Amended under the slip rule on 16 August 2024 pursuant to the order of Employment Judge Adkinson

EMPLOYMENT TRIBUNALS

Claimant:	**Dr A M D'Arcy**
Respondent:	**University of Leicester**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	6 November 2023 and 7 November 2023 morning (reading in, parties did not attend) 7 November 2023 (afternoon only), 8 November 2023, 9 November 2023 (morning only) 13 and 14 November 2023 15 November 2023 (deliberations, parties did not attend)
Before:	Employment Judge Adkinson sitting with Mrs J Barrowclough Mrs L Woodward
Appearances	
For the claimant:	In person
For the respondent:	Ms J Cowen, Counsel

JUDGMENT

UPON considering the evidence from and submissions from each party, it is the Tribunal's unanimous judgment that:

1. The respondent unfairly dismissed the claimant, and that the claimant has not contributed to her dismissal;
2. The claimant's claims of discrimination arising from a disability fail and are dismissed;
3. The claimant's claims of failures to make reasonable adjustments fail and are dismissed;
4. Remedy be determined at a separate hearing, directions for which will follow.

REASONS

5. The Claimant (Dr D'Arcy) brought claims of disability discrimination and unfair dismissal against the Respondent ("the University"). The details are set out in the list of issues below. The respondent denied these claims.

The Hearing

6. Dr D'Arcy represented herself. Ms Cowen, Counsel, represented the University. We are grateful to both for their help.

7. There was an agreed bundle of about c.1200 pages. A lot is repetitious. As we indicated to the parties we would, we have taken into account those pages to which they referred us.

8. We heard oral evidence from the following people:

   8.1. Dr Anne Marie D'Arcy, the claimant;

   8.2. Ms Deirdre O'Sullivan, Dr D'Arcy's trade union (TU) representative;

   8.3. Professor Gordon Campbell (retired), Fellow of Renaissance Studies at the University;

   8.4. Ms Baljit Bains, at the relevant times Senior Human Resources (HR) Advisor to the University;

   8.5. Professor Henrietta O'Connor, at all relevant times, Pro-Vice-Chancellor to the University and Head of the College of Social Sciences, Arts and Humanities;

   8.6. Dr Catherine Morley, Director of Studies for English from 2018 and Head of the School of Arts since 18 January 2021; and

   8.7. Mr Richard Tapp, at all relevant times lay member of the University's Council.

9. Dr D'Arcy also intended to call Professor Elaine Treharne, who was the Head of the Department of English from 2000 to 2004. She now works at Stanford University and was not involved in the events relevant to this claim. Professor Treharne had prepared a witness statement. She would have given evidence by video link. Before Dr D'Arcy called her, the University indicated it had no questions to ask her. Therefore we did not hear from her. However because she was prepared to give evidence and be cross-examined, we treat her witness statement as though it was unchallenged oral evidence given on affirmation.

10. We have taken all of the above witness evidence into account.

11. At the end of the case each party made oral and written closing submissions. We have taken those into account as well.

12. Each day we started at 10am (except 7 November 2023 when we started at 2pm) and ended at 4pm (except 9 November 2023 when we stopped at 1pm). We took lunch 1pm to 2pm and took a break mid-morning and mid-afternoon. Dr D'Arcy informed us we may need to stop suddenly at other

times as a reasonable adjustment. We agreed, though this was required only once. At times Dr D'Arcy became emotionally distressed. When this happened we took breaks. The Employment Judge assisted Dr D'Arcy from time to time with her questioning of the University's witnesses during cross-examination, without objection from the University.

13. We are satisfied that this has been a fair hearing. Neither party has suggested the hearing was unfair.

14. We decided to reserve our decision. This is that decision. It is unanimous.

Issues

15. Ms Cowen prepared in advance a proposed list of issues. After discussion with Dr D'Arcy and after consideration of the case, we are satisfied it represents the issues we must decide.

16. The respondent asked the Tribunal not to make a ruling on whether any remedy might be reduced to reflect the chance the University might have dismissed Dr D'Arcy fairly or some other reason if Dr Darcy's claim for unfair dismissal succeeded (i.e. under the principle in **Polkey**) – or likewise if the dismissal were discriminatory, the prospect of a non-discriminatory dismissal. This was because it may have additional evidence it wished to adduced. After discussion with Dr D'Arcy (who did not object), and with some hesitation we agreed to defer that issue to any remedy hearing. We concluded that it was ambiguous from case management orders whether that would be dealt with as an aspect of liability and thought it best to ensure the parties are on an equal footing by affording them an opportunity to prepare for it properly.

17. Because the size of a reduction for contributory fault may be affected by the remedy awarded and any reduction under **Polkey**, the parties agreed that the size of any reduction, if appropriate should be deferred to any remedy hearing.

18. Therefore the issues are as follows:

Unfair dismissal

18.1. What was the reason or principal reason for dismissal? The respondent says the reason was redundancy.

18.2. If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide, in particular, whether:

18.2.1. The respondent adequately warned and consulted the claimant;

18.2.2. The respondent adopted a reasonable selection decision, including its approach to a selection pool;

18.2.3. The respondent took reasonable steps to find the claimant suitable alternative employment;

18.2.4. Dismissal was within the range of reasonable responses.

18.3. If the claimant was unfairly dismissed,

18.3.1. Did they cause or contribute to dismissal by blameworthy conduct?

18.3.2. If so, would it be just and equitable to reduce the claimant's compensatory award?

18.4. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal?

Discrimination arising from disability (Equality Act 2010 section 15)

18.5. Did the respondent treat the claimant unfavourably by:

18.5.1. Failing to delay the redundancy process?

18.5.2. Selecting the claimant for redundancy?

18.5.3. Failing to provide a porter for the claimant's belongings?

18.6. Did the following things arise in consequence of the claimant's disability:

18.6.1. Inability to engage with the redundancy process?

18.6.2. Inability to move her belongings?

18.7. Was the unfavourable treatment because of any of those things?

18.8. Was the treatment a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

18.8.1. To ensure the future stability of the English Department,

18.9. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

Reasonable Adjustments (Equality Act 2010 sections 20 and 21)

18.10. Did the respondent know or could it reasonably have been expected to know that the claimant had the disability? From what date?

18.11. The University did not dispute in closing oral submissions it applied the provisions, criteria or practices ("PCPs"):

18.11.1. Requirement to teach predominantly something other than Medieval Literature in the last 5 years,

18.11.2. Requirement to give Expression of Interest in new job (Associate Professor(Teaching and Research) in Late Medieval and Early Modern Literature) by a deadline,

18.11.3. Requirement to be interviewed/assessed for the new job (if applied),

18.11.4. To engage with collective and/or individual consultation,

18.11.5. To remove personal belongings from workplace on termination?

18.12. Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the Claimant was absent from work due to stress and unable to engage directly with the Respondent?

18.13. Did the respondent know or could it reasonably have been expected to know that the claimant was likely to be placed at the disadvantage?

18.14. What steps could have been taken to avoid the disadvantage? The claimant suggests:

18.14.1. Delaying the redundancy process,

18.14.2. Not choosing the Claimant for redundancy,

18.14.3. Redeployment with the English Department,

18.14.4. Providing a porter to remove the Claimant's belongings.

18.15. Was it reasonable for the respondent to have to take those steps and when?

18.16. Did the respondent fail to take those steps?

Facts

Observations about the witnesses

19. The Tribunal begins with observations about the witnesses. The Tribunal is satisfied that each witness has done their best to tell the Tribunal what they believe to be the truth.

20. The University suggested that Dr D'Arcy's unreliability is demonstrated by her insistence that she taught only Mediaeval and Early Modern English Literature but equally her reliance on the list of dissertation candidates she supervised and their far broader range of topics as evidence she taught far wider topics too. We reject that. There is no inconsistency. Her teaching (in the sense of lecturing to a class) was at the time exclusively Mediaeval and Early Modern English Literature. This is the sense that the word "teaching" has been used by the University in this case. The dissertation topics she supervised were far wider. We do not accept that supervision of dissertation is "teaching" as used by the University – though no doubt the supervisor of a dissertation is teaching a candidate in a wider sense of providing education and direction through means other than the classroom into e.g. self-directed study and research. It is in reality a difference in each person's personal dictionary as to where the boundary in meaning lies. It does not undermine Dr D'Arcy's point or credibility.

21. For our part, we will use "teach" (and its derivatives) to refer to e.g. delivering lectures or seminars/tuition groups to students and "supervision" (and derivatives) to refer to the process of providing education through the supervision of people writing dissertations. When we talk of Dr D'Arcy

delivering education of a specific area, we will refer to her as a "teacher" to maintain consistency in words used.

22. We now turn to the facts necessary for us to decide this case and that we have found proven on the balance of probabilities.

About the respondent and the Department of English

23. The University is a public university in the city of Leicester, United Kingdom. It undertakes under- and post-graduate teaching and is a public research institution. It teaches across a broad range of subjects. The topics the University taught at undergraduate and post-graduate level included English language and literature.

24. The Tribunal will describe its structure (so far as relevant) at the times relevant to this case. It may or may not reflect the current structure or areas of work. The University divides the topics into Colleges. These Colleges are then divided into Schools. Each School is then divided into a Department. Thus, the hierarchy that concerns English is that it is taught by the Department of English, that is part of the School of Arts, which in turn is part of the College of Social Sciences, Arts and Humanities.

25. The University is dependent on income to fund research. Some funds come from public or private grants, but a lot comes from under- and post-graduate students and the associated income from the fees they pay. Therefore teaching is a key part to securing income.

26. The University is run on a day-to-day basis by a Vice-Chancellor. He is assisted by a Deputy Vice-Chancellor and Pro-Vice-Chancellors. The management are answerable to a governing body known as the University's Council ("Council"). In summary, the Chancellors are akin to company executive officers and the Council is akin to the board of directors.

27. The University is governed by a charter and statutes which do not need to concern the Tribunal. Its policies on e.g. redundancy and disciplinary matters are set out in Ordinances, which the University is empowered to alter. They are akin to normal workplace policies.

28. The University employs people who usually (but not exclusively) are Doctors and Professors to teach under- and post-graduates and to carry out their research. There were no people to whom our attention was drawn employed in relation to English Literature to carry out pure research.

29. Unlike in a primary and secondary School where the curriculum dictates what a teacher teaches, in the Department of English prior to the completion of the redundancy process and at least so far as Dr D'Arcy was concerned, it was for each teacher to set out what optional topics they wanted to teach to students. These were then offered to students who elected which topics (called "modules") they wanted to study. Once the students had made their elections, the Department could consider the number of students per module and decide if the module were worth running and, if so, devise a timetable.

30. The University allocates staff to grades which dictates the range in which their salary falls. Within the grades there are salary points that staff progress to with e.g. length of service.

About the claimant

31. Dr D'Arcy was at the University a teacher and researcher. The modules that she taught at the University were exclusively on Mediaeval and Early Modern English Literature and the works of Geoffrey Chaucer. This represented her chosen area of research. The University accepts her research was excellent, as was her colleague's research. She also supervised students writing their dissertations. The topics of the dissertations that she supervised covered a far wider range in both period and aspects of English Literature than that which she taught. Dr D'Arcy was grade 9 on the University's salary scale.

Dr D'Arcy's disability

32. At all material times the claimant was disabled because of type 2 diabetes ("diabetes") since 19 August 2020.

33. The respondent concedes (sensibly in our view in light of the evidence which we do not now need to go into) that it knew that Dr D'Arcy was disabled because of type 2 diabetes from 19 August 2020.

34. We have been presented with no evidence beyond Dr D'Arcy's bare assertion that her diabetes increased stress at all or to such an extent that she was absent from work because of it, that impacted on her ability to engage with e.g. the redundancy process or present an expression of interest. Similarly beyond an assertion that it was so, we have been presented with no evidence that shows her diabetes impacted on her ability to remove her belongings from her office when her employment ended. We accept these things may be a possibility. However they are not in our view self-proving or so inherently plausible we can accept them without more. Such evidence as we have (like occupational health ("OH") reports, Ms O'Sullivan's evidence and doctor's sick notes to which we will come) do not support Dr D'Arcy's contention. We are not medical experts and consider we are unable to use our "common sense" to decide if these things are connected to her diabetes. Therefore in the absence of evidence we cannot accept Dr D'Arcy's assertions these were effects of her diabetes. It follows we find as a fact they were not.

35. Dr D'Arcy has constantly referred throughout the hearing to her stress and anxiety. We will mention them below. However they were never put forward as her disabilities and she never applied for permission to amend to add them to her claims. We do not approach them therefore as being disabilities at the relevant time.

The Llewellyn review

36. Over a sustained period of years, the number of students enrolling to study English had declined. There was no suggestion the numbers would increase because fewer students were studying English A-level, which is a natural feeder to an English degree. We accept that if fewer students are enrolling and there is no reason to foresee a stabilisation or increase in the number of applicants to study in the near future, the viability of the Department was at risk.

37. Therefore In June 2018 or thereabouts, Professor O'Connor commissioned Professor Mark Llewellyn of Cardiff University to review the University's undergraduate programme in English. No criticism has been made of Professor Llewellyn or his report. We make none either – it seems considered and thorough to us. He reported back in September 2018. He made a number of recommendations, such as a move to focus more on student employability and on student preferences for options.

38. There was a delay acting on the report. We do not see that as concerning because no party has argued its rationale, methodology or conclusions had become invalid over time since publication.

The Shaping for Excellence Review

39. Towards the end of 2019 Professor Nishan Canagarajah became Vice-Chancellor.

40. He initiated a strategic review in Summer 2020 called "Shaping for Excellence". Professor Canagarajah sought to focus on the University's perceived core strengths and to maintain its areas of excellence. The review covered the English Department and highlighted similar issues to those identified by Professor Llewellyn. The focus in the Department was not primarily financial but considered the obvious: more students would mean more money and more research; fewer students would mean less money and less research. We have seen no financial data but it seems to us axiomatic that this is correct. The Department review, chaired by Professor Halliwell, concluded that the latter outcome (fewer students) was more realistic because of the decrease in A-level English candidates and consequent decrease in English undergraduates. The School devised a strategy therefore to provide stability for the Department.

41. In the hearing Dr D'Arcy raised the issue that Professor Canagarajah had said he wanted to "de-colonise" the curriculum, which was explained to mean less or no focus on e.g. Chaucer and more focus on English Literature from a wider range of non-culturally British sources. We see no evidence he held this view, had this aim or that it informed the process that followed. We conclude that at all times the focus was solely on maintaining the viability of the English Department.

Pre-change engagement process

42. The University began what it called a "pre-change engagement process" in October 2020.

43. Thus on 22 October 2020 there was a meeting of all academic staff in the English Department. It was chaired by Professor Halliwell, who was now the outgoing head of School, and Dr Morley. They discussed various matters such as external factors, undergraduate trends, league tables, grants, the National Student Survey, the Llewellyn Review and the School's strengths, weaknesses and future direction as identified in the Shaping for Excellence Review. They raised the possibility that the English Department may have to "slim down" which implied redundancies, though no decision had yet been taken in this regard. The meeting concluded with a confidential survey for staff to complete afterwards which asked a number of questions to allow staff to feed back their views and suggestions. We are

quite satisfied that it was a genuine and open attempt to engage staff and allow for feedback that would be genuinely considered.

44. The effect of this though on Dr D'Arcy was significant. We accept that it left her shocked, upset and stressed. It is inherently plausible that someone would be left in such a state after such a meeting, particularly when they are so passionate about their work like Dr D'Arcy plainly is. It is also supported by the doctor's sick notes, evidence of Ms O'Sullivan and OH reports to which we will come.

45. On 6 November 2020 the academic staff submitted a detailed collective response to the pre-change engagement process addressed to Professor O'Connor and Professor Canagarajah. Dr D'Arcy did not write the letter, but she did read it, approved it and agreed that her name be added to it as a signatory. We do not feel any benefit derives to our task from analysing its contents or substance.

46. On 30 November 2023 Professor O'Connor provided her own written "thematic feedback". It repeated the earlier observations about the risk to the department.

Case for change

47. Professor O'Conner and Dr Morley then considered the feedback and prepared a document called "Case for Change for English in the School of Arts – Subject to Consultation". Based on their evidence we are satisfied they did genuinely consider the feedback, and other circumstances, when preparing this Case for Change. They also looked at what staff had taught and had previously expressed their desire to teach.

48. The document is significant in length and exhibits as annexes many of the documents to which we have referred already, and background we have already alluded to. In summary it proposed to:

    48.1. Close English Language. This would result in 4 staff members being placed at risk of redundancy.

    48.2. Cease to teach Mediaeval Literature. This would result in 3 staff members being placed at risk of redundancy.

    48.3. Reduce the teaching in Early Modern Literature. This would entail a reduction from 4 to 3 staff. One member of staff was going to leave in any event, so no redundancies would be needed.

    48.4. Create a post to "teach out" topics relevant to this case that we can simply label Mediaeval and Early Modern English Literature. Such a role would educate those already enrolled on the course but would end after a few years when the student numbers had ceased. It was not therefore a long-term posting.

49. The net effect was that 6.8 staff full-time equivalent ("FTE") in Mediaeval and Early Modern Literature would be reduced to 2.8 FTE with a "teach-out" post for a relatively short time to accommodate students in situ.

50. We find as a fact that the University had a genuine belief that there was a need to reduce FTE employee headcount in Mediaeval and Early Modern

Literature. We note again there is no financial analysis, but again the axiomatic fact that fewer students now and in the future means less income and less need for teaching staff.

51. The University had a long-stop date for completion of the redundancy process, 27 April 2021. This was because the University needed to ensure that it had sufficient time to implement the changes arising from the process in time for the start of the 2021-2022 academic year and for the necessary acceptance of students after A-level results or similar were published in August. We accept therefore the University had to keep to that deadline but could be flexible within that constraint.

Collective consultation and Dr D'Arcy's reaction

52. On 18 January 2021 the University invited affected staff and trade union representatives to a collective consultation meeting. The meeting was scheduled for 27 January 2021.

53. Dr D'Arcy reacted by becoming irate continually calling Professor ~~O'Connor~~ Morley and saying things like "How dare I be treated like this?". The communications became more frustrated and personal. In the context of what follows, it demonstrates how this adversely impacted her.

The media, impact on Dr D'Arcy and Professor Canagarajah's letter

54. In the meantime, the proposals had been leaked outside the University They had been reported on certain websites and by certain newspapers as the University seeking to "decolonise" English and "ban Chaucer".

55. The reporting was inaccurate about the proposals but nonetheless it prompted a strong response online. We have seen a sample of the responses sent personally to Dr D'Arcy directly through her social media. We do not need to set out the detail. However they are over a period of time, strongly worded, rude, offensive and ignorant. Dr D'Arcy also found herself being contacted by media outlets for comments constantly.

56. Dr D'Arcy reported this abuse to Professor O'Connor. She asked Dr D'Arcy to forward the comments and the like to her. Dr D'Arcy did not do so. The University attempted to make contact with Dr D'Arcy but she did not respond. Dr D'Arcy had told Professor O'Connor that she would contact Dr Angie Pears, Associate Director of Equality, Diversity and Inclusion to help. She did not do so, however. We do not accept that the University can be criticised in the circumstances for continuing as it did, given Dr D'Arcy's lack of engagement and its encouragement for her to do so.

57. On 26 January 2021 Professor Canagarajah wrote to the University's alumni about changes proposed at the University. He disowned the way the media had presented the suggestions. He did however say that the University was anticipating a reduction of 60 posts, 7 of which were in English of which 3 taught Mediaeval Literature.

58. Maybe the letter was ill-timed in all the circumstances, but we do not see the letter as relevant. The word "anticipate" we believe conveys to the reasonable reader no more than that is the proposal that at that point appeared likely to be followed. That was an accurate statement of fact. We

do not accept this shows any element of pre-determination by Professor Canagarajah or the University more widely.

Collective consultation meeting

59. Dr D'Arcy and Ms O'Sullivan attended the meeting on 27 January 2021. The University had prepared a PowerPoint slide show setting out the proposals as at that stage, the reasons and the effect. The notes show an open discussion at which many staff asked questions. Though we are satisfied she had the opportunity to do so, Dr D'Arcy did not ask any questions.

60. Following the meeting, staff were asked to book the first individual consultation meeting.

First individual consultation meeting

61. Dr D'Arcy did not book an individual consultation meeting. Ms Bains emailed Dr D'Arcy on 2 February 2021 to encourage her to do so. Dr D'Arcy replied that she was not going to attend an individual consultation meeting until her trade union had made submissions to the University. However later she changed her mind and booked a meeting for 18 February 2021.

Dr D'Arcy's illness and effect

62. The effects of the previous events (online abuse, media, risk of redundancy etc.) as set out above had an adverse effect on Dr D'Arcy's mental health.

63. This manifested itself by her withdrawal from consultation, some messages she sent in February online (see below), being signed off with stress, the OH reports (see below) and Ms O'Sullivan's own evidence.

64. The messages she posted online were messages on her Facebook account. It is a private account but she has 200 "friends" on it who include academics all over the world. One person who saw the messages reported it to the University. The University does not suggest they are relevant to issues of contributory fault and we see no reason we should demur. Therefore so far as is necessary to resolve the issues before us we need say only that they were strongly and provocatively worded and not the words of a calm, rationally acting individual – they tended to involve glib comparisons between the University's proposals and Naziism. Dr D'Arcy has attempted to say they are covered by the principle of academic freedom. While the principle was discussed in the hearing and the University provided the policy to us, we do not feel it assists to analyse it for the simple reason that we consider that if she were not in such an adverse emotional state, she would never have written them. Dr D'Arcy does not strike us as though she genuinely believed in the comparison as such but, ill-advisedly perhaps, resorted to the ill-judged comparator to express how she felt. The messages did prompt the commencement of a disciplinary process. That was suspended and, ultimately, went no further. We need not say anything more about it. However at one point Dr D'Arcy suggested a link between her writing of these messages and the decision to dismiss her. Beyond that speculative suggestion, we see no evidence to suggest a link. We find as a fact these messages played no role therefore in her dismissal.

65. The evidence that we have shows to us that she stopped posting messages on or about mid-February 2021. This tallies with when she was signed off by her doctor.

66. Dr D'Arcy says from this point she became withdrawn and was unable to take part in any way in the redundancy process, yet alone engage in normal-day-to-day matters. Any thought of the University or redundancy process was triggered in her an adverse emotional reaction.

67. We accept this. Her general practitioner signed Dr D'Arcy off sick with stress from 17 February 2023 until her employment ended. Ms O'Sullivan's evidence was also compelling. She told us that Dr D'Arcy was the worst she had ever seen of anyone she had represented. While Ms O'Sullivan did not meet in person with Dr D'Arcy (because of restrictions imposed in response to the then Covid-19 pandemic), she did speak to her a number of times by phone. She told us that Dr D'Arcy was totally unable to engage in any rational or effective way. Any contact from the University would trigger a strong adverse emotional reaction, such that Ms O'Sullivan had to become the intermediary who would pass on communications. We also accept Dr D'Arcy's evidence about the medication which she was placed on which included 2 soporifics, a strong anti-depressant and another drug which she described as an anti-psychotic. This image is even more credible when we reflect on how Dr D'Arcy was before the Tribunal – namely when for example there was a reference to online abuse she became inconsolable. Finally the contents of the OH reports (see below) also confirm this view.

68. While we accept the University's point that a doctor's sick note that someone cannot attend work does not mean that they cannot take part in other management processes such as a redundancy process (the University relied on **Andreou v Lord Chancellor's Department [2002] IRLR 728 CA** to support that proposition), the other evidence also shows Dr D'Arcy could not engage.

69. As noted, the result was that the University, Dr D'Arcy and Ms O'Sullivan agreed she would act at an intermediary – a go-between. Documents and emails would be sent to Ms O'Sullivan would liaise with Dr D'Arcy using her discretion in doing so, and feed things back. It was also agreed that the University would not contact Dr D'Arcy directly. This is because any correspondence from the University had a triggering effect on Dr D'Arcy.

Union consultation

70. On 25 February 2021 the University met with trade union representatives, including Ms O'Sullivan to consult with them about the proposals.

1st OH report

71. On 22 February 2021 the University referred Dr D'Arcy to OH, and they reported back on 1 March 2021. While Dr D'Arcy says the University was wrong not to simply accept her doctor's sick note, we disagree. The note simply says she cannot work. It is entirely appropriate to refer her to occupational health to assess the limitations and possible adjustments. We are fortified in our view because Ms O'Sullivan agreed that the referral was reasonable and sensible.

72. The report concluded that Dr D'Arcy was not fit for work because of "emotional lability and poor concentration" and said it could last 4-8 weeks. It also said:

"[In] my opinion Anne-Marie is not medically fit to for meetings with management as:

"she is capable of understanding proceedings, but would struggle to defend herself
"she would struggle to participate without high levels of emotional stress

"she is experiencing a fragile psychological state."

73. The report referred to a gastero-intestinal upset as being a symptom of her stress. Dr D'Arcy linked that specifically to her diabetes. While we are open to accept it might be a symptom, it is on its face more plausible it was a symptom of her stress and anxiety because it was but one symptom in a list of symptoms including panic attacks and insomnia and frequent tearfulness and because of the way the OH report is written. There is no medical evidence that shows that that particular symptom was attributable wholly or partly to her diabetes. In the circumstances, we find as a fact it was not.

The counter-proposal

74. On 4 March 2021, the Department's academic staff prepared a counter-proposal to the University's redundancy proposal. We do not need to go into the details because the University did change its proposal in light of the letter.

75. Dr D'Arcy was one of the signatories. The University suggests this shows that Dr D'Arcy was capable of taking part since she had put her name to the letter. We do not accept that. Rather at this time Dr D'Arcy was very stressed and her ability to take part was superficial. That is reflected in the evidence we have already referred to about her illness and effect. There is no suggestion it had eased up. We conclude she had only the most superficial participation in the letter, and that does not undermine our conclusions about how affected she was by the process.

2nd OH report

76. A second occupational health report on 8 March 2021 confirmed that Dr D'Arcy could not take part in any management process because of high levels of emotional distress.

2nd collective consultation meeting and modified proposal

77. On 10 March 2021 there was a second collective consultation meeting. Dr D'Arcy did not attend but Ms O'Sullivan did.

78. At the meeting the University disclosed it had reconsidered the proposal in light of the staff counter-proposal. The University did not accept the counter-proposal but accepted some of the feedback. It now decided not to create the "teach out" post but instead to "retain" one teaching and research post that covered both late Mediaeval and Early Modern English Literature. The retained post was to be grade 9. Applications for that post would be ring-

fenced to the 3 grade 9 teaching and researchers in Mediaeval Literature (which included Dr D'Arcy) who faced redundancy. The post would

"support the delivery and resilience of the Early Modern modules as well as providing an anchor to the chronological spine of the programme by potentially maintaining a small amount of late Mediaeval content."

Any person interested would apply by expressing an interest. It was not to be advertised externally. It is not clear if they would be interviewed for the role but we do not think it affects our decision in the circumstances.

79. Dr D'Arcy said there was a requirement that anyone expressing an interest in the retained post was required to have taught predominantly something other than Medieval Literature in the last 5 years. We reject that assertion. We have seen no evidence for that, and it was quite apparent that the University considered that Dr D'Arcy would have been eligible if she had expressed an interest based on their evidence and that she was 1 of the 3 to whom the post had been ringfenced. Such a requirement would be incompatible with that eligibility.

80. While Dr D'Arcy queried the division between English language and literature in the proposals, we can see no basis to say the division is outside of the options available to the University. They are different topics, albeit expertise, resources and possibly teaching may overlap. However we have seen nothing to suggest they cannot reasonably be treated separately since they are separate topics within English.

Effect of the modified proposal

81. What we did note was the University used the word "retain" in its proposal, rather than "create" or similar. The original proposal said it was to "create" the fixed-term teach-out roles. We conclude that this word "retain" was chosen deliberately because firstly one assumes the School is familiar with words and meanings and because of the deliberate change in words from "create" the teach-out post in the original proposal to "retain" a grade 9 post in this new proposal.

82. This choice of word seemed entirely apt to us when we reflected that the 3 people at risk of redundancy were:

82.1. the same grade as the retained post (we do not consider any variation in why on the salary point within that grade the retained post would fall is relevant since it is the substantive grade that is important),

82.2. teachers in broadly the same subject as the retained post, and

82.3. researchers in broadly the same field as the retained post,

82.4. had the expertise to teach the material required for the retained post.

While we accept that Dr D'Arcy's teaching was narrower than that expected of the retained post, we are not persuaded this meant the retained post was not anything but a continuation of her position (or that of her 2 other colleagues) – it was in short a restructuring of the curriculum. At the risk of repeating ourselves,

> the University obviously saw it as a continuation because it was now "retaining" a post and not "creating" one and it restricted recruitment to the 3 people at risk. Dr D'Arcy's own evidence that persuaded us she could adapt to the broader curriculum that the retained post based on her teaching and supervision. While teachers had freedom to propose the optional modules on the syllabus that they wanted to teach, we have seen nothing that says that the University could not for example restructure the curriculum and therefore teachers would have to modify their teaching accordingly, within reason.

83. Therefore we find as a fact that the new post was in fact a continuation of one of the three posts at risk of redundancy. We are fortified in this view because in the material the University itself says it is proposing to "retain" – not "create". "Retain" implies it sees the new post as continuation of one of the existing posts. In addition the University ringfenced this retained post to the 3 posts at risk of redundancy. In context, this implies again that this is a comparable post and that it is a continuation of one of the existing posts.

84. We also find as a fact that the University's decision-makers never applied their minds at the time to the consequences of changing the proposal from creating a post to retaining a post. Rather, they inadvertently simply continued with the assumption that the 3 posts at risk of redundancy would remain so. As a result they never took the necessary step back to review the process, instead simply slotting in the change to the process they had already designed. As a result they never compared job specifications of those at risk to the retained post, never considered whether a pool was necessary or any of the consequential matters that would arise like scoring system and avoided having to make the decision itself on who to retain and who to dismiss.

85. We come to this conclusion based on the University's witnesses' answers in cross-examination. The witnesses generally were fluent with their answers. However when the Tribunal's panel raised this issue there was in our view marked hesitation and wavering. Witnesses seemed surprised by the issue. They hesitated when asked. We do not criticise witnesses for hesitating. We do not think this demonstrates anything like dishonesty or unreliability. Rather the hesitations on this issue as opposed to the other issues reflected this had never occurred to the University.

86. The proposal has in particular inconsistency about the approach to retained post which the University seemed to suggest was irrelevant even though the retained post would be carrying out research like the posts at risk of redundancy. However the University told us the research of those at risk was not relevant because it was all excellent and research is a personal matter for the researcher to choose (within certain bounds) and so they cannot make a distinction. We do not accept that as the reason because they never carried out any evaluation to test if that belief is true. Rather the manner of oral the evidence and lack of evidence of prior consideration of this at the time leads us to conclude this was an ex post facto justification, and it had never entered the University's mind to consider. The University also sought to rely on the difference in teaching topics. That again is an ex

post facto justification because it was never a consideration at the time, demonstrated by the University retaining rather than creating a post.

3rd OH report

87. On 16 March 2021 there was a third OH assessment. The report reported that Dr D'Arcy

> "is unlikely to be able to participate in management processes due to high levels of emotional distress. She is able to engage with written information, but may struggle to respond fully or within tight time constraints."

Expressions of interest for the retained post

88. At some point the University opened up the opportunity for those 3 at risk of redundancy to apply for the retained post by expression of interest. We are unclear when applications opened but in our view it does not matter.

89. The University set the original deadline for expressions of interest for the retained post for 22 March 2021. However Ms Bains's email of 19 March 2021 to Ms O'Sullivan shows the University offered to extend it to 26 March 2021 for Dr D'Arcy to reflect her personal circumstances. Dr D'Arcy attempted to suggest there was something sinister in this. We reject that. It was the University attempting to accommodate Dr D'Arcy.

90. At this point the University through Ms Bains was liaising with Ms O'Sullivan directly and not with Dr D'Arcy. This is what they had agreed. The email of 19 March 2021 summarises a discussion that had taken place between Ms Bains and Ms O'Sullivan. We do not need to go into the detail but it persuades us that Ms O'Sullivan was doing her best for Dr D'Arcy while seeking at all times to be as co-operative as possible with the University, and that Ms Bains was seeking to do what she could to accommodate Dr D'Arcy too while recognising the University had a deadline in that any changes had to be in place to allow the Department to ready itself for the new academic year (a date which itself was inflexible). It shows genuine co-operation in our view and good employment practice.

91. However there was an unfortunate occurrence. Dr D'Arcy was under the impression that the expression of interest would require her to apply like she would for an academic post. Such applications are lengthy, detailed and often involve cross-referencing prior research. If she were an external candidate then that is what would be required. However the expression of interest required only a short letter and summary of about no more than 2 pages in length. It appeared to us that Dr D'Arcy only realised there was a far less demanding requirement at the hearing.

92. It is not clear to us how this had happened. Our focus is only on the University's conduct for the purposes of this decision. We have seen no evidence that suggests the University led Dr D'Arcy to have concluded that the University was expecting a full application like that of an external candidate if she wanted to express her interest in the retained role. Indeed the University had already by this time circulated the appropriate form for an expression of interest that would have guided her as to the limited detail required of her. Therefore any misunderstanding is not the fault of the University.

93. The end result was that Dr D'Arcy did not express an interest and so the University did not consider her for the retained post.

94. The University however did seek to clarify the position. On 29 March 2021 Ms Bains emailed Ms O'Sullivan as follows:

> "As I have not heard anything further on [the expression of interest], I am taking this as an indication that [Dr D'Arcy] does not wish to be considered for the role and that she does not wish to make an application for voluntary redundancy."

95. Miss O'Sullivan replied that day, "I have not heard back from her."

96. The University was contacting Ms O'Sullivan as had been agreed. Ms O'Sullivan was liaising with Dr D'Arcy in a way that reflected demands from other trade union members on her time and how unwell Dr D'Arcy was. We have been given no reason to infer anything other than both were doing the best they reasonably could do in the circumstances.

Personal consultation meeting

97. There was a personal consultation meeting arranged between the University and Dr D'Arcy. Ms Bains sent the invite on 9 April 2021 to Ms O'Sullivan and offered Dr D'Arcy the opportunity to submit comments in writing or to relay comments verbally through Ms O'Sullivan or another member of staff. The University also offered Dr D'Arcy the opportunity to suggest alternative methods subject to the long-stop date of 27 April 2021.

98. The date set was 16 April 2021. Dr D'Arcy did not attend and did not submit any representations.

4th OH report

99. Between the invite and scheduled personal consultation meeting, Dr D'Arcy attended a OH assessment. It reported on 12 April 2021 that:

> "Today [Dr D'Arcy]'s mood appears to be lifting slightly and she seems a little more positive. She still experiences distress when discussing participation in management processes, in particular disciplinary process.
>
> "In addition, she had developed a problem with her foot which became infected following an injury she had been prescribed strong antibiotics and her GP has advised her to be on bed rest for two more weeks.
>
> "It is unlikely that [Dr D'Arcy] will be able to participate in management processes without significant distress, however she is happy for her union Rep to continue to represent her at these in order to bring about a resolution. She continues to receive the appropriate help and support from her GP and she now has access to counselling for when she feels able to engage."

100. The foot condition may or may not be related to her diabetes – Dr D'Arcy says it was but there is no medical evidence to that effect. However whatever the cause, we have seen no evidence to persuade us that the foot injury had any particular impact on her ability to engage at all with the redundancy process or to remove her belongings (see later). However the report's references to stress do show in our view that Dr D'Arcy was still

emotionally unable to engage directly in the process. In our view Dr D'Arcy remained unable to take part because of her emotional state.

101. We accept Ms O'Sullivan's evidence that Dr D'Arcy was unable still to give her proper instructions and rather felt able only to leave it to Ms O'Sullivan's discretion. This is evidenced by Ms O'Sullivan's email of 15 April 2021 where Ms O'Sullivan set out the detail of the foot injury and confirmed that she had nothing to add.

Redundancy

102. On 11 May the University wrote to Dr D'Arcy confirming that she was being made redundant on notice with effect therefore from 11 August 2021. The letter set out several details about help available to Dr D'Arcy and informed her she may appeal.

5th OH report

103. A further OH appointment was arranged for 18 May 2021. Dr D'Arcy did not attend.

Appeal against dismissal

104. On 24 May 2021 Dr D'Arcy appealed against her dismissal for redundancy. The letter is 18 pages long. We summarise it as follows: It complained that the University had not followed the redundancy ordinance in relation to consultation or notification and the circumstances leading to and the effect of the abusive social media, unfair selection method and criteria alleging bias on Dr Morley's part, and "new information" which related to the modules that would be taught.

6th OH report

105. There was a 6th OH assessment on 12 June 2021. It reported Dr D'Arcy was unfit to work but likely to be fit within 3 months, and that Dr D'Arcy was aware she needed to participate in meetings and would require adjustments e.g. the right to be accompanied by a suitable person. It also said:

"Doctor D'Arcy is experiencing high levels of distress at the thought of returning to the university to clear out her office. If it could be accommodated, it would be helpful if arrangements could be made to box up her office contents so that someone could collect them for her."

In our view this clearly shows the difficulty of boxing up her office was not related to the diabetes, but rather to her emotional state resulting from the events she had been through in relation to the redundancy.

Appeal hearing and outcome

106. The appeal was heard on 16 September 2021. While quite a long time had passed between the appeal and it being heard, we conclude that was because of the effects of the then Covid-19 pandemic and the demands it placed on the University, and not for any sinister reason.

107. The Council heard the appeal. It had no involvement in the redundancy process. The appeal was by way of review of the decision, rather than a fresh reconsideration. It also focused only on the points that Dr D'Arcy raised. Therefore, as Mr Tapp fairly and readily conceded, it did not

consider the matter we raised above about the “retained” post and the consequences that change might have for the redundancy proposal.

108. We have had regard to the notes of the meeting. The are lengthy. Dr D’Arcy attended with Ms O’Sullivan as her trade union representative. They disclose that the panel went through each allegation thoroughly, did not simply rubber-stamp the University’s position on each appeal point, and afforded Dr D’Arcy a fair and generous opportunity to put her case. We are also quite satisfied they carefully considered the appeal before reaching their decision. The outcome letter of 8 October 2023 is lengthy and has annexed to it a document of 3 columns which sets out, from left to right, Dr D'Arcy’s case, the University’s case and the panel’s conclusions (akin to a Scott Schedule in legal proceedings).

Collection of belongings

109. Like all leaving employees, the University required Dr D’Arcy to collect her belongings from the University and remove them when her employment ended.

110. It is not entirely clear which day was agreed for Dr D’Arcy to attend the University but the following is enough for us to be able to decide the case:

110.1. There were about 2,000 or so books that she had to remove.

110.2. It was in the Covid-19 pandemic when there were restrictions on movement.

110.3. At the time Dr D’Arcy was living in Ireland.

110.4. She had agreed a date with the University when she would attend. This was the start of August 2021. This was necessary because it was the academic vacation and Covid-19’ regulations and guidance meant it was not feasible simply to arrive and be accommodated.

110.5. To be able to remove her belongings she had hire a van in Ireland to drive it to Leicester and then return. Hiring a van was not straightforward, again because of the Covid-19 pandemic and consequential regulations.

110.6. In order to leave Ireland she had to get the agreement of the Garda Síochána and return to Ireland within 72 hours.

110.7. She also needed to book a ferry which the Covid-19 pandemic and consequent regulations made difficult.

110.8. As a result she attended the day after that which was booked.

110.9. There were no porters available that day to help her. The University had not packed her belongings away

110.10. It took Dr D’Arcy a long time to pack up her belongings as was exhausting.

110.11. She did remove all her belongings eventually with the help of someone who came with her from Ireland.

111. We add that we have seen no convincing evidence that links this to her diabetes or suggests that her diabetes had any particular impact on this event. Like the OH report shows, that the distress and difficulty was a result of her emotional state, the pressures caused by the Covid-19 restrictions and the sheer volume of items to be moved that were the issue.

Law

Unfair dismissal

112. Redundancy is a potentially fair reason for dismissal under the **Employment Rights Act 1996 section 98**.

113. **The Employment Rights Act 1996 section 139** says a person is dismissed for redundancy if the employer shows the dismissal is wholly or mainly attributable to (so far as relevant)

"(b) the fact that the requirements of that business—

"(i) for employees to carry out work of a particular kind, or

"(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

"have ceased or diminished or are expected to cease or diminish."

114. It is not for us to consider the wisdom of redundancy or the commercial case for it: **Hollister v National Farmers' Union [1979] ICR 542 CA; James W Cook And Co Ltd v Tipper [1990] ICR 716 CA.**

115. The approach to whether there was a redundancy under limb (b) is as follows (**Murray v Foyle Meats Ltd [1999] IRLR 562 UKHL**)

115.1. The first is whether one or other of various states of economic affairs exists.

115.2. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation.

116. It is a factual question whether work is that of a particular kind, focusing on the tasks performed not the nature of the job*:* **Murray v Foyle Meats Ltd [1999] IRLR 562 UKHL; Johnson v Nottinghamshire Combined Police Authority (1973) 8 ITR 411 NIRC**).

117. When it comes to reasonableness the burden of proof is neutral. The tribunal should consider all the circumstances including the employer's size and administrative resources.

118. We have considered the guidance in **Williams v Compair Maxam Ltd [1982] IRLR 83 EAT**. It reminds Tribunals that the test is whether the University's conduct was that which a reasonable employer could have adopted and that the employer must show it was reasonable to dismiss this employee, rather than an employee. The lay members in **Williams** also set out the hallmarks of a reasonable process.

"1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant

facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

"2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

"3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

"4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

"5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

"The lay members stress that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. But the lay members would expect these principles to be departed from only where some good reason is shown to justify such departure. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim."

Contributory fault

119. Finally when considering both the basic award (see **Employment Rights Act 1996 section 122(2)** and compensatory award (see **Employment Rights Act 1996 section 123(6)**) the Tribunal must consider if the claimant's conduct before dismissal is such that it is just and equitable to reduce or further reduce the amount of the basic award to any extent. Applying **Steen v ASP Packaging Ltd [2014] ICR 56 EAT** and recognising that for the compensatory award, any fault must contribute to the dismissal, the approach is:

119.1. identify the conduct which is said to give rise to possible contributory fault,

119.2. decide whether that conduct is culpable or blameworthy,

119.3. for the compensatory award, decide if it contributed to the dismissal, then in either case.

119.4. decide whether it is just and equitable to reduce the amount of the basic award to any extent.

120. What amounts to contributory fault is the same for both the basic and compensatory award: **Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/02 EAT**. Contributory fault is "culpable and blameworthy" conduct that includes conduct that is foolish or "bloody minded" conduct: **Nelson v BBC (No2) [1980] ICR 110 CA**. It is an objective test and therefore the employee's knowledge is not determinative: **Allen v Hammett [1982] ICR 227 EAT; Department for Work and Pensions v Coulson UKEAT/0572/12 EAT**.

Disability

121. The **Equality Act 2010 section 6** provides the references to disability mean to the actual disability the claimant has, and references to those with a disability means a reference to those who share the same disability as the claimant.

Discrimination arising from a disability

122. The **Equality Act 2010 section 15** provides:

"Discrimination arising from disability

"(1) A person (A) discriminates against a disabled person (B) if—

"(a) A treats B unfavourably because of something arising in consequence of B's disability, and

"(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

"(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

123. The approach to cases under **section 15** was explained in **Pnaiser v NHS England aor [2016] IRLR 170** and **Sheikholeslami v University of Edinburgh [2018] IRLR 1090 EAT**. In summary

123.1. The first issue is whether A treated B unfavourably because of an (identified) something? This requires examination of the alleged discriminator's state of mind.

123.2. The second issue is: did that something arise in consequence of B's disability? This is an objective question in light of the evidence. This could describe a range of causal links;

123.3. the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

123.4. There is no reason why the second issue cannot be determined first in sequence.

Failure to make reasonable adjustments

124. The **Equality Act 2010 sections 20** and **21** provide (so far as relevant) that if an employer applies a PCP to its employees which places a disabled employee at a substantial disadvantage compared to non-disabled employees, then the employer must make adjustments such as are reasonable to avoid the disadvantage. "Substantial" means "more than

minor or trivial": **section 212**. . The Employment code **appendix 1[8]** states that the requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people.

125. The Tribunal has to ask whether the PCP put the disabled employee at a substantial disadvantage compared with a non-disabled employee. If they are treated equally but there is a disproportionate impact on the disabled person, then there is a substantial disadvantage: **Smith v Churchills Stairlifts plc [2006] ICR 524 CA; Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA**; **Sheikholeslami**.

126. Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is capable of amounting to a relevant step. The only question was whether it was reasonable for it to be taken: **Griffiths**.

Burden of proof: Equality Act 2010

127. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA; [2021] 1 WLR 3863 UKSC; Hewage v Grampian Health Board [2012] ICR 1054 UKSC** and **Madarassy v Nomura International plc [2007] ICR 867 CA**.

128. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage but it can take into account the respondent's evidence is assessing if the claimant has discharged the burden of proof. At this stage it is irrelevant that the respondent has not adduced an explanation.

129. It is not enough for a claimant to prove bare facts e.g. a difference in status and a difference in treatment. They only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that the respondent had committed an unlawful act of discrimination or harassment: **Madarassy at [56]; Efobi UKSC at [46]**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.

130. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.

131. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.

132. In **Efobi UKSC** and **Hewage** the Court said it is important not to make too much of the role of the burden of proof provisions. As Lord Hope said at para 32:

"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

Conclusions

133. Drawing on the findings of fact and applying the law to those facts, our conclusions are as follows.

Discrimination arising from disability (Equality Act 2010 section 15)

134. We consider it more efficient to start with the things that allegedly arose from Dr D'Arcy's disability.

Did the following things arise in consequence of the claimant's disability:

(a) Inability to engage with the redundancy process?

(b) Inability to move her belongings?

135. We have considered each separately. However in both cases, the answer is the same for the same reasons. We see no evidence beyond bare assertion that either of these things arose from her diabetes. Therefore we conclude they did not.

136. While we accepted it is possible that diabetes contributed to these things, we conclude that, rather, her inability to engage with the redundancy process was because of her stress and anxiety which we have set out above in the facts and is evidenced by the doctor's sick notes, the evidence of Ms O'Sullivan and the OH reports. There is no evidence that linked it to diabetes. It is also supported by how Dr D'Arcy reacted in proceedings when issues of the online abuse arose.

137. As for the inability to move her belongings, we have found as a fact that her diabetes played no part in this. Specifically, we have seen no evidence that shows her inability to move her belongings arose from her diabetes. Therefore we conclude it did not.

138. In any case she did move her belongings from the University. However if we overlook that, it was other circumstances (stress, Covid-19, volume of material etc.) as set out above in our findings of fact that were the reason she found it difficult.

Conclusion

139. This claim fails at this stage. Therefore it must be dismissed since any of the 3 alleged detriments cannot be because of the consequences of Dr D'Arcy's disability. Issues such as unfavourable treatment, legitimate aim and date of knowledge do not arise.

Reasonable Adjustments (Equality Act 2010 sections 20 and 21)

140. Because the University did not dispute that it applied the PCPs to Dr D'Arcy, we have first turned to whether they placed her at a more than minor or trivial disadvantage compared to a non-disabled person.

Did the PCPs put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the Claimant was absent from work due to stress and unable to engage directly with the Respondent?

141. We have considered each PCP and whether it had a substantial impact on Dr D'Arcy compared to someone without diabetes separately, but our conclusion for each is the same: they did not.

142. Like we have noted in relation to the claim for discrimination arising from a disability, it is no more than a bare assertion unsupported by evidence. Rather the evidence shows any "disadvantage" that Dr D'Arcy suffered derived not from her diabetes but from stress. This is evidenced by the doctor's sick notes, the evidence of Ms O'Sullivan and the OH reports. As we noted, while it is possible that her type 2 diabetes put her at a more than minor or trivial disadvantage in comparison, there is nothing but bare assertion to show this was so.

143. In any case,

143.1. any claim founded on any requirement to teach predominantly something other than Mediaeval Literature in the last 5 years would fail because there was no such requirement (and it cannot sensibly be linked to diabetes in any event).

143.2. Any requirement to express an interest did not put her at a substantial disadvantage because of diabetes in comparison, but rather any disadvantage derived from her emotional state that was not linked to diabetes. Therefore this claim would fail.

143.3. If there were a requirement to be interviewed or assessed for the retained post we cannot see anything on the evidence that explains how sensibly her diabetes puts her at a disadvantage.

143.4. Her inability to engage with collective and/or individual consultation is not in any way connected to her diabetes.

144. The requirement to remove things from her workplace is not impacted by her diabetes, rather it was impacted by the other factors to which we have already alluded above.

Conclusions

145. The claim fails at this stage. It follows the University was not required to make any reasonable adjustments. We do not therefore need to consider knowledge.

Unfair dismissal

What was the reason or principal reason for dismissal?

146. The reason was redundancy. The facts show that the University honestly believed there was a redundancy situation. The reports show a decrease in students enrolling for English modules, and it is perfectly plausible to accept

that if there are fewer students, then there is a reduced need for teachers and a reduction in funding as a consequence.

If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant.

147. We are satisfied on the facts that there was initially proper and genuine consultation. This is demonstrated in our view by the process the University went through and ultimately by the University's decision to change its proposal not to have a "teach-out" position but to "retain" a teaching and research post.

148. We also believe that the respondent was justified in working to and keeping to the timetable it devised for the redundancy process for the reasons given in our findings of fact, namely the academic year and recruitment of students from A-Level results, and the need to prepare for those.

149. We believe the University behaved reasonably when it extended the time for Dr D'Arcy to express an interest because it was a reasonable balance between her needs and the University's needs.

150. We also believe the University behaved reasonably by directing all communications through Ms O'Sullivan, as everyone including Dr D'Arcy agreed, and in confirming Dr D'Arcy had not expressed an interest in the retained role.

151. We believe the University's appeal process was fair (e.g. genuinely considered the appeal and reached an independent decision) albeit it failed to correct the unfairness we refer to below.

152. We conclude that the University was reasonable in the initial pool selection. In the initial consultation 3 teachers and researchers would be made redundant. In effect research would cease because there was no need for teaching, but the University accepted that all research would cease and therefore their research was not relevant. The only role would be a "teaching-out" fixed-term role. We refer to the facts to explain why the University made this proposal and we believe it represented a reasonable proposal.

153. However we conclude the University's conduct after the change in plans in in March 2021 or thereabouts was not that of a reasonable employer, and as a result made the dismissal unfair.

154. We conclude the failure is as follows. If a reasonable employer had decided to change the redundancy proposal so that it was going to "retain" a post, they would have paused and reviewed the whole approach, noting that the retained post was possibly a continuation of one that was being made redundant. The University did not do that in this case. Instead it left untouched the question of whether it was in effect reducing the headcount from 3 to zero and then recruiting into the retained post or whether in fact it was reducing the headcount from 3 to 2.

155. We also further conclude as follows:

155.1. We found as a fact the "retained" post was a continuation of the role of one of the three at redundancy. It was not a new post in

any meaningful sense. In our view the reasonable employer would not simply have proceeded as before on the basis of requiring those at risk to express an interest, but rather would have consulted on the pool, selection criteria and then applied them to the process.

155.2. The University's approach of expecting those at risk to express an interest if they wanted to seek to avoid redundancy is not reasonable. It has the effect of the University disowning the responsibility of deciding who to dismiss and instead passes the responsibility to the employees at risk to take steps to retain their employment. That is not the action of a reasonable employer. Rather a reasonable employer would grasp the proverbial nettle, consider how to make the decision and then make the decision.

156. We note the University points to its ordinance on redundancy and observes that it does not mention pools or selection criteria. We acknowledge the importance of comparing actions against written policies. However we do not accept that it makes unreasonable actions reasonable. The concept of pools and selection criteria and the hallmarks of a fair process are long- and well-established. An employer the size of and with the resources of the University can reasonably be expected to know of such concepts or at least be able to resource taking advice on such matters if only from e.g. the Acas website. We find it curious the ordinance makes no mention of these concepts. Regardless, we do not accept that a reasonable employer would hide behind the omission of these obvious and well-known concepts from its policies in the way it conducts itself or do as happened here which was in effect to surrender responsibility for making a decision and place the onus on the employees at risk.

157. Therefore the dismissal was unfair.

Is the Claimant guilty of culpable or blameworthy conduct?

158. The University relies on her non-engagement in the redundancy process and failure to express an interest for the role. In simple terms we do not accept there was a culpable and blameworthy failure. We have set out how badly she was affected and the evidence in support above. She was unable to play an effective role from mid-February until notification of her dismissal in May. She was in no position to express an interest or to engage in any other way after mid-February 2021.

159. We note that Dr D'Arcy provided some contribution to the alternative proposal. We note that Dr D'Arcy engaged in what we consider ill-advised online discussion. All of that was before she was ill with stress. Therefore it is not relevant to this issue in our view.

Employment Judge Adkinson

Date: 6 December 2023

Amended and redated 16 August 2024

JUDGMENT SENT TO THE PARTIES ON

.....23 August 2024.....

.....

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