Appeal No.UKEAT/0380/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 June 2015
Judgment handed down on 7 July 2015

Before

THE HONOURABLE MR JUSTICE WILKIE

MR P L C PAGLIARI

MRS G SMITH

MRS E GREGG — APPELLANT

TROY ASSET MANAGEMENT LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ROBIN ALLEN QC (of Counsel) Instructed by: Sheridans 76 Wardour Street London W1F 0UR
For the Respondent	MR DANIEL STILITZ QC (of Counsel) Instructed by: Farrer and Co LLP 66 Lincoln's Inn Field London WC2A 3LH

SUMMARY

UNFAIR DISMISSAL - Automatically unfair reasons

The Employment Tribunal, though it dealt with all the issues identified in the pre-trial list of issues, failed to consider an issue which, though not spelled out in that document, was, nonetheless, an issue in the case as argued before the Employment Tribunal. The Employment Tribunal had heard evidence on the issue, tested in cross examination and the issue was the subject of written and oral submissions by the parties in their closing addresses.

The appeal was allowed and the case remitted to the same Tribunal for it to determine that issue and its consequences upon the decision on liability.

THE HONOURABLE MR JUSTICE WILKIE

Introduction

1. Emilie Gregg appeals against a decision of the Employment Tribunal at London Central which dismissed her claims, made against Troy Asset Management Ltd, of discrimination, unfair constructive dismissal and automatically unfair dismissal. Those decisions were made after a hearing on seven days between the 9 and 19 June 2014 and consideration in chambers by the Tribunal on 17 and 18 June.

2. As will be seen below, the Tribunal decision covered a wide ranging series of issues. The focus of this appeal is much more narrow, effectively on two grounds, and we tailor our review of the relevant facts and issues accordingly.

3. The claims arose out of the circumstances leading up to the resignation of the Claimant from the employment of the Respondent on 3 June 2013, shortly after she was due to return to work from maternity leave on 17 April 2013.

4. The Respondent is an asset management company established by Mr Lyon in 2000. Mr Lyon had previously worked for Stanhope Investment Management Ltd, the management company for the pension fund of GEC. Lord Weinstock wanted to establish the Respondent as a company to manage his family's money. Initially, in 2000, it managed some £35 million but grew rapidly so that, by April 2013, it was managing some £5.2 billion. At the end of 2008 the Respondent had four full-time employees but by the end of 2009 there were ten employees and by July 2013 head-count had reached 20.

5. The Claimant had initially joined as personal assistant to the office manager in May 2009. She had previously been a dealer at Morgan Stanley. She was the Respondent's seventh employee. Her role evolved from helping with portfolio administration to dealing for the fund managers and, in August 2009, she accepted a new contract with the job title of "Dealer and Portfolio Administrator". She was a successful employee with good appraisals and regular increases in salary and with significant discretionary bonuses being paid. She was awarded share options in 2010 and 2011.

6. In 2010, the Tribunal found, Isabel Dodds de Jesus joined the Respondent as a second dealer and portfolio administrator. There are issues surrounding Ms Dodds de Jesus' job title and role and her working relationship with the Claimant.

7. It appears to us now to be common ground that Ms Dodds de Jesus' job title initially was "Dealer Support" but that at some point, prior to the relevant events her job title changed to "Dealer and Portfolio Administrator". It also appears to be the case that, contractually, Ms Dodds de Jesus was said to report to the Claimant. To what extent, in practice, that was so was an issue before the Tribunal and there was evidence from various witnesses which pointed in different directions. At its highest it appears that, on a day-to-day basis, the Claimant exercised some level of oversight or supervision over Ms Dodds de Jesus. It is common ground, however, that she did not conduct any appraisals of Ms Dodds de Jesus nor did she have any input as to her salary levels. Those matters were undertaken by their boss, Mr Davies.

8. The Tribunal found that, after Ms Dodds de Jesus joined, the Claimant started to use the title "Head of Dealing" but it is also common ground that her contractual job title was never changed and she remained employed as "Dealer and Portfolio Administrator".

9. On 19 October 2011 the Claimant informed the Respondent that she was pregnant. On 17 March 2012 she took annual leave which then ran into her maternity leave which commenced on 18 April 2012.

10. In September 2012 the Respondent's Executive Committee decided to institute a review of the dealing function to be undertaken by external consultants IMS. Effectively, this was because the funds being managed had increased approximately four-fold whilst the value of trade had doubled between 2011 and 2012.

11. On 2 October 2012 the Claimant met Mr Davies to discuss her return to work date. On that day Mr Davies told the Claimant about the review and that they would discuss the preliminary findings of the IMS review with both the dealers presently working on the desk (Ms Dodds de Jesus and a maternity replacement for the Claimant) and the Claimant.

12. On 28 November 2012 Mr Davies updated the Claimant by email on the progress of the review. On that date IMS were conducting field work in the Respondent's premises, over a period of two days, which included interviewing the two dealers who were at work to identify what they did. Mr Davies informed the Claimant that he would let her know what IMS recommended. He did not offer that the Claimant should come in and see IMS as part of their field study, but nor did she request to do so. On 29 November she responded only by asking to see the report and recommendations when they were available.

13. IMS reported and one of their recommendations was that the structure of dealing should change. There would be a new role of "Head of Execution" under whom the existing dealers would work and there would be a recruitment of a third dealer. The Head of Execution role

was to be a significantly more senior role than the Claimant's, effectively replacing some of Mr Davies' role, and it was envisaged that the Claimant (along with Ms Dodds de Jesus) would report to the Head of Execution rather than, as previously, to Mr Davies who was the Company Secretary. The dotted line of reporting through the Head of Execution to Mr Lyon would remain as previously.

14. It is a matter of record that the Respondent's Board approved this IMS recommendation at its meeting on 11 December 2012.

15. On 22 January 2013 Mr Davies emailed the Claimant to the effect that IMS had reported. He identified, briefly, their recommendations. He informed the Claimant that the size of the dealing department was to be increased to four with the recruitment of a Head of Execution and the permanent recruitment of her maternity leave replacement. He informed her that the Head of Execution would be a senior appointment, would bring added skills and experience, and would alleviate some of Mr Davies' workload. He set out, briefly, what that person's functions would be. He then said as follows:

> **"Your role as Dealer and Portfolio Administrator will remain largely unchanged although your reporting line will be to the Head of Execution when an appointment is made … if you would like to discuss any of these changes with me or Sebastian please do call or email or if you would prefer, we could arrange a meeting."**

16. The Claimant was then on holiday and picked up this email and a chasing email from Mr Davies on 15 February 2013 when she told Mr Davies she would review his communications and would be in touch.

17. On 1 March 2013 the Claimant sent Mr Lyon a grievance document which contained a number of allegations about the way she had been treated during her pregnancy and maternity

leave. It included a claim that the Head of Execution role largely reflected her role as "Head of Dealing" or involved tasks she was capable of carrying out and that she was being forced to resign.

18. On 7 March 2013 Mr Lyon replied expressing his surprise and concern that she had raised a formal grievance, saying that there had clearly been a huge misunderstanding which they would like to put right and emphasising the regard which the Respondent had for her as a core member of their team, as demonstrated in her levels of remuneration including bonus and the granting of share options.

19. Mr Lyon enclosed a copy of the IMS report. He stated that the restructuring process had yet to begin and indicated a willingness to discuss the position further. He also offered an independent HR Consultant to investigate her grievance. The Claimant did not take up Mr Lyon's express invitation to share her views on the future structure of the team.

20. An independent HR and Business Consultant, Ms Sisson, investigated the Claimant's grievance. Her investigation included interviewing Mr Lyon. She produced the detailed grievance investigation report to the member of the Executive Committee who was to determine the grievance, Ms Boyle. Ms Boyle rejected the grievance on 9 May 2013. On 15 May 2013 the Claimant appealed that decision to the Respondent's Chairman, Mr Pethick, who, having met the Claimant on 22 May to discuss her appeal, wrote on 30 May 2013 rejecting that grievance appeal.

21. The Claimant was due to return to work on 17 April but, on 12 April, sent a sick note advising she would be unable to attend for four weeks due to stress. A further sick note was

submitted on 9 May for a further eight weeks. The Respondent asked the Claimant to attend an appointment with an occupational health doctor, which she agreed to attend. An appointment for 3 June 2013 at 11.30 was made, but, by her email sent at 9.07 on 3 June 2013, she resigned.

The Claim and the Changed Focus of the Hearing

22. The Claimant's ET1 set out her legal claims at paragraph 41. They were: a claim of unfair dismissal contrary to section 98 of the **Employment Rights Act 1996** ("ERA"); unfair dismissal contrary to section 99; unlawful discrimination on the grounds of the Claimant's pregnancy contrary to section 18(2) of the **Equality Act 2010**; on the grounds of her compulsory maternity leave contrary to section 18(3) and on the grounds of her exercising her right to ordinary or additional maternity leave contrary to section 18(4); in the alternative, if necessary, she contended discrimination in the form of less favourable treatment pursuant to section 13 of the **2010 Act**.

23. The ET1 also set out, at paragraphs 1 to 40, extensive details of her claim which culminated, at paragraph 40, by the contention that the course of conduct of the Respondent amounted to a breach of the implied term of trust and confidence such that she was entitled to resign and claim constructive dismissal. Within that narrative she stated:

> **"31. The effect of the reorganisation was that the Claimant would be demoted from her position of Head of Dealing and would have to report to a new Head of Execution.**
>
> **32. The Claimant further contends that the role that she was previously performing was equivalent to, or at least very similar to, the role of Head of Execution and that it was this role that should have been offered to her on her return from maternity leave."**

She reiterated the point at paragraph 39 in the following terms:

> **"The Tribunal will also be invited to conclude that the reorganisation of the business and the changes in the Claimant's reporting line, and amendment of her job title, amounted to a clear demotion in the Claimant's status. In the alternative the Claimant's role was practically indistinguishable from the Head of Execution role which is the role that she should have been offered on her return from maternity leave."**

24. She also contended at paragraph 33 that she was not consulted in any meaningful way at all about her role or the reorganisation that was considered by IMS.

25. In the ET decision there is discussion of how and when a "list of issues" was produced. It had been the product of a case management discussion conducted by Employment Judge Hodgson when the case had initially been listed for hearing. On that occasion it was agreed to postpone the hearing to a date when sufficient days would be available but, in case managing the case, the Judge noted that the issues needed to be clarified. A full list of issues were then before the Judge and he brokered a revision of one of the lists and provided a direction that the Claimant would file an amended list of issues within seven days. That list was before the ET.

26. That list is organised in the following way. It first set out the alleged acts upon which the Claimant relied. They are set out in 26 numbered paragraphs with sub-headings relating to acts pre-maternity leave and acts during and after commencement of maternity leave in March 2012.

27. There is then a section, headed "discrimination", which sets out issues as to whether the acts set out at various paragraphs amounted to unfavourable treatment pursuant to section 18(2) and/or 18(3). A third paragraph in this section posed the question whether, in so far as section 18 was inapplicable, the matters set out in paragraphs 1 to 26 amounted to less favourable treatment pursuant to section 13(1) of the **2010 Act**. The last of the issues posed under "discrimination" raised the question of whether any of the allegations were out of time.

28. The third heading in the list of issues is "unfair dismissal". It states as follows:

> **"31. In respect of the Act set out at paragraphs 1 to 29 above**

a. Did the Respondent's actions constitute a repudiatory breach of contract? The Claimant contends that there was a breach of the implied term of mutual trust and confidence.

b. If so, did the Claimant resign in response to that breach, or was there an alternative reason for the Claimant's resignation, namely the pursuit of alternative career opportunities or the Claimant's loss of status?

c. If so, was that constructive dismissal unfair contrary to Sections 98 and/or 99 of the Employment Rights Act 1996 …in respect of the claim pursuant to Section 99 of the ERA the Claimant relies upon Regulation 20(1)(a), 20(1)(b) and 20(2) of the Maternity and Parental Leave Regulations 1999. The Claimant relies upon Regulation 20(3)(a), (b), and (d) in this regard."

29. Within the paragraphs setting out issues in relation to alleged acts upon which the Claimant relies are the following:

"21. The Claimant had not been kept informed, involved or consulted meaningfully or at all, in relation to the IMS investigation and report. …

23. On or about 11th December 2012, on adoption of the IMS report's recommendation by the Respondent, the effect was that the Claimant would be demoted from her position as Head of Dealing and would have to report to a new Head of Execution.

24. The Respondent failed to offer the Claimant the role of Head of Execution (an equivalent or very similar role) as her role on her return from maternity leave."

30. We are informed by Mr Stilitz QC, who represented the Respondent before the Tribunal, and we accept that it is clear from the terms of the ET1 and the terms of the list of issues that the question whether the Claimant was demoted on her return to work and/or should have been offered the job of Head of Execution was focused on her contention that the new job of Head of Execution was effectively the same as the job she believed she had been undertaking namely "Head of Dealing". It is also stated by Mr Stilitz, and we accept, that it quickly became clear from cross-examination of the Claimant that this contention was misconceived and that the job of Head of Execution was a much more senior job than that which the Claimant had been undertaking and that elements of it were very different. Mr Stilitz informs us, and we again accept, that when that became clear the focus of the Claimant's contention in relation to the job to which she was to return after her maternity leave shifted and it is accepted by him, as is clear from the cross-examination of his witnesses and the written submissions of the

Claimant and Respondent in closing their cases, that considerable attention was paid to whether the job to which the Claimant was to return after the maternity leave, and after the reorganisation of the structure had taken place, was "the job in which she was employed before her absence" (Regulation 18(1) and (2) of the **Maternity and Parental Leave Regulations 1999**).

31. This entailed consideration of a number of issues: her job title, both official and unofficial; her reporting line, previously to Mr Davies subsequently to the Head of Execution; the extent to which, whether formally or in practice, Ms Dodds de Jesus reported to her and/or she had oversight/supervision over Ms Dodds de Jesus; and the extent to which she had previously visited clients and whether she was to continue to do that under the new structure.

32. The ET, in its decision, dealt with the claims systematically. It set out, at paragraphs 1 to 34, a narrative account which it described as "the factual background". It briefly set out the position in respect of the witnesses heard and the fact that the Respondent urged caution before acceptance of the Claimant's version of events. It identified the statutory provisions to which their attention had been directed, including Regulations 18A and 20 of the **1999 Regulations**. It also identified the authorities to which their attention had been drawn, respectively, by the Claimant and the Respondent. They included **Blundell v Governors of St Andrews Catholic Primary School** [2007] ICR 1451.

33. It also included a description of how the list of issues came into being. It then went systematically through the 31 issues making finding in respect of each. Having done so, it concluded at paragraph 43:

> **"In the light of the above findings on the list of issues, we dismiss all claims".**

The Grounds of Appeal

34. We have indicated that they are twofold. Ground 1 concerns the right to return and is in the following terms:

> **"The Tribunal failed to find that the Respondent was in breach of Regulations 18 and 18A of (the 1999 Regulation) in failing to permit the Claimant to return to the job in which she was employed before her absence after a period of additional maternity leave. The Claimant contends that the Respondent was proposing to reduce her seniority by reference to both her job title and her reporting lines."**

It is asserted that the ET applied the incorrect legal test in its response to Issue 23 in that it applied a contractual test rather than a test which goes further than mere contract (there is reference to **Blundell**). It is also contended that, on the Tribunal's own finding, the Tribunal was bound to conclude that the Claimant's job title of "Head of Dealing" had to be reflected in her return to work and that to deny her that job title represented a demotion or reduction in her seniority. It is also contended that a change in the reporting line amounted to demotion in status because it was contended (wrongly, as it has turned out) that Mr Davies was a Board Director whereas the Head of Execution would not be.

35. It is also contended that the Respondent's own evidence was that, prior to maternity leave, the Claimant was the more senior dealer on the desk and had management responsibilities in relation to Ms Dodds de Jesus, whereas under the new structure they would be on the same level such that the only conclusion available to the Tribunal on the evidence before it was that the Claimant was to lose her management responsibilities as regards Ms Dodds de Jesus so as to reduce her status and seniority. Thus it was contended that the Tribunal erred in law in not finding that the Respondent was in breach of Regulations 18 and 18A of the **1999 Regulations** in that her job title was changed, her reporting line was changed and her management responsibilities as regards Ms Dodds de Jesus were removed.

36. Ground 2 contends that the failure to involve the Claimant in the IMS process and report amounted, on the Respondent's own evidence, to less favourable treatment than the other dealers and that it amounted to unfavourable treatment because she was on maternity leave.

37. The focus of these grounds of appeal are on the ET's response to issues 21 (ground 2) and 23 and 24 (ground 1). The ET had said in respect of issues 23 and 24:

> **"Issue 23:**
>
> **a. The Claimant's job title of "Head of Dealing" was her own invention determined by her on the appointment of Isabel Dodds de Jesus as a means of asserting her seniority to Isabel. Her job title under the contract of employment dated 19 August 2009 was that of "Dealer and Portfolio Administrator". This actual title never changed. The Respondent did not regard job titles as particularly important and failed to notice that, on the first appraisal form she filled in, she had appropriated to herself the title of "Head of Dealing". When, on the next appraisal, it was noted, the Respondent chose not to make an issue of it.**
>
> **b. The proposal that IMS made for a Head of Execution was a proposal for a new post entirely. The adoption by the Respondent of this IMS recommendation did not have the effect of demoting the Claimant. She had been reporting to Mr Davies as her line manager with a dotted line of reference to Sebastian Lyon. Under the recommendation, she would report instead to the Head of Execution with her dotted line of reference to Mr Lyon continuing. As regards the dealers, of which the Claimant was one, there would now be three instead of two and she would have remained the longest serving. The Claimant was told that the Head of Execution was a senior appointment bringing added skills and experience to the department. It would alleviate some of Mr Davies' workload. She was also told that her role as Dealer and Portfolio Administrator would remain largely unchanged.**
>
> **c. The Claimant had the right to return from leave to the job she was employed in before her absence. She had no right to return to a new, more senior appointment.**
>
> **Issue 24**
>
> **We agree that the Respondent did not offer the Claimant the role of Head of Execution on her return from maternity leave. We do not accept that the Head of Execution role was the job in which she was employed before her maternity leave."**

38. In respect of Issue 21 the Tribunal said:

> **"Issue 21. We consider the Claimant was kept informed and involved in relation to the IMS investigation and report. As to whether she was not consulted meaningfully, we say this:**
>
> **a. The decision to appoint a consultancy firm such as IMS and the acceptance of a recommendation made by such a firm are business decisions. We do not think that the Claimant had an entitlement to be consulted before such business decisions are made. It might have been good industrial relations practice for management to have elicited her input ahead of the adoption of the recommendation but there was no right for her to be consulted.**
>
> **b. Those who staffed the Dealing desk in her absence were interviewed by the IMS consultant who conducted the field work finding out exactly what was done on the dealing desk. They were not invited to submit their ideas on how best the dealing desk should be reorganised, if at all.**
>
> **c. Mr Davies emailed the Claimant on the afternoon of 28th November 2012 the second of the two days that the IMS conducting the field work spent in the department. He told her that the**

consultant had been in the office to understand the current position before going away shortly to prepare his report and recommendations. Mr Davies told her that she would be informed as to what IMS recommend.

d. Mr Davies did not take that opportunity to invite the Claimant to come in to meet with the consultant. However, we are in no doubt that, had the Claimant at that point expressed the wish to confer with IMS ahead of the production of their recommendation, the Respondent would have arranged for that to happen. As it was, the following day, 29th November 2012, she thanked Mr Davies for his email and said "send over the report and recommendations when you have them …"

39. Issue number 31 was directed at unfair dismissal. It reads:

"In respect of the acts set out at paragraphs 1-29 above

a. Did the Respondent's actions constitute a repudiatory breach of contract? The Claimant contends that there was a breach of the implied term of mutual trust and confidence.

b. If so did the Claimant resign in response to that breach, or was there an alternative reason for the Claimant's resignation, namely the pursuit of alternative career opportunities or the Claimant's perceived loss of status?

d. If so was that constructive dismissal unfair according to Section 98 and/or 99 of the Employment Rights Act 1996 (the ERA)? In respect of the claim pursuant to Section 99 of the ERA the Claimant relies upon Regulation 20 (1)(a), (b), and 20 (2) of the Maternity and Parental Leave Regulations 1999. The Claimant relies upon Regulation 20(3)(a), (b), and (d) in this regard".

The Tribunal said:

"a. In our view the Respondent's actions did not constitute a repudiatory breach of contract.

b. Our view is that the motivation for the Claimant's resignation was a combination of her perception of loss of status coupled with a desire to pursue alternative career opportunities.

c. In the light of our findings at a) above, we do not need to consider this."

The Relevant Statutory and Case Law

40. The scope of this appeal is limited. We are focused on the provisions of section 99 of the **ERA** and the supporting regulations. Section 99 provides:

"(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if –

(a) The reason or principal reason for dismissal is of a prescribed kind …

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to –

(a) Pregnancy, child birth or maternity …

(b) Ordinary, compulsory or additional maternity leave …"

41. The prescribed Regulations for the purposes of section 99 are the **Maternity and Parental Leave etc Regulations 1999**. Regulation 18 concerns the right to return after maternity or parental leave. It provides:

> **"(1) An employee who returns to work after a period of ordinary maternity leave, …**
>
> **is entitled to return to the job in which she was employed before her absence.**
>
> **(2) An employee who returns to work after -**
>
> > **(a) a period of additional maternity leave …**
>
> **is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practical for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.**
>
> **(3) The reference in paragraph (1) and (2) to the job in which an employee was employed before her absence is a reference to the job in which she was employed -**
>
> > **(a) if her return is from an isolated period of statutory maternity leave, immediately before that period began …"**

42. Regulation 18A concern incidents of the right to return. It provides:

> **"(1) An employee's right to return under Regulation 18(1) or (2) is a right to return -**
>
> > **(a) with her seniority, pension rights and similar rights as they would have been had she not been absent and**
> >
> > **(b) on terms and conditions no less favourable than those which would have applied if she had not been absent …"**

43. Regulation 19 concerns protection from detriment. It provides:

> **"(1) An employee is entitled under Section 47C of the 1996 Act not to be subject to any detriment by any act or any deliberate failure to act by her employer done for any of the reasons specified in paragraph 2.**
>
> **(2) The reasons referred to in paragraph 1 are that the employee -**
>
> > **(a) is pregnant …**
> >
> > **(d) took, sought to take, or availed herself of the benefits of ordinary maternity leave or additional maternity leave …"**

44. Regulation 20 concerns unfair dismissal. It provides:

> **(1) An employee who is dismissed is entitled under Section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if**
>
> > **(a) the reason or principle reason for the dismissal is of a kind specified in paragraph (3) …**
>
> **(3) The kinds of reason referred to in paragraph (1) … are reasons connected with -**

(a) the pregnancy of the employee …

(d) the fact that she took, sought to take or availed herself if the benefits of ordinary maternity leave or additional maternity leave …"

45. Regulation 2 concerns interpretation and provides:

(1) In these regulations - …

"job" in relation to an employee returning after … maternity leave … means the nature of the work which she is employed to do in accordance with her contract and the capacity and place in which she so employed …"

46. The leading authority on the meaning of and approach to the assessment of whether a job is "the job in which she was employed before her absence" is **Blundell v Governing Body of St Andrews Roman Catholic Primary School** [2007] IRLR 652, a decision of the Employment Appeal Tribunal presided over by Mr Justice Langstaff.

47. In that decision the EAT introduced its consideration of the same job by reference to an industrial tribunal decision **Edgell v Lloyds Register of Shipping** [1977] IRLR 463. It cited a passage from that decision in the following terms at paragraph 50:

"… The Act does not say that an employee who returns after maternity leave is entitled to exactly the same job back again or anything like that. It says the job means the nature of the work which she is employed to do, in accordance with her contract and the capacity and place in which she was so employed. …"

48. The EAT that went on in its judgment at paragraph 51 in the following terms:

"51. Two things are clear, first, the contract is not definitive … otherwise the regulations could and probably would in simple terms require the contract to be honoured whereas they refer only to the contractual provisions as to the nature of the job. This most obviously encompasses the job description, if it is contractual, but may not be limited to it, since, where a contract consists of two parts as a contract of employment often does – the job description is one part and particular terms and conditions of employment is another – those other terms may have some impact upon the nature of the work. Secondly, the phrase "in accordance with her contract" qualifies only the nature of the work. If it had been intended that capacity was to be defined by the contract of employment or place the phrase would have read 'the nature of the work and the capacity and place in which she is employed to do it in accordance with her contract …" or to similar effect

52. Capacity is more than status though may encompass it. It seems to us to be a factual label descriptive of the function which the employee serves in doing work of the nature she does.

53. That this is a factual label, not determined purely by the contact, is most readily demonstrated by considering the word place. This too is not purely contractual for it too is

not subject to qualification (in accordance with the contract) which applies to nature … The regulation's aim, as we see it, to provide that a returnee comes back to a work situation as near as possible to that she left. Continuity, avoiding dislocation, is the aim.

54. The level of specificity with which the three matters: nature, capacity and place are to be addressed is likely to be critical. … Whereas the "nature of the work" is to be as provided for by the contract, which will thus, within its terms, (if written) tend to indicate the level of specificity there is to be about it. This will not be so where the contract is an old one, or where nothing which is written indicates clearly the job to be done. So far as "capacity" and "place" are concerned much will depend upon the level to which specificity it taken. For someone working on a conveyor belt, is the place of work to be the particular position at the belt (which may, if she is particularly friendly with those immediately besides her, be a matter of some importance to her)? Or at that section of the belt in that work room on that floor of the factory. The central question is how the level of specificity should be determined, and by whom.

55. It seems to us that the answer to this question is essentially one of factual determination and judgment, and hence for the Tribunal at first instance. Unless it is obviously so wildly wrong as to be perverse, or wrong considerations have clearly informed it, the level of specificity it regards as appropriate having listened to the evidence will be respected on appeal. However, to say that a decision is a judgment of this category is not to assist a Tribunal in the approach – for by what approach is it to be reached.

56. The answer, as we see it, is to have in mind both i., the purposes of the legislation and, ii, the fact that the Regulations themselves provide for exceptional cases – namely that where it is not reasonably practicable for the employer to permit her to return to her previous job, he may provide for her return to another job which is both suitable for her and appropriate for her to do in the circumstances. As to i, the legislation seeks to ensure that there is as little dislocation as reasonably possible in her working life, so as to avoid adding to the burdens which will inevitably exist in her family or private life simply because she has a very young infant making new demands upon her. As to ii, even given that the purpose of the legislation is to protect the employee there is no need to construe "same job" as covering a broad spectrum of work in order to ensure an appropriate balance between employer and employee. "Job" can be quite specifically defined. Latitude is provided by an employer being able to provide a job which is not the same job, but is nonetheless suitable."

49. The approach of the EAT in **Blundell** has been adopted subsequently in **Kelly v Secretary of State for Justice** an unreported decision of the EAT number 0227/13/JOJ.

50. We have been referred to a decision of the Court of Justice of the European Union **Napoli v the Italian Ministry of Justice** [2014] ICR 486. That concerned the interpretation of certain provisions in the Parliament and Council Directive 2006/54/EC and, in particular, Article 15 which provides:

> **"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 and to benefit from any improvement in working conditions to which she would have been entitled during her absence."**

51. The factual matrix of that case, briefly, was that Ms Napoli was successful in a competition for a post as Deputy Commissioner of the Prison Corps. She was appointed Probationary Deputy Commissioner. She had to attend a course of training of 12 months' duration and pass an exam before promotion to the post was confirmed. A person who did not pass that exam must take part in the next course.

52. By a provision of Italian domestic law, by reason of her being on compulsory maternity leave, she was not able to attend the commencement of the relevant course and, accordingly, was excluded from that course and the opportunity to pass the exam, so as then to be permanently promoted to her new position, was postponed. The CJEU considered whether that set of circumstances constituted a breach of Article 15. The court asked whether Article 15 was to be interpreted as precluding national legislation which, on public interest grounds, excluded a woman on maternity leave from a vocational training course which was compulsory in order to be able to be appointed definitively to a particular post and in order to benefit from an improvement in her employment conditions.

53. The heart of the judgment is as follows:

> **"31. The fact remains that, being excluded from the vocational training course a as a result of having taken maternity leave, has had a negative effect on Ms Napoli's working conditions…**
>
> **32. … She for her part is required to wait for the next training course to begin and … it is moreover uncertain when that will be**
>
> **33. The exclusion of the party concerned from the first course and the fact that she is subsequently prevented from participating in the examination at its end result in her losing a chance of benefiting, in the same way as her colleagues, from an improvement in working conditions and must therefore be regarded as constituting unfavourable treatment for the purposes of Article 15 of Directive 2006/54."**

54. Mr Allen QC, for the Appellant, argues that **Napoli** enhances the approach taken by the EAT in **Blundell** and reduces the test to a simple one: whether any developments whilst on maternity leave "has had a negative effect on Ms Napoli's working conditions". He contends

that satisfying this simple test is sufficient to satisfy the Regulation 18 question that she is entitled to return to the job in which she was employed before her absence.

55. In our judgment **Napoli** does not have that effect. Regulation 18 is specifically about the return to the job and not about wider ramifications which may have had a negative effect on the returnee's working conditions. Furthermore, the CJEU was concerned with a specific issue arising under Article 15 namely whether Ms Napoli had been precluded from benefitting from any improvement in working conditions to which she would have been entitled during her absence. In each case the court or tribunal is obliged to consider a specific statutory question against a purposive background. In our judgment the approach of the EAT in **Blundell** is not superseded by the general words in paragraph 31 of CJEU in **Napoli** but the Tribunal, considering the question in this case, must always have in mind the source of the domestic obligations in EU Law and the purpose of the Directive.

Submissions and Conclusions

56. We first deal with Issue 23. The Appellant no longer suggests that the ET was not entitled to conclude that the use by the Claimant of the job title "Head of Dealing" was never adopted by the Respondent as her job title but accepts that it was adopted by herself to differentiate herself from Ms Dodds de Jesus after she joined the workforce. The Claimant also accepts that the change in the reporting line, whereby she was now to report to the holder of the position of Head of Execution rather than to Mr Davies, does not represent any relevant change in her job, as it is now common ground that Mr Davies was not a member of the Board of Directors.

57. The Claimant's appeal is to the effect that the ET has failed to address certain issues of fact, which were brought to the fore at the hearing, but which were not germane to her primary case that she should have returned as the new Head of Execution. This, secondary, case was to the effect that the job to which she returned was not the same as the job she previously had because the nature of the work she was employed to do, in accordance with her contract, and the capacity in which she was so employed had changed to her detriment. In particular the ET did not, she says, deal with the evidence concerning the extent to which, if at all, her managerial/supervisory functions in respect of Ms Dodds de Jesus (and the third member of the Dealing team upon her return) would have disappeared or lessened.

58. There was evidence which pointed in different directions on this. There was evidence to suggest that her managerial functions vis-à-vis Ms Dodds de Jesus would disappear. There was evidence that it would not. There was different evidence as to the extent to which she had, in practice, supervised Ms Dodds de Jesus. The findings of the ET in respect of this issue were limited to the following passages in its decisions.

> **"7. In 2010 Isabel Dodds de Jesus joined the Respondent as its second dealer and portfolio administrator. This prompted the Claimant to start to use the title of Head of Dealing. This was apparently to differentiate her from the other, more junior dealer, Isabel, but it did not signify a material change in role, nor was her contract formally amended. Management did not challenge her over the use of this title."**
>
> **Issue 23**
>
> **a. The Claimant's job title of Head of Dealing was her own invention determined by her on the appointment of Isabel Dodds de Jesus as a means of asserting her seniority to Isabel. Her job title under the contract of employment dated 19th August 2009 was that of Dealer and Portfolio Administrator. This contractual title never changed …**
>
> **b. … As regards the dealers, of which the Claimant was one, there would now be three instead of two and she would have remained the longest serving …"**

59. In addition, though not adverted to in the grounds of appeal, oral argument before us focussed on a second issue which had been the subject of evidence before the ET: the contact which the Claimant had with clients. There was evidence that one of the consequences of the

restructuring would be that the Claimant would no longer have contact with those clients. There was evidence as to how extensive or limited that had been and what proportion of the content of her job it amounted to. This issue is entirely absent from the ET's reasons.

60. Mr Allen draws our attention to the fact that, although Regulation 18 and **Blundell** were referred to the ET, and noted as such, the decision does not refer to the content of either the Regulation or the principles to be derived from **Blundell**.

61. The Appellant invites us to draw the inference that the ET failed to consider the secondary case put forward by the Appellant at the Tribunal hearing: that the job to which she returned was not the same as that which she had undertaken before and that it had changed in those two ways – the removal of her managerial function vis-à-vis Ms Dodds de Jesus and the removal of her client contact – which was detrimental and amounted to a breach of Regulation 18.

62. The Respondent points out, correctly, that the issue of the removal of client contact was not one of the grounds of appeal and invites us to disregard that.

63. As for the issue of management of Ms Dodds de Jesus, the Respondent contends that the ET, at paragraph 7 and in dealing with Issue 23, reflects the evidence that, in the job she had been doing before her maternity leave and in the job she would be doing upon her return, she would remain the more senior dealer as between her and Ms Dodds de Jesus and that the ET's findings at Issue 23 that the IMS proposal did not have the effect of demoting the Claimant, that she had a right to return from leave to the job that she was employed in before her absence, though she had no right to return to a new, more senior appointment, implicitly involved the ET

considering and coming to the conclusion that the job to which she was to return was the same job as the one she had previously undertaken.

64. In our judgment Mr Allen is correct when he says that the decision and reasons of the ET did not deal with the alternative case which had emerged during the hearing, and upon which there was a certain degree of focus both in the evidence and in the closing submissions of the parties. The ET did not engage with the argument that, regardless of the correctness of her views about the Head of Execution job, the Claimant was being asked to return to a job which was not the same, because her managerial/supervisory function in respect of Ms Dodds de Jesus was to disappear.

65. The ET, as is good practice, had sought to identify the issues which it had to consider in advance of the hearing and structured its decisions and reasons so as to ensure that it addressed and answered those issues which the parties had identified were for decision. At that stage the primary case of the Claimant was that the job of Head of Execution should have been hers because it was the equivalent role which she claimed she had been undertaking before she went on return from maternity leave. It is apparent that, in the course of the evidence, her contention became untenable because the role of Head of Execution was plainly a different role from that which she had been previously undertaking. The list of issues, however, did not identify the secondary case which emerged at the Tribunal hearing: that the job to which she would return was different from the job which she had previously undertaken in terms of nature and capacity. The ET, whilst dealing with all the issues listed, did not address itself to this alternative basis upon which the Claimant was advancing her case. In our judgment it is straining the language of the Tribunal in those passages in its decision, to which we have referred by the Respondent,

to conclude that those passages reflect a decision adverse to the Claimant on that secondary case.

66. In our judgment, therefore, the decision of the ET is incomplete in this respect. The appeal on this ground is allowed and the case will be remitted to the same Tribunal for it to determine the question whether the job to which the Claimant was to return was the same as the job in which she was employed before her absence. We anticipate that the Tribunal will receive and have to determine argument in respect of both of the factual issues canvassed with us namely: the contention that her managerial role vis-à-vis Ms Dodds de Jesus and the other dealer was to be removed and the removal of the function of dealing with clients.

67. Issue 21. The argument of the Appellant has changed in the course of the oral submissions on this issue. It is clear that the ET made a finding of fact that the members of the dealing team who were at work when IMS conducted its field work were only asked to describe what they were doing and were not invited to submit their ideas on how best the dealing desk should be reorganised if at all. The ET has also made findings of fact that the Appellant did not ask at that stage to be involved in the field work and that on the day following her email contact with Mr Davies and in response to it she limited herself to asking to see the report and recommendations when they emerged. In our judgment those were findings of fact that were open to the ET, as was the inference drawn from it that the Appellant did not ask to be involved at that stage and that had she asked, it would have been granted. There was nothing whatsoever in the relationship between the Appellant and the Respondent as found by the ET which went against such a finding. On the contrary, the findings by the Tribunal on the offers to the Claimant to make comments, if she wished, upon the proposed reorganisation and the fact, not

disputed, that the implementation of the restructuring was put on hold pending the outcome of the Claimant's grievance, supports such a conclusion.

68. We remind ourselves that in the case of **Stewart v Cleveland Guest Engineering Ltd** [1994] IRLR 440 the EAT (Mr Justice Mummery presiding) stated that in this area "if the error of law relied upon is the argument that the Industrial Tribunal reached the decision which no reasonable Tribunal on a proper appreciation of the facts and law would have reached an overwhelming case to that effect must be made out" (paragraph 35).

69. In our judgment no such case has been made out by the Appellant in respect of Issue 21.

70. It follows that the Tribunal will need to reconsider its conclusions under Issue 31 in the event that it were to conclude that there was a breach of Regulation 18 in respect of the job to which the Appellant was to return not being the same as the job which she had done prior to going on maternity leave.

71. We point out, and in this we do not accept Mr Allen's submission, that such a finding would not necessarily result in a conclusion that the Appellant had been automatically unfairly dismissed pursuant to section 99. Issue 31 poses a series of questions which reflect the structure of Regulation 20. If the Tribunal were, upon remission, to conclude that there was a breach of Regulation 18, it would need to consider whether that breach constituted a repudiatory breach of contract: that is a breach of the implied term of mutual trust and confidence. It would then have to consider whether the Appellant's resignation was a response to that breach of the implied term of trust and confidence. Only if both of those questions were answered affirmatively would there be a dismissal, which is the trigger under Regulation 20 for

the dismissal to be automatically unfair under section 99. It is of course the case that a breach of Regulation 18 may be actionable on the part of a claimant as a detriment pursuant to Regulation 19 and does not necessarily automatically trigger a complaint of automatic unfair dismissal under Regulation 20.

Summary

72. Accordingly we uphold the appeal to this extent that the Tribunal by its decision and reasons failed to address the questions whether the Respondent was in breach of Regulation 18 of the **1999 Regulations** by providing the Appellant, on her return from maternity leave, with a job which was not the same job as that which she had undertaken immediately prior to the commencement of that maternity leave. We remit the case to the Employment Tribunal for it to determine that issue.

73. We also remit the case to the Employment Tribunal for determination afresh the question of automatic unfair dismissal, pursuant to section 99 of the **1996 Act**, by reference to the Regulation 20, in the light of the Tribunal's conclusions in respect of the alleged breach of Regulation.