EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4105551/2016 and S/4105560/2016

Held in Glasgow on 21 and 26 April 2017, 9 and 15 May 2017 and 25 May 2017 (In chambers)

Employment Judge: P Wallington QC
Members: Mrs J Ward
Dr S Wilson

(1)	**Mr S McGuire**	**First Claimant** **Represented by:** **Mr R Lawson – Solicitor**
(2)	**Ms P Kasparek**	**Second Claimant** **Represented by:** **Mr R Lawson – Solicitor**
Scottish Refugee Council		**Respondent** **Represented by:** **Mr C Roberts - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is as follows:-

1. **First Claimant: Mr S McGuire (Case No: 4105551/2016)**

1.1 The First Claimant was unfairly dismissed by the Respondent.

1.2 The Respondent is ordered, on or before 31 July 2017, to reinstate the First Claimant into the post of Refugee Integration Adviser on the salary and other terms and conditions applicable to his post immediately prior to 30 June 2016, and with the benefit of any improvement in terms and conditions or benefits applicable to the post of Refugee Integration Adviser that may have occurred since 30

June 2016, any increase in salary and any increment which would have become payable for length of service had the First Claimant remained in the employment of the Respondent,.

1.3 The Respondent is further ordered to pay to the First Claimant such sum as, after deduction therefrom of income tax and National Insurance Contributions at the applicable rate produces the net sum of £6,084.09 (Six Thousand and Eighty Four Pounds and Nine Pence) as arrears of wages.

1.4 The Respondent is further ordered, on or before 31 July 2017, to re-admit the First Claimant as a member of its pension scheme and to credit him with pensionable service backdated to 1 July 2016, and to make such employer and employee contributions to the said scheme as may be required to secure the crediting of such service.

1.5 Pursuant to Rules 76(4) and 75(1)(b) of the Employment Tribunals Rules of Procedure 2013, the Respondent is ordered to pay to the First Claimant expenses in the sum of £1,200.00 (One Thousand and Two Hundred Pounds), being reinstatement of fees incurred by the First Claimant in bringing his claim.

2. **<u>Second Claimant: Ms P Kasparek</u> (Case No: 4105560/2016)**

2.1 The Second Claimant was unfairly dismissed by the Respondent under reference to Section 99 of the Employment Rights Act 1996, read together with Regulation 20(1)(b) of the Maternity and Parental Leave etc Regulations 1999.

2.2 The Second Claimant was unfairly dismissed by the Respondent under reference to Section 98 of the Employment Rights Act 1996.

2.3 The Respondent is ordered to pay the Second Claimant a compensatory award of £8,466.02 (Eight Thousand, Four Hundred and Sixty Six Pounds and Two Pence). The Recoupment Regulations apply to this award. The prescribed amount is £4,487.35 (Four Thousand, Four Hundred and Eighty Seven Pounds

and Thirty Five Pence), and the prescribed period is from 1 July 2016 to 21 April 2017 inclusive.

2.4 The Second Claimant's claims of unlawful pregnancy and maternity discrimination pursuant to Sections 18(2) and 18(4) of the Equality Act 2010 are not well founded and are dismissed.

2.5 The Respondent unlawfully discriminated indirectly against the Second Claimant on the ground of her sex contrary to Sections 19 and 39 of the Equality Act 2010 in the arrangements it made for competitive interview for posts to be filled following the deletion of the Second Claimant's post with effect from 30 June 2016.

2.6 The Respondent is ordered to pay to the Claimant £10,000.00 (Ten Thousand Pounds) as compensation for injury to feelings sustained by reason of the Respondent's said unlawful discrimination.

2.7 Pursuant to Rules 76(4) and 75(1)(b) of the Employment Tribunals Rules of Procedure 2013, the Respondent is ordered to pay to the Second Claimant expenses in the sum of £1,200.00 (One Thousand, Two Hundred Pounds), being reimbursement of fees incurred by the Second Claimant in bringing her claim.

REASONS

Introduction and preliminary matters

1. In this case there were originally two separate claims presented respectively by the First Claimant, Mr Stephen McGuire, and the Second Claimant, Ms Petra Kasparek, against their former employer, the Respondent, the Scottish Refugee Council. In accordance with an order made earlier in the proceedings, the two claims were heard together.

2. The claims relate to the dismissal of each of the Claimants on 30 June 2016 for redundancy. The First Claimant complained of unfair dismissal, and sought reinstatement, alternatively compensation, as

his remedy. The Second Claimant also claimed unfair dismissal, both 'ordinary' unfair dismissal under Section 98 of the Employment Rights Act 1996 ('ERA 1996') and automatically unfair dismissal under Section 99 read together with Regulations 10 and 20(1)(b) of the Maternity and Parental Leave etc Regulations 1999. In addition she claimed unlawful direct discrimination by reference to the protected characteristic of pregnancy, under sections 18(2) and 39 of the Equality Act 2010 ('EqA 2010'), or in the alternative unlawful indirect sex discrimination under sections 19 and 39 EqA 2010. The remedies she claimed initially included reinstatement but this was not pursued at the hearing; instead she seeks compensation.

3. The Tribunal heard both claims over three days. At the start of the hearing the parties' representatives tendered an agreed statement of facts and an amended list of issues, both of which we found helpful.

4. In the course of the hearing it became clear that the Second Claimant wished to advance an *esto* case of pregnancy discrimination under reference to s 18(4) EqA 2010, which extends the definition of pregnancy discrimination to cover unfavourable treatment of a woman because she is exercising, or has exercised, the right to take ordinary or additional maternity leave. As this point had not been specifically set out in the First Claimant's particulars of claim, Mr Lawson, for the Second Claimant, applied for permission to amend the particulars of claim to specify this additional head of claim, without opposition from Mr Robertson, for the Respondent.

5. We noted that the amendment arose from facts already in issue, and that there would therefore be no requirement for additional evidence to be led, and that the Respondent would not face any particular difficulty in dealing with the issue in submissions. We therefore concluded that it was consistent with the principles laid down in **Selkent Bus Services Ltd v Moore [1993] ICR 836** that the amendment should be permitted, in that the balance of prejudice would be greater for the Second Claimant if the amendment was

refused than that for the Respondent if it was allowed, and accordingly permitted it to be made.

Evidence

6. The Tribunal heard evidence, on oath or under affirmation, for the Respondent from Mr John Wilkes, who at all material times had been Chief Executive of the Respondent, Mrs Kes Cameron, Head of Finance and Administration, and Mr Gary Christie, Mr Wilkes' successor as Chief Executive; and for the Claimants from each of the Claimants and from Mr James Stewart, who is employed by the Respondent as a Housing Development Officer and is also a lay representative for the Unite trade union.

7. We found both of the Claimants, and Mr Stewart, to be impressive witnesses who gave honest and clear accounts to the best of their recollection. We also found Mr Christie to be a clear, honest and helpful witness. We must record that we were much less impressed with the quality of the evidence given by Mr Wilkes and Mrs Cameron. We do not doubt that they were each doing their best to give truthful accounts, but both showed a striking lack of insight, or appreciation of the criticisms levelled at their decisions.

8. In addition Mr Wilkes appeared to us to have a surprisingly poor understanding of the Respondent's policies and procedures, and a poor grasp of how some of the actions of the Respondent were at variance with its formal policies. Mrs Cameron was clearly and significantly lacking in experience or understanding of the role of a manager conducting an appeal against dismissal, and of the conflicts of interest inherent in her undertaking the role of hearing an appeal against a decision which had been taken by her line manager in consultation with the Chair of the Board, to which he reported.

9. We therefore treated those parts of their evidence which were not supported by documentation or consistent with the agreed statement of facts with caution. On some points, where there were differences

between their oral evidence and contemporaneous documentation, we preferred the documentation.

10. With these preliminary points made, we turn to set out our findings in fact.

Findings in fact

11. The Respondent is a registered Scottish Charity, whose principal work is, as its name suggests, providing various forms of support to members of the refugee community in Scotland. It is governed by a Board of Trustees. Responsibility for day to day management is delegated to the Chief Executive, acting where necessary in consultation with the Chair of the Board. The Respondent employs about 35-40 staff (precise numbers vary; at the time of the Claimants' dismissal there were 36 staff). It has a turnover of around £2 million a year, and reserves, after provision for a pension fund deficit, of a little under £1 million, from which most unbudgeted contingencies must be met. Other funds available include a development of change reserve, used to fund redundancy payments, and a fund to cover the cost of maternity leave cover. The Respondent was operating for the financial year 2016-7 on a deficit budget, with projected expenditure exceeding projected income by approximately £160,000, or 8%.

12. The Respondent's income is principally derived from grants from public bodies such as the Scottish Government and local Councils, and from non-governmental funding bodies, of which the one relevant for the purposes of this case is the Big Lottery Fund. Grants are typically for a particular project or service, and for a set period of time. If the period covered by a grant runs out, and the grant is not renewed and no alternative funding source is found, the usual result is that the service supported by the grant will have to cease, and any staff employed to provide that service are thus at least potentially redundant.

13. One of the services provided by the Respondent in the period up to the end of June 2016 was a Refugee Integration Service. This was principally funded by a two year, £2 million, grant from the Big Lottery Fund, which was due to end at the end of June 2016. This funding met the cost of two managerial posts and three posts of Refugee Integration Adviser ('RIA'). One of these three posts was held substantively by the Second Claimant, who had been employed by the Respondent since July 2012. Although her post was financed by a time-limited grant, her contract (pp 238-9) was for an indefinite period.

14. In June 2015, the Second Claimant commenced a period of maternity leave. The First Claimant, who had been employed on a temporary contract since 2014, was appointed as maternity replacement cover for the expected duration of the Second Claimant's leave. There were two other RIAs, Ms Karolina Kaminska and Mr Tommy Taylor. There were thus four employees 'on the books' as RIAs, but only three posts, principally funded by the Big Lottery but with some funding derived from a Scottish Government grant. The cost of the First Claimant's salary, to the extent not met by reimbursement of the Second Claimant's Statutory Maternity Pay by the DWP, was met from the fund used by the Respondent for maternity cover.

15. The Second Claimant's period of maternity leave had originally been intended to run until 20 June 2016. However she decided that she wished to resume her post earlier, and gave due notice of her intention to return from maternity leave on 12 May 2016. She had a considerable amount of accrued annual leave entitlement. The Respondent expected staff returning from maternity leave to take any accrued annual leave within three months of returning. In light of this, the Second Claimant decided to take the bulk of her accrued leave in a block starting on 12 May 2016 (the date she had notified as her date of return from maternity leave) and running through to 4 July 2016, on which date she would actually resume her duties. This was

all agreed by the Respondent; in consequence, the Second Claimant began to receive her usual salary again (having latterly been on unpaid maternity leave) on 12 May 2016.

16. The Respondent has a number of policies of the kind to be expected of a responsible employer. These include a Redundancy Policy and Procedure (pp 236-7 and 245-50). The principles to which the Policy commits the Respondent include that it will consider all alternatives to redundancy to avoid or minimise the numbers of redundancies, consult with staff and the recognised trade union at the earliest possible opportunity, and adopt fair and objective selection criteria which comply with its equal opportunities and diversity policy and any other relevant policies. The Policy gives the Chief Executive delegated authority to approve redundancies, up to a maximum of four posts, in certain cases, and requires management to consult with staff and the union on 'all matters relating to a redundancy situation'. The Policy also provides for a right of appeal against selection for redundancy, appeals being dealt with under the Respondent's Grievance Appeals Procedure.

17. The Policy is fleshed out in the Procedure, which sets out details of the information the Respondent is to disclose to affected individuals and the union once a decision has been made that there is a redundancy situation. The Procedure states that consultations will begin on the issuing of notices of potential redundancy to affected individuals. The Procedure also sets out how selection criteria will be agreed in any particular redundancy situation requiring selection of individuals. The Procedure states that

> *' the following general criteria will be used:*
>
> *Funding streams and/or the future viability of a project department.* [It was not suggested by any witness that this was relevant in this case.]

Skills, knowledge, experience and/or qualifications appropriate to the future needs of the organisation.

Attendance and conduct.' (p 247)

The Procedure also sets out the level of redundancy payments (which include an ex gratia payment of one month's salary in addition to the statutory entitlement) and the right of appeal.

18. The Respondent's Grievance Procedure (pp 240-2) provides for formal grievances to be addressed by the aggrieved individual's line manager at a formal meeting, and for appeals to be heard 'by a manager or senior manager, but not the one who heard the original grievance'. For grievances by senior managers the Procedure provides that the first stage is to be dealt with by the Chief Executive, with any appeal to be dealt with by a member of the Board of Trustees. There is also provision in the Procedure for it to be adapted to deal with grievances by former employees.

19. The Respondent has a practice of conducting thorough annual appraisals of each member of staff, the results of which are fully documented.

20. The Respondent was aware in early 2016 that funding for the refugee Integration Service would end at the end of June. At some point (we were not told the date, but it must have been some time before the beginning of June 2016) a formal application for a second grant was submitted to the Big Lottery Fund. When it became apparent that a final decision on this application would not be given until after the end of June 2016, a second application was made for what was referred to as 'development funding' which was in effect bridging funds to keep the service going pending a decision on longer term funding.

21. In the meantime the Respondent took the first step to secure the financial position following the expiry of the then current grant, by issuing formal notices of dismissal to each of the six affected staff.

The two managers, Wafa Shaheen and Elodie Mignard, were entitled to three months' notice, and notices were issued to them on 31 March 2016. We were not shown the letters containing these notices, but were informed that they were in the same terms as those issued to the Claimants (and to the other RIAs) on 20 May 2016. The letters to each of the Claimants (pp 67-70) were in materially identical terms. Each contained the statement 'we are required to inform you that your contract for the role of Refugee Integration Adviser will end on 30 June 2016', and attached details of the redundancy payment the recipient would receive. The letters went on to state that if the Respondent was successful in finding alternative funding before 30 June, it would write to update the recipient 'of the change of circumstance, and any offer of suitable employment that we can make'.

22. Mr Wilkes in evidence asserted that these letters were no more than indications of potential redundancy. He was unable to explain why they were expressed in unconditional terms, and appeared not to appreciate that their effect was to give notice to each recipient to terminate his or her contract, which notice could not thereafter be unilaterally withdrawn. We find however that that was what the letters were, and that was their effect.

23. There was no attempt by the Respondent to consult with any of the individual recipients of these letters when they were issued, or at any time prior to 13 June 2016. So far as the union was concerned. Mr Wilkes had periodic scheduled meetings with Mr Stewart, the Unite representative, to discuss issues potentially of concern to staff. A meeting was held in early May 2016 at which the subject of the expiry of the Big Lottery funding and the Respondent's attempts to secure new funding was referred to, but no information was provided to Mr Stewart in writing in accordance with the Respondent's Redundancy Procedure and there was no discussion of any steps that might be taken to avoid or mitigate the effect of redundancies, or of what selection procedure might be adopted.

24. Nothing further happened until 6 June 2016. On that date the Big Lottery wrote to the Respondent (pp 70A-C) to notify it that its application for funding for the Refugee Integration Service for a further two year period had been passed through to the second stage of consideration, but that it would not be possible to reach a final decision on it until August 2016 (and there was of course no guarantee that the application would be successful). The letter went on to advise the Respondent that its application for development funding to bridge the gap had been rejected.

25. The Board of Trustees met on 9 June 2016 to consider the position following the Big Lottery's letter. The Board decided that two RIA posts would be retained on a temporary basis for two months, from 1 July to 31 August 2016, pending the final decision on the Respondent's grant application. One of these posts was in fact required to be retained to meet the requirements of the Scottish Government, which was providing funding under separate arrangements. The second post was to be funded from reserves. It was implicit in this decision that whoever was appointed to the temporary posts would, if the funding application succeeded, be retained as an RIA in one of the posts funded by the new grant. It was also decided that the First Claimant should be included in the pool for consideration for one of the two continuing posts. The Board also decided to retain temporarily the two managerial posts for the Refugee Integration service. (These posts were subsequently funded by the Big Lottery Fund's second grant, when this was authorised in mid-August 2016.) The total projected cost of the decisions was £19,000, which the Board agreed should be drawn from reserves.

26. One further matter that was decided related to Ms Kaminska, who was due to start maternity leave on 22 June 2016. The Board decided that it would not fund a temporary maternity cover post for her. This was a reflection of the fact that as the Respondent pays full salary for the first four months of maternity leave, rather than just Statutory Maternity Pay, 90% of which is recoverable from the DWP,

there would be a significant unfunded cost involved in employing a temporary replacement.

27. The effect of the Board's decisions was that Mr Wilkes would need to implement a process whereby the four RIAs were reduced to two, with effect from 30 June 2016. The time available was constrained by this, and by the additional factor of Ms Kaminska imminently commencing her maternity leave. Mr Wilkes considered that he did not have authority to exceed the cost commitment directly resulting from the Board's decisions, at least without further approval from the Chair of the Board, Ms Sue Moodie.

28. Mr Wilkes produced a paper detailing the position and his proposals for selecting the two RIAs who would be appointed to the two temporary posts. This document (pp 71-5) was sent on 13 June (a Monday) to each of the affected individuals and to Mr Stewart. Mr Wilkes explained the funding position and the decisions taken by the Board, and that the result was that there would be only two posts available for the four RIAs (including the First Claimant) currently in post. He indicated that there would be a period of time for consultation and for affected staff and the union to comment on the proposals. He stated that 'a matching process [to select the two individuals to be retained] would be open to difficulty' and that therefore all four individuals would be offered the opportunity for an interview by a panel with one external member. He did not refer to the possibility of selection of who was to be dismissed by reference to any of the criteria referred to in the Redundancy Procedure, such as experience, assessment through past appraisals, and/or records of attendance and conduct.

29. The proposed procedure entailed the deletion of all the existing posts, with post holders being required to compete for the new, temporary post. Those not successful would be made redundant. The letter ended with a proposed timetable, which allowed for consultations until the following Friday, 17 June, with interviews to be

held in the week commencing 20 June, decisions notified and individual consultation over the period 27 to 29 June, and notices of termination issued to the unsuccessful individuals on 30 June.

30. Mr Stewart responded very quickly, on 14 June 2016, setting out the initial response of the union on behalf of the affected members (pp 80-3). His reply set out detailed arguments in support of a request for reconsideration of the decision to limit the retention of RIA posts to two, questioned why the cost of two posts for two months was stated to be £19,000, with particular reference to the funding provided by the Scottish Government for one of the posts to be retained, and criticised the Respondent's failure to engage in consultation with the union prior to taking the decisions that Mr Wilkes had intimated in his paper. In this initial response Mr Stewart did not address the proposed method of selection for the two temporary posts the Board had decided should be created.

31. Mr Wilkes sent an initial response later that day (pp 77-9), stating that the Board's decision stood. He explained that the £19,000 cost covered salary and associated costs for the two management posts (Head of Service and Manager) and one of the RIA posts, the other RIA post being funded by the Scottish Government. He noted the absence of any comments on the process of selection proposed and affirmed his intention to consider any thoughts the union might have on this.

32. Mr Wilkes then responded more fully to Mr Stewart on 16 June 2016 (pp 86-90). His response was a more detailed justification of the Board's decision, primarily on financial grounds, but offered no possibility of the Board's original decision being reopened. Mr Wilkes concluded his letter by repeating the invitation to the union to offer any views or suggestions it might have on the implementation process. The letter did not, however, propose any meeting to discuss this issue.

33. In the meantime, on 15 June 2016, Ms Shaheen, Interim Head of Refugee Services, wrote to each of the RIAs other than the Second Claimant, with a copy to Mr Stewart, intimating her intention to hold interviews on 20 June, attaching a job description for the posts to be filled, and summarising 'the focus and tasks advisers will be expected to focus on'. It was not explained to us why this email was not copied to the Second Claimant (who was at that point still on annual leave).

34. Mr Stewart wrote again to Mr Wilkes on 16 June 2016 (pp 91-3), raising on behalf of the union and affected staff what he identified as failures by the Respondent to follow its Redundancy Policy and Procedure. In particular he drew attention to the commitment in the Policy to consult with staff and the union 'at the earliest possible opportunity', and the fact that notices of dismissal had been issued to affected staff at various dates well before any consultation had been initiated. He also highlighted the absence at that point of any consultation on selection procedures, which he stated was particularly unfortunate because one of the staff at risk was about to go on maternity leave and another (the Second Claimant) about to return from leave. He criticised the proposal for individual consultation with staff after the selection process had taken place and the absence of any opportunity for appeals before the redundancies were to be implemented on 30 June 2016.He concluded by inviting Mr Wilkes to abandon the selection interviews scheduled for 20 June so that the Respondent and the union could 'sit down and ensure that the current situation is dealt with in line with the agreed Policy and Procedures, and in line with the requirements of employment law'.

35. Mr Wilkes telephoned Mr Stewart on 17 June 2016, having received his letter. Mr Wilkes asserted that the Respondent had followed the applicable Procedure. This produced a letter from Mr Stewart dated 19 June 2016 (pp 98-9), rebutting the assertion, and pointing to the obligation to consult as soon as redundancies are proposed and to the Respondent's failure to provide much of the information required to be given in writing under the terms of the Procedure.

36. Mr Wilkes replied on 20 June 2016 (pp100-3) rejecting the request to halt the interviews scheduled for that day, and responding in detail to the complaints of breaches of the Respondent's procedure. Amongst points made in Mr Wilkes' letter were that the Second Claimant had been provided with a copy of her last appraisal and had had a discussion with her line manager 'to bring her up to speed on developments within the team and any changes to legislation, processes and procedures that have impacted on the role'. (We record, however, that the Second Claimant was not afforded access to the Respondent's client database before her interview, so that she did not have an opportunity to refresh her memory of clients with whom she had dealt prior to her maternity leave.) He also addressed the issue of rights of appeal, stating that it was not necessary still to be an employee to appeal, and that 'should the appeal be upheld, and the person is no longer an employee of [the Respondent], the person would be reinstated'.

37. As indicated in Mr Wilkes' letter, the interviews of each of the four RIAs, including both Claimants, proceeded on 20 June 2016. Prior to the interviews the four interviewees had each been offered an interview skills support session; two, Mr Taylor and Ms Kaminska, had accepted that offer. Additionally Ms Shaheen had emailed each of the RIAs except the Second Claimant on 17 June 2016 to advise them that the interviews 'will be a discussion on the specifics of your current Advice Worker role for the interim period'.

38. The interviews were conducted by Ms Shaheen, Ms Mignard, and an external member, Mr Phil Arnold of the British Red Cross (a close partner organisation of the Respondent). The interviews consisted of a number of pre-agreed question, each interviewee being asked the same questions. Scores were awarded separately by each member of the panel for each of the six agreed questions, and each panel member's scores were added together to give a total score. Mr Taylor scored a total of 152 points, Ms Kaminska 147, the Second Claimant 142.5 and the First Claimant 140 (p 229). We are satisfied, and find

as a fact, that the Second Claimant was disadvantaged in this process by the fact that she had not had any recent experience of dealing with refugee clients that she could refer to to amplify answers, particularly to questions 4 and 8 (there were no questions numbered 1 or 7). Question 4 read: *'From your experience what doi you need to be aware of to ensure good participation [in group work] and how would you protect confidentiality in group setting/ Give us an example.*' Question 8 read: *'Tell me about types of challenging clients. Could you tell us of a situation when you worked with a challenging client. How did you deal with that situation? What was the outcome and learning?*'

39. Later that week Mr Stewart went on scheduled annual leave, and his role as Unite representative was from that point taken over by Mr Graham O'Neill. On 24 June 2016, Mr O'Neill submitted detailed proposals, which had been discussed with the affected staff, and which were intended to inform the individual consultations scheduled for the period 27 to 29 June 2016. A slightly revised version was submitted shortly thereafter (pp 134E-H). Mr O'Neill also asked for the opportunity to discuss the proposals with management ahead of the individual consultations.

40. The proposals were in the form of a number of alternatives, for each of which the cost to the Respondent was indicated. The first was for notices of redundancy to be deferred to the end of July 2016, and for staff then to work out their notice during August. If Big Lottery money was forthcoming, the staff could be retained in posts funded by the new grant, and the cost of redundancy payments would be avoided. If not, the Respondent would have incurred the cost of paying the two staff members for an extra month. (Mr Wilkes in evidence pointed out that there would also be an increase in redundancy costs. This is true; the amount would be an additional week's pay for the Second Claimant, who would have completed an additional year's service. The First Claimant's entitlement would have been unchanged).

41. A variant of this proposal envisaged both Claimants taking a week of their annual leave entitlement, which would reduce the Respondent's liability to make payments in lieu for holiday not taken.

42. The second proposal involved one of the two Claimants remaining in post until mid-July 2016 and then transferring to a vacant half-time Welfare Rights Adviser post, from which he or she would transfer back to a RIA post in September if the bid for funding succeeded. The other Claimant would be given notice of redundancy at the end of July 2016, but would then work out his or her notice (as in the first proposal).

43. The third proposal was the same for the Claimant selected for the Welfare Rights post. The other Claimant would continue to be employed until the end of July 2016, but be laid off without pay for the last two weeks of July; he or she would then work out his or her notice in August, but be reappointed if funding was received. Mr O'Neill calculated the cost of this to the respondent to be only £130 more than the cost of the redundancies proposed, with the advantage of potentially retaining the services of both Claimants, and avoiding redundancy costs, if there was a new Big Lottery grant. Mr Wilkes again pointed out that there would also be an additional redundancy cost for the Second Claimant if the Big Lottery bid failed and her delayed redundancy was effective; this would increase the total cost to the respondent to £609.

44. Finally Mr O'Neill offered to discuss any other permutations of the elements comprised in his three alternative proposals.

45. On the same day these proposals were sent to Mr Wilkes, he responded in detail (pp 139-42). The essential point of his reply was that there was no additional funding beyond that approved by the Board, and that Ms Moodie had confirmed this position. Accordingly all of Mr O'Neill's proposals were rejected, save that Mr Wilkes confirmed that if either of the two Claimants was interested in the half time Welfare Rights post, they would be offered this (or if both were

interested, whichever of them had scored more in the selection exercise would be offered it), but subject to being laid off for the period between the end of June 2016 and the start date for the post (13 July 2016), with only statutory guarantee pay of £26 a day for five days. In the event, whilst the Second Claimant initially expressed interest in the Welfare Rights post, neither Claimant chose to pursue this option.

46. Mr Wilkes also rejected Mr O'Neill's request to accompany the Claimants at their individual consultation meetings, as not being provided for in the Redundancy Procedure. The consultation meetings for each Claimant were scheduled to take place on 28 June 2016.

47. Mr O'Neill discussed the situation with the Claimants and on their behalf put forward a further proposal on 27 June 2016, which he asked should be responded to at the individual consultation meetings the following day (pp 151-2). This was that the redundancies would proceed on 30 June as intended by the Respondent, but that the Respondent would undertake that if Big Lottery funding was forthcoming in August, the Claimants would be reinstated or re-engaged, with continuity of employment, and would repay the redundancy pay and additional ex gratia payments received.

48. This proposal was sent to Wafa Shaheen, the Interim head of Service. She discussed it with Mr Wilkes and replied on his behalf on 28 June 2016 (p 153). She rejected the proposal, on the ground that once the redundancy notices took effect, the Claimants would no longer be employees of the Respondent, and it was the Respondent's policy to ensure that any vacancies were first offered to current staff under notice of potential redundancy; it was, she stated, therefore not possible to ring fence the possible new posts in this way.

49. Mr O'Neill again discussed this proposal with the Claimants, and responded to Ms Shaheen on 29 June 2016 with a modification of the

previous proposal, namely that the Claimants would only be reinstated if there were at the time no staff of the respondent at risk of redundancy, or, if there were any, none who were interested in and suitable for the posts (p 156). However this proposal too was rejected by Ms Shaheen later the same day, citing the absence of any contractual obligations to the Claimants once they had left the Respondent's employment. She subsequently clarified that there would be no barrier to the Claimants applying for any new post that might be publicly advertised, should the Big Lottery application be successful.

50. The consultation meetings with each Claimant took place on 29 June 2016. However the only matter open for discussion was the possibility of taking up the 0.5 time Welfare Rights Adviser post. Having initially expressed interest in this the Second Claimant declined it as not being financially viable.

51. Each of the Claimants was sent a letter of dismissal on 30 June 2016 (pp 180,183). The letters simply notified the termination of the recipient's employment that day, gave details of the payments to be made, and wished the recipient well. It made no reference to any right of appeal. Each Claimant received his or her statutory redundancy payment, an ex gratia payment of one month's salary (both free of tax) and payment in lieu of four weeks' notice and any pay in lieu of untaken holiday (both subject to statutory deductions).

52. The First Claimant did not appeal against the decision to dismiss him. However, the Second Claimant did, by way of a written statement of grievance dated 30 June 2016 (pp 181-2). Her grounds of appeal were that she had been discriminated against in the selection process adopted for the two new posts because she was placed at a disadvantage by having recently been absent on maternity leave, followed by annual leave which she had been required to take immediately following her maternity leave. She stated that this had been compounded by the fact that her recently born child had health

issues (a point however which she had not raised previously). She stated that a fairer process of selection would have been to assess the actual performance of the candidates 'against transparent and objectively measurable criteria'. She also cited as unreasonable the rejection of the proposals made by Mr O'Neill for undertakings of reinstatement if funding for the service was secured. She also raised an issue, not relevant to these proceedings, about her annual leave entitlement.

53. Mr Wilkes decided that the appeal should be heard by Mrs Cameron. he did so despite the fact that she reported to him, and that she had neither experience of nor training in appeal hearings. Mr Wilkes was unable to give any reason why he had not considered arranging for the appeal to be heard by a member of the Board. Mrs Cameron had access to HR assistance in the shape of Laura Wilkie, who in addition to her HR function worked as Mr Wilkes' PA.

54. The appeal hearing was held on 9 August 2016. The second Claimant was accompanied by Mr Stewart; notes were taken by Ms Wilkie. The Second Claimant was supplied with a copy of the notes. She corrected what she regarded as a number of errors, and these corrections were incorporated into what was in effect an agreed note (pp 195-203). After the appeal, Mrs Cameron consulted Mr Wilkes about the various interactions he had had with the union representatives, and Mr Wilkes provided a factual summary with supporting documentation (pp 207-8).

55. Mrs Cameron issued her decision on the appeal on 26 August 2016. This was to reject the appeal (pp 212-6). The decision letter sets out in turn Mrs Cameron's reasons for rejecting each of the grounds of appeal. In particular Mrs Cameron concluded that the Second Claimant was not disadvantaged either by her absence on maternity leave or her lack of access to the Respondent's client database because the questions asked were based on skills and did not require current working knowledge. She stated that 'members of the

interview panel have confirmed that they were not looking for specific clients or cases to be used as examples', the implication of which is that Mrs Cameron had consulted the panel members; however there was no evidence before us of the content of any communication between the panel members and Mrs Cameron.

56. The matter of the Second Claimant's child was rejected as a ground of appeal because it had not been raised as an issue at the time. As for the Claimant's complaint that selection by reference to past performance, Mrs Cameron rejected this on the basis that 'no processes or procedures were breached during the selection process'; Mrs Cameron appears not to have considered that it was the choice of a competitive selection process to fill new jobs, rather than selection for redundancy by reference to performance in the employees' current posts, that was the basis for the Second Claimant' ground of appeal.

57. Next, Mrs Cameron rejected the ground of appeal that the final alternatives put forward by Mr O'Neill had been rejected on the ground that 'no processes or procedures were broached, and that the point 'does not relate to the selection process for the [RIA] posts'.

58. Finally Mrs Cameron addressed other matters raised by the Second Claimant during the appeal hearing, in particular that she had been suffering from post natal depression (as to which Mrs Cameron rejected the suggestion that this was a foreseeable situation, pointing out that it had not been raised with the Respondent at the time of the selection process); and the shortness of the consultation period (as to which she stated that there is no minimum period specified for individual consultations.

59. By the time this decision was issued, the Respondent had been notified that the Big Lottery application was successful Mrs Cameron gave no consideration to how this might affect the position. She did not appreciate that her powers in relation to the appeal extended to

reinstating the second Claimant, and therefore did not consider doing so.

60. Mrs Cameron's decision was the final stage in the appeal process. The Second Claimant remained unemployed until 3 October 2016, when she secured new employment, but at a rate of pay some £94 a week net less than her earnings from the respondent. She was promoted in April 2017, and her salary increased, to a level leaving her some £60 a week short of what she would have earned had she been retained by the Respondent.

61. Since obtaining her new job (which is in Edinburgh, where she lives, and therefore more convenient for travel to work than the Respondent's premises in Glasgow) the Second Claimant has continued to look for alternative posts paying at the same level as did her position with the Respondent, but without success, and has not made any further applications for work. The Respondent sought to argue that she had failed to mitigate her loss by not making further applications, but adduced no evidence of any suitable posts for which the Second Claimant could have applied, and we find that she did not act unreasonably in making no further applications after she secured her present post.

62. However the Second Claimant became eligible for membership of her new employer's pension scheme after three months, and initially opted to join, but then changed her mind, and has remained outwith the pension scheme. We find that the Second Claimant could reasonably be expected to have mitigated so much of her loss as relates to the accrual of pension benefits by joining her new employer's pension scheme.

63. The First Claimant did not appeal, having chosen to wait to see what happened to the Second Claimant's appeal. He obtained temporary employment from 8 August 2016, for three months, and further temporary employment from 14 November, for two months. He then received Employment Support Allowance for a month, from 16

January 2017 to 156 February 2017, before securing continuing employment, initially on a part time basis but increasing from 1 May 2017 to full time, but at a rather lower salary than he had received from the Respondent. It was not suggested by the respondent that the First Claimant failed to take reasonable steps to mitigate his loss.

64. In their Claim Forms, which were presented to the Tribunal in early November 2016, both Claimants indicated that they sought reinstatement, and the Respondent was therefore from that point on notice of their wishes.

65. The Big Lottery grant which was awarded in August 2016 is for two years from 1 September 2016. The funding provided is sufficient to finance the employment of four full-time RIAs. Mr Taylor and Ms Kaminska were appointed to two of the RIA posts. The other two were filled by external recruitment. If the Claimants had still been employed by the Respondent at the end of August, we find that they too would have been retained in employment in the two posts that were in fact filled by external recruitment.

66. Mr Christie's unchallenged evidence was that the Respondent had no suitable positions vacant at the time he gave evidence (9 May 2017). However he also confirmed that an additional RIA post had been created using funding from the Scottish Government, and this post had been filled at the end of April 2017 by an employee who was at risk of redundancy following the expiry of the period of funding by Glasgow City Council for his then post. Mr Christie confirmed that this role matched that held by the First Claimant prior to his redundancy.

Relevant Law: First Claimant's case

67. There is no dispute that the Claimant as an employee of the Respondent with two years' service had the right not to be unfairly dismissed; that he was dismissed on 30 June 2016; or that his claim was presented in time. In these circumstances the law relevant for the purpose of determining whether that dismissal was unfair is

contained in Section 98 of the Employment Rights Act 1996 ('ERA 1996').

68. The first requirement of section 98 is that the employer shows what the reason or principal reason was for the dismissal, and that it was one of the potentially fair reasons listed in section 98(2), or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. It is again not in dispute that in this case the reason was redundancy, one of the potentially fair reasons listed in section 98(2); the requirements of the Respondent for employees to perform work of a particular kind, namely that of RIA, were diminishing as a consequence of the expiry of the first Big Lottery grant and the absence at that stage of alternative external funding.

69. The next stage in the process of determining whether a dismissal is fair or unfair, in relation to which the burden of proof is neutral, is that the Tribunal must determine whether in all the circumstances, having regard to the size and administrative resources of the employer, and to equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the employee. In approaching this single statutory question the Tribunal is required to guard against substituting its view for that of the employer. Rather it must apply an objective test: whether the employer's decision was within the range of reasonable responses open to a reasonable employer. This test applies equally to procedural as to substantive issues.

70. Guidance has been given in many appellate decisions as to factors relevant to the application of the test of fairness in redundancy cases. The classic exposition remains that given in **Williams v Compair Maxam Ltd [1982] IRLR 83**, in which the EAT under Browne-Wilkinson J set out the principles a reasonable employer can be expected to follow in redundancy cases. These are that the employer should give as much warning as possible of impending redundancies;

that the employer should consult, and seek to agree with, any recognised trade union as to the means to achieve the employer's objectives, and in particular the criteria for selection for redundancy; that the criteria chosen do not depend solely on the opinion of the person making the selection but can be objectively checked against such matters as attendance, efficiency, experience and length of service; and that the employer will take reasonable steps to identify opportunities for alternative employment.

71. As recently as March 2017, the EAT in **Green v London Borough of Barking and Dagenham UKEAT/0157/16** confirmed that these principles apply equally in a redundancy situation where the employer chooses to select by the deletion of existing posts and requiring employees to compete for a lesser number of new posts, as in this case. The essential requirements for fairness are accordingly genuine and timely consultation, a reasonable, and objectively based, method of selection for the new posts, and reasonable consideration of alternatives to redundancy. A reasonable employer can also be expected to comply, so far as circumstances permit, with any formal policy or agreed procedure it has. These principles (as against their application in this case) were not in contention between the parties.

72. If the Tribunal finds the dismissal unfair, the first remedy it must consider, if this is sought by the employee, is reinstatement: s 116(1) ERA 1996. That section requires the Tribunal to consider, in addition to the employee's wishes, whether it is practicable for the employer to comply with an order for reinstatement; this is an initial consideration, insofar as if reinstatement is ordered and the employer is unable to comply with the order, it is open to it to satisfy the Tribunal that it was not practicable to reinstate the employee. Only if it fails so to satisfy the Tribunal is an additional award of compensation to be made. In addition, in considering whether to make an order for reinstatement, if the Claimant caused or contributed to his dismissal, the Tribunal must consider whether it would be just to order reinstatement. As it was not suggested in this case that the First Claimant in any way

contributed to his dismissal, it follows that it is not necessary in this case to consider, as a separate issue to practicability, whether it would be just to make the order.

73. There is a substantial body of authority for the proposition that it is not practicable to reinstate a former employee if it would be necessary to make somebody else redundant to create a vacancy. However the application of that principle is limited by section 116(5) and (5) ERA 1996. These provide that the Tribunal must disregard the fact that the employer has engaged a permanent replacement for the dismissed employee, unless the employer shows that it was not practicable to arrange for the dismissed employee's work to be done without engaging a permanent replacement or that the replacement was engaged after the lapse of a reasonable period, without the employer having heard from the employee that he wished to be reinstated.

Submissions and Conclusions: First Claimant

74. Mr Lawson for the First Claimant submitted that he was unfairly dismissed. He relied on a number of points, in particular the Respondent's failure to inform the First Claimant, or to consult, when the proposals were still at a formative stage, failure to follow the selection criteria set out in the agreed Redundancy Procedure, and failure properly to consider the proposals made on behalf of the First Claimant by his union representatives both before and after the selection exercise. He further submitted that there was a failure to adopt a fair basis for selection, in that subjective criteria were adopted and the criteria set out in the Respondent's Procedure were not applied. In relation to the proposals made by the union to avoid or mitigate the consequences of redundancy, Mr Lawson submitted that the Respondent failed to take such steps as a reasonable employer would have taken to avoid or mitigate redundancies. Finally he submitted that the fact that the First Claimant was employed under a fixed term contract due to expire on 30 June 2016 was irrelevant in

the context that the Respondent had agreed to treat him in the same way as the other RIAs, and in particular only relied on redundancy as the reason for dismissing him. Mr Robertson for the respondent concurred in this last point.

75. Mr Robertson submitted that it was not for the Tribunal to apply its own standards; that the Respondent was faced with an urgent need to act when notified of the refusal of development funding on 6 June 2016, particularly given what he described as its precarious financial position; that objective criteria for selection were used; and that there was sufficient consultation with the affected individuals. He further submitted that the Tribunal should not re-score employees, but rather decide whether the criteria in fact used were fair and reasonable in the circumstances. He stated that the duty of an employer in relation to avoiding redundancy is to make reasonable efforts to find alternative employment, and that this had been done. Insofar as Mr Wilkes did not have authority to commit the Respondent to additional expenditure, he was in regular contact with the Chair of the Board, and was entitled to conclude that none of the proposals put by the union was appropriate.

76. In relation to remedy, Mr Lawson referred to section 116 ERA 1996 and submitted that the appointment to an RIA post made shortly before the hearing fell to be disregarded under s 116(5); the First Claimant had made known his wish to be reinstated in his claim to the Tribunal, which had been served on the Respondent in November 2016. He submitted that it was, absent this appointment, practicable to reinstate the First Claimant and that that order ought accordingly to be made. Mr Robertson opposed such an order on the ground that no vacancy to which the First Claimant could be reinstated existed; had the appointment disclosed by Mr Christie not been made, there would have had to be a redundancy within the Respondent. He also referred to the First Claimant having lost confidence in the Respondent, and Mr Wilkes in particular. Mr Robertson also submitted that if the dismissal of the First Claimant was held to be

procedurally unfair and the issue was of compensation, no compensation should be awarded applying the principles in **Polkey v A E Dayton Services Ltd [1988] ICR 142**, as a fair procedure would inevitably have led to the same result.

77. We have concluded that the dismissal of the First Claimant was unfair. We do so for the following reasons, broadly accepting the points made by Mr Lawson. Our reasons in more detail are as follows.

77.1 The Respondent failed to comply with its own Policy and Procedure in relation to redundancies. The Policy is to consult with staff and the union 'at the earliest possible opportunity' (p 243). The Procedure goes into more detail, stating that information specified in detail in the Procedure is to be disclosed to the union and affected individuals as soon as redundancies are proposed, by way of notices of potential redundancy. The information mentioned includes potential ways of avoiding or minimising redundancy, and the proposed method of selection, 'including, where relevant, the adoption of fair and objective selection criteria such as: skills, experience and aptitude, standard of work performance; attendance or disciplinary record' (p 245). The Procedure goes on to state that consultations will begin with the issue of notices of potential redundancy.

77.2 What Mr Wilkes regarded as notices of potential redundancy (although in fact they were actual notices of dismissal) were issued to the RIAs on 20 May 2016. That, at latest, was 'the earliest possible opportunity', at which point consultations should have been commenced by the provision of the information set out in the procedure. It is fairly arguable that consultation should have started even earlier, since the two managers of the Refugee Integration Service, who were entitled to three months' notice, were sent notice of dismissal

on 31 March 2016, so that the closure or partial closure of the Service in which the Claimants were employed was at least contemplated by that date. In fact no attempt to consult was made until 13 June, by which time a decision of the Board, which neither the Claimants nor their union had any opportunity to influence, had determined how far steps to minimise redundancies would be financed, and what number of jobs would in consequence be lost.

Mr Lawson referred us to the following definition of consultation, taken from a passage in **R v British Coal Corporation ex p Price [1994] IRLR 72** and quoted with approval by the Inner House of the Court of Session in **King v Eaton Ltd [1996] IRLR 199**:

'Fair consultation means: (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; (d) conscientious consideration by an authority of a response to consultation. Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matter about which it is being consulted, and to express its view on those subjects, with the consultor thereafter considering those views properly and genuinely.'

We consider that what happened failed to meet at least the first and fourth of these precepts. In particular there was no serious consultation over the method of selection. Mr Wilkes invited the union to propose alternatives, but did not attempt to engage with its request for the interviews to be postponed to enable discussion of the methods of selection to take place.

77.3 Whilst we accept that in principle it is legitimate for an employer requiring to reduce the number of employees doing

a particular job by arranging a competition for appointment to the remaining jobs, there were criteria for selection laid down in the Respondent's Policy and Procedure. A reasonable employer would apply the criteria in its own procedure unless there was a good reason not to. Mr Wilkes' evidence was only that he did not consider matching individuals to the newly created jobs was practicable; he gave no consideration at all to selecting for dismissal using the criteria referred to in the Procedure, in particular performance and experience, assessed by reference to the thorough appraisals that had been undertaken for each of the affected employees. (We note that it was not alleged in relation to the First Claimant that the interviews, or scoring system used, were as such unfair to him; this is a point to which we return in relation to the Second Claimant.)

77.4 The proposals made by the union to avoid, or mitigate the effects, of the redundancies were not made the subject of any serious consultation; each was in turn simply, if politely, rejected by Mr Wilkes. A reasonable employer would have appreciated that the union was making serious efforts to identify a solution that had as little cost, and as many potential advantages, to the Respondent as possible, including proposals that would entail financial sacrifices by the Claimants. Mr Wilkes regarded himself as constrained by the Board's decisions, to the extent that he did not consider that a proposal that would have incurred a total cost of £609 above the funds allocated, and potentially had considerable advantages for the Respondent if its grant application succeeded, in that it would have secured the retention of the services of two valued employees and avoided the cost and delay of recruiting afresh, and saved the cost of redundancy payments substantially exceeding £609, justified seeking approval for the extra cost from the Board.

77.5 Moreover in relation to the final proposal made by Mr O'Neill, which would have involved no cost at all, and was thus within Mr Wilkes' authority to accept, and which met the one specific concern raised in response to the first version of this proposal (that there might be internal candidates at risk of redundancy) Mr Wilkes, we consider that any reasonable employer would have taken up this proposal, and at least accepted it subject to sufficient funding being made available by the Big Lottery and the Big Lottery agreeing to the filling of posts created with their funds being filled in this way.

77.6 In refusing even this lifeline to the about to be dismissed Claimants, Mr Wilkes was in our judgment acting in a way no reasonable employer would have acted. We note that the two RIAs who were retained after 30 June 2016 were given permanent posts when funding became available, and that there were funds for two further RIA posts, and have no doubt that had Mr Wilkes acceded to any of the union's proposals, the First Claimant would have been in the same position.

77.7 As a separate point, the authority to accept or reject proposals at variance with the Board's decisions of 9 June 2016 remained with the Board, or possibly its chair, Ms Moodie, under delegated authority. The Board was given no opportunity to consider any of the representations made by the union. Ms Moodie's view was sought on the first set of proposals submitted on 24 June 2016, but even she was not consulted before Mr Wilkes rejected the union's final proposals made on 29 June 2016. It may be argued that there was insufficient time for Mr Wilkes to take matters to a higher level of authority, but that is simply a consequence of the Respondent's failure to initiate consultations at the point when redundancies were likely (i.e. no later than when the first notices of dismissal were issued to the Claimants on 20

May 2016), which would have enabled the union to put proposals to the Board rather than just to Mr Wilkes when he was acting under the constraints both of a Board decision and of time.

78. Each of these points individually may not be sufficient to justify a conclusion that the dismissal of the First Claimant was unfair in the statutory sense. However we are required to look at all the circumstances. It is the cumulative effect of the failures in consultation, including failures to comply with the Respondent's own procedure, the failure to follow its own procedure in relation to selection, and its failure to entertain any of the proposals made on the First Claimant's behalf to save his job, which lead us to the clear conclusion that the Respondent acted in a way outwith the range of reasonable responses of a reasonable employer.

79. In reaching this conclusion we have taken into account the fact that the First Claimant did not appeal against the decision to dismiss him, thus depriving the Respondent of the chance to correct the unfairness of his dismissal. However, we also bear in mind that he was not offered the facility of an appeal: the final letter of dismissal did not even mention the right of appeal. Additionally, we consider that the way in which the Second Claimant's appeal was handled removes any basis for thinking that an appeal by the First Claimant might have been handled in such a way as to cure the unfairness's.

80. We have also taken into account two further points made in Mr Robertson's submissions. He submitted, under reference to the case of **Rogers v Slima plc UKEAT/0186/06** that there are no prescribed timescales for consultation in redundancy cases; thus a seven day period was held sufficient in **Rogers**. We accept the point, but it in turn misses the point that consultation did not take place at the earliest opportunity. This is not a technical point; the fact that by the time consultation was initiated, the Board of the Respondent had taken a decision which Mr Wilkes treated as limiting his authority,

robbed the consultation of much if not all of its substance as an opportunity for the Claimants and their representatives to influence the outcome for their position.

81. Mr Robertson's second point is that the Tribunal should not re-score employees (under reference to **British Aerospace plc v Green [1995] IRLR 433** and several cases which have followed it). Again we accept the point, and have not attempted to do so. In the First Claimant's case there is no issue as to the fairness of the conduct or scoring of the interviews; there is an issue as to the fact that the method of selection adopted did not follow those specifically referred to in the Respondent's procedure. We are not in a position to say what the outcome might have been had the Respondent made a selection based on assessments of past performance via appraisals, for instance. We consider that a reasonable employer would not simply have ignored the option of this method of selection, given its commitment to use it. This issue is in any case of more importance in relation to the Second Claimant's case, as we explain below.

Remedy: First Claimant

82. Having found the dismissal of the First Claimant to be unfair, we turn next to remedy. We are required first to consider the First Claimant's request for an order for reinstatement. As reinstatement has been requested, and there is no issue as to the First Claimant having contributed to his dismissal, the only remaining question for us to consider under section 116(1) ERA 1996 is whether reinstatement would be practicable. If there is no vacancy, and it would be necessary to dismiss another employee in order to make room for the reinstated employee, reinstatement would not be practicable. However the statutory provisions require us in certain circumstances to disregard any appointment made after the Respondent was on notice of the request for reinstatement.

83. This in our view is just such a case. Mr Christie confirmed that there was a vacancy for a RIA which was filled in April 2017. The

Respondent has been on notice of the First Claimant's wish to be reinstated since November 2016. Mr Christie did not in his evidence suggest that it was not practicable to arrange for the First Claimant's work to be done without making a permanent appointment. The fact that the person appointed was at risk of redundancy from his then post did not necessitate that he was appointed permanently to the position. Nor was there any evidence as to whether the risk of redundancy had since materialised. The evidence given by Mr Christie does not in our view go so far as to show that the conditions in section 116(6) are fulfilled; it follows that in this case section 116(5) apples and we are required to disregard the appointment made and treat the post of RIA as available. It is therefore in our view practicable for the Respondent to reinstate the First Claimant.

84. Insofar as the remedy is a matter of discretion, there are no factors which in our judgment point against making an order for reinstatement. The First Claimant was a well-regarded employee whom the Respondent would undoubtedly have retained had the Big Lottery funding awarded in August 2016 been awarded in June. Mr Robertson submitted that the First Claimant had lost trust in the Respondent, and in particular Mr Wilkes, and sought reinstatement only for financial reasons. We consider this to be a misrepresentation of his evidence, which was that he had enjoyed his job, and sought reinstatement for financial reasons (in our view a perfectly legitimate reason) and because Mr Wilkes was no longer employed by the Respondent. To the extent that the First Claimant had lost confidence in Mr Wilkes, his departure made that irrelevant to the practicability of the reinstatement of the First Claimant.

85. We also bear in mind that the judgment that reinstatement would be practicable is in effect provisional. If the Respondent finds that it is not practicable, and the order for reinstatement is not carried out, the matter will come back to us for a decision based on the Respondent's evidence as to why it was not practicable to comply with the order, rather than our expectation that it will be practicable.

86. We therefore order the Respondent to reinstate the First Claimant in the post of Refugee Integration Adviser. The order is to be complied with by 31 July 2017. Section 114(1) ERA 1996 provides that the effect of an order for reinstatement is that the employer must treat the complainant in all respects as if he had not been dismissed. Accordingly the terms on which the First Claimant is to be reinstated are that it must be on the salary and other terms and conditions applicable to his post immediately before 30 June 2016 and with the benefit of any improvement in terms and conditions or benefits applicable to the post of Refugee Integration Adviser that may have occurred since 30 June 2016, any increase in salary and any increment which would have become payable for length of service had the First Claimant remained in the employment of the Respondent. Additionally, the Respondent must readmit the Claimant as a member of its pension scheme and credit him with pensionable service backdated to 1 July 2016, and make such employer and employee contributions to the scheme as may be required to secure the crediting of such service.

87. Section 114(4) further requires the Tribunal to award such sum as the First Claimant would have received (net) had he remained in the employment of the Respondent, less such sums (again net) as received by the First Claimant as wages in lieu of notice, remuneration from other employment, and such other benefits as the Tribunal thinks appropriate in the circumstances. We consider it appropriate that both the statutory redundancy payment and the additional ex gratia payment made to the First Claimant are brought into account under this last provision, so that everything paid to the First Claimant on or after dismissal is set off against the net pay he would have received had he remained employed, in addition to his net earnings and the Employment Support Allowance he received for a period when he was in between jobs.

88. The First Claimant provided us with an updated Schedule of Loss, the figures in which were not in dispute. This shows that his net pay

at the time of dismissal was £378.00 a week. As he was paid in lieu of four weeks' pay on dismissal, the period of his loss is from 29 July 2016 to 30 July 2017, a period of 52 weeks and three days. The total net loss is therefore £(378.00 x 52 3/7) = £19,818.00.

89. From this sum the following require to be deducted:

Statutory and ex gratia redundancy pay: £2,959.38 (see p 180).

Earnings from Royston Youth Action, 8 August 2016 to 7 November 2016: £2,792.28.

Earnings from NHS, 14 November 2016 to 10 January 2017: £2,233.86.

Employment Support Allowance, 16 January 20167 to 16 February 2017: £365.50.

Earnings 17 February 2017 to 30 April 2017: 10 weeks 3 days at £179.38 a week: £1,870.68.

Earnings 1 May 2017 to 30 July 2017: 13 weeks at £270.17 a week: £3,512.21.

The total payable by the Respondent for the First Claimant's shortfall in net income is therefore £19,818.00 - £(2,959.38 + 2,792.28 + 2,233.86 + 365.50 + 1,870.68 + 3,512.21) = £6,084.09.

90. We therefore order the Respondent to pay the net sum, after statutory deductions, of £6,084.09. This does not take into account any increase in pay which the First Claimant would have received had he remained employed by the Respondent (as to which we had no evidence). Any such sums are additional to the sum of £6,084.09.

91. Before leaving the question of remedy for the First Claimant we need to address one other submission of Mr Robertson. He submitted that any compensation for the First Claimant should be reduced to nil, applying the principles in **Polkey**, on the ground that had any

procedural unfairness been avoided, the outcome would inevitably have been the same. There are in our view two answers to this point. The first is that there is no room within the statutory provisions on reinstatement for the application of a principle which applies to the compensatory award. The provisions governing the terms of an order for reinstatement in section 114 ERA 1996 are mandatory, and are designed to restore the position to what it would have been if the employee had not been dismissed, so far as can be achieved by money. There is no room in this for taking account of the chance that the employee might have been fairly dismissed had the employer followed a fair procedure.

92. The second answer is that it is for the employer to show that the employee would or might have been fairly dismissed had a fair procedure been followed. Mr Robertson's assertion of this is not supported by the evidence. We simply do not know what the position might have been if the RIAs and the union had been consulted timeously, and in particular before the Board meeting on 9 June 2016. More significantly, we consider that a reasonable employer would have responded more positively to the union's final alternative proposal on 24 June 2016 (see pp 134E-H, third alternative); if the Respondent had done so, the First Claimant would have retained his job. Moreover if, as we consider a reasonable employer would have done, the Respondent had accepted the union's final proposal made on 29 June 2016, the Claimant would have been re-employed with continuity of employment from September 2016. The premise for Mr Robertson's submission is therefore not well-founded.

Relevant law: Second Claimant

93. We consider first the Second Claimant's claim of unfair dismissal. The law of 'ordinary' unfair dismissal is summarised at paragraphs 66-72 above, and we need not repeat the summary here. However, it is also necessary to summarise the law relevant to the Second Claimant's primary claim, which is of automatically unfair dismissal

under section 99 ERA 1996. Section 99(1)(b) provides that as dismissal is automatically unfair if it occurs in 'prescribed circumstances'. The relevant prescribed circumstances are set out in Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 ('MAPLE 1999'). Regulation 20(1)(b) provides that a dismissal is automatically unfair for the purposes of section 99 if the reason or principal reason for the dismissal is redundancy, and regulation 10 has not been complied with.

94. Regulation 10 applies if during the 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. In that event, where there is a suitable vacancy, the employee is entitled to be offered alternative employment under a new contract offering suitable work and under not substantially less favourable terms and conditions of employment.

95. Regulation 7(1) of MAPLE 1999 provides, subject to provisions not material in this case, that the ordinary maternity leave period is 26 weeks from its commencement. Regulation 7(4) provides, again subject to immaterial exceptions, that the additional maternity leave period continues for 26 weeks from the day on which it commences (which is the day immediately following the end of her ordinary leave). The regulation does not provide for the period to come to an end at an earlier date if the employee returns to work before the last date on which she would be entitled to return from additional maternity leave. It was made clear by the EAT in **Sefton Borough Council v Wainwright [2015] ICR 652** that the obligations imposed by regulation 10 apply once the employee's position is redundant, applying the statutory definition in section 139 ERA 1996, that is, when the employer's requirements for employees to perform work of a particular kind have ceased or diminished or are expected to cease or diminish.

96. Turning to the Second Claimant's claims under the Equality Act 2010 ('EqA 2010), her first claim is under section 18(2), read together with section 39 (which makes discrimination by way of dismissal or subjection to a detriment unlawful). Section 18(2) provides that a person discriminates against a woman if during the protected period in relation to a pregnancy of hers, he treats her unfavourably because of the pregnancy. The protected period is defined by section 18(6) as beginning when the employee's pregnancy begins and ending, if she has the right to ordinary and additional leave (as was the case for the Second Claimant) at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy.

97. In this case it is common ground that the additional maternity leave period for the Second Claimant ended at midnight between 19 and 20 June 2016 (52 weeks after her maternity leave commenced). The critical issue determining whether she can rely on section 18(2) is whether she 'returned to work' on 12 May 2016, the date notified as her date of return, notwithstanding that she did not physically return to work but commenced a period of annual leave, which was scheduled to continue until 4 July 2016, by which date she had been dismissed.

98. Section 18(5) EqA 2010 provides that for the purpose of section 18(2), if the treatment of a woman is in implementation of a decision taken during the protected period, the treatment is to be regarded as occurring within that period even if its implementation does not occur until the period has ended.

99. Section 18(4) EqA 2010 provides that a person also discriminates against a woman if he 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. This is not limited, as is section 18(2), to discrimination occurring during the protected period.

100. There is no provision in the EqA 2010 for indirect pregnancy discrimination. However the Second Claimant also claims indirect sex discrimination, which is defined in section 19 as occurring where a person applies to the complainant a provision, criterion or practice ('PCP') which is discriminatory in relation to her gender. This is so if the PCP is or would be applied to men, puts or would put women at a particular disadvantage when compared to men, and puts or would put the complainant to that disadvantage. This is subject to the possibility of justification, if the discriminator shows the PCP to be a proportionate means of achieving a legitimate aim.

101. Under section 136 EqA, if there are facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned, the Tribunal must so find, unless the respondent shows that it did not contravene the provision. This is in effect a reversal of the burden of proof, but subject to an initial burden of proof on the complainant to show sufficient facts that the Tribunal could properly infer discrimination in the absence of rebutting evidence from the respondent.

102. In the event that the Tribunal finds that the employer has discriminated unlawfully, the remedies available to the Tribunal, in addition to a declaration to that effect, include the award of compensation for injury to feelings, subject to evidence that the complainant has suffered such injury. Guidance as to the amount that it is appropriate to award in that event is given by the decision of the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] ICR 318.** We refer below to the bands proposed by the Court in that case. These were expressed in money values applicable at the time of the discrimination in that case, namely December 1997, and the tribunal is entitled to adjust those bands for changes since then in the value of money. The Retail Prices Index for December 1997 was 160.0; this had increased by June 2016 to 263.3, an increase of 65%.

Submissions and Conclusions: Second Claimant

Unfair dismissal

103. We address first the claim of automatically unfair dismissal. As noted above, the maternity leave period for the Second Claimant was 52 weeks from the date on which she commenced leave, 22 June 2015. It was not shortened by her bringing forward the end of the leave to 12 May 2016. Regulation 10 MAPLE is engaged if during an employee's 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. We find that at latest on 20 May 2016, when the Respondent sent the Second Claimant a letter giving notice of dismissal by reason of redundancy, with attached information about the redundancy payment she would receive when the notice took effect on 30 June 2016, the condition in regulation 10(1) was satisfied. The contrary was not submitted by Mr Robertson. (His submissions on this issue were based on the maternity leave period having ended when the Second Claimant's additional maternity leave ended on 12 May 2016, but this submission overlooked the effect of regulation 7, and is for that reason misconceived.)

104. On 9 June 2016, still within the maternity leave period, the Respondent's Board decided to create two temporary posts of RIA to run for two months from 1 July 2016, with the expectation that if the application for Big Lottery funding was successful the posts would be converted to continuing posts. We find that each of these posts was suitable alternative employment. They were for the purpose of doing the same job, and on the same terms, as the posts of RIA one of which the Second Claimant occupied. Moreover, insofar as it is for the employer to judge whether a post is 'suitable alternative employment', the fact that the Respondent arranged a competition for the two posts, and the Second Claimant was one of those permitted to compete, makes it inevitable that we find that the Respondent did

so consider the new posts. In his written submissions Mr Robertson asserted as an esto position that there were no suitable vacancies, but his reason for this appears to be that the posts were not created until the Board meeting on 9 June 2016, which was (notwithstanding his submission to the contrary) within the maternity leave period as defined in regulation 7.

105. In these circumstances regulation 10 creates an obligation of positive discrimination. Such a provision is rare in our law of discrimination, but Parliament has chosen to recognise the disadvantages in the workplace which pregnancy and absence on maternity leave can cause, and has decided to give women in such situations a compensating advantage, namely the right to be offered suitable alternative employment if this is available, without regard to the possibility that others at risk of redundancy may have a stronger claim to the position in question.

106. The consequence of regulation 10 applying is that the Respondent was obliged to offer the Second Claimant one of the two RIA posts available from 1 July 2016. It did not do so. The consequence of that is that regulation 20(1)(b) applies: the reason for the Second Claimant's dismissal was redundancy, regulation 10 was not complied with, and accordingly she is entitled, using the wording in regulation 20(1), to be regarded for the purposes of Part X ERA 1996 as unfairly dismissed. Accordingly we find that the Second Claimant was unfairly dismissed.

107. It is not necessary for us to make findings on the Second Claimant's alternative case that she was unfairly dismissed applying the test in section 98(4) ERA 1996. We consider it appropriate however to indicate that we would have found the dismissal of the Second Claimant to be unfair on this basis also. In large part, our reasons are the same as for the First Claimant: the same failures of the Respondent applied equally in her case as in his.

108. There are however two additional factors in the Second Claimant's case. The first is that the Respondent failed to take adequate steps to ensure that the interview process did not unfairly disadvantage the Second Claimant by reason of her having been absent from the workplace for a year. We return in more detail to this in the context of the Second Claimant's claim of indirect sex discrimination.

109. The second matter is the Second Claimant's appeal. A fair appeal may cure the unfairness of the process leading to a dismissal. The leading case of **Taylor v OCS Group Ltd [2006] IRLR 613** establishes that there is no particular requirement as to the form of the appeal; rather the question is whether the procedure as a whole, including the fact and conduct of the appeal, was such that the employer acted within the range of reasonable responses open to a reasonable employer.

110. In this case there were several features of the appeal which served to aggravate, rather than cure, the unfairness of the procedure which had led to the Second Claimant being dismissed. the decision to dismiss had been taken by Mr Wilkes, the Chief Executive. The appeal was heard by Mrs Cameron, who reported to him. She had neither experience of nor training in the conduct of appeals. Her only source of HR advice was Ms Wilkie, who was in addition to her HR role Mr Wilkes' PA.

111. We recognise and take into account that the Respondent is a relatively small organisation, with commensurate resources. However, it would not have been difficult to arrange for a member of the Board to hear the appeal; indeed this is specifically envisaged in the Respondent's Grievance Procedure where a senior employee is the aggrieved person. We consider that any reasonable employer structured as the respondent is would have taken the simple step of ensuring that an appeal against dismissal was heard by a person or persons with a level of authority sufficient to enable them to afford an effective remedy to the appellant if the appeal succeeded.

112. Whilst Mrs Cameron stated in evidence that she would if she considered it appropriate have allowed the appeal, she also indicated that she did not appreciate that she had the power to reinstate the Second Claimant. Since that was the purpose of her appeal, the appeal process can only be described as little more than a sham. We are also unpersuaded that she had the confidence needed to overturn her line manager's decision.

113. The conduct of the appeal also raises significant concerns. Mrs Cameron's decision rejected the Second Claimant's arguments that the process, and the questions asked at her interview, had placed her at a disadvantage; however when pressed on this in cross-examination she accepted that the Second Claimant was indeed disadvantaged by the fact of her absence, specifically in answering question 8. Mrs Cameron relied in her decision on the fact that the Second Claimant had not made known at the time of the interview the issues concerning her own and her child's health, but declined to reconsider the outcome in light of the information given to her by the Second Claimant on these matters at the appeal hearing.

114. The clear impression we were given by Mrs Cameron's evidence was that her sole concern in deciding the appeal was whether correct procedures had been followed; but even by that measure she failed, in that she failed to appreciate the ways in which the Respondent had failed to follow its own Policy and Procedure (as we have detailed in our findings with respect to the first Claimant's case).

115. In addition, by the time the appeal decision was issued on 26 August 2016, the Respondent, and specifically Mrs Cameron, was aware that the Big Lottery application had been successful and new RIA posts would therefore be available, but gave no consideration to whether the Second Claimant might be given one of these posts; her only explanation for this was that by that time the Second Claimant was no longer an employee.

116. For these reasons we would have found the dismissal of the Second Claimant to be unfair applying the test in section 98(4) ERA 1996; so far from being curative of earlier procedural defects, the appeal served to underline them.

Unfair dismissal: remedy

117. We therefore turn to remedy. The Second Claimant initially sought reinstatement, but following her success in finding another job she no longer seeks this remedy. We therefore have to consider compensation. There is no basic award in this case, as it is agreed that the statutory redundancy payment made to the Second Claimant cancels out her claim to a basic award. The issue is therefore what compensatory award should be made under section 123 ERA 1996.

118. The amount of the Second Claimant's net loss taking into account loss of her net salary from the Respondent and the value of the employer pension contributions, and the net earnings received and expected to be received from her new employment, for the period from the Second Claimant's dismissal to the end of August 2018 (when Big Lottery funding is due to end) were substantially agreed between the parties. Before setting the figures out and explaining our conclusions, however, it is necessary to address a number of submissions made by the Respondent, each to the effect that the compensatory award should be reduced.

119. The Respondent first submitted that there should be a **Polkey** reduction of 100% in the compensatory award on the basis that a fair procedure would have led inevitably to the same result, namely dismissal. This submission falls away in the face of our finding that the dismissal was automatically unfair. We also consider that it has no merit in relation to our alternative conclusion that the dismissal of the Second Claimant was unfair under section 98(4). The onus is on the Respondent to show the probability, or degree of possibility, that if a fair procedure had been followed the Second Claimant would still have been dismissed. It is in our view highly unlikely that the Second

Claimant would have been dismissed had there been timeous consultation with the union before the Board meeting of 9 June 2016, or if Mr Wilkes had given the consideration we consider that a reasonable employer would have given to the proposals put by the union both before and after the interview process, or if a method of selection consistent with the Respondent's own policy had been followed; and it cannot be said with any certainty what would have happened if the second Claimant's appeal had been competently dealt with by someone with sufficient authority to direct her reinstatement if the appeal had succeeded.

120. Mr Robertson next submitted that the Second Claimant had failed to take reasonable steps to mitigate her loss. In his written submissions he argued that because she had failed to look for better paid work after obtaining a job in October 2016, her compensatory award should be nil. We regard this as an extravagant submission. In his oral submissions Mr Robertson was more restrained. He did not argue that she could or should have done more to find another job before she did so (her new employment started on 3 October 2016, three months after her dismissal). Rather, he pointed to the fact that her net pay in the new job was initially £94.11 a week less than her pay from the Respondent. He argued that she should have actively applied for other jobs paying a better salary, and that had she done so, she would have found a job paying as well as the RIA job within three to six months of October 2016, and that compensation for continuing loss after October 2016 should be limited accordingly.

121. It is for the Respondent to establish on the balance of probabilities that a Claimant has acted unreasonably in failing to mitigate his or her loss. The Second Claimant's evidence was that she continued to look for better paid jobs after she secured her present job in October 2016, but that she did not find anything suitable. The Respondent adduced no evidence of any potentially suitable jobs paying more than the Second Claimant's new salary for which she could have been expected to apply. In addition, Mr Robertson did not suggest

that it was unreasonable of the Second Claimant not to apply for the RIA posts advertised by the Respondent in the autumn of 2016.

122. We are not persuaded that the Second Claimant acted unreasonably in not applying for better paid jobs after October 2016. There is no evidence that there were any such jobs for which she could realistically have applied. She also had a child under two to care for, and would have needed to work a pattern of hours compatible with what could reasonably be arranged for childcare. Moreover, in April 2017 she received a promotion and increase in salary, and was reasonably entitled to consider that this indicated that her current position was reasonably stable.

123. However we do accept that the Second Claimant could not expect to sit on her hands indefinitely in a less well paid job, without taking steps to find better paid work. We consider that a reasonable period of time, after which the Second Claimant can be expected to have found work at a comparable salary to that paid by the Respondent, would be until the end of 2017. We therefore limit the period of her loss of pay to that period.

124. Finally Mr Robertson submitted that the Second Claimant should not be able to recover for loss of employer pension contributions after the end of 2016. After three months in her new job she became entitled to join her new employer's pension scheme, but opted out almost immediately on cost grounds. We consider that had she acted reasonably she would have mitigated her loss to the extent possible by becoming a member of her new employer's pension scheme, and that her pension loss should be limited to the period from her dismissal to 31 December 2016.

125. Accordingly we conclude that the Second Claimant should receive a compensatory award which covers the net loss of salary from 1 July 2016 to 31 December 2017, credit being given, by agreement, for the pay in lieu of notice and ex gratia additional redundancy payment she received on dismissal, and her net earnings during the period 3

October 2016 to 31 December 2017. In addition she should be compensated for the value of the respondent's pension contributions for the period 1 July 2016 to 31 December 2016. She is also entitled to compensation for loss of statutory rights. Mr Lawson claimed £400 for this, without opposition from Mr Robertson, and we award that amount.

126. The calculations to give effect to the foregoing are as follows. The Second Claimant's net pay prior to dismissal was £427.03 a week. The period 1 July 2016 to 31 December 2017 is 78 weeks and three days. Her total net loss of salary before setting off credits to be given is therefore £(427.03 x 78 3/7) = £33,491.35. From this are to be deducted:

Pay in lieu of notice (net): 4 weeks at £427.03 a week = £1,708.12

Ex gratia payment: £2,170.25

Earnings 3 October 2016 to 19 April 2017: 28 weeks 3 days at £332.92 a week = £9,464.44

Earnings 20 April to 31 December 2017: 36 weeks and 3 days at £366.37 a week = £13,346.34

Total credits are therefore £(1,708.12 + 2,170.25 + 9,464.44 + 13,346.34) = £26,689.15.

Net loss of pay is therefore £(33,491.35 - 26,689.15) = £6,802.20.

127. Pension loss is agreed at £48.08 a week. This continued from 1 July 2016 to 31 December 2016, a period of 26 weeks and two days; loss is therefore £(48.08 x 26 2/7) = £1,263.82.

128. To this must be added £400.00 for loss of statutory rights, giving a grand total of £(6802.20 + 1,263.82 + 400.00) = **£8,466.02**. This is therefore the amount we award by way of compensatory award.

129. The Recoupment Regulations apply, as the Second Claimant received Jobseeker's Allowance during the period she was unemployed in 2016. For this purpose the prescribed period is from 1 July 2016 to 21 April 2017 (the date of the commencement of the hearing). The prescribed amount (the net loss of earnings attributable to that period) is £(17,934.84 - 1708.12 - 2,170.25 - 9464.44 - 104.68) = **£4,487.35**.

Pregnancy discrimination

130. We turn next to the Second Claimant's claims of pregnancy discrimination. We take first the claim under section 18(2) EqA 2010. As we have noted in setting out the relevant law, section 18(2) only applies to discrimination committed during the protected period, which ends when the employee 'returns to work'. There is an extension to the scope of section 18(2) by the effect of section 18(5), which applies where the treatment complained of occurs after the protected period but is in implementation of a decision taken during the protected period.

131. The discrimination complained of is the arrangements made for selecting which of the four RIAs should be offered the two temporary posts created by the Board on 9 June 2016, to come into effect on 1 July 2016. The decision to use the method of selection adopted was taken on or immediately before 13 June 2016. The Second Claimant's protected period ended either on 19 June 2016, when her additional maternity leave period was originally due to end, or on 12 May 2016, the earlier date she notified as the date on which she would return to work. In the first case, section18(5) would bring the conduct of the interviews on 20 June 2016 within the scope of section 18(2) by virtue of the extension made by section 18(5). In the second case, section 18(2) would not apply, and section 18(5) would make no difference. It is therefore critical to this claim whether on 12 May 2016 the Second Claimant 'returned to work' within the meaning of that phrase as used in section 18(6).

132. Mr Lawson submitted that the protected period continued until the end of the Second Claimant's maternity leave period, and relied on regulation 7 MAPLE 1999 as establishing that that was the full period of her entitlement to ordinary and additional maternity leave. However regulation 7 of MAPLE does not purport to govern the meaning of section 18(6) EqA, unsurprisingly since it predates the EqA by 11 years. The wording of section 18(2) includes the express qualification that the protected period ends with the employee's return to work, if earlier than would otherwise be the end of the period. That must be given *some* meaning; at the least it must mean that if the employee physically returns to the workplace and resumes working, the protected period ends. In that respect reg 7 MAPLE may be regarded as anomalous, in that it expressly defines the maternity leave period as covering the whole period of entitlement, without regard to whether the employee returns to work earlier than the law requires. Insofar as that is an anomaly, it is for Parliament, not this Tribunal, to correct it, and it cannot affect the meaning of the differently worded provisions of the 2010 Act.

133. We have concluded that the Second Claimant returned to work on 12 May 2016, and that therefore her claim is outwith the reach of section 18(2), even with the benefit of the extension to its scope made by section 18(5). The meaning of 'returns to work' has not been the subject of any authority of which we are aware or to which we have been referred. We are therefore faced with the simple question whether it is necessary, for there to be a return to work, that the employee actually returns physically to the workplace and resumes her work, or whether it is sufficient that the date which she has notified as the date of her return to work arrives, she is placed back on the employer's payroll and begins to receive her salary, but she immediately commences a period of annual leave (or sick leave: we see no difference between the two situations).

134. In answering this question we consider that two factors point strongly in favour of return to work occurring on the earlier date. The first is

that this is the date on which the employee has told her employer that she will return to work. The exercise of her right to take accrued annual leave is only available because she has at that point returned to work; to take annual leave whilst still on maternity leave would be a contradiction in terms. Secondly, it is from this date that she is entitled to be paid her usual salary. Prior to returning to work, whilst she is on maternity leave, she is not entitled to salary, but only to such statutory or contractual maternity pay, if any, as may be due at that point in her maternity leave. It appears to us natural to equate the period during which special protection is afforded against discrimination on pregnancy grounds with the period during which the employee's status is that of a woman on maternity leave, and we consider it more probable that that is what Parliament intended.

135. This is in our view reinforced by the additional protection given against detrimental and discriminatory treatment occurring after return to work but which had been decided on during the maternity leave period, and the more focussed prohibition on discrimination in section 18(4) in relation to which there is no limitation that it must occur during the protected period.

136. We therefore find that the claim of discrimination made by the Second Claimant, that she was unfavourably treated by the Respondent in the arrangements it made for selection for the new RIA posts because of her pregnancy, is not justifiable by reason that the relevant statutory provision, section 18(2) EqA 2010, did not apply at the material time; nor is this affected by operation of section 18(5). This claim is accordingly dismissed.

137. We consider next the claim under section 18(4) EqA 2010. The Second Claimant's claim here is that in the arrangements made to select for the two newly created RIA posts, and in not selecting her (thereby leading to her dismissal), the Respondent treated her unfavourably because she had exercised her right to take maternity leave. As noted above, this provision applies whenever the

discriminatory treatment occurs, albeit the longer the period after a woman's maternity leave the less easy it will be to demonstrate the connection.

138.. It is plain to us that the Second Claimant was unfavourably treated, in being put through an interview in which she was disadvantaged as someone who had not been at work for the preceding year, and had not been accorded access to the Respondent's client database. She was less well equipped because of each of these factors to perform well in the interviews, and she suffered the consequence of not being one of the two best performers, and thus not being selected for one of the two vacancies. As Mr Lawson pointed out in his submissions, 'unfavourable treatment' is not defined in the statute; but we consider its meaning to be the ordinary meaning of the words, and have no doubt that the Second Claimant suffered unfavourable treatment by being rejected for the vacancies and in consequence losing her job.

139. This takes us to the critical question whether the unfavourable treatment was 'because' the Second Claimant had taken maternity leave. (We interpolate that it is not whether the treatment was because of her recent pregnancy: that would fall within section 18(2).) The question can best be put as whether the fact of the Second Claimant having availed herself of the right to take maternity leave had had a significant influence on the minds of those who subjected her to the unfavourable treatment: see in particular **Nagarajan v London Regional Transport [1999] ICR 877**. We are attracted to the advice given to Tribunals by Lord Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** that rather than assessing whether there are sufficient facts to cause the reversal of the burden of proof, the Tribunal should simply address the question why the Respondent did that which amounted to unfavourable treatment of the employee.

140. However before attempting to answer that question we must address a point raised by Mr Lawson's submissions. He submitted that the

question was one of the conscious or unconscious mental processes of the alleged discriminator (a point we readily accept), but went on to address this on the basis that it was the members of the interviewing panel whose mental processes we required to consider. He pointed out that the Tribunal had heard no evidence from any of the panel, asserted that the Second Claimant had shown sufficient facts to trigger the reversal of the burden of proof, and relied on the absence of evidence from the panel as leading to the conclusion that the Respondent had not satisfied the burden on it.

141. We consider that this argument over-simplifies the position, and directs its fire at the wrong target. It was the fact of a requirement to pass through a competitive interview process at all which constitutes the basis for the complaint of unfavourable treatment. There is no evidence that any members of the panel treated the Second Claimant any less favourably than the other interviewees, or were biased against her because she had been on maternity leave. On the contrary, one of the two successful interviewees was due to commence maternity leave almost immediately after the interviews, and there was evidence that the external member of the panel was unaware that she had been on maternity leave.

142.. We consider that the person whose mental processes are most relevant is Mr Wilkes, who took the decision to select the two RIAs who would be appointed to the posts authorised by the Board by setting up a competitive interview process. We are clear that he intended this to be fair to each of the candidates. The reason why he adopted this method of selection was first because he failed to consider the methods set out in the Respondent's Policy and Procedure - but out of negligence rather than any animus towards the Second Claimant - and secondly because he considered matching not to be practicable - a legitimate judgment since all four employees had the same duties and would therefore have been equally matched to the new posts.

143. Indeed the Second Claimant's real (and as we explain below, legitimate) grievance was that the Respondent, through Mr Wilkes, failed to take into account the consequences for her prospects in an interview of the Second Claimant's absence over the preceding year. It was the failure to ensure that the selection procedure did not unfairly disadvantage her that is the Second Claimant's real complaint. That is not a complaint encompassed by an allegation of direct discrimination because of having been on maternity leave. The answer to the question why the Second Claimant received the treatment of which she complains is that the Respondent required to select two out of four employees for the two posts which would be available after 30 June 2016, and chose to make the selection by competitive interview. That decision was not influenced, consciously or subconsciously, by the fact that the Second Claimant had been on maternity leave. Nor is there any reason to conclude that any of the panellists was influenced against the Second Claimant because she had been on maternity leave. The scores she received represented her performance. That her performance was less good than that of the successful interviewees was at least in part because she was less well prepared to address some of the questions, because she had been absent for a year, and was not able to illustrate her answers by reference to current or recent clients. But that is not why the Respondent chose this method of selection.

144. If this matter is approached applying the test in section 136 EqA 2010 as to the reversal of the burden of proof, we would have serious reservations as to whether sufficient facts have been shown that, in the absence of an explanation, would entitle the tribunal to infer that the unfavourable treatment of which the Second Claimant complains was because of her recent maternity leave. the facts that she had been on maternity leave until 12 may 2016 and that she had to undergo an interview in which she was at a disadvantage because she had not been at work for the past year, in combination, would not in our view justify the drawing of an inference that the method of

selection for the RIA posts was chosen because she had been on maternity leave.

145. Even if the circumstances were sufficient to cause a reversal of the burden of proof, the fact that another employee, Ms Kaminska, who it was known was about to go on maternity leave, was successful in the interview process would be in our view compelling evidence that the process was not designed or intended to disadvantage the Second Claimant because she had been on maternity leave. We repeat that there is no basis for thinking that the Second Claimant's scoring was influenced to her detriment by the fact that she had been on maternity leave; indeed one of the interviewers had not been aware of this. Her real complaint is that the interviews as structured placed her at an inherent disadvantage. However we are satisfied from the evidence given by Mr Wilkes that this was not his intention in devising the selection process: his choice of competitive interviews was an honest, if misguided, attempt to be fair as between the four contenders for the two posts. Therefore even if there had been grounds for the reversal of the burden of proof, we would have held that the Respondent had discharged that burden.

146. This claim of direct discrimination therefore fails, and we dismiss it.

Indirect sex discrimination

147. The final claim which we have to determine is a claim of indirect sex discrimination, under reference to section 19 EqA 2010. The Second Claimant's complaint is that the Respondent applied a provision, criterion or practice ('PCP') which put her at a disadvantage, and put, or would put, other women at that disadvantage. The PCP, as formulated in Mr Lawson's submissions, is 'the competitive interview process that the Respondent implemented in relation to the [RIA] roles'. In order to be offered one of the posts, and thus avoid being dismissed for redundancy, the Second Claimant had to perform sufficiently well in the interviews to achieve either the highest or

second highest scores. It is not disputed that the Second Claimant was indeed subjected to the PCP as thus formulated.

148. Mr Robertson submitted that the Second Claimant was not disadvantaged by the interview process due to having been on maternity leave. This however is a question of fact, and we have already recorded at paragraph 38 above our finding that she was disadvantaged. Specifically, she scored relatively poorly on question 8 in particular, and we accept that this was because she was unable to flesh out her answer by reference to clients with whom she had had recent dealings, because there were none, owing to her absence from the workplace for the preceding year. (We have set out the wording of question 8, and also question 4, which was more difficult for her to answer without recent experience of performing her work, at paragraph 38 above.)

149. The particular disadvantage that the Second Claimant suffered was that it was more difficult to perform well (particularly on questions 8 and 4) as a consequence of having been on maternity leave. This of course is a circumstance inextricably linked with her sex. In terms of scoring, she was placed third, with 142.5 points, compared with 147 for the second-placed candidate, and as a result was not offered one of the new posts and was dismissed.

150. The real point of dispute in this case (albeit not addressed by Mr Robertson in his submissions, as he rested his case on disputing that there was any disadvantage to the second Claimant) is whether the PCP applied to the four RIAs put or would put women to a particular disadvantage. This is a question we have found particularly difficult to resolve, because of the necessarily limited evidence that can be derived from the actual application of the PCP to only four people. Mr Lawson put forward a statistical analysis based on the percentages of the interviewees who had recently been on maternity leave, but this is a flawed approach because the protected characteristic is not pregnancy, or having been on maternity leave, but being female.

However the absence of relevant statistics should not, under the updated definition of indirect discrimination in the EqA 2010, be a barrier to a conclusion that those sharing a protected characteristic would be put to the particular disadvantage to which the PCP put the particular claimant.

151. We take into account in approaching this point a number of factors. The first is that only women will have been absent for an appreciable period on maternity leave. (Whilst it is true that men now have rights to shared parental leave, it is well known that the level of take up of this facility has to date been minimal.) We have no evidence of the number or percentage of women (or more particularly of female employees) who, at any particular point in time, are or have just been on maternity leave. We also appreciate that both male and female employees may be absent from work for an extended period due to long term sickness or having sustained a serious injury; again we have no statistics to assist us.

152. Having noted those points, however, we consider it highly likely that the proportion of women who would suffer the disadvantages which flow from having been away from the workplace for several months is significantly greater than that of men, and that that is because only women need to take maternity leave. The question is not just how many, or what proportions of, men and women were in fact disadvantaged by the PCP, but how many or what proportion were or would be so disadvantaged.

153. We have found assistance in answering this in the decision of the Court of Appeal in **London Underground Ltd v Edwards [1999] ICR 494**. This was a case under the Sex Discrimination Act 1975, but it is well established that the slightly different formulation of indirect discrimination in the EqA 2010 is not intended to apply any less widely than that in the 1975 Act. In the **Edwards** case there were 21 female tube train drivers, and some 2,000 men. A new shift system was introduced. All of the men could comply with the requirement to

work to the new shift times. All but one of the women also could do so, but Ms Edwards, a single mother, could not. The Court upheld a finding under the then test that a considerably smaller proportion of women than men could comply with the requirement (what would now be referred to as the PCP) of working the new shift rosters. The Court indicated that it was not appropriate to draw a line defining the margin within, or threshold beyond, which, in relation to small percentage differences, the lower percentage should not reasonably be regarded as 'considerably smaller' than the higher percentage. If that was the case in the application of the old definition of indirect discrimination, it must at equally be so, and without any absolute need for percentages, under the new.

154. At the end of the day the question requires a judgment to be made on whether a PCP of requiring employees at risk of redundancy to undergo assessment in interviews where questions are asked that cannot easily be answered as well by those who have been away from the workplace for a significant period would disadvantage appreciably more women than men. In our judgment the answer is yes. Accordingly we find that the PCP in this case was indirectly discriminatory against the Second Claimant as a woman.

155. We therefore turn next to the question of justification. It is for the Respondent to satisfy us that the method of selection for the RIA posts was a proportionate means of achieving a legitimate aim. In his submissions for the Second Claimant, Mr Lawson pointed out, correctly, that justification had not been pled by the Respondent; nor was any justification advanced by Mr Robertson in his written or oral submissions. It follows that there is no justification and the Second Claimant's complaint of indirect sex discrimination succeeds.

156. For completeness we observe that it would not have been difficult for the Respondent to point to a legitimate aim in this case; given the Board's decision that it could only fund two temporary RIA posts, the Respondent had the legitimate aim of selecting the best candidates

for those posts from the pool of current RIA post holders. However it would, to say the least, have been an uphill struggle to show that the means selected were proportional when the Respondent inexplicably failed to adopt the means prescribed in its own Policy and Procedure of relying on objective evidence of past performance, and selected the interview method without any prior consultation with the union recognised to represent the affected employees. Moreover it would be difficult to justify the means adopted in the Second Claimant's case in particular when the Respondent had simply overlooked that it was under a legal obligation, under regulation 10 of MAPLE 1999, to offer one of the posts to the Second Claimant prior to any consideration of the other RIAs. We therefore consider the Respondent's decision not to advance any justification to be sound and realistic.

Indirect discrimination: Remedy

157. The application of the PCP which we have found to be indirect discrimination led directly to the Second Claimant's dismissal. Had she not been awarded compensation for the financial loss attributable to her dismissal by way of the compensatory award for unfair dismissal, we would have made an award of the same sum as compensation for indirect sex discrimination, save only that as the Recoupment Regulations do not apply to claims of discrimination, it would have been necessary for her to give credit for Jobseeker's allowance received between July and October 2016. As we have already awarded compensation for unfair dismissal, no further award is appropriate for financial loss sustained as a consequence of the unlawful discrimination the second Claimant suffered.

158. The Second Claimant is however entitled to seek an award of compensation for injury to her feelings. The loss of her job clearly bore heavily on the Second Claimant. It came at a particularly unfortunate time for her. She had suffered from post natal depression and her child had continuing health problems which necessitated

periodic visits to hospital. Her husband had unfortunately very recently been made redundant. We are satisfied from her evidence, and her demeanour whilst giving evidence, that the Second Claimant was genuinely distressed and shocked by the way in which she was put through an unfair interview and then lost her job. We have no doubt that she suffered significant injury to feelings.

159. The **Vento** guidelines establish three bands for the award of compensation for injury to feelings. As originally articulated the middle band, which subsequent cases have indicated is generally appropriate for discriminatory dismissal, ranged from £5,000 to £15,000. Allowing for inflation of 65% between 1997 (the date of the events in **Vento)** and 2016, the middle band is now of the order of £8,000 to £24,000.

160. Mr Lawson submitted that the award should be at the mid point of the middle **Vento** band, which he quantified (we think a little over-modestly) at £12,000. Mr Robertson argued for an award, if it fell to be made, no higher than £3,000 to £6,000, in the lower band. We consider that an award in the lower band would under-compensate the Second Claimant for the loss of her job and the circumstances in which she lost it, including what must have been a very uncomfortable interview process. But we also think that the middle of the middle band is rather high for a dismissal which was not career-ending, and where there are no aggravating features such as harassment or openly sexist motivation. We have concluded that an award towards the lower end of the middle **Vento** band is appropriate. Allowing for the adjustment required for inflation, we award the second Claimant £10,000.

162. We record that we have not applied the 10% uplift to the **Vento** bands that has been considered in a number of recent decisions of the EAT in English cases. We were not asked to do this, and we know of no Scottish authority for this remedy, which originates from an upward adjustment in awards in English personal injury cases to

reflect changes in the procedural regime for such proceedings, applying in Scotland.

Expenses

163. The Tribunal has a discretionary power by virtue of rules 75(1)(b) and 76(4) of the Employment Tribunals Rules of Procedure, to make an award of expenses against a respondent where a claimant has incurred fees in bringing his or her claim and has succeeded in whole or in part in that claim. Such an order is not to be made automatically whenever a claimant wins, but the guiding principle is that normally a successful claimant's fees should be paid by the respondent unless there are reasons to the contrary. In the case of both Claimants in these proceedings, the Claimant has incurred fees of £1,200.00 to present their claim and have it brought to a hearing. The First Claimant has been fully successful in his claim, the Second Claimant substantially successful We have not been made aware of any considerations that would point against the award of expenses in this instance, and we therefore make awards of £1,200.00 for each Claimant against the Respondent, being the amount for the fees incurred by that Claimant.

Employment Judge: P Wallington

Date of Judgment: 4 July 2017

Entered in register and copied to parties: 6 July 2017