Case Number 2211326/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs L Milligan	**v**	**1. Love My Human Limited**
		2. Jennifer Matthews

Heard at: Central London Employment Tribunal

On: 18 - 19 May 2023, 23 May 2023 (In Chambers)

Before: Employment Judge Brown

Members: Dr V Weerasinghe
Mrs J Griffiths

Appearances:

For the Claimant: Ms L Simpson, Counsel
For the Respondents: Ms K Sheridan, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1. **The First Respondent unfairly dismissed the Claimant.**
2. **The Respondents did not subject the Claimant to discrimination arising from disability.**
3. **The Respondents did not subject the Claimant to any part-time worker detriment.**

The majority judgment of the Tribunal is:

4. **It was 60% likely that the First Respondent, acting fairly, would have dismissed the Claimant in any event.**

The minority judgment of the Tribunal is:

5. ***It was 60% likely that, acting fairly, the First Respondent would have retained the Claimant in employment.***

REASONS

The Claim and Response

1. By a claim form presented on 12 December 2022, the Claimant brought complaints of unfair dismissal, disability discrimination and part time worker detriment against the First Respondent, her former employer, and the Second Respondent, Director of the First Respondent.

2. The Respondents defended the claim.

3. The case had not been case managed at a Preliminary Hearing but the parties had prepared fully for a Final Hearing on liability. The agreed List of Issues was as follows:

UNFAIR DISMISSAL

1. When was the Claimant dismissed?

The Claimant says she was dismissed on 8 August 2022, the Respondents say she was dismissed on 2 September 2022.

2. What was the reason for the Claimant's dismissal? Can the Respondent establish that the Claimant was dismissed by reason of redundancy? In particular:

(i) Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished?

(ii) Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at (i).

3. Was the dismissal within the range of reasonable responses, having regard to (i) consultation and warning, (ii) fair selection and (iii) alternative employment?

4. If the Claimant was unfairly dismissed, should there be a reduction to any award in line with the principles set out in Polkey v AE Dayton Services Ltd 1988 ICR 142 HL?

DISCRIMINATION ARISING FROM A DISABILITY

5. It is conceded that the Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010.

The Respondent's concession is limited to the day-to-day activities which are pleaded in the GoC, namely "reduced walking distance" and "physical activity" (GoC, 4).

6. Did the Respondent know, or could it have reasonably been expected to know, that the Claimant had her particular disability at the material time?

7. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability?

The Claimant relies on the following as alleged instances of "unfavourable treatment":

(i) the disciplinary process

(ii) the offering of an alternative role, knowing she would be unable to accept due to her disability

(i) and dismissal

(GoC, paras 4 and 29)

The Claimant relies on the "something arising" as "the Claimant's inability to attend the offices due to her disability" (GoC, para 32)

8. Was the treatment a proportionate means of a legitimate aim?

9. The Respondent denies that any of the alleged unfavourable treatments were done because of the Claimant's (alleged) "inability to attend the offices". In any event, the Respondent relies on the legitimate aims of:

(i) Disciplinary: the legitimate aims of maintaining staff discipline.

(ii) Offering an alternative role: pursued the legitimate aim of seeking to avoid the Claimant's redundancy.

(iii) Dismissal: pursued the legitimate aim of operational needs of the business.

10. The Tribunal will consider:

(i) Was each of the alleged unfavourable treatments a reasonably necessary way of achieving that aim?

(ii) Could something less discriminatory have been done instead, without compromising those legitimate aims?

(iii) How should the needs of the Respondent and the effect of the alleged unfavourable treatment on the Claimant be balanced?

PART TIME WORKERS CLAIM

11. Was the Claimant treated less favourably than a comparably full-time worker by being subjected to a detriment of her employer (Part Time Workers regulations, reg 5 (1))? The Claimant relies on the detriments of the disciplinary process and dismissal.

(i) Was the treatment on the ground that the Claimant was a part-time worker? And

(ii) Was the treatment justified on objective grounds?

4. It was agreed that this hearing would consider liability only and that a provisional remedy hearing would be listed. There was a Bundle of Documents. Page references in these reasons refer to pages in that Bundle. The Tribunal heard evidence from the Claimant and from Max Milligan, who is her husband and a former Operations and Business Development Manager at the Respondent Company. For the Respondents, it heard evidence from: Jennifer Matthews, Director and founder of the First Respondent; and Annabelle Colairo, shareholder in the Respondent company. Both parties made written and oral submissions.

The Facts

The Respondents' Business and the Claimant's Role

5. Jennifer Matthews, the Second Respondent, is the founder and a director of the First Respondent. The First Respondent is a pet-care business which sells pet accessories, pet care products, pet food and treats, as well as providing grooming services to customers' pets. Ms Matthews oversees the day-to-day operations of the First Respondent and is involved with all aspects of the business. She works long hours, 6 days per week.

6. The First Respondent has two sites, called Love My Human and Love My Human Townhouse. The Townhouse opened in June 2021, 3 years after the opening of Love My Human. LMH Townhouse is a large café and seating area for customers and their dogs with dog day care and pet grooming facilities on the upper floors.

7. The Claimant's husband, Max Milligan, is Ms Matthews' nephew. Before the events in this case, Ms Matthews and Mr and Mrs Mulligan enjoyed a close and supportive family relationship. It is unfortunate indeed that that is no longer the case.

8. The Claimant commenced employment with the First Respondent on 1 February 2019 as a "Part-time Operations Manager". She was contracted to work 16-17 hours per week, p70. Her contractual place of work was "home … and occasionally at Love My Human shop premises". Throughout her employment she worked part time, from home.

9. The Claimant's role later changed to Operations Assistant. It encompassed answering email inbox enquiries, being the customer service point of contact, back end administrative work including recording holiday requests, attending remote staff meetings, monitoring and responding to messages in 6 WhatsApp groups for employees and responding to requests from the team and line managers.

10. The Claimant initially worked from home because of her childcare responsibilities.

The Claimant's Illness

11. In March 2020 the Claimant contracted Covid19 and was hospitalized for about 24 hours. She has been diagnosed with Long Covid, p315, and has been treated by her GP for other health related problems including asthma, chronic fatigue, dysfunctional breathing and migraines, p754.

12. On 12 August 2020 Dr Ganes Lingam, Consultant Chest Physician, wrote to the Claimant's GP saying of the Claimant, "She is able to walk about a mile, but feels

weak towards the end of the day and for the day following that. She tells me that she was poorly with COVID and even developed respiratory failure. Her symptoms of pain and shortness of breath started about a month after that. She has minimal cough and denies wheezing." P414.

13. The Claimant was identified as clinically extremely vulnerable during the Covid pandemic, p428.

14. On 21 December 2020 the Claimant consulted Dr Yasser Ahmed, Locum Consultant in Respiratory Medicine, and reported continuing pain in the left side of her chest and feeling short of breath on walking upstairs. Dr Ahmed referred her to a Chronic fatigue clinic, p430.

15. On 28 February 2021, Mrs Kim van Mouwerik, Rehabilitation Consultant, reviewed the Claimant by video consultation. The Claimant reported that she continued to have a sharp pain on breathing in. She also reported that she would develop post exertional fatigue after 10 – 20 minutes walking. She reported continuing headaches. The Rehabilitation Consultant reported that the Claimant's symptoms were indicative of long covid, p439.

16. On 9 May 2022 Dr Patricia McNamara reported that the Claimant had been experiencing palpitations, shortness of breath and a trembling feeling since February 2022, as well as long standing significant fatigue and attentional cognitive symptoms typically seen in post Covid infection, p556.

17. The Claimant and her husband, Max Milligan, exchanged regular text messages with Mrs Matthews about the Claimant's health, as well as other matters.

18. Mrs Matthews was aware that the Claimant had had Covid19 in March 2020.

19. On 27 February 2021 Ms Matthews texted the Claimant asking her how she was doing after her vaccine. The Claimant replied, "I am looking forward to life returning soon, we go out for walks and get outside. I'm under the long covid department now at the hospital … they are doing a lung function text, scan of my heart … Also physio to help heal my lungs and fatigue so it's all positive and within 2 years I should be back to full health. …" p184.

20. On 9 April 2021 the Claimant told Ms Matthews that she would be having physiotherapy that day to help her lung function, p185.

21. On 20 July 2021 the Claimant told Ms Matthews that she was only seeing people outside and said that she still had Long Covid, for which she was receiving physiotherapy on her lungs. She said that she still suffered from "awful fatigue", p186.

22. On 13 July 2022 the Claimant told Ms Matthews that she had been experiencing a high heart rate and had been really out of breath, p218.

23. Mr Milligan also texted Ms Matthews regularly and told her of his social activities, so that Ms Matthews was aware that the Claimant and he went out from time to time on day trips with their young son, to Legoland and the Natural History Museum and for lunch and dinner, p182. The Claimant attended family and Christmas dinners and children's birthday parties.

24. Ms Matthews told the Tribunal that she never observed the Claimant to be out of breath or to use a wheelchair, and that the Claimant was always well-dressed and well-groomed, and never told Ms Matthews she was unable to move. Ms Matthews told the Tribunal that she often observed the Claimant not wearing a mask during the pandemic.

25. The First Respondent never referred the Claimant to Occupational Health to establish the extent of the Claimant's illness and its effect on her ability to carry out work duties. Ms Matthews did not challenge the Claimant, at the time, about her illness, or the effect the Claimant said it was having on her. Ms Matthews did not ask the Claimant, who she knew was having physiotherapy on her lungs, why she was not wearing a mask.

26. The Claimant told the Tribunal that she needed to sit down and rest while on family days out. On Ms Matthews' evidence, the Claimant would need to commute for 3 hours each day if she were working at the company premises. The Claimant told the Tribunal that, because of her fatigue due to Long Covid, she would be too exhausted to commute and work in the shop.

27. The Tribunal accepted the Claimant's evidence that she needed to sit down to rest while on outings with her family. The Claimant has been diagnosed with Long Covid and there are numerous entries in the medical notes recording her longstanding and continuing fatigue and breathing difficulties. On account of the Claimant's documented significant fatigue and breathing difficulties, the Tribunal accepted that she would be exhausted by a 3 hour commute, as well as by shop assistant duties, so that she would not be able to undertake either of them.

Other Employees in the Business

28. The Covid pandemic badly affected the First Respondent' business. On 30 September 2021 the First Respondent had as little as £25,543 total equity – a fall of more than £120,000 compared to 2020, p395.

29. The Claimant's husband, Max Milligan, was also employed by the Respondent Company as an Operations and Business Development Manager from 3 January 2022.

30. He told the Tribunal that he could see opportunities to develop the business, bringing it in line with health and safety regulations, improving profitability, increasing revenue, decreasing reputational and legal risk, improving staff engagement and increasing cash-flow. He gave evidence that, when he started working for the Company, it was apparent that there were simple business metrics, such as cash flow and profit margins, which had not been given attention. He said, however, that he found it difficult to improve these because Ms Matthews misallocated resources and overspent.

31. On the evidence, Mr Milligan rewrote the staff handbook and advised Ms Matthews on staffing issues. He was responsible for helping develop the e commerce aspect of the Company. He also understood business analytics, identifying bestselling products and producing business reports.

32. The Respondents produced a list of employees and their responsibilities, which had been created in about 2021. The Claimant and Mr Milligan were listed

together, as sharing the following responsibilities: “Uploading and pricing of all products on Vend system. Make price changes. Provide refund on internet sales. Make occasional changes on website. HR and keeping record on staff holidays sick days. Assist in buying where Aniko, Mandy and Jenny have missed out and procurement of general items needed for the company ie toilet roll, hand soap etc. Submit weekly sales reports for both shops. Analysis sales and products and wholesale and retail pricing. Develop e commerce side of LMH business.” P62.

33. Other employees were listed individually. They included: Mandy, full time Shop Manager and Assistant Buyer, working 3 days per week in the shop and 2 days in the office; Aniko, full time Assistant Shop Manager and Food Buyer, working 4 days in the shop and 1 day in the office; Alycia, full time Display and Sales Assistant, working 4 days in the shop; Madalina, part time Sales Assistant; Sally, Events Assistant and Website Marketing and Sales, working 4 days in the office and 1 day at home, who helped to organize events, compile the newsletter and implement sales on social medica for example Instagram and Facebook. Lara was listed as a Saturday Sales Assistant. There were 7 dog groomers of various ranks and dog day care carers to care for and walk dogs. There were also café managers, chefs and waiters. A part time bookkeeper was listed. P63 – 68.

34. It was not in dispute that another worker, Charlie Parfect, was also working at the First Respondent at the time of the Claimant’s dismissal. The documents appeared to show that he worked part time, p363 – 367, as an independent contractor.

35. The First Respondent appeared to have employed around 20 employees in 2021 – 2022.

Events Before the Claimant’s Dismissal

36. On 29 July 2022, Ms Matthews emailed Mr Milligan saying that he needed come into the First Respondent’s premises more often. She said, “Following our conversation and conversations with the shareholders … we feel you focus too much on 'office work' ie staff work descriptions and appraisals when we feel you would be more effective in person with each department … assisting each department and individual key members of staff and … identify weaknesses and strengths and help motivate the staff. You then have two 'Office' days to then do the buying, analyse, business development, appraisals, manuals for the company and any other 'office' back of house matters. … I told Simon about the appraisal documents that you spend time preparing he said that with a company this size its not urgent and that its better for you to be on hand to get to know every member of staff that way we know exactly who to keep and who to get rid of.” p 228.

37. In an email on 3 August 2022, concerning a £40,000 VAT bill due on 6 August 2022, Ms Matthews told the 3 other shareholders in the Respondent company that it had £38,320 in its company bank account. She set out forthcoming expenses, including salary and rent, and said,

“The above totals £14,419 leaves us £23,901 and with additional funds coming in we should have at least £25K to go towards the VAT payment by Friday. This leaves us short by £15,400 (lets say £15K to round it up)

This unfortunately means that each of the shareholders will need to contribute 5K each to keep the company running, I am so sorry to ask I really have tried my best. If any one of us has a problem with this please let me know asap. We do have a 5K overdraft facility as well which we can use to help reduce this amount again." p402.

38. Ms Matthews set out her expectations regarding future revenue, saying she hoped for better footfall from September.

39. Both Ms Matthews and Annabelle Colairo, another shareholder, told the Tribunal that the 4 shareholders – Ms Matthews and her husband and Ms Colairo and her husband - met on 4 August 2022 to discuss the Respondent Company's finances.

40. Ms Colairo told the Tribunal, "The Second Respondent has always been very clear about the importance of customer service. The stores are based on Kings Road in Chelsea and it has always been abundantly clear that the store could succeed or fail depending on its popularity with customers. Customer service was therefore paramount, particularly in the café and particularly regarding the groomers who looked after the customers' dogs."

41. Ms Colairo told the Tribunal that she and the other shareholders were concerned by the high cost of employees' salaries and that they discussed whether each member of staff was essential. She told the Tribunal, "We talked about whether the employees in the café could help with other duties such as cleaning or sales … and we also talked about whether two cooks were needed in the kitchen. We agreed that the café and grooming staff were all needed and that their experience levels were important to the success of the business. … We then turned to discuss administrative and managerial staff namely, Mr. Milligan and the Claimant. We believed at that time that Mr Milligan's role was required as we thought he was helping the operational running of the First Respondent … We were concerned however that Mr Milligan didn't appear to be attending the stores regularly and we thought he should be in the stores 5 days a week to drive the business forward … We queried whether the Claimant's role was essential and whether that standalone position had diminished … We made no decisions in this meeting but discussed whether the duties that the Claimant carried out, which seemed to me to be minimal, could be absorbed by other employees including Jenny Matthews."

42. Ms Colairo told the Tribunal that the other shareholders left it to Ms Matthews to handle matters with the Claimant.

43. The Tribunal accepted Ms Colairo's evidence, it was not significantly challenged in cross examination.

44. Ms Matthews then monitored how much work the Claimant undertook in a week. Ms Matthews noted that the Claimant had had to purchase 4 items and to respond to 1 email enquiry. There were no staff holiday requests during the relevant week. Ms Matthews believed that the duties added up to 20 minutes of work in 4 days. She therefore decided to warn the Claimant that she was likely to be dismissed because there was very little work to be done. Seeing that the Claimant was not in the shop, Ms Matthews texted her, as this was how she always communicated with her.

45. Ms Matthews did not make a written record of her analysis and she did not discuss the Claimant's duties with her at the time. The analysis was of a snapshot in time. The Claimant told the Tribunal that she worked for 3 hours every day. It was difficult for the Tribunal to assess how much work the Claimant was, in fact, undertaking in summer 2022.

46. On 8 August 2022, Ms Matthews sent Mr Milligan a message saying, "… we are having a cost cutting meeting tonight with Joe and Annabelle – after our meeting last week for the bail out money it was decided that our overheads are too high particularly salaries. Laura's position was highlighted." p 230.

47. Later on 8 August 2022 at 17.17, Ms Matthews sent the Claimant a message saying, "After our shareholders meeting when I had to ask for more funds to keep the company going, I was told that we have to make cuts to salaries as literally half of our revenue goes to paying the staff. Your part time role was put to question and it is very likely that we will have to lose you. They said half the things that you do should be done by Max … and other things like that buying can be handed to someone at LMH. I just want to give you enough time to find an alternative part time job." P231.

48. The Claimant responded, querying who would take on her work, and describing all the work she was doing.

49. Ms Matthews replied saying, "It looks like I will have to stand in for now … Max knows what the numbers are and he can see how we can't afford so many staff, p233.

50. During their exchange, Ms Matthews said, "Laura this is not a debate and unless we can shift all the stock overnight to pay salaries we still can't afford your position right now." P234. The Claimant replied saying, "So the decision has already been made and your firing me by text." P235. Ms Matthews replied further saying, "No we will of course write to you formally." … "To be honest it was decided last week and tonight we are going to talk about it again. But I don't see how we are going to get round it. Unless you can come in and take the sales assistant job part time? These are all the things that we will talk about but I've already said you can't because of [the Claimant's son]." P235 – 237.

51. The Claimant and Ms Matthews also spoke later on 8 August 2022 in a telephone call. The Claimant secretly recorded the call.

52. During the call, Ms Matthews said, "And by all means, come in, come in, come in and help us, you know we need, Beth isn't great on the retail floor. Come in and help us. And I'll cut Beth's hours so you can still have a job. We've all got to be flexible. And this isn't forever. I've got to save the company at the moment. Every week, this week we're losing 8 grand alone this week." P381.

53. The Claimant suggested that other staff should be dismissed. She mentioned the café staff. Ms Matthews said, " … without them I can't run a cafe. Laura I'm telling you come in. I offered for you and Max to stay here on the weekends. So you can come in and help and work …" The Claimant said, " So, hang on a minute. You're either firing me because you don't make enough money or you're firing me because now you want to change my position?" p832.

54. Ms Matthews did not contradict the Claimant when the Claimant said that the Claimant was being dismissed.

55. Later in the telephone call, the Claimant said, "You don't fire people over text message Jen." Ms Matthews responded, "I didn't fire you over text message?" p385.

56. The Claimant told Ms Matthews that Ms Matthews had been unprofessional in the way that she had communicated with the Claimant by text message.

57. Also on 8 August, after the telephone call, Ms Matthews removed the Claimant from the WhatsApp Groups relevant to her job, p247.

58. Ms Matthews told the Tribunal that she had done so because she considered that the Claimant had been very critical of her and the business on the telephone and she thought that the Claimant should be suspended from her role. Ms Matthews did not tell the Claimant on 8 August that she had suspended her.

59. Max Milligan met with Ms Matthews on 9 August 2022. Again, Mr Milligan secretly recorded much of the meeting.

60. Ms Matthews told Mr Milligan that she considered that the Company could absorb the Claimant's duties by Ms Matthews taking them on herself, p710, 711.

61. Mr Milligan commented that Ms Matthews was losing money in the café, that staff were stealing money from the business and that Ms Matthews had no business plan, p725 -6.

62. Mr Milligan said, "… you've then responded saying, well actually the decision was already made a week ago by Jo, Simon and Annabelle." Ms Matthews replied, "Yes, and I haven't known how to deliver the news … ". Mr Milligan responded further, "Well doing it by text probably isn't best." P711.

63. Ms Matthews said that she had not dismissed the Claimant by text. Mr Milligan responded, "What's the difference? You said the decision is already made, I've seen it in black and white from you. So, what is it? You can't have both." Ms Matthews replied, " The decision was made." P729.

64. On 10 August 2022 at 07.06 Ms Matthews emailed the Claimant asking her to attend a Zoom meeting at noon that day, p249. The Claimant replied, saying she could not attend at that time.

65. Later on 10 August 2022, at 13.47, Ms Matthews emailed the Claimant again saying, "Due to the recent unpleasant exchanges … we are suspending your role in company and removed you from all company communication", p251.

66. At around this time Mr Milligan resigned from the First Respondent.

67. On 16 August 2022 Ms Mathews emailed the Claimant again, inviting her to a disciplinary hearing, "following your unsatisfactory behaviour and negative accusations made towards me … to discuss the matter and other issues relating to your performance ., "1 . Uploading and changing quantities of products on to the POS system. 2. Responding to staff regarding holiday requests and subsequently

informing the director of the requested—holidays 3. Procurement procedure of items requested by staff4. Fulfilling your contracted work hours each day and notify us of un worked hours." P254.

68. On 17 August 2022 the Claimant's solicitors sent a "formal letter of appeal" against the Claimant's dismissal to the Respondents, p256. The letter said that the Claimant had been singled out for redundancy, with the Respondents proposing that her part time hours would be taken over by her husband, who was employed full time. It said that the decision to dismiss had been made a week previously, with no consultation process.

69. On 17 August 2022 Ms Matthews sent the Claimant more details of disciplinary allegations against her, p259. These included, "1. Uploading and changing quantities of products on to the POS system. We have proof that you were not performing this work and that a majority of it was performed by Max Milligan. … 2. Responding to staff regarding holiday requests and subsequently informing the director of the requested holidays. Please see attached texts to this email and letter from staff and from me asking you to respond to staff with regards to their holiday requests I did so on 13th July and 26th July 2022 via WhatsApp yet, you continued to not respond to them. 3. Procurement procedure of items requested by staff. On many occasions you failed to make the purchases requested by staff in a timely manner, text evidence of this is attached to this email and letter. …".

70. On 18 August 2022 Ms Matthews replied to the Claimant's solicitor's letter, saying that the Claimant was currently employed and suspended on full pay, p265.

71. On 22 August 2022 the Claimant's solicitor sent Ms Matthews the Claimant's detailed response to the disciplinary allegations against her, p280. She said that there had been 1,437 messages between the staff on their message groups which she had had to review. She said that her work had doubled over time and that Mr Milligan had been employed to support her expanding role.

72. On 26 August 2022 Ms Matthews wrote to the Claimant, saying that the First Respondent had identified her role as being at risk of redundancy, p290. She said that the Claimant's role had been assessed while the Claimant had been suspended and that the Company considered that the Claimant's duties would not require more than 3 hours work per week. She said, "There is a diminished requirement for your role, which pays an annual salary of £13,900, in light of the fact that your duties can be undertaken in a matter of a few hours per week, and the duties can be reasonably undertaken by your colleagues in addition to their own duties." Ms Mathews said that there would be a one week consultation period and invited the Claimant to make suggestions to avoid redundancy. She invited the Claimant to a redundancy decision meeting on 2 September 2022.

73. On 31 August 2022 the Claimant's solicitor replied, saying that it was surprising that the Respondent Company was attempting to follow a dismissal process when the Claimant had already been dismissed on 8 August, p294.

74. The Claimant's solicitor said, "The decision made to dismiss our client was in breach of the Part Time Working Regulations and in breach of the Equality Act 2010 given that it had been decided that her role would be given to her husband, Max, a full-time, male employee and other full-time employees. Therefore, given

that our client is no longer employed by [you], she will not be attending the meeting on 2 September 2022 and she is under no obligation to attend any further meetings …". P294.

75. The Claimant's solicitor set out alternatives to dismissal which the Respondent Company could have considered, including, " … ensure that staff members are all paid in line with their contract, and work within their contractual hours rather than paying staff members for overtime and additional breaks. … There should be a process in place to ensure only essential items are purchased if the Company is currently struggling. In any event, the Company are already making a cost-saving of £38,000' given that Max is no longer employed by the organisation. …" p294.

76. The solicitor noted that the Claimant had received pay since 8 August and said that the Claimant would return the overpayment, on confirmation of payment details and details of the overpayment. P295.

77. On 2 September 2022 Ms Matthews wrote on behalf of the First Respondent saying that the Claimant was dismissed by reason of redundancy with effect from 2 September 2022. She said that the Claimant had not put forward any proposals or suggestions for avoiding her redundancy, p305

78. Ms Matthews did not say that the Claimant had the right of appeal from the redundancy decision.

79. The Tribunal accepted Mr Milligan's evidence that Charlie Parfect took over much of the Claimant's role.

80. There was no evidence that more employees were employed to undertake either the Claimant or Mr Milligan's roles when they left the First Respondent. Mr Milligan suggested that, later, a new employee called Maria Pedrosa assumed both the Claimant and Mr Milligan's roles. Ms Matthews told the Tribunal that, within a week of the Claimant and Mr Milligan leaving, the business was running smoothly and no new employees had been recruited to replace the Claimant and Mr Milligan.

Relevant Law

81. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

82. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,* " .. or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

83. It is generally not open to an employee to claim that his dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant, *Moon v Homeworthy Furniture (Northern) Ltd* [1976] IRLR 298, *James W Cook & Co (Wivenhoe) Ltd v Tipper* [1990] IRLR 6. Courts can question the genuineness of the decision, and they should be satisfied that it is made on the basis of reasonable information, reasonably acquired, *Orr v Vaughan* [1981] IRLR 63.

Dismissal

84. The test of whether ostensibly ambiguous words or conduct amount to a dismissal is an objective one. The Tribunal must consider all the surrounding circumstances. If the words or conduct are still ambiguous the Tribunal should ask itself how a reasonable employee would have understood by the words used: *Chapman v Letheby and Christopher Ltd* [1981] IRLR 440, EAT.

85. In *Feltham Management Ltd and ors v Feltham and ors* EAT 0201/16, the employer's conduct in ceasing to pay an employee when she walked out after a disagreement was not conduct amounting to an unambiguous termination.

86. Where the employer gives advance warning of dismissal to occur at some future date, this does not constitute a notice of dismissal *Morton Sundour Fabrics Ltd v Shaw (1966*) 2 ITR 84 and *Burton Group Ltd v Smith* [1977] IRLR 351. In *Morton* the QBD held that, in order to end a contract of employment, an employer must specify when the termination is to occur, or at least make it possible for that to be ascertained. In that case, the employer had only given the employee a warning that his employment would terminate and had not given him notice terminating his employment.

Redundancy

87. Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

…

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

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

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

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

88. According to *Safeway Stores plc v Burrell* [1997] IRLR 200, [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] 3 All ER 769, [1999] IRLR 562 there is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

89. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof.

90. *Williams v Compair Maxam Ltd* [1982] IRLR 83, sets out the standards which guide tribunals In determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

91. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

92. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

<u>Pool</u>

93. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

<u>Alternative Employment</u>

94. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, *[1976] ICR 296; British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, *[1978] ICR 70*.

<u>Polkey</u>

95. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

96. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the *Polkey* principle applies, not only to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment, Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

<u>Discrimination Arising from Disability</u>

97. *s 15 EqA 2010* provides:
“(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability”.

98. Simler P in *Pnaiser v NHS England* [2016] IRLR 170*, EAT*, at [31], gave the following guidance as to the correct approach to a claim under *EqA 2010 s 15:*

'(a) 'A tribunal must first identify whether there was unfavourable treatment and by whom: in other words, it must ask whether A treated B unfavourably in the respects relied on by B. No question of comparison arises.
(b) The tribunal must determine what caused the impugned treatment, or what was the reason for it. The focus at this stage is on the reason in the mind of A. An examination of the conscious or unconscious thought processes of A is likely to be required, just as it is in a direct discrimination case. Again, just as there may be more than one reason or cause for impugned treatment in a direct discrimination context, so too, there may be more than one reason in a s.15 case. The “something” that causes the unfavourable treatment need not be the main or sole reason, but must have at least a significant (or more than trivial) influence on the unfavourable treatment, and so amount to an effective reason for or cause of it.
(c) Motives are irrelevant. The focus of this part of the enquiry is on the reason or cause of the impugned treatment and A's motive in acting as he or she did is simply irrelevant: see *Nagarajan v London Regional Transport* [1999] IRLR 572. A discriminatory motive is emphatically not (and never has been) a core consideration before any prima facie case of discrimination arises..
(d) The tribunal must determine whether the reason/cause (or, if more than one), a reason or cause, is 'something arising in consequence of B's disability'. That expression 'arising in consequence of' could describe a range of causal links. Having regard to the legislative history of s.15 of the Act (described comprehensively by Elisabeth Laing J in *Hall*), the statutory purpose which appears from the wording of s.15, namely, to provide protection in cases where the consequence or effects of a disability lead to unfavourable treatment, and the availability of a justification defence, the causal link between the something that causes unfavourable treatment and the disability may include more than one link. In other words, more than one relevant consequence of the disability may require consideration, and it will be a question of fact assessed robustly in each case whether something can properly be said to arise in consequence of disability.
(e) For example, in *Land Registry v Houghton* UKEAT/0149/14, [2015] All ER (D) 284 (Feb) a bonus payment was refused by A because B had a warning. The warning was given for absence by a different manager. The absence arose from disability. The tribunal and HHJ Clark in the EAT had no difficulty in concluding that the statutory test was met. However, the more links in the chain there are between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection as a matter of fact.
(f) This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

(g) There is a difference between the two stages – the "because of" stage involving A's explanation for the treatment (and conscious or unconscious reasons for it) and the "something arising in consequence" stage involving consideration of whether (as a matter of fact rather than belief) the "something" was a consequence of the disability.
(h) Moreover, the statutory language of s.15(2) makes clear (as Miss Jeram accepts) that the knowledge required is of the disability only, and does not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment is a consequence of the disability. Had this been required the statute would have said so. Moreover, the effect of s.15 would be substantially restricted on Miss Jeram's construction, and there would be little or no difference between a direct disability discrimination claim under s.13 and a discrimination arising from disability claim under s.15.
(i) As Langstaff P held in *Weerasinghe*, it does not matter precisely in which order these questions are addressed. Depending on the facts, a tribunal might ask why A treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of "something arising in consequence of the claimant's disability". Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "something" that caused the unfavourable treatment.''

99. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax* [2005] IRLR 726 per Pill LJ at paragraphs [19]–[34], Thomas LJ at [54]–[55] and Gage LJ at [60]. It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context: *Hardys & Hansons plc v Lax* [2005] IRLR 726, CA.

Knowledge

100. Regarding knowledge of disability, an employer may be under a duty to make enquiries to establish whether a person is suffering from a qualifying disability. The Equality and Human Rights Commission Code of Practice 2010 on Employment gives an example at paragraph 6.19 of an employee who has depression and cries at times at work. It advises that it is likely to be reasonable for the employer to discuss with the worker whether their crying is connected to a disability.

101. In *Gallop v Newport City Council* [2013] EWCA Civ 1583, [2014] IRLR 211, the Court of Appeal said that it essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment.

Polkey and Discrimination Cases

102. Tribunals must not ignore the possibility that the discriminatory act might have been the only causative factor. As the EAT confirmed in *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202) the general rule in assessing compensation is that damages are to place

the claimant into the position they would have been in if the wrong had not been sustained. In the context of discriminatory dismissals, if there was a chance of a non-discriminatory dismissal this must be taken into account. As per Underhill J, 'the claimant [ought not to make a] 'windfall' 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had – it may be subconsciously and only to a small extent – allowed himself to be influenced by discriminatory considerations. There is nothing in the statute to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply'.

Part Time Detriment

103. Paragraph 5 Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides:

"5(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker –

(a) As regards the terms of his contract; or

(b) By being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if –

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied."

Discussion and Decision

104. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. It considered the dismissal in the composite context of the unfair dismissal, discrimination arising from disability, and part time work detriment complaints. For clarity, it has stated its conclusion on individual allegations separately.

DISCRIMINATION ARISING FROM A DISABILITY

105. The Respondent conceded that the Claimant is a disabled person within the meaning of section 6 of the Equality Act 2010, but the concession was limited to the day-to-day activities which are pleaded in the GoC, namely "reduced walking distance" and "physical activity" (GoC, 4).

Did the Respondent know, or could it have reasonably been expected to know, that the Claimant had her particular disability at the material time?

106. Ms Matthews knew that the Claimant had had Covid in March 2020. In July 2021, more than a year later, the Claimant told Ms Matthews that she had Long

Covid, for which she was receiving physiotherapy on her lungs and that she still suffered from "awful fatigue", p186. In July 2022 the Claimant told Ms Matthews that she had been experiencing a high heart rate and had been really out of breath, p218.

107. Ms Matthews knew, over a long period of time, of the Claimant's breathing difficulties and the Claimant's extreme fatigue. She knew that the Claimant had been suffering from Long Covid for more than a year.

108. Ms Matthews did not challenge the information the Claimant gave her. She did not refer the Claimant to Occupational Health, nor seek a medical report on the Claimant's health. If she had done so, she would have been told that the Claimant had, indeed, been diagnosed with Long Covid and that, as Dr Patricia McNamara reported on 9 May 2022, the Claimant had been experiencing palpitations, shortness of breath and a trembling feeling since February 2022, as well as longstanding significant fatigue and attentional cognitive symptoms typically seen in post Covid infection, p556. In particular, she would have known that the Claimant's fatigue was longstanding and clinically significant. That would have indicated that the fatigue had had a more than minor effect on the Claimant's daily life.

109. Ms Matthews therefore knew, or reasonably ought to have known, by summer 2022, the Claimant had been suffering from extreme fatigue and breathing difficulties for more than a year. The Tribunal considered that she ought to have known that extreme fatigue and breathing difficulties would have a more than minor effect on the Claimant's ability to carry out normal activities such as walking, shopping, commuting and concentrating. She ought to have known that, even if the Claimant could do these things, she would need to rest after she did.

110. Ms Matthews knew, or ought to have known, by summer 2022, that the Claimant was a disabled person.

111. The fact that the Claimant could occasionally go for outings, or join in festivities at her son's birthday party, was not a reasonable basis for believing that she was not disabled. That could apply a stereotype to disabled people, by assuming that, in order to be disabled, a person must be almost completely physically incapacitated. Further, disability is not determined by what a person can do, but what they cannot do, or can only do with difficulty.

The Claimant relies on the "something arising" in consequence of disability as "the Claimant's inability to attend the offices due to her disability" (GoC, para 32)

112. The Tribunal has already found, as a fact, that the Claimant would be exhausted by a 3 hour commute, as well as by shop assistant duties, so that she would not be able to undertake either of them.

113. It therefore found that the Claimant unable to attend the offices due to her disability.

DISMISSAL

1. When was the Claimant dismissed?

114. The Claimant contends that she was dismissed on 8 August 2022; the Respondents say she was dismissed on 2 September 2022.

115. On 8 August 2022 at 17.17, Ms Matthews sent the Claimant a message saying, "Your part time role was put to question and it is very likely that we will have to lose you. They said half the things that you do should be done by Max … and other things like that buying can be handed to someone at LMH. I just want to give you enough time to find an alternative part time job." P231.

116. The Claimant responded, querying who would take on her work, and Ms Matthews replied saying, "It looks like I will have to stand in for now …", p233.

117. During their exchange, Ms Matthews said, "Laura this is not a debate and unless we can shift all the stock overnight to pay salaries we still can't afford your position right now." P234. The Claimant replied saying, "So the decision has already been made and your firing me by text." P235. Ms Matthews replied further saying, "No we will of course write to you formally." … "To be honest it was decided last week and tonight we are going to talk about it again. But I don't see how we are going to get round it. Unless you can come in and take the sales assistant job part time? These are all the things that we will talk about but I've already said you can't …". P235 – 237.

118. The Tribunal considered, first, whether Mrs Matthews had used unambiguous words of dismissal. It decided that she did not – she said, "it is very likely that we will have to lose you" and "It looks like I will have to stand in for now" and "… unless we can shift all the stock overnight to pay salaries we still can't afford your position right now." Those statements referred likely events in the future, rather than constituting a definitive statement that the Claimant's contract had ended.

119. Furthermore, even though Ms Matthews also said that a decision to dismiss the Claimant had already been made, she did not say the Claimant's contract had already ended, nor did she give any indication of a date on which the Claimant's contract would end.

120. The Tribunal concluded, following *Morton Sundour Fabrics Ltd v Shaw* (1966) 2 ITR 84, that Ms Matthews did not specify when the termination was to occur, nor did her words make it possible for that to be ascertained.

121. The Tribunal decided that, in reality, Ms Mathews warned that the Claimant that the Claimant would be – or was highly likely to be - dismissed in the future. She did not give her notice terminating her employment.

122. The Tribunal understood why the Claimant believed she "had been dismissed" – because she was told a decision to dismiss her had already been made. Nevertheless, in most dismissals, a decision to dismiss will normally be made before the employee's contract is actually terminated. The fact that a decision is made to dismiss does not end the contract at that point. An employee may be told that a decision to dismiss them has already been made, but their employment will not end until the date on which they are told their contract has been terminated, or they are given a date for its termination following a specified notice period.

123. The Claimant was later dismissed by letter or 2 August 2022, which told her that she was dismissed by reason of redundancy with effect from 2 September 2022.

2. What was the reason for the Claimant's dismissal? Can the Respondent establish that the Claimant was dismissed by reason of redundancy? In particular:

(i) Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished?

124. On the facts, the Tribunal concluded that Ms Matthews had decided, between 4 and 8 August 2022, that the Claimant would be dismissed. She did so, first, on the understanding that the shareholders had agreed that the Claimant's tasks could be absorbed by other staff, and having formed the view, on a quick assessment of the Claimant's tasks, that there was little work for her to do, so that the Claimant was not required.

125. That being the case, Ms Matthews decided that the Respondent Company did not need as many employees to carry out the administrative work the Claimant was doing.

126. There were no additional staff taken on at that time to do the Claimant's work.

127. The Tribunal notes that the legal test is NOT whether there was less work to be done, but whether the employer needed fewer employees to do it.

128. In this case, the Respondents did decide that the need for employees to carry out administrative work had diminished. There was therefore a redundancy situation.

(ii) Was the dismissal of the employee caused wholly or mainly by the state of affairs identified at (i).

Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability by dismissing her?

Was the Claimant treated less favourably than a comparably full-time worker by being dismissed?

129. Following the shareholders meeting on 4 August 2022, Ms Matthews understood that the shareholders had identified the Claimant's role as being able to be absorbed by others. No other employee was identified as potentially being redundant at that meeting.

130. Ms Matthews made the decision between 4 and 8 August to dismiss the Claimant – because the shareholders had approved that course and because Ms Matthews had decided, on the basis of a brief assessment, that the Claimant was doing little work so that her duties could be absorbed by others.

131. As she told the Claimant on 8 August, and she repeated to Mr Milligan, the decision was made before 8 August.

132. While Ms Matthews was angered by the Claimant's texts and phone call on 8 August 2022, the Tribunal decided that there was no resulting change to the decision to dismiss, or the reasons for it. Ms Matthews' anger simply meant that it was even less likely the decision would be revisited.

133. The Tribunal decided that the decision to dismiss was mainly because of redundancy. It was mainly because the Respondents believed that her duties could be absorbed by others.

134. In its decision-making on the reason for dismissal, the Tribunal considered whether the fact that the Claimant was working part-time was any part of the decision to dismiss.

135. The Claimant contended that the Respondents decided to dismiss her, rather than Mr Milligan, because she was part-time and he, as a full-time worker, could absorb her role.

136. The Tribunal noted that Mr Milligan and the Claimant were listed as performing the same tasks in the list of employees produced by the Respondents. The Claimant was selected for redundancy and Mr Milligan was not. The Tribunal noted that Ms Matthews specifically told the Claimant that her "part-time role" was being put into question, p231.

137. However, despite the contents of the list of employees, the Tribunal found that the Claimant and Mr Milligan were not, in fact, carrying out the same roles. Mr Milligan was undertaking staff appraisals and managing staff, rewriting the handbook and undertaking business analysis. The Claimant did not undertake this work. At the relevant times, she was employed as an assistant, not a manager.

138. The Tribunal also found that Ms Matthews and the shareholders did not consider that Mr Milligan was undertaking the same work as the Claimant. From Ms Matthews' email to Mr Milligan on 29 July 2022, the shareholders considered that Mr Milligan's primary duties were to manage staff and develop the business.

139. It was therefore not correct that Mr and Mrs Milligan were carrying out the same tasks but the Claimant, as a part-time employee, was dismissed, when Mr Milligan, as a full time employee was not.

140. The Tribunal also noted that the Respondents retained other part-time workers after they dismissed the Claimant.

141. Ms Matthews offered to cut the hours of a full-time employee, Beth, so that the Claimant could remain in employment with a part-time position, albeit undertaking a sales assistant role.

142. The Claimant's responsibilities were not given to full-time workers. They were taken over by a part-time independent contractor, Charlie Parfect. Mr Milligan's role, which was full-time, was also absorbed by existing employees.

143. On the evidence, the Tribunal concluded that Ms Matthews and the shareholders really wanted employees – including full-time Mr Milligan and the part-time Claimant - to attend the shop and to drive sales and interact with customers and staff, face to face. Ms Matthews and the other shareholders had no issue with part-time hours, but they wanted employees on the premises, in customer-facing roles.

144. On all the facts, the Tribunal decided that the dismissal was not in any way because the Claimant was part-time. The Respondents simply considered that

they did not require an administrative assistant, because that work could be absorbed by other employees.

145. The Tribunal therefore also considered whether the "something arising from disability" – the Claimant's inability to attend the offices – was part of the reason for her dismissal.

146. The Claimant contended that the Respondent wanted the Claimant to also work at least for some of her working hours, on the premises, and the fact she could not do this was a source of aggravation for the Respondents, which materially contributed to the decision to dismiss her.

147. On 29 July 2022 the Second Respondent asked Mr Milligan to come in and be more active in the workplace. Ms Matthews invited the Claimant to come in to work and assist on the shopfloor.

148. However, Ms Matthews decided to dismiss the Claimant from her administrative role, not because the administrative role was being done from home, but because she decided that there was no need for an employee to carry out that role. It would not have made any difference if the administrative role had been done at the offices.

149. She did want employees to carry out shop assistant roles in the shop – and suggested that role to the Claimant in their phone call – but the reason Ms Matthews decided to dismiss the Claimant from the administrative role was that the administrative role itself was not needed, no matter from which geographical location it would be carried out.

150. The Tribunal did not accept that Ms Matthews was otherwise aggravated by the Claimant working from home.

151. The Claimant was not dismissed because of something arising from her disability.

Disciplinary Process – Part Time Worker Detriment and Discrimination Arising from Disability

152. The Claimant contended that the sole reason for the disciplinary process was an attempt by the Respondents to find a way to (re-)terminate the Claimant's employment, having realised that Ms Matthews had not gone about this correctly on 08 August 2022. She contended that the disciplinary process was intimately connected to the dismissal itself.

153. The Respondents contended that the disciplinary process was commenced because Ms Matthews was upset by the manner in which the Claimant had texted her and spoken to her on the telephone.

154. On the Claimant's case, the disciplinary process was discriminatory, so the disciplinary process was also discriminatory, as it was intended to achieve dismissal.

155. As the Tribunal has found that the dismissal not was not a part time worker detriment and was not discrimination arising from disability, likewise it finds that the disciplinary process was not discriminatory or detrimental.

Was the dismissal within the range of reasonable responses, having regard to (i) consultation and warning, (ii) fair selection and (iii) alternative employment?

156. The Tribunal considered whether the First Respondent consulted when proposals were at a formative stage – and on the constitution of the pool and on alternatives to dismissal.

157. It decided that the decision to select the Claimant for redundancy was made before 8 August. In the text exchange on 8 August the Claimant said, "So the decision has already been made and your firing me by text." P235. Ms Matthews replied further saying, "No we will of course write to you formally." … "To be honest it was decided last week and tonight we are going to talk about it again."

158. During their meeting on 9 August 2022, Mr Milligan said, "… you've then responded saying, well actually the decision was already made a week ago by Jo, Simon and Annabelle." Ms Matthews replied, "Yes, and I haven't known how to deliver the news … ".

159. The Tribunal decided that the decision to dismiss the Claimant had already been made, long before any consultation the First Respondent purported to commence a consultation exercise on 26 August 2022.

160. There was no consultation on pool before the decision was made. Ms Matthews kept no record of her analysis of the Claimant's job tasks. The analysis of the job functions was not carried out in consultation with the Claimant.

161. The Claimant's response to the disciplinary allegation, p280, insofar as the disciplinary allegations had related to the Claimant's lack of work, was completely ignored by the Respondents. The First Respondent made no response at all to the Claimant's analysis. That indicated that there was no meaningful consultation on the selection of the Claimant for redundancy, even when the Claimant tried to engage with the Respondent on its decision.

162. The Claimant sent proposed alternatives to redundancy by her solicitor's letter on 31 August 2022, p294 but, in the dismissal letter dated 2 September 2022, Ms Matthews said that the Claimant had not put forward any proposals or suggestions for avoiding her redundancy, p305.

163. That indicated that the First Respondent simply ignored the Claimant's suggested alternatives to redundancy.

164. The First Respondent offered the Claimant no appeal against the decision to dismiss her. The Tribunal found that that was not simply a procedural failing: it reflected the fact that the First Respondent had no intention, at any stage, of considering alternatives to dismissing the Claimant.

165. The decision to dismiss the Claimant was procedurally and substantively unfair.

If the Claimant was unfairly dismissed, should there be a reduction to any award in line with the principles set out in Polkey v AE Dayton Services Ltd 1988 ICR 142 HL?

166. The Tribunal reminded itself that it must consider what was the likelihood that this employer, acting fairly, would not have dismissed the Claimant.

167. The Tribunal considered that, this employer, acting fairly, would have had an open mind as to alternatives to the Claimant's redundancy.

168. The Tribunal also decided that this employer, acting fairly, would not have taken offence when the Claimant said that the wrong decision had been made and different decisions about running the business should be made instead of making the claimant redundant. A fair consultation process inevitably involves the selected employee suggesting that different decisions should be made - thereby expressly or impliedly criticizing the decision to select them.

169. The Tribunal considered that, if this employer had had an open mind to alternatives, it would have noted that Max Milligan had resigned during the dismissal process for the Claimant. The Second Respondent had commented, during the dismissal discussions, that Max Milligan would be able to take on the Claimant's role.

170. The Tribunal concluded that, if this employer had acted fairly, there was a chance that, when Mr Milligan resigned, the First Respondent would have been willing to consider that the Claimant could be retained to do her previous role as well as part of the role which Mr Milligan had been undertaking. Mr Milligan had been working full-time, so there was a considerable body of work which needed to be reallocated. The Claimant had originally been employed as an Operations Manager, rather than an Assistant. This employer, acting fairly, would have undertaken a proper assessment of the Claimant's own role and an assessment of which of Mr Milligan's tasks she could also undertake, to support Mrs Matthews.

171. The Tribunal also bore in mind that a fair employer would not act in a discriminatory manner. It would be open to considering what tasks such an Administrative Assistant / Operations Assistant/Manager could undertake while working from home.

172. In considering the likelihood that the Claimant would have been dismissed in any event, even following a fair procedure, the Tribunal took into account that financial situation of the company was very poor.

173. It was certainly not the case that there was a high probability that, given the urgent need to save money, the Claimant would have been retained. There was no indication that the First Respondent considered that any other employee could be dismissed instead. The First Respondent saw dog groomers and café staff as essential to its survival. The Claimant's role had been particularly identified as not required. This was a small employer with limited options.

174. On the other hand, on Mr Milligan's resignation, there was a substantial number of tasks which needed to be done. Mrs Matthews was already working extremely hard. There were few other employees who could take over Mr Milligan's tasks. Most other employees were employed in the café, shop and as dog groomers. The Claimant had relevant skills, as indicated in her original job role. She was not an

expensive employee, given her part-time hours and pay. There was a more than minimal chance that this employer, acting fairly, would not have dismissed the Claimant.

175. On all the facts, the Tribunal, in the majority, considered that it was more likely than not that the First Respondent would still have dismissed the Claimant. However, there was a decent chance that it would not. The Tribunal therefore, in the majority, concluded that it was 60% likely that, acting fairly, the First Respondent would have dismissed the Claimant in any event.

176. *Dr Weerasinghe, in the minority, concluded that it was 60% likely that, acting fairly, the First Respondent would have retained the Claimant in employment. Dr Weerasinghe reasons as follows:*

176.1. A substantial saving arising from Mr Millgan's resignation and the Claimant's ability to do Mr Milligan's work (paras 170, 172 above)

176.2. Mrs Matthews was already working "extremely hard" (para 174)

176.3. There was an unavoidable necessity to do the work the Claimant was doing

176.4. Distribution of the Claimant's work amongst the other 'customer-facing' roles (as preferred by Mrs Mathews and the share-holders, para 143) would invariably have an impact on income generation

Discrimination Arising Disability: the offering of an alternative role, knowing she would be unable to accept due to her disability

177. The Claimant contended that Ms Matthews offered the Claimant a part-time sales assistant role on the basis the Claimant could remain employed only if she was willing to attend the premises, and not work from home. The Claimant contended that the role was therefore offered to her because of her known inability to attend the premises, arising from her disability. The Claimant contended that the role was not offered in any genuine attempt to avoid the Claimant's redundancy.

178. The Tribunal disagreed. First, it found that the part time assistant role was mentioned by Ms Matthews on a number of occasions to the Claimant, both in text messages and in their telephone call. Ms Matthews said, "Laura I'm telling you come in. I offered for you and Max to stay here on the weekends. So you can come in and help and work …" The Tribunal did not accept that Ms Matthews did so, knowing that the Claimant could not come into work. It found that the offer was genuine and that Ms Matthews would have welcomed the Claimant's assistance on the shop floor.

179. In any event, when Ms Matthews raised the matter in a text message, but then dismissed it, she did so because of the Claimant's childcare responsibilities. Ms Matthews said, "But I don't see how we are going to get round it. Unless you can come in and take the sales assistant job part time? These are all the things that we will talk about but I've already said you can't because of [the Claimant's son]." P235 – 237. The Tribunal found that, insofar as Ms Matthews thought the Claimant

could not accept the shop assistant role, she did not have anything arising from the Claimant's disability in mind. Ms Matthews believed that the Claimant could not attend the premises solely because of her need to care for her son.

180. The Respondents did not subject the Claimant to discrimination arising from disability.

Conclusion

181. In conclusion, the Claimant's unfair dismissal claim succeeds against the First Respondent Company. The majority of the Tribunal has found that it was 60% likely that she would have been dismissed in any event. Her other claims fail. A remedy hearing will take place.

____________3 July 2023____________

Employment Judge Brown

SENT TO THE PARTIES ON

03/07/2023

FOR THE TRIBUNAL OFFICE