Appeal No. UKEAT/0168/14/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 13 October 2014

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SEFTON BOROUGH COUNCIL APPELLANT

MRS M WAINWRIGHT RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS L CHUDLEIGH (of Counsel) Instructed by: Sefton Metropolitan Borough Council Magdalen House 30 Trinity Road Bootle Liverpool L20 3NJ
For the Respondent	MR P SIGEE (of Counsel) Instructed by: Simpsons Solicitors 3rd Floor St Nicholas House Old Church Yard Chapel Street Liverpool L2 8TX

SUMMARY

MATERNITY RIGHTS AND PARENTAL LEAVE

Sex discrimination

Unfair dismissal

Return to work

Maternity and Parental Leave Regulations 1999 (MAPL Regs) - regulation 10 - redundancy during maternity leave and entitlement to be offered suitable available vacancy.

Equality Act 2010 (EqA) - section 18 - direct discrimination because of pregnancy and maternity

Appeal against the Employment Tribunal's finding that there had been a breach of **regulation 10 MAPL Regs 1999**, dismissing that appeal:

The employer sought to rely on the restructuring process – and the displacement and redeployment stages of that process – it had itself introduced. That did not, however, avoid the conclusion (open to the Employment Tribunal on the evidence) that the Claimant's post was redundant and that she was entitled to be offered a suitable alternative vacancy. To allow that it was for the employer to determine when the redundancy arose could undermine the protection afforded by regulation 10; employers could state that there was only a redundancy after others had been "redeployed" into what might otherwise have been suitable available vacancies. "Redundancy" should be given the same meaning as under the **Employment Rights Act 1996** (**Secretary of State for Justice v Slee** UKEAT/0349/06/JOJ). Doing so, it could not be said that the Employment Tribunal reached a perverse conclusion in finding that the Claimant's position was redundant.

Further, although regulation 10 does not define 'vacancy' and does not expressly oblige an employer to offer *every* suitable vacancy or, where there is more than one available, any *particular* suitable vacancy, on the evidence in this case the Employment Tribunal was entitled to find that the position of Democratic Service Manager ("DSM") was an available vacancy that was (on the employer's own assessment) "suitable" for the Claimant. The DSM post was unoccupied (as a newly created post) at the time the Claimant's position became redundant and, adopting a normal approach to the use of the word, it was open to the Employment Tribunal to conclude that it was an available 'vacancy'. It may be that the employer could have met its

obligation under regulation 10 if it had offered the Claimant a different suitable available vacancy (which would allow considerations of proportionality to come into play, see **Eversheds Legal Services Ltd v De Belin** [2011] IRLR 448, EAT), but it never did.

Ultimately this ground really amounted to an attempt to challenge findings of fact that were permissible on the evidence before the Employment Tribunal. The appeal on this basis was dismissed.

Appeal against finding of direct discrimination under **section 18 EqA 2010**, allowing that appeal:

On this point, the employer was correct as to the difference in how the protections were afforded under **section 18 EqA**, on the one hand, and under **regulation 10 MAPL Regs**, on the other. The former provides that, if possessing the protected characteristic, a woman has to demonstrate unfavourable treatment because of pregnancy or maternity leave. Regulation 10 provides that during the relevant period a woman is entitled to special protection and (by virtue of regulation 20) will be treated as unfairly dismissed unfairly dismissed if this is denied.

The Claimant's case was put on the basis that a breach of regulation 10 must mean that there is inherent discrimination (**Johal v the Commission for Equality and Human Rights** UKEAT 0541/09) for section 18 purposes. That went beyond the language of the statute and was not the assumption made in other authorities on regulation 10 (or earlier provisions to the same effect). Here, the unfavourable treatment of the Claimant (her own position being made redundant and the failure to offer her a suitable alternative vacancy) certainly coincided with her being on maternity leave but that did not inevitably mean that it was *because* of it. The Employment Tribunal was required to ask what was *the reason why* the Claimant had been treated the way she was. The failure to do so was an error of law and this ground of appeal would therefore be allowed.

In many cases, the section 18 question might well be answered by a finding under regulation 10. The particular facts of this case, however, allowed for more than one conclusion. As the Employment Tribunal had simply assumed its finding on regulation 10 answered the section 18 claim, it had failed to set out relevant findings on the "reason why" question. That matter should be remitted to the same Employment Tribunal for further consideration in the light of this Judgment.

HER HONOUR JUDGE EADY QC

1. I refer to the parties as the Claimant and the Respondent, as below. The appeal is that of the Respondent against a Judgment of the Liverpool Employment Tribunal (Employment Judge Robinson sitting with members) on 25 and 26 September 2013 ("the ET"), that Judgment being sent to the parties on 16 October 2013, with Reasons following on 6 December 2013. Representation before the ET was as it is before me.

2. The Judgment of the ET was that the Claimant's claims of automatic unfair dismissal, breach of regulation 10 of the **Maternity and Parental Leave Regulations 1999** and direct sex discrimination all succeeded. In fact, the Reasons make clear that the direct discrimination was because of pregnancy and maternity rather than sex, and the Respondent accepts that the finding was one of direct discrimination under section 18 of the **Equality Act 2010**.

The Background Facts

3. The Respondent is a local authority. Faced with having to make budget cuts, from at least November 2010, it was planning redundancies. By February 2011, it was engaged in a management restructuring process in order to make the necessary savings. The resultant redundancy process then continued until the 2012/2013 financial year. That was because the Respondent had decided that would preferable to having two separate redundancy processes; it therefore held back making redundancies until the latter part of 2012.

4. The Claimant was employed by the Respondent from May 2001, latterly from September 2007 as Head of Overview and Scrutiny. In the period with which this case is concerned, from 16 July 2012 to July 2013, the Claimant went on her third period of maternity leave.

5. As part of the restructuring proposals - signed off by the relevant cabinet member in June 2012 - a new position was created; that of Democratic Service Manager ("DSM"). This combined the Claimant's role as Head of Overview and Scrutiny with the equally graded position of Head of Member Services, a post held by a Mr Steve Pierce. Both the Claimant and Mr Pierce were duly notified that their positions were at risk of redundancy and they were formally placed on that footing on 26 July 2012. The Claimant had by that time commenced her maternity leave.

6. The Respondent accepted that both the Claimant and Mr Pierce were prima facie qualified to perform the new role of DSM; indeed, had the Claimant been the only employee affected, she would have been slotted into that role. That was, however, not the position the Respondent faced. It therefore went through a selection process whereby both the Claimant and Mr Pierce were interviewed in December 2012 for the position.

7. It seems to have been common ground before the ET - and it was certainly the Respondent's view at the time - that Mr Pierce was the better candidate for the new role. That being so, the Respondent offered him the DSM position in December 2012.

8. Thereafter, on 8 January 2013, the Claimant was given three months' notice of redundancy. That notification also informed her of her right to be redeployed, but she did not express interest in other alternative positions and the notice took effect on 15 April 2013.

9. Events post-dating the offer of the DSM position to Mr Pierce in December 2012 do not appear clearly from the ET's Judgment on liability. It did, however, consider those points at the remedy stage, in respect of which there was a hearing on 6 January 2014 and a discussion in

chambers on 7 February 2014. The ET then concluded that, after losing out on the DSM role, the Claimant lost interest in working for the Respondent any more. Whilst the Respondent would have continued to send her details of internal vacancies had she wished, she was no longer interested. In any event, the ET accepted there were few suitable alternative vacancies available and, as a matter of fact, none were ever actually offered to her.

The ET's Reasoning

10. The Respondent had accepted that the Claimant was suitable for the DSM post; it was thus a suitable alternative vacancy for the purpose of regulation 10 of the **Maternity and Parental Leave Regulations 1999**. It further accepted that, if regulation 10 had been breached, by virtue of regulation 20(1)(b) of the **1999 Regulations**, there would be an automatic unfair dismissal within the meaning of section 99 of the **Employment Rights Act 1996**. The issue for the ET was whether, before the DSM role was filled, the Claimant was entitled to be offered that role under regulation 10.

11. The Respondent's position before the ET - and before me - was as set out in its letter to the Claimant's representatives of 17 August 2012 where it was stated:

> **"Your client is on the redeployment register and is receiving details of vacancies. The provisions of Regulation 10 would only take place after the process has been followed and in respect of your client only if she was unsuccessful."**

See paragraph 14 of the ET's Liability Judgment.

12. On the facts of this case, the Respondent's position was that the Claimant was not entitled to special treatment under regulation 10 until the decision had been taken as to who was the best candidate for the DSM role. Until the restructure was complete, her right to special

treatment was not engaged. Adopting that approach would be proportionate and recognise the varying interests of the Claimant, Mr Pierce and the Respondent.

13. The ET accepted that the requirement to offer a suitable alternative available vacancy under regulation 10 was contingent upon the new terms and conditions not being substantially less favourable, but it took the view that suitability should not be tested by assessment or interview as that would erase (although perhaps "undermine" would be a more apt description), any protection afforded by regulation 10.

14. Noting that the definition of redundancy for regulation 10 purposes was identical to that applicable under the **Employment Rights Act 1996**, the ET took the view that the right to be offered the vacancy arose when the redundancy situation affecting the employee's job became known and was extinguished either when the dismissal took effect (i.e. not until the end of the notice period) or when the maternity leave ended.

15. It further observed that regulation 10 gave rise to an absolute right. Where there is a suitable available vacancy it must be offered to the employee on maternity leave. A failure to do renders the subsequent dismissal automatically unfair. Further, regulation 10 required that the employee on maternity leave should be offered the suitable vacancy when it was available; not simply the opportunity to apply for it.

16. Applying these principles to the facts, it held that the Claimant's job was no longer available to her as at July 2012, when she was put at risk. Nothing could save her job at that point (just as nothing could then save Mr Pierce's job). The new role of DSM was a suitable available vacancy. Prior to July 2012, regulation 10 had not been engaged. As at July/August

2012, however, it was. At that point, the Claimant was on maternity leave. She was therefore entitled to be offered a suitable available vacancy. The DSM job was suitable, available and vacant. There should have been no competition for it; the Claimant should have been slotted into it. The Respondent's failure to do so was a breach of regulation 10 and thus rendered the Claimant's dismissal automatically unfair as an act of direct pregnancy and maternity discrimination.

The Appeal

17. The grounds of appeal are essentially twofold.

18. First, on the finding on direct discrimination, that the ET wrongly equated a breach of regulation 10 of the **1999 Regulations** with direct discrimination contrary to section 18 of the **Equality Act 2010**: regulation 10 requires *more* favourable treatment, whereas there can be no direct discrimination under section 18 unless there is *un*favourable treatment. Here there was no unfavourable treatment as the decision to appoint Mr Pierce (and not the Claimant) was made because he was the better candidate, not because of any protected characteristic of the Claimant.

19. Second, on the regulation 10 finding, the ET erred in finding that regulation 10 came into play before the interviews for the DSM role. Until the process of reorganisation had been completed and the decision made not to slot the Claimant into the DSM role, the right to be offered any suitable available vacancy had not arisen.

The Relevant Legal Principles

20. I start with the direct discrimination claim. Relevantly, section 18 of the **Equality Act 2010** provides:

> **"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
>
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —**
>
> **(a) because of the pregnancy, …**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."**

There is no dispute: the Claimant fell within the protection of section 18 at the relevant time.

21. Turning then to Article 15 of the **Equal Treatment Directive 2006**:

> **"A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her...."**

22. In domestic legislation that entitlement receives expression by, relevantly, regulation 10 of the **Maternity and Parental Leave Regulations 1999**, which provides:

> **"(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.**
>
> **(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).**
>
> **(3) The new contract of employment must be such that—**
>
> **(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and**
>
> **(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract."**

23. If an employee is dismissed for redundancy in these circumstances and the requirements of regulation 10 are not met, regulation 20 of the **1999 Regulations** further applies to render the dismissal automatically unfair for the purposes of the **1996 Act**.

24. The availability of a suitable vacancy for these purposes is a question of fact. A post may be available even if there are economic reasons for the employer not wishing to offer it to the employee in question, see **Community Task Force v Rimmer** [1986] ICR 491, where the EAT observed (see page 498A-B):

> **"The test of availability … is not expressed to be qualified by considerations of what is economic or reasonable. The tribunal must simply ask themselves whether a suitable vacancy is available. If it is available, the consequences, however unpleasant, of the employer giving the job to the employee are not relevant …"**

25. The question of suitability requires an assessment on the part of the employer. If, however, there is a suitable alternative position which is available, then the entitlement is not subject to a test of reasonableness. That being so, the alternative position would need to be offered under regulation 10 notwithstanding the fact that there might be another employee also facing redundancy, but not pregnant or on maternity leave, who might be better suited to it. Employees who would otherwise gain the protection of regulation 10 should not be required to undertake some form of competition in order to exercise their right.

Submissions

The Respondent's Case

26. For the Respondent, Miss Chudleigh first addressed the regulation 10 appeal. Noting that regulation 10 did not define "vacancy" and did not expressly oblige an employer to offer every suitable vacancy, the Respondent argued that the DSM position was not a vacancy in the sense of being open and available to a pool wider than the Claimant and Mr Pierce. The issue thus

raised by the appeal was whether the Claimant's right to more favourable treatment under regulation 10 arose before or after a decision was made as to which post-holder of the two merged posts should be slotted into the DSM position; whether the Claimant had an absolute right to the DSM role, despite not being the best candidate and despite the possibility that there might be other suitable vacancies available for displaced candidates. The obligation to redeploy the Claimant into a suitable vacancy did not arise until the restructure was complete. It was not complete until the decision had been made as to which of the occupants of the two merged positions should be given the combined role. Adopting that approach would be both fair and proportionate.

27. That said, Miss Chudleigh accepted that, once in the redeployment pool, the Claimant would have been entitled to advantageous treatment, i.e. to be offered a suitable available position in favour of other - perhaps better suited - candidates. The distinction was that in those circumstances all employees would be in the redeployment pool; all would have been displaced from their former positions.

28. In making good this submission, Miss Chudleigh relied on the EAT Judgment in **Eversheds Legal Services Ltd v De Belin** [2011] IRLR 448 (Underhill P, as he then was, presiding). In that case, it was held that the employer had gone beyond what was reasonably necessary to afford the required favourable treatment to a woman on maternity leave (Miss Reinholz) and a real injustice had been done to another employee not so protected (Mr De Belin), who thus succeeded in his complaint of sex discrimination. At paragraph 29 of that Judgment Underhill J observed:

> **"… that the obligation in question cannot extend to favouring pregnant employees or those on maternity leave beyond what is reasonably necessary to compensate them for the disadvantages occasioned by their condition. (We use the term 'reasonably necessary' in the sense that it is understood in this field, ie as requiring the application of the proportionality principle … To the extent that a benefit extended to a woman who is pregnant or on maternity leave is disproportionate, we see no reason why a colleague who is correspondingly**

> **disadvantaged should not be entitled to claim for sex discrimination … The only justification for treating the woman more favourably is the need to see that she is not disadvantaged by her condition, and where the treatment in question goes beyond what is reasonably necessary for that purpose a real injustice may be done to a colleague. Quite apart from the matter of principle, it is important not to bring into disrepute the legislation which protects pregnant women and those on maternity leave by giving it a wider scope than is properly required."**

29. By analogy, the Respondent contended that the position adopted by the ET in the present case went further than was reasonably necessary to protect the Claimant's interests and would have given rise to an unfairness to Mr Pierce if the Respondent had thus acted. The Claimant's interests could be reasonably protected by affording her regulation 10 entitlement only when she was in the redeployment pool.

30. Turning then to the appeal against the finding of direct discrimination, Ms Chudleigh observed that section 18(2)-(4) provides that, in the protected period (as the Claimant was), a complainant does not have to show *less* favourable treatment, simply *un*favourable treatment because of pregnancy or maternity leave. The requirement was thus to ask *the reason why* the Claimant was treated the way she was (see **Johal v the Commission for Equality and Human Rights** UKEAT 0541/09).

31. An adverse finding under regulation 10 did not automatically mean that there had been a breach of section 18 of the **Equality Act**; different tests applied. Regulation 10 required more favourable treatment to be afforded to the woman within the protected period. Section 18 required that she was not treated unfavourably.

32. Applying the test under section 18 of the **Equality Act**, this was not a case involving an inherently discriminatory act (see **Johal**). Indeed, the ET did not find that the act of appointing Mr Pierce was inherently discriminatory. The rationale for its Judgment was that it was rendered directly discriminatory because there had been a breach of regulation 10. It had made

no findings adverse to the Respondent in terms of the conduct of the interview or the offer to Mr Pierce. Given that there was no finding that the act of appointing Mr Pierce was inherently discriminatory, the ET should have addressed its mind to the reason why question; it failed to do so. It wrongly equated a breach of regulation 10 with direct discrimination for section 18 purposes, and that amounted to an error of law which should be overturned on appeal.

33. The Respondent recognised that there could be cases involving both a breach of regulation 10 and direct discrimination (see, for example, **Secretary of State for Justice v Slee** UKEAT 0349/06/JOJ). Those cases, however, involved a differential treatment of the Claimant once she was on maternity leave as compared to how she had been treated before; there was a basis for the finding of direct discrimination which was not present in this case.

The Claimant's Case

34. On behalf of the Claimant it was observed that regulation 10 applies to the position where it is not practicable to employ the complainant by reason of redundancy. In **Secretary of State for Justice v Slee** at paragraph 78 the EAT (Silber J presiding) had held that, for the purposes of regulation 10, redundancy had the same meaning as that laid down by section 139 of the **Employment Rights Act 1996**: there would be a redundancy when the requirements of the business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish. That being so, the Respondent's obligation to offer the Claimant a suitable alternative vacancy arose as soon as it was clear that she would not return to her previous job because of the redundancy situation affecting it.

35. On the ET's findings of fact the Claimant's job was no longer available to her as at July 2012, when the decision was made which removed the Claimant's position from the

Respondent's organisation (and, indeed, the Respondent had described the Claimant's position as redundant prior to her being put into the redeployment pool). On its finding as to when the Claimant's position was redundant the ET had correctly held that the obligation under regulation 10 was engaged.

36. The **De Belin** case was not on point. That was a conventional redundancy exercise involving two individuals, where one would be made redundant. There was no alternative vacancy, simply the removal of one of two positions.

37. The Respondent's approach would make a nonsense of regulation 10: an employer would be able to avoid the operation of regulation 10 protection by declining to define the position as 'redundant' until after all possible alternative posts had been filled. That would be similar to what had been proposed in the case of **Philip Hodges and Co v Kell** [1994] IRLR 568, EAT. The ET had there held that there would be a breach of the statutory forerunner of regulation 10 if an employer could fill any alternative vacancy with another employee before telling the employee on maternity leave that she was redundant and that no suitable alternative existed for the operation of her regulation 10 rights. The EAT had not disapproved that approach.

38. Turning to the direct discrimination appeal, Mr Sigee submitted the ET's Judgment had been made under section 18 on the basis of findings that the Claimant was unfavourably treated because of the way the appointment to the DSM position was undertaken. Although the ET did not find that the interview was itself discriminatory, it had found that the requirement that the Claimant engage in a competitive interview and selection process amounted to unfavourable treatment. This was a case where the underlying treatment was inherently discriminatory (using the language of **Johal**) because there had been a denial of the Claimant's regulation 10 rights.

Indeed it was the Claimant's case that a breach of regulation 10 must always give rise to direct discrimination for the purposes of section 18 **Equality Act 2010**.

The Respondent in Reply

39. Miss Chudleigh questioned the relevance of the **Philip Hodges v Kell** case. That was not a restructuring case but involved different facts: there the Respondent had employed someone from outside the workplace whilst the Claimant was on maternity leave. The issue in that case had been whether the Claimant's regulation 10 (equivalent) rights only arose upon her serving notice of her intention to return.

Discussion and Conclusions

40. I consider first the appeal relating to regulation 10 of the **Maternity and Parental Leave Regulations 1999**. In this case it seems to me that the issues were (and are) fairly simple. It was common ground that the Respondent had, or expected to have - because of its need to meet budgetary cuts - a diminishing requirement for employees to carry out work of the particular kind for which the Claimant was employed. As a result, her position was to be deleted from the organisation by reason of redundancy. The ET concluded that had been so as from July/August 2012. At this stage, the question for me is whether the ET erred in reaching that conclusion; was it absent any evidential basis or perverse in some other way? Given its findings, it seems to me that this was a conclusion that the ET was entitled to reach. In particular I note the finding at paragraph 22:

> **"The claimant's job was no longer available to her as at July 2012 when she was put at risk. Nothing could save her job at that point, nor indeed Mr Pierce's, and it was inevitable that they would go head to head for the new role of DSM. That job was a suitable alternative vacancy."**

41. Miss Chudleigh seeks to avoid that conclusion by contending that there was a distinction between the Claimant's position in the period July/August 2012 to December 2012 and then after she had been given notice of redundancy in January 2013. She says that the Claimant was only displaced after Mr Pierce had been slotted into the DSM position. She accepts that, once in the redeployment pool, the Claimant was entitled to more advantageous treatment and would need to be offered any suitable alternative vacancy over a better candidate. But, she argues, at that stage all the employees concerned would be in the redeployment pool, having been displaced from their former positions.

42. The danger with this argument is that the Respondent is seeking to rely on terms such as "displaced" and "redeployment" rather than engaging with the term used by the regulation, that of "redundancy". Its position becomes all the more confusing given that the Respondent itself described the Claimant as being on the redeployment register in August 2012; so, some time before she was given notice of redundancy in January 2013. Moreover, in its argument, the Respondent refers to the Claimant's position as being redundant prior to the completion of restructuring. It is hard to conclude other than that both the Claimant and Mr Pierce had been displaced from their positions once a decision was taken that their posts should be deleted in July/August 2012 and that they were both thus potentially redundant unless they could be engaged in some alternative position. By using the language of "displacement" and "redeployment", the Respondent effectively puts its focus on the process that it decided to operate rather than the redundancy situation in which that process was to take place. That does not assist greatly for regulation 10 purposes.

43. Moreover, I agree with Mr Sigee that such an approach could be used to undermine the protection afforded by regulation 10. It is largely left open to employers to decide how best to

carry out redundancy and restructuring processes. If it is also left to the employer to decide when a redundancy actually occurs - so, to determine when the obligation under regulation 10 arises - it is easy to see how that position might be abused (as was noted by the ET in the **Kell** case). The correct approach is that laid down by the EAT (Silber J presiding) in **Slee**. "Redundancy" is to be defined for regulation 10 purposes as it is under section 139 of the **Employment Rights Act 1996**. Once an employee's position is thus "redundant", the obligation under regulation 10 arises.

44. The ET was thus entitled to conclude that there was a redundancy when the Respondent decided that two positions, including that of the Claimant, would be deleted from its structure and replaced by one. The requirements of the Respondent's business for employees to carry out work of that particular kind had ceased or diminished, or were expected to do so. If not provided with a suitable available vacancy, the Claimant's employment would be terminated by reason of redundancy. That position was not, in my judgment, altered by the fact that the Respondent would have slotted either the Claimant or Mr Pierce into the newly created position of DSM, without any wider competition taking place. That did not mean that their previous positions were not redundant; they were. They just had a chance to avoid being dismissed by reason of redundancy by being offered the DSM vacancy.

45. That said, I can also accept Miss Chudleigh's submission that regulation 10 does not define "vacancy" and does not expressly oblige an employer to offer every suitable vacancy or, indeed, any particular vacancy if more than one might be suitable. If the Respondent had, as a matter of fact, offered the Claimant a suitable available vacancy other than the DSM position, it might well have complied with its regulation 10 obligation in any event. That does not mean, however, that I would agree with her that the DSM position was *not* a vacancy. Miss

Chudleigh says it was not because it was not open or available to a pool wider than the Claimant and Mr Pierce: as this was a post into which either the Claimant or Mr Pierce would simply be slotted in (there was to be no wider competition), it was not a vacancy. That again seeks to define the terms in question through the prism of the Respondent's chosen way of proceeding. I do not find it helpful. The fact that a job is only open to a limited pool does not mean that it is not "vacant", as that term would normally be understood; that is, "not presently occupied". Certainly, on the facts of this case, the ET was entitled to conclude that this was a vacancy, and - given the Respondent's concession - on that was "suitable" for the Claimant.

46. I can see that the Respondent might not have wanted to give the DSM vacancy to the Claimant in preference to Mr Pierce, but, in my judgment, it was obliged to do so unless it was in a position to offer the Claimant some other suitable available vacancy. This, it seems to me, is the answer to Miss Chudleigh's proportionality point.

47. As the EAT held in **Eversheds Legal Services v De Belin**, the obligation is to do that which is reasonably necessary to afford the statutory protection to the woman who is pregnant or on maternity leave. Doing more than is reasonably necessary would be disproportionate and puts the employer at risk of unlawfully discriminating against others. Here, the protection is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain. Indeed the point is graphically illustrated in the present case when the Claimant had to attend the DSM interview at a time when she had, "three young children under the age of three including one babe in arms" and responded to a query from the Respondent in February 2013 saying she was "at war with her children who had chicken pox etc". In order to afford the Claimant the protection she was entitled to under regulation 10 once her position was redundant (on the ET's

finding that was July/August 2012), the Respondent was obliged to assess what available vacancies might have been suitable and to offer one or more of those to the Claimant. She should not have been required to engage in some form of selection process.

48. Whether that meant that the Respondent had to offer the DSM position, or whether it would have been able to offer some other suitable alternative vacancy, was for it to assess. At that stage, it would have been open to the Respondent to have taken into account the interests of Mr Pierce and its own desire to appoint the best person to the new role of DSM. It might not have been proportionate to have required the Respondent to have offered the Claimant a particular vacancy (such as the DSM role) if something else would also have been suitable and had been offered. On the evidence before the ET, however, the Respondent offered the Claimant nothing notwithstanding, on its own case, the DSM position, which needed to be filled, being a suitable alternative for her.

49. For those reasons I consider the ET reached a conclusion entirely open to it on the regulation 10 case and, therefore, also on the question of automatic unfair dismissal. Accordingly, I dismiss that ground of appeal.

50. Turning to the appeal against the ET's conclusion on direct discrimination, I consider Miss Chudleigh is right in distinguishing between how the protection is afforded under section 18 of the **Equality Act** and how it is provided under regulation 10 of the **1999 Regulations**. The former provides that, if possessing the protected characteristic, a woman does not have to show less favourable treatment; merely unfavourable treatment because of pregnancy or maternity leave. Regulation 10, on the other hand, provides that, during the relevant period, a

woman is entitled to special protection and will be treated as unfairly dismissed if this is denied to her.

51. The Claimant's case is put on the basis that a breach of regulation 10 means that there is inherent discrimination (per **Johal**) for section 18 purposes. That, however, goes beyond the language of the statute. It would have been relatively easy for the legislators to provide that a breach of regulation 10 would give rise to a breach of section 18 of the **Equality Act** (as is effectively done in respect of unfair dismissal by the operation of regulation 20). The legislators apparently chose not to do so. Instead the language used is that of unfavourable treatment which is required to be because of the protected characteristic.

52. Here the unfavourable treatment of the Claimant - her own position being made redundant and not being offered a suitable available vacancy - certainly coincided with her being on a relevant period of maternity leave. I do not, however, accept Mr Sigee's submission that must inevitably mean that it was *because of* it. That seems to me to be assuming the reason why something happened simply on the basis of the context in which it happened. I note that such an assumption is not made in the other authorities to which I have been referred and it does not seem to me to be the way in which section 18 is worded. I accept Miss Chudleigh's submission that the ET was therefore obliged to ask what was *the reason why* the Claimant was treated the way she was.

53. I think, therefore, that the ET fell into error in assuming that the section 18 question was answered by its finding there had been a breach of regulation 10. In many cases, the answers may be the same. The particular facts of this case, however, allowed for more than one answer.

54. The Respondent says, given the ET's findings, I can answer that question myself. I am not persuaded that is correct. Because the ET assumed that a breach of regulation 10 necessarily meant a breach of section 18, it did not ask the "reason why" question and the considerations which might arise when that is done might be more subtle than emerge from the findings made by the ET. I can see force in the Respondent's argument that the ET did not find the interview process inherently discriminatory and did not make other findings adverse to the Respondent, which might have been relevant under section 18. That said, such findings might have not been expressed because of the way in which the ET jumped from its finding on regulation 10 to its finding under section 18. I do not think that it is obvious that only one conclusion was possible.

55. The result of my Judgment on the regulation 10 point is that the ET's Judgment is upheld on that claim. On the other hand, I allow the appeal on the section 18 claim. Having heard further submissions on the question of disposal, and taking into account the factors laid down by the EAT in **Sinclair Roche Temperley v Heard and Fellows** [2004] IRLR 763, I direct that this matter should be remitted to the same ET to consider again the direct discrimination claim. There is no question as to this ET's ability to re-hear this; it has already heard all the evidence before; there is no question of bias and this is certainly the most proportionate approach. Unless there is any other reason why it is not practicable, the order will be that the direct discrimination claim is remitted to the same ET.

56. Having given my Judgment in this matter and determined the correct disposal of the appeal, the Respondent has applied for permission to appeal to the Court of Appeal on the regulation 10 point. Miss Chudleigh observes that this is not an area previously explored previously by the Court of Appeal and submits that it might be a point of law of wider interest.

In my judgment, this is ultimately a case which depends on its own facts. As such, it does not give rise to any arguable point of law for the Court of Appeal nor is there any compelling reason for it to proceed to a further appeal. I do not grant the application.

57. Miss Chudleigh has also asked for her client's costs limited to the fees that have been paid for lodging the appeal (£400) and the subsequent hearing fee (£1,200). Mr Sigee resists that; observing that the Respondent has only been partially successful, on one of the two grounds of appeal and urging that, in these circumstances, no order should be made.

58. It is right to say that under Rule 34A(2)(a) **EAT Rules 1993 (as amended)** a broad discretion is given to the EAT in terms of such an order. In the normal course of events it might be expected that a successful party should be entitled to recover their fees from a party that has resisted an appeal. The position is arguably more complex, however, when an appeal has only been partly successful. One does not know - and it is difficult to unpick the history - what the position might have been had only one point been taken. It might have been that the other party would not have sought to resist the appeal on that basis. On the other hand, I do not consider it right in this case simply to ignore the fact that the Respondent has been put to these costs.

59. In order to bring any appeal the Respondent had to pay a lodgement fee of £400. Given that it has been at least part successful, and it would have had to pay that fee in order to achieve any success, I see no particular reason why it should not recover the £400. On the hearing fee, matters might have been more complicated had the Respondent only been pursuing the appeal against the direct discrimination finding. The Claimant might not have sought to resist the appeal; might have taken no active part in the proceedings and that might have been a relevant

point to take into account. I speculate, but it is difficult to do anything else at this stage. Given that the Respondent has only been partly successful, I exercise my discretion and give it only part - one half - of its hearing fee. I therefore order that the Claimant pay costs limited to £1,000 to the Respondent.