



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Shelly McAuley

**Respondent:** Canterbury Christ Church University

**Heard at:** London South

**On:** 14<sup>th</sup> June and 21<sup>st</sup>  
August 2024 (in chambers)

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

## Representation

Claimant: Ms J Callan, Counsel

Respondent: Ms K Shields, Counsel

# RESERVED REMEDY JUDGMENT

1. The claimant is entitled to compensation under s124 of the Equality Act 2010 of £32,684.38, calculated as follows:
  - a. Financial loss: £3,799.43, including loss of earnings, loss of pension and loss of statutory rights.
  - b. Injury to feelings: £21,000
  - c. Interest of financial loss: £1,182.75
  - d. Interest on injury to feelings: £6,702.20
2. As the Claimant has received a redundancy payment equal to her entitled to a basic award for unfair dismissal, no basic award is payable under s122 Employment Rights Act 1996.
3. As the Claimant has been fully compensated for her losses under s124 Equality Act 2010, no compensatory award is payable under s123 Employment Rights Act 1996.

# REASONS

## **Introduction**

1. This is a remedies judgment with reasons, following the Tribunal's earlier decision on liability. It should be read together with the liability judgment and its accompanying reasons.

## **Claims and issues**

2. At the liability stage the Employment Tribunal concluded that Ms McAuley had been unfairly dismissed and that the act of dismissal was also unfavourable treatment because of something arising in consequence of her disability.
3. The context of the dismissal was an ongoing redundancy process within the University. At the liability stage the Tribunal concluded that compensation would be considered on the basis that Ms McAuley 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.
4. The key issues at this remedy stage were to determine Ms McAuley's financial loss and to consider injury to feelings.

## **Procedure, documents and evidence heard**

5. In addition to the evidence considered at the liability stage, the Tribunal heard further evidence on remedy from Ms McAuley and from Simon Wright (Human Resources Business Partner at the University).
6. A bundle of documents of 202 pages was produced for the remedies hearing. References to page numbers are referenced to that bundle unless otherwise indicated.
7. Both counsel made oral and written submissions. The Tribunal was grateful for their assistance. The points made in submissions are addressed as they arise in these reasons.

## **Findings of fact**

8. 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.
9. 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.

10. Ms McAuley began a period of sick leave on 28<sup>th</sup> February 2020. She was dismissed by letter on 24<sup>th</sup> August 2020; the effective date of termination was 30<sup>th</sup> November 2020. The parties agreed that compensation should be assessed on the basis that Ms McAuley was earning £512.70 net at the time of her dismissal.
11. In assessing remedy, the Tribunal must consider a scenario in which Ms McAuley was not dismissed for redundancy but was appointed to one of the Faculty Manager roles for which she applied. The decisions about these roles were made in June and July, as set out in the liability decision.
12. The key issue in respect of Ms McAuley's financial loss is whether Ms McAuley would have been fit to return to work in order to take up one of these roles and when. And, further, to consider whether there would have been a fair dismissal on grounds of ill health before she was able to return. Fundamentally, these issues were determinative of what financial compensation would be awarded for loss of earnings and loss of pension.
13. The Tribunal also had to consider the emotional impact of the dismissal on Ms McAuley, in order to consider an award for injury to feelings.

*Policies and procedures*

14. The University's Sickness Absence Management Procedure was produced, p36-43. It sets out a conventional approach to sickness absence, consistent with what would be expected of an employer like the University. In particular it provides for a series of meetings that may culminate in a capability dismissal where an employer may not be able to return to work within a reasonable timeframe.
15. Ms McAuley's statement of main terms and particulars of employment was also produced, p44-51. In particular, this confirms that Ms McAuley was entitled to access to the Local Government Pension Scheme (LGPS) and would receive sick pay in accordance with the University's sick pay policy. Given her length of service, Ms McAuley was entitled to sick pay on the basis of six months full pay and six months half pay, p52. This means that her paid sickness absence would have ended on 28<sup>th</sup> February 2020.
16. Mr Wright gave evidence about how the University operated these policies in practice. The University treated absences of 28 days as cases of long-term ill-health. Such absence would trigger review by Occupational Health, if that had not already been arranged. The review would then inform the University's approach and next steps. Broadly, there were four likely courses of action. First, to delay further steps pending further developments / further review. Second, to progress towards a return to work where the prognosis was suitable. Third, consider redeployment to another position. Fourth, to consider ill-health retirement, in conjunction with the LGPS pension scheme.
17. The Tribunal accepted Mr Wright's evidence that the University would generally regard the end of an employee's paid sickness absence as bringing the issue of sickness absence to a head, if this had not already occurred. Ms McAuley

agreed that, while it was not unknown for an employee to remain in employment after their paid absence period had expired, this was unusual.

18. Evidence was produced about the outcome of mental health long-term absence cases within the University over the previous decade, p158-161. This showed the outcome of 42 cases where the employee left the university. Seven were dismissed, 23 resigned, 3 were retired on the basis of ill health and 9 entered settlement agreements. 195 employees who experienced long-term ill health on mental health grounds returned to work in some form.

#### *Local Government Pension Scheme*

19. Ms McAuley was a member of the Local Government Pension Scheme (LGPS) as part of her employment with the University.

20. The LGPS is a defined benefit pension scheme. Members pay contributions in order to maintain their membership of the scheme. Each year 1/49<sup>th</sup> of their pensionable pay is credited to their pension account. At the end of the year the total amount in their pension account is adjusted in line with inflation. Employees within the LGPS are entitled to take their full pension at their normal retirement age, which in most cases equates to their State Pension age. There are permitted to take the pension earlier, but this will generally mean accepting a reduced annual pension.

21. Like many such schemes the LGPS has provisions allowing for early retirement on the basis of ill health. These provisions are important because they allow an employee to retire earlier than their pension age, without the reductions to their pension that would normally result from this.

22. In order to qualify for ill-health retirement, an employee must be permanently unable to do their current role until their state pension age and not immediately capable of undertaking gainful employment. In this context 'gainful employment' is defined as paid employment for at least 30 hours a week.

23. The LGPS ill health retirement provisions operate in a series of three tiers, depending on the nature of the employee's prognosis. Each tier has different consequences for the entitlement to pension:

- a. Tier One: Where an employee is unlikely to be capable of gainful employment before their state pension age.
- b. Tier Two: Where an employee is unlikely to be capable of gainful employment within three years of leaving their current role, but is likely to be capable of gainful employment before their state pension age.
- c. Tier Three: Where an employee is likely to be capable of gainful employment within three years of leaving their current role (or before their pension age if that is earlier).

24. An employee in Tier One is eligible for the pension they have built up immediately, with no reduction for early payment. Their pension is also

increased by the amount they would have built up from their leaving date to their normal pension age. That pension is paid for the rest of their life.

25. An employee in Tier Two is eligible for the pension they have built up immediately, with no reduction for early payment. Their pension is also increased by 25% of the amount they would have built up from their leaving date to their normal pension age. That pension is paid for the rest of their life.
26. An employee in Tier Three is eligible for the pension they have built up immediately, with no reduction for early payment. There is no further increase., That pension is paid until either a) the pension has been paid for three years; b) the employee starts gainful employment c) the employee becomes capable of gainful employment.

#### *Application for ill-health retirement*

27. On the 12<sup>th</sup> March 2020, shortly after the beginning of her sickness absence, Ms McAuley applied for ill-health retirement. During her cross-examination it was suggested to her that this must have meant that she felt, at that early stage, that she was too ill to return to work, either at that date or in the foreseeable future from that date.
28. While the Tribunal agrees that terms of ill-health retirement under the LGPS require that an employee be permanently unable to carry out their current role, it found that only a very limited inference could be drawn from Ms McAuley's application. At this point she was in a difficult situation. She was experiencing a significant episode of depression and was unable to work. She felt that she had been badly treated in the workplace. A redundancy process had just begun, which was likely to place her job at risk. In those circumstances, it was natural that she would wish to explore all available options. She would not have applied for ill-health retirement if she had not felt that she was potentially entitled to it because of her ill-health. But she was not approaching the question as a lawyer giving advice might, by careful reference to the precise criteria she would need to fulfil. Her application does not therefore imply that, at that stage, she had reached a considered view that she was unlikely to be able to return to work within the foreseeable future. Beyond confirming that Ms McAuley felt that she was not fit to return to work at that date and was experiencing significant mental health difficulties, it is not of material assistance in assessing the position or likely prognosis later in the year.

#### *Occupational Health evidence*

29. Ms McAuley was seen by occupational health a number of times in 2020.
30. On 2<sup>nd</sup> April 2020 she was seen by an Occupational Health Advisor, Jenny Hillman, p55-56. Ms Hillman's report confirmed that Ms McAuley had been on sick leave since 5<sup>th</sup> March 202, due to 'an exacerbation of the symptoms of depression and anxiety'. Ms Hillman concluded that she was temporarily unfit for work. She referred her to an occupational health psychiatrist for further advice and support.

31. Ms McAuley was then seen by Dr Zoettl, a Consultant Psychiatrist, on 28<sup>th</sup> April 2020, p57-58. He confirmed that she was temporarily unfit for work, by reason of moderate to severe recurrent depression.
32. Dr Zoettl summarised Ms McAuley's history of mental health difficulties up to that point. He noted that, up to this point, her longest absence from work had been 'nearly a year' around 2001. He emphasised, however, that while she had a history of relapses, there were also periods of recovery. He considered it was realistic to hope for another recovery and to 'make it last this time'. He also found that it was significant that Ms McAuley had previously been treated with SSRIs, which he described as 'the most basic group of antidepressants' that were 'perfectly fine in primary care'. She had not previously been treated in secondary care, where wider pharmacological options were available. He proposed increases to her existing medication, with the options of shifting drugs if this was not successful.
33. Dr Zoettl concluded that it was 'too early to suggest ill-health retirement' since he was hopeful that Ms McAuley would be able to recover. He suggested that he should see her again in about two months.
34. Ms McAuley had a further appointment with Dr Zoettl on 19<sup>th</sup> June 2020, p59-61. He recorded that she had begun a course of cognitive behavioural therapy, although she was finding this too demanding and unhelpful. He also summarised her recent pharmaceutical treatment. He noted that this had not been entirely successful, since an increased dose of Mirtazapine had made her feel irritable and aggressive, as well as causing restless limbs. Dr Zoettl also recorded that Ms McAuley had entertained thoughts of suicide, but had reassured him that she would never act on these. Dr Zoettl described Ms McAuley as being in a severe episode of depression.
35. Dr Zoettl concluded that Ms McAuley remained unfit for work, including for a job interview. He described her mental state as having worsened and her depression as having deepened. He noted, however, that she had been referred to the Community Mental Health Team, who were likely to accept her for treatment in July. She had also been prescribed Vortioxetine, which had been one of the secondary care drugs he had previously suggested might be suitable. Dr Zoettl's view, therefore, was that it was only at this point that the first steps were being taken to secure the necessary treatment in secondary care. On this basis, he concluded that there remained a good chance of recovery.
36. On 22<sup>nd</sup> June 2020 Dr Zoettl wrote to the University in response to questions raised on his previous letter, p67. He indicated that he expected Ms McAuley's condition to improve within the next six months, with a phased return to work possible within this time. In response to a query about the likelihood of a successful application for ill health retirement, he responded that Ms McAuley was ineligible, because there was still a good chance of recovery.
37. Dr Zoettl saw Ms McAuley again on the 15<sup>th</sup> September 2020, p 68-69. He recorded that, at this stage, she had been under the care of the Community Mental Health Team for a month and was being seen three times a week. Her prescriptions continued to be adjusted and she was also expecting to receive

talking therapy. Dr Zoetl concluded that she remained in a severe episode of depression.

38. At this stage Ms McAuley had been made redundant and Dr Zoetl concluded that she was likely to 'process the redundancy as another negative experience'. He recorded that he feared it would have a negative impact on her mental health. Nonetheless, he found that, with the positive impact of the Community Mental Health Team it was not 'beyond the bound of possibility' that the episode of depression would start to lift before the end of the year. Reading between the lines, it seems that Dr Zoetl was somewhat more pessimistic about Ms McAuley's prognosis at this stage than in June. His view had shifted from an expectation that she would be about to return to work by the end of the year, to one that significant improvement was possible by that point. Nonetheless he remained optimistic of her recovery.
39. In relation to ill-health retirement, he recorded that he had reminded Ms McAuley that she could apply for her pension, but also that this would be more likely to be successful if the prognosis was negative, which he did not think it was. Dr Zoetl was not formally advising on the possibility of ill health retirement and deals with it briefly at this stage. Nonetheless, he appears to have reached a fairly firm view that it was not a realistic option at this stage. Given that Dr Zoetl was aware that Ms McAuley's employment was coming to an end by reason of redundancy and that the University had previously considered ill health retirement, it is likely that, had he thought it was a realistic possibility, he would have encouraged her to pursue it.

*Events following dismissal*

40. Following her dismissal, Ms McAuley continued to struggle with her mental health. She describes being under the care of the Thanet Community Mental Health team from August 2020.
41. A letter from Thanet CMHT records the care plan they had in place in February 2021, p111-112. It describes Ms McAuley has having a moderate depressive episode. It records Ms McAuley's account of feeling low most of the time; sleeping only 4-5 hours at night with interrupted sleep and feeling tired during the day. She describes poor energy and motivation.
42. Following her dismissal Ms McAuley sought other employment. In December 2020 Ms McAuley secured an interview for a role as a Personal Assistant, p101. At the interview she experienced what she described as a breakdown. Her unhappiness about her dismissal and the situation she was in became overwhelming and she was not able to answer the questions being posed effectively. She describes herself as being slow to respond and unable to remember examples of her work or to show any confidence. Following the interview she describes herself as relapsing, not being able to get up or maintain her personal care for a number of weeks.
43. From 14<sup>th</sup> December 2020 Ms McAuley was in receipt of Employment and Support Allowance, p108.

44. In March 2021 Ms McAuley was taken to Accident and Emergency with serotonin syndrome. As a result of this condition she had to reduce the number of anti-depressants she was taking.
45. On 22<sup>nd</sup> April 2021 Ms McAuley was examined by a DWP Health Care Professional, for the purposes of assessing her capability for work. At that time she described her anxiety and depression as getting worse for several months, because of bullying at work. She described low mood, anxiety, tearfulness, a loss of interest and enjoyment, with a lack of motivation all the time. She also described suicidal thoughts in the past six months, but without any intention to act on them. She said that she was speaking to the Mental Health Team daily.
46. In her description of an average day, Ms McAuley described poor sleep caused by feeling low and worry. She said that her husband had to encourage her to get out of bed. She was able to wash without prompting, but did not always change her cloths. She describes spending time in a quiet room, just staring, without the motivation to engage with household chores without support from her husband. She describes not being able to engage with online shopping and having to relying on her husband to do this. She said that she cannot go into a shop because she finds this overwhelming and so spends most of her time at home. She describes her husband having to do the cooking and, although she is encouraged to assist, struggling to do so. Overall, the report describes symptoms of serious depression.
47. Following the assessment the DWP concluded that Ms McAuley had limited capability for work and limited capability for work related activity. This meant that the DWP did not require her to seek work or engage in activities to prepare her for work (such as CV workshops or training courses).
48. Ms McAuley did not actively seek work after this point. In her evidence she said that she was not fit either seek work or to carry out a job during this time.
49. Ms McAuley was assessed by an Occupational Physician on 9<sup>th</sup> June 2023 as part of a further application for ill health retirement, p138-140. This describes Ms McAuley as 'struggling with high levels of anxiety, low mood, poor concentration, fatigue, poor motivation and poor sleep. She suffers from nightmares and when anxious suffers from chest pain'. She also described found that Ms McAuley's memory had been affected, meaning that she was unable to read and could only watch television for a short period of time.
50. The report also records that in the second half of 2020 Ms McAuley had begun to feel somewhat better, but had then worsened due to a number of stressors. These included both stress at work (this would have been around the time of her unsuccessful applications and the decision to make her redundant) and stress coping with her son who has attention deficit hyperactivity disorder. During cross-examination it was suggested to Ms McAuley that difficulties caring with her son contributed to her mental health worsening. Ms McAuley said that it was difficult to cope with a child with ADHD when you are not 100%, but that her son had always had ADHD.
51. At the end of 2023 Ms McAuley was contacted by a previous college who was able to help her secure a part time role at a multi-academy trust. Ms McAuley said that she was able to cope with this role because it was significantly less



responsible than her previous jobs (being a part-time executive assistant post, rather than a managerial position). She was also able to work flexibly when struggling with her mental health. The role is to cover for an employee on maternity leave and is expected to conclude in October 2024, although Ms McAuley said that she hopes to continue working if this is possible.

52. The report concluded that Ms McAuley was, at this point, permanently incapable of discharging the duties of her former employment, by reason of ill health. As a result she was found eligible for an ill health retirement pension from August 2022.

### **The law: compensation**

53. Remedies for discrimination are provided by s 124 Equality Act 2010. In particular, this allows for an order that the respondent pay compensation to the complainant on the same tortious basis as would be awarded by the civil courts.
54. This means that compensation should seek to place the claimant in the financial position that they would have been, but for the act of discrimination. Unlike in cases of unfair dismissal there is no statutory cap on discrimination awards and the Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply. Credit must, however, be given for benefits received if they would not have been received but for the discrimination, because failure to do so would result in a complainant being financially better off (as a result of receiving both compensation and benefits).
55. Remedies for unfair dismissal are provided by sections 112 to 124A of the Employment Rights Act 1996. In summary these provide for a basic and compensatory award. This is case the parties are agreed that Ms McAuley has received a redundancy payment that means that she is not entitled to any basic award.
56. In relation to the compensatory award, the Tribunal is required to award such amount as it considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer. Since the Tribunal will consider compensation for discrimination first and there can be no double recovery (that is recovery of the same loss twice under different causes of action) we will not make a separate award for compensation for unfair dismissal.

### **The law: injury to feelings**

57. The key guidance on injury to feelings award in discrimination cases was given in *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2003] IRLR 102. This established the three *Vento* bands. In recent years these have been the subject of regular Presidential Guidance, which aims to take account of the impact of inflation. Because this claim was presented to the Employment Tribunal on 9<sup>th</sup> March 2021, the applicable guidance included the third addendum, which provided that:

In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000. NB these bands take account of the 10 per cent *Simmons v Castle* uplift.

58. The Tribunal also bore in mind the guidance provided in *Prison Service v Johnson* [1997] ICR 275. This noted that: awards must compensate the injured party fully, but should not be used to punish the guilty party; they must not be inflated by a Tribunal's feelings of indignation; they should not be so small that they diminish respect for the underlying policy of equality legislation, but also not so high that they are regarded as making claims as a route to untaxed riches; they should bear some broad similarity to awards made in personal injury cases and Tribunals should bear in mind the value in everyday life of the sum involved.
59. It is also well established that the focus when assessing injury to feelings must be on the impact of the discrimination on the individual concerned, see *Essa v Lang* [2004] IRLR 313. This means that awards in relation to similar behaviour may vary widely, because of differences in how they are experienced by the individuals concerned and the impact of the behaviour on them. Something that might have a profound impact on one person (perhaps because they are particularly vulnerable) may have little significant impact on another (perhaps because they are particularly resilient). The same individual may shrug off seemingly serious behaviour on one occasion, but then suffer serious injury as a result of something apparently trivial on another. The focus must always be on the particular impact of specific behaviour on a specific individual.

## Conclusions

60. The parties agreed that Ms McAuley had received a statutory redundancy payment and was therefore not entitled to a sum in respect of the basic award.

*Would Ms McAuley have been able to return to work?*

61. In respect of compensation for loss of earnings and pension, the key issue was whether Ms McAuley would have been able to return to work, had she been appointed to one of the Faculty Manager roles.
62. The Tribunal concluded that it was unlikely, had she not been dismissed that, Ms McAuley would have been well enough to be able to work, before she was dismissed on the basis of ill-health by the University.
63. This is a difficult matter to assess, because it is inevitably speculative. Nobody can know for certain what would have transpired if Ms McAuley had been appointed to either Faculty Manager position.
64. Ms McAuley's evidence was that she believed she would have been able to return, as she had in the past. She points out that she had worked for the

University for 23 years. On a number of occasions, she had bouts of depression which meant she required time off work, but had always been able to return. In the submissions on her behalf, it was argued that she would have been able to return to work by December 2020, with some form of phased return occurring before that point.

65. There was support for this view, in particular the Occupational Health reports provided by Dr Zoettl.
66. The Tribunal also concluded that Ms McAuley's mental health would probably have been better from July 2020 onwards, if she had been appointed to one of the Faculty Manager roles. In her evidence, she describes her mental health deteriorating and Dr Zoettl noted that the news of her redundancy was likely to have a negative impact on her.
67. At the same time, there were other factors which had an impact on Ms McAuley's mental health. Her sickness absence obviously significantly predated her dismissal and therefore was not caused by it. The Tribunal also found that the stress of caring for her son had some impact on her mental health, as suggested by both her evidence and by the 2023 ill health retirement report. It would be wrong to say that Ms McAuley's mental health difficulties following her dismissal were solely caused by the dismissal.
68. Nonetheless, as a matter of common sense and industrial experience it is likely that any employee who is experiencing depression who is then told that they are to be dismissed is likely to do worse when compared with a similar situation in which they are successful in being appointed to a new role.
69. At the same time, Dr Zoettl's prediction that Ms McAuley would be likely to improve within six months was heavily depended on her being able to access secondary care. When this prediction was made in June 2020, Dr Zoettl did not know that she would not be brought under the CMHT until August 2020. This suggests that, if a similar timeline was still to apply, Ms McAuley would not be able to return to work until around February 2021.
70. The Tribunal also notes that Ms McAuley's subsequent struggles with mental health were significantly greater than Dr Zoettl had hoped. It is difficult to judge to what extent this might have been different if Ms McAuley had not been. The Tribunal finds that this was a significant factor, for the reasons set out above. At the same time, Ms McAuley's mental health difficulties and her sickness absence long predated that dismissal. On the balance of probabilities, the Tribunal concludes that, even had she not been dismissed, it is likely that Ms McAuley would have required somewhat more time to recover than Dr Zoettl anticipated. It is therefore likely that she would not have been able to return to work, even on a phased return basis, when her paid sick leave entitlement ran out in February 2021.
71. At that point, she would have been off sick for one year, having been appointed to a new role in June / July 2020 which she had not been able to take up, except possibly as part of a phased return.
72. In practice this would have caused very significant difficulty to the University. The organisation was being restructured and the new academic year started in

September 2020. There would be obvious practical difficulties if Ms McAuley was not well enough to be in post at that point. The University would also be naturally concerned if, at that stage, it was uncertain whether she would be able to return and unclear, if she would, when that could be expected.

73. All of this means that it is likely that the University would have begun to seriously consider the possibility of dismissal on the basis of ill health even before the start of the new academic year.

74. A key argument made on behalf of Ms McAuley is that the possibility of dismissal could have been avoided by the appointment of someone to cover her role on a temporary basis until Ms McAuley was well enough to return. An analogy was drawn with maternity cover, which is routinely provided by employers. It was argued that such cover would have been provided by the University, on the basis that it would have been a reasonable adjustment to her disability required by the Equality Act.

75. The Tribunal did not accept this argument. It did not find that the situation was analogous to a maternity cover role. It is much easier for an employer to appoint to a maternity cover position, because that is known in advance and benefits from a relatively clear timeline. This is quite different to a situation where Ms McAuley was already on sick leave and there could be no certainty as to when she would return. Further, it was not clear on what basis Ms McAuley would be able to return. What was in Dr Zoettl's mind was some form of staged return. All of this would have significantly complicated the appointment of any cover. Attracting a candidate to a cover position in these circumstances would have been extremely difficult. They would have needed someone to take on a role of considerable responsibility at short notice, which might last only a very short period and require some form of job share at the point that Ms McAuley was well enough to return on a phased basis. The situation would have been made more challenging by the ongoing restructure and by the beginning of the new academic year in Autumn 2020. This sort of cover arrangement was unlikely to be practical.

76. On balance, the Tribunal concluded that it was inevitable in these circumstances that the University would have commenced an ill health / capability process. This might well have occurred before the new academic year or during the autumn term; but it would certainly have occurred before the point at which Ms McAuley was likely to return. Taking into account the length of Ms McAuley's absence, the fact that at this point it would have been impossible to be sure that she would be able to return and the pressures of the restructuring process and the new academic year meant that much the most likely outcome of this process would be that Ms McAuley would be dismissed.

*Would Ms McAuley have secured ill health retirement at that point?*

77. The Tribunal concluded that Ms McAuley would not have been able to make a successful application for ill health retirement at that point.

78. The key evidence in this regard is that of Dr Zoettl. His consistent view was that Ms McAuley was not a suitable candidate for ill-health retirement, because her prognosis was too positive to meet the criteria. He expressed this view firmly

on the 22<sup>nd</sup> June 2020 and again on the 15<sup>th</sup> September 2020. It is notable that, in September 2020 Dr Zoettl was aware that Ms McAuley had been dismissed. He also appears to have been somewhat more pessimistic about her prognosis since, having expected Ms McAuley to be able to return to work full time by December 2020, he was now noting only that it is 'not beyond the bounds of possibility that this episode of depression will start to lift before the end of the year'. Despite this, he appears to remain confident that ill health retirement was not a likely option.

79. Even if Ms McAuley had still been off sick in February 2021, it is unlikely that the prognosis for her condition would have worsened to the point that Dr Zoettl (or another OT psychiatrist) would have concluded that she would be unable to return to her current role at any stage before her normal retirement date. Any assessment would have borne in mind the same factors identified by Dr Zoettl, in particular the fact that Ms McAuley had previously been able to return to work after periods of ill health and that she had recently begun to receive more intensive secondary care. She would therefore not have met the requirements for ill health retirement at this stage.
80. The Tribunal noted that the ill health retirement assessment in June 2023 had concluded that Ms McAuley was permanently unable to carry out her previous role. But this conclusion was reached over two years later, when her ill health had continued for a significant period. It did not suggest that the same conclusion would have been reached in February 2021.

#### *Financial losses*

81. The Tribunal therefore accepted the University's submission that the appropriate compensation for loss of earnings was nine weeks of net wages. This represents the nine weeks of remaining paid sick leave would have received from 1<sup>st</sup> December 2020. This is  $9 \times £512.70 = £4,614.30$ . There would not have been any further loss of wages, because she would not have continued to be paid while absent on health grounds after that point and would not have returned to work at the University.
82. Ms McAuley received Employment Support Allowance of £74.35 from 14<sup>th</sup> December 2020. This means that 7 weeks  $\times$  £74.35 must be deducted from the loss of wages. This is £520.45. The final figure for loss of earnings is £4,093.85
83. During this period there would also have been contributions to Ms McAuley's pension. Given the short period of time involved it is appropriate to value this loss by reference to the contributions made to the pension scheme. The weekly contributions were £122.81. This is therefore  $9 \times £122.81 = £1,105.29$ .
84. The Tribunal also awarded £500 in respect of loss of statutory rights.
85. This means there was a total financial loss of  $£4,093.85 + £1,105.29 + £500 = £5,699.14$ . This must be reduced by one third to reflect the *Polkey* reduction. The final pecuniary loss was therefore £3799.43

*Injury to feelings*

86. The Tribunal concluded that the appropriate award for injury to feelings was £21,000. This is towards the higher end of the middle band of the *Vento* guidelines.

87. In reaching this conclusion the Tribunal took account of the following factors:

- a. The discrimination in this case was the dismissal of Ms McAuley. Dismissal from employment is generally a significant event that will normally have a substantial impact on an employee. As a general rule, this means that a discriminatory dismissal is likely to fall within the middle band of *Vento*.
- b. This was the dismissal of a long serving employee who had a significant emotional attachment to the University and her role within it.
- c. The dismissal was, however, in the context of a redundancy process. It was in no way specifically aimed at Ms McAuley in the sense that she was being deliberately targeted. Rather, as set out in the liability decision, it was a genuine error to appreciate what a fair process required of the University. This type of situation is likely to attract a lower award than a dismissal that involved personal animosity and specific prejudice against an employee, because such personal behaviour is likely to cause greater injury to feelings.
- d. The Tribunal accepted Ms McAuley's evidence that the dismissal caused her a great deal of distress, as detailed in the above findings of fact. Her situation, in particular her mental health conditions, meant that she was less robust than another employee might have been in similar circumstances and suffered greater injury to her feelings as a result. The dismissal was not the only factor contributing to this distress. It had predated the decision to dismiss, as can be seen from the fact that Ms McAuley had been on sick leave for some time with symptoms of depression. Following her dismissal there were other contributing factors, such as the stress of caring for her son in difficult circumstances and her unsuccessful job interview. Nonetheless, her dismissal was a significant factor in Ms McAuley's distress from that point.
- e. The Tribunal accepted the University submission that the discrimination for which liability has been found is limited to the selection process for the two Faculty Manager roles. Although there has been reference to other events within the employment history, these are not relevant to this remedy determination. This means that we are not dealing with a case that involves a prolonged period of discrimination against Ms McAuley.

88. The Tribunal concluded that it was not appropriate to make a separate award for personal injury. Although the Tribunal accepted that dismissal had an impact on Ms McAuley's symptoms of depression, the depression itself was a preexisting condition. Both counsel agreed in submissions that the evidence did not establish that there was a psychiatric injury caused by the dismissal. Compensation for the exacerbation of Ms McAuley's symptoms is properly reflected in the above award for injury to feelings.

*Interest*

89. Interest on the pecuniary losses runs from the midpoint of the loss (i.e. 1<sup>st</sup> January 2021) to the judgment date. That is 1425 days. 8% interest on £3,799.43 is £303.95 a year / 83p per day. The total interest on the financial loss is therefore £1,182.75.
90. Interest on the injury to feelings award runs from the date of dismissal (i.e. 30<sup>th</sup> November 2020) to the judgment date. That is 1457 day. 8% interest on £21,000 is £1,680 a year / £4.60 per day. The total interest on the injury to feelings is therefore £6,702.20.

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Employment Judge Reed

26 November 2024