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EMPLOYMENT TRIBUNALS

Claimant: **Miss L Mansfield**

Respondent: **ST Solicitors (A firm)**

Heard at: **East London Hearing Centre** **On: 14-17 March 2017; and in chambers on 20 April 2017**

Before: **Employment Judge C Hyde** **Members: Mr S Dugmore, Mr M L Wood**

Representation

Claimant: Mr J Taylor (Counsel)

Respondent: Mr J Crosfill (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The complaints brought under sections 18(2), 18(4) and 13 of the Equality Act 2010; and under section 99 of the Employment Rights Act 1996 were not well founded and were dismissed.

REASONS

1 Reasons are provided in writing for the above judgment as the judgment was reserved.

2 The reasons are set out only to the extent that it is necessary to do so in order for the parties to understand why they have won or lost, and only to the extent that it is proportionate to do so.

3 All findings of fact were reached on the balance of probabilities.

4 The Claimant presented a claim form on 13 September 2016 in which she complained of discrimination under the Equality Act 2010 (“the 2010 Act”) and automatic unfair dismissal under section 99 of the Employment Rights Act 1996/the Maternity and Parental Leave etc Regulations 1999 (“the MAPLE Regs”). All the complaints were said to be unfavourable treatment related to the Claimant’s pregnancy and/or maternity leave.

5 By Grounds of Resistance attached to a response submitted to the Tribunal on 13 October 2016, the Respondent set out the grounds on which they proposed to resist the claims.

6 The Tribunal resumed its deliberations, which had commenced on 17 March, in chambers on 20 April 2017.

The Claims and Issues

7 All of the claims arose out of the Claimant’s dismissal on 27 May 2016 which the Respondent asserted was a dismissal by reason of redundancy. The Claimant’s case was that:

1. Her dismissal was unfair contrary to sections 94 and 99 of the 1996 Act;

2. Her dismissal was an act of unlawful discrimination because of pregnancy/maternity leave contrary to sections 18 and 39 of the 2010 Act; and

3. (In the alternative to the claim above) her dismissal was an act of unlawful discrimination because of her gender contrary to sections 13 and 39 of the 2010 Act.

8 The issues were discussed at a Closed Preliminary Hearing which took place in person on 14 November 2016 before Employment Judge Burgher. His Order records the issues agreed (pp 51A/51B).

9 Up to the commencement of the full merits hearing, the Claimant put her case as follows:

1. She disputed that there was a genuine redundancy situation; and

2. She contended that: *“the Claimant has effectively been ‘bumped out’ of her role in favour of her replacement Ms Wilson”* [ET1 para 20 page 24].

3. Her claim under section 18 of the 2010 Act was made on the basis that a decision to dismiss her was made before she returned to work on 5 May

2016 [ET1 para 21 page 24] and therefore she could maintain a claim under that section; and

4. her claim under section 13 of the 2010 Act was essentially an alternative claim, in which she alleged that the reason for her dismissal was the fact that she became pregnant and availed herself of maternity leave.

5. Her automatic unfair dismissal claim under section 99 of the 1996 Act (the MAPLE Regulations) was put on the basis that the reason or principal reason for her dismissal was the fact that she had been pregnant or had taken maternity leave. She contended that if the Tribunal found that there was no redundancy situation then it followed that the Tribunal must find the dismissal was automatically unfair [ET1 para 28 page 25].

Documents produced/evidence adduced

10 At the commencement of the hearing the parties produced a bundle of documents, the contents of which were agreed and which numbered just in excess of 200 pages [R1]. Further documents were added by agreement during the hearing. The parties had also compiled a bundle of witness statements which the Tribunal marked [R2]. In the order in which they gave evidence, there was a witness statement from the Claimant (A1-A8); and on behalf of the Respondent, statements from Ms Alyson Christie, Practice Manager and Conveyancer (A21-A29), and from Mr Sam Themis, the Senior Partner of the firm (A9-A20a).

11 Also, the Respondent’s Counsel had prepared an Opening Note which the Tribunal marked [R3]; and a cast list which was marked [R4].

12 The Tribunal asked the parties to agree structure diagrams to help illustrate the position in relation to staffing at the Respondent’s premises during the relevant timeframes. Four such diagrams were produced which collectively were marked [R5]. They were produced when the Tribunal commenced hearing evidence after reading witness statements.

13 Subsequently on 16 March 2017, the Respondent produced an email chain which had been disclosed but which had not been included in the bundle because the parties could not agree to do this. The Claimant produced her version of the email chain at this point. The documents were marked respectively [R6] and [C2].

14 On the first day of the hearing the Claimant also produced a chronology which was marked [C1].

15 Both parties produced written closing submissions which were supplemented orally. They also produced a number of authorities. The Respondent’s written submissions were marked [R7] and the Claimant’s were marked [C3].

16 At the commencement of the hearing Mr Crosfill produced copes of two authorities. The first was *Sefton Borough Council v Wainwright* [2015] IRLR 90, an

authority relied upon by the Claimant in correspondence and in the claim form. Mr Crosfill also produced the transcript of the judgment of the Employment Appeal Tribunal in the case of *Indigo Design Build and Management Ltd and Tank v Martinez* (UKEAT/0020/14 and UKEAT/0021/14).

17 In the event Mr Taylor did not seek to rely on the *Sefton* authority as part of the Claimant's case.

18 Further, in closing Mr Crosfill produced the following: -

Chandhok v Tirkey [2015] IRLR 195;
Chagger v Abbey National plc [2010] IRLR 47, CA;
Maund v Penwith District Council [1984] IRLR 24, CA;
Kuzel v Roche Products Ltd [2008] IRLR 530, CA.

19 During the course of his submissions Mr Crosfill also took the Tribunal to and addressed points that he anticipated the Claimant making in relation to the cases of *SG Petch Ltd v English-Stuart* UKEAT/0213/12, a transcript of which was before the Employment Tribunal, and *Rees v Apollo Watch Repairs plc* [1996] Lexis citation 2870 (unreported).

20 He also commented on some of the other documents produced by the Claimant in support by way of authorities or text.

21 Mr Crosfill also helpfully attached by way of a three page schedule to his closing submissions, the text of the relevant provisions of the Equality Act 2010 and the Employment Rights Act 1996 with which this Tribunal was concerned.

22 On behalf of the Claimant, Mr Taylor produced the following:

1. Page 103 of the Statutory Code of Practice in respect of Employment made under the Equality Act 2010;
2. A five page extract (paragraphs [270]-[275.03]) of Harvey on Industrial Relations and Employment Law [Division L Equal Opportunities/3. Prohibited Conduct] in relation to the interpretation or construction of the phrases 'on grounds of' or 'because of': the reason for the less favourable treatment.
3. He also produced three first instance decisions of the then Industrial Tribunals in relation to the case of *Stelfox v Westco Building Components Ltd* (all promulgated in 1995);
4. The unreported case of *Rees* above;
5. *Risby v London Borough of Waltham Forest* (UKEAT/0318/15);
6. *Commissioner of Police of the Metropolis v Keohane* [2014] ICR 1073. The Tribunal was referred to a transcript of this judgment printed out from a website; and
7. The case of *Petch* referred to above.

23 Both Counsel agreed that the Tribunal's focus should be on the claim under section 18(4) of the Equality Act. Mr Taylor further submitted that the Tribunal should also consider the claim in the alternative under section 13 of the Equality Act and the

claim under section 99 of the Employment Rights Act 1996 (“the MAPLE Regulations”).

24 It was confirmed in the case management order that there was no claim being advanced alleging detriment contrary to section 47C of the 1996 Act - whistle-blowing.

25 As is apparent from some of the authorities above relied upon by the Respondent, the Respondent strongly urged the Tribunal to guard against allowing the Claimant to enlarge upon her case beyond that which was pleaded in the claim form.

26 Mr Taylor also did not pursue any suggestion that there had been a breach of Regulation 10 of the MAPLE regulations as initially contended in the claim form. He acknowledged that as the Claimant had returned to work, this Regulation did not apply in any event.

27 Although Mr Taylor on behalf of the Claimant indicated which claims he put a greater focus on, he expressly indicated that he was not withdrawing any of the claims.

Findings of Fact and Conclusions

28 The Respondent is a firm of solicitors, of which Mr Themis is the Principal. The Claimant commenced her employment with the Respondent on 30 June 2014 and fell pregnant in September 2014. She commenced her maternity leave in May 2015. The Claimant’s son was duly born in early June 2015.

29 The Tribunal considered the first question as to whether there was as a matter of fact a genuine redundancy situation. From December 2015, after Ms Dowman had left the Respondent’s office in Woodham, Ms Wilson picked up the slack in the sense that she continued to perform her substantive post assisting Ms Smithyes the Conveyancing solicitor and absorbed all the work which had previously been done by the Claimant and then by her maternity cover Ms Dowman. All the evidence before us was that Ms Wilson easily coped with this. In addition, it was not in dispute as set out above that the Respondent installed a considerable amount of new equipment which it was common ground made the work of the receptionist/legal secretary easier or more manageable.

30 There was no suggestion on the Respondent’s part that they made any attempt to recruit further assistance once Ms Dowman had left. Mr Themis described that he gave consideration to it but that it was not deemed necessary. The Tribunal considered that all these matters would have meant that there was a redundancy situation as at about December 2015.

31 It was further not in dispute that the Claimant and Ms Wilson were appropriately put in the same pool subsequently in the redundancy exercise in May 2015. There was evidence before us which supported this decision, to the effect that their job roles were very similar, albeit the roles might have been described slightly differently in internal documents as legal assistant, legal secretary, legal secretary/receptionist.

32 The Tribunal also considered that it was relevant that prior to the Claimant going on maternity leave in May 2015 she was the only secretary at the Woodham office which at that point was the only office run by the Respondent, and that she provided

the secretarial support to both Mr Themis and the new partner Ms Claudia Parks, who joined the practice in March 2015. Further, she had provided support to Ms Christie who was not a solicitor but who worked both as a conveyancer and as Practice Manager.

33 The Respondent put their case in relation to the redundancy situation on the basis that the redundancy arose out of the need that the Respondent perceived to make costs savings on 5 May 2016 as a result of the loan of £10,000 which Mr Themis had arranged with his wife's company, arriving in the Respondent's account. Mr Themis indicated that thereafter he was under pressure to proceed with cost savings so that his wife's company could be assured that the loan would be repaid appropriately.

34 The Tribunal accepted on the balance of probabilities the picture painted by the Respondent that largely as a result of investing in the expansion of the practice and opening the Shenfield office at about the end of November 2015, the Respondent had incurred considerable expenses and that this was having a negative effect on the firm's finances. In addition, the pipeline of work which was expected had 'fallen off a cliff' due to the change in the tax arrangements in respect of stamp duty.

35 An issue which arose in relation to the Respondent basing their case on the need to cut costs as of 5 May 2016 was that this did not adequately explain why the Respondent made the decision to restrict the pool of people at risk of redundancy to the two legal secretaries at the Woodham office. The Respondent's case was that after the preliminary meetings with all the staff on 6 May 2016, the plan evolved into only the Claimant and Ms Wilson and (arguably also Ms Richards) being at risk.

36 The Tribunal noted that this was a small solicitor's firm and it was a feature of the case that the contemporaneous documentation was in some respects very sketchy and unreliable. It was consistent with the workings of a small office that such paperwork would be less formal than in a larger operation. The very brief notes produced by the Respondent in relation to the meetings which were held with staff on 6 May and then on 11 May were contemporaneously recorded by Mr Themis. In contrast, the more detailed notes produced by Ms Christie had been written up by her based on her contemporaneous "scribbles", but they were only written up after the Respondent received correspondence from solicitors acting on behalf of the Claimant at the end of June 2016. She had then destroyed the original "scribbles" which she had made during the meetings. These were therefore not as contemporaneous as the much shorter notes apparently made by Mr Themis during the meetings, and where they were disputed, their content could not be verified against the original "scribbles".

37 Mr Themis explained during his evidence that his plan was to get Ms Smithyes, the Conveyancing solicitor who he had recently recruited, to train Debbie Richards about Conveyancing with a view to terminating the services of Ms Smithyes in due course, once Ms Richards had become sufficiently competent.

38 It goes without saying that the second part of this plan was not shared with Ms Smithyes when she was consulted about the redundancy on 6 May. There was no reference to the Respondent's intention to dispense with her services in due course once she had sufficiently trained up Ms Richards who would clearly be able to provide

the necessary service at a lower cost. Thus, what may have appeared to be an irrational decision about where the focus of the cuts would be, namely on the legal secretaries, appeared to make more sense against that background.

39 Throughout the time that the Claimant was absent on maternity leave, she remained in contact with the Respondent, primarily by text messaging with Ms Christie the Practice Manager. She also popped into the Respondent's offices from time to time. The texts or WhatsApp messages exchanged between the Claimant and Ms Christie were produced and in the bundle. They disclosed a picture of the Claimant being extremely flexible about what hours and days she would be prepared to work and it was understood by both parties that this would, to a certain extent, be subject to her childcare arrangements. She was prepared to yield to the requirements of the Respondent and, if so required, to do a job share with the lady who had been recruited to be her maternity cover, Ms Dowman.

40 Once Ms Dowman had left however the Claimant continued to indicate to the Respondent that she would be flexible and would go along with whatever the Respondent suggested. It appeared that from about December 2015 onwards the Respondent through Ms Christie communicated to the Claimant that their need was really only for the Claimant to work two days a week. There was some consideration given to a third day, namely on a Monday, but eventually Ms Christie communicated to her that based on her discussions with Mr Themis, the Respondent would only have work for the Claimant for two days a week. It was also relevant that the two days which were being contemplated were Thursday and Friday, the days on which Ms Wilson left early at 3pm because of her childcare commitments.

41 Against that background the Claimant also eventually had a meeting with Mr Themis on 2 May 2016 shortly before her return to work on 5 May 2016.

42 Mr Themis in his evidence indicated that he had had no idea what Ms Christie had been saying to the Claimant in the WhatsApp messages. Whilst it was correct that Mr Themis was not copied in to that correspondence, the Tribunal was satisfied that Ms Christie was careful to check with Mr Themis what she should say to the Claimant about the return to work.

43 The correspondence between Ms Christie and Mr Themis which was only produced after Ms Christie had given evidence also confirmed, in the Tribunal's view, the picture given to the Claimant in the WhatsApp messages by Ms Christie that she was acting in accordance with Mr Themis' instruction. When he responded in a way which was not sufficiently clear, Ms Christie asked him for clarification so that she could be clear about his instructions. This emerged from the correspondence in relation to a number of matters in the emails which were exchanged on 22 April 2016.

44 Ms Christie came across as an honest and reliable witness and had on one and possibly two occasions conveyed information to the Claimant expressly on the basis that these were the results of her discussions with Mr Themis. This was relevant in relation to the messages that the Claimant would only be needed for two days a week at the Woodham office. This was also consistent with Mr Themis' own position as expressed to Ms Christie towards the end of April 2016 in the email correspondence which was produced belatedly, to the effect that the Respondent did not need Miss

Mansfield at the Woodham office but that as part of a "gentle reintroduction" to the workplace it would be better for her to work two days a week at the Shenfield office.

45 Mr Themis' case was that before he spoke to the Claimant face to face on 2 May he had had no inkling that she had been hoping to work more than two days a week. There was an email from Ms Christie to Mr Themis sent on 22 April 2016 at 13:01 [C2] in which Ms Christie reported to Mr Themis that Miss Mansfield had said she would be happy to work on a third weekday (Mondays) if Mr Themis wanted this to happen "*at a later date*", but that she would need notice of this because of her son. On the balance of probabilities, we had no basis for finding that Mr Themis was aware that the Claimant wanted to work more than two days a week, on her return to work, prior to meeting her on 2 May 2016 (R6, C2 especially 22 April 2016).

46 This email correspondence [C2] further supported the Tribunal's finding that the fact that there was a classic redundancy situation in relation to the Woodham office at the very least would have been apparent to the Respondent before 5 May 2016.

47 Indeed, Mr Themis' exposition of his "grand plan" to transfer the Claimant to Shenfield to work as his personal assistant if he were able to transfer Ms Richards to the Woodham office to learn about Conveyancing from Ms Smithyes, was in the Tribunal's view an implicit acknowledgment of his appreciation of the existence of the redundancy situation.

48 There was however no evidence that the Respondent took any action prior to 5 May to address the redundancy situation.

49 After determining the question of whether there was a genuine redundancy situation as at 5/6 May 2016, the Tribunal also gave consideration to the case as originally put by the Claimant in one respect, namely that the Respondent had effectively 'bumped' Miss Mansfield out of her role in favour of her replacement, Ms Wilson: para 20 of particulars of claim (p.24).

50 There was no dispute that the Respondent had treated the Claimant unfavourably by way of dismissing her/selecting her for redundancy. There was further no suggestion that there was a suitable alternative post available as at the time that that decision was made.

51 The Respondent however urged the Tribunal to find that Ms Wilson was not "the replacement" for the Claimant. The Tribunal considered that this was factually correct on the balance of probabilities in that the person who was hired to cover during the Claimant's maternity absence was Ms Dowman. She had been recruited approximately a month before the Claimant departed on maternity leave in about April 2015, and this was in order that there should be a handover to her. As noted above, Ms Dowman was employed on a 12-month fixed term contract. Further, her employment was terminated by way of her resignation. Whilst it was not disputed that she had made an error in her work shortly before her departure, and that this had been brought to her attention by the Respondent, there was no suggestion that there had been any formal action taken against her by the Respondent which could have led to the termination of her employment. In those circumstances, the Tribunal could not properly find that the Respondent had acted to bring about the termination of Ms

Dowman's employment in any way.

52 Further, given the evidence that we had before us as to the circumstances and the timing of the recruitment of Ms Wilson, there was no proper basis on the balance of probabilities for finding that she was employed for any reason other than that maintained by the Respondent, namely to support the new Conveyancing solicitor who was employed at about the same time in September/October 2015, namely Emma Smithyes.

53 Also, it was apparent from a review of the claim form that one of the matters the Tribunal had to decide was whether the Respondent's decision to select the Claimant for redundancy fell foul of section 18(4) of the 2010 Act.

54 The Claimant further contended that in the circumstances of this case the decision to select her for redundancy was taken during the protected period relevant for section 18(2) which relates to the period from the beginning of the pregnancy through to the end of the additional maternity leave period (section 18(6)). Her case was further that the decision was implemented after that period and therefore reading section 18(2) with section 18(5) the Claimant was entitled to bring a complaint in relation to that section. Mr Taylor explained that his focus was on section 18(4) and not on sections 18(2) or 18(7) which related to a section 13 claim because it was clear when one looked at the circumstances of the case that the issues revolved around the Claimant's maternity leave as opposed to her pregnancy which was what section 18(2) was directed at.

55 For this reason also, in summary, he indicated he did not need to trouble the Tribunal in relation to submissions in relation to section 13(1) of the 2010 Act as that added nothing material to the primary case being pursued under section 18(4).

56 The Tribunal concluded that by 5 May 2016 there was insufficient work at the South Woodham Ferrers office to keep both the Claimant and Lisa Wilson fully occupied. This is corroborated by the Claimant's witness statement at paragraph 15.

57 On the morning of 5 May 2016 Mr Themis sent an email to all members of staff warning of the possible need to make redundancies and a need to make cost savings (p.61A sent at 07:17).

58 That email was followed by a meeting which took place at Mr Themis' home attended by Mr Themis, his wife, Ms Christie and Ms Burrows an accountant. Mrs Themis was also referred to in many of the documents as Ms Tina George. Ms Parks, the partner on maternity leave attended by conference call. The Tribunal accepted Mr Themis' evidence on the balance of probabilities that the outcome was a decision to conduct a review of the business and the possibility of costs savings. This was accepted not least because there was no other evidence to contradict it.

59 Thereafter the Respondent held meetings with Ms Smithyes (p.90A), Ms Lisa Wilson (p.90A), Ms Deborah Richards (p.89A), Ms Fotoulla Menikou (p.89A) and the Claimant (p.90A) on 6 May 2016. The page references are references to Mr Themis' notes of those meetings.

60 Following these discussions, the Respondent made a number of decisions. The first was that Ms Menikou's position was safe. She was by then undertaking matrimonial work at Shenfield. Further the Respondent decided that Emma Smithyes would be retained on the basis set out above i.e. to train Ms Richards as a Conveyancer. For that purpose, an increase in her hours from three to four days a week was discussed but never implemented. The Respondent's thinking in discussing that increase in her hours was that that would permit her to complete the training of Ms Richards more quickly.

61 Further the Respondent decided that Ms Richards would undertake more Conveyancing work with a view to releasing Ms Christie to do marketing work and that insofar as there were cost savings to be made, any redundancies would be made from the legal secretaries/receptionists.

62 As became apparent although it was not in dispute that it would have been appropriate to place the Claimant, Lisa Wilson and Deborah Richards were appropriately in the same pool, the Tribunal considered that the evidence indicated that Ms Richards was not in fact treated in the same way as Ms Wilson and the Claimant in the redundancy process.

63 Thus, on 10 May 2016 Mr Themis proposed some selection criteria in an email to Ms Christie (p.101). The stated intention was that these should be shown to "both" of the members of staff who would be affected by the redundancy selection exercise and that the Respondent would consider any alterations to the criteria requested by them. This email was sent on 10 May 2016 and a meeting was planned for the following day with the Claimant and Ms Wilson.

64 Ms Richards was not apparently included in the discussion at this stage.

65 On Wednesday 11 May 2016 Lisa Wilson sent an email to both Mr Themis and Ms Christie at 10am setting out the reasons why she believed she should retain her job (p.115). That email referred to the fact that Lisa Wilson had 16 years of experience working in law. It was not in dispute that the Claimant's experience of work in a legal firm was limited to the two years that she had spent with this Respondent.

66 The Tribunal did not consider that it was fair to criticise in any way the Claimant for having failed to put in a similar submission by this date because after the meeting on 6 May 2016 Ms Wilson had in the normal course of her duty been back at work again on the Monday and Tuesday. The Claimant only worked two days a week and therefore had not been back in the office since the meeting on 6 May 2016.

67 During the afternoon of 11 May 2016, Mr Themis and Ms Christie met with Ms Wilson and the Claimant at 2:15 and 4pm respectively for scheduled meetings of approximately half an hour each (p.204). Further Wednesday 11 May was not the Claimant's usual working day so she had had to make exceptional arrangements to come into work and for childcare on that day. During her meeting with Mr Themis and Ms Christie the Claimant was told that Ms Wilson had sent the email referred to above and it was suggested that she might wish to do something similar.

68 An issue arose as to whether Ms Wilson had been prompted to send this email

by Mr Themis and/or Ms Christie. The Claimant relied on the opening phrase of the email from Ms Wilson, which read: *"Following on from our conversations last week with regard to the position of the firm and plans going forward …*" The Tribunal did not consider that it was a necessary conclusion from that phrase that Ms Wilson had been specifically prompted by Mr Themis and Ms Christie to write this letter. The Tribunal took into account that as recorded in the notes of the meeting with Ms Wilson on 6 May 2016 she had previously been through a redundancy process (pp. 98 and 98A). The Tribunal also considered that this was also consistent with her 16 years' experience of legal work. In all the circumstances, therefore on the balance of probabilities we could not conclude that Ms Wilson had been prompted by the Respondent to put in such a submission. Even if she had, the Tribunal as set out above noted and it was not disputed that the Respondent invited the Claimant to submit a similar document (para 20 of the Claimant's witness statement and oral evidence).

69 There was no similar meeting held with Ms Richards on 11 May 2016.

70 After the conclusion of the meeting with the Claimant on 11 May 2016, she returned to the office and asked for an impromptu meeting in which she indicated that she wanted to be made redundant. There was no dispute that the Claimant was extremely upset and indicated to Ms Christie and Mr Themis that she had spoken to her father following the earlier meeting (para 24, A27).

71 At the meetings at 2:15 and 4pm respectively the Respondent shared the selection criteria with Ms Wilson and the Claimant as they had been set out in the email referred to above (p.101). They were also told that the time for the decision would be by the end of the week. Both Ms Wilson and the Claimant had expressed in their respective meetings that they wanted the process over and done with speedily. Both were upset at the process.

72 At the impromptu meeting at which the Claimant offered that she should be the one to be made redundant, Mr Themis and Ms Christie did not accept that offer and invited the Claimant to reflect on her position.

73 The following day, Thursday 12 May 2016 which was a normal working day for the Claimant, she was asked twice for any written representations at 9:30 and 11:40am in emails from Ms Christie and Mr Themis respectively (pp.61B and 61C). She was told in an email sent at 11:38 by Mr Themis that in the absence of any representations the scoring exercise would be carried out that day (p.61C).

74 The Respondent's case was that the scoring exercise was carried out in the evening of 12 May 2016 separately by Ms Christie and Mr Themis. Ms Christie gave the Claimant 45 out of 60 marks (p.106) and gave Ms Wilson 48 out of 60 marks (p.112). Mr Themis gave 47 out of 60 (p.105) and 48 out of 60 (p.113). Mr Themis' case was that he conducted the scoring after Ms Christie had left the office at 5pm. Their case was that the results of the scoring were not discussed jointly until 13 May 2016.

75 There was no evidence and the Respondent did not seek to suggest that there was any scoring at the same time of Ms Richards or indeed that she had been invited to send in a written submission about why her services should be retained as was the

case in relation to the Claimant above.

76 At 10pm on Thursday 12 May 2016 the Claimant sent an email to Mr Themis, copied at the same time to Ms Christie in which she set out her position in relation to the redundancy situation (p.61D).

77 In the letter she confirmed her very flexible approach to continued work for the Respondent and also her intention to increase her relevant qualifications. She also made some other points.

78 Mr Themis sent an email in reply timed at 00:38 on 13 May 2016, some two and a half hours after the Claimant's email, informing her that the scoring had already taken place because the Claimant had failed to indicate her intentions as requested by the Respondent (p.116).

79 Once again it was the Respondent's case that a meeting took place between Mr Themis and Ms Christie on Friday 13 May 2016 at the office during which they compared their scores. The Tribunal accepted this on the balance of probabilities although there was no documentary evidence to support it because there were no proper grounds for us to reject this evidence. The Claimant had scored 4 points in total less than Ms Wilson. A meeting was then held with the Claimant at which she was informed of the outcome of the redundancy selection process.

80 In relation to this part of the process also there was no evidence whatsoever from the Respondent that Ms Richards was included in a similar or the same process.

81 In a letter dated Thursday 19 May 2016, which was the Claimant's next working day, the outcome of the redundancy selection process was confirmed to her in writing. The Claimant was offered the right of appeal, an offer which she did not take up (p.161R). In this letter was the first reference to Ms Richards having been subjected to the same redundancy selection process.

82 The Claimant was informed that the termination of her employment would take effect at the end of May 2016 (p.161R), reference was made to the possibility of the Claimant returning to do temporary work with the Respondent, and she was invited to discuss that with the Respondent so that dates could be provided to her.

83 The Respondent also relied on a document setting out how Ms Richards met the redundancy selection criteria. This was a typed-up document said to have been prepared by Mr Themis. It was in a similar format to the typed records of the scores for Ms Wilson and the Claimant. However, there was no documentary evidence to verify the date of this document. There was no suggestion that a similar scoring exercise was conducted by Ms Christie in relation to Ms Richards (p.114).

84 Although Mr Themis' evidence was that the scoring of Ms Richards was done on 12 May the Tribunal considered it surprising that in that case there was no discussion of Ms Richards when he had the meeting with Ms Christie on Friday 13 May to discuss the scores. Ms Christie was unaware that any such scoring had taken place and she was not said to have been involved in any scoring of Ms Richards.

85 By 28 June 2016, Debbie Richards had left the Respondent's employment having earlier resigned. The Respondent offered the Claimant the opportunity to be re-engaged as a legal secretary on the same terms as she previously enjoyed. Mr Richard's role was full-time. Although this offer was made to the Claimant in a letter dated 28 June 2016 (p.60) it was relevant that relations between the Claimant and Mr Themis had now soured somewhat following legal correspondence being exchanged between and on behalf of the two. In the event the Claimant declined that offer (pp.60 and 64) in a letter in reply from her solicitors dated 7 July 2016. The solicitors acting for the Claimant explained that although they thanked Mr Themis for the offer of re-engagement, given the "*comments, language and tone*" used in Mr Themis' letter to them, in particular the disparaging comments that he had made about Miss Mansfield personally, their client was of the reasonable opinion that she could not return to work. The Tribunal agreed with that perception having regard to the tone of Mr Themis' response in the letter of 28 June 2016.

86 The correspondence from solicitors on behalf of the Claimant started on 23 June 2016.

87 The last day worked by the Claimant appears to have been Friday 27 May 2016 as recorded in her solicitor's letter of 23 June 2016 (p.55). The Tribunal could not see anything untoward about the letter from Messrs Attwells, acting on behalf of the Claimant to the Respondent.

88 Having reached the findings of fact set out above the Tribunal then considered the claims. Mr Crosfill urged the Tribunal not to enlarge upon the Claimant's case in the section of his closing submissions entitled "*Shifting sands*".

89 The specific respect in which it was said that the Claimant was seeking to broaden her case beyond the case set out in the claim form was the suggestion which was put to the Claimant in re-examination that she may have been prejudiced by the timing of the redundancy exercise, so swiftly after her return to work from maternity leave.

90 The Tribunal accepted that it was correct as a matter of law and necessary for a fair hearing that the list of issues should be interpreted as subsidiary to the claim form and explaining the matters which were set out in the claim form rather than as providing any new grounds of complaint. If the latter were the case, this would have needed to have been addressed fairly and squarely by way of an application to amend.

91 In relation to the Claimant's contention that the decision was made to dismiss her before her return to work on 5 May 2016, the Tribunal considered the relevant evidence. Deciding such matters as we must on the basis of what was likely on the balance of probabilities, we took into account that it was not in dispute that at the meeting between the Claimant and Mr Themis at Shenfield on 2 May 2016, the Claimant told Mr Themis that she would be prepared to work a third day, namely on a Monday, and that Mr Themis offered her the possibility of carrying out some sort of bookkeeping work on that day. Thus, Mr Themis' immediate response was to try to find the Claimant something else to do. Although this did not materialise, the Tribunal accepted on the balance of probabilities that this reaction to the Claimant's expressed interest in an additional day's work was inconsistent with the Claimant's contention that

Mr Themis had already made a decision to terminate her employment by 5 May 2016. Further, as set out above, we had no adequate reason to reject the Respondent's account of the discussions which took place between Mr Themis and his wife and Ms Burrows on the morning of 5 May 2017.

92 Also, as set out in our findings above, it was not likely on the balance of probabilities that the Respondent engineered Ms Dowman's departure and then Ms Wilson taking up the slack in the absence of Ms Dowman and the Claimant on maternity leave.

93 The Tribunal also considered that the questions which the Respondent asked of the members of staff who were interviewed on 6 May about flexibility of work and the possibility of working additional hours was consistent with the Respondent still considering several options as at that point.

94 Mr Crosfill urged us to bear in mind a real distinction between a recognition on the Respondent's part that redundancies could be made and the Respondent settling on redundancy for a particular person and focusing on one person. There was, he submitted, nothing unlawful about a respondent deciding while an employee was on maternity leave that in principle someone was going to have to go.

95 In relation to the Respondent's consideration of only Ms Wilson and the Claimant in the pool in the first instance, the Tribunal considered that there was no satisfactory explanation provided by the Respondent for this. However, it did not, in the Tribunal's view, undermine their case that they were considering both the Claimant and Ms Wilson and that of the two, Ms Wilson was a stronger candidate for retention. From the information available to the Tribunal about Ms Richards, it appeared that the Respondent had made the decision that she would be trained up to take on the work that Ms Smithyes was doing and based on the scores which were not disputed she had a far stronger case to be retained by the Respondent even compared to Ms Lisa Wilson.

96 Further the Respondent's quite proper refusal to accept the Claimant's offer to be made redundant on 11 May also undermined the contention that they had already made the decision to terminate her employment. Further the Respondent also clearly sought further information from the Claimant to support making a decision to retain her in employment. They made it clear to her what the timeframe was in which they would be making their decision. Further, the evidence that both people actively affected by this, namely the Claimant and Ms Wilson, had expressed the desire to have the matter dealt with quickly sufficiently explained the time frame in which the decision was made.

97 The Claimant criticised Mr Themis for a failure to take into consideration the email sent by her at 10pm on the Thursday. While the Tribunal considered that Mr Themis was extremely inflexible in taking the approach that the email would be disregarded because it was sent after the close of business on 12 May, the Tribunal did not consider that this tended to show that the Respondent had discriminated against the Claimant in the manner alleged having regard to all the circumstances of the invitations to the Claimant to submit representations. The Tribunal also took into account that the contents of the Claimant's representations were not such as to have been likely to have had a significant impact on the overall judgment of her entitlement

to be retained in employment when compared with Ms Wilson.

The section 18 claim

98 Both claims under sections 18(2) and 18(4) of the 2010 Act relied on the same allegation of unfavourable treatment, namely being selected for redundancy. There was no dispute that the Claimant was thereby treated “unfavourably” for the purposes of the section. The issue for the Tribunal was the determination of the reason for that treatment. The Tribunal also accepted Mr Crosfill’s submission that the proper way of addressing this was not to ask whether the Claimant would have been treated favourably “but for” the pregnancy, but to ask the question why: para 18 of Mr Crosfill’s submissions and his reliance on the case of *Indigo Design & Build Management Ltd v Martinez* UKEAT/0020/14.

99 A section 18(2) claim may only be brought if the unfavourable treatment occurs within the “protected period” or results from a decision taken during the protected period and implemented thereafter. Although as a matter of fact Ms Wilson took on some or possibly all of the Claimant’s duties while the Claimant was on maternity leave this did not amount to evidence that a decision was taken as at that point to make the Claimant redundant and/or to dismiss her. It was simply a matter of chance and practicality that the work that the Claimant had been doing was allocated to or performed by Ms Wilson in the Claimant’s absence.

100 As set out above in our findings, there was no evidence from which we could properly conclude that a decision to dismiss the Claimant was taken by the Respondent prior to her return to work on 5 May 2016. The decision to dismiss therefore fell outside the protected period.

101 Further in relation to a claim under section 18(2) the characteristic that is protected is pregnancy (and illness although that is not material to this case) and not the fact that a person has taken time off as a consequence of pregnancy. Protection in relation to the latter circumstance is afforded by subsection (4).

102 There was no evidence before the Tribunal from which we could properly conclude that the reason for the Claimant’s treatment was that she became pregnant. Further that case was not put to Alison Christie. The circumstances of the case as set out above confirm this. Indeed, this was conceded by Mr Taylor in his closing submissions.

103 The Tribunal then assessed the claim under section 18(4) of the 2010 Act. The Tribunal did not accept the argument that as the Claimant’s duties had been assigned to Lisa Wilson in her absence, it was not open as a matter of law to the Respondent to undertake a competitive redundancy exercise. The Tribunal accepted the Respondent’s submission that before, during and after a period of maternity leave, section 18(4) does not operate to make a dismissal for redundancy unlawful, unless that decision is “because” the mother has taken or will take maternity leave.

104 The Claimant confirmed in oral submissions that reliance was placed on the case of *Rees v Apollo Watch Repairs plc* case. However, the Tribunal considered that the *Rees* case was distinguishable from the present case. The *Rees* case involved the

replacement of the mother by the person who had been recruited to cover her duties during her maternity absence. The Tribunal found above that this was not the case in relation to the Claimant. The maternity cover was to be provided by Ms Dowman as set out above. Lisa Wilson was not recruited by the Respondent as a maternity cover and as referred to above, the fact that Ms Dowman left and the slack was naturally then taken up by Ms Wilson was not brought about by the actions of the Respondent. Further the Claimant was then assessed as part of a redundancy selection process once she had returned to work.

105 There was also merit to Mr Crosfill's submission that the Claimant's argument appeared to be a consequence of applying the "but for" approach to causation, which was erroneous in this case. If the Claimant had not gone on maternity leave, on 5 May 2016, the Respondent would still have had a surplus of legal secretaries. There would still have been a redundancy situation and the likelihood was that the Claimant would still have been selected.

106 The Respondent accepted that dismissal would have been discriminatory if a material reason for that treatment was the fact that the person had gone on maternity leave. In other words, it would be discriminatory to favour the incumbent (for that reason) in preference to the returning employee. This was not the way in which the Claimant pleaded her case and the Tribunal accepted that it would be wrong to consider such a case which had not been pleaded. As set out above we accepted that we had to determine the points in the claim form rather than as may have been foreshadowed by looser wording in a list of issues.

107 On the facts of this case as found by the Tribunal, even if the Claimant were permitted to pursue such a wider case we found in any event that the Respondent applied criteria wholly unrelated to the fact that the Claimant had been on maternity leave. There was consideration of the Claimant's performance in the short period since her return from maternity leave but the Respondent's evidence was clear that this was considered along with her performance prior to taking maternity leave. In all the circumstances therefore, the Claimant's maternity leave was not "the reason why" she was selected for redundancy.

108 In making his submissions under section 18(4) Mr Taylor relied on both the cases of *Rees* and *Stelfox*. He relied on these in support of his contention that both cases involved the employer preferring the mother's replacement. His submission was not in the Tribunal's view successful because it was based on a factual matrix which the Tribunal did not accept, namely that Ms Wilson was the Claimant's replacement. This has been dealt with in our findings above.

109 As part of his submissions Mr Taylor relied on the codes of practice. In particular, he relied on page 103 and paragraph 8.20 of the code. Having considered that text the Tribunal did not consider that it added anything of substance to the submissions which were made.

110 Given the agreement between the Counsel as to the central issue and central importance of our determination in relation to section 18(4) and the submission of Counsel on behalf of the Claimant that it was unnecessary to make further and separate submissions in relation to section 13(1) and that the Claimant was relying

primarily on section 18(4), and given our finding above that the section 18(4) claim was not made out, the Tribunal also found that the section 13(1) complaint was not well-founded.

Unfair dismissal: section 99 of the 1996 Act (Maple Regulations)

111 In relation to liability under section 99, the Tribunal had to determine the reason or if more than one, the principal reason for the dismissal. This is a different legal framework from the test of causation in the discrimination legislation. It is not enough in the context of a section 99 claim that maternity or pregnancy is a factor in a decision to dismiss. It must be the principal reason either for the dismissal or for the selection for redundancy of the Claimant.

112 For the avoidance of doubt the Claimant did not rely on Regulation 10 of the Maple Regulations 1999. She could not because her dismissal took place after she returned to work.

113 The Claimant relied on the case of *Stelfox* in relation to the section 99 unfair dismissal complaint. Mr Crosfill addressed the Claimant's reliance on *Stelfox* in this context. In his oral and written submissions in relation to the section 99 claim Mr Taylor relied on the cases of *Petch* and *Rees v Apollo Watch* as well. He relied on the case of *Petch* in the context of construing the third limb of the Regulation 20(2) test which provided that if the reason or principal reason for the employee's selection for redundancy were reasons connected with the fact that the employee took maternity leave, the dismissal would be automatically unfair.

114 The Tribunal was satisfied from the *Petch* judgment that the burden of proving that the reason for dismissal was a reason of a kind specified in paragraph 3, namely the fact that the mother sought to take or availed herself of the benefits of maternity leave (statutory maternity leave), lay on the Claimant. In that case, it was held that the subsection is satisfied if the mother can show that the reason or reasons for the dismissal was or were connected to the fact that she had taken maternity leave. In the *Petch* case the dismissal for redundancy took place because the employer had appreciated the redundancy situation and the need for cutting back from four employees to three, as a result of the fact that the Claimant was away on maternity leave.

115 The Tribunal first of all relies on our findings in relation to the section 18(4) claim above in which we were satisfied that the Claimant was not "replaced" by her locum cover. The locum recruited to cover the maternity absence was Ms Dowman and she left voluntarily. Further although the redundancy situation may have emerged during the Claimant's absence on maternity leave the Respondent importantly took no action in relation to selection for redundancy until after the Claimant's return to work. Thereafter they considered various scenarios and options, only one of which was the option of reducing the complement of legal secretaries/receptionist.

116 Then the Tribunal was satisfied that the Respondent applied an objective set of selection criteria to select the relevant member of staff to be made redundant. The fact that the Claimant had been pregnant and/or taken maternity leave were part of the background but had nothing to do with the reason for the redundancy. If the Claimant

had not taken maternity leave, the situation would have been identical. Matters such as the reduction in work and, to a lesser extent, the presence of Ms Wilson in any event would have led to the same situation. The Tribunal also noted that Ms Wilson was hired at a time when the Claimant's locum cover was in place.

117 In all those circumstances, therefore the Tribunal considered that the section 99 claim was not well-founded and was dismissed.

Employment Judge Hyde

7 September 2017