Appeal No. UKEAT/0120/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 April 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

SERCO LEISURE OPERATING LTD — APPELLANT

MISS M LAU — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS AKUA REINDORF (of Counsel) Instructed by: Pinsent Masons LLP 55 Colmore Row Birmingham B3 2FG
For the Respondent	MR RICHARD BLOOMFIELD (of Counsel) Direct Public Access

SUMMARY

SEX DISCRIMINATION - Pregnancy and discrimination

SEX DISCRIMINATION - Burden of proof

Pregnancy discrimination - section 18 ***Equality Act 2010***

Burden of proof - section 136 ***Equality Act 2010***

The Claimant had notified the Respondent of her pregnancy shortly before a management restructure was announced that put her position at risk of redundancy. The manager responsible for the restructure had failed to notify HR of the Claimant's pregnancy or to take other required steps, such as the carrying out of a risk assessment but this, the ET concluded, was simply due to her lack of experience in this regard; more generally, the ET was satisfied the restructure was for entirely proper reasons, unrelated to the Claimant's pregnancy. The Claimant applied for one of the alternative positions in the new structure but was unsuccessful; this selection process, the ET accepted, had been fair but was based on performance on the day and the Claimant had the poorest score. There were two other (lower grade) supervisor positions, which the Claimant also applied for but then left on pregnancy-related sick leave and was unable to attend for further interview. The Respondent decided to use the scores for the previous selection process, which meant the Claimant failed as she had the lowest score; having not succeeded in obtaining one of the remaining positions, the Claimant was selected for redundancy and duly dismissed.

On the Claimant's claims of automatic unfair dismissal and pregnancy discrimination, the ET concluded that her pregnancy had not been the principal reason for her dismissal and thus she had not been automatically dismissed for the purposes of section 99 **Employment Rights Act 1996**, but (applying the different test under section 18 **Equality Act 2010**) she had suffered unfavourable treatment because of her pregnancy as this had materially influenced the decision to use a method of selection for the supervisor positions, which had been an effective cause of her dismissal. The Respondent appealed against the ET's decision on the section 18 claim.

Held: allowing the appeal.

The ET's finding that the burden of proof had shifted for the purposes of section 136(2) **Equality Act 2010** was inadequately explained, such that the Respondent could not understand why it had lost on this point, the ET seemingly referring to matters it had already discounted as justifying any inference of discrimination. As for the ET's approach to the Respondent's explanation (assuming, in the alternative, that the ET had permissibly concluded the burden had shifted), its findings as to what would have been fair were insufficient to justify the conclusion reached and its approach elided context and reason. Further, to the extent the ET had identified matters that might have suggested a motivation (whether conscious or subconscious) other than that relied on by the Respondent, there was no obvious correlation with the Claimant's pregnancy (a desire to retain the existing supervisors in post, for example, would still suggest a reason unrelated to the Claimant's pregnancy even if not a reason the Respondent had been prepared to admit).

HER HONOUR JUDGE EADY QC

Introduction

1. The appeal in this matter concerns the application of the burden of proof in respect of a claim of pregnancy discrimination brought under the provisions of the **Equality Act 2010** ("EqA").

2. In this Judgment, I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Respondent's appeal from a Reserved Judgment of the North Shields Employment Tribunal (Employment Judge Wade sitting with members, Ms Jackson and Mr Denholm, on 14 and 15 December 2016; "the ET"). Mr Bloomfield of counsel appeared for the Claimant before the ET, as he does on this appeal. The Respondent was then represented by a solicitor, but today appears by Ms Reindorf of counsel.

3. By its Judgment the ET rejected the complainant's complaint of unfair dismissal but upheld her claim of unfavourable treatment because of pregnancy. It is against that latter Judgment that the Respondent appeals, on the following two grounds: (1) that the ET erred in finding that the burden of proof had shifted to the Respondent on the basis of factors that it had found to be non-discriminatory; (2) the ET further erred in finding that the Respondent had failed to provide a non-discriminatory explanation. The Claimant resists the appeal, relying on the reasoning provided by the ET.

The Factual Background

4. The Claimant, who had several years of leisure and management experience with North Tyneside Council, joined the Respondent in July 2014 to work on a local water park - "Wet and

Wild" - the lease of which the Respondent had taken on after the park had closed in 2013 due to financial difficulties. The Claimant was employed as one of three Assistant Managers, assisted by an Operations Support Manager, Ms McCabe, but reporting to the Respondent's Partnership Director, Mrs Kurton, whose role it was to oversee the park along with other leisure centres in the Greater Manchester area.

5. Going into 2015, Mrs Kurton had to address the fact that the "Wet and Wild" park was running at a loss. As part of her response, in October 2015, she had formulated plans to reorganise the management team to replicate the structure that existed at the other centres that she managed; that was with a Facility Manager reporting to her, and two Supervisors reporting to the Local Manager. Before Mrs Kurton had shared her views about the proposed restructure, however, one of the three Assistant Managers, Mr Ford, left for another job. That left the Claimant and the other Assistant Manager, Mr Nolan, along with two Supervisors, Mr Boersma and Mr Lee.

6. It was also in mid-to late October 2015 that the Claimant told Mrs Kurton and Ms McCabe that she was pregnant. Mrs Kurton had no previous experience of a direct report notifying her of a pregnancy or going on maternity leave. She did nothing to inform Human Resources of the Claimant's news, nor did she take any other action, such as to carry out a risk assessment, albeit, in early November, in response to the Claimant raising an issue about coping with long shifts, Mrs Kurton agreed she could use her holiday to ease the strain. In any event, at the end of November 2015, the Claimant had her 12-week scan and felt able to tell her other colleagues of her good news.

7. On 1 December 2015, Mrs Kurton made her announcement that there would be a management restructure, stating this would potentially impact on the Claimant and Mr Nolan (the two Assistant Managers), and the two Supervisors who reported to them. They were all told that they could apply for the new Facilities Manager role and that those who were unsuccessful in that could then apply for the two new Supervisor roles. There would no longer be any Assistant Manager roles.

8. The Claimant took the restructure announcement badly and was very concerned about the potential impact on her at what was a difficult time, given her pregnancy. Mrs Kurton met her in the café at the park and said she would investigate how the potential timetable for the restructure - which envisaged redundancies in January 2016 - might impact upon the Claimant's entitlement to maternity pay. After this conversation, the Claimant forwarded further information to Mrs Kurton relative to her position, initially resulting from her own researches but then as provided to her when she contacted the Respondent's HR department. Mrs Kurton next spoke to the Claimant about these matters on or around 11 November, saying that if the Claimant did not apply for the Supervisor's job, she would get her maternity pay. The Claimant reported that conversation to Human Resources, which then advised Mrs Kurton about the need to slot the Claimant into a role, apparently advising that she had no right to be slotted into any particular role because of her pregnancy; the right to first call on any jobs only arising if the redundancy occurred during maternity leave.

9. The selection exercise for the Facility Manager post was held on or around 15 December. It took the form of three written exercises and a half-hour interview, the latter playing a greater part in the overall marking than the exercises. Mr Nolan, the other Assistant Manager, scored most highly in all respects and was duly appointed to the Facility Manager

position. The Claimant did not score worst on the written exercises, but she did on the interview. The ET accepted that the selection assessment had been entirely genuine but depended solely on performance on the day.

10. Having carried out the Facility Manager selection, the job descriptions for the Supervisor positions were then circulated. The Claimant felt that she was not in good standing to apply for these roles due to a lack of lifeguard training and other qualifications apparently required. The Respondent, however, disagreed, taking the view that very clearly the Claimant could have done either Supervisor role, with any necessary training being arranged. In the event, the Claimant did apply for the Supervisor role but, shortly afterwards, on 21 December, became unfit for work due to her pregnancy coupled with the stress arising from the redundancy process and embarked upon a period of sick leave on her doctor's advice. Given the Claimant's difficulties, the interviews for the Supervisor positions were postponed twice, but ultimately took place with Mr Boersma and Mr Lee on 15 January 2016, with the Claimant still absent from work and thus unable to attend.

11. Given the Claimant's inability to attend for an interview, and the need to complete the process before the park's reopening, Mrs Kurton ultimately decided to choose who to appoint to the Supervisor positions by using the scores from the Facility Manager process. As the Claimant had the lowest score from that process, this meant she was selected for dismissal. Just before Mrs Kurton made her decision in this regard, however, on 3 February 2016, there was a serious chemicals incident in the pool of the park. An investigation took place involving Mr Boersma, Mr Lee and Mr Nolan - the Claimant was not part of this because she had been away and obviously could have had nothing to do with the incident. Notwithstanding this incident, however, Mrs Kurton proceeded to make her decision based on the Facility Manager

selection process scores, and this was communicated to the Claimant, initially by telephone on 8 February 2016, confirmed in writing on 11 February 2016, stating that the Claimant was being dismissed by redundancy with effect from 12 February 2016 with pay in lieu of notice.

The ET's Decision and Reasoning

12. In asking what was the reason or principal reason for the Claimant's dismissal, notwithstanding the apparent coincidence in timing, the ET was satisfied that Mrs Kurton's decision to restructure the management roles was for entirely proper and genuine reasons, unconnected with news of the Claimant's pregnancy. Although there had been various omissions on Mrs Kurton's part in response to being told of the Claimant's pregnancy, the ET did not consider these were such as to give rise to an inference that the pregnancy was the principal reason for the restructure; rather, these omissions reflected "*the simple fact that Mrs Kurton had not previously had to deal first hand with a pregnant direct report*" (ET paragraph 52). Moreover, the ET was satisfied it was because she had scored lowest in the Facility Manager selection exercise that the Claimant was not appointed to one of the Supervisor positions; that was not a reason related to the Claimant's pregnancy, and therefore her claim of automatic unfair dismissal under section 99 of the **Employment Rights Act 1996** ("ERA") failed.

13. The ET noted, however, that the test was different in respect of the Claimant's claim of pregnancy discrimination under section 18 of the **EqA**. For this purpose, the question was whether the Claimant's pregnancy was a material influence in the unfavourable treatment in issue - here, her selection for redundancy and dismissal. In this regard, the ET first asked whether the Claimant had established facts from which, absent an explanation from the Respondent, it could conclude there had been a contravention of section 18. It considered this

had been demonstrated from the chronology, including the various omissions by Mrs Kurton following the Claimant's notification of her pregnancy; there was clearly something more than merely pregnancy and unfavourable treatment (see the ET's reasoning at paragraph 58).

14. Having thus concluded that the burden of proof had shifted to the Respondent, the ET returned to the question what had caused the Claimant's selection and dismissal. The immediate answer was that the cause was her score in the Facility Manager exercise. The ET, however, further asked why Mrs Kurton had decided to use those scores to appoint to the more junior role. In this regard, Mrs Kurton had provided a three-fold explanation: (1) the fact that the park was due to reopen imminently - an objective fact; (2) the fact that the Claimant's colleagues were waiting in limbo until the matter was resolved; and (3) she believed that the use of the Facility Manager scores was the fairest means. The ET rejected the third of those reasons. It concluded it was not the fairest means as it put the Claimant at the disadvantage of being tied to her performance on a particular day; it was, further, possible that the Claimant would have performed better on another day, perhaps when she was untroubled by sickness due to her pregnancy, and also when interviewed on the basis of questions relating to the Supervisor positions. It was also apparent that the Respondent believed that the Claimant could have performed either Supervisor role and could have been trained in any specific qualification needed. Had any objective matters been used - such as disciplinary record or attendance (excluding pregnancy-related absence) - the ET considered it was very likely that the Claimant would have performed best.

15. Allowing, however, that unfair treatment alone was not sufficient to establish discrimination, the ET returned to the question why Mrs Kurton had opted for the least favourable means of selection so far as the Claimant was concerned. The ET observed there

was a lack of appreciation of the prejudice to the Claimant, with the balance of fairness being decided against her without any consultation or discussion. It was, further, a decision taken at a time when three out of the four management team members were being investigated for a disciplinary matter arising from the chemicals incident, with only the Claimant not being implicated. As for the delay in conducting the interviews, that was due to the Claimant's pregnancy-related illness. The ET further noted that Mrs Kurton had previously sought to put a proposal to the Claimant that, in not applying for the Supervisor role, she would arrange a termination date that ensured the Claimant received her company and statutory paid maternity leave; that, it felt, suggested it better suited the Respondent to retain the status quo of Mr Lee and Mr Boersma in the Supervisor posts. The Claimant having not agreed to that proposal, the ET noted that Mrs Kurton had subsequently terminated her employment earlier than the date the Claimant would need for maternity pay purposes; that position was subsequently corrected, but Mrs Kurton had not been able to give a cogent or credible explanation for her original decision in this regard.

16. Weighing all these matters, the ET inferred that, whether consciously or subconsciously, the Claimant's pregnancy and the inconvenience of it at the relevant time had been a material influence and the effective cause of Mrs Kurton's decision to use the Facility Manager scores, which had, in turn, resulted in the Claimant's dismissal. For those reasons, it found the Claimant's claim under section 18 of the **EqA** was made out.

The Relevant Legal Principles

17. The ET was concerned with the Claimant's claim of having suffered pregnancy discrimination, as defined by section 18 of the **EqA**, relevantly as follows:

> **"(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, or

(b) because of illness suffered by her as a result of it.

…

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends -

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy."

18. As already recorded, the ET had rejected the Claimant's claim of automatic unfair dismissal under section 99 of the **ERA**, a claim that was subject to a different test, as follows:

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

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

(3) A reason … prescribed under this section must relate to -

(a) pregnancy, childbirth or maternity,

…

and it may also relate to redundancy or other factors."

19. When addressing the section 18 **EqA** claim, the ET was required to apply the burden of proof, as provided by section 136 of that 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."

20. Guidance as to how to approach the burden of proof under section 136, or its legislative predecessors, has been provided in a number of cases, notably in **Igen Ltd v Wong** [2005] IRLR 258 (in particular see the annex to that judgment). That guidance was approved by the Supreme Court in **Hewage v Grampian Health Board** [2012] UKSC 37, to the extent that the Supreme Court declined an invitation to give further guidance because it was unnecessary. In that case, Lord Hope added the caveat that, while the reversal provisions are of importance

where there is doubt as to the facts, they will "*have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other*" (see paragraph 32).

21. In considering the first stage provided by section 136 - that is, whether the Claimant has established facts from which the ET could conclude that there has been discrimination - it has been clarified that the ET is to consider all the primary facts, not just those advanced by the complainant; see **Hewage** at paragraph 31, and **Laing v Manchester City Council & Another** [2006] ICR 1519 at paragraphs 56 to 59. The words "*could conclude*" can be construed as meaning "*a reasonable tribunal could properly conclude*", see paragraph 57 **Madarassy v Nomura International plc** [2007] ICR 867. There must, however, be a *prima facie* case that the act or omission complained of was discriminatory; mere detrimental treatment is not sufficient, there must be something more. That said, where the initial burden is met, the ET *must* conclude there was discrimination unless the Respondent discharges the burden then upon it to show that the conduct or decision in issue was in no sense because of the relevant protected characteristic, see **Ayodele v Citylink Ltd & Another** [2017] EWCA Civ 1913. At the second stage, the ET must "*assess not merely whether the [Respondent] has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the relevant protected characteristic] was not a ground for the treatment in question*" (see the **Igen** guidance at Annex paragraph 12) and, moreover, the Respondent must show that its reason was "*nothing to do with [the relevant protected characteristic]*" (see **Laing** again at paragraph 51). There will be some cases in which the criterion applied by the employer necessarily means that the conduct in issue is discriminatory. As the ET recognised here, however, this was a case that required it to look into the reasoning or motivation (if not the intent, because discrimination can be subconscious) of the relevant decision taker (i.e. Mrs Kurton) for the decisions in issue.

Submissions

The Respondent's Case

22. Allowing that section 18 **EqA** imposed a different test to that applicable under section 99 **ERA**, the Respondent contends that when making its findings under the latter the ET had gone further than was strictly necessary to explain why pregnancy was not the principal reason for the dismissal; its reasoning amounted to a finding that the dismissal was nothing to do with the Claimant's pregnancy at all. In particular, at paragraphs 51 and 53, it found the restructure was unrelated to the Claimant's pregnancy and, at paragraph 52, it found Mrs Kurton's failure to inform HR of the Claimant's pregnancy or to conduct a risk assessment reflected the fact that she had not previously had to deal first-hand with a pregnant direct report; that had not supported an inference that the Claimant's pregnancy was a reason for the restructure.

23. Turning to the second ground, the Respondent accepts that its explanation had to be adequate to discharge the burden of proof but that did not require its explanation to be reasonable or even sensible, it merely needed to be non-discriminatory. Allowing that the ET at this stage was entitled to look behind the direct reason for the Claimant's selection - to the question why the Respondent had used the particular selection mechanism it had determined to use - the Respondent contended that the ET's reasoning was fundamentally flawed. Essentially, the ET found that, because of the Claimant's pregnancy it would have been fairer to her if the Respondent had used a different selection mechanism, but that was not the same as concluding that the Claimant's pregnancy was an effective cause of the decision to use that selection mechanism. Accepting that the ET had been entitled to analyse whether or not Mrs Kurton's decision to use the selection mechanism in question was, in fact, discriminatory rather than merely unfair, the Respondent objects that the ET failed to ask the straightforward question whether the explanation put forward by the Respondent was adequate to show her

decision was non-discriminatory. The ET, instead, considered a number of factors which were in large part simply further reasons why the decision not to use the selection mechanism was unfair but those factors were not elements of the Respondent's explanation and therefore did not fall for consideration at this stage. More specifically, the Respondent objects that the ET's conclusion at paragraph 70 - that Mrs Kurton's decision was taken because of the inconvenience of the Claimant's pregnancy - was unsupported by any of the preceding findings of fact; findings that could only have led to a conclusion that the selection process was unfair for reasons unconnected with the Claimant's pregnancy, not that the decision to use that process was in fact discriminatory.

The Claimant's Case

24. For the Claimant it is submitted that the ET had plainly addressed the separate tests required under section 99 **ERA** and section 18 **EqA**, and had correctly applied the burden of proof in regard to the latter. There was nothing in the first ground of appeal: the most that could be said was that the ET's reasoning required a degree of unpacking. The Respondent was seeking to infer that the ET's references to the chronology and the omissions of Mrs Kurton referred back to the earlier reasoning, as explained under the heading of unfair dismissal but there was no reason to limit the reference in that way; the ET was plainly having regard to the entirety of its primary findings of fact, including those matters that it later emphasised when addressing the Respondent's explanations for its decisions and actions under section 18 **EqA**.

25. As for the second ground, the ET's decision had to be seen in context. The Respondent had chosen two separate and distinct tests for the two different posts being competed for. Its own case was, thus, that it was necessary to use different tests. Yet, as a direct consequence of

the Claimant's pregnancy, the Respondent had then gone on to use the results from one test, which had not been designed for use in selection for the second. And this was in the context that the Respondent then knew the Claimant would perform worst. On the evidence before it, the ET had concluded that, rather than wait for the Claimant to return and/or to use some other recognised methods (and see the alternatives identified by the ET from paragraph 65 onwards), the Respondent had chosen to use the method that was least fair to the Claimant. That, the ET had permissibly found, did not provide a non-discriminatory explanation.

Discussion and Conclusions

26. This was a case where the ET was concerned with two claims arising from the same facts, which required it to apply two different statutory tests. It is not suggested that the ET lost sight of that; it had correctly directed itself as to the relevant legal principles and obviously understood that the answer it reached on the unfair dismissal claim did not simply read across to provide an answer to the discrimination claim. The question is whether the ET properly carried out the task required of it in respect of that latter claim, in particular as regards how it applied the burden of proof.

27. An overly technical approach to the shifting burden of proof provided by section 136 **EqA** can sometimes appropriately be avoided by moving straight to the "reason why" question that is really at the heart of the second stage - the question whether the Respondent has provided an explanation for the decision or conduct in issue that is not informed by the relevant protected characteristic. Here, however, the ET did not adopt that course, but first considered whether the Claimant had established facts from which it could - although not necessarily would - conclude a contravention of section 18. There was, plainly, unfavourable treatment: the Claimant had been selected for redundancy having not secured an alternative position

within the new structure; furthermore, the Claimant possessed the relevant protected characteristic. As the ET reminded itself, however, that was not sufficient to shift the burden to the Respondent; the Claimant needed to have established something more, something from which the ET could conclude that the unfavourable treatment was indeed related to her pregnancy.

28. The ET seems to have considered there was a simple answer to this question. At paragraph 58 of its reasoning, it held that the Claimant had indeed discharged the primary burden upon her, a conclusion that, it stated, followed from its primary findings of fact, only offering by way of further explanation that this was supported by "*the chronology including unfavourable treatment and the omissions of Mrs Kurton following the notification of pregnancy*". The difficulty with that explanation is, however, that it does not enable the Respondent to understand what it was that persuaded the ET that the burden had shifted.

29. Specifically, when looking back at the basic chronology of events, the Respondent observes that the ET had made it clear that it did not find the restructuring of the management positions to have been related to the Claimant's pregnancy (it had entirely accepted Mrs Kurton's evidence on that) and, to the extent it had been critical of Mrs Kurton's omissions in response to the Claimant's notification of her pregnancy, the ET had stated that it drew no adverse inference in this regard. As for the decision not to select the Claimant for one of the remaining positions, it was apparent that the ET did not find the pregnancy to have been the reason or principal reason for this and its earlier findings had not included anything that would demonstrate that it had already concluded that it was, nonetheless, a material influence.

30. For the Claimant it is suggested that the reference to the chronology should not be so limited: at the preliminary stage, the ET was entitled to consider the material before it in the round, and that included the evidence going to the Respondent's explanation and thus the ET's later findings relevant to the second stage of this exercise.

31. Although I accept that an ET is entitled to take into account all the material before it when deciding whether a Claimant has met the primary burden of proof for section 136 purposes, the difficulty here is that it is unclear what in fact weighed with the ET at this stage. That might, in part, arise from a failure of explanation. Although it is possible that (as the Claimant contends) the reference to "*the chronology*" was intended to refer to various matters emphasised by the ET at the later stage, when dealing with the Respondent's explanation, it is still hard to understand the reference back to the omissions of Mrs Kurton following the Claimant's notification of her pregnancy given the ET's earlier discounting of this as a matter from which any adverse inference should be drawn. More generally, however, it is not easy to see the ET's subsequent critique of the Respondent's explanation as simply being part of "*the chronology*". Ultimately I am led to the conclusion that, to the extent that the ET considered the answer to the first stage of the test under section 136 to be straightforward, it either failed to properly address the need to identify the "*something more*" it had recognised was required, or it failed to explain what it had in mind in this regard. In either event, I consider the first ground of appeal is thus made out.

32. That would be sufficient to dispose of the appeal, but in case I am wrong about the first ground I have, in the alternative, proceeded to consider the second.

33. When turning to the question whether the Respondent had met the burden of showing that it had reached the relevant decision regarding the Claimant's selection and dismissal for reasons wholly unrelated to her pregnancy, the ET was entitled to test the explanation it had been given. Thus, although the Respondent is right to observe that the issue for the ET was not whether the selection process was fair, given that fairness had been part of Mrs Kurton's explanation, the ET was entitled to test her evidence in that respect against what might reasonably be judged to have been fair in the circumstances. Moreover, as is apparent from the reasoning provided, the ET correctly did not stop at that stage but went on to expressly return to the reason why Mrs Kurton had adopted the course that she had.

34. At this stage, it seems to me that the first issue identified by the Respondent in its second ground of appeal raises the question whether the ET confused context with reason. Certainly, one of the factors apparently taken into account by the ET was the fact that "*the matter that was delaying the supervisor interviews was the Claimant's pregnancy related illness*". That might be seen as a potential reason for questioning Mrs Kurton's reliance on the delay as the explanation for her choice of selection process, but it is not a finding that the Claimant's pregnancy or pregnancy-related illness motivated her decision, as opposed to, for example, a rather more basic desire to ensure the Supervisors were in post before the imminent reopening of the park. It is, in truth, a finding by the ET about context, not reason.

35. More than that, however, the Respondent contends that the ET's conclusion is not supported by its primary findings of fact. Allowing that the ET was entitled to test Mrs Kurton's account as to why she had chosen a method that would obviously mean the Claimant would be selected for redundancy, the Respondent contends it was not enough for the ET to conclude that the method produced neither the fairest nor most optimum result. It needed to

find that Mrs Kurton was motivated, consciously or subconsciously, by the Claimant's pregnancy.

36. On this question I initially considered the merit of the Respondent's point to be evenly balanced. To the extent that Mrs Kurton had said she had adopted the course she had because it was the fairest means, the ET was entitled to find that this was not an adequate explanation. It was also entitled to have regard to other matters, such as the failure to explain why the Claimant had originally been dismissed with pay in lieu (so as to give rise to a question regarding her maternity pay entitlements) and also to the earlier suggestion Mrs Kurton had made to the Claimant that if she did not apply for the Supervisor role, she (Mrs Kurton) would ensure that her termination date was such as to guarantee her benefits. These seem to me to be matters from which an ET certainly could - although not necessarily would - conclude that the Claimant's pregnancy was a motivating factor in Mrs Kurton's decisions. For the reasons I have already explained, I am not satisfied that these were in fact the matters that the ET actually had in mind when determining that the burden of proof had shifted, but, had they been, I would have accepted that they could amount to the "*something more*" required.

37. The difficulty is that the ET only appears to have had regard to these further factors when testing the Respondent's explanation at the second stage under section 136. Whilst certainly potentially relevant to its assessment at that stage, at this point I consider the Respondent is entitled to then complain that the ET fails to explain how these factors warranted its finding that the Claimant's pregnancy was a material influence and effective cause of Mrs Kurton's decision as to the method of selection. Even if, for example, Mrs Kurton was motivated by a desire to maintain the *status quo* in terms of the existing holders of the Supervisor positions, that is a reason other than the Claimant's pregnancy. That complaint, it

seems to me, is further made good by the ET's apparent failure to be clear as to the distinction between context and reason; the two are not necessarily the same. Somewhat reluctantly, therefore, I would thus also allow the appeal on the second ground.

38. Although this was a case where the ET identified various building blocks that might justify a decision in the Claimant's favour, the reasoning it has provided does not explain how these have been fitted together to justify the conclusions reached. For the reasons I have given, therefore, I allow the appeal.

Disposal

39. On the question of disposal, it is the Respondent's primary position that the EAT should itself substitute a decision in its favour. Recognising that might be a difficult position to maintain, it urges I remit the case back to a differently constituted ET, noting that this was a short hearing (over two days), that took place some time ago, so there was little in terms of proportionality to justify keeping this ET together. More substantively, the Respondent had a natural concern that remitting the case to the same ET may encourage a perception that this was an opportunity to have a second bite of the cherry - to simply make good the ET's reasoning, as opposed to approaching the matter afresh. For the Claimant, on the other hand, it is said that this is obviously a matter that needed to be remitted to the same ET, which had made the underlying primary findings of fact.

40. It is clear to me that the only appropriate course is for me to remit this matter to the ET for determination; it would be wrong, in the circumstances of this case, for the EAT to seek to step into the shoes of the ET in making the assessment necessary under section 18 **EqA**.

41. Considering then the factors laid down by **Sinclair Roche & Temperley v Heard & Fellows** [2004] IRLR 763, it is, in my judgment, right that I remit this matter (to the extent it is still practicable) to the same ET. First, it is proportionate for me to do so. Although some time has passed and this was a relatively short hearing, this ET made a number of findings of fact that will inevitably be relevant to the issues it has to determine under section 18 **EqA**, and it would be difficult for another ET to come in and to deal with the case at this stage. I am not suggesting that the present ET should seek to take any short cut in carrying out the exercise required of it, but it will inevitably be a shorter hearing than if this matter had to go back for an entirely new hearing before a differently constituted ET. Moreover, this is not a case where it has been suggested that there has been a complete failure in the ET's carrying out of its tasks, or that its decision was fundamentally flawed. Rather, the concerns that have led me to uphold the appeal largely relate to how the ET has expressed its reasoning - whether that discloses a failure to explain or, as may also be possible, a failure to properly apply the test the ET had itself recognised it needed to apply. There is no question of bias or prejudice in this case and it seems to me that the parties can trust the ET to adopt an entirely professional approach in seeking to address the issues it has to determine under section 18 afresh. For those reasons, therefore, I remit this matter back to the same ET. It may find it helpful to have a telephone case management discussion and/or to permit further submissions before determining how to proceed on the remitted hearing, that is a matter of case management for the ET.