Case No: 2300946/2021

EMPLOYMENT TRIBUNALS

Claimant: Ms Shelly McAuley

Respondent: Canterbury Christ Church University

Heard at: London South **On:** 12th – 16th June 2023

Before: Employment Judge Reed, Mr Paul Adkins and Ms Julie Cook

Representation
Claimant: Ms J Callan, Counsel
Respondent: Ms K Shields, Counsel

RESERVED JUDGMENT

1. The complaint of unfair dismissal is well-founded. The Respondent unfairly dismissed the Claimant.

2. The complaint of unfavourable treatment because of something arising in consequence of disability is well-founded and succeeds. The dismissal of the Claimant was such unfavourable treatment.

REASONS

Introduction

1. This is a claim about the Claimant, Ms McAuley, having been dismissal by the Respondent, Canterbury Christ Church University (the University). The University says that it was a fair dismissal, arising from a restructure within the University. Ms McAuley says that it was both an unfair dismissal and also discrimination on grounds of her disability.

Claims and issues

2. Ms McAuley has brought claims for unfair dismissal and discrimination arising from disability. Prior to the hearing the parties had agreed the relevant issues as follows, pA43:

Unfair Dismissal

1. If the Claimant is found to have been dismissed:

a. What was the reason or principal reason for the Claimant's dismissal?

The Respondent's case is that the Claimant was dismissed on grounds of redundancy, in the alternative some other substantial reason namely business reorganisation.

b. Was it a potentially fair reason within the meaning of section 98(1)-(2) ERA?

c. Was dismissal fair and reasonable in all the circumstances and was the sanction of dismissal within the range of reasonable responses open to a reasonable employer in the circumstances?

d. Did the Respondent follow a fair procedure?

The Claimant's case is that the Respondent failed to carry out meaningful consultation in the redundancy process and that the redundancy process did not contain enough information.

e. If the procedure was unfair, would the Claimant have been dismissed in any event, in accordance with Polkey v AE Dayton Services Ltd [1987] ICR 142?

Disability Discrimination

<u>Disability – Section 6 Equality Act 2010</u>

2. Was the claimant a disabled person as defined by s6 of the Equality Act 2010 at the time of any alleged act of discrimination?

The Respondent accepts that she was a disabled person under the Equality Act in respect of her depression and General Anxiety Disorder.

<u>Discrimination arising from disability – Section 15 Equality Act 2010</u>

3. Did the Respondent treat the Claimant unfavourably?

The Claimant alleges her dismissal is the unfavourable act relied on.

4. If yes, was that treatment because of something arising in consequence of the Claimant's disability?

5. The Claimant asserts the 'something arising from' was attendance at work and being fit enough to attend interviews.

6. If yes, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

The Respondent's case is that if (which is not accepted) the Claimant's sickness absence and unfitness to attend selection interviews was an effective cause of the Claimant's dismissal, then dismissal, including the process followed, was a proportionate means of achieving a legitimate aim in any event. The legitimate aim was to carry out a redundancy process in the interests of economy and efficiency, i.e. to address a diminishing requirement for the work undertaken by Faculty Managers as the result of the merger of the two faculties and to achieve the consequent costs savings.

7. The Tribunal will decide in particular:

a. was the treatment an appropriate and reasonably necessary way to achieve those aims;

b. could something less discriminatory have been done instead; and

c. how should the needs of the claimant and the respondent be balanced?

3. At the beginning of the hearing both parties confirmed that the list of issues remained accurate. The Tribunal and both parties agreed that it was appropriate to deal first with issues of liability (and the issue of any potential Polkey deduction). Other issues in relation remedy would then be dealt with, if necessary, at a further hearing. In part this was because, at the time of the hearing, Ms McAuley was in the process of being considered for ill health retirement. The outcome of that process could have a significant impact on the appropriate remedy.

Procedure, documents and evidence heard

4. The Tribunal heard evidence from Ms McAuley and considered a statement made on her behalf from Ms Claire Alfrey, although Ms Alfrey did not give evidence. The Tribunal heard evidence on behalf of the University from Dr Lynnette Turner (Pro Vice-Chancellor and Dean of the Faculty of Arts, Humanities and Education) and Simon Wright (Human Resources Business Partner).

5. There was an agreed bundle of 429 pages. References to page numbers are referenced to that bundle unless otherwise indicated.

Findings of fact

6. The Tribunal considered the oral evidence and the documentary evidence to which we were referred. All findings of fact are made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not.

7. The written findings are not intended to address every point of evidence or resolve every factual dispute between the parties. The Tribunal has made the findings of fact necessary to resolve the legal disputes before us. Where we have not made findings or made findings in less detail that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

8. The Respondent, Canterbury Christ Church University, is a university based in Canterbury. It has approximately 15,000 undergraduate / postgraduate students and 1,800 staff.

9. The Claimant, Shelley McAuley, worked for the University between 1997 and 2020. She was first employed as an Administrative Officer, but soon became Deputy Director of the International office. She progressed through a number of roles, before become Faculty Manager of Business Operations within the Faculty of Education in June 2018.

10. It is common ground that, at all relevant times, Ms McAuley has been disabled, within the meaning of the Equality Act 2010, as a result of medical conditions of depression and generalized anxiety disorder. As is common with such conditions, her symptoms varied from time to time. On a number of occasions they meant that she took a period of sickness absence, in particular for about two weeks in August 2014, between January and March 2015, between January and April 2016. There was also a substantial period of ill health absence between November 2017 and May 2018.

Background to the redundancy process

11. In January 2018, Ms McAuley had raised a formal grievance against her then line manager, Wendy Taylor, pB41-48. She said that Ms Taylor had failed to support her, had taken credit for her work, undermined her professional credibility in front of others, failed to treat her equitably and insulted her professional integrity.

12. In February 2018, Giles Polglase, then Faculty Director of Operations, Social and Applied Sciences, upheld the grievance in part, pB49-B62. He concluded that Ms Taylor had failed to support Ms McAuley; failed to treat her equitably and insulted her professional integrity.

13. In June 2018, Ms Taylor was made redundant during a restructuring exercise and Ms McAuley was appointed Faculty Manager of Business Operations.

14. In Spring 2019 the Faculty of Education within the University, where Ms McAuley worked was restructured. As part of this process Ms McAuley successfully applied for the post of Faculty Manager (Business Operations and Quality).

15. Also in 2019 the Faculty of Arts and Humanities was undergoing a similar review process. Both restructures / reviews arose from a background of declining student numbers and, consequently, a reduction in tuition fee income.

16. One outcome of the review of the Faculty of Arts and Humanities was a proposal that the two faculties should be merged. This was seen as having a number of benefits, both in terms of the portfolio of courses that could be offered and a reduction on the number of roles that would be required, which would create costs savings.

17. Ms McAuley describes her workload at this time as being 'overloaded with roles and responsibilities' She says that there was simply too much work and responsibility for one person to do the job properly. This is denied by the University and it is not necessary to resolve the dispute in detail. It is sufficient to record that the Tribunal accepted Mr Wright's evidence given during cross-examination that it was, in all the circumstances, a challenging role with a heavy workload. It is plain that Ms McAuley was under significant stress at this point.

18. Ms McAuley raised her concerns about her workload with her then line manager, Mark Humphreys, Interim Faculty Director of Operations. She describes him as being dismissive of her concerns and their relationship was a difficult one. Again, it is not necessary to resolve every detail of their dispute. The Tribunal accepted Mr Wright's evidence that Mr Wright struggled in his managerial and leadership role in relation to Ms McAuley and that she found it difficult working with him.

19. On 11th July 2019, following an argument with Mr Humphreys, Ms McAuley left the workplace and remained at home for several days. When she returned to work Mr Humphreys had been transferred to the Faculty of Arts and Humanities. He was replaced by Xanthia Ash.

20. On 16th August 2019, Mr Humphreys had a discussion with Ms McAuley in which he told her that the Faculty of Education would be merging with the Faculty of Arts and Humanities. Ms McAuley says that he told her that Dr Turner would be appointed as Dean of the combined faculty and that certain other members of staff would be retained. Ms McAuley and another member of staff were not mentioned as being retained and she took that as a suggestion that she would be dismissed.

21. Ms McAuley argues that Mr Humphrey's conversation demonstrates that he had knowledge of the outcome of the merger and consultation process, prior to any form of consultation. She argues that this is evidence that the consultation and the redundancy process was predetermined – particularly since Mr Humphrey's predictions were largely (although not entirely) accurate.

22. The Tribunal did not accept this. It is almost inevitable that, in any large organization, some individuals will have advance knowledge of a possible change or restructure. The University accepts that there were conversations ongoing about the possible merger at this point. As a senior member of the management team, Mr Humphrey's was well placed to be aware of these. It is also inevitable, that a well informed and astute individual will often be able to predict the likely course of such events with some accuracy. Mr Humphries was such an individual. The Tribunal concluded that he was able to make an educated guess about both the suggested merger going ahead and how it would affect a number of members of staff. His comments to Ms McAuley were made on this basis and not because he had been told the outcome of the consultation process or because it had been predetermined.

Formal Consultation

23. A formal consultation process began in February 2020. A consultation document was produced by Dr Turner, who had been appointed as Dean of the Faculty of Education in April 2019, pB74-96. It was shared with the recognized trade unions on 26th February 2020 and then staff in both Faculties on 10th March 2020.

24. Originally the consultation was expected to end on 8th April 2020, but it was extended as a result of the Covid pandemic to 30th April 2020.

25. The consultation document confirmed the decision to merge the Faculty of Arts and Humanities and the Faculty of Education. This was intended to reduce the number of mangers required and thereby reduce costs, as well as provide opportunities for collaboration and better working within the reorganised Faculty.

26. Of particular relevance to Ms McAuley was the intention to reduce the number of Faculty Manager posts from five to three. Included in the consultation documents were job descriptions for the roles that would be available in the merged structure.

Enhanced Voluntary Redundancy

27. In an effort to minimise compulsory redundancies the University operated a voluntary redundancy scheme. Ms McAuley applied for voluntary redundancy on 26th March 2020, pB167-169. Her application was approved, see letter of 4th May 2020, pB175-176.

28. By the 13th May 2020, however, Ms McAuley decided not to continue with the voluntary redundancy option, because she had decided she wished to return to work and would be well enough to do so.

Overall redundancy process

29. Broadly, the University approached the redundancy process by considering everyone within the Faculty of Arts and Humanities and the Faculty of Education as at risk for redundancy. They had drawn up (and consulted upon) a proposed structure for the merged Faculty, which included specific roles and job descriptions which would exist in the new structure.

30. The University then engaged in a matching / slotting process, whereby individuals and their existing roles were compared with the roles in the new structure.

31. If the roles were sufficiently similar the roles would regarded as ‘matched’. The criterion for matching are laid down in the University’s ‘Restructuring and Redundancy Policy and Procedure’ as a ‘75% or greater alignment’ in the

requirements of the post, including the grade of the post and the essential elements of the person specification.

32. If a role was 'matched' by an existing post holder that post holder could be appointed to that role without a further selection process. If, however, a number of existing staff matched with the same role there would be a selection process to decide between them. That selection, however, would be 'ring-fenced' to those who matched with the position; nobody outside that group would be considered.

33. In practice, in relation to the managerial staff effected by the merger, the University did not identify any matched roles.

34. They did, however, operate a secondary ring-fencing process, whereby specific roles were identified as sufficiently similar to the new roles that it was reasonable to restrict selection to those existing employees.

35. If following the process of matching and ringfenced selection, posts remained open, the University would then carry out on open selection process to fill them.

Impact on Ms McAuley

36. Ms McAuley's post of Faculty Manager (Business Operations and Quality) was, like the other Faculty Manager posts, placed at risk of redundancy.

37. The other Faculty Managers at that time were:

    a. Jacqui Ellis, who held a permanent role as Faculty Manager (Administration) in the Faculty of Education. Between February 2020 and July 2020 she was appointed to a temporary role of Senior Faculty Manager.
    b. Amanda Lavocat, who was Faculty Manager Administration in the Faculty of Education.
    c. Elizabeth Lampert, who held a permanent role as Faculty Manager (Administration and Operations) in the Faculty of Art and Humanities. At the time of the redundancy exercise she was appointed to a temporary role dealing with the an ongoing project (Modernising Our Student Information)
    d. Jamie Marchettii who was temporarily appointed as Faculty Manager (Administration and Operations) in the Faculty of Arts and Humanities, covering Ms Lampert's role during her secondment.
    e. Hazel Solly who was Faculty Manager (Quality) in the Faculty of Arts and Humanities

38. On the 29th May 2020 a Matching and Slotting panel met to consider whether there were matching posts to various managerial positions, including the Faculty Manager posts. The panel was made up of Rama Thirunmachandran (Vice Chancellor) and Margaret Ayers (Director of Human Resources and Organisational Development) as well as Dr Turner and Mr Wright.

39. The panel approached the matching by comparing the existing job descriptions in the two faculties to the proposed roles in the merged structure. Job

descriptions and person specifications for the new roles had been drawn up for this purpose. Copies in job description and person specification for the Faculty Manager (Operations) and the Faculty Manager (Quality) were provided to the Tribunal, pB102-B117.

40. Notes of the meeting were also produced, pD2-4. The Tribunal accepted that these were an accurate account of the meeting.

41. The panel concluded that there was no match between the existing Faculty Manager posts and those in the new structure.

42. They did, however, identify a number of posts where the existing Faculty Managers should be ringfenced to apply for the new roles.

43. In relation to Mr McAuley the post identified was Faculty Manager Operations: which was ringfenced to Ms McAuley, Jamie Marchetti and Elizabeth Lampert.

44. Over the course of the hearing there was significant criticism of the decision to include Mr Marchetti in this ring fence group. This was because he held the role as a temporary appointment rather than as a permanent role. Ms McAuley's evidence was that in the previous restructurings that she had gone through the University had applied a policy that someone holding a temporary position would only be included in a ring fence if they had held that position for at least two years. The Tribunal accepted that this had been the approach taken in the past.

45. In cross examination it was suggested to Dr Turner that Mr Marchetti was included in the ring fence because he was the University's preferred candidate who had been earmarked for the role. She denied this and said that the panel took the view that his 18-month period in the role meant that he merited inclusion.

46. The Tribunal accepted Dr Turner's evidence that the primary reason Mr Marchetti was included in the ring fence was his significant period in the temporary role. He was not placed there because, at that stage, he was the preferred candidate. The panel would have been aware in broad terms of his performance in the role and that was relevant to the extent that if he had been performing poorly he would probably have been excluded. That is not the same, however, as Mr Marchetti being a preferred candidate or the outcome having been predetermined.

47. The panel also considered the post of Faculty Manager Quality. This was initially ringfenced to Hazel Solly alone. This meant that Ms Solly would have needed to successfully apply for the role, but was not at that stage in competition with anyone else for it. In the event, Ms Solly chose not to apply.

Sick leave

48. In early March 2020 Ms McAuley had a mental health breakdown. She went home sick on 5th March 2020 and was certified as unfit to work by her GP.

49. Ms McAuley's ill health let her to consider ill health retirement. She emailed Mr. Wright regarding this on 12th of March 2020, B139-140.

50. On 25th March 2020 Ms McAuley was referred to Occupational Health, B29. She met with an occupational health nurse on 2nd April 2020 who produced a report, B31-32. In summary the report recorded Ms McAuley's history of depression and anxiety and concluded that she was temporarily unfit to work due to an exacerbation of these symptoms. Ms McAuley was referred on to the occupational health psychiatrist. The report also noted the nurse's view that Ms McAuley's condition would be considered a disability under the Equality Act 2010.

51. Ms McAuley met with the occupational health psychiatrist on 28th of April 2020. He also produced a report, B33-34. The psychiatrist agreed that Ms McAuley was temporarily unfit for her role, due to 'moderate to severe recurrent depression'. He also agreed that Ms McAuley's condition would amount to a disability.

52. The psychiatrist also made a number of recommendations. For the purposes of this claim it is particularly significant that he commented on Ms McAuley's ability to participate in any selection process, indicating:

> *In addition to being temporarily unfit for work, this includes not being fit for a job interview. Her current mental state makes her unable to realistically represent her own professional abilities and it is possible that she has struggled to convey these for quite some time.*

53. With regard to Ms McAuley's prognosis the psychiatrist noted that she had a long history of depression, including relapses, but this included periods of recovery. He stated that she had a good chance of recovery, noting in particular that she had not previously received secondary care or seen a psychiatrist. With such treatment, he suggested, 'there is still a reasonable expectation of a full recovery'. He went on to indicate 'I don't think I should see her before another two or three months, as severe depression naturally does take time to respond to treatment'.

54. The psychiatrist was asked two follow up questions by the University 22nd June 2020 and he replied the same day, pB38. First, he was asked whether he could comment on the likely time frame for Ms McAuley to return to work. He replied that 'I expect her to improve within the next six months, with a phased return to work within that time frame'.

55. Second, he was asked whether he could advise on the likelihood of an ill health retirement under the local government pension scheme. He replied that since there was 'still a good chance of recovery' Ms McAuley was ineligible for ill health retirement.

Application for Faculty Manager Operation post

56. Ms McAuley spoke to Mr Wright on Friday 26th June 2020. Part of their conversation related to the possibility of applying her applying for the Faculty

Manager Operations role, which had been ringfenced to her, Mr Marchetti and Ms Lampert.

57. The following Monday, Mr Wright wrote an email to Ms McAuley, summarising their discussion, pB294.

58. They agreed that Ms McAuley was interested in applying for the role, but in light of her ill health was not able to make a written application or to attend an interview.

59. Mr. Wright therefore agreed that she would be considered for the post without a formal application. The panel would also consider references in support of her application provided by named colleagues. In his e-mail sent at 10.56am Mr. Wright requested that these colleagues be named by 2.30pm. He suggested that either himself or Ms McAuley could contact those individuals.

60. Ms McAuley replied at 11.46am, pB295-297. She indicated that she was not well enough to contact anyone and asked Mr Wright to contact Claire Alfrey on her behalf. She named two further colleagues who might provide a further reference if needed. She also suggested that the panel could consider the written application she had previously made for the Faculty Manager Business Operations post in June 2018.

61. Mr Wright replied at 2.30pm. He indicated that the university had not been able to locate the June 2018 application but had a copy of the application Ms McAuley had made for the Faculty Director of Operations post in 2019.

Selection for the Faculty Manager, Operations post

62. Ms McAuley was considered for the Faculty Manager, Operations post. She was unsuccessful. Mr Marchetti was appointed to the role.

63. The selection panel for the Operations comprised Dr Turner, Giles Polglaise (who was at that stage acting as Faculty Director Operations) and Helen Hogg (a HR advisor). Ms Hogg role was to provide HR advice and support. She did not form part of the decision making panel.

64. On the 29th June 2020, Mr Wright sent an email to the panel, confirming that Ms McAuley was not able to attend an interview and setting out what he had agreed with her, pB-310.

65. The panel post met remotely on the 30th June 2020. They considered the three candidates who had been ring-fenced for the role: Ms McAuley, Jamie Marchetti and Elizabeth Lampert.

66. In relation to Mr Marchetti and Ms Lambert assessment was conducted in a traditional interview form, by video. The two candidates were asked prepared questions by reference to the job description and person specification. They received a score / grade based on their answers. Although the documents relating to this exercise were not disclosed, Dr Turner confirmed that there had been similar questions / score sheets as prepared as part of the earlier selection process for the Senior Faculty Manager post, B71-73.

67. It has it is at this stage necessary to deal with the lack of documentary material available to the Tribunal in relation to the selection decision. As noted above, the detailed assessment documents in relation to the candidates were not disclosed. Dr Turner agreed that there would have been prepared questions for the candidates. There would have been scoring sheets, on which each member of the panel would have made notes during the interviews and written their scores. She said that there would also have been a summary of the discussion between the panel, probably written on one of the scoring sheets.

68. None of this documentary evidence has been provided. Both Dr Turner and Mr Wright's evidence was that searches have been undertaken for these records and that all relevant documentary evidence has been disclosed. Neither has been able to provide a detailed explanation about what has happened to the missing documents. In general, both note that the University was conducting a large restructuring exercise under the extremely difficult circumstances of the Covid pandemic and lockdown. This meant that the process was being conducted in unusual or new ways. Discussions that would normally take place in person were being conducted online. All of this, they suggest, may have led to documents not being retained in the way one would normally expect.

69. Despite the difficult circumstances, the Tribunal was surprised by the extent to which key documents could not be found. The University is a large employer, with extensive relevant experience and access to HR expertise. It should have been obvious to those dealing with the redundancy processes, including Dr Turner and Mr Wright, that it was important that the process was properly documented. For that matter, such understanding is apparent in much of the earlier disclosure, in which the process of formal consultation is recorded.

70. Both Dr Turner and Mr Wright must also have been aware that the University might face legal challenges in relation to its decisions. The Tribunal would have expected Ms Hogg, in her role of providing HR advice to the panel, to have a similar awareness. To some extent that must have been in her mind, since she produced a note of the decision in relation to Ms McAuley. All three should have sought to ensure that the decisions were properly documented and relevant documents safely retained. It is surprising they did not.

71. The Tribunal gave careful consideration to whether we should draw any adverse inference from this lack of documentation in respect to our findings of fact. We concluded that we should not. The Tribunal bore in mind that the purpose of drawing such inferences is to arrive at accurate factual conclusions. The drawing of inferences is not a mechanism to punish a party for failing to meet the Tribunal's view of good practice. We accepted the evidence of Dr Turner and Mr Wright that the University had searched for relevant documents and disclosed what it had found. We did not find that there had been any deliberate attempt to destroy or supress relevant evidence. What had been disclosed did not suggest that evidence had been cherry picked to slant it in favour of the respondent. In those circumstances it would be wrong to draw any adverse inference.

72. The lack of documentation, however, did create difficulty in considering how Ms McAuley's application for the role was considered. The most relevant document is notes of the panel discussion written by Ms Hogg. These read:

Previous interview process for a higher level set of responsibilities, interviewed Jamie, Jacqui and Shelley – Shelley was not appointable, was well at the time but did not interview well, not confident.

Not agile.

Has done parts of her role very well, but has become unwell when asked to focus on specific elements of the role, sometimes tries to take on too much – wants to fix everything, overloads herself. Doesn't reach out for support and building networks. Concerns about ability to develop her in order to create a high performing team. Would want to support AA areas as well, currently need someone strong and focused on Operations.

Emotional intelligence to sift through to understand what needs doing – key to this role, particularly over the next 12 months.

Application – does have a record of leading in changing environments, but is not there currently.
Does have experience, but not the personal qualities required.

On the evidence that we have, Shelley would not be appointable to the role.

Q's for Claire – Emotional intelligence, leadership (ability to be transformative vs transactional), self-reflection / self-awareness.

73. There reference to 'Q's for Claire' strongly suggests that the note was produced before Claire Alfrey was contacted, which was following the selection meeting on the 30th.

74. In her witness statement Dr Turner said that these notes fairly reflected the panel discussion.

75. In her oral evidence and under cross-examination, however, Dr Turner gave a significantly different account. She said that the panel had sought to score Ms McAuley in a similar way to the other candidates. Since Ms McAuley did not attend the interview they did so on the basis of the information that they had. At this stage, this was very limited since Claire Alfrey had not yet been contacted to provide a reference. They only information that was available, therefore, was the previous application for the Faculty Manager Business Operations post, pB-311-320, and the personal knowledge that the panel had about Ms McAuley.

76. The later was not extensive or current. Mr Polglaise had not worked with Ms McAuley for several years. Dr Turner had not worked directly with her, although she had line managed Xanthia Ash when Xanthia Ash line managed Ms McAuley.

77. Dr Turner's account of this process was not a detailed or specific one. She said that the panel would have scored the candidates individuals, including Ms McAuley, individually and then discussed them. She was initially unsure whether that occurred on the 30th June or the 1st July. She was not able to

explain in any detail how the scoring was done, beyond very generalised statements that they had compared the application and their knowledge of Ms McAuley to the job description / person specification.

78. The Tribunal concluded that, at the very least a preliminary decision about Ms McAuley's suitability must have been reached on the 30th. That is what is recorded in Ms Hogg's note, which is a contemporaneous document. That assessment is that Ms McAuley was not appointable.

79. The Tribunal did not accept, however, that this was the result of the sort of scoring exercise that Dr Turner described. Ms Hogg's note does not refer to such a scoring exercise. Instead it records a much more general assessment of Ms McAuley's capabilities, focusing primarily on her state of health. The reference to her previous application for the more senior Director role is framed by reference to her health ('was well at the time'). It suggests that, in her current role, she has 'become unwell' and 'overloads herself'. It refers to her previous record of leading change but suggests that she is 'not there currently'. It describes her as not having the 'personal qualities required'. A fair reading of the note, in context, is that these are references to Ms McAuley's mental health at the time meaning that she was not fit to take up the role.

80. The Tribunal also concluded that the exercise described by Dr Turner would have been an exceptionally difficult one. The task of assessing one candidate on paper, and comparing them to other candidates who attended an interview – and do so fairly to all three candidates – would be challenging exercise under any circumstance. To do so when the paper application was several years old and for a different (albeit similar) role would significantly exacerbate that difficulty.

81. We concluded that, if a detailed exercise of that kind had been conducted it would have been likely a) that Dr Turner would have had a more detailed recollection of it, and b) at least some of that exercise would have been reflected in Ms Hoggs note.

82. The Tribunal also considered that, other than her state of health, there was no information that would suggest that Ms McAuley was not appointable to the role. She had held similar roles at at the same level within the University. There was nothing in her application for the previous role in 2018 that would apparently disqualify her. In her evidence, Dr Turner did not identify any specific element of the application that meant that Ms McAuley was unappointable. The most plausible basis, therefore, for that conclusion was an assessment of Ms McAuley's health.

83. In cross-examination, it was suggested to Dr Turner that Ms McAuley's sickness absence was a factor in the decision not to select her. Her evidence was that it was not. The Tribunal did not, however, accept this evidence and concluded that the selection panel reached the conclusion that Ms McAuley should not be appointed because of her ill-health.

84. It follows from this that, to a significant degree, the Tribunal rejected Dr Turner's account of the selection process and the decision taken.

85. Following the selection meeting Ms Hogg emailed Claire Alfrey, requesting her views on Ms McAuley's capabilities, pB323-324. The email also refers to a conversation between Ms Alfrey and Mr Wright that took place the same afternoon. The email was sent at 15.08.

86. The email is short and simply asks Ms Alfrey to comment on the three areas identified in Ms Hogg's note: 'Emotional intelligence, leadership (ability to be transformative vs transactional), self-reflection / self-awareness.'

87. Ms Alfrey sent two separate emails the following day. Only the second email has been disclosed, pB321-323. Little turns on this, since what Ms Alfrey was to send one email at shortly before 2pm, which was a work in progress. Then she sent a second email at 4.05pm, which was a completed version. The additional material was in a different colour, so it is clear what had been added. The timing of the first email is apparent from an initial paragraph in which she says she is sending what she has written so far, before her next meeting begins at 2pm.

88. In relation to the three areas that she was asked to discuss Ms Alfrey's reference is a glowing one. She describes Ms McAuley as demonstrating 'strong emotional intelligence', who 'got the best out of people by utilising their strength, but equally holding hard conversations when necessary'. She is described as 'the ultimate professional at all times' who handled difficult and contentious areas with 'great tact and diplomacy'. Ms Alfrey says that 'transformative leadership is really at the heart of what she does' and describes Ms McAuley as 'an equal and a key member of the management team'.

89. It is difficult to determine the extent to which Ms Alfrey's emails were seen or considered by the panel prior to making their decision. Ms Hogg's note strongly suggests that the preliminary decision that Ms McAuley was not appointable was made before Ms Alfrey was asked to comment.

90. The emails were sent, in the first instance, to Ms Hogg, who would have needed to send them to the panel. An email from Dr Turner to Mr Wright at 4.55pm refers to an earlier communication of the decision. The decision must, therefore, have been taken at least some time before that, allowing time for it to be communicated by Dr Turner to Mr Wright.

91. It seems, therefore, highly implausible, that the full panel would have had time to consider, even relatively briefly, Ms Alfrey's second and more complete email – much less discuss it as a panel.

92. Although there would have been time for the panel to receive, read and discuss the earlier email before reaching a decision, the Tribunal concluded that they did not do so. The timing to do so would have been tight. In her evidence, Dr Turner said that she did not recall such a discussion, although she was confident she had read Ms Alfrey's email. There is no record of the discussion (although given the poor state of document retention around this decision the Tribunal did not put more than minimal weight on this factor).

93. The Tribunal concluded that the panel had, for practical purposes, reached their decision on the 30th, as recorded by Ms Hogg. They had then sought Ms Alfrey's comments, because Mr Wright had agreed with Ms McAuley to do so.

It is possible that they received some cursory attention from Dr Turner and the panel (although the evidence did not establish that they were received by Mr Polglaise). The panel did not, however, substantively revisit their earlier decision that Ms McAuley was not appointable.

94. Ms McAuley was then informed of the outcome of the selection process through her husband by Mr Wright.

95. On the 2nd July 2020,Dr Turner emailed Mr Wright setting out feedback to be provided to Ms McAuley, in relation to the selection decision, pB328. That feedback is brief and does not far beyond saying that another candidate was considered more suitable. Notably, it does not suggest that the panel concluded that Ms McAuley was not appointable in the role and does not suggest that the decision was related to concerns about her state of health.

96. Dr Turner later produced somewhat longer feedback for Ms McAuley, pB332. This was not sent to her until the 24th July 2020, after the selection process for the Faculty Manager, Quality role had finished. Feedback regarding both roles was sent at the same time. That feedback essentially reiterates the previous information, at somewhat greater length. It indicates that 'another candiate presented better' and refers to their clear vision for the role of Professional Services, firm / strong example and insight into learning from Covid-19. Again, there is nothing in this feedback to suggest that the panel had considered Ms McAuley's health.

Selection for the Faculty Manager of Quality

97. Although the post of Faculty Manager, Quality had initially been ring-fenced to a single employee, Hazel Solly, Ms Solly had chosen not to apply for it.

98. It was therefore decided that it would be ringfenced to the two unsuccessful candidates for the Faculty Manager, Operations role: Ms McAuley and Ms Lambert. Both applied for the position.

99. The selection panel met on the 16th July 2020 by video. The panel was Dr Turner, Giles Polglaise and Richard Brown (Faculty Director of Quality). Ms Lambert was interviewed and Ms McAuley's application was considered on paper. Ms Lambert was appointed to the role.

100. As with the Faculty Manager, Operations role, very limited documentary evidence has been disclosed in relation to the selection. There are no scoring sheets and no record of the discussion. There is also no equivalent note to that produced by Ms Hogg in the earlier exercise.

101. Dr Turner's account was that selection panel had carried out a similar process to that in the earlier role.

102. Feedback on the selection was provided on the 24th July 2020. It was put to Dr Turner that this was, in essence, 'cut and pasted' from the feedback provided at the same time in relation to the Operations role, which she denied. It is apparent, however, that much of the material has been copied. The first three paragraphs are identical – including a reference to Ms McAuley's

application for the Operations role, when the feedback is intended to relate to the Faculty Manager, Quality process. The fourth paragraph is identical, save that references to Operations have been updated to Quality.

103. The substantive differences between the two documents are in the numbered bullet points, which seek to explain why another candidate was preferred. In relation to the Quality role, these were that the other candidate had: provided good knowledge of the range of Quality processes that would come together in the new Faculty, demonstrated a strong aptitude for data analysis and had current relevant experience in process mapping and systems simplification.

104. There is nothing wrong or improper in copying material from one document to another, where that information is common between the two documents. In this case, the main significance of this approach is that it tends to confirm that, at least in Dr Turner's view, a similar approach had been taken.

105. The Tribunal had, to a significant degree, found Dr Turner's in relation to the previous selection process unreliable. In those circumstances, and given the lack of corroborative evidence, the Tribunal treated her evidence in relation to this process with caution. Ultimately, the Tribunal found that it also could not be relied upon. It was inherently implausible that having approached the selection for the Operations role in one way Dr Turner and Mr Polglaise had then taken a very different approach to a very similar exercise only a short time later. It was more likely that, having concluded that Ms McAuley's ill health made her unappointable to one Faculty Manager role, they believed that she was also unappointable to the second, similar role.

Dismissal

106. Once Ms McAuley was unsuccessful in her applications for the Faculty Manager roles Dr Turner made the decision to dismiss her. She was sent a letter of dismissal on 24th August 2020, pB339-341.

107. Given the structure of the redundancy process, this was the inevitable consequence of the earlier decisions.

The law: unfair dismissal

108. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is redundancy. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.

109. Redundancy is defined by s139 ERA. In summary an employee is dismissed by reason of redundancy if the dismissal is because a) the employer ceases to carry out the business for the purposes of which the employee was employed (either at all or in the place where the employee was employed) or b) the requirements of the business for employees to carry out work of a

particular kind (either at all or in the place where the employee was employed) ceases or diminishes or is expect to do so.

110. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it consider whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the question of fairness, which is to be approached neutrally.

111. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.

112. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether they would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

113. In the context of a redundancy dismissal the fairness of the decision to dismissal should be approached by reference to the guidance given by the Employment Appeal Tribunal in *Williams v Compair Maxam Ltd* [1982] IRLR 83. A fair redundancy requires:

a. A fair process of warning / consultation with affected employees and any recognised Trade Union.
b. A fair process of selecting employees to be made redundant.
c. A fair process of seeking to find any employee at risk of redundancy alternative employment.

114. To determine whether the process of selection is fair it is necessary to consider both the identification of the pool (i.e. how the group of employees who are at risk of dismissal is determined) and how employees are selected from that pool.

115. This approach was confirmed by the House of Lords in *Polkey v AE Dayton Services Ltd* [1987] ICR 142, in which Lord Bridge indicated:

> *… in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representatives, adopts a fair decision which to select for redundancy and*

takes such steps as may be reasonable to minimise a redundancy by redeployment within his own organisation'.

116. The guidance in *Williams* and *Polkey*, however, is not a series of statutory tests to be applied mechanistically, but questions to assist a Tribunal in applying the test in s98(4) ERA.

117. This is particularly important where, as in this case, an employer approaches a redundancy situation by identifying all employees doing work of a particular kind as redundant and then seeking to select, from that group, those to be appointed to the newly available posts. As noted by the Employment Appeal Tribunal in *Morgan v Welsh Rugby Union* [2011] IRLR 376 this kind of approach can create a situation in which the approach laid down in *Williams* is difficult to apply or wholly inappropriate. In such cases, HHJ Richardson indicated:

To our mind a tribunal …. must apply s.98(4) of the 1996 Act. No further proposition of law is required. A tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under s.98(4).

118. This approach was confirmed by then HHJ Eady QC in *Green v London Borough of Barking & Dagenham* UKEAT/0157/16, who noted:

At all times, the touchstone would need to be s 98(4); the ET would keep in mind the need not to fall into the error of substitution, but it would still need to review the decisions made and the process followed and determine whether each stage fell within the range of reasonable responses.

The law: disability

119. s15 Equality Act 2015 defines discrimination arising from disability. This occurs if a person treats someone unfavourably because of something arising in consequence of that person's disability.

120. This requires a Tribunal dealing with a s15 complaint to consider:

a. Whether the claimant has been treated unfavourably;
b. The reason for that treatment;
c. Whether the reason is something arising in consequence of the employee's disability;
d. Whether the employer knew, or could reasonably have been expected to know about the disability; and

e. Whether the treatment can be justified by the employer (i.e. whether the employer can show that it was a proportionate means of achieving a legitimate aim).

121. Whether something arises in consequence of a disability must be considered on an objective basis. This means that the mental process of the respondent is not relevant, see *Pnaiser v NHS England* [2016] IRLR 170. Something may arise 'in consequence of a disability' through a series of links in a chain of consequences, see *Sheikoleslami v University of Edinburgh* UKEAT/0014/17.

122. The reason for the treatment, however, requires consideration of the reason in the mind of the person who allegedly discriminated. The reason does not, however, have to be the sole or main reason. It also does not have to be the conscious motive of the individual concerns, it may be a subconscious or unconscious reason.

123. Discrimination arising from disability can only occur if an employer knew, or could reasonable have been expected to know about the disability. An employer does not, however, need to know that the 'something' arose in consequence of the disability.

124. There is no discrimination arising from disability if the treatment by the employer is justified. To be justified the treatment must be a proportionate means of achieving a legitimate aim. In considering whether the means are proportionate the Tribunal must reach an objective determination of whether an employer's actions are appropriate to the aim and necessary to achieve it. This requires balancing the discriminatory impact on the employee and the reasonable needs of the employer.

125. The Tribunal bore in mind that, in considering whether unfavourable treatment is justified, it must focus on the substance of the outcome rather than the process. This means that the approach to justification in relation to discrimination differs from the approach to fairness in the context of unfair dismissal. Unfavourable treatment does not become unjustified because it is the result of an unfair process, although that process may be evidentially relevant to whether there were less discriminatory alternatives. See *DWP v Boyers* [2022] IRLR 741.

126. In relation to all of this, the burden of proof is on the claimant initially to establish facts from which the tribunal could decide, in the absence of any other explanation, that the respondent discriminated. This requires more than a difference in treatment combined with a difference in protected characteristic, se *Madarassy v Nomura International PLC* [2007] ICR 867. There must be something further from which it could be concluded that the protected characteristic influenced the decision. If this is established it is for the respondent to show that they did not discriminate.

127. If, however, a tribunal is able to make positive findings on the evidence it is not necessary to apply the burden of proof provisions mechanistically. In such a case a Tribunal may proceed directly to considering the reason for the treatment, see *Hewage v Grampian Health Board* [2012] UKSC 37.

The law: reduction of awards

128. Where a dismissal is found to be unfair, it is open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee may still have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

129. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

130. The assessment of a Polkey reduction is an inherently uncertain exercise since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

131. In cases of discrimination the compensation awarded must take account of the chance that a respondent might have caused similar loss lawfully if it had not done so in a discriminatory fashion. In cases where the alleged discrimination is a dismissal this may require a Pokey reduction, as in an unfair dismissal claim. See *Abbey National plc v Chagger* [2009] IRLR 86.

Submissions

132. Both Counsel provided written submissions, in addition to their oral arguments. Rather than set out these out in detail separately, this decision aims to address the particular points made in the context of the Tribunal's findings of fact and conclusions.

Conclusions – Unfair dismissal

133. The Tribunal reached the following conclusions. They are set out by reference to the agreed list of issues.

What was the reason or principal reason for the Claimant's dismissal?
Was it a potentially fair reason within the meaning of section 98(1)-(2) ERA?

134. The principal reason for the Claimant's dismissal was redundancy.

135. By the stage of submissions it was agreed between the parties that the reason for dismissal was redundancy. In any event, the evidence established that Ms McAuley was dismissed because the University was seeking to reduce the number of employees carrying out the work of Faculty Managers.

136. It follows from this that the dismissal was for a potentially fair reason.

Was dismissal fair and reasonable in all the circumstances and was the sanction of dismissal within the range of reasonable responses open to a reasonable employer in the circumstances?

Did the Respondent follow a fair procedure?

137. In broad terms the approach taken by the University to the redundancy situations created by the merger of the two faculties was a reasonable one. The decision to regard all the affected managers as potentially at risk of redundancy and to proceed by then selecting them for the roles in the new structure was one open to a reasonable employer.

138. The matching process carried out by the University was also fair.

139. One argument made by Ms McAuley is that she should have been consulted in greater detail in relation to the matching process and decision. It is true that there was very little consultation on this point. More could have been done to seek information and views from the affected employees. Considering however the consultation as a whole this was not sufficiently serious to render the dismissal unfair.

140. A key criticism made of the process of selection was the inclusion of Jamie Marchetti within the ring-fenced selection for the post of Faculty Manager Operations. Ms Callan argued that since Mr Marchetti held the post of Faculty Manager on a temporary basis and therefore retained a separate permanent post he was not at risk of redundancy. It was, she argued, unfair to include him within the pool.

141. This argument is put forward on three grounds. First, that the University's redundancy policy refers only to staff 'at risk' of redundancy. This point can be illustrated by the section of the policy dealing with ring fenced selection (similar wording occurs throughout the policy). It reads:

> Where the number of potentially suitable staff at risk of redundancy exceeds the number of new posts available, candidates will be required to submit 'Expressions of Interest' after which competitive ringfenced interviews will be arranged.

142. Ms Callan suggests that this means employees who are not at risk of redundancy should not, under the policy, be included in the ring-fenced selection.

143. Second, Ms Callan argued that it was an unfair approach, based on Ms McAuley's evidence that, in previous restructuring exercises seconded employees were only included in a ring-fencing exercise if they had been in the temporary post for at least two years. Mr Marchetti had only been in his Faculty Manager role for 18 months.

144. Third, Ms Callan argued, that it is inherently unfair for employees who are at risk of redundancy to be disadvantaged by the inclusion within a pool of those who are not at risk of redundancy.

145. The Tribunal did not accept these arguments. Although the policy refers to staff 'at risk' this is a general reference to those affected by the redundancy process. The tribunal did not conclude that it was intended to bear the meaning suggested by Ms Callan. The tribunal accepted Ms McAuley's evidence the previous exercises had operated on the basis that only temporary appointments with two years' service in that post would be included in any ring fenced selection. That supports the University's position that the policy had not previously been understood as meaning that only those holding a permanent role that was placed at risk should be considered during a ring-fenced selection process.

146. The two-year rule that had been applied in the past did not form part of the formal policy and it did not preclude the University applying a different rule. An employer that applies a particular policy choice in relation to a redundancy on one occasion (or multiple occasions) is not thereby precluded from applying a different policy choice during a later redundancy process, provided the policy applied is fair.

147. In relation to the general fairness of including the conduct staff in the pool for ring-fencing the Tribunal found that this fell within the range of options open to a reasonable employer. A different employer might, quite reasonably, have reached a different decision. But this did not make the University's approach unfair. There will be many cases in which an employer will have the option between a narrowly defined pool or a more widely defined one. The choice will inevitably determine the likelihood that any individual employee will be dismissed. Some employees may benefit from a narrower pool (because they will then fall outside it). Some employees may benefit from a wider pool, which reduces the chance that they are selected.

148. A choice that means an employee is more likely to be dismissed does not, without more, render the pool unfair. In this case Mr Marchetti had held the faculty manager role for 18 months. It was not unreasonable to regard him as a proper candidate for the role in the merged Faculty. The situation is closely analogous to that of a 'bumping dismissal' in which an employee, performing work for which their employer still requires the same number of employees, is dismissed so that their role can be taken by an employee who would otherwise be dismissed for redundancy. During a redundancy process an employer will need to make decisions about which employees are placed within a group for consideration, whether that is in the context of a traditional pool of those potentially redundant or, as here, a group ring-fenced for selection to a role. Such decisions, inevitably, involve advantaging some employees at the cost of disadvantaging others. This is not, in itself, unfair. Nor is an employer required to make decisions on the basis that it must seek to minimise the number of dismissals for redundancy. The fundamental question remains whether the employer approached the process in a way that was open to a reasonable employer. Applying that rule, Mr Marchetti's inclusion within the ring-fencing was reasonable.

149. The tribunal did conclude that the selection for the faculty manager operations role was unfair. Most fundamentally, although it was presented to Ms McAuley as a process assessing her skills and knowledge in relation to the post the decision was in fact based on her ill health.

150. Considering Ms McAuley's state of health was not inherently unfair. A reasonable employer might well have considered it important to take into account whether Ms McAuley was well enough to take on the role and, if not, when she was likely to be fit. These issues could be relevant to a redundancy selection exercise of the type the university was conducting.

151. To consider these issues fairly however the university would have needed to be frank with Ms McAuley the nature of the decision they were making. They were not. At no stage was it suggested that the university believed or might believe that she could not be appointed to the role of Faculty Manager Operations. If this had been made clear Ms McAuley would have had the opportunity to respond to that possibility. She might have suggested, as she did in the course of this hearing, some form of staged return or temporary cover for that role. Whatever conclusions might have been reached in relation to this fairness required her to be given that opportunity.

152. In addition for a fair decision of this nature to be made a respondent would need to fairly consider the available evidence this in particular would have required consideration of the occupational health reports that dealt with Ms McAuley's prognosis. These were not considered by the selection panel.

153. The failure to take into account that information was particularly significant in this case. The Occupational Health reports the most relevant and important information on the question. In addition the information available to the panel, that Ms McAuley was not well enough to attend an interview and was pursuing ill health retirement was likely to give a far more pessimistic impression then that given by the Occupational Health reports.

154. It was also unfair, having agreed to obtain and consider information from Claire Alfrey, to reach to reach a conclusion before seeking that information and therefore without considering it.

155. In relation to the selection for the Faculty Manager Quality, the Tribunal found that the decision not to appoint Ms McAuley was unfair for the same reasons. This selection was similarly made on a different basis than the one that was suggested to Ms McAuley and again failed to take proper account of the medical evidence that the Respondent had in its possession.

156. Stepping back to consider the situation as a whole, the University's fundamental error was that it, possibly inadvertently or unconsciously, merged its redundancy selection process with consideration of Ms McAuley's capability for work on grounds of ill health. If it had been carrying out an explicit capability process, it seems likely that both Dr Turner and Mr Wright would have recognised that fairness required that Ms McAuley be informed about the nature of the process and that the relevant decision makers fully consider all the relevant evidence, including medical evidence. When, however, similar issues arose in the context of the redundancy selection process, they appear to have lost sight of this.

157. The Tribunal recognised that the University staff, including Dr Turner and Mr Wright, were dealing with a challenging process in difficult circumstances. None of the staff involved had any personal animosity against Ms McAuley. Nonetheless, the University's actions fell outside the range of reasonable responses.

158. For completeness, the Tribunal did not accept a number of the arguments relied upon by the Claimant in relation to the fairness of the dismissal.

a. Prejudgment of the redundancy process: The Tribunal concluded that there had not been any prejudgment of the outcome of the disciplinary process or deliberate manipulation of it to achieve a particular result.

b. Communication during the consultation process: There were occasions on which communication with the claimant about the redundancy process was delayed because she was on sick leave and not always accessing her work emails. Overall, however, as she accepted in her evidence, she was kept properly informed of the process and had an opportunity to participate in the consultation.

c. It was suggested that the University should have assessed Ms McAuley either by sending her more specific written questions in relation to the roles or by interviewing Ms Alfrey. In circumstances in which Ms McAuley had indicated that she was not well enough to participate in the selection process, including by making a written application, the Tribunal did not find that it was unfair to take the limited approach that it did. Some form of interview with Ms Alfrey would have been possible, but it was not something that fairness required the University to do.

Conclusions – Disability

Did the Respondent treat the Claimant unfavourably?

159. The University accepted that, in dismissing Ms McAuley, they treated her unfavourably.

If yes, was that treatment because of something arising in consequence of the Claimant's disability?

160. As set out above, the Tribunal concluded that Ms McAuley was dismissed because of the University's view of her mental health and it's impact her ability to carry out the Faculty Manager roles she had applied for.

161. The Tribunal found that those views arose in consequence of Ms McAuley's disability. The relevant managers held those views because of Ms McAuley's absence from work, her inability to attend the interviews and her application for ill health retirement – all of which arose because of her disability.

If yes, can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim.

162. In the list of issues the Respondent's legitimate aim was described as 'to carry out a redundancy process in the interests of economy and efficiency, i.e. to address a diminishing requirement for the work undertaken by Faculty Managers as the result of the merger of the two faculties and to achieve the consequent costs savings'.

163. This was elaborated upon over the course of the hearing and submissions. The final formulation of the proposed legitimate aim was to achieve an efficient merger of the two faculties, minimising the impact on both students and faculty.

164. It is important to note that the Tribunal did not understand this to be an argument that dismissing Ms McAuley was a means of ensuring an efficient merger process in the sense of the redundancy selection process itself. Dismissal of a disabled employee in order to conduct an efficient redundancy process would not, save possibly in the most unusual circumstances, be justified. The Tribunal did not understand the University to be advancing such an argument.

165. Rather, the University's position was (if the earlier elements of the s15 claim were established) was that it was important for the merger itself to be completed in good time and the merged faculty to be properly in place in time for the new academic year. The Tribunal accepted that this was a legitimate aim.

166. The Tribunal concluded that, in principle, dismissing an employee (whether directly as part of a capability process or, as in this case, through a redundancy selection process) could be a proportionate means of achieving that legitimate aim.

167. Stepping back from the facts of this case, the fact that an employee is presently unable to carry out their duties at work and their employer cannot reasonably be expected to wait for them to be able to return, is routinely the basis on which an employee is dismissed. In principle, such a dismissal may be both fair and justified.

168. The question for the Tribunal, however, is whether the University has established that Mr McAuley's dismissal was so justified.

169. The best evidence in relation to Ms McAuley's prognosis and ability to return to work, was the Occupational Health Psychiatrist's letter of 22nd June 2020, which indicated that she would be able to return to work, as part of a phased return, by December 2020, pB38.

170. As set out above, the University's process of redundancy selection did not include any consideration of when Ms McAuley would be able to return to work or what the impact of any delay in her taking up either Faculty Manager role would be on the University. The Tribunal, however, must take an objective approach to the question of justification. The University's evidence to the Tribunal, however, also did not engage with this issue.

171. The Tribunal had no significant evidence that would establish the impact of someone, such as Ms McAuley, being appointed who was not able to take up the role immediately.

172. The highest the University's case on this point could be put was that Ms McAuley accepted in her evidence that it was important to the University that the merger (and therefore the appointments) was resolved before the new term. The Tribunal accepted this evidence. If Ms McAuley was appointed to either role there would be some delay in her taking it up, because of her ill health. That would inevitably cause some level of difficulty to the University's operations and that difficulty would be increased by the fact that she would be unlikely to have returned to work on a full-time basis by the time the new academic year began. So far as it goes, that is simply a matter of common sense.

173. This, very general, conclusion, however, is not sufficient to establish that the dismissal was justified. When dealing with a disabled employee, it will very often be the case that avoiding discrimination and / or fulfilling the duty on an employer to make reasonable adjustments will involve some level of difficulty, inconvenience or cost. The purpose of the justification element of the legal test is to balance those negatives elements against the impact on the employee. It is not sufficient, in order to rely on the justification defence, to establish merely that there will be some such difficulties.

174. The Tribunal therefore concluded that the evidence did not establish that Ms McAuley's dismissal was a proportionate means of achieving a legitimate aim.

Polkey Reduction

175. Although the Tribunal concluded both that Ms McAuley had been unfairly dismissed and that the dismissal was an act of discrimination arising from disability, this does not mean that she would have inevitably been appointed to either Faculty Manger role.

176. The Tribunal therefore sought to assess that chance that Ms McAuley would have been appointed to either role. This exercise was made difficult, because of the lack of any detailed information about the performance of the other candidates or how Ms McAuley would have been considered had the process been conducted in a fair and non-discriminatory manner.

177. This was also not, however, a case where it was appropriate to abandon the exercise on the basis that no sensible conclusion could be reached. In the context of a competitive selection process it was plain that Ms McAuley might not have been successful. It would be wrong to approach compensation on any other basis.

178. The Tribunal therefore concluded that compensation, in relation to both the unfair dismissal and discrimination, should be awarded on the basis that each candidate in the two selection processes had an equal chance of being appointed to the role. This is necessarily applying a very broad-brush

assessment, but the Tribunal was unable, on the basis of the available evidence, to reach a more nuanced conclusion.

179. This means that Ms McAuley's compensation will be considered on the basis that she had a one in three chance of being appointed as Faculty Manger, Operations. Then, if she had been unsuccessful in that application, a one in two chance of being appointed as Faculty Manager, Quality.

180. Both parties agreed that consideration of the appropriate compensation would need to take into account events following Ms McAuley's dismissal and, in particular, Ms McAuley's subsequent state of health. This is likely to include consideration of whether she might have been dismissed, on ill health grounds, at a later stage. The Tribunal has not heard evidence on those matters and therefore has not reached any conclusions at this stage.

_____

Employment Judge Reed

2nd October 2023

_____

Date