

REASONS

3. The claimant presented a claim to the Employment Tribunal on the 9 July 2019 alleging she had been unfairly dismissed (in terms of section 98 Employment Rights Act) and victimised (in terms of section 27 Equality Act).
- 5 4. The claim was heard on the 12, 13, 14, 17, 18 and 20 February 2020. The tribunal decided the claimant was unfairly dismissed. The tribunal noted, in relation to remedy, that the claimant wished to be reinstated or re-engaged if successful. The tribunal decided it would be appropriate to arrange a remedy hearing to hear further from the parties regarding the remedies of reinstatement and re-engagement. The tribunal made this decision in light of 10 the fact the respondent was undergoing a restructuring and in light of the Covid situation which may have had a bearing on delaying the restructuring.
- 15 5. The Employment Judge arranged a preliminary hearing with the representatives where it was agreed the representatives would submit a list of agreed facts, documents regarding the restructuring and written submissions. This was all to be done on the understanding that if the tribunal ultimately felt it needed to hear evidence, then a hearing (be that in-person or remote) would be arranged.
- 20 6. Mr Allison, the claimant's representative, by email of the 19 June 2020, submitted the list of agreed facts, three papers regarding the restructure and his written submissions. Mr Brown, the respondent's representative, by email of the 20 June, submitted his written submissions.
- 25 7. The Employment Judge met remotely with the members on the 21 July 2020 to consider the written submissions, the list of agreed facts and the documents which had been presented.

The Agreed Facts

8. The restructure consultation document dated February 2020 sets out the most recent proposal for restructuring.

9. The proposal to restructure has been approved in principle by the Principal, following consultation stages. The final version of the structure is still to be written up and sent to the unions for final confirmation then taken to the Remuneration Committee of the Board for approval of any changes, the Committee having already approved the proposal at an earlier stage. It is not known when this will happen because of Covid-19.
10. As at today's date, the college still intends to proceed with restructuring, but the specific terms of any restructuring may require to be looked at again and/or altered in light of the impact of Covid-19. It is unlikely – but still possible – that the proposals for level 2 and level 3 positions would be changed. In any event, whatever form subsequent restructuring takes, it is likely to involve a reduction in the number of and a change in the remits of level 3 posts within the college.
11. The present proposal for restructuring is on the basis of creating four Curriculum and Quality Lead posts at level 3, and forty eight Curriculum Manager posts at level 2 in place of the current structure. In the current structure there are fifteen people holding level 3 positions and ninety people holding level 1 position.
12. The claimant's previous role as Head of Curriculum for Computing is as at today's date in terms of the existing structure a level 3 position.
13. The post holders in Heads of Curriculum level 3 positions within the college are being /will be considered for the four Curriculum and Quality Lead posts. However, those roles are not being ring-fenced and will also be open to applications from current level 1 post holders. Those who are displaced from level 3 or level 1 will be considered for redeployment. National collective agreements, in these circumstances, allows:
- employees displaced from a level 3 position but who are successful in being retained in a level 2 position and
 - employees displaced from a level 3 position but who are redeployed as Lecturers and

- employees displaced from a level 1 position and redeployed as Lecturers

to benefit from a conserved salary for a period of four years.

- 5 14. Eleven voluntary severance (VS) packages have been agreed in relation to those that hold the current level 3 and level 1 positions. These comprise five who currently hold level 3 positions and six who currently hold level 1 positions. Those voluntary severances are due to take effect at the end of June 2020. The specific VS Scheme that was made available is now closed and any subsequent VS would be dependent on funding and on approval from
- 10 the Scottish Funding Council.
15. The existing proposal was based upon the anticipated requirements for the college prior to the impact of Covid-19. The exact impact of Covid-19 is not known.
16. The job description for the proposed Curriculum and Quality Lead (level 3) post is contained within appendix 2 of the restructure consultation academic management phase 2 document (February 2020). As presently proposed, the post would not involve direct line management of front line lecturing staff. It would however involve the direct line management of approximately 14 Curriculum Manager posts.
- 20 17. The job description for the proposed Curriculum Manager (level 2) post is contained within appendix 3 of the restructure consultation academic management phase 2 document (February 2020). As presently proposed, this post would involve direct line management of front line lecturing staff.
18. In the event that an order for reinstatement or re-engagement is made:
- 25 a. the sum to be awarded by the Tribunal is £43,500 as compensation for loss of all earnings and benefits incurred in the period prior to 1 July 2020;
- b. the date on the reinstatement or re-engagement order should be with effect from 1 July 2020;

c. in the event of reinstatement:

- i. it would be to the position of Head of Curriculum for Computing;
- ii. the terms and conditions to apply as from 1 July 2020 are to be no less favourable than the terms which would have applied had the claimant's employment as Head of Curriculum for Computing not been terminated, including that her salary should be £51,500 per annum.

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19. With the exception of points (a) and (b) above, no agreement is reached regarding the terms on which the claimant should be re-engaged (if she is not to be reinstated).

20. Notwithstanding points (a) and (b) above, the respondent maintains its objection to an order for reinstatement or re-engagement and agrees the matter can be concluded by way of written submissions.

21. In the event that no order for reinstatement or re-engagement is made, the sum to be awarded to the claimant is £12,700 (basic award) plus £49,603.32 (compensatory award), giving a total of £62,303.32.

Respondent's submissions

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22. The respondent remains of the view that neither reinstatement or re-engagement would be practicable or just for the reasons set out previously. In particular:

(a) the problem that existed within Computing – which included the claimant's view that she was being targeted – has not been resolved;

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(b) regardless of what view the respondent has of the claimant, the claimant does not trust the respondent. She said exactly that. The breakdown does not need to be bilateral – it is enough that she believes she was the victim of a conspiracy by the most senior staff in the respondent and/or the victim of misogyny among those staff and

(c) the claimant previously refused an offer or re-engagement to a role as Head of Curriculum which was on the same terms and conditions.

23. The claimant claimed that she was victimised for having made a reference to gender during a conversation with Mr Vincent. Regardless of what she said during that conversation and who is correct in relation to that point, it remains the case that (according to her evidence) she believes she was victimised. She expanded upon that point in her evidence when she referred to Mr Vincent and Mr Hughes as being misogynists. Throughout her evidence – which followed several days after Mr Vincent's evidence – she remained insistent that she believed she had been victimised. The fact that she ultimately instructed her representative to withdraw the legal claim at the time of submissions does nothing to undermine the clear evidence she gave as to what she believed to be the case. And even aside from the victimisation claim, there remain the points which she made:

- 15 • about the offer of Head of Construction – she believed that Mr Vincent wanted staff to see that she had been punished, he wanted her to take that role but he wanted her to fail in that role;
- about the creation of the STEM role – that the respondent was including things within the job description for the sake of it but knowing she would not end up getting to do them and
- 20 • about the appeal panel (which included a Chair of the Board which employed) – that it was paying lip service and just wanted the hearing to be over.

24. The claimant's view that Mr Vincent and Mr Hughes were misogynists emerged, for the first time, in her evidence. Therefore, there was no opportunity for either to give evidence about how that impacted on their view of the claimant and how it might impact upon their relationship. It cannot safely be said that such a serious allegation will not undermine the trust and confidence between the parties. Similarly, the allegations which the claimant made in her evidence about the approach of the Board to her appeal – that it was not genuinely seeking to hear and consider her appeal – was not put to

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the Board. She believed those views to be accurate and that, alone, is enough to undermine the relationship. It would also be safe to assume that Mr Vincent, Mr Hughes and the Board's views would also be affected by discovering her views. It cannot be said that, on the balance of probabilities, she can successfully be reintegrated into those relationships.

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25. For clarity, it is not the fact that she made the allegations of sexism in her claim or in her evidence which is the issue. The issue is what those allegations demonstrate about her view of the respondent. The tribunal is not required to ignore those views – and nor is the respondent – regardless of the fact they were expressed in the course of a claim. To suggest that what a claimant says in a claim or evidence can have no bearing on a decision whether to reinstate or re-engage would lead to unconscionable results. Therefore, the claimant's position that they were protected acts must, even if correct, be rejected as irrelevant.

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26. The new roles will have a considerable element of line management responsibility. Whether that is line management of lecturers or of others is of no significance. The important point is that, with reference to paragraph 272 of the tribunal's judgment, there has been not, in fact, a "removal or limiting of line management responsibility". Instead, the situation described by Mr Vincent is correct – that the posts replacing the current Head of Curriculum positions will not directly line manage lecturers.

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27. Mr Brown submitted it would be impossible for the tribunal to reasonably conclude that the claimant can be reinstated successfully. Regardless of whether the respondent could have made further attempts to persuade staff to mediate, the tribunal is not in a position to conclude that further attempts, and therefore her reinstatement, will be successful.

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28. Equally, in the context of re-engagement, it is clear there are not enough posts available. There is no basis on which to conclude that it would be just to give the claimant one of those posts in preference to any other individual in circumstances where (by choice, after refusing redeployment) she has not been performing a Head of Curriculum role for over a year.

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29. The claimant seeks re-engagement to any Head of Curriculum role in circumstances where she has previously refused this. It would be absurd if the tribunal were to order the respondent to do something which it previously offered to do and which the claimant refused to accept. This would be particularly unjust when the respondent would be providing back pay to the claimant despite not having had any benefit from the services which, by offering redeployment, it had asked her to perform. It would be particularly unjust if it then resulted in the employment of another individual being terminated or them being redeployed in the restructure.
30. The outlook for the College and its employees, particularly in relation to the structures that might be required is uncertain. There is no basis on which to conclude that she can be successfully reintegrated into any particular role in a way which is just.
31. Mr Brown submitted the evidence does not support a conclusion that the legal test for reinstatement or re-engagement has been met. The evidence does not demonstrate that either order would be practicable or just.

Claimant's submissions

32. Mr Allison invited the tribunal to read the submissions in conjunction with the agreed list of facts and the additional documents which had been produced and which had been agreed as the relevant documents in relation to the restructuring.
33. Mr Allison submitted the claimant wished to be reinstated or re-engaged, and he referred to sections 116 and 117 of the Employment Rights Act.

Reinstatement

34. Mr Allison submitted the tribunal had not made any findings of fact that would support or imply contributory conduct. Accordingly, the issue of reinstatement was focussed on practicability. Mr Allison noted the tribunal accepted the respondent's position and found as a matter of fact that there was a breakdown in relationships between the claimant and members of her team, and not between the claimant and the respondent. Any consideration of trust

and confidence could not therefore be founded upon a breakdown of trust and confidence between the claimant and respondent management. The respondent had vociferously opposed any suggestion of a breakdown between the claimant and the respondent when it was suggested they had misrepresented the true reason for dismissal, and they could not ride two horses to suit different purposes. In this case, any issue of practicability could not be founded upon a wider issue of trust and confidence. In fact, issues between the claimant and other employees cannot be an issue of trust and confidence at all because that concept is one specific to and derivative from the employer/employee relationship.

35. Mr Allison noted the tribunal had accepted the evidence of Mr Vincent that there was no belief or suggestion of the claimant being guilty of any misconduct or blameworthy conduct. This was not only germane to the issue of practicability, but also supported the fact there was no contributory conduct (because there can be no contributory conduct if there is blameworthy conduct).

36. The tribunal itself concluded that the issues between the claimant and other staff were relationship issues and there was a pre-existing, broader issue of relationship/tensions since the merger which the respondent had not properly managed. Accordingly, whilst the issues between the claimant and the staff had arisen acutely at this point, there were, and are, symptomatic of a broader issue in the College. This gives rise to two points of substance: (i) an objective assessment of practicability must consider the issues between the claimant and those staff in context that they do not exist in isolation: that is, it appears those tensions may continue to exist in some way or another whether the claimant is reinstated or not and so the question of whether the claimant is reinstated or not is not an answer of itself to that particular conundrum for the respondent. The tribunal was reminded that any assertion that a breakdown of trust and confidence (bearing in mind what is said above) must be both rational and objectively justified ***United Lincolnshire Hospitals NHS Trust v Farren UKEAT/0198/16***.

37. Secondly, the tribunal's conclusion that the claimant's dismissal was unfair is predicated upon the failure of the respondent to properly and meaningfully explore reasonable alternatives, including steps to resolve those relationship issues. Given the tribunal's factual conclusions that these were pre-existing issues that had not been addressed, the tribunal should be very slow to permit an employer who fails to take reasonable steps to then rely upon their own failure and/or its apparent consequences to justify an employee being refused reinstatement. Such a scenario would be perverse.
38. The respondent asserts there has been a mutual breakdown of trust and confidence. There are no findings of fact that would support the conclusion that there is such a breakdown from the claimant's position. The claimant was challenged on this point in cross examination and gave a clear and candid position. She confirmed that she did accept a breakdown in relationships with the staff in question albeit she did not necessarily accept that this of itself meant that there was no other resolution (which is entirely consistent with the tribunal's conclusions on liability). The claimant went on to explain why she felt she could return to her role and why she felt that would be unaffected. The tribunal accepted the claimant to be credible and reliable. There is no objectively justifiable basis to doubt the claimant's position: her actions to date (in consistently seeking reinstatement) are entirely consistent with that. The respondent may be surprised she takes that view, but they are not in a position to gainsay it. In any event the position of the claimant is no different to the position of the respondent who also separated out and viewed as severable the localised relationship of trust and confidence. The respondent's criticism of the claimant sits uncomfortably with their own position and appeared nevertheless a position of convenience.
39. In terms of Mr Vincent's evidence about the claimant in light of her allegation of sex discrimination, it was clear that Mr Vincent had misunderstood this allegation. The claimant made this in good faith on the basis of what appeared to be a genuinely held concern, but whilst nevertheless was not borne out. She acted reasonably and in good faith by withdrawing that allegation once she had heard Mr Vincent's full explanation in his evidence. It was submitted

that given the tribunal's favourable assessment of Mr Vincent it would be surprising if the respondent were now to say that Mr Vincent could not put that out of his mind. Furthermore, the claimant's allegation was made in these proceedings and so are a protected act for the purposes of section 27(2) Equality Act. Any suggestion that the respondent could not reasonably be expected to have the claimant working for them because of that allegation almost implicitly presumes the respondent's treatment of the claimant might change based upon that protected act. It was reasonable that an employer would be presumed and expected to act lawfully until the contrary occurs.

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10 40. Mr Allison referred to the case of **McBride v Scottish Police Authority 2016 UKSC 27** and reminded the tribunal the assessment of practicability at this stage was provisional. If the intended reinstatement proved not practicable, the respondent would have the opportunity to demonstrate this at the next stage.

15 41. Mr Allison submitted the respondent's restructuring was relevant to the claimant's reinstatement in two ways: (a) directly, in terms of whether the claimant's position was there to reinstate her to and (b) indirectly in the sense of how the broader restructuring might affect the above relationship issues and/or other practicability considerations.

20 42. The agreed facts in relation to the restructure broadly confirm the restructuring will go ahead but may be delayed and/or tweaked. As at today's date the claimant's post still exists and the restructuring is not at a stage where it has superceded matters. If anything this was the opportune time to reinstate the claimant given the respondent has something of a blank canvass to work with
25 going forward.

43. In terms of point (b), if the claimant was reinstated to her role, that would be to a level 3 role. The parties have agreed the level 3 (Curriculum and Quality Leader) posts would not have direct line management responsibility. As such, if the claimant subsequently moved to such a role, the potential for such relationship issues was substantially reduced. The evidence made clear that
30 the issues arose in the context of the claimant's direct management of the

staff in question. The “buffer” of the new level 2 management positions gives a clear means by which not only should the issues not arise, but a means by which the issues could be addressed or limited.

5 44. In the event the claimant did not secure a level 3 position, she would either (i) secure a level 2 position on conserved salary for 4 years or (ii) potentially have the option of voluntary severance. The question of whether voluntary severance is immediately available is, it was submitted, a red herring because if the respondent has to implement the structure then they require to offer one or more alternatives for existing level 3 postholders given the reduced number
10 of level 3 posts. If the claimant ended up in a level 2 post, it was entirely within the parties’ gift to ensure she did not have line management of the individuals in question (there are 48 level 2 posts). It was submitted that it was difficult to envisage any outcome that might lead to the claimant having direct line management of the individuals in question.

15 45. Mr Allison noted the reference by the respondent to the uncertainties caused by the current Covid situation, and reminded the tribunal that this was the first stage of considering practicability. Further, the Covid situation may delay the restructuring or make it more pressing.

20 46. The parties had agreed the terms of an order for reinstatement. If the start date was later than the one agreed, the compensation awarded would have to be adjusted. The claimant’s net ongoing loss is £1229.48 per calendar month.

Re-engagement

25 47. Mr Allison confirmed that if the tribunal did not order reinstatement, the claimant sought an order for re-engagement to a Band 3 Head of Curriculum role. Mr Allison referred to the tribunal to the agreed list of facts where it had been agreed the restructuring will go ahead (even if there is the potential for change) and that those changes will not affect the proposals for level 2 and level 3 posts. Mr Allison submitted the tribunal was entitled to be creative in
30 the terms of any such order (***Hazel and another v The Manchester College 2014 EWCA Civ 72***) provided the form of the order is consistent with the

requirement for it to be comparable or otherwise suitable employment and the tribunal is satisfied as to the practicability of re-engagement on those terms.

48. Mr Allison referred to his earlier submissions regarding practicability which applied equally to any order for re-engagement. An order for re-engagement could be designed to minimise any issues: for example, the order could re-engage the claimant to another Level 3 post where she would not be the line manager of the individuals in question even under the present structure.

Compensation

49. Mr Allison invited the tribunal to make an award of compensation in the event no order for reinstatement or re-engagement was made. The parties agreed the claimant should receive a basic award of £12,700 and a compensatory award of £49,603.32 and the tribunal was asked to give effect to that. (The prior arguments raised by the respondent regarding Polkey and contributory fault no longer arose and did not require to be addressed).

Reply to respondent's submissions

50. The submissions above cover the points which have been raised by the respondent, but for the avoidance of doubt the following points were noted:

- There is no finding of fact that the claimant distrusts the respondent at large. That was not the claimant's position and is taken out of context of her evidence as a whole. In any event, there is nothing unusual about an employee expressing a lack of faith about a disciplinary process or the way in which that discrete process is managed. The tribunal's conclusions suggest the claimant had good reason for any such time-specific mistrust. That does not take away from the claimant's general evidence that she is able to put those matters to one side because the outcome of this process will represent an absolute resolution to those matters.
- The distinction made by the respondent with reference to paragraph 272 of the tribunal's judgment is semantic. This is not a case where either the respondent or the tribunal concluded that the claimant was

5 simply a difficult person to work under, or was incapable of managing staff. The respondent's own position to the tribunal was that any relationship issues were specific to certain staff. That cohort of staff were front line lecturers. Whilst it is hypothetically possible that under the new model the claimant may end up having to manage one or more of them now or in the future, the restructuring is not going to lead to the recreation of the same management relationship whereby the claimant would have to manage this cohort as a whole or as a significant part of her duties.

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- The balance of the respondent's submissions regarding reinstatement necessarily involve an invitation to the tribunal to speculate on the outcome of any attempt at reinstatement. There is no need for the tribunal to do so, and the tribunal being asked to reach a concluded view on that is inconsistent with the two-stage test identified in **McBride**. At this stage, the tribunal is only required to reach a provisional view of practicability. It is accepted by the claimant that the tribunal has to conclude that reinstatement or re-engagement has a reasonable prospect of success, but that is not the same as reaching a decision that reinstatement will unequivocally succeed.
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- The difficulty with the respondent's submissions regarding re-engagement is that it invites the tribunal to take an equitable analysis of the claimant securing a particular post as against any other individual. That is not a relevant consideration for the purposes of re-engagement. The tribunal is only carrying out a preliminary analysis at this stage and if there transpires to be good reason why re-engagement cannot take place then that will be addressed at stage two in terms of section 117 Employment Rights Act. The point about the claimant taking a position in preference to others is premature because the tribunal would be ordering re-engagement at a stage before the restructuring is fully implemented. Accordingly, the claimant would be re-joining the pool of level three heads of curriculum in advance of any implementation of the restructuring. Five level three position have just
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5 been vacated (joint list of agreed facts number 7), meaning that under the existing structure there are a range of vacancies available. If the restructuring proceeds immediately, then the exact number of level three post holders would not appear to be of great significance because there will be a surplus of level three post holders regardless of whether the claimant is added to that number and the exercise identified at agreed list of facts number 6 will arise in any event.

Discussion and Decision

10 51. We firstly had regard to the relevant statutory provisions which are set out at sections 113 – 117 of the Employment Rights Act.

Section 113 provides that *“an order under this section may be (a) an order for reinstatement (in accordance with section 114) or (b) an order for re-engagement (in accordance with section 115) as the tribunal may decide.”*

15 52. Section 114 provides that *“(1) An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed. (2) On making an order for reinstatement the tribunal shall specify (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of reinstatement; (b) any rights and privileges (including seniority and pension rights) which must be restored to the employee and (c) the date by which the order must be complied with...”*

25 53. Section 115 provides that *“(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer ... in employment comparable to that from which he was dismissed or other suitable employment. (2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including the identity of the employer, the nature of the employment, the remuneration for the employment, any amount payable by the employer in respect of any benefit (including arrears of pay) for the period between the date of termination of employment and the date of re-*

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engagement; any rights and privileges (including seniority and pension rights) which must be restored to the employee and the date by which the order must be complied with ...”

54. Section 116 provides that “(1) *In exercising its discretion under section 113, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement and (c) whether the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.* (2) *If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and if so on what terms.* (3) *In doing so the tribunal shall take into account (a) any wish expressed by the complainant as to the nature of the order to be made, (b) whether it is practicable for the employer to comply with an order for re-engagement and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and if so, on what terms.* (4) *Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.* (5) *Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)9b) or (3)(b) whether it is practicable to comply with an order for reinstatement or re-engagement.* (6) *Subsection (5) does not apply where the employer shows (a) that it was not practicable for him to arrange for the dismissed employee’s work to be done without engaging a permanent replacement, or (b) that (i) he had engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged and (ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee’s work to be done except by a permanent replacement.”*

Reinstatement

55. We next considered whether to make an order for reinstatement of the claimant to the post of Head of Curriculum (Computing). We noted in terms of section 116 (above) that the claimant wished to be reinstated to this post. Our considerations of reinstatement and re-engagement are taking place against a background of the restructuring. The very helpful statement of agreed facts made clear that although the respondent intends to proceed with the restructuring, the specific terms of the restructure and/or the timetable for it, may be subject to change.
56. We proceeded on the basis the restructuring will proceed and that the plan is to delete all Heads of Curriculum posts (level 3) from the existing structure and to create four Curriculum and Quality Lead posts at level 3 and 48 Curriculum Manager posts at level 2. The claimant, if reinstated, would return to the post of Head of Curriculum (Computing) and in due course that post would be deleted and the claimant would be required to apply for one of the four level 3 Curriculum and Quality Lead posts, or one of the 48 Curriculum Manager posts at level 2 (or seek other redeployment or voluntary severance).
57. We considered the practicability of reinstatement to the post of Head of Curriculum (Computing). We noted that when assessing practicability, tribunals should look at the circumstances of each case and take “a broad common sense” view (*Meridian Ltd v Gomersall 1977 IRL 425*). We also noted that at this stage our determination of practicability is provisional on the evidence before us. It is only at the stage second (if the employer refuses to comply with the order to reinstate) that a tribunal must make a final determination on practicability (*Scottish Police Services Authority v McBride EATS/0020/09*).
58. The respondent argued that it would not be practicable to reinstate the claimant because the problem that existed within Computing has not been resolved and the claimant does not trust the respondent and believes she was the victim of a conspiracy. We shall deal with each of these points.

59. We accepted the difficulties which existed within Computing have not been resolved. The claimant was suspended after the collective grievance was raised and did not ever return to work. The personal relationship between the claimant and those she managed is a relevant factor for the tribunal to consider. We reminded ourselves of the following points: (i) a number of people whom the claimant managed raised a collective grievance regarding the claimant's style of management; (ii) the claimant admitted that her relationship with five of those whom she managed had broken down and (iii) the outcome of the investigation was that there had been a very significant breakdown in relationships between the claimant and her staff but this was not a situation which should be treated as misconduct on the part of the claimant. This outcome was accepted by the respondent.
60. There is case authority for the position that re-employment will be unlikely if relations at work have become irretrievably soured (*Intercity East Coast Ltd v McGregor EAT 473/96* where it was said by the EAT that it was "not practicable to order two parties to reunite when war has broken out"). However, by contrast, in the case of *Baldwin v KLM Royal Dutch Airlines ET 67019/95* a tribunal ordered the reinstatement of an employee even though he had been dismissed for assaulting a colleague. The tribunal found that the employee was a good employee and that the assault was a one-off incident.
61. The claimant, if reinstated, would resume line management for those who complained about her and for those with whom her relationship had broken down. This tribunal has no power to order that if reinstated, workplace mediation should take place between the claimant and those whom she would manage, or to order that line management responsibility be removed from the claimant. The effect of an order for reinstatement would be to place the claimant back into the position of Head of Curriculum (Computing) and all that went with it.
62. We attached weight to the fact there was a finding, following a lengthy investigation into the matter, of no misconduct on the part of the claimant. The investigation also made clear that many of the complaints were about

“perception” of how someone had, or may have been, treated. That said, however, we could not overcome the fact there had been a breakdown in relationships with some members of staff and difficulties with others. In those circumstances we concluded reinstatement would not be practicable for this reason.

Re-engagement

63. The claimant, if not reinstated, wished to be re-engaged to a level 3 Head of Curriculum post. We must consider the practicability of the respondent re-engaging the claimant to one such post. The respondent, in arguing re-engagement would not be practicable, focussed on the argument that the claimant did not trust the respondent and that she believed she had been the victim of a conspiracy to remove her from her position.

64. There were a number of points for the tribunal to consider regarding the respondent’s submissions. The first point was that there was no finding of a breakdown in the relationship between the claimant and the respondent (whether as employer or in terms of the respondent’s senior management). The respondent (Mr Vincent) was asked about a breakdown of trust and confidence and vociferously denied any suggestion that this had been the reason for dismissal. The fact there was no breakdown in the relationship between the claimant and her employer, or its senior management, at the time of dismissal was supported by the fact the claimant was offered redeployment prior to dismissal.

65. The second point related to the complaint of victimisation brought by the claimant but withdrawn prior to submissions. The complaint, in essence, was that a number of managers had been accused of bullying, but only two had been suspended (that is, the claimant) and Mr Vincent’s predecessor (a female) who had also been suspended following allegations of bullying and harassment. Mr Vincent misunderstood the complaint and believed it was being said that he had referred to the claimant’s gender during the suspension meeting. He was adamant that no such reference had been made. Mr Vincent considered the claimant had been “dishonest” in making the allegation and

this was advanced as one of the reasons not to reinstate or re-engage the claimant.

- 5 66. Mr Vincent was directed in cross examination to the claim form which, he accepted, made no reference to any comment alleged to have been made by him. This however did not alter Mr Vincent's view of the claimant. Mr Vincent, in the opinion of the tribunal, remained irritated by his (mistaken) understanding of the complaint.
- 10 67. Mr Vincent, when advised of the details of the allegation of victimisation, told the tribunal that the claimant had never alleged to him that two females had been suspended in circumstances where the males had not.
- 15 68. The confusion regarding the complaint of victimisation was not helpful. We concluded from all of this that (i) Mr Vincent's feelings regarding the claimant's "dishonesty" were based on his misunderstanding of the complaint of victimisation and accordingly his view should be put to one side because it was based on a misunderstanding of the complaint and (ii) no issues can arise from the victimisation complaint actually made by the claimant in circumstances where, according to Mr Vincent's own evidence, this was never raised with him.
- 20 69. Mr Brown invited the tribunal to focus on the fact the claimant believed she had been victimised and referred to Mr Vincent and Mr Hughes as being "misogynists". We could not accept the claimant referred to Mr Vincent and Mr Hughes as "misogynists". The evidence of the claimant was that there had been reference in the letter of appeal to 13 managers accused of bullying and harassment, but only two had been suspended and the claimant felt there
- 25 "was an element of misogynistic treatment".
- 30 70. The third point related to Mr Brown's submission that the issue was not about the fact the claimant raised a complaint of victimisation, but what it demonstrated about her view of the respondent. This tied in with the suggestion the claimant did not trust the respondent and believed she had been the victim of a conspiracy by the most senior staff. Mr Brown, in support of his submissions, invited the tribunal to have regard to the following

5 comments made by the claimant during her evidence: (i) the claimant's comment that she felt Mr Vincent was trying to punish her and make clear to staff that this had happened (to make clear that she had been put in her place); (ii) she stated she believed Mr Vincent wanted her to take the Head of Construction role because he wanted to see her fail; (iii) the respondent included things within the STEM role for the sake of it, knowing she would not end up getting to do them and (iv) the appeal panel paid "lip service" to the appeal.

10 71. We accepted the claimant did make statements similar to those referred to at points (i) to (iv) above, but we considered these statements cannot simply be taken at face value and must be viewed in context as part of the claimant's evidence when she described not only the way in which she felt she had been treated, but also how this had made her feel. The claimant told the tribunal on a number of occasions that if she had been given full details of the allegations, and if she had been given an opportunity to respond to those allegations, she would have been able to give a very full response. We did not doubt this. The claimant's frustration with the process adopted by the respondent was clear and fuelled by the fact no-one explained to her why this process was being adopted.

20 72. A good example of the above point is demonstrated by the approach taken to the investigation. The claimant was informed of the collective grievance and provided with a copy of it where the names of the complainers had been redacted. The allegations raised in the collective grievance were very general and provided no details regarding the date of any alleged incident, what was alleged to have happened or the names of those involved. We accepted the claimant was not given adequate notice of the allegations and could not, therefore, fully respond to those allegations.

30 73. Ms Thomson released more detailed information to the claimant on a step-by-step basis but there was no dispute regarding the fact the claimant did not see all of the information until after the conclusion of the investigation. The claimant felt very strongly that she had not had a fair opportunity to understand the allegations against her and to respond to them: the claimant's

opportunity to defend herself against what was being said was severely impacted by the way in which the respondent carried out its investigation.

74. There was evidence at the tribunal to explain why Ms Thomson had adopted this approach and this was because she was conscious of not further
5 damaging the relationship between the claimant and the members of staff and jeopardising the claimant returning to her role. The claimant was not told this at the time and therefore would have had no understanding of why the respondent would not provide her with all of the information which they had collected regarding the allegations. We accepted that it was against this
10 background that the claimant voiced criticism of the respondent and concern regarding the way in which she had been treated. It was also against this background that the claimant questioned whether there was some other reason/motive influencing the respondent's actions, because it appeared there was no other explanation for it.

15 75. The claimant was also very keen to return to her role particularly when there was a conclusion of no misconduct on her part. The claimant was, again, frustrated by the respondent's apparent lack of energy in trying to find a solution to allow her to return to her post. This was particularly so in circumstances where the claimant felt that she had only been "doing her job"
20 and that certain members of staff had made life very difficult for her.

76. We considered the claimant was surprised to be offered the Head of Curriculum (Construction) role because she understood that the person occupying a Head of Curriculum role should have some understanding of the subject matter/s. The claimant told the tribunal that she "had a feeling Mr
25 Vincent was trying to punish [her]". The claimant also said that at the time she was offered this role her confidence was "not high" and she questioned whether she was being set up to fail. We considered there was a subtle difference between this expression of self-doubt, contrasted with the suggestion made by Mr Brown that the claimant had said Mr Vincent wanted
30 her to take the role because he wanted her to fail.

77. The tribunal considered, with regard to the STEM position, that the claimant and Mr Vincent approached this from different perspectives. The claimant put together her proposals for the new role. Mr Vincent, who was contemplating creating a role for the claimant, took those proposals and created a “hybrid” role where the respondent’s interests in developing commercial contracts and growth were to the fore. The reality of the new role was that the commercial targets came first and the claimant would only get to undertake and develop the proposals she had put forward once the targets had been met. The claimant did feel this was a situation where she would never get to undertake the part of the role she had wanted to develop.
78. We accepted the claimant did consider the appeal process to be “quite clinical” and that they did not listen.
79. We next considered that it was appropriate to have regard to the fact the claimant had a period of 28 years’ unblemished service with the respondent. There was no suggestion the claimant had had any previous difficulties managing staff or that she was a difficult employee to manage (Mr Vincent in fact confirmed the claimant was not a difficult employee to manage). We also had regard to the fact the claimant was well regarded in her role and in her work and had, very recently, been put forward for three recommendations.
80. We stood back and considered all of the above points, and asked ourselves whether these points rendered it not practicable to re-engage the claimant. We reminded ourselves that there was no finding of fact that the claimant distrusted the respondent, and indeed this was not the claimant’s evidence to the tribunal. We acknowledged the fact the claimant made the above comments, but we did not consider those comments in, and of, themselves were sufficient to conclude a lack of trust by the claimant of her employer. We considered that in a case of unfair dismissal it is common for employees to be critical of the process followed by the employer, but this does not automatically equate to a loss of trust and confidence in the employer. The claimant had good reason to be critical of the process (see the example above).

81. We also had regard to the fact that both the claimant and the respondent (Mr Vincent) have had the opportunity of hearing all of the evidence in this case and there will be a better understanding by both parties of the reasons why the respondent acted as it did, and the claimant's frustrations with the process.
82. We were satisfied there was no breakdown in the relationship between the claimant and the respondent, and we were further satisfied – for the reasons set out above – that we could not accept the submission that the claimant did not trust and respondent.
83. Mr Brown, in his submission, also argued that it would not be right to give the claimant a post she has already refused (for example, the Head of Curriculum (Construction) post). We could not accept this submission because the circumstances of re-engagement to a Head of Curriculum post would be different to those pertaining at the time of redeployment. The claimant, if returned to a Head of Curriculum post, would not remain in that post for any length of time because of the restructuring.
84. The final factor for the tribunal to consider in respect of re-engagement is any issue of contributory conduct. The tribunal made no finding of contributory conduct. Mr Brown, in his original submissions to the tribunal suggested the claimant had, at least to some degree, contributed to the breakdown in relationships and that she had unreasonably refused the job offer. We could not accept this submission for two reasons: firstly, the conclusion of the investigation was that there was no misconduct on the part of the claimant. Secondly, the Court of Appeal in the case of **Nelson v BBC (No 2) 1980 ICR 110** held that three factors must be satisfied if the tribunal is to find contributory conduct. The first factor is that the relevant action must be culpable or blameworthy. The relevant action (we assume) must be the claimant's contribution to the breakdown in relationships. The difficulty, however, is that we have no basis upon which to evaluate this, beyond the fact the relationship had broken down. The investigation carried out by the respondent did not reach a conclusion regarding whether any of the allegations had been substantiated.

85. We acknowledge that Mr Brown did, in cross examination, put alleged incidents to the claimant but we did not consider this was a sufficient basis to make a finding of contributory conduct. We say that because the claimant was able to give a detailed response to each of the alleged incidents which included either her explanation of what had happened, or the basis for her decision, or denying the alleged incident took place.
86. We concluded that given the fact the investigation reached no conclusions regarding whether allegations had been substantiated, and given there was no misconduct on the part of the claimant, we made no finding of any contributory conduct.
87. Mr Brown did also argue the claimant had contributed to her dismissal by unreasonably refusing the job offer. Mr Brown did not specify which job offer he considered had been unreasonably refused. In any event, we made no finding that the claimant's refusal of the Head of Curriculum (Construction) post or the STEM post was unreasonable. The claimant put forward a reasonable explanation for refusing those posts in the format in which they had been offered.
88. We, in conclusion, decided there was no contributory conduct on the part of the claimant. We should state that even if we had reached the conclusion that the claimant had contributory to her dismissal, we would have further concluded that it would still be just to order re-engagement in the circumstances of this case where there was no misconduct on the part of the claimant and where the respondent did not adequately explore alternatives to dismissal before deciding to dismiss the claimant.
89. We decided to make an order for re-engagement, the terms of which are as follows:
- The employer, The Board of Management of Glasgow Clyde College, shall re-engage the claimant in the role of Head of Curriculum (band/level 3). The remuneration for the employment is £51,500.*
- This order must be complied with by 1 October 2020.*

The respondent shall pay to the claimant the sum of £47,188.44 in respect of arrears of pay and any other benefits the claimant might reasonably be expected to have had but for the dismissal for the period between the date of dismissal and the date of re-engagement.

5 *The respondent shall restore to the claimant all rights and privileges including pension contributions at 17.2% of gross annual salary; annual leave, sick pay and other contractual terms as per the last contract of employment between the claimant and the respondent.*

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15 Employment Judge: L Wisemen
Date of Judgment: 30 April 2020
Entered in register: 12 May 2020
and copied to parties

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