The next day, Mrs Lowthian emailed Mrs Law with a meeting request for 29 May. The subject of the meeting was "*Caroline &*

Rachel 1 – 1 and End of Fixed Term Contract meeting." A partially-completed HR13 form was attached to the email.

32. The University has Guidelines for the termination of fixed term contracts. These include the following, under the heading "Contracts Approaching the End of the Fixed Term":

    When reviewing a fixed term contract and deciding whether it should be extended, made permanent or ended, the following should be considered:

    - *whether there is an ongoing need for the work to continue (and whether this would be for an indefinite or limited period);*
    - *whether there is funding to continue with the role; and/or*
    - *what the continuous service of the individual is.*

33. Around this time another zoology lecturer became unavailable for work (it is not clear whether, or when, his contract was actually terminated). This meant that Mr Dittrich was the only permanent academic working in zoology. The envisaged re-advertisement of the lecturer post had not taken place, we find this was due to financial uncertainty caused by the pandemic. Mr Dittrich began to involve Mrs Law more heavily in the work for that degree course.

34. During May, there were mass staff communications from the Vice Chancellor which raised the possibility of cost-cutting measures as a result of the pandemic, but also sought to reassure staff that there would be no redundancies due to Covid-19 and that risk assessments would be done to ensure that any cost-cutting measures did not disproportionately affect vulnerable groups.

35. It is clear that Mrs Lowthian approached the HR13 process (adopting a short-hand used by the witnesses) in a very blunt way. As far as she was concerned, the fact that the funding would be coming to an end meant that the role would be coming to an end. Subject only to any successful application for redeployment, Mrs Law would be made redundant. As per the Guidelines, the ending of the funding should have been only one factor for consideration (albeit an important one). Mrs Lowthian didn't embark on any assessment of the work that Mrs Law was undertaking and the extent to which there was an on-going need for that work. Given her role, she was probably not the right person to conduct such an assessment, but neither she nor HR identified this and undertook to involve Dr Manns, Ms Hunt or Ms Mallebon in any process of establishing what Mrs Law had been working on and what the on-going requirement for that work was.

36. Mrs Lowthian completed the HR13 form prior to the 29 May meeting and shared her proposed comments on-screen with Mrs Law during the meeting. In the sections headed "*Reason for fixed term contract ending*" and "*Summary of discussion at consultation meeting with the employee concerning future of the post*" Mrs Lowthian had inserted short responses indicating that the post was coming to an end because the funding had ended. In the section headed "*The Employee asked for the following to be considered before a final decision to end the contract was made (if relevant)*" Mrs Lowthian had inserted "N/A". We accept Mrs Law's evidence

that Mrs Lowthian told her that that part of the form was not applicable to her situation.

37. Mrs Lowthian's explanation for replying very quickly to the email from HR on 19 May was that that reply triggered Mrs Law's eligibility for the University's redeployment process. She considered it to be in Mrs Law's interest for that to happen as soon as possible, as it entitled her to preferential treatment should any relevant role become available. However, there was no meaningful discussion about redeployment during the 29 May meeting. Mrs Lowthian explained that she would not have had sight of any roles going through the university's approval process before they were approved. Once approved, they would appear on the intranet vacancy system where Mrs Law and others could access them. Essentially, as Mrs Law's line manager, Mrs Lowthian did not consider that she had any particular part to play in the redeployment process once she had triggered it by confirming the fixed term contract would not be extended. There was some discussion around the practicalities of the contract ending, and Mrs Lowthian told Mrs Law she would need to take all her leave before the contract end date, as there was no budget to pay her for any accrued holiday pay on termination.

38. Although Mrs Lowthian did not enter into substantive discussion around the decision to terminate the contract, or potential redeployment opportunities, she did raise the subject of Mrs Law's pregnancy. In the context of Mrs Law facing financial difficulty (her husband was undergoing a redundancy process with an unrelated employer) Mrs Lowthian volunteered some advice about securing child benefit, sourcing second-hand baby-clothes and also (although the context for this is less clear) the benefits of a particular type of thermometer and techniques for bathing a baby. She told Mrs Law she would introduce her to another member of staff (called Jamie) who Mrs Lowthian also managed, and whose wife was currently pregnant.

39. We accept Mrs Lowthian's evidence that her comments were entirely well-intentioned. We equally accept Mrs Law's evidence that she found the comments "*a bit weird and inappropriate*" in the context of a formal meeting about the possible termination of her employment. A few minutes after the meeting Mrs Lowthian sent an email headed "Babies" to effect an introduction between Mrs Law and Jamie. Jamie later replied although Mrs Law did not take up the introduction. She found it embarrassing and upsetting to be introduced as an expectant parent on the basis of a common employer, when she was being made redundant from that employer.

40. Prompted by the fact that the redundancy process her husband was engaged in seemed different to her own, over the next few days Mrs Law began to research into her employment rights and the University's obligations towards her. This prompted an email exchange between 1-10 June, between Mrs Law and Mrs Lowthian. Mrs Lowthian sought advice on her proposed replies from Vikki Thomas of the university's HR department. Those emails (not copied to Mrs Law) are material, at least to some extent, in illustrating the thinking of the decision-makers in this process. They were not disclosed in accordance with case management orders, and instead emerged as additional documents (designated as 'R2') disclosed during a break in Mrs Lowthian's evidence. The respondent's position was that Mrs

Lowthian had provided copies of these documents to the HR department in a timely way but due to "an error" they had not been identified as relevant documents for the purposes of the litigation and had not been forwarded to the respondent's solicitors.

41. We pause to note that the emails were able to be obtained at all only because Mrs Lowthian had retained copies. Ms Thomas left the service of the University on the same day as Mrs Law. Mrs Knox-Davis informed the Tribunal that the university's practice with any leaver is to 'freeze' their email account on the day they leave, with the account then being automatically deleted 90 days later. She had been told by the IT department that it was therefore impossible to access Ms Thomas's emails for the purpose of these proceedings at the point where disclosure was being undertaken. The Tribunal panel was surprised and concerned to be told this. HR emails will often contain key information related to individual employees (which may in turn prove to be key evidence for ET proceedings) and it is simply not appropriate for an employer of this size to operate a system which means that the retention of those documents is dependent on a particular HR officer remaining in post. Mrs Knox-Davis has told us that, irrespective of the outcome of this case, the University will review these arrangements to ensure that the same problem does not arise in the future.

42. Mrs Law prepared comments for the section of the HR13 form which had been completed as "N/A". Her comments were as follows:
"Although this was a project based role, I also undertook teaching activities within SNROS (contributed to Forensics, Zoology, Conservation) and contributed to marketing and recruitment activities for the department (aside from the JFF objectives). Although the project in its current format is drawing to a close it should be embedded and there will still be outreach, schools & colleges recruitment work ongoing. In January I was asked to support with delivering Zoology due to a vacant position which failed to recruit and it was suggested that this would be recruited for again, what has happened to this role? I am expecting my first child, due in September and I'm worried if an opportunity was to arise after my redundancy that I might miss it because I will be due to or just recently have given birth and this might suggest that my role is not entirely redundant."

43. Although these comments were accepted as an addition to the HR13 form, there was no attempt by Mrs Lowthian or anyone else to engage with the substance of the points Mrs Law was making. Nothing was done to engage Dr Manns or anyone else from SNROS in the process, nothing was done to explore the work that Mrs Law had been doing and the extent to which it would be required to continue irrespective of the external funding. Indeed, that exercise only took place retrospectively during the Tribunal hearing itself (or very shortly before) when Ms Knox-Davies asked Ms Hunt and Ms Mallebon to examine the claimant's teaching commitments for the purpose of this claim, as noted at paragraphs 16-17 above. As at May 2020, Dr Manns' budget for the following academic year remained unfinalised. We accept that it was a budget which was under pressure due to the impact of covid, although we have been given no specific evidence about the figures, or the extent of this pressure. Mrs Lowthian made no attempt to advocate for Mrs Law, or even to facilitate Mrs Law advocating for herself, in respect of continued employment within SNROS as an alternative to redundancy.

There was no attempt to answer the very pertinent question about how the University would cover the requirement to provide Zoology teaching on an on-going basis.

44. During the period 1-10 June Mrs Law had further meetings with Debbie Hurst of HR, with Mrs Lowthian and with Dr Manns. The meeting with Mrs Lowthian took place on 4 June and Mrs Law raised some of concerns, particularly that her teaching work would still be required and that that had not been accounted for in the decision to make her redundant. She also stated that she was uncomfortable with the comments that had been made in the previous meeting relating to her pregnancy. Mrs Lowthian said that she would make similar comments to 'anyone' and mentioned the (male) colleague that she had attempted to put Mrs Law in touch with by way of example. She suggested that Mrs Law might be able to do marking work from home whilst the baby slept and that if she kept working hard then 'karma' would mean things would work out for her. Mrs Law was unhappy that, so far as she was concerned, Mrs Lowthian saw no other outcome than that she would be leaving the University and would not to anything to try to prevent that.

45. Mrs Law was due to meet with Dr Manns on 5 June in relation to a work matter. They had not met before and it was a short meeting. We accept Mrs Law's evidence about this meeting as Dr Manns has not given evidence. Dr Manns explained that budgeting was tight due to covid and the budget was unlikely to be finalised before the end of July. It may be that nothing would come up, and if anything did it might be part-time. Dr Manns expressed that she did not want to get Mrs Law's hopes up. There was no discussion about how Dr Manns envisaged the zoology course would be delivered.

46. Mrs Law and Mrs Lowthian met again on 12 June. They discussed the fact that Mrs Law was now assisting Mr Dittrich with zoology planning for the following year and that Mrs Law struggled to understand how Mr Dittrich was going to deliver the course alone. Mrs Lowthian responded that that was probably what he (i.e. Mr Dittrich) was wondering too. Mrs Law never received an explanation of how the zoology teaching would be covered, despite also raising this via HR and in an email to the vice-chancellor around this time.

47. Following this meeting, Mrs Lowthian emailed Dr Manns noting that Mrs Law had been asked by Mr Dittrich to work on planning the next year's zoology courses with him. Mrs Lowthain states that "*I understand why he has contacted her but this could continue to raise her hopes for a role for her next year which I assume is still unlikely…*" She goes onto to request that someone from SNROS lets Mrs Laws know that recruitment for a new lecturer is unlikely. Dr Manns reply states that she has already done so, presumably in reference to the conversation mentioned above.

48. On 16 June 2020 Mrs Law received a letter confirming that her post would end on 31 July. Although the letter does not explicitly state that she is being dismissed by reason of redundancy it does set out her entitlement to a redundancy payment and states "*as the funding for the project is coming to an end the university will terminate your contract of employment on the date above*". This letter pre-dated a meeting arranged at Mrs Law's request with

Vikki Thomas, which took place on 18 June. In any event, Mrs Law did not obtain the answers she was looking for at the meeting with Ms Thomas.

Appeal

49. By letter dated 22 June 2020, Mrs Law appealed the dismissal decision.

50. The appeal meeting took place on 9 July 2020 and was conducted by David Chesser, the University's Chief Operating Officer.

51. Broadly, Mrs Law complains that her concerns were not taken seriously at the appeal stage, that it was nothing more than a 'tick box' exercise and that Mr Chesser was dismissive of her. There are a number of complaints which contribute to this argument, and it is unfortunate that Mr Chesser was not here to address them. The Tribunal was told that he was unavailable as he was engaged on an extended visit to his daughter, who lives in Australia and is due to give birth. The respondent chose not to apply for a postponement, a witness order, for Mr Chesser to give evidence remotely from Australia, or for a written statement to be admitted. There may well have been difficulties with any or all of those possibilities, and it is, of course, for the respondent to choose how it wishes to present its case. However, the upshot of Mr Chesser not giving evidence is that the claimant's account of the appeal meeting is unchallenged. Whilst Mrs Lowthian did not challenge the substance of Mrs Law's account of their meetings, she did put forward a positive case as to her thought processes and reasoning for certain actions which the Tribunal has been able to take into account. With Mr Chesser, in contrast, there is a vacuum.

52. We accept that during the appeal meeting Mr Chesser emphasised the impact of covid and the financial burden it had placed on the University. We further accept that he was dismissive when Mrs Law raised her concern that her pregnancy may have impacted on the process and outlined the comments made by Mrs Lowthian which she had considered to be inappropriate. In particular, he told Mrs Law that the suggestion that her pregnancy may have had an influence on the decision-making process was "*quite a statement to make*" and appeared to shake his head as she was outlining her concerns.

53. Mrs Law referred to statements by the Vice-Chancellor that the university would not permit vulnerable staff to be disproportionately affected by the University's covid-19 response and explained that she felt she was vulnerable due to her pregnancy and had been disproportionately affected as, absent covid, there had been an expectation that she could continue to work within SNROS. Mr Chesser dismissed this comment within the meeting, stating that the Vice-Chancellor's statement was entirely correct an was something he could uphold "as well". Mrs Law inferred from the use of the phrase "as well" that Mr Chesser had already determined that he would uphold her dismissal.

54. Mrs Law found the meeting difficult and emotional and was in tears by the end of it. At the end, Mr Chesser commended her for articulating her case well and "*speaking up so boldly*". Mrs Law found this was condescending.

55. Following the meeting , Mr Chesser did not speak to Mrs Lowthian to obtain her account of the earlier meetings or to probe whether Mrs Law's feelings that she had been discriminated against might be justified. Nor did Mr Chesser speak to Dr Manns or anyone in SNROS to explore what was happening with the zoology teaching, or any other aspect of Mrs Law's role, or whether there was any scope for alternative work within the department. The appeal outcome letter was produced the day after the appeal. Whilst it noted that Mrs Laws was concerned that she may have been treated unfairly due to her pregnancy and impeding maternity leave, Mr Chesser expressed no comment or conclusion on this point.

56. 9 July was also Mrs Law's final day at work (remotely) due to the block of leave she had to take before the termination of her employment. On 10 July Mrs Laws attended hospital as a scan had detected some concerns in her pregnancy. It is not necessary to set out any further detail in this judgment, but subsequently Mrs Law was to have additional monitoring and a plan was made for the management of her pregnancy. This was a very difficult time, particularly as covid-19 restrictions meant that Mrs Law had to attend appointments alone. On 24 July, Vikki Thomas emailed Mrs Law with details of vacancies. Although there were two non-academic roles within IBIL which may have been suitable, Mrs Law decided not to apply given the difficulties she was experiencing with her pregnancy and her disillusionment with the redundancy process and the university as an employer.

57. There was an exchange of emails between Mrs Law and Ms Thomas about notes of the appeal hearing. Ms Thomas had inadvertently produced the notes on a template headed "Disciplinary Appeal Hearing". This was very unfortunate, although clearly done in error. Ms Thomas apologised when Mrs Law pointed the error out.

58. Mrs Law wanted to submit a grievance in relation to her dismissal and the way the process had been handled. She produced a detailed document, which was sent to Mrs Knox-Davis on 29 July. This raised complaints of discrimination against both Mrs Lowthian and Mr Chesser, as well as other matters. Mrs Knox-Davies was unsure how to handle the grievance. We recognise that there some legitimate uncertainty; to some extent the grievance was an attempt to re-open the appeal, but to some extent it raised different issues. There were a number of different options potentially open to Mrs Knox-Davies, no doubt some would be more welcome than others to Mrs Law. Mrs Knox-Davis asked Ms Thomas to prepare a draft response on her own last day in the job. It is clear that the purpose of the response was to 'knock back' the grievance. Mrs Knox-Davis was satisfied, without investigating the matter, that there was nothing in Mrs Law's discrimination complaints. Ms Thomas having prepared the response, Mrs Knox-Davis then omitted to finalise it and send it to Mrs Law. So, in the end, there was no response at all to the grievance. Mrs Knox-Davis realised her oversight when the claim was submitted, at which point she felt embarrassed by her mistake and decided to ignore it. She apologised during her evidence for this error.

Treatment of other employees

59. A contrast can be made between the process outlined above and the HR13 process undertaken in respect of the two employees on the engineering side of the JFF project, Stephen Mullen and Dimitrios Kontziampasis. Both reported to Kate Dixon, a senior employee within IBIL. They were both male and had less than two years' service as they had no prior employment at the university.

60. Ms Dixon decided that it was appropriate for the university to continue some of the work that had been done by Mr Mullen and Mr Kontziampasis and that this should be funded directly by the University. This resulted in the creation of one new senior lecturer in engineering post, which was advertised on the internal recruitment system in July 2020. Both individuals applied for the job and Mr Mullen was successful in obtaining it. He was not required to attend an HR13 meeting. Mr Chesser was involved in the approval process for the role which Mr Mullen secured, and we accept Mrs Law's suggestion that Mr Chesser must have been aware that this role was pending at the point at which he was determining Mrs Law's appeal on the basis that the university could not continue to employ her due to the cessation of external funding.

61. Mrs Laws spent considerable time in her own evidence and in cross examination to trying to establish that the JFF funding had required, or at least envisaged, that the project would act as a "kick-start" for outreach work which would then become "embedded" in the University i.e. the continuation of the work would be funded from the University's own resources. The recruitment of Mr Mullen onto the permanent staff illustrates that the University did take this approach in relation to the engineering aspect of the work. We further accept Mrs Law's interpretation of the reports that were prepared for JFF at the end of the project, namely that the funder was given the impression that the roles that had been created would be continued.

62. Mr Kontziampasis was required to attend a HR13 meeting, held by Ms Dixon, once it had been determined that he was not the successful applicant. This was held on 25 June, much later than Mrs Law's meeting. The HR13 form notes that "*several discussions have been held leading up to the end of the contract over the last few months*". That, of course, was not the experience of Mrs Laws, who had no discussions before her HR13 meeting. Further, in the section of the form dealing with matters the employee asked to have taken into consideration, Mr Kontziampasis asked to be able to be paid for untaken accrued leave at the end of his contract, which would have the effect of mitigating the financial burden of redundancy. This was permitted for 6 days' leave, seemingly on the basis that this is the University's usual permitted carry-over. Again, this is in contrast to the position taken in regards Mrs Laws, who was required to take all of her leave during the currency of the contract.

63. Happily, Mr Kontziampasis secured an alternative post at Stafford University for the following academic year. Realistically, Mrs Law's personal situation (her advanced pregnancy alongside the lack of other HE institutions in the vicinity) meant that it was not feasible for her to apply for roles elsewhere. We accept Mrs Law's point that the impact of the dismissal was therefore greater on her, than on Mr Kontziampasis, in a way which would be readily foreseeable.

64. Chloe Wood, a graduate intern reporting to Mrs Law, was also dismissed on the expiry of her fixed term contract.

65. We heard some relevant evidence about academics within SNROS. This evidence was all, to some extent, second hand, as the respondent did not produce any witnesses from SNROS. It came mainly from a table in the bundle which included employment information about a variety of employees and (we understand) was agreed between the parties. In particular, we heard that a male lecturer in biology, Andy Chick, was on a succession of fixed term contracts from November 2018. To some extent it appears his role was to backfill Nigel Smith's secondment, although the position was somewhat more complex than that as Ms Hunt's teaching responsibilities had also varied with her changes of role. In any event, Mr Chick's contract was also due to terminate on 31 July 2020 but was extended and subsequently made permanent, despite Mr Smith's return to his substantive role.

66. There was a redundancy exercise which took place within the University in August/September 2020. We had little direct evidence of this but it appears that a requirement was identified to reduce headcount by nine and around thirty staff were identified as potentially affected. Ultimately, there were five redundancies as the remaining reductions was secured in other ways. This affected a number of roles within SNROS and one employee, Darryl Smith, was redeployed from Carlisle, where he had been teaching environmental modelling, to teach at Ambleside. Mrs Law believes that tis was the zoology teaching that she had expected to be able to take up. The respondent's witnesses stated that Mr Smith was not teaching the same zoology modules as Mrs Law had taught, although it is evident that he was teaching within the zoology curriculum from an email from Dr Manns to Mrs Knox-Davis dated 30 November 2020. Even at the date of this email, Dr Manns is aware that Darryl Smith will shortly be leaving employment. Dr Manns stated "*we hope to now get permission to go out to advert for the Zoology post as we have no further capacity to support the teaching in this area*". The lecturer in zoology role was subsequently advertised in February 2021 for the start of the academic year. Mrs Law did not apply as she had lost trust in the University, which she felt had 'abandoned' her during her maternity period.

Unfair dismissal

Relevant Legal Principles

67. The unfair dismissal claim is brought under Part X of the Employment Rights Act 1996.

68. The effect of section 95(1) is that where a fixed-term contract terminates on the expiry of the fixed term, the employee is to be treated as having been dismissed by her employer.

69. In respect of the fairness, the primary provision is section 98 which (so far as relevant) provides as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it … is that the employee was redundant …

(3) …

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

70. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) …

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish".

71. If the dismissal was by reason of redundancy, Regulation 20(2) Maternity and Parental Leave etc Regulations 1999 provides that the dismissal will be unfair if:
"it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee who have not been dismissed by the employee, and
It is shown that the reason (or, if more than one kind, the principal reason) for which the employee was selected was for dismissal was [the pregnancy pf the employee]"

72. Further (and again where the dismissal is by reason of redundancy) Section 105(7E) ERA read together with Regulation 6 Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 provides that the dismissal will be unfair where the reason for the redundancy selection is that:

"the employee-
(i) Brought proceedings against the employer under the [Fixed-Term Employee) Regulations;
(ii) Requested from his employer a written statement under Regulation 5 or Regulation 9;
(iii) Gave evidence or information in connection with such proceedings brought by any employee;
(iv) Otherwise did anything under these Regulations in relation to the employer or any other person;
(v) Alleged that the employer had infringed these Regulations;
(vi) Refused (or proposed to refuse) to forgo a right conferred on him by these Regulations; or
(vii) Being-

(aa) a representative of memvers of the workforce for the purpose of Schedule 1, or

(bb) a candidate for election in which any person elected will, on being elected, become such a representative,

Performed (or proposed to perform) any functions or activities as such a representative or candidate."

73. If neither of these 'automatic' reasons for dismissal is established, the Tribunal will then consider whether the dismissal is nevertheless unfair applying the general test of fairness set out in section 98(4) ERA.

74. The section 98(4) test has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

75. The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee. See **Abernethy v Mott Hay and Anderson [1974] ICR 323**. In the case of a fixed-term contract, the reason for dismissal is the reason the contract is not renewed – **Nottinghamshire County Council v Lee 1980 ICR 635, CA**.

76. A historical conflict between the 'contract' and 'function' tests for determining whether a redundancy situation was established was resolved by the EAT in **Safeway Stores plc v Burrell [1997] ICR 523**, later approved by the House of Lords in **Murray v Foyle Meats Ltd [1999] ICR 827**. Both those cases emphasise that the question of whether there is a diminution in the employer's requirement for employees to carry out work of a particular kind is distinct from the subsequent question of whether the dismissal of the claimant employee was wholly or mainly attributable to that diminution.

77. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

78. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:
'Fair consultation means:
- **(a) consultation when the proposals are still at a formative stage;**
- **(b) adequate information on which to respond;**
- **(c) adequate time in which to respond;**
- **(d) conscientious consideration by an authority of the response to consultation".**

79. The employer's duty to look for alternative employment is not to be conflated with the statutory provisions around suitable alternative employment which may, in some circumstances, disentitle an employee from a redundancy payment if they turn down an alternative role deemed to be suitable. In order to fairly dismiss, the employer has a much broader obligation to bring the employee's attention to opportunities within the organisation. The assessment is to be made based on facts known to the employer at the time of dismissal and the appearance of a vacancy shortly afterwards would not make the dismissal unfair. However, the facts known to the employer at the time of dismissal might include the fact that a position was "under review" or may become available within a short time (**Maguire v London Borough of Brent EAT 0094/13**).

Submissions

80. Mrs Law submitted, in essence, that this was not a true redundancy because her teaching work continued and because the University had an on-going obligation to continue with the outreach work due to the arrangements with the funders. Even if it was a redundancy, it was not fair as Mrs Lowthain had had a closed mind and had not considered alternatives to the dismissal, both in respect of whether the University should continue to fund the post itself, and whether there was alternative work she could do, particularly based around the zoology teaching. Mrs Lowthian was not the budget-holder in respect of those decisions and had no interest in retaining her. Mrs Laws further submitted that this was influenced by her pregnancy, a fact demonstrated by the dismissive treatment she had received from both Mrs Lowthain and, particularly, Mr Chesser, and by the way in which the university had managed to retain and find roles for various male employees who were also employed on fixed term contracts, particularly Mr Nigel Smith, Mr Mullen and Mr Chick.

81. Ms Steed submitted that this was a true redundancy. The University had decided to discontinue the STEM Outreach Lead role for the very genuine reason that the funding had ended. Whilst the University could, in theory, have made a decision to continue that role and fund it from its own resources, it was not open in law for Mrs Law to challenge that decision and not for the Tribunal to substitute its decision for a genuine decision made by the employer. In respect of the teaching, this was only a small ancillary part of the role and the fact that it would have to continue did not undermine the conclusion that the role was redundant. There was no zoology lecturer vacancy approved prior to Mrs Law's dismissal. To the extent that that might have been expected at one point, the impact of covid had changed everything and put the SNROS budget under extreme pressure. That had nothing to do with Mrs Law's personal situation. SNROS was able to cover all the teaching requirements for the start of the academic year using

existing staff within the department, there were no vacancies and nothing to offer the claimant.

Discussion and conclusions

Reason for dismissal
Issues 1.1-1.2

82. We agree with the respondent that the reason for dismissal was redundancy, within the meaning of s.139 ERA. We accept that the respondent had made a genuine decision to discontinue the majority of the work associated with the role of Academic Lead for STEM Outreach due to the end of the funding. This meant that the outreach work specifically associated with that role would not be continued by the University, and to the extent that it might be continued in some limited respects it would be absorbed by existing staff within SNROS. That choice meant that the need for people to do that work had diminished. That conclusion is not undermined by the fact that a requirement would continue for one specific element of the work being done by Mrs Law – namely teaching within SNROS and particularly within zoology. We take account of the fact that that teaching was a relatively minor aspect of the role, comprising about one-fifth of a full-time role.

83. We do not consider that Mrs Law's pregnancy played in part in the decision that the Academic Lead for STEM Outreach role should be made redundant. All of the JFF funded roles were made redundant and removed from the organisation. Although Mr Smith and Mr Mullens continued in employment, they did so in different roles. There is a more nuanced question to consider what part, if any, Mrs Law's pregnancy played in the way that her redundancy was handled and whether she too could have continued in another role. That is discussed further below.

84. As we are satisfied that that decision was a genuine one, we cannot 'go behind' the decision, as Mrs Law would invite us to do, and interrogate whether that decision was justified, either in terms of whether it made sense from the perspective of the University, or whether it was a decision that was contrary to the funding arrangements or the report prepared for the funders.

'Automatic' unfair dismissal claims
Issue 1.3.2 and 1.3.3

85. We find that the terms of Regulation 20(2)(b) Maternity and Parental Leave Regulations 1999 ("the MPL regulations") do not apply to this case as there were no employees who held position sufficiently similar to Mrs Law for that Regulation to be applied. Her role was unique. Further, given our conclusions above about the reason for dismissal, we are satisfied that Mrs Law was not selected for redundancy due to her pregnancy.

86. Mrs Law was keen to establish that she was selected for redundancy "because" she was a fixed-term employee. The late-disclosed R2 emails indicated that this was, indeed, Mrs Lowthian's position, hence Mrs Law's view that these emails were fatal to the respondent's case. The law, however, is more complex than that. Where a dismissal happens on expiry

of a fixed-term contract, we have to look to the reason why the contract was not renewed to find the reason for dismissal. That point derives from the case of **Nottinghamshire County Council v Lee** and explains (at least in part) the decision in **Webley v Department for Work and Pensions [2005] ICR 577**, which was relied on by Ms Steed.

87. Regulation 6 FTE Regulations, quoted above, provide that dismissal will be automatically unfair in certain circumstances related to fixed-term working, but these circumstances do not include cases where the employee is selected for redundancy due to being a fixed-term employee. Instead, they are what an employment lawyer might refer to as 'victimisation' provisions. In simplistic terms, a dismissal will be automatically unfair where a fixed-term employee is selected for redundancy because they have complained about being treated badly as a fixed-term employee, or otherwise asserted their rights under the regulations. That is not the case here. Mrs Law only began to assert her rights (including for example, by querying why she had not been made permanent at the four-year point) once the redundancy process was well underway.

88. Both the MPL Regulations and the FTE regulations have the scope to address dismissals and other actions which may be discriminatory, even if the claims of automatic unfair dismissal are not made out. These arguments are discussed further below.

Procedural fairness
Issue 1.3 (excluding sub-issue 1.3.2 and 1.3.3)

89. We now turn to the question of whether the dismissal was fair or unfair under s.98(4) ERA.

90. We are satisfied that Mrs Laws was given appropriate warning about the possibility of redundancy, and that the respondent applied an appropriate selection process. As she held a unique position and the redundancy affected that position, it was reasonable for her to be selected and placed 'at risk' of redundancy without being placed in a selection pool with other employees.

91. The areas the give rise to concern in this decision are the consultation that the respondent undertook with Mrs Law, and its efforts in relation to finding alternative employment. On the facts of this case, those two matters are interrelated.

92. The law required the University to consider whether Mrs Law's employment should be continued (whether by continuing the current role and funding it from within the University, or adapting it in some form). That requirement is mirrored in the University's own guidance (quoted above), which indicates that the funding arrangements are part of this consideration, but only part. The consideration could only be undertaken by someone who had budgetary responsibility for SNROS – most probably Dr Manns but possibly Ms Hunt/Ms Mallebon subject to approval by Dr Manns. Effective consultation required Mrs Law to be permitted to input into that decision before it had been taken, and for the relevant decision-makers to give "conscious consideration" to the valid points that she had to make. This

would include her points about the commitment to embed the outreach work within the University, her points about the extent of the teaching work she had been doing and the absence of teaching resource for zoology and her points about how her upcoming maternity leave could be managed in a way that would minimise the financial impact to the University during the immediate financial pressure point (e.g. she had suggested that she could be appointed to a post which was then not formally back-filled during maternity, reducing immediate costs, she had also offered to take a short period of unpaid leave in the run up to maternity leave).

93. Despite numerous attempts, Mrs Law was never given the forum to address these points to Dr Manns within the redundancy process. A short conversation at the end of an unrelated work meeting does not equate to being given conscious consideration.

94. Mrs Lowthian appears to have had little conception as to her obligations as a manager involved in a consultation process. To some extent, this is not her fault, it is evident from the totality of the evidence that she was never the right person to make substantive decisions about whether the role was redundant and about what opportunities there might be for redeployment (at least within SNROS). We are also conscious that in summer 2020 she was facing a personally difficult situation trying to carry out her role whilst working from home with small children. Nonetheless, the absence of any sense of responsibility towards Mrs Law, far less attempt to give her the substantive help to maintain her employment that she was asking for, is stark.

95. The way in which Mrs Lowthian completed the HR13 form demonstrates that she considered this to be a tick-box exercise, that her mind was entirely closed to the possibility of any outcome other than termination (absent, possibly, an opportunity elsewhere in the University appearing on the vacancy list). This continued even when Mrs Law identified her concerns and things that she was asking to have considered and Mrs Lowthian did nothing with them. The approach from the University at every stage was simply to knock back Mrs Law's points, rather than engage and respond to them in any meaningful way.

96. We therefore consider that there was no effective consultation in this case about the decision to dismiss for redundancy. This was a wholesale failure which was outside the band of reasonable responses. The failure to have an effective consultation means that the dismissal was unfair.

97. In relation to alternative employment, all Mrs Lowthian did was trigger Mrs Law to be classified as a redeployee. This would give her priority in respect of any applications for internal vacancies. All employees, including Mrs Law, had access to internal vacancies listed on the intranet. It appears that there was some further action from Vikki Thomas in emailing Mrs Law about specific vacancies, but that was minimal. Nobody was considering what vacancies were 'in the pipeline' for approval and communicating with Mrs Law about that. There is some force in Mrs Lowthian's concern that it would be wrong to get Mrs Law's hopes up. However, it is evident that the University had managed to have open and on-going conversations with Mr Mullens and Mr Kontziampasis about the engineering role before it was

formally approved. It is also evident that, in reality, work (particularly teaching work) was distributed and redistributed between staff without formal vacancies necessarily being created. As in Mr Mullens' case, the advertisement of a formal vacancy might represent the end point in a process of a department advocating for a role because there had already been a decision that it would be desirable to offer alternative employment to someone who otherwise faced redundancy.

98. We have real concern about the opaque decision-making surrounding the distribution of teaching responsibilities within SNROS. No evidence was given about the SNROS budget (beyond the fact that it was under pressure) or the broader staffing structure before and after the ending of the JFF funding. We know that the respondent was able to 'find' teaching work for Nigel Smith, who was returning to his substantive position, and also, seemingly, for Andy Chick, who had been covering (at least to some extent) Mr Smith's role on a fixed-term basis. We know that a redundancy exercise took place in August/September 2020 and that redundancies were avoided by redeploying Darryl Smith to Ambleside. It is difficult to see why that informal redeployment opportunity existed in August/September, but apparently did not exist at the end of July. For those reasons, we do not consider that the list of approved vacancies tells the whole story of redeployment opportunities within the respondent. Taking everything into account, we do not consider that the respondent took appropriate steps to offer the claimant alternative employment that might have enabled her to avoid redundancy.

99. Further, the obligation on the respondent to consider suitable alternative employment continued right up until Mrs Law was dismissed. Due to the complications with her pregnancy (and, to a lesser extent, the block of leave she had been forced to take) Mrs Law was not in a position at that point to actively consider alternative employment herself. In those circumstances, we do not consider that the University fulfilled its duty towards her merely by giving her access to a vacancy list. A reasonable employer would have ensured that someone – whether Mrs Lowthian or an HR officer – was themselves examining the roles that were available, potentially reaching out to the relevant managers or departments and actively brokering communication between those managers and Mrs Law to attempt to facilitate her retention in employment if feasible. That was not done. Even relying on the published vacancy list alone there were potentially suitable roles within IBIL. We accept that the claimant was made aware of them and did not apply for those and, in many cases, that would absolve the respondent of its obligation. On the particular facts of this case, however, we consider that any reasonable employer would have done more.

Polkey
Issue 1.4

100. In accordance with the List of Issues, the next issue to be determined would be the chances that the claimant would have been dismissed in any event, even if a fair procedure had been followed. The principle that procedural unfairness will still render a dismissal unfair, but that the prospect of a fair dismissal taking place in any event must be accounted for in determining the amount of compensation awarded, comes from the case

of **Polkey v ~AE Dayton Services Limited [1987] ICR 142** and is invariably referred to as the "Polkey principle", "Polkey reduction" or simply "Polkey" for short.

101. It is often appropriate to hear submissions on this issue and determine it alongside the liability issues in the case, and this was envisaged by the List of Issues prepared by EJ Warren. However, following discussion at the end of the hearing about the legal and factual complexity of this case and the difficulty presented to both parties in arguing in the abstract about the proper application of Polkey without knowing the basis for the Tribunal's conclusion that the dismissal was unfair (indeed, without at that stage knowing if the Tribunal would reach such a conclusion at all), it was agreed that the Tribunal will hear submissions on the proper reduction (if any) to be made on this basis at the remedy hearing.

102. The Employment Judge made it clear to the parties that this delay was intended only to allow them to formulate clear submissions on the issue, based on the evidence which has already been presented and the findings the Tribunal has made. It is not an opportunity for the respondent to seek to introduce new evidence to attempt to make good any of the deficiencies that have been identified in this Judgment. The respondent had full opportunity to lead the evidence it wished to lead and it would be inappropriate, as well as disproportionate, to introduce new evidence at this stage as to what the result of a fair consultation/suitable alternative employment exercise may have been.

Written statement of reasons for dismissal
Issue 1.5

103. Although listed as a sub-issue under the unfair dismissal claim, this represents a separate claim brought by the claimant under s93 ERA 1996, which permits an employee to complain to an Employment Tribunal if they do not receive a written statement of reasons for their dismissal (including on expiry of a fixed-term contract). Mrs Law had the right to receive such a statement without having to request it because she was pregnant at the time of dismissal (s92(4)).

104. Mrs Law considers that she was never given a "proper explanation" for her dismissal. This includes such matters as how the zoology teaching would be covered and why she could not be retained to do that, why the outreach role was not being embedded when it was represented to the funders what it would be, and why she was dismissed despite statements from the vice-chancellor about the University's covid response not including redundancies and not disproportionately impacting on vulnerable people.

105. Although we consider that those matters ought to have been more fully addressed in the consultation process, the purpose of the s.92 right is not to require an employer to provide "chapter and verse" about its reasons for dismissal. On balance, we consider that the dismissal letter of 16 June 2020 contained enough information to constitute "written particulars" of the reason for dismissal. It stated (albeit in an implied way) that the reason for dismissal was redundancy and that the reason for this was that "funding for

the project is coming to an end". We consider that is sufficient and this claim therefore fails.

Discrimination on grounds of pregnancy

Relevant Legal Principles

106. Section 18 Equality Act 2010 provides as follows (subsections which are not relevant to this case are omitted):

Pregnancy and maternity discrimination: work cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.

(3) …
(4) …
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) …

107. S.39(2) EA provides that an employer must not discriminate against an employee by dismissing her or by subjecting her to any other detriment.

108. A "detriment" occurs when a reasonable worker would or might take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work. See **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL**.

109. The effect of these provisions are that a woman can succeed in a claim of discrimination on grounds of pregnancy or maternity by demonstrating that in dismissing her or subjecting her to a detriment her employer has treated her unfavourably on the grounds of pregnancy or maternity. If she establishes this, the claim will succeed and she need not compare herself to a man (real of hypothetical) who has received (or would receive) more favourable treatment.

110. In considering the question of whether unfavourable treatment was 'because of' the claimant's pregnancy the Tribunal must examine the respondent's grounds for treating the claimant in a particular way. The

pregnancy need not be the only reason, but it must have played a part. Further, it can be a conscious or unconscious motivation.

111. Section 136 EA contains the burden of proof provisions namely that if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the tribunal must hold that the contravention occurred.

112. In **Igen Ltd V Wong 2005 ICR 931 CA** the Court of Appeal considered and amended the guidance contained in **Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332** on how to the previous similar provisions concerning the burden of proof should be applied:

112.1 It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful .These are referred to as " such facts"

112.2 If the claimant does not prove such facts the claim fails.

112.3 It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

112.4 In deciding whether the claimant has proved such facts it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inference it is proper to draw from the primary facts found by the tribunal.

112.5 It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

112.6 Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.

112.7 To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is

adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

112.8 Since the facts necessary to prove an explanation will normally be in the possession of the respondent, a tribunal will normally expect cogent evidence to discharge that burden of proof. In particular a tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any relevant code of practice.

113. The guidance has been approved in subsequent cases including, significantly, **Hewage v Grampian Health Board [2012] IRLR 870, SC** and **Royal Mail Group v Efobi 2021 ICR 1263, SC**. The case law makes it clear that the tribunal is not expected to split its hearing into two parts, but instead conducts the two-stage exercise during its deliberations, having heard all of the evidence. Secondly, in conducting this exercise the tribunal may take account of all relevant evidence at stage 1, without artificially excluding evidence which comes from the respondent at this stage of the decision-making process.

Submissions

114. We consider that the respondent's submissions on this point demonstrated a misunderstanding of the difference between a pregnancy discrimination claim and (say) a direct sex discrimination claim. With regard to the comments that Mrs Law complained about, Ms Steed emphasised that Mrs Lowthian would have treated a man the same way, and drew on the example of discussions she had had around pregnancy with Jamie, the make employee that she had attempted to introduce Mrs Law to. She expanded this out to a wider argument that a male (or non-pregnant female) employee in the claimant's role would have been treated in the same way regarding the end of the fixed-term contract and the redundancy. Whilst we recognise that, in some cases, evidence of how other employees were treated may assist one party or the other in establishing the likely reason for particular treatment, it did not assist us in this case to consider comments that may or may not have been made to Jamie in circumstances where he was not facing redundancy.

115. Fundamentally, the respondent's position was that Mrs Law had been unlucky that her fixed term contract came to an end during the budgetary squeeze precipitated by covid. There was never any guarantee of a continued role following the expiry of the JFF funding and her pregnancy played no part whatsoever in the decision-making process.

116. Mrs Law drew attention to the fact that she had been a highly-regarded employee prior to her pregnancy and had been given reason to expect that a new role would be found for her within SNROS. She highlighted (as she saw it) the different treatment that male members of staff had experienced and the fact that she had been abandoned and not listened to during the redundancy process. She submitted that it was unprofessional and inappropriate for Mrs Lowthian to talk about her pregnancy during the HR13 meeting and the subsequent meeting, that it had made her feel uncomfortable, and that she believed it demonstrated that Mrs Lowthian did

not envisage her as having a future within the University and instead envisaged her giving up her career, at least in the immediate future, to start her family. This had – consciously or unconsciously – affected Mrs Lowthian's attitude to the process.

Discussion and conclusions

Issue 2.2 Did the respondent discriminate against, cause detriment to or treat the claimant unfavourably because of her pregnancy by…

117. For reasons addressed below, we considered it helpful to address Issue 2.2 and its sub-issues, before addressing issue 2.1.

118. Issue 2.2 as defined in the List of Issues is set out above. This is a slightly confused expression of the statutory test, which requires the identification of a detriment and consideration of whether that detriment amounted to unfavourable treatment on the grounds of pregnancy (not *less* favourable treatment, as noted above). If both those ingredients are present, then the respondent discriminated against the claimant according to the terms of the statute.

119. We have applied the terms of the statute and the legal principles identified above, to the list of allegations of discrimination which are set out at points 2.2.1-2.2.10 in the List of Issues. Our conclusions are set out below.

2.2.1 Miss Lowthian's alleged statement to the claimant at the meeting on 29 May 2020 set out in paragraph 12 of the particulars of claim.

2.2.2 Miss Lowthian's alleged statement to the claimant on 4 June 2020 set out in paragraph 18 of the particulars of claim.

120. These complaints refer to Mrs Lowthian's comments about second-hand baby clothes, child benefit, parenting advice and doing on-line marking while the baby sleeps as a possible future work option. Whilst Mrs Lowthian did not have a record, or particular recollection of the comments, she readily accepted that she had made comments of this nature and had very likely made the ones the claimant described. We accept that they were made.

121. It is not easy to determine whether these comments amount to a detriment. We recognise Mrs Law's frank acknowledgement whilst giving evidence that unsolicited advice is an inevitable side-effect of pregnancy. We also recognise that Mrs Lowthian was well-intentioned and believe that this was also apparent to Mrs Law. Mrs Law's concern was not so much about the advice itself, but about what it said about the redundancy process that Mrs Lowthian was spending the HR13 meeting dispensing such advice.

122. We also recognise that the comments were mostly made in the 29 May meeting, before Mrs Law had expressed unhappiness about them. When she said in the next meeting that she had not appreciated them, the extraneous comments about baby clothes etc appear not to have been repeated. The comment about doing marking whilst the baby slept, whilst

not taken well by Mrs Law, was, we find, a legitimate suggestion in the context of a discussion about what work might be available for Mrs Law.

123. We accept that Mrs Law perceived these comments to be detrimental to her but, as noted above, we consider this to be in the context of her being (understandably) stressed and frustrated about her impending redundancy and how it was being handled. We must also consider, from an objective perspective, whether the comments should be regarded as a detriment in law. There is a margin of appreciation in which comments may be unwelcome, slightly crass or unprofessional, without passing the threshold where it is proper to regard them as amounting to detriments in law. This is perhaps particularly so in relation to pregnancy, where employees will have different attitudes as to how much they want to discuss their pregnancy in the workplace. Some employees, particularly in the circumstances of covid, might have welcome Mrs Lowthian's input. On Mrs Law's own account, the introduction of these comments in the context of this sort of meeting was, at its highest, "*a bit weird and inappropriate*". On balance, we do not consider that these comments can reasonably be seen as a detrimental in themselves, even taking into account the circumstances and position of Mrs Law at the time. The claim therefore fails in respect of these allegations.

124. If we were wrong on that conclusion, then given that the claimant's pregnancy and expected child was the direct subject of the comments, we are satisfied that by subjecting the claimant to that detriment there would be no alternative to the conclusion that the respondent had treated Mrs Law unfavourably on grounds of her pregnancy and the claim for succeed.

2.2.3 Mr Chesser's alleged remarks at the appeal hearing on 9 July 2020 set out at paragraph 24 of the particulars of claim.

125. This issue concerns Mr Chesser's comment that the vice chancellor's statements that the university would ensure that vulnerable staff were not disproportionately or adversely affected by the University's covid-19 response was "entirely correct" and that he could "entirely uphold" the comments about vulnerable staff.

126. We consider that Mrs Law did perceive this comment to be a detriment and that she was entitled to do so. We find the comment difficult to understand but it is clear that it diminishes the claimant's valid point that she was vulnerable as a pregnant woman, and was being adversely affected in a very significant way by the situation arising out of the University's response to covid. The validity of Mrs Law's point is demonstrated by the contrast in her situation and Mr Kontziampasis's – although both were made redundant at the same time he was in a position to quickly seek equivalent work elsewhere, whereas she simply could not do so. A sensitive recognition that Mrs Law was vulnerable, and that she was being placed in a particularly difficult situation would not necessarily have meant that the University was obliged to change its decision. However, rather than conceding this obvious point Mr Chesser chose to belittle Mrs Law and we find that she was understandably very upset by this attitude.

127. Although not directly a statement about the claimant's pregnancy on the face of it, the context of the conversation was that the claimant was

explaining that she was vulnerable by reason of her pregnancy and Mr Chesser was dismissing this out of hand. Essentially, it seems he was rejecting the Mrs Law's reasonable point that pregnancy itself creates a vulnerability. Having regard to that context, we find Mr Chesser's comments were unfavourable treatment on the grounds of the claimant's pregnancy. This part of the claim succeeds.

2.2.4 Mr Chesser's alleged failure to conduct an adequate investigation into the claimant's appeal against dismissal.

128. We refer to our findings at paragraph 55 above. Mr Chesser's approach to the appeal was perfunctory. Mrs Law had raised serious and difficult issues which merited exploration and explanation at the very least. Mr Chesser did nothing other than to sign off an appeal outcome letter which pointedly ignored the fact that Mrs Law had raised a concern that her pregnancy may have played a part in the redundancy process.

129. This failure was unfavourable treatment, but was it on the grounds of pregnancy?. It is possible, as Ms Steed invites us to conclude, that this was simply the actions of 'bad employer' whose managers had little clue about what was required of them and that Mrs Law's pregnancy played no part in Mr Chesser's inadequate approach.

130. We find that Mrs Law has done enough to shift the burden of proof to the respondent. She has proven facts from which it is possible to conclude that Mr Chesser's actions may have been different if she had not been pregnant, specifically:

130.1 She was a highly regarded and valued member of staff before she become pregnant;

130.2 She was in a fairly advanced state of pregnancy at the time of her meeting with Mr Chesser;

130.3 She had specifically raised the concern that her pregnancy may have impacted on the dismissal process, including concern about Mrs Lowthian's comments;

130.4 Mr Chesser had made dismissive comments around the issue of "vulnerability" and failure to acknowledge the particularly vulnerable position Mrs Law found herself in;

130.5 Mr Chesser then dealt with the appeal in am extremely cursory way, which is incompatible with any suggestion that he took seriously the issues that Mrs Law had raised;

130.6 He then conspicuously failed to address her pregnancy concerns in his outcome letter.

131. We have no evidence from the respondent as to other investigations that may have been conducted similarly 'badly'. We have no evidence from Mr Chesser as to whether it was his practice to be dismissive of all employee concerns, on whatever basis they were raised. Given that the burden of proof has shifted to the respondent we do not find that the respondent has satisfactorily discharged it. We therefore find that this was an act of discrimination on the grounds of pregnancy.

2.2.5 Failing to seek or consider alternatives to redundancy.

2.2.6 Pre-determining the outcome of the redundancy consultation.

132. In line with our findings above, we accept that the respondent did not take adequate steps to seek or consider alternatives to redundancy for Mrs Law. We also accept that the outcome of the redundancy consultation with Mrs Lowthian was pre-determined. It was a tick-box exercise rather than an actual consultation. Both these matters amount to detriments.

133. Again, we consider that the claimant has done enough in this case to shift the burden of proof to the respondent. In relation to this aspect of the case, the following facts are material:

133.1 She was a highly regarded and valued member of staff before she become pregnant;

133.2 She offered a flexible skill set with the ability to adapt to teaching work and to help out at short notice where cover was required;

133.3 Although there had been no guarantee that she would be offered another role, there was, prior to early spring 2019 a reasonable shared expectation that she would be retained within SNROS in some capacity or another;

133.4 Other (male) employees including Nigel Smith, Darryl Smith, Stephen Mullens and Andy Chick were found alternative positions. Although none of them had directly comparable positions, this fact demonstrates that the University could, and did, strive to retain people even against the difficult financial backdrop of covid-19;

133.5 Responsibility for the consultation process sat with Mrs Lowthian, who had no real say in the matters at issue. This contrasts with the position in relation to the male engineers, who had the benefit of an effective, extended consultation process conducted within their own department, which led to one job being continued and the other at least having the benefit of being permitted to take accrued leave on termination;

133.6 There was no proper explanation given by the respondent about the allocation of teaching and why it was not possible to redeploy the claimant to a teaching role, particularly given the situation which had arisen in zoology;

133.7 Although we did not consider Mrs Lowthian's baby-related comments to be detrimental in themselves, we share Mrs Law's concern that they were indicative of Mrs Lowthian's state of mind, and that she may have considered that redeployment would be less of a priority for the claimant than another employee;

133.8 There was a failure by the respondent to ever engage with Mrs Law's concerns and offer proper explanations about the matters she had raised.

134. Again, we do not find that the respondent has discharged the burden of proof to demonstrate an alternative explanation for the treatment we have identified. To some extent, it might be said that covid provided a change of

circumstances, co-inciding with the claimant's pregnancy, which meant that the possibilities for the respondent being able to continue with her employment rapidly changed. However, that does not provide a full explanation for all the difficulties we have identified with the way that this case was managed. The respondent is left in a very difficult position due to the lack of evidence presented about the availability of work in SNROS and its failure to engage in a meaningful consultation process where Mrs Law's points might have been effectively addressed. The claimant's claim also succeeds on this allegation.

2.2.7 Mr Chesser's alleged failure to conduct an adequate investigation into the claimant's appeal against dismissal.

135. This issue was set out twice in the List of Issues, presumably in error, and has been considered above.

2.2.8 Mr Chesser's failure to address in his reasoning the issues raised in the appeal.

2.2.9 Mr Chesser's alleged predetermination of the outcome of the appeal hearing.

136. We are satisfied that Mr Chesser did fail to address the issues raised by Mrs Law in her appeal, particularly her concern that Mrs Lowthian's comments indicated a discriminatory taint to the redundancy process. We are also satisfied that the outcome of the appeal was pre-determined. Overall, we consider that Mr Chesser's conduct of the appeal was wholly inadequate. On the same basis that we have decided his failure to investigate was discriminatory, we are satisfied that these two matters are bound up as part of the same discrimination on the part of Mr Chesser.

2.2.10 Failing to respond to and/or address the grievance raised by the claimant.

137. This refers to the failure of Mrs Knox-Davis to respond to the claimant's grievance, as detailed in our findings of fact at paragraph 58 above. We are satisfied that this amounts to a detriment.

138. Although Mrs Knox-Davis' explanation is not commendable, we accept it is honest. It is clear from the documents that there was a draft response to the grievance which was close to being finalised. Mrs Knox-Davis' explanation that the task of finalising it and sending it to Mrs Law was simply overlooked is more credible than any other explanation. In this case, the 'bad employer' defence succeeds and we are satisfied that there was no discrimination involved. The claim in relation to this allegation therefore fails.

Dismissal

139. Returning to the issue of dismissal, this was set out at point 2.1 of the List of Issues, as follows:

Did the respondent discriminate against the claimant because of her pregnancy by dismissing her because of redundancy.

140. We were satisfied that Mrs Law was not selected for redundancy due to being pregnant. She was selected for redundancy because her fixed term contract was coming to an end and there was no external funding to continue the role on an on-going basis. However, that is not the end of the matter. We are not persuaded that that initial selection for redundancy necessarily meant that Mrs Law's employment at the University had to come to an end. The evidence in this case demonstrates that Mrs Law herself was given further roles when earlier roles or tranches of funding had come to an end, including a short-term extension to her contract when her future was uncertain. It also demonstrates that roles were found for other people whose circumstances were also changing during summer 2020. Ms Steed's case is that there is a good explanation in each case why a different outcome was appropriate in each of those of those circumstances but, sadly, not in Ms Law's case. It all has the air of a game of musical chairs in which, entirely coincidentally, the music stops just as the pregnant Mrs Law, with her four-year record of good service, adaptable skills and excellent feedback, is the one left furthest away from the remaining seats.

141. The decision to dismiss in a case such as this one, against the backdrop of external funding issues and covid-19, is a complex one. In order to find for the respondent we would have to be satisfied that Mrs Law's pregnancy played no part whatsoever in that decision. Given the extent of problems and criticisms we have identified in discussing issues 2.2.1-2.2.10 above, we are unable to reach that conclusion. In particular, our findings that the respondent failed to properly consider alternatives to redundancy and that the decision to make Mrs Law redundant was predetermined, lead, almost as a matter of inevitability, to a conclusion that the overall dismissal decision was tainted by discrimination in a way which is unlawful by virtue of s.18 and s.39 EA, notwithstanding our conclusion above that the dismissal was not 'automatically' unfair.

<u>Fixed-Term Employee claims</u>

Relevant Legal Principles

142. As noted above in relation to the unfair dismissal part of the claim, statutory protection for fixed-term employees is contained in the FTE Regulations. Regulation 3 deals with less favourable treatment and regulation 2 defines who is a "comparable employee" for the purpose of bringing a claim. Regulation 7 provides employees with the right to complaint to an Employment Tribunal. Regulations 2 and 3 provide as follows:

2. Comparable employees

(1) For the purposes of these Regulations, an employee is a comparable permanent employee in relation to a fixed-term employee if, at the time when the treatment that is alleged to be less favourable to the fixed-term employee takes place,

(a)both employees are—

(i)employed by the same employer, and

(ii)engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification and skills; and

(b)the permanent employee works or is based at the same establishment as the fixed-term employee or, where there is no comparable permanent employee working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

(2) For the purposes of paragraph (1), an employee is not a comparable permanent employee if his employment has ceased.

3. Less favourable treatment of fixed-term employees

(1) A fixed-term employee has the right not to be treated by his employer less favourably than the employer treats a comparable permanent employee—

(a)as regards the terms of his contract; or

(b)by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to—

(a)any period of service qualification relating to any particular condition of service,

(b)the opportunity to receive training, or

(c)the opportunity to secure any permanent position in the establishment.

(3) The right conferred by paragraph (1) applies only if—

(a)the treatment is on the ground that the employee is a fixed-term employee, and

(b)the treatment is not justified on objective grounds.

(4) Paragraph (3)(b) is subject to regulation 4.

(5) In determining whether a fixed-term employee has been treated less favourably than a comparable permanent employee, the pro rata principle shall be applied unless it is inappropriate.

(6)-(7)…[omitted]

143. Unlike discrimination claims under the EA, FTE claims cannot be based on a comparison with a “hypothetical comparator” sharing the same material circumstances. For a claim to succeed, an actual comparable employee, who fits within the definition given in Reg 2 must be identified. Important assistance in determining whether employees are properly comparable can be obtained from the House of Lords decision in **Matthews v Kent and Medway Towns Fire Authority 2006 ICR 365 HL** which dealt with similar provisions contained in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The broad principles established in that case include the following:

143.1 Similarities and differences in the two roles must be looked at as a whole.

143.2 The extent to which the work performed is “exactly the same” will be relevant.

143.3 If the core activity is the same, then time spent by full timers (and, by analogy, by permanent employees) additional ancillary tasks is less relevant.

143.4 Differences in qualification, skills and experience are only relevant insofar as they determine or affect the work actually carried out.

144. As in a discrimination case, a "detriment" occurs when a reasonable worker would or might take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work.

145. The court of appeal case of **Webley v Department for Work and Pensions 2005 ICR 577**, relied on by the respondent, establishes the principle that non-renewal of a fixed-term contract does not, of itself, amount to less favourable treatment. However, selection for redundancy on the basis of fixed-term status would be a detriment, subject to justification.

146. Turning to objective justification, there is a specific type of objective justification available under Regulation 4 in cases where the less favourable treatment relates to a contractual claim. That is not relevant in this case. The relevant test here is a broader (undefined) test of objective justification. This is not expressed in the same way as the familiar test used in the EA in relation to age discrimination and discrimination arising from disability, but similar factors will fall to be considered.

147. In particular, it is relevant to note that the mere fact that fixed-term work is temporary in nature will not amount to objective justification for a difference in treatment. However, a legitimate difference in expectations of permanency between a permanent and fixed-term worker can contribute to such justification. See **Montero Mateos v Agencia Madrilena de Atencion Social de la Consejeria de Politicas Sociales y Familia del la Comunidad Autonoma de Madrid 2019 ICR 63, ECJ** and **Grupo Norte Facility SA v Moreira Gomez 2018 IRLR 970, ECJ**.

148. For completeness, these has been a considerable amount of discussion in this case about whether Mrs Law should have been made permanent at the time when her contract was renewed in summer 2019 and/or when she attained 4 years of continuous service. Regulation 9 provides the mechanism through which an employee can apply to a Tribunal to seek to establish their permanent status. However, such an application can only be made where the employee in in employment at the time of making it (Reg 9(6)(b)).

Submissions

149. The parties' submissions on this part of the case were relatively simple without detailed argument. The respondent submitted that Mrs Law was the only person employed in her role and there were no relevant comparable employees. To the extent that there were any comparable employees, the treatment was justified.

150. Mrs Law's submissions focused on the late-disclosed emails and the confirmation, in her view, that she had been dismissed "purely" because she was a fixed-term employee.

Discussion and conclusions

151. We dealt with the issues identified in relation to this part of the claim compendiously, in two groups, as set out below.

3.1 Did the respondent treat the claimant less favourably than a comparable permanent employee because of her fixed term status by:

3.1.1 Applying a different redundancy process to her.
3.1.2 Not making her role permanent.

3.2 If so, is there any objective justification for the less favourable treatment alleged namely that the claimant's role was externally funded.

3.3 The comparators relied upon by the claimant are:-

3.3.1 Nigel Smith STEM CoOrdinator.

3.3.2 SNROS Academic staff who went through a redundancy process in August/September 2020.

152. At the start of the hearing, Mrs Law confirmed that she was particularly relying on Darryl Smith (the lecturer allegedly moved to cover the zoology work) in relation to 3.3.2.

153. We considered it appropriate to begin with the question of comparability. It was not helpful that the respondent did not seem to have addressed its mind to the particular test in relation to the FTE regulations in preparing its evidence. There was little evidence about the work of Nigel Smith presented by the respondent's witnesses, although relevant contractual documentation had been included in the bundle. Mrs Law did address the point in her evidence, although we consider that she would have a limited perspective on Mr Smiths' overall work and role. Doing our best with the evidence presented, we consider that Nigel Smith's role was not comparable within the terms of Regulation 2. Although both Mrs Law and Mr Smith were working on the STEM Outreach project, they took responsibility for different aspects of it, including different partnerships and different events. We also consider it is relevant that Mr Smith was employed at a higher grade than Mrs Laws. Mrs Law's work was, to some extent, focused around her career path as an early-career academic, including the facilitation of her obtaining her teaching qualification and the lecturing work this entailed. Nigel Smith was an established academic whose work would therefore have a different focus.

154. Turning to Darryl Smith, he was employed in a "standard" academic role as a lecturer. He worked on environmental modelling within SNROS before being redeployed in part, as we have found, to cover the zoology shortfall. Mrs Law accepted very frankly that her own role was not a "standard" academic role and we have little difficulty in concluding that these roles were not comparable roles for the purpose of the regulations.

155. The fact that Mrs Law's role was, effectively, a unique role, creates a stumbling block to her pursuing a claim under these Regulations. As she fails on the comparability point, the claim must fail.

156. In case we are wrong, however, we have briefly considered the further points as set out in the List of Issues. We accept that the respondent applied a different redundancy process to Mrs Law than to Nigel Smith when the JFF funded contracts were coming to an end for both of them. Mr Smith was not subjected to any 'redundancy' process at all, he was simply moved back to his previous, and substantive, role as a senior lecturer within SNROS. We accept that this amounted to less favourable treatment of Mrs Law, who was placed under the HR13 process and, ultimately, dismissed. However, we are satisfied that the reason that Mr Smith was treated in the way he was was due to him having a substantive role which pre-dated the JFF-funded role. A permanent employee without such a pre-existing substantive role might well have been subjected to a different redundancy process than Mrs Law, as the HR13 process expressly applied to fixed-term staff only. But to consider that is to move into the realm of hypothetical speculation which these Regulations do not permit. Finally on this point, we consider that applying a different redundancy process to Nigel Smith in these circumstances would be objectively justified as it is legitimate, and in the interests of good employment relations, for employers to be able to encourage permanent staff to accept 'secondment' to important externally-funded roles which may be less secure by giving them the right to return to their substantive posts in due course.

157. The issue identified at point 3.1.2 was the complaint of "not making her role permanent". We struggle a little with how this can properly be described as less favourable treatment on the grounds of FTE status as, by definition, if Mrs Law had been made permanent she would no longer have that status. In line with **Webley** we do not consider that a proper argument can be made for this as an instance of less favourable treatment, even aside from the difficulties in identifying a comparator.

3.4 Did the claimant request a written statement giving particulars as to why she had not received a PPDR and had received a different redundancy process and had not been deemed permanent after four years in accordance with Regulation 5(1) of the Regulations on 29 July 2020 and if so, did the respondent omit to provide that written statement.

3.5 Did the respondent objectively justify the reasons for retaining the claimant as a fixed term employee and not a permanent employee namely that she was engaged to carry out different roles during her employment and the most recent role prior to the termination of her employment was subject to external funding.

158. We did not resolve these issues as we considered that they were relevant to a claim under Reg 9 which we did not have jurisdiction to determine. If Mrs Law had brought a claim to the Tribunal for a declaration that she was, indeed, a permanent employee shortly after her contract renewal there would have been legitimate arguments in both directions for dismissing or upholding that claim. It is not necessary for the purposes of

determining this claim to establish which side had the better argument. We do repeat the comments made in our findings of fact that we find it extremely surprising that the University HR department would purport to have reached a conclusion that there was justification for withholding permanent status without consulting the individual involved, or their managers, and without documenting that decision in any way. We trust from what Mrs Knox-Davis has said that that process will now be reviewed.

Conclusion

159. It is therefore our conclusion that the claimant's claims succeed in part, as identified in the summary at the start of this document and as explained in the reasons above.

160. A remedy hearing will be held on **28 June 2022**. The Tribunal will write to the parties separately about arrangements for this hearing.

Employment Judge Dunlop

Date: 19 April 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date:20 April 2022

....
FOR EMPLOYMENT TRIBUNALS

List of Issues

Unfair Dismissal

1.1 It is accepted that the respondent dismissed the claimant.

1.2 When dismissing the claimant did the respondent have a potentially fair reason for dismissal namely redundancy or some other substantial reason under Section 98(1) and 98(2) ERA 1996.

1.2.1 Was there a redundancy situation.
1.2.2 Which aspects of the claimant's work was ceasing and diminishing.
1.2.3 Was redundancy the real reason for the dismissal.
1.2.4 Was there a re-organisation carried out in the interests of economy and efficiency which constitutes some other substantial reason for dismissal.

1.3 Did the respondent act reasonably in treating this as a sufficient reason for dismissing the claimant in accordance with the equality and substantial merits of the case under Section 94(4) ERA 1996.

1.3.1 Was there a selection pool.

1.3.2 Was the claimant selected for redundancy because of her fixed term status and/or because she was pregnant.

1.3.3 Did the circumstances of the redundancy apply equally to another employee in the same undertaking who held a position similar to that of the claimant and who has not been dismissed namely Nigel Smith STEM CoOrdinator.

1.3.4 Were selection criteria identified which were objective and fairly applied.

1.3.5 Was there a consultation with the claimant.

1.3.6 Was the outcome of the redundancy situation pre-determined.

1.3.7 Were reasonable efforts made to seek to obtain alternative employment for the claimant.

1.4 If the Tribunal finds that the respondent did not follow a fair procedure in dismissing the claimant in accordance with Polkey -v- A E Dayton Services Limited [1987] ICR 142 would the claimant have been dismissed in any event.

1.5 Did the respondent fail to provide the claimant with a written statement of the reasons for her dismissal.

2 Discrimination on the grounds of pregnancy or maternity

2.1 Did the respondent discriminate against the claimant because of her pregnancy by dismissing her because of redundancy.

2.2 Did the respondent discriminate against, cause detriment to or treat the claimant unfavourably because of her pregnancy by

2.2.1 Miss Lowthian's alleged statement to the claimant at the meeting on 29 May 2020 set out in paragraph 12 of the particulars of claim.

2.2.2 Miss Lowthian's alleged statement to the claimant on 4 June 2020 set out in paragraph 18 of the particulars of claim.

2.2.3 Mr Chesser's alleged remarks at the appeal hearing on 9 July 2020 set out at paragraph 24 of the particulars of claim.

2.2.4 Mr Chesser's alleged failure to conduct an adequate investigation into the claimant's appeal against dismissal.

2.2.5 Failing to seek or consider alternatives to redundancy.

2.2.6 Pre-determining the outcome of the redundancy consultation.

2.2.7 Mr Chesser's alleged failure to conduct an adequate investigation into the claimant's appeal against dismissal.

2.2.8 Mr Chesser's failure to address in his reasoning the issues raised in the appeal.

2.2.9 Mr Chesser's alleged predetermination of the outcome of the appeal hearing.

2.2.10 Failing to respond to and/or address the grievance raised by the claimant.

3 Breach of the fixed – term employees (Prevention of Less Favourable Treatment) Regulations 2002

3.1 Did the respondent treat the claimant less favourably than a comparable permanent employee because of her fixed term status by:

3.1.1 Applying a different redundancy process to her.
3.1.2 Not making her role permanent.

3.2 If so, is there any objective justification for the less favourable treatment alleged namely that the claimant's role was externally funded.

3.3 The comparators relied upon by the claimant are:-

3.3.1 Nigel Smith STEM CoOrdinator.

3.3.2 SNROS Academic staff who went through a redundancy process in August/September 2020.

3.4 Did the claimant request a written statement giving particulars as to why she had not received a PPDR and had received a different redundancy process and had not been deemed permanent after four years in accordance with Regulation 5(1) of the Regulations on 29 July 2020 and if so, did the respondent omit to provide that written statement.

3.5 Did the respondent objectively justify the reasons for retaining the claimant as a fixed term employee and not a permanent employee namely that she was engaged to carry out different roles during her employment and the most recent role prior to the termination of her employment was subject to external funding.