Case Number: 2208337/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms J Marlow		**AIG Asset Management (Europe) Ltd**

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 7 JULY 2017

Introduction

1 The Respondents, who employ about 80 people in the UK, describe themselves as part of the investment management function of the AIG group of companies ('the Group'), a global insurance business with headquarters in the United States. The organisation employs some 56,000 people worldwide.

2 The Claimant, Ms Jennifer Marlow, who was born on 20 April 1979 and is the mother of two children, joined Banque AIG, a company within the Group, as a derivatives trader in 2005 and, in 2011, transferred to the Respondents under the TUPE Regulations 2006, working on their Capital Global Markets ('GCM') desk. Her employment was terminated on 9 September 2016 on the stated ground of redundancy, notice of dismissal having been given to her three months earlier, three days after her return from her second period of maternity leave.

3 It is not in question that the Claimant is a most able and highly-regarded performer. She attained the senior grade of Executive Director in 2008. At the time of her departure she was working part-time under a four-day-week contract which attracted remuneration in excess of £250,000 per annum.

4 By a claim form presented on 30 November 2016 the Claimant brought complaints of unfair dismissal, discrimination on grounds of pregnancy, alternatively sex, detrimental treatment based on pregnancy/maternity and victimisation. All claims were resisted on their merits and some were also met with the defence that they were outside the Tribunal's jurisdiction on time grounds.

5 At a Preliminary Hearing (Case Management) on 27 July 2016 Employment Judge Glennie noted that the parties had agreed a list of issues. A copy is appended to these Reasons.

6 The dispute came before us on 6 June this year for final hearing with seven days allocated, but unfortunately the Tribunal was able to sit for only six days. The Claimant was represented by Mr Daniel Tatton-Brown QC and the Respondents

by Mr Daniel Stilitz QC. Having taken time to read into the case, we completed the evidence and submissions at lunchtime on day five and then reserved judgment, devoting what was left of the allocation to our deliberations in chambers.

The Legal Framework

Pregnancy/maternity discrimination – the Equality Act 2010

7 The Equality Act 2010 contains special protection for pregnant women. By s18 it provides that:

> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –**
>
> **(a) because of the pregnancy …**

The 'protected period' begins when the pregnancy begins and ends when the period of additional maternity leave ends unless the individual returns to work before that date or, if she is not entitled to additional maternity leave, two weeks after the end of the pregnancy (s6).

8 Victimisation is governed by s27 which, so far as material, provides:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because –**
>
> **(a) B does a protected act, or**
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act –**
>
> **(a) bringing proceedings under this Act;**
> **(b) giving evidence or information in connection with proceedings under this Act;**
> **(c) doing any other thing for the purposes of or in connection with this Act;**
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**

9 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(d) by subjecting B to any … detriment.**

A corresponding provision prohibits victimisation (s39(4)(d)). A 'detriment' arises in the employment law context where, by reason of the act(s) complained of, a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

10 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

11 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. Giving the only substantial judgment in the Supreme Court, he said this (para 32):

> **[The burden of proof provisions] will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.**

In so far as the provisions do bear upon the Tribunal's analysis, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

12 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. "Conduct extending over a period" is to be treated as done at the end of the period (s123(3)(a)). The 'just and equitable' discretion is a power to be used with restraint: its exercise is the exception, not the rule (see *Robertson-v-Bexley Community Centre* [2003] IRLR 434 CA).

Pregnancy- and/or maternity-related treatment – the Employment Rights Act 1996

13 By the Employment Rights Act 1996, s47C(1) and (2) read with the Maternity and Parental Leave etc Regulations 1999, reg 19(1) and (2) an employee is entitled not to be subjected to any detriment on the grounds (*inter*

alia) of pregnancy, maternity or the fact that she has sought to avail herself of her maternity leave rights. Since this protection is no wider, and in some respects narrower, than that under the 2010 Act, s18, we do not consider it necessary or proportionate to give separate consideration to the claims under the 1996 Act and the 1999 Regulations.

Unfair dismissal

14 The Claimant invokes the protection against unfair dismissal enacted in Part X of the Employment Rights Act 1996 ('the 1996 Act'). The key provision is s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (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.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(c) is that the employee was redundant …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

15 The 1996 Act, s139 includes:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **…**
> **(b) the fact that the requirements of the business –**
> **(i) for employees to carry out work of a particular kind, or**
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
> **have ceased or diminished or are expected to cease or diminish.**

16 In *Murray & another-v-Foyle Meats Ltd* [1999] ICR 827 HL Lord Irvine of Lairg LC pointed out that the redundancy legislation asks two simple questions. First, does one or other of the economic states of affairs mentioned in s139 exist? Second, if so, is the dismissal wholly or mainly attributable to that state of affairs?

17 Although our central function is to apply the clear language of the legislation, we are also mindful of the guidance in the authorities. The leading

cases are well-known and we will mention only one. In *Williams-v-Compair Maxam Ltd* [1982] ICR 156, the EAT (Browne-Wilkinson J and members) drew attention to the main factors likely to figure in decisions on the reasonableness of redundancy dismissals. These include whether selection criteria were objectively chosen and fairly applied, whether employees were duly warned and properly consulted, and whether appropriate steps were taken to find suitable alternative employment for those identified as redundant. The EAT also made the point that the first-instance analysis involves asking whether the employer's action lay within a permissible range of conduct. The Tribunal is not permitted to substitute its view for that of the employer.

Oral Evidence and Documents

18 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Eoin O'Grady, Managing Director, London GCM, Mr Geoff Cornell, Deputy Chief Investment Officer, AIG Inc., Mr Tim Prister, Head of GCM, Ms Rebecca McGill, UK Human Resources Manager, and Ms Brenda Monaghan, Managing Director, Global Real Estate. All gave evidence by means of witness statements.

19 In addition to the testimony of witnesses, we read the documents to which we were referred in the five-volume bundle prepared by the Respondents.

20 Finally, we had the benefit of sundry documents prepared by the representatives: Mr Tatton-Brown's opening and closing submissions and, on the Respondents' side, a chronology, a cast list, an agreed trial timetable and Mr Stilitz's closing submissions.

The Facts

21 We have had regard to all the evidence but it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

The main narrative

22 GCM was one division of the Group's Asset Management function. It operated in London and in Wilton, Connecticut. An organisational chart which dates, we were told, from April 2015 divided GCM into three main functions: Program Execution, Trading and COO Team. At the top of the chart was Mr Jon Liebergall, Head of the division, who was based in the US. Beneath him sat the three function heads, all also based in the US. Program Execution divided into Capital Markets Structured Execution and Short Term Investing & Financing. Capital Markets Structured Execution included three individuals, two based in the US and Mr O'Grady, Managing Director, GCM London. He became the Claimant's line manager in January 2016. Under Short Term Investing & Financing were two US-based employees and Mr John Chan, based in London, to whom we will return in due course. The Trading section was split into Foreign Exchange ('FX'), Interest Rates ('IR') and Structured. In each of those teams were two US-based employees and, in FX, Ms Lauren Evans and in IR the Claimant, both based in

London. The COO Team consisted of four US-based individuals and one who worked in London, Mr Biran Shah. Mr Shah later moved to a Program Execution role, still based in London, and an additional member of the COO Team was recruited in London, Mr Rajesh Ghedia.

23 The GCM London operation was managed by Mr O'Grady. He reported to Mr Liebergall until November 2015, when Mr Liebergall was made redundant. Thereafter Mr O'Grady reported to Mr Prister, who was and is based in Wilton.

24 The Claimant's work largely involved trading in FX and IR derivatives. A derivative is a financial instrument derived from an underlying asset or entity, such as an exchange rate for an interest rate. Following the global financial crisis of 2008, the Group reassessed its position on certain financial products and, from 2009 onwards, wound down its derivatives portfolio. That strategy resulted in a reduction of about 99% in its historical derivatives trading volumes. At the same time, however, there was some new derivatives business which, it seems, was not seen as carrying the same degree of risk and was maintained.

25 Short Term Investing & Financing ('STI') is an aptly-named function which involves placement of funds for limited periods. It was common ground before us that work in this area does not call for a comparable level of skill and experience with that required to trade in the specialist field of derivatives. Accordingly, employment in STI roles is available to relatively junior employees and rewards are correspondingly more modest.

26 On 26 October 2012 the Claimant commenced her first period of maternity leave. She returned on 13 September 2013 working, at her request, a four day week, rather than full-time as before.

27 In September 2014 the STI function moved to GCM from Treasury and Ms Evans, who worked within it as a London-based STI trader, accordingly transferred to GCM. She was pregnant at the time and due to take maternity leave at the beginning of 2015.

28 Also in September 2014, the Claimant became pregnant with her second child. The following month she made a request for permission to move to a three-day week. That request was refused. At the time it was made the Respondents were not aware that she was pregnant. She may also have been unaware. At all events, she informed them of that fact in November 2014.

29 By the time of her departure on maternity leave, Ms Evans had developed some experience in the more simple kinds of FX transactions, having shown an interest in such work and a capacity to learn quickly. She was mentored and assisted by the Claimant in doing so. We find that, by January 2015, FX trading formed a not insignificant part of her overall responsibilities but we cannot accept Mr O'Grady's evidence that it had become her "core" duty. And she had not executed a single IR trade.

30 When Ms Evans started her maternity leave, her STI duties were shared by Mr O'Grady and the Claimant. It was, however, apparent that that solution would

only last until the Claimant's maternity leave commenced in June 2015. Initially, it was proposed that Mr Chan be offered a temporary role to cover the STI work in Ms Evans's absence. By early February 2015, however, a decision had been taken to offer him the position on a permanent basis. It seems to us that two main factors contributed to this change in strategy. First, Mr Chan already held a permanent position elsewhere in the organisation and a temporary (and inherently insecure) role would have little attraction for him. Secondly, the STI work was expanding. In addition, the fact that Ms Evans had started to develop fresh skills and interests may have been seen even by February 2015 as suggesting at least the possibility of her returning to work in a somewhat different capacity. We accept Mr O'Grady's evidence that there were, prior to Ms Evans's departure on maternity leave, conversations (not assurances) to that effect.

31 Mr Chan duly transferred to GCM in May 2015 and was assigned to perform the STI function.

32 Mr Chan's was a full-time role at Grade 22, attracting a salary of £71,400 plus benefits. When she left on maternity leave Ms Evans was employed full-time at Grade 21, with a salary of £54,000 plus benefits. It seems to be uncontroversial that the total remuneration for the two was of the order of £99,000 and £64,000 respectively.

33 The Claimant's second period of maternity leave commenced on 8 June 2015. While she and Ms Evans were away, the London trading work was wholly or very largely covered by Wilton staff and Mr Chan undertook the STI function. These transfers of duties were implemented without incident. There was no need to recruit any additional personnel, in Wilton or London.

34 In October 2015, during her maternity leave, Mr O'Grady telephoned the Claimant and proposed that they meet for lunch. She accepted and, soon afterwards, the lunch took place. Those present were Mr Liebergall, Mr O'Grady and the Claimant. One matter discussed was the possibility of the Claimant and Ms Evans returning to work under a job share arrangement. It was agreed that the Claimant would discuss the matter with Ms Evans and revert to the company. Shortly afterwards, she and Ms Evans met and discussed the job share idea. They were both attracted by it. On 22 October 2015 Ms Evans wrote to Mr O'Grady setting out proposals. In particular, she suggested that the Claimant should work Mondays, Tuesdays and Wednesdays and she, Wednesdays Thursdays and Fridays. Her message touched on a number of uncertainties. In addition to questions of physical accommodation, whether the proposed mix of days would suit the organisation and certain other matters, Ms Evans included this:

> **Job Spec - would we be FX only with John [Chan] remaining on STI and us acting as back up?**

35 That question did not receive a direct answer, but it does evidence the broad understanding of the Claimant and Ms Evans that the main focus of the job share would be on FX trading and that following their return Mr Chan would continue to have primary responsibility for the STI function. That, we find, broadly

corresponded with Mr O'Grady's thinking and there is nothing to suggest that Mr Liebergall envisaged anything different. Mr O'Grady took HR advice and initiated an email correspondence with senior managers based in the US. These included Mr Cornell who, by an email of 2 December 2015, commented that the proposal sounded like a "win win for everyone" but asked for reassurance from Mr O'Grady and others that they were happy with the plan. Mr O'Grady replied that he would have been more comfortable with a three-month review period but that employment law constraints made it necessary to accept a one-year period. We do not know the source of this understanding. Mr Cornell, by an email of 5 December 2015, then gave his approval in these terms:

> **I am OK with this. My main concern is that people with obvious family priorities such as these understand the business needs and can be flexible. It can be challenging to manage a team around one person who wants flexible hours so I worry about managing two and at the same time recognise that their family will naturally come first. You know the situation and personalities best Eoin so I support your decision.**

36 The decision just referred to was never implemented. New forces were, by the time it was taken, already in play. By a document dated 2 November 2015 addressed to the AIG workforce as a whole, Mr Peter Hancock, CEO, gave notice of plans for widespread cost-cutting measures across the entire Group. This programme of reform was given the title, 'Simplifying AIG'. Its two central features were stated to be reduction of management costs and simplification of the organisational structure. The essential rationale was explained in these words:

> **The case for change is strong: a cost structure that is not competitive, an unacceptably low return on equity, and outdated technology. Recognising that great change brings pain along with opportunity, we have taken a very deliberate approach to determine what AIG must do today and in the coming quarters to get us from where we are to where we need to be. We continue to move forward with a sense of urgency.**

37 An immediate consequence of Mr Hancock's announcement was the dismissal on redundancy grounds of a number of senior figures in GCM including Mr Liebergall and two very senior US-based traders, Mr Chris Toft and Mr David Chang.

38 Mr Cornell told us that his approach to the requirement to achieve economies was to ask his direct 'reports' how they would design the parts of the business for which they were responsible if setting them up from scratch. He also told us that his approach was to get on with the unpleasant business of implementing changes as quickly as possible so as to avoid or at least minimise the personal and commercial harm which an extended reorganisation programme would inevitably entail.

39 On 1 February 2016 Mr Cornell sent an email to his immediate superior, Mr Douglas Dachille, attaching a presentation setting out proposals to reorganise several different business areas. Included was a table identifying a number of senior individuals as candidates for redundancy[1]. The only listed employee within

[1] The total cannot be given because the list includes a team whose numbers are not stated.

GCM was Mr Ed Lieber, who held a governance role within the COO Team and was US-based.

40 On replacing Mr Liebergall, Mr Prister became one of Mr Cornell's 'reports'. Before us much attention has focused on an email conversation between Mr Prister and Mr Cornell which began on 5 February and ended on 8 February 2016. It appears from a message of 10:39 on 5 February that Mr Cornell had had a useful conversation with someone senior to him which he interpreted as giving him a certain freedom to make important decisions. The next important message came from Mr Prister on 6 February at 09:46. He said this:

> **My thinking was long-term GCM. If we were able to rif the 2 women in London as part of it I think we could manage things for the time being but longer term would look to replace them with a AVP[2] type Trader/Structurer. So the hard part would be to permanently lose them but shorter term I think we can manage things. It also gives us flexibility in the future.**

We were told that RIF is an acronym for 'Reduction In Force', and is common parlance in US military circles.

41 Mr Prister told us, and we find, that the fact that the Wilton team had managed the London trading work without any adverse consequence was a material factor in the thinking which underlay his proposal.

42 It is apparent that Mr Cornell was working against a deadline (whether self-imposed or otherwise) of 12 February. On that date he issued a revised version of the table sent on 1 February, containing a substantially increased list of proposed candidates for redundancy and a correspondingly increased estimate of possible cost savings. Among additions to the list were the Claimant and Ms Evans. Against their names, in a column headed "Rationale", we read this:

> **Have been on maternity leave and position no longer needed**

Under "Other" is entered:

> **Currently on maternity leave in London**

43 It was common ground that not all those named on either schedule ultimately suffered dismissal. In particular, Ms Kerry O'Brien, a US-based Portfolio Manager paid almost $750,000 per annum appeared on both schedules but survived the redundancy round and is still within the organisation. It is, however, also right to point out that Ms O'Brien was identified on the schedule as "high risk" whereas the Claimant and Ms Evans were classified as "low risk".

44 On 2 March 2016 Ms Evans returned to work following her maternity leave, on a three-day week pattern.

45 In early March Mr O'Grady was informed of the proposal to transfer the London GCM trading function permanently to the Wilton desk.

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[2] Assistant Vice President

46 On 16 March the Claimant and Ms Evans were informed of that proposal.

47 The Respondents held three consultation meetings with the Claimant, on 23 March, 8 April and 22 April. Notes were taken on each occasion. At the first meeting, attended by the Claimant, Mr O'Grady and Ms Lauriel Pearson of HR, Mr O'Grady explained the proposal to transfer the trading function from London to Wilton and answered a number of questions posed by the Claimant. The Claimant challenged the business case for the move. There was some discussion about alternative roles. She suggested that she should be considered for the STI work. It was agreed that Mr O'Grady would look further into that aspect.

48 He did so. Following HR advice the company's position, conveyed to the Claimant by email soon afterwards, was that the STI role was not suitable alternative employment for her because it involved work of much lower status and difficulty than hers and because it required a full-time incumbent and was not suited to a job-share arrangement.

49 The second consultation meeting, on 8 April, was attended by the Claimant, Mr O'Grady, Ms McGill and, by telephone, Mr Prister. The Claimant raised a sustained challenge to the business case for the transfer of the trading operations to Wilton and Mr O'Grady and Mr Prister defended the proposal. It was also explained that a certain amount of ad hoc trading would remain in London and would be covered by existing resources. The Claimant also explored in some detail the appointment of Mr Chan to GCM and questioned the purpose behind that appointment and its appropriateness. Apart from maintaining (by obvious implication if not explicitly) her earlier suggestion that she should be considered for the STI work in place of Mr Chan, she did not advance any alternative to her dismissal if the central strategy of moving the trading work to Wilton was to proceed.

50 It was initially agreed that the meeting would reconvene on 13 April 2016 but the Claimant subsequently stated that she did not wish that to happen. She did, however, submit further questions to Mr O'Grady on 12 April, to which he replied the following day. One matter which she raised was the suggestion that she and Ms Evans should share the STI work and that Mr Chan should be 'bumped' to accommodate them. Mr O'Grady maintained the company's line that the STI work did not represent suitable alternative employment for the Claimant. The Claimant also confirmed that she had been supplied with a schedule of vacancies within the organisation. None, it seems, was suitable.

51 On 20 April the Claimant submitted to Mr O'Grady, Mr Prister and others a document anticipating the third consultation meeting, commenting on the consultation process to date and proposing an "Alternative Role". In essence, she advocated a three-way competition for the STI role, between Ms Evans, Mr Chan and her. She also voiced the concern that she and Ms Evans were experiencing discrimination based on their maternity absences.

52 The third consultation meeting was held on 22 April. Those present were the Claimant, Mr O'Grady and Ms McGill and again Mr Prister participated by telephone. Much ground already covered was revisited but there was a fuller

exploration of alternatives to redundancy. In particular, the Claimant put forward three possibilities: first, that she remain in her current role under the job share arrangements which had been discussed in October; secondly, that she should replace Mr Chan in his STI role; thirdly, that she and Ms Evans should replace Mr Chan on a job-share basis. Mr O'Grady explained to the Claimant why none of these ideas was seen as a viable solution. The first would negate the central strategy of transferring the trading work from London to Wilton. The second and third were both inappropriate because the STI job sat at a much lower level than hers and because it was not apt for sharing. Shortly after the meeting the Claimant formulated her three proposals in a short document and submitted it to Mr O'Grady and Mr Prister. The company's position did not change.

53 On 7 June the Claimant's second period of maternity leave ended.

54 On 10 June 2016 the Claimant attended a meeting with Mr O'Grady and Ms McGill (again participated in by Mr Prister by telephone) at which she was given notice of dismissal on the ground of redundancy. We find that the dismissal was decided upon jointly by Mr Prister and Mr O'Grady.

55 On 16 June the Claimant submitted an eight-page document appealing against the dismissal. In it she rehearsed and developed many of the points debated in the consultation process but also directly questioned the genuineness of the redundancy exercise and alleged in terms that she and Ms Evans were victims of the "targeted elimination" of their roles, that the reorganisation was a "pretence and a pretext", and that what lay behind it was "clear bias to exclude female employees on maternity leave".

56 The appeal was entrusted to Ms Monaghan. She held a meeting with the Claimant on 28 June 2016 and further interviews with Mr O'Grady, Ms McGill and Mr Prister on 30 June, 4 July and 8 July respectively.

57 By a letter dated 15 July 2016, Ms Monaghan dismissed the appeal. She found that the redundancy was genuine, that the STI role did not represent suitable alternative employment, and that the consultation process had been proper and sufficient. She declined to make any findings as to whether the STI role could have been performed part-time or on a job-share basis. Towards the end of the letter she referred to the allegations of discrimination which the Claimant had raised. She said this:

> **I consider that I have dealt above with the key aspects of your appeal and, as I have made clear, I am satisfied that your redundancy was genuine and that a fair and proper process was followed. As such I do not uphold your appeal. However, I also wanted to explore whether there was any merit in your allegations of a "bias to exclude female employees on maternity leave from a fair and appropriate selection process" and that "new management is unwilling to consider part-time working patterns from others on the team" (page 1 of your appeal letter). Although not strictly relevant to your redundancy appeal, I consider these allegations to be very serious and I offer the following observations which have arisen out of my investigation.**
>
> **I have seen evidence of GCM/HR considering and planning for the job-sharing arrangements at the request of you and [Ms Evans] as far back as October 2015. I**

> **am satisfied that, prior to the GCM restructure, the intention was that you and [Ms Evans] would share a job, each working a three-day week – with a cross-over on a Wednesday. It was GCN's clear intention that you would share the FX tasks with you taking on the more complex needs and [Mr O'Grady] overseeing [Ms Evans] and assisting on swaps trading as necessary. EO was satisfied that the flexible working arrangements would work well for AIG and employees alike.**

Ms Monaghan did not cite any other reason for dismissing the complaint of discrimination. Before us, she accepted that she could have done more to explore and test the serious allegations which the Claimant had raised. In particular, she accepted that her interview of Mr Prister lasted no more than 18 minutes and that she had failed to explore a matter by which the Claimant set particular store, namely the timing of the emergence of the proposal to transfer the trading function to Wilton. She told us that the letter of 15 July had been prepared in part by HR and legal advisers.

58 Throughout the consultation process and at the appeal stage the Claimant's position was and remained that, while she was interested in being considered for alternative employment in London, she would not contemplate a reduction in her current rate of pay.[3] It seems that the possibility of her moving to Wilton was never explicitly canvassed but she told us in evidence that she would not have entertained the idea had it been raised.

59 The Respondents' case was that the reorganisation was vindicated by subsequent events. That is a business assessment on which we would not presume to comment. It is also largely irrelevant to the matters we have to decide, which depend on decision-making in the first half of 2016. But for what it is worth, we find these facts: the work which transferred to Wilton was managed by the existing team, to which no addition was made, and there was never a need to appoint an AVP (or similar) in London, as Mr Prister had contemplated.

Facts relevant to the victimisation claim

60 As an employee, the Claimant was entitled to the benefit of membership of the Group's Long Term Incentive Plan ('LTIP'). Its purpose was to incentivise employees to contribute to the long-term performance of the organisation. Subject to certain conditions, it provided for 'Performance Share Units' ('PSUs') to vest in three equal instalments on 1 January of each of the three years immediately following the expiry of each three-year 'Performance Period'. Section 6A set out the general rule that any unvested awards were forfeited on the termination of a participant's employment. That was subject to the conditions in Section 6B and G which, read together, entitled employees whose employment ended (*inter alia*) involuntarily and without cause to receive awards under the Plan as if still employed, provided that they signed a form of release agreeing not to bring any claim arising out of the employment or its termination.

61 Following her dismissal the Claimant sought to recover the awards to which she believed she was entitled under the LTIP, but when invited to sign the

[3] We say *rate* of pay advisedly. Self-evidently, had she returned from maternity leave to a three-day weekly pattern, she would not have quibbled with a pro rata reduction of her earlier four-day week earnings.

prescribed form of release, refused to do so. On that basis the Respondents declined to entertain her claim for the unvested awards and no part of them was paid to her.

62 There was no evidence before us to suggest that the line taken by the Respondents in the Claimant's case differed from their standard practice, or indeed that they have *ever* waived the Section 6B and G conditions.

'Background' points

63 It was suggested on the Claimant's behalf that the treatment of the Claimant and Ms Evans was part of a pattern of adverse treatment by the Respondents of women employees who take maternity leave. The suggestion was not backed up by evidence. The Respondents replied by producing (very late in the day) a schedule purporting to show maternity leave statistics for the entire AIG UK workforce (which includes the Respondents) for February 2016 to January 2017. Although they were not challenged as false, no witness spoke to these figures. For what they are worth, they say that 72 women took maternity leave in the period, 65 went back to work and, of those who did not, three out of seven left through involuntary redundancy (two being the Claimant and Ms Evans).

64 We heard some largely uninformative evidence about the 'culture' of the Respondents. The Claimant told us that she felt that it was not supportive of working mothers. One or two witnesses on behalf of the Respondents offered contrary opinions. Those tested on their knowledge of, and training in, equal opportunities and associated topics were not able to put impressive evidence before us.

Secondary Findings and Conclusions

The discrimination claims

65 As we understood him, Mr Tatton-Brown put his case under s18 in two alternative ways. First, he submitted that the Respondents' treatment of the Claimant in subjecting her to the alleged detriments and in dismissing her was the product of conscious or subconscious bias based upon her maternity and/or her absences on maternity leave. We will call this the 'broad claim'. Secondly, he contended that the alleged detriments and the dismissal were done 'because of' the Claimant's maternity and, in particular, her maternity leave in the sense that the maternity leave had been a direct cause of the recruitment to GCM of Mr Chan and of the perception of Mr Prister and Mr O'Grady that it was possible to manage the trading function from Wilton and do without the services of the Claimant and Ms Evans (that having been demonstrated during the period when both were away on maternity leave and their work was covered on a temporary basis from Wilton). We will refer to this as the 'narrow claim'.

Discrimination – the broad claim

66 As to the broad claim, we have had regard to all of the many points marshalled before us by Mr Tatton-Brown on behalf of the Claimant. For our part,

we think that four points stand out. First, it was not shown conclusively that it was *necessary* to recruit Mr Chan permanently to GCM. We were shown no hard evidence demonstrating that he was not prepared to move on a temporary basis. Secondly, we heard no satisfactory explanation for the fact that Ms Evans was not, at the very least, given the opportunity to be considered for the STI work once the decision had been taken to move the trading to Wilton. It is true that the Respondents strongly maintained that the STI role needed to be performed full-time, but even if that was their view, why was Ms Evans not given the chance to challenge it or, failing that, to be considered for full-time STI duties (either in direct substitution for Mr Chan or as his competitor in a pool of two)? Given our primary findings above, we remain puzzled by the Respondents' approach of treating Ms Evans as if she were a specialist trader when she was not. Thirdly, there is force in Mr Tatton-Brown's submission that the language used in some of the documents can be seen as pointing to a degree of prejudice based on maternity and/or maternity absences. The gratuitous reference to the gender of the Claimant and Ms Evans in Mr Prister's email of 6 February and Mr Cornell's reference to maternity leave in the 'Rationale' column of the schedule of 12 February are striking examples. Fourthly, Ms Monaghan's extraordinary remark that the Claimant's allegations of discrimination were "not strictly relevant" to the appeal and the perfunctory way in which those allegations were dispatched do not inspire confidence that the organisation regarded the avoidance of discrimination as a priority.

67 On the other hand, there are telling factors arguing in the contrary direction. First, it was not suggested that there was any history of the Respondents having subjected mothers to discrimination based on their maternity or their exercise of the right to take maternity leave. The 'background' evidence did not suggest to us an organisation hostile to working mothers, maternity leave, flexible working practices and the like. Secondly, Mr Stilitz was entitled to draw support from the fact that the idea of a job share between the Claimant and Ms Evans received strong backing from Mr O'Grady and Mr Liebergall. It is significant that, whether or not the germ of the idea originated from Ms Evans (see her witness statement, paragraph 19), it was senior executives of the Respondents who took the initiative in seeking to develop the proposal and take it forward. That is not, on its face, conduct which one would expect of a company disposed to penalise women for taking maternity leave or to think negatively of them for having done so. Thirdly, it is plain and beyond question that the 'Simplifying AIG' reorganisation was genuine and substantial and produced, as it was intended to do, huge cost savings across the organisation. In that context, it is not possible to detect a pattern of unfavourable treatment towards women, mothers, or those who had taken, or planned to take, maternity leave. Fourthly, the Respondents' responses to the Claimant's proposals for means of avoiding redundancy were entirely rational. In short, she advanced no suggestion which was compatible with their priorities of rationalising the trading function and achieving significant cost savings.

68 One factor strongly urged upon us by Mr Tatton-Brown as supportive of the broad claim was the timing of the proposal to close down the London trading operation and dismiss the Claimant and Ms Evans as redundant. We cannot agree with this submission. It seems to us that the timing of key events was consistent with the Respondents' case. Mr Cornell invited the seven executives

who reported to him to review their business areas and come up with proposals for reform. Mr Prister duly did so on 6 February 2016. His suggestion was examined and Mr Cornell was persuaded. So it was that, by 12 February, the Claimant and Ms Evans been added to the draft schedule. So had other names, no doubt as a result of input from one or more of the other individuals reporting to Mr Cornell. In our judgment the timing of these events is unexceptionable and lends no support to the theory of conscious or subconscious discrimination.

69 Having weighed up the evidence and arguments with care, we conclude that the considerations which lean against the inference of unlawful discrimination for the purposes of the broad claim are stronger than those which lean in favour. In the first place, Mr Chan's appointment, although regarded with suspicion by the Claimant, occasioned no disadvantage to her. He was brought in to do work which she was not employed to perform and which, for good reason, the Respondents never envisaged her performing. His appointment occasioned no detriment to her and, we think, cannot possibly have been intended (consciously or unconsciously) to put her at any disadvantage. Moreover it is not, we think, realistic to regard Mr Chan's appointment as evidence of a strategy to engineer the redundancy of Ms Evans during or immediately after her maternity leave. Although Ms Evans had not made the transition from STI work to trading, it is clear to us that all concerned saw her career as moving in that direction. Hence her query in the email of 22 October 2015 as to whether "we" (she and the Claimant) would be working on FX "only" under the job-share arrangement. And although the evidence could have been better, it seems to us highly probable that (as witnesses for the Respondents told us) Mr Chan did express unwillingness to move from a secure post into a temporary maternity cover role which was liable to become redundant within the year. All in all, we find in the appointment of Mr Chan no support for the theory of maternity-based discrimination against the Claimant.

70 Second, although it has given us pause, in the end we think it more likely than not that the treatment of Ms Evans (about which, we have no doubt, she was justifiably aggrieved) is innocently explained. Our thinking here develops the reasoning in the preceding paragraph concerning the appointment of Mr Chan. Although Ms Evans had not made the transition to dedicated trader, we accept that Mr O'Grady in particular was already seeing her in that way by the time she commenced maternity leave. Mr Chan successfully filled the STI role and brought some additional work to it. We strongly doubt whether it even crossed the minds of Mr Prister or Mr O'Grady to consider offering Ms Evans the STI job, or the chance to compete with Mr Chan for it. We think that the installation of Mr Chan and the shift (partly effected, partly anticipated) in Ms Evans's career direction explain the oversight in failing to give proper consideration to Ms Evans's situation in light of the planned reorganisation.

71 Third, the treatment of Ms Evans is in any event at best a matter of tangential relevance to the Claimant's case. Unlike Ms Evans, the Claimant was not in a good position to raise strong arguments for preserving her employment. She was not prepared to take any cut in her rate of pay or to consider moving to the US. And the suggestion that, alone or in a job-share with Ms Evans, she should replace Mr Chan in the STI role was quite unrealistic. That was patently

not suitable alternative employment for her and the proposal would have entailed the Respondents paying massively over the odds to retain her services at the expense of one or two individuals equipped with the necessary skills and commanding relatively modest salaries appropriate to the work involved. In these circumstances, once the decision was taken to move the trading function to the US, the Claimant's fate was sealed.

72 Fourth, it follows that the Claimant's case necessarily hangs on a theory that the Respondents designed and implemented the reorganisation of the trading function with the purpose (conscious or subconscious) of punishing her (and, no doubt, Ms Evans) for having become a mother and/or taking maternity leave and/or requesting flexible working arrangements. A theory of such devious and malign scheming is, we think, inherently implausible.

73 Fifth, that theory becomes all the more improbable when examined against the simple explanation offered by the Respondents. Mr Prister was asked to find substantial savings and to redesign his area of business as if it was being set up from scratch. There was no objective reason why trading *needed* to operate from Wilton *and* London and recent experience had demonstrated that running it solely from Wilton could be done without adding to the headcount there. Deleting the London trading function would deliver a very substantial cost saving. That explanation of Mr Prister's thinking, adopted by Mr Cornell, is, we think, inherently plausible.

74 Sixth, the wider contextual facts tend to support the Respondents' explanation. The absence of any background history pointing to a tendency to discriminate on grounds of maternity or pregnancy and the proactive pursuit by Mr O'Grady and Mr Liebergall of the job share proposal in October 2015, which attracted the endorsement of Mr Cornell are, to our minds, telling considerations which argue against the theory of discrimination. There are certainly points which lean the other way (the unguarded use of language in emails and other documents and the way in which the appeal was dealt with, to name two), but overall we regard the contextual and 'background' facts as more helpful to the Respondents' case than the Claimant's.

75 Seventh, Mr Tatton-Brown urged us to be mindful that the Claimant's case does not require a finding that *the* reason for the matters complained of was a discriminatory reason: if discrimination plays a material part, that is enough. He is, of course, right, but we do not accept that there was a subsidiary, discriminatory motivation behind the acts complained of. In our judgment, the Respondents' explanation for their conduct is true and accurate and fully accounts for their treatment of the Claimant.

76 Eighth, the individual detriment claims, in addition to that based on the dismissal (list of issues, para 2(a)-(f)), are not made out. As to (a), we have already explained why we take the view that the appointment of Mr Chan was no detriment to the Claimant. And even if a detriment was made out, we hold, for reasons already stated, that it was not done wholly or in material part because of the Claimant's pregnancy or maternity or because of any consequence of those conditions. As to (b) and (c), it may have been a detriment to be identified as

potentially redundant, but that was the natural result of the reorganisation proposed by Mr Prister and, for reasons already stated, we are satisfied that his proposal was not tainted by discrimination. There is nothing in (d). It was for the Respondents' senior management to formulate their plans for the business and, in so far as those plans involved possible redundancies, to consult affected employees on them. That is what was done. There was no detriment and, in any event, no discrimination. As to (e), the Claimant did have FX trading responsibilities removed from her without her consent. That was the effect of the reorganisation which brought about her redundancy. There was no discrimination. We find no substance in (f). The alternatives to dismissal put forward by the Claimant were considered. As we have stated, those proposals were unrealistic and their rejection by the Respondents did not entail discrimination.

77 For these reasons we reject the broad claim. The facts that the Claimant and/or Ms Evans were mothers and/or had taken maternity leave was not the reason for, or a material factor in, any of the matters about which she complaints.

Discrimination – the narrow claim

78 We turn to the narrow claim. In his opening written submissions, Mr Tatton-Brown made the following remarks:

> **24. The R asserts that the fact that the C had taken maternity leave "had no bearing on" the R's decision to make her redundant … However, of the 5 reasons cited by TP as the "business rationale" for the proposal to make her role redundant, the 2nd is that the proposal to move derivatives and FX trading to Wilton had been "successfully trialled" when the C and LE had been on maternity leave and their work had been moved to the US …**
>
> **25. It is well established that the allegedly discriminatory reason need not be the sole or even the main reason for the treatment in question: it is sufficient if it is a contributory cause in the sense of being a "significant influence" … Although "the fact that the move had been successfully trialled" is a gender neutral reason, it arose only because of the C's absence on maternity leave. The absence on maternity leave was the underlying reason for the trial. Thus "because" the C had exercised the right to maternity leave she was subjected to the detriment of being selected for redundancy.**

Very similar arguments are advanced in Mr Tatton-Brown's closing submissions (paras 42-43).

79 In support of the narrow claim Mr Tatton-Brown placed particular reliance on two reported decisions of the EAT. In *Rees-v-Apollo Watch Repairs* [1996] ICR 466 EAT the claimant was dismissed on the ground that the employer found her maternity leave replacement more efficient. The ET dismissed her complaint of direct sex discrimination but the EAT allowed the appeal. Giving judgment, Judge Peter Clark said:

> **In the instant case the tribunal found that Miss Rees was not dismissed simply because she was unavailable for work through pregnancy. It is therefore distinguishable from Webb on its facts. However, Mr Saini submits that by extension where the background to her dismissal is her unavailability for work through pregnancy which leads to the appointment of a replacement whom the employer**

> **finds to be more efficient and acceptable than Miss Rees and for this reason she is dismissed, that constitutes direct sex discrimination since but for her pregnancy Mrs Turner would not have been engaged, the comparison between their respective performances would not have been made and Miss Rees would not have been dismissed.**
>
> **Such an argument was advanced before the Industrial Tribunal and rejected. However, the tribunal did so by reference to the wrong test, namely, whether the employer would have treated a man differently were he in the same position as Miss Rees. Following the decision of the ECJ and the House of Lords in Webb (No.2) no such comparison may properly be made. It follows, in our judgment, that the effective cause of Miss Rees' dismissal was her absence on maternity leave and that is discrimination on the grounds of her sex.**
>
> **In reaching that conclusion we reject the submission of Mr Giffin that there has been a break in the chain of causation. The *immediate* cause of her dismissal, as the tribunal found, was that Mr Pollock found Mrs Turner more efficient and acceptable than Miss Rees. That is a "gender neutral" reason in much the same way as the need to find a replacement for an employee herself absent on maternity leave, as in the case of Webb. However, the underlying reason is Miss Rees' absence on maternity leave. Since no comparison may properly be made with a hypothetical male we conclude that this Industrial Tribunal erred in directing itself, quite properly at the time, in accordance with the Court of Appeal decision in Webb.**
>
> **Finally we are fortified in reaching our conclusion in this case by the policy behind the legislation. The protection afforded to women on maternity leave would be drastically curtailed if an employer was able to defeat a complaint of direct discrimination by a woman who, during such absence, discovers that the employer prefers her replacement, a state of affairs which has arisen solely as a result of her pregnancy and therefore of her sex.**

80 *Commissioner of Police for the Metropolis-v-Keohane* [2014] ICR 1073 was a case under the 2010 Act, s18. When the Claimant, a police dog handler, became pregnant one of the two dogs assigned to her was allocated to another police officer, pursuant to a policy that, for reasons of health and safety, officers would not generally be permitted to serve as operational dog handlers during pregnancy. Her complaint under s18 was upheld by the ET, essentially on the basis (Reasons, para 23) that there was "sufficient connection between the pregnancy and the removal of [the dog] for it to be said reasonably that the removal … was because of the … pregnancy". The Commissioner appealed, contending (*inter alia*) that the 'because of' test under s18 should be given a narrow interpretation, requiring a "direct causal link". Giving judgment on behalf of the EAT dismissing the appeal, Langstaff P appeared (para 20) to endorse the ET's analysis, and certainly found no error of law in it, noting that it had acknowledged the key distinction between a "direct causal link" and the converse, where the alleged "cause" is really only the context within which the relevant circumstances have arisen. At a later point he said this:

> **36. Further, and separately, we do not think it helpful to inquire whether as a proposition of law the words "because of" import a broad as opposed to a narrow construction, so as to argue from that conclusion that what would otherwise be a tenuous link of no real causative significance would suffice to establish causation; nor do we consider that to argue that it should have a narrower focus, to apply which would circumscribe the circumstances in which a Tribunal could legitimately find causation when, unconstrained, it would have found it established, would produce anything other than an artificial result. In short, we do not think that "breadth" or "narrowness" of the test is a necessary step in any reasoning. Those**

> **concepts are not required to answer the question whether, in the context established by the evidence before a Tribunal, it is appropriate to hold causation established for the purpose of awarding damages on the footing, or making an appropriate declaration, that a social evil has occurred. Causation is a finding robustly to be made, for that purpose, taking into account the circumstances. It is unnecessary to step beyond that. If, however, we are wrong on that, we would unhesitatingly prefer the broader approach. This is the approach taken in the Equal Treatment Directive 2006/54/EC; equivalent to the test recited in Paquay, to which Danosa referred. It gives the words used in European legislation and cases an interpretation which would fit with the statutory interpretation considered in Malcolm and ex Parte UNISON. It satisfies the purpose of the legislation, which in common with anti-discrimination statutes generally seeks to address the social evil of discrimination, and must be determined purposively to that end. The fact that the needs of the Metropolitan Police to keep Nunki Pippin operational may have been a major, or indeed *the* major, reason for the decision does not mean to say that the Claimant's pregnancy was not also a cause of it. In any event, here (as we have observed already) the act of removal, and failure to reallocate a dog was not in itself a detriment. They subjected the Claimant to one: namely being put at risk that upon her return to work she would both have no second dog and have lost the opportunity of overtime, and that her career prospects would have been damaged. It is not difficult to see that the cause of that detriment was clearly suffered because of her pregnancy. The focus of the risk is upon the conditions she was to face on return to work following pregnancy and maternity leave, and that they should be no worse than they were as a consequence of her taking such leave, but the risk arose immediately upon the apparently permanent removal of Nunki Pippin (as Mr. Pilgerstorfer submitted it to be). This is a complete answer to Mr Basu's submissions that it was all to do with the unavailability of the dog during pregnancy and maternity leave. It was to do with the risk of what the Claimant would face on her return to work; and it needs to be emphasised that it was subjecting the Claimant to the risk itself, not whether it actually materialised on return to work, which constituted the detriment.**

81 Mr Stilitz submitted that the narrow claim was wrong in law in that it rests on an impermissible 'but for' analysis and that, if the correct legal test was applied, the only possible conclusion was that the Claimant's absence on maternity leave was not the reason, or a material reason, for her being selected for redundancy.

82 In *Amnesty International-v-Ahmed* [2009] ICR 1450 EAT Underhill P, giving judgment on behalf of the EAT, reviewed much of the case-law exploring the subject of the 'ground' or 'grounds' for acts impugned as directly discriminatory under the pre-2010 code of anti-discrimination legislation.[4] He observed:

> **29. In Nagarajan[5] the applicant claimed that he had been denied appointment to a job with London Regional Transport because he had brought a number of previous race discrimination claims against it or associated companies. An industrial tribunal had upheld his claim of victimisation contrary to s. 2 (1) of the 1976 Act, finding that the decision-makers had been "consciously or subconsciously" influenced by knowledge of his previous complaints. That decision was overturned on appeal but restored by the House of Lords. For present purposes it is sufficient to set out the relevant passage from the speech of Lord Nicholls, who said, at pp. 510-511:**
>
> > **"Section 1(1)(a) is concerned with direct discrimination, to use the accepted terminology. To be within section 1(1)(a) the less favourable treatment must**

[4] As we have already noted, the introduction of the 'because of' test under the 2010 Act did not change the law.

[5] *Nagarajan-v-London Regional Transport* [1999] IRLR 572 HL

be on racial grounds. Thus, in every case it is necessary to inquire why the complainant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision will have to be deduced, or inferred, from the surrounding circumstances.

The crucial question just mentioned is to be distinguished sharply from a second and different question: if the discriminator treated the complainant less favourably on racial grounds, why did he do so? The latter question is strictly beside the point when deciding whether an act of racial discrimination occurred. For the purposes of direct discrimination under section 1(1)(a), as distinct from indirect discrimination under section 1(1)(b), the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign. For instance, he may have believed that the applicant would not fit in, or that other employees might make the applicant's life a misery. If racial grounds were the reason for the less favourable treatment, direct discrimination under section 1(1)(a) is established.

This law, which is well established, was confirmed by your Lordships in Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission [1989] AC 1155, a case concerning similar provisions in the Sex Discrimination Act 1975. In that case the answer to the question I have described as the crucial question was plain. The council did not treat all children equally. Girls received less favourable treatment than boys. Your Lordships decided that, this being so, the reason why the girls were discriminated against on grounds of sex was irrelevant. Whatever may have been the motive or intention of the council, nevertheless it was because of their sex that the girls received less favourable treatment, and so were the subject of discrimination: see p. 1194 per Lord Goff of Chieveley.

The same point was made in James v. Eastleigh Borough Council [1990] 2 AC 751. The reduction in swimming pool admission charges was geared to a criterion which was itself gender-based. Men and women attained pensionable age at different ages. Lord Bridge of Harwich, at p. 765, described Lord Goff's test in the Birmingham case as objective and not subjective. In stating this he was excluding as irrelevant the (subjective) reason why the council discriminated directly between men and women. He is not to be taken as saying that the discriminator's state of mind is irrelevant when answering the crucial, anterior question: why did the complainant receive less favourable treatment?"

He went on to make clear that the relevant "mental processes" of the putative discriminator include his "subconscious motivation".

30. We should refer also to Khan[6] ... We need not in this case summarise the facts, but the following passage from the speech of Lord Nicholls (at para. 29) requires quotation:

[6] *Chief Constable of West Yorkshire Police-v-Khan* [2001] IRLR 830 HL

> **"Contrary to views sometimes stated, the third ingredient ("by reason that") does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [2000] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."**

A little later, Underhill P continued:

> **37. We turn to consider the "but for" test recommended in the second of the passages which we have quoted from Lord Goff's speech in James v Eastleigh: see para. 28 (3) above. The passage in question forms part of the final section of the speech, and follows the section (at pp. 772-3) where he has expressed his conclusion on the primary issue as regards direct discrimination. That section begins (at p. 773C):**
>
> > **"Finally, I wish briefly to refer to the use, in this present context, of such words as intention, motive, reason and purpose."**
>
> **Thus, although (as Lord Goff points out) the test may be applied equally to both the "criterion" and the "mental processes" type of case, its real value is in the latter: if the discriminator would not have done the act complained of but for the claimant's sex (or race), it does not matter whether you describe the mental process involved as his intention, his motive, his reason, his purpose or anything else – all that matter is that the proscribed factor operated on his mind. This is therefore a useful gloss on the statutory test; but it was propounded in order to make a particular point, and we do not believe that Lord Goff intended for a moment that it should be used as an all-purpose substitute for the statutory language. Indeed if it were, there would plainly be cases in which it was misleading. The fact that a claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment. That point was clearly made in the judgment of this Tribunal in Martin v Lancehawk Ltd. (UKEAT/0525/03, BAILII: [2004] UKEAT 0525_03_2203). In that case the (male) managing director of the respondent company had dismissed a (female) fellow employee when an affair which they had been having came to an end. She claimed that the dismissal was on the ground of her sex because "but for" her being a woman the affair would never have occurred. At para. 12 Rimer J. referred to the Tribunal's finding that the dismissal was "because of the breakdown of the relationship" and continued:**
>
> > **"… [T]he critical issue posed by section 1(1)(a) [is] whether Mr Lovering dismissed Mrs Martin "on the ground of her sex", an issue requiring a consideration of *why* he dismissed her. As we have said, we interpret the tribunal as having found that the dismissal was because of the breakdown of the relationship. That, therefore, was the reason for the dismissal, not because she was a woman. We accept that, but for her sex, there would have been no affair in the first place. It could, however, equally be said that there would have been no such affair "but for" the facts (for example) that she was her parents' daughter, or that she had taken up the employment with**

> **Lancehawk. But it did not appear to us to follow that reasons such as those could fairly be regarded as providing the reason for her dismissal."**

> **See also Seide v Gillette Industries Ltd. [1980] IRLR 427, where an employee who had been moved to a different department to escape anti-Semitic harassment fell out (for non-racial reasons) with his colleagues in his new department and was disciplined: it was held that the fact that but for the earlier harassment he would not have been in the department where the problem arose did not mean that the action of which he complained was taken on racial grounds. Lord Goff was not of course considering issues of this kind; but these examples illustrate that the ultimate question must remain whether the act complained of was done on the proscribed ground (or for the proscribed reason).[7]**

83 On 14 June this year the Court of Appeal gave judgment in the case of *Chief Constable of Greater Manchester-v-Bailey* [2017] EWCA Civ 425. It is not necessary for present purposes to summarise the facts. Dealing with one particular claim, of direct discrimination and victimisation in failing to allow the claimant to complete a secondment, Underhill LJ, giving the only substantial judgment in the Court of Appeal, said this:

> **35. There are two quite distinct strands to the Tribunal's reasoning ... First, there is an attempt to establish what, as a matter of fact, was the actual motivation of the decision-maker(s) ... Secondly, there is the conclusion … that the first exercise is in fact unnecessary because "in any event" the causation question was sufficiently answered by the fact that the entire situation "flow[ed] from [the Claimant's] position under the Compromise Agreement, and hence also … from his protected act".**
>
> **36. It is, again, common ground before us that the second of those strands of reasoning is wrong in law – and, with all respect to the Tribunal, obviously so. It is self-evidently the case that there would have been no secondment to terminate if the Claimant had not brought his earlier claims, but that kind of "but for" causative link does not mean that the termination was "because of" his earlier claims in the relevant sense.**

We have not invited the parties' submissions on this judgment because it contains nothing new. It merely restates well-established principles.

84 Mr Stilitz relied on *Charlesworth-v-Dransfields Engineering Services Ltd* UKEAT/0197/16/JOJ, a decision of Simler P sitting alone in the EAT. There the claimant, who was disabled, was off work as a consequence of his disability for a period of months. A few months after his return a process was commenced which resulted in his dismissal on ground of redundancy. He complained (*inter alia*) of discrimination arising from disability (the 2010 Act, s15), which proscribes unfavourable treatment "because of something arising in consequence of" the complainant's disability, unless justified by the employer, on the basis that his disability-related absence had enabled the respondents to identify an ability to manage its business without him. The ET rejected that claim, holding that the absence had not been "an effective or operative cause" of the dismissal but rather the "occasion" which had opened the respondents' eyes to a way in which a saving might be achieved. The EAT dismissed the appeal, concluding the ET's decision was permissible and betrayed no error of law. Simler P commented:

> **18. The Tribunal accepted that there was a link between the Claimant's absence through illness and the fact that he was dismissed, the link being that his absence afforded the Respondent an opportunity to observe the way in which the work was dealt with and threw into sharp relief their ability to manage without anybody fulfilling his role of Rotherham Branch Manager. Nevertheless, the Tribunal went on to say that was not the same as saying that the Claimant was dismissed because of his absence. This is a case where on the facts found by this Tribunal it felt able to draw a distinction between the context within which the events occurred and those matters that were causative. No doubt there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause. But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts. Here, the Tribunal concluded that the Claimant's absence was not an effective or operative cause of his dismissal but was merely the occasion on which the Respondent was able to identify something it may very well have identified in other ways and in other circumstances, namely that the particular post was capable of being deleted with its responsibilities absorbed by others. That conclusion led the Tribunal to hold that what caused the Claimant's dismissal on these particular facts was the view that the Respondent could manage without him and that the absence formed part of the context only and was not an operative cause. In my judgment, that was a conclusion open to the Tribunal, applying the statutory test, and reached without error of law.**

85 In our view, Mr Tatton-Brown's submissions are wrong. They posit a 'but for' causation test which, as high authority has repeatedly told us, is inapplicable. Unfortunately, as can be seen in some of the extracts cited above, the language of causation, which can lead to error, continues to be used routinely in discrimination cases before us and in the higher courts. Addressing the 'reason-why' question, and focusing on the mental processes of the decision-makers, we are clear that the fact that the Claimant took maternity leave was part of the material background but was not the *reason* for the matters complained of. Had she and Ms Evans not been absent on maternity leave, the trading function would not have been temporarily transferred to Wilton and the successful 'trial' would not have occurred. The absence and the temporary transfer of the work are part of the relevant context and can be seen as *causes* which contributed to the Claimant losing her job. But they are not *reasons* for the decisions and actions under challenge.

86 Mr Tatton-Brown urged us to find that, even if the Claimant's pregnancy (or absence on maternity leave) was not *the* reason for the treatment complained of, it was at least *a* significant contributing factor. We cannot accept that submission, which seems to us to be contrary to principle. It ignores the need to focus on the mental process of the person(s) responsible for the act impugned as discriminatory. We see no logic in the contention that if a 'but for' cause cannot be *the* reason, it can nonetheless be *a* reason. We are in any event satisfied that the fact that the Claimant had taken maternity leave did not of itself influence to any material extent the decision-making of Mr Prister and Mr O'Grady.

87 We are not able to reconcile *Rees* with the high authority to which we have referred and feel constrained to treat it as a decision on its own special facts. It seems to us that *Keohane,* a case on facts quite different from ours, presents no difficulty. The *treatment* complained of (removal of the dog) was, manifestly, 'because of' the claimant's pregnancy. That fact is not gainsaid by the detail (irrelevant for our purposes) that the *detriment* for which the claimant was entitled

to be compensated (risk of career damage) was a consequence of the treatment rather than the treatment itself. *Charlesworth* illustrates the important distinction between a context and a reason (something which operates to a material extent on the mind of the decision-maker). And the observations at para 18 of the judgment (cited above) do not, in our view, significantly assist the Claimant's case as Mr Tatton-Brown submitted. It must be borne in mind that the s15 test sets a different, and much lower, standard than s18. Under the latter, the pregnancy, maternity, maternity leave etc must be the reason, or at least a material reason, for the treatment under challenge. Under the former, all that is needed is treatment because of "something arising from", or caused by – here the language of causation is certainly appropriate – the disability. The question whether something arises from the relevant disability is an objective one. It does not turn on the mental processes of the decision-maker. So a 'but for' test is appropriate and a 'but for' cause, if not too tenuous, is all that is required. But the 'because of' element is a quite different matter.

88 Finally, in case we are wrong in any part of our reasoning on the narrow claim, we should add that, in our judgment, the fact that the move of the trading function to Wilton had been "successfully trialled", while a contributing ground in Mr Prister's analysis, was not determinative of the decision to dismiss the Claimant. It is certainly right that, had she and Ms Evans not been away on maternity leave, the 'trial' would not have happened, but we are satisfied that Mr Prister would have put forward the same proposal to Mr Cornell in any event, and that the proposal would have been accepted. Mr Prister had been called upon to come forward with cost-cutting measures and rationalising the trading function was an obvious option. The fact that the work of the Claimant and Ms Evans had been managed by Wilton with no ill-effects gave him added confidence that his proposal was sound, but it was not the decisive factor in his thinking or that of Mr Cornell. Accordingly, had the narrow claim been upheld, it would not have attracted substantial compensation.

Detrimental treatment under the 1996 Act

89 Since the discrimination claims have failed, it inevitably follows that those brought under the 1996 Act are also unsuccessful.

Unfair dismissal

90 What was the reason for dismissal? It was, we find, that the Claimant was redundant within the meaning of the 1996 Act, s139(1)(b)(ii), alternatively (i).

91 On the question of reasonableness, Mr Tatton-Brown submitted that the Respondents applied an unfair procedure. In our view the process followed was imperfect but not outside the range of permissible action. The Claimant was consulted and given a full opportunity to contribute on the matters on which she was entitled to be heard. The fact that her proposals for ways to avoid her redundancy were swiftly rejected does not point to closed minds on the part of Mr Prister and Mr O'Grady, although we suspect that they approached the consultation exercise with a perception that the reorganisation of the trading function left her with precious few possibilities. Her proposals were, as we have

found, unrealistic and it would have been irrational to accept any of them. The possibility of her moving to Wilton could and probably should have been raised (even though the Claimant in her detailed email exchanges never broached the subject) but very little was made of that before us and we think on balance that the Respondents not unreasonably treated the matter as a non-issue. We have commented already on the appeal. We found Ms Monaghan's treatment of the discrimination complaint unimpressive. But (after declaring it irrelevant) she did reach a conclusion upon it which was rational (and with which we agree) and gave brief reasons in support. Internal appeals, even those conducted by large and powerful organisations, are not to be judged by the standards of judicial decisions. In the end, we conclude that the redundancy procedure, viewed in the round, was not unreasonable in the sense of being outside the range of reasonable conduct open to the Respondents in the circumstances.

92 Had we found this dismissal unfair on procedural grounds, we would have held that any compensatory award must be reduced to nil on *Polkey* grounds. But for any procedural blemish, the Claimant would in any event have lost her job when she did. There was no practicable means of avoiding that outcome.

Victimisation

93 The victimisation claim is, to our minds, plainly unfounded. The Respondents simply applied their rules regarding vested awards. The Claimant, as she was perfectly entitled to do, declined to sign the release and accordingly forfeited her entitlements. She relies on that refusal as a protected act, presumably under s27(2)(c). We find that it was not a protected act. She did not discernibly do any thing "for the purposes of or in connection with" the 2010 Act. Nor was it a detriment to refuse to accord to the Claimant preferential treatment in the form of a waiver of an important contractual term. To use an overworked expression, she was seeking to have her cake and eat it and any sense of grievance at being met with a negative response was clearly unjustified. Moreover, the 'because of' link is not made out. The Respondents' reason for refusing to make the claimed payments was quite simply that the Claimant had not brought herself within the contractual terms governing entitlement. *Her* reasons for that state of affairs are beside the point.

94 The allegations of discrimination raised in the consultation process and in the appeal to Ms Monaghan *could* have stood as protected acts, but the case was not put in that way and in any event there is no basis for supposing that the Respondents' action in enforcing their contractual rights was out of the ordinary or that it was attributable in any way to the fact that she had complained of discrimination.

Time

95 Had we found substance in the detriment-based discrimination claims, we would have considered whether they formed part of 'conduct extending over a period'. Even if not, we would have been inclined to exercise the 'just and equitable' discretion to extend the limitation period in such a way as to bring them within the Tribunal's jurisdiction. We would have been sympathetic to the

contention that, as an unrepresented individual (at the relevant time), she acted reasonably in regarding the series of events beginning with the appointment of Mr Chan and ending with the dismissal as a continuum. And we would have seen little risk of prejudice to the Respondents as a result of extending time. But given our primary and secondary findings above, the time issue must be resolved against the Claimant. There was no unlawful conduct extending over a period and it would be idle to exercise a power to bring within the jurisdiction complaints which have been held to be unfounded.

96 Out-of-time detriment claims under the 1996 Act, s47C, being confronted by the harsher 'not reasonably practicable' test (s48(3)), inevitably also fail for want of jurisdiction.

Result

97 For the reasons given all claims fail on their merits.[7] Those claims presented outside the primary three-month limitation period (as extended under the Early Conciliation provisions) also fail on jurisdictional grounds. The proceedings are accordingly dismissed.

98 We are very grateful to both leading counsel for their considerable assistance.

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EMPLOYMENT JUDGE SNELSON

7 July 2017

[7] The sex discrimination claim included in the list of issues was rightly not pursued, being excluded by the 2010 Act, s18(7).

IN THE EMPLOYMENT TRIBUNAL

BETWEEN

JENNIFER MARLOW

Claimant

and

AIG ASSET MANAGEMENT (EUROPE) LTD

Respondent

LIST OF ISSUES

A: The Employment Right Act 1996 ("ERA 1996")

1. The C was dismissed with effect from 9/9/16. She alleges that the **dismissal was unfair,** contrary to Part X of the ERA 1996. The issues are:
   a. What was the reason or principal reason for her dismissal? The R contends that it is redundancy.
   b. If the R can establish its reason for dismissal, was the dismissal fair or unfair having regard to the test in s.98(4) of the ERA 1996?

2. The C alleges that she was subjected to detriments done for the reason that she was about to go on maternity leave or was on maternity leave and/or had given birth to a child contrary to **s.47(C) of the ERA 1996** and **Regulation 19 of the Maternity and Parental Leave etc Regulations 1999 ("MPL Regulations")**, namely:
   a. Mr Chan was brought into London GCM desk and thereafter employed on a permanent basis;
   b. The C was identified as a suitable or potential candidate to be made redundant;

c. Mr Prister did not properly investigate and ascertain the Claimant's skills, experience and responsibilities before identifying her as a suitable or potential candidate to be made redundant;

d. The Claimant was not given the opportunity to influence or comment on her selection for redundancy until the proposal to make her redundant was no longer at a formative stage;

e. The Claimant had FX responsibilities removed from her without her knowledge or consent;

f. The Respondent failed to consider a potential alternative role or roles for her with an open mind.

3. The issues are:

a. Was the C subjected to these detriments? The R denies that she was.

b. If she was, and having regard to the onus on the R to show the ground on which any act or deliberate failure to act was done [s.48(2) of ERA 1996], was the reason that she was about to go on maternity leave or was on maternity leave and/or had given birth to a child?

B: The Equality Act 2010 ("EA 2010")

4. The C's "protected period" for the purposes of **s.18 of the EA 2010** was from mid-September 2014 until 7 June 2016.

5. Was the C discriminated against contrary to **s.18 of the EA 2010** by being treated unfavourably in her protected period because she sought to exercise and then exercised her right to maternity leave by being subjected to the detriments referred to above?

6. Was the C because of her sex treated less favourably than the Respondent would treat others, contrary to **s.13 of the EA 2010**, by being subjected to the detriments referred to above and by being dismissed.

Victimisation claims

7. Did the C do a protected act for the purposes of s.27(2)(c) of the EA 2010? The C contends that her refusal to enter into a release of all her claims or potential claims (including claims under the EA) as a condition of receiving awards under the Short Term and Long Term Incentive Plans amounted to such an act.

8. Was the R's refusal to pay the C Incentive Awards (or its refusal to consider the C for payment in respect of such Awards) under the R's Short Term and Long Term Incentive Plans an act of victimisation contrary to **s.27 of the EA 2010?**

9. Alternatively, was the R's insistence that the C waive any potential claims under the EA 2010 as a condition of paying her relevant Awards (or considering her for such payment) an act of victimisation contrary to s.27 of the EA 2010?

Time limits

10. Are the acts of discrimination or victimisation complained of out of time, having regard to the provisions of the EA 2010 at s.123(1), (3) and (4)? If so would it be just and equitable for the ET to extend time under s.123(1)(b)?

Remedies

11. If the C's complaint of unfair dismissal succeeds should an order be made for reinstatement or reengagement?
12. What financial compensation (if any) ought the C to be awarded for the purposes of s.123 of the ERA 1996 and/or s.124 of the EA 2010?
13. What (if any) declaration or recommendations ought the ET to make under s.124(2) of the EA 2010?