EMPLOYMENT TRIBUNALS

Claimant: Mrs Caroline Law

Respondent: The University of Cumbria

Heard at: Manchester Employment Tribunal **On:** 28 June 2022

Before: Employment Judge Dunlop
Mr TD Wilson
Mr J Murdie

Representation

Claimant: In person
Respondent: Ms Steed, solicitor

JUDGMENT

1. The respondent's application to introduce new evidence relating to the issue of what, if any, "Polkey" reduction should be made to the claimant's compensation is refused.

2. A reduction of 35% will be made in respect of the financial losses which flow from the claimant's dismissal (which the Tribunal has, in a previous Judgment, found to be discriminatory and unfair). This reduction reflects the probability, as assessed by the Tribunal, of the claimant being dismissed in any event as a result of this redundancy process, absent the unfairness and discrimination identified in the earlier Judgment.

3. A further Remedy Hearing will be held on 13 September 2022 to quantify the financial losses suffered by the claimant and to set a date for a third Remedy Hearing, where the claimant's non-financial losses will be considered with the benefit of expert evidence.

REASONS

Introduction

1. This Judgment should be read alongside the Tribunal's Reserved Judgment on liability, sent to the parties on 20 April 2022 which sets out the background to this case.

2. In the briefest of terms, Mrs Law is an academic who was employed by the respondent University under a series of fixed term contracts. She was dismissed on the expiry of the last fixed-term contract on 31 July 2020, whilst she was pregnant. She succeeded in her claim of unfair dismissal and also succeeded in establishing that her dismissal was an act of discrimination on grounds of pregnancy. She also succeeded in establishing that certain other acts of the University amounted to discrimination on the same ground. Various other claims, including claims arising from her status as a fixed-term worker, were unsuccessful.

Today's Hearing

3. At the conclusion of the liability hearing, the Employment Judge informed the parties that there would be a reserved decision. A provisional date for a remedy hearing was set for 28 June 2022. There was, at that stage, a degree of uncertainty about what would be determined in the remedy hearing, which came about in the following circumstances.

4. Mrs Law sadly suffered from pre-eclampsia which meant that she was hospitalised during part of pregnancy. She considers that the stress caused by the respondent's treatment of her was causative of that illness and wishes to claim damages in respect of personal injury caused by discrimination (a remedy which was expressly sought in her original pleadings).

5. The parties recognised that expert medical evidence would be necessary on the issue of the causal connection between the "stress" caused by discrimination and the pregnancy-related illness suffered by Mrs Law, and that such evidence would take time to obtain. Mrs Law indicated that she was unsure if she would, ultimately, wish to pursue the point and both sides agreed that it was undesirable to embark on obtaining such expert evidence pending the Tribunal's reserved judgment on liability.

6. In those circumstances, we discussed the possibility of a split remedy hearing, with the issue of financial loss being dealt with at an initial stage, and appropriate case management orders being made to progress the preparation of the case on compensation for personal injury damages. This envisaged a second remedy hearing which would deal with injury to feelings and personal injury damages (since those are matters which may overlap) as well as any other non-financial loss elements of the award (e.g. aggravated damages). Alternatively, if (as she suggested she might) Mrs Law decided not to pursue the personal injury aspect of the claim, it was hoped that all matters could be dealt with at one remedy hearing.

7. Directions were given for Mrs Law to confirm, following receipt of the Judgment whether she did wish to pursue the personal injury part of the claim. By email dated 17 May 2022, she duly confirmed that she did. This hearing, therefore, proceeded on the basis that we would consider the financial loss elements only. In deciding to proceed in this way, we have regard to the fact that the claimant remains in a precarious financial position. We consider that it is not in the interests of justice for there to be a delay in her accessing compensation which she is entitled to merely because one

head of damage is legally complex and it is right that the parties are given time to obtain the necessary expert evidence to determine it.

The Polkey issue and the respondent's application

8. This case is, at its heart, a redundancy case. In common with virtually all unsuccessful respondents in such cases, it is the position of this respondent that the claimant would in all probability have been made redundant if a fair/non-discriminatory process had been followed. Employment Tribunals routinely hear such arguments and very often adjust the compensation payable to claimants to reflect accordingly, either by applying a 'cut off point' following which the Tribunal is satisfied the claimant would have been dismissed in any event, or, where it is not possible to make such a definitive judgment, by applying a percentage reduction to reflect what the Tribunal judges to be the probability that the claimant would have been dismissed in any event.

9. This practice arises in accordance with the statutory provision that a compensatory award in an unfair dismissal claim shall be "such amount as the Tribunal considers just and equitable" (s.123(1) Employment Rights Act 1996). The case which established the proper interpretation of the legislation on this point is the landmark House of Lords judgment in **Polkey v AE Dayton Services Ltd [1988] ICR 142** and, for that reason, it is commonly referred to as the "Polkey principle", with a reduction made on this basis being referred to as a "Polkey reduction". Although the **Polkey** case itself dealt with unfair dismissal law, it is now well established that the principle can also be applied to reduce compensation (where appropriate) in cases of discriminatory dismissal (see **Abbey National plc v Chaggar, CA, [2010] ICR 397**).

10. In most such cases, the Tribunal will reach a decision on whether it is appropriate to make such a reduction, and the level of the reduction, at the stage of determining liability. This is because the relevant evidence will overlap to a significant degree, if not entirely, with the evidence relevant to liability, and will therefore already have been heard before the Tribunal gives its liability Judgment. In contrast, evidence about the claimant's attempts to mitigate loss, or about personal injury/injury to feelings, is often not heard at the liability stage, and will be adduced only if the claimant is successful.

11. The case management orders in this case provided that there should be a separate remedy hearing. In particular, at paragraph 13 of the case management summary prepared by Employment Judge Warren and sent to the parties on 31 March 2021, it is stated:

    "The clamant has supplied the respondent with a Schedule of Loss. There may well be issues with regard to her pension, this it has been agreed will be dealt with, along with any personal injury compensation, at the remedy hearing if appropriate."

12. A List of Issues was appended to the same Case Management Order. The question of a Polkey reduction (in relation to the unfair dismissal claim) is identified at point 1.4 in the List of Issues. No other 'remedy' issues are identified. The Tribunal are of the view that the case management orders strongly imply that the matter will be dealt with in the conventional way i.e.

that the Polkey issue will be determined as part of the liability phase of the hearing, with the more readily divisible remedy issues put to one side pending the determination of liability.

13. At the start of the hearing, the Employment Judge confirmed with the parties that the List of Issues was accurate, which they agreed it was. At the start of Mrs Law's evidence (she was the first witness) it was confirmed that there would be no cross examination on "remedy issues" as these would be dealt with at a remedy hearing if necessary. It does not appear that there was any express discussion about whether the Polkey issue would form part of the liability hearing or the remedy hearing.

14. The Presidential Guidance on Case Management issued by the (then) President of the Employment Tribunal in England and Wales in January 2018 says the following about submissions on Polkey (emphasis added):

> **Submissions on Polkey and contributory fault**
>
> **16. In an unfair dismissal claim, if an employee has been dismissed, but the employer has not followed a proper procedure (such as the ACAS Code), the Tribunal will follow the guidance in the case of Polkey v AE Dayton Services Limited and subsequent cases. The Tribunal will consider whether, if a fair procedure had been followed, the claimant might still have been fairly dismissed, either at all, or at some later time. This question is often referred to as the "Polkey" question or deduction.**
>
> **17. There are also cases where the dismissal may be procedurally unfair, but the employee's own conduct has contributed to the position they now find themselves in. This is called "contributory conduct".**
>
> **18. Where either or both of these are relevant, the Tribunal will reduce the compensation awarded by an appropriate percentage in each case. This means that there may be two reductions, which, where there has been really serious misconduct, could be as high as 100%, so that nothing would be payable.**
>
> **19. Generally the Tribunal will decide these issues at the same time as it reaches its decision on the merits of the claim. Sometimes this will be done at a separate remedy hearing. The Tribunal will usually explain at the start of the hearing which of those options it will follow. If it does not, then the parties should ask for clarification of when they are expected to give evidence and to make submissions on these matters.**

15. As stated above, the notes suggest that the Tribunal omitted to expressly address this point during the 'housekeeping' phase of the liability hearing. Ms Steed, as she acknowledges, also omitted to raise it.

16. Against this backdrop, at the conclusion of the case, the Panel anticipated hearing submissions on the Polkey issue as part of the submissions on liability. At the close of the respondent's submissions, and given that nothing specific had been volunteered on this point, the Employment Judge raised the issue with the parties and invited any further submissions from the respondent to cover the point. Ms Steed, for the respondent, noted that it was difficult to make submissions which were contingent on the Tribunal's findings on liability. That was a fair point, as this was a relatively complex case with numerous complaints. There was scope for the claimant to succeed in a variety of ways, which would have implications for the basis on which any Polkey argument could be put. In those circumstances, the Employment Judge suggested that the Tribunal could refrain from making

any decision on Polkey, and that the issue could be revisited (if necessary) with further submissions at the remedy hearing, when the parties would have the benefit of the reasons given as part of the Reserved Judgment. For the avoidance of doubt, the Employment Judge stated her expectation that any such submissions would be made on the basis of the evidence heard at the liability stage, along with the findings of the Tribunal in the Liability Judgment, and would not represent an opportunity for the parties to lead new evidence in order to have a "second bite of the cherry". The parties accepted this proposal, which was confirmed in a letter from the Tribunal accompanying the Judgement, which dealt with various matters relating to case management of the remedy part of the case.

17. However, by letter dated 10 June 2022 the respondent made a detailed application to be permitted to adduce new evidence in relation to the Polkey point at today's hearing. By a letter dated 13 June 2022 the claimant set out her objection to that application, again going into some detail. Unfortunately, probably due to an error in the case number in the email subject line, those letters were not referred to the Employment Judge until the Friday before this hearing was due to take place. The parties were informed that the application would be dealt with at the outset of the hearing.

18. In the meantime, the respondent produced a Remedy Hearing bundle, in accordance with the case management orders. The bundle included a supplemental witness statement from Mrs Knox-Davies, who had given evidence at a liability hearing. That statement was split into sections headed 'Dismissal Process' 'Financial Loss' 'Injury to Feelings' and 'ACAS Uplift'. The final three sections were in line with the evidence that the Tribunal expected the respondent to produce for the remedy stage of the proceedings, albeit that we were not in a position to deal with all of those issues today. The 'Dismissal Process' section could be said to stray into the area of providing new evidence for the purposes of the respondent's case on the Polkey issue. However, the substance of this section was either a reiteration of evidence given at the Liability hearing or a commentary on the Liability Judgment. In this respect, the document was more in the nature of submissions on Polkey than new evidence on the point. The bundle also contained a supplemental witness statement from Mrs Law, covering similar ground. Although she gave material evidence about her financial circumstances post-dismissal, it is also the case that this document contained submissions alongside evidence.

19. The bundle also included, as its final section, a witness statement from Dr Helen Manns and one from Mr David Chesser, along with a small number of accompanying documents referred to in those statements. Neither of these individuals gave evidence at the liability hearing. Both now sought to give evidence about the dismissal process and about what might have happened if the process had been conducted differently, taking account of the tribunal's criticisms. This comprised the additional evidence which the respondent wanted to introduce.

20. The panel heard the application at the outset of the hearing. Both parties took time to put forward detailed submissions, essentially amplifying the points made in their respective letters. Neither side referred to any legal authorities. The unanimous decision of the panel was to exclude the new

evidence in the final section of the bundle and not to permit the witnesses to be called. Reasons for this were given orally to the parties. At the conclusion of the hearing Ms Steed requested written reasons for our decision in respect of the application, as well as for our decision in relation to the Polkey reduction itself. These are set out here, which is why the Judgment deals with this application at length.

21. In reaching the decision below we did take some account of the relevant passages in the supplemental witness statements of Mrs Law and Mrs Knox-Davies, albeit that there had been no cross-examination on those statements (the focus of the application being on the new evidence from Dr Manns and Mr Chesser). Those statements conveniently summarised the respective positions of the parties and, so far as they did contain evidence relevant to the Polkey issue, it was opinion evidence. The same points could all have been properly made by way of submissions at the conclusion of the liability hearing.

Framework for the decision on evidence

22. Although not formally termed as such, the Employment Judge considers that the comments at the end of the liability hearing, stating that the Tribunal would hear submissions on the Polkey issue at the Remedy Hearing but would not hear new evidence, are properly viewed as a case management order precluding the admission of new evidence.

23. Rule 41 Employment Tribunal Rules of Procedure 2013 provides that the Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles in the overriding objective.

24. Rule 29 states as follows:

> **"…A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular were party affected by the earlier order did not have a reasonable opportunity to make representations before it was made."**

25. Although the test "necessary in the interests of justice" would appear to be a broad one, the power to set aside or otherwise vary case management orders is to be used sparingly. This principle has been firmly established in numerous decisions of the higher courts particularly **Serco Ltd v Wells EAT 2016 ICR 768**. In giving judgment in that case, HHJ Hand pointed out that the Tribunal rules were drafted with regard to the principle that it is desirable for there to be finality and certainty when judicial orders are made, meaning that challenges to an order should normally be pursued via an appeal. In view of this, the phrase "necessary in the interests of justice" should be interpreted narrowly in these circumstances. A material change of circumstances, or the fact that the order was based on a misstatement, might be situations in which variation or setting aside the order may be appropriate.

26. We also had regard to the recent EAT decision in **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis 2022 EAT 9** and the commentary contained therein on **Serco**. That decision emphasises the importance of finality in litigation and parties having reassurance that case

management orders will not be overturned without good reason. Generally, again, this will involve a change of circumstance which affects the underlying basis for the original decision.

Discussion and conclusion in respect of new evidence

27. Although the case management order in question was made at a hearing with both parties present, Ms Steed's position was that she did not have a sufficient opportunity to consider her position and object, as she was caught "on the backfoot" and the proposal was presented as a decision that had already been taken, rather than an issue on which submissions were invited. To some extent, that is a reasonable comment, but that must be set against the background where the Tribunal had been expecting submissions on the Polkey issue but, in view of the complexity, were prepared to allow both parties the concession of delivering those submissions after they had received the Judgment.

28. We do not accept (and did not understand Ms Steed to be suggesting) that there was any genuine confusion about what was to be determined at the liability hearing. We are satisfied that the respondent expected the Polkey point to be determined as part of the liability judgment, in line with convention and the list of issues produced by EJ Warren. It follows that the respondent knew that any evidence relevant to Polkey issues ought to have been produced in advance of that hearing. If the respondent had been proceeding on any other basis, then we are sure that the point would have been raised by Ms Steed at the outset of the hearing (as advised in the Presidential Guidance) and/or when the Employment Judge gave the indication that new evidence would not be admitted when agreeing to delay submissions on the Polkey issue to the remedy hearing.

29. Many of Mrs Law's points in her objection might be characterised as **Serco** points – the ET had a made a decision, repeated it in the case management letter, and the respondent should not be permitted to go behind that at a later point. There is strength in those points for all the reasons identified in **Serco** and the associated body of case law around finality of decisions and certainty for parties engaged in litigation.

30. Judging the matter in accordance with **Serco** principles, we would have concluded that there was no material change in circumstances between the point where the Tribunal's original decision was announced and the point where the application to adduce new evidence was made. In the application, the respondent drew attention to an increase in the sums claimed in the claimant's Schedule of Loss, but the sums claimed were already very substantial and the change related primarily to a quantification of pension loss which the respondent had known was in issue but which had previously been unquantified. The other matters the respondent drew attention to were matters arising from the evidence given in the claimant's statement prepared for the liability hearing. They were therefore matters that were already known by the respondent at the outset of the liability hearing.

31. Having said that, the panel were mindful of the fact that the Employment Judge's comments had not been presented as a formal case management order and that the parties (respondent in particular) had not been expressly

invited to make submissions as to whether new evidence should be permitted. In those circumstances, we determined it was appropriate to consider the matter afresh, with the wider discretion available under Rule 29 where a party has not had a reasonable opportunity to make submissions before the order in question was made.

32. In order to do so, and to balance the interests of the parties in considering whether the interests of justice required the admission of the new evidence, we read the two statements put forward. This was with the agreement of Mrs Law, who wanted to argue that the evidence in the statements covered ground which had already been covered in the Tribunal's liability decision, and was effectively targeted at undermining that decision.

33. We noted that the two witnesses were both individuals who had featured in the evidence on liability but had not given evidence at the liability hearing. In respect of Dr Manns, this was because the respondent appears to have decided that direct evidence about the budgeting and staffing constraints within SNROS (the department within which Mrs Laws worked) were not relevant. In respect of Mr Chesser, this was because he was unavailable as he was travelling to Australia. We also noted that the evidence that they now wished to give would have been relevant to the liability decision, as well as to the remedy decision.

34. The respondent submitted that, in effect, it had been wrong-footed by late exchange of witness statements and the fact that the claimant's evidence raised certain issues about the redundancy that they had had insufficient time to deal with in the short period before the liability hearing. We did not consider this to be a strong argument as it is usual in redundancy cases for questions around budgets, selection and alternative employment to feature strongly. If the claimant's evidence was genuinely new and unexpected, then an application to adduce late evidence at the liability stage (if necessary accompanied by a postponement application) could have been made, but it was not.

35. In the view of the Tribunal, this case provides a good illustration of why Polkey points are, as a matter of convention, dealt with at the liability stage of proceedings rather than at the remedy stage. It would have been relevant, and, indeed useful, to have evidence from Dr Manns and Mr Chesser at the liability hearing. Having that evidence might well have resulted in a different judgment, whether in major respects or merely minor ones. To introduce it now presents a practical difficulty – the claimant would have to be given the opportunity to cross-examine on it and potentially to introduce her own evidence in rebuttal. This would result in a mini-trial of many of the same issues that we have already reached conclusions on in the substantive hearing. Aside from the purely practical issues, this prospect gives rise to the more grave danger that the Tribunal may be led into making conflicting decisions at liability and remedy stage.

36. We also see force in Mrs Law's submissions that the respondent has been able to 'craft' this evidence with regard to the criticisms made by the Tribunal in the Liability Judgement. There is obviously a strong incentive for the respondent to now attempt to minimise the financial impact of the Judgment, and we do not consider that evidence obtained in these circumstances is as

helpful or reliable as evidence presented at an earlier stage of the litigation in line with usual practice.

37. The thrust of Mrs Law's submissions was that the respondent should not be given the opportunity to try to make good the deficiencies that had been found in their case at the liability stage. Whilst we recognise that this case is a high-value one (and that it would therefore not necessarily be disproportionate to take the time to introduce new evidence and enable cross-examination to take place) we agree with Mrs Law that it is not in the interests of justice to allow any respondent to attempt to re-litigate (even in part) a liability decision by introducing new evidence which could properly have been introduced at that earlier point.

38. Having read the statements, we were satisfied that the new evidence which the respondent sought to admit was evidence which would have been available to the respondent in preparing for the liability hearing, had it chosen to introduce it (subject to the point about Mr Chesser's availability, which would not have prevented a statement from being prepared and exchanged). If the respondent had been relying on any 'new facts' (e.g. that a supervening funding loss meant that an entire campus had been closed a few months after the claimant was made redundant) then it is likely that we would have taken a very different view of what the interests of justice required. In this case, however, there is no such argument being advanced by the respondent.

39. Overall, for all the reasons set out above, we were satisfied that it was appropriate to refuse the respondent's application and exclude the new evidence.

The decision on Polkey reduction

40. Having made the determination to exclude the new evidence, we then heard submissions from both parties as to what reduction, if any, should be applied.

Legal Principles

41. The basic principles under which the Tribunal will make reductions to awards is set out in paragraphs 8-9 above.

42. The first question is whether it is appropriate to make any reduction at all on the circumstances of this case. In **King and ors v Eaton Ltd (No.2) 1998 IRLR 686, Ct Sess (Inner House)**, Lord Prosser stated:

> **'…the matter will be one of impression and judgement, so that a tribunal will have to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure makes no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.'**

43. There may be cases where the dismissal process is so undermined by unfairness that it is not appropriate to embark on speculation as to whether the claimant might have been dismissed in any event. This may include, for example, cases where a purported redundancy has been shown to be a sham.

44. Important guidance on approaching the question of an appropriate reduction (and compensation more generally) is found in **Software 2000 Ltd v Andrews [2007] ICR 825**. (It is recognised that the **Andrews** decision reflects the short-lived statutory disciplinary and grievance procedures then in force, and those references must be set aside by Tribunals using the authority to guide their decisions today). We considered that case as a whole, and in particular the guidance summarised at paragraph 54, which is not set out here in the interests of brevity.

45. We bear in mind that in making an assessment, we must consider what *this* employer would have done (absent the unfairness and discrimination we have found) and not what a hypothetical fair employer might have done (see **Hill v Governing Body of Great Tey Primary Schooll [2013] ICR 691, EAT**).

46. Where an employee might have continued in an alternative role at a lower wage, it is the income from that alternative role which should be used as the basis from which to assess financial loss (**Red Bank Manufacturing Co Ltd v Meadows [1992] ICR 204, EAT**).

Submissions

47. Ms Steed contended for a high reduction, pitching the appropriate figure as being 80% in the counter-schedule of loss which the respondent had helpfully prepared.

48. Ms Steed outlined legal principles, relying on the cases of **Ventrac Sheet Metals Ltd v Fairley EATS/0064/10** and **Contract bottling Ltd v Cave EAT, [2015] ICR 146** and well as the **Andrews** decision mentioned above. We have read those authorities and have taken into account the principles set out within them. In particular, Ms Steed emphasised (relying on **Ventrac**) that the severity of the respondent's default, or any desire to punish the respondent, are not appropriate factors in the assessment of financial loss. We fully accept that submission.

49. Ms Steed emphasised that there was little realistic chance that the claimant would have been kept on her current role, as the respondent had chosen not to fund continued outreach work in SNROS. Further, that role had been found by the Tribunal to be genuinely redundant (see paragraphs 82-84 Liability Judgment). The two realistic possibilities that the Tribunal therefore had to consider were that she could have been offered a teaching role, or that she would have applied for (and succeeded in obtaining) one of two non-academic roles within IBIL referred to at paragraphs 56 and 99 of the Liability Decision.

50. In respect of the potential teaching role, Ms Steed emphasised that no such role was approved until February 2021, long after the claimant's employment had terminated. She was not a member of teaching staff and SNROS were entitled to cover this work by deploying teaching staff to do it in the intervening period. The restrictions on the SNROS budget were stressed (albeit that Ms Steed confined herself to referring to the limited evidence about this which formed part of the liability hearing, rather than the

fuller evidence that had been excluded by the Tribunal). Even it had been advertised, it was not a given that the claimant would have been appointed. The role was only able to be advertised in February because another lecturer left. It would not have been appropriate to 'bump' other candidates with substantive lecturing roles to give the claimant this work.

51. In respect of the IBIL roles, Ms Steed empasised that Mrs Law had been notified of them but had chosen not to apply, and pointed out that they would have represented a step back from Mrs Law's expressed wish to move towards an academic career path. Further, it was noted in the counter-schedule that redeployment into this position would have been financially disadvantageous as it was at a lower grade. Although the claimant's pay would be protected for two years, she would have a less valuable pension entitlement.

52. In her submissions Mrs Law emphasised that the Tribunal needed to focus on what the position would have been absent any (legally) unfair or discriminatory conduct. Her position was that there should be no reduction at all, because if there had been a full and open-minded consultation it would inevitably have resulted in a solution to the problem being found and some alternative role being agreed. This was likely to be based around zoology teaching, but she pointed out that outreach work could also be part of a lecturer's role, and that there may have been some scope for continuing with some of her previous work on this basis.

53. The starting point for this submission was the claimant's own firm aim to remain with the university given that she was shortly to become a mother, had strong personal incentives to remain in the local area, had a strong desire to continue an academic career and was working at the only university within the vicinity. Allied to this was the evidence that the respondent had, pre-pregnancy, considered the employment relationship to be a long-term one and had encouraged and invested in the claimant in ways going far beyond what might be expected for an employee on a fixed term contract (albeit one which had been renewed/extended over several years). (Reference is made to the findings of the Tribunal at paragraphs 14 and 133.1-133.3).

54. Mrs Law reminded the Tribunal of the evidence she had given at the liability hearing, contending that retaining her would have had a minimal financial impact, as the respondent could have chosen not to backfill the post when she went on maternity leave. That could have meant, for example, that the staff used to cover the zoology teaching could still have been deployed to provide that cover during the maternity leave period. She also made reference to her willingness to take unpaid leave to bridge any gap between the funding for her previous role coming to an end and any new role commencing. We accept that Mrs Law was committed to retaining a role at the university and would have offered a high level of flexibility in order to do so.

55. Mrs Law drew attention to emails within the bundle which, she submitted, showed that the Zoology vacancy had existed throughout this time, but recruitment to it had not been undertaken in order to (artificially, in her

submission) balance the budget. She emphasised the reasons why she would have been a strong candidate.

56. In relation to the IBIL roles, Mrs Law submitted that her decision not to apply for those roles must be considered against the backdrop of the discriminatory treatment which the Tribunal had found she had already been subjected to at that point. If the university had dealt with the redundancy process in a fair, non-discriminatory way, then she would have been very open to putting herself forward for one of those roles. Her previous non-academic roles within the University meant that she was well-placed to be appointed. If she had been in-post in one of these roles, she would have been able to apply for the zoology role which was then advertised the following February.

Discussion and conclusions

57. We first considered whether this was a case in which it was appropriate to make no reduction at all, as Mrs Law argued should be the case.

58. Notwithstanding our serious concerns about the dismissal process (including, in particular, the elements we have found to be discriminatory) we rejected this argument.

59. We recognise that the funding for Mrs Law's existing role had come to an end, and that there was pressure on resources which meant that the respondent had taken a business decision not to fund the outreach work she had been doing from its own resources. As stated in the Liability Judgment, we found that that decision was not a sham and, whilst we understand why Mrs Law disagreed with it, it was therefore not a decision we are entitled to go behind.

60. Taking that as a starting point, and having regard to the wealth of authorities which caution against shying away from making an assessment where there is some cause to find that the employment may not have continued, we consider that we are obliged to embark on an assessment of the prospects of Mrs Law's employment surviving the redundancy of her previous role. This remains the case notwithstanding that the exercise will inevitably involve some degree of uncertainty and speculation.

61. This is not a case where it is appropriate to consider the time that would be taken for a fair procedure to be followed. The respondent had sufficient time to conduct a fair procedure and did, in many respects, go through the motions of a consultation process. The claimant's success in this case is based on the substantive deficiencies of that process.

62. We consider that there is a good chance that, absent the unfairness and discrimination found, the claimant would have ended up being appointed to a Grade 7 post, on either a fixed term or permanent basis. We consider this post would predominantly have involved teaching on the Zoology syllabus, but it may also have involved other teaching responsibilities or even a mixture of teaching and Outreach work. We do not consider that we need to embark on a detailed analysis of the components of that role as the key point is that it would have enabled the claimant to continue employment at

Grade 7, maintaining her terms and conditions. Although this would be a different role, her financial losses can be assessed in the same way as if she had continued in her previous role. At the risk of repeating matters already set out in the Liability Judgment, we felt that the following matters were important in reaching this conclusion:

62.1 The high regard in which she had been held before becoming pregnant, the commensurate investment the respondent had made in the claimant, and the assurances given to her about her future;
62.2 The claimant's dedication to her work and to the institution;
62.3 Her employment history, which showed that she had previously been able to move between different fixed-term roles, including being offered a short-term contractual extension whilst funding was finalised;
62.4 The fact that she was requested to assist with Zoology work (both teaching and planning) when the position was vacant, that she had willingly done so, and had been commended for her work;
62.5 The fact that the claimant would have offered flexibility in relation to the detail of her employment, for example by offering to take a short period of unpaid leave prior to her maternity leave;
62.6 The fact that certain other employees were offered alternative work, and vacancies were approved where necessary, notwithstanding the financial pressures facing the respondent.

63. We are not particularly persuaded by the respondent's answer to this, which is essentially that the SNROS budget was tighter than that in other departments and that there was no ability to advertise the Zoology vacancy until February 2021. The respondent in this case is the University, not SNROS and it is the University which has an obligation to consider suitable alternative employment for those which it is making redundant. The respondent's argument ignores one of the key points, which is that the decision to cover the zoology work initially with other staff, and to withhold the role from being approved from recruitment, is one which might well have been different if the respondent had properly consulted with Mrs Law and had not been adversely influenced by her pregnancy. We repeat the point made at paragraph 97 of the Liability Decision, that the formal advertisement of a role could represent the end point of a successful consultation process where an employee and their managers had advocated for a role to be created (as in Mr Mullen's case), rather than a starting point.

64. Broadly, we consider the claimant's appointment to such a post was the most likely outcome of a fair and non-discriminatory redundancy procedure. We recognise that another possibility is that the claimant could have successfully applied for one of the Grade 6 IBIL roles. We consider that there was a realistic chance of that if the respondent had chosen not to offer the role described above, but had acted in a fair and open way during the consultation process so as to avoid the loss of trust and confidence which evidently occurred through this process, and informed the claimant at an

earlier stage about the IBIL roles being 'in the pipeline' and facilitated communication between her and the relevant managers.

65. We considered whether we should calculate the claimant's losses (in due course) by determining separate percentage chances for each of these possibilities. However, we were concerned to avoid applying an artificially precise or scientific approach to something that is, by its nature, a broad-brush calculation. Further, we are unconvinced that there would have been much difference in the claimant's financial losses under either alternative. Although the IBIL roles were at a lower grade, the claimant would have been entitled to pay protection for two years. If Mrs Law had secured one of those roles then we consider that she would almost certainly have gone on to apply for the Zoology role when it was then advertised in February, and that there is a very strong chance she would have succeeded in moving into an academic role at that point. We appreciate that there would be some difference in pension loss due to the Grade 6 positions being subject to a defined contribution rather than a defined benefit scheme. As we consider she would most likely have spent only a short time at Grade 6, it seems to us to be more appropriate to take this eventuality into account within our overall percentage estimate, rather than embarking on over-complicated calculations for different 'slices' of loss based on the chances of securing different roles.

66. Taking into account everything discussed above, we have determined that the appropriate Polkey reduction to apply to the financial loss elements of the award is 35%. This reflects both the possibility that Mrs Law would not have continued in employment at all, and the possibility that she would have materially worse off in an alternative role.

67. The time taken to determine the respondent's application and the Polkey reduction, as well as the complexity of the financial losses claimed by Mrs Law (including pension compensation) meant that we had insufficient time in this hearing to proceed to calculate and determine the financial losses that would be awarded. We have not heard submissions on matters including mitigation of loss and the possibility of external events curtailing the claimant's loss (e.g. whether she may have chosen to move to Scotland and resign her employment to do so), as well as the proper approach to the calculation of loss as set out in the schedule and counter-schedule. The parties will be given full opportunity to cross examine Mrs Law and Mrs Knox-Davies on their respective statements in relation to these matters, as well as to make submissions, at a reconvened Remedy Hearing in due course.

Employment Judge Dunlop

Date: 6 July 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

7 July 2022

FOR EMPLOYMENT TRIBUNALS