EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs L Creaney		**DAC Beachcroft Services Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 26, 27 & 28 June 2018
26 July 2018 (Panel Only)

EMPLOYMENT JUDGE GASKELL **MEMBERS:** Mr MJ Bell
Mr R Moss

Representation
For the Claimant: **Mr A MacPhail (Counsel)**
For Respondent: **Ms S Omeri (Counsel)**

JUDGMENT

The unanimous judgment of the tribunal is that:

1 **The claimant was not dismissed by the respondent: her claim for unfair dismissal is not well-founded and is dismissed.**
2 **The respondent did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's complaint of discrimination prohibited by Section 18 of that Act, brought pursuant to Section 120, is dismissed.**

REASONS

Introduction

1 The claimant in this case is Mrs Lisa Creaney who was employed by the respondent, DAC Beachcroft Services Limited, as a Service Delivery Manager, from 12 September 2012 until 18 September 2017 when she resigned.

2 By a claim form presented to the tribunal on 24 November 2017, the claimant claims that her resignation was a constructive unfair dismissal; and that she suffered discrimination on the grounds of pregnancy or maternity; in addition, she claimed unpaid notice pay and other unspecified payments.

3 The constructive unfair dismissal claim has several elements: -

(a) She claims that the respondent's conduct towards her amounted to a fundamental breach of the employment contract, the implied term of trust and confidence, entitling her to resign and claim "ordinary" unfair dismissal pursuant to the provisions of Section 98 of the Employment Rights Act 1996 (ERA).
(b) She further claims that the treatment complained of, which prompted her resignation, was by reason of her pregnancy and/or maternity leave and that her constructive dismissal was therefore automatically unfair pursuant to the provisions of Section 99 ERA.
(c) She claims that, at the time of her resignation, the respondent was in breach of Regulation 10 of the Maternity & Parental Leave Regulations 1999 (MPLR); and that this breach alone was a fundamental breach of her employment contract.
(d) Finally, she asserts that, by reason of Regulation 20(1)(b) MPLR, she is in any event taken to have been unfairly dismissed.

4 The pregnancy/maternity discrimination claim alleges unfavourable treatment relating to a redundancy process which was ongoing at the time of the claimant's resignation.

5 The claims are denied in their entirety: the respondent denies acting in breach of the employment contract as alleged or at all; the respondent specifically denies that Regulation 10 MPLR was at any time engaged; and the respondent further denies any unfavourable treatment by reason of the claimant's pregnancy/maternity.

The Evidence

6 The claimant gave evidence on her own account; she did not call any additional witnesses. For the respondent, we heard oral evidence from two

witnesses: Catherine Lesley Burt – Partner; and Amy Laura Kendall - Interim Employee Relations Manager. There were two further witnesses for the respondent: Craig Richard Godding – Partner; and Sara Elizabeth May – Partner; their evidence was not challenged, and accordingly, they were not required to give oral evidence - their witness statements were taken as read.

7 In addition, the tribunal was provided with an agreed hearing bundle extending to some 316 pages and three additional smaller bundles produced by the claimant as the hearing progressed (C1, C2 & C3). The panel have considered those documents from within the bundles to which we were referred by the parties during the hearing.

8 We found the claimant to be an unsatisfactory witness who appeared willing to present a false picture to the tribunal to enhance her case. Of principal concern were the contents of her letter of resignation dated 18 September 2017 and the content of Paragraphs 76 and 78 of her witness statement as originally drafted and exchanged.

(a) In a series of emails in July 2017, the respondent had attempted with the claimant to convene a meeting to restart a redundancy consultation process which had been placed on hold at the commencement of the claimant's maternity leave in July 2016 and to discuss an alternative role of Business Analyst. In the final email of this series, on 24 July 2017, the claimant states that she will be available to attend a meeting from the week commencing 28 August 2017.
(b) Between 16 August 2017 and the date of the claimant's resignation, there was extensive correspondence between solicitors instructed on behalf of the claimant and those instructed on behalf of the respondent: most of that correspondence is marked "without prejudice". It appears that the claimant had been advised that the respondent would not be permitted to make reference to without prejudice correspondence at the hearing, and accordingly, in both her letter of resignation and Paragraph 78 of her original witness statement, the claimant asserted that there had been no communication from the respondent after her email of 24 July 2017and no attempt to arrange the suggested meeting.
(c) This presented a wholly misleading picture: because there had been communication - albeit with solicitors and attempts during those communications to arrange the meeting. The respondent applied to introduce the without prejudice correspondence to correct the misleading picture presented by the claimant. Initially, Mr MacPhail objected to the introduction of that correspondence: but later, the claimant produced an amended and more accurate witness statement; and withdrew any objection to the without prejudice correspondence being introduced.
(d) In Paragraph 76 of her witness statement the claimant referred to having been required to attend a "competitive" interview for the Business Analyst

role. In evidence, the claimant agreed that it had never been suggested that any interview would be competitive.

9 We are further concerned that on 21 March 2017, and again on 9 May 2017, the claimant indicated to the respondent that she was unwilling/unable to attend interviews during her maternity leave and because of health concerns applying to both herself and her husband. And yet, it transpired in evidence that, on 8 June 2017, the claimant arranged an interview with a potential alternative employer and attended that interview on 20 June 2017.

10 By contrast, we found the evidence of Mrs Burt and Ms Kendall to be straightforward, compelling and consistent. Their evidence remained internally consistent throughout; they were consistent with each other; and with contemporaneous documentation. The evidence of Mr Gooding and Ms May was unchallenged.

11 The primary facts of this case are not in dispute, but where there is a factual dispute between the claimant's evidence and that given by the respondent's witnesses, we prefer the evidence of the respondent's witnesses and we have made our findings of fact accordingly.

The Facts

12 In 2012, the respondent's Head of its Claims Validation Team ('CVT'), Lorraine Carolan felt that her team should have its own audit function and to this end recruited the claimant and her more junior colleague, Eleanor Shipway. The claimant's and Ms Shipway's roles were unique as no other service line had its own audit function. Instead audit was centralised. The claimant's role was therefore, unique to the way Ms Carolan worked and dealt with her team.

13 One third of the claimant's work comprised audit. As such it was a duplication of the work of the Quality Support Services (QSS) team. The balance of the claimant's role covered a variety of different duties which could be absorbed naturally within other roles and was not a complete role.

14 In 2014, discussions were had about streamlining the business by ensuring that audit was wholly centralised within the QSS team. On 8 October 2014, the claimant wrote to Partner, Dan Prince, in the following terms:

"Just a quick note to say that I'm running low on work – I have enough to keep me going this week as I'm out Friday & Monday. Going into next week (unless the QSS report is back) I'll be back to Service Delivery audits for Aviva. I have no issue with this, but it will take work away from Eleanor. Have been pushing for completion of guidance notes on all aspects of her work in preparation for her

maternity leave plus have asked her to reduce the outstanding historical amendments for all teams to increase her workload/minimise disruption.

Is there anything else you want me to look at?"

15 An Executive Report was presented to then CEO, Bill Paton on 21 October 2014. It stated:

"Various factors have led CVT management to propose that these two roles are now redundant.

We will cease the review of every new instruction and other audits would be transferred to QSS or carried out by the Account Managers."

16 On 26 January 2016, the claimant informed the respondent that she was pregnant.

17 On 20 April 2016, Mrs Burt met with the claimant and other team members to inform them that the audit function would be managed by the Practice Governance and Risk Department via the QSS team with effect from 1 May 2016 to ensure greater consistency in auditing. The claimant was notified that this may result in some redundancies and, specifically, that her role was at risk of redundancy.

18 On 4 May 2016, Mrs Burt held a first redundancy consultation meeting with the claimant. At this meeting, Ms Burt set out the proposal to streamline the audit function, the reasons for it and the proposed timescale. The claimant was given the opportunity to ask questions, request information and propose alternatives to redundancy. There was also discussion concerning vacancies and redundancy entitlements, in particular, whether the respondent would pay the claimant enhanced (contractual) maternity pay. The claimant was also informed that two people were at risk. The second person was Mr Nicholas Blocksidge who was based in Manchester.

19 On 9 May 2016, Ms Kendall sent the claimant an email answering the questions raised at the first consultation meeting. In particular, Ms Kendall indicated that the respondent had agreed to pay enhanced maternity pay even if it were to be concluded, at the end of the one-month consultation period that the claimant was to be dismissed by reason of redundancy (before commencement of her maternity leave). However, at that stage, the respondent would not be looking to split the payments (ie to pay the claimant monthly) as the claimant had requested to avoid being taxed at the rate of 40%.

20 On 18 May 2016, Ms Burt endeavoured to conduct a second redundancy consultation meeting. However, early in the meeting, the claimant submitted a

grievance in relation to her having been put at risk of redundancy. Specifically, she complained that: -

(a) the wider QSS team should be put at risk with her;
(b) poor communication by R;
(c) that she had been selected for redundancy because she was pregnant;
(d) R had failed to offer her a severance package allowing retention of maternity benefits without having to pay a higher rate of tax.

21 On 19 May 2016, the respondent's HR Business Partner, Kirsty Weller and its Chief Operations Officer, Brian Pearse, agreed that the claimant could receive her maternity pay monthly thereby avoiding paying the higher rate of tax.

22 On 24 May 2016, Ms Burt met with the claimant to give her an update regarding the consultation process. At this meeting, Ms Burt informed the claimant that the respondent had agreed to address her concerns in relation to the payment of a higher rate of tax in the manner described above. That is, that the claimant would remain on the payroll for the duration of her maternity leave. She would remain "at risk" and the respondent would look to meet with her (to continue consultation) after she had received her enhanced maternity package. The claimant was also informed that she would continue to receive the respondent's vacancy list in order to be able to apply for any role in which she was interested. By this means, the claimant's consultation/redeployment period was effectively extended by 12 months. The claimant indicated that she had applied for the role of Business Analyst in which she had previously expressed an interest.

23 On 26 May 2016, the claimant was invited to a formal grievance meeting to be chaired by Partner, Craig Godding; the meeting was held on 7 June 2016. At the meeting, the claimant stated that: *"from the beginning she could not understand the motivation of the firm unless it was to do with her pregnancy."*. The claimant further referred to Project Assistant, Hannah Hall, who had come back from maternity leave to no role but was not put at risk and did not have to apply or interview for another position. The claimant also confirmed that she had an interview for the Business Analyst role the following day. Mr Godding pointed out to the claimant that her grievance appeared internally inconsistent in that on the one hand she was suggesting that her role was not comparable to that of QSS auditors and on the other that they should be pooled with her. When Mr Godding asked the claimant whether she felt that her role was comparable to that of a member of staff in the QSS team, she replied that it was not her saying the role was similar.

24 After the meeting, Mr Godding carried out some further investigations. Specifically, he interviewed Ms Burt, Ms Kendall and Mr Prince and sought further information from HR Business Partner, Jenna Adams Mr Godding's

conclusion was ultimately not to uphold the claimant's grievance. In particular, Mr Godding indicated that he had been unable to find any evidence of maternity discrimination. In the meantime, the claimant had declined to attend her interview for the Business Analyst role. During Mr Godding's meeting with Ms Kendall, Ms Kendall stated that, on the vacancy lists supplied to the claimant during the consultation period, there was a QSS vacancy which was located in Bristol or Leeds. Ms Kendall informed Mr Godding that she believed that there may have been some flexibility in the location of that role and she would have pursued enquiries along these lines if the claimant had expressed any interest. When giving evidence before us, Ms Kendall acknowledged a degree of circularity to this position: the claimant would be unlikely to express interest in a role which required relocation to Bristol or Leeds; she may have been interested in such a role if it could be located in Birmingham. Ms Kendall explained that she would not normally have made enquiries as to flexibility in location unless the candidate for redeployment expressed an interest in a role but required a change in location.

25 The claimant commenced her maternity leave on 15 July 2016. On 4 August 2016, Tess Harris - Senior Employee Relations Adviser sent the claimant notes of her grievance meeting and asked her to review them. Ms Harris was conscious that the claimant was close to her due date, she expressly gave the claimant the option of reviewing the notes immediately or delaying the review until a later date. The claimant's due date was 5 August 2016; her baby was born on 17 August 2016.

26 On 27 September 2016, the claimant appealed against Mr Godding's decision not to uphold her grievance. On 18 October 2016, the claimant confirmed to Employee Relations Advisor, Safeera Razaq, that she preferred, rather than attending a grievance appeal meeting, for the grievance appeal manager, Sara May to review her grievance appeal document, investigate the situation and communicate a final decision.

27 To this end, Ms May re-interviewed Ms Burt, Mr Prince and Ms Kendall and sought further information from Senior Employee Relations Advisor, Tess Harris and from Ms Adams. In her interview with Ms May, Ms Burt stated that she had *"lost count of the number of times someone in her team had a baby and she had welcomed them back following their return from maternity leave. [She] advised that there were two members of her team who were pregnant now."*

28 By letter dated 9 March 2017, Ms May conveyed her decision on the grievance appeal. In her letter, Ms May noted that the claimant's colleague, Mr Blocksidge was also placed at risk of redundancy at the same time as the claimant and therefore that the claimant was not treated unfairly by reason of her pregnancy. Ultimately, Ms May determined not to uphold the appeal. She also indicated that the claimant's redundancy consultation would re-commence at the end of her maternity leave. Although it was not part of the original grievance or of

the appeal, in her letter, Ms May dealt with the fact that the claimant had not received a salary review in January 2017: she stated that the reason for this was that the claimant's role "*is no longer needed by the business*".

29 On 17 March 2017, Ms Kendall sent the claimant an email informing her that the Business Analyst role was now available following a resignation in the team. When the claimant replied that she would not be attending an interview whilst on maternity leave, Ms Kendall replied that the business would advertise the role externally on a fixed term contract in order to enable the claimant to consider whether she wished to take up the role at the conclusion of her maternity leave.

30 On 8 May 2017, Ms Kendall sent the claimant the role description for the position of Data Analyst which Ms Kendall thought may be of interest to her. The following day, the claimant replied indicating that she was currently caring for her husband who had had major surgery with a recovery time of a minimum of 8 weeks and had her own health issues and that her position "*therefore*" remained the same. The latter reference to the claimant's position remaining the same was to her last email to the respondent, dated 21 March 2017, in which she asserted that she did not intend to undertake any interviews while on maternity leave. But, on 8 June 2017, the claimant was in contact with Allianz UK arranging an interview which she attended on 20 June 2017.

31 On 5 July 2017, Ms Kendall wrote to the claimant to confirm that her maternity leave was due to end on 16 July 2017 but that she had 41.5 days of accrued annual leave days. Ms Kendall also confirmed that the claimant was eligible for a bonus payment as part of the Support Management Scheme. Ms Kendall invited the claimant to contact her if she had any questions.

32 On 12 July 2017, Ms Kendall sent an email to the claimant confirming that the Business Analyst role was still available and indicating that if the claimant were interested in it, she could make the necessary arrangements for an interview to discuss the role in more detail. Ms Kendall asked that the claimant notify her by close of business on 17 July 2017 if she was interested in the role. In her email Ms Kendall described the Business Analysts role as "*a reasonable alternative role*". When Ms Kendall gave evidence, she explained that this was her provisional view, but, as an HR Manager, she was in no position to judge the suitability of the role for the claimant - this needed further exploration. When Ms Kendall did not hear from the claimant by this date (or at all) she chased her by email sent on 20 July 2017. On 24 July 2017, the claimant replied to Ms Kendall's email of 20 July stating that if there was a suitable alternative role, it should be offered to the claimant with a 4-week trial period without the need for an interview. When giving evidence the claimant explained that she had requested a trial period because: "*there may have been something about the role which was unsuitable, and I may not have been able to continue*".

33 On 25 July 2017, Ms Kendall confirmed with the claimant that she would not be required to attend for a formal interview in relation to the Business Analyst role but merely to have a conversation with the recruiting manager, Al Hobson, to discuss the role in more detail. Ms Kendall suggested that the meeting take place in the week commencing 28 August 2017; she indicated that if the claimant would like a conversation/meeting before this date she should let Ms Kendall know. The claimant did not reply to Ms Kendall's email.

34 On 16 August 2017, solicitors instructed by the claimant sent a letter to the respondent referring to the claimant having claims for pregnancy and maternity discrimination and constructive and automatic unfair dismissal. This was despite the fact that the claimant remained employed by the respondent.

35 On 29 August 2017, the respondent's Employee Relations Manager, Ben Morris (Ms Kendall's manager) replied to the letter. He confirmed that the claimant remained an employee; that redundancy had not been confirmed; and that notice had not been served. Mr Morris stated that the respondent remained committed to consulting fully with the claimant including by exploring ways of avoiding redundancy but that the claimant's engagement was required. He indicated that the respondent would be in contact with the claimant under separate cover to seek to re-commence the consultation process.

36 In a response dated 7 September 2017, the claimant's solicitor stated that if Mr Morris *"wished to have any meaningful discussion about the possibility of a resolution…"* he was invited to contact the solicitors. Alternatively, the claimant would embark on legal proceedings.

37 Mr Morris replied on 11 September 2017. He explained that the claimant's responses to email had left the respondent with the impression that she did not wish to engage with the respondent until the week commencing 28 August by which time the respondent was in contact with the solicitors. He confirmed that the respondent was still prepared to re-commence consultation with the claimant and to arrange for a conversation between her and Mr Hobson in relation to the Business Analyst role. Mr Morris went on to say that: *"If however, Lisa does not wish to engage in that conversation or in any further consultation I would ask that either you or your client lets us know."* Within that letter Mr Morris also stated that - contrary to the claimant's assertion that her role had been removed from the respondent's corporate structure: "*despite the proposal that there is a reduced requirement for the role, it is visible on our "Operations Hub" organisation chart, with Lisa's name assigned to it. This will remain the case until the conclusion has been reached".*

38 On 13 September 2017, the solicitor wrote again to Mr Morris concluding that: *"I will nevertheless take final instructions from my client about what she*

would like to do, and you will no doubt be made aware of her final decision in due course.".

39 On 18 September 2017, the claimant sent an email to Mr Morris, resigning from her post. In this letter, she stated:

"As yet you have not communicated any information or meetings in respect of my return to the office and by my calculation I should have returned to work already this for me is the last straw in over 16 months of mistreatment, disregard and uncertainty.".

The Law

40 **The Equality Act 2010 (EqA)**

Section 18: Pregnancy and Maternity Discrimination: Work Cases

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(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.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(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.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
(b) it is for a reason mentioned in subsection (3) or (4).

Section 123: Time limits

(1) Proceedings on a complaint within Section 120 may not be brought after the end of—

(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or
(*b*) such other period as the employment tribunal thinks just and equitable.

Section 136: Burden of proof

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(*a*) an employment tribunal;

41 **Employment Rights Act 1996 (ERA)**

Section 94: The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct - *Constructive dismissal.*

Section 98 - General Fairness

(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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(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.

Section 99: Leave for family reasons

(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, or
(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity,
(b) ordinary, compulsory or additional maternity leave.

Section 139: Redundancy

(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—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that 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.

42 **Maternity and Parental Leave Etc Regulations 1999 (MPLR)**

Regulation 10: Redundancy during maternity leave

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

Regulation 18: Right to return after maternity or parental leave

(1) An employee who returns to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less, which was—

(a) an isolated period of leave, or
(b) the last of two or more consecutive periods of statutory leave which did not include—

(i) any period of parental leave of more than four weeks; or
(ii) any period of statutory leave which when added to any other period of statutory leave (excluding parental leave) taken in relation to the same child means that the total amount of statutory leave taken in relation to that child totals more than 26 weeks,

is entitled to return to the job in which she was employed before her absence.

(2) An employee who returns to work after—

(a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or
(b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above, is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the

employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before her absence is a reference to the job in which she was employed—

(a) if her return is from an isolated period of statutory leave, immediately before that period began;
(b) if her return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 10 applies.

Regulation 20: Unfair dismissal

(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3),

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave or additional maternity leave;

43 **Decided Cases: Pregnancy/Maternity Discrimination**

R (on the application of E) -v- Governing Body of JFS **[2009] UKSC 15 (SC)**

The “but for” test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

Interserve Limited -v- Tuleikyte **[2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the “reasons why” approach; it is not a “criterion” test.

Nagarajan v London Regional Transport **[1999] IRLR 572 (HL)**
Shamoon -v- Chief Constable of the RUC **[2003] IRLR 285 (HL)**
Villalba v Merrill Lynch & Co **[2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?
If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Amnesty International -v- Ahmed **[2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

Johal -v- Commission for Equality and Human Rights **[2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

Ladele –v- London Borough of Islington **[2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

Igen Limited –v- Wong **[2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc **[2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination.

The Law Society -v- Bahl **[2003] IRLR 640**

A tribunal is not entitled to draw an inference of discrimination from the mere fact that an employer has treated an employee unreasonably. It is a wholly unacceptable leap to conclude that whenever the victim of unreasonable conduct has a protected characteristic then it is legitimate to infer that the unreasonable treatment was because of it. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory. To establish unlawful discrimination, it is necessary to show that the employer's reason for acting was one of the proscribed grounds. Discrimination may be inferred if there is no explanation for the unreasonable behaviour, it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination, but rather the fact that there is no reason advanced for it.

44 **Decided Cases: MPLR**

The Secretary of State for Justice -v- Slee **UKEAT/0349/06/JOJ**

The question of whether it is not practicable to continue to employ a woman under her existing contract of employment "*by reason of redundancy*", is to be answered by reference to the standard definition of redundancy in Section 139 ERA. It was held that Regulation 10 was engaged even though, under the employee's contract, the employer was entitled to move her to an alternative role which it intended to do. The redundancy situation did not therefore bring an end to the contract, but she was nevertheless redundant for the purposes of the Regulation.

Sefton Borough Council -v- Wainwright **[2015] IRLR 90 (EAT)**

The respondent decided to abolish two roles including that of the claimant who was on maternity leave and replace them with one new job. The claimant was not offered the new job and succeeded in a claim of automatically unfair dismissal on the basis that the new role was a suitable vacancy. On appeal to the EAT, the

respondent argued that Regulation 10 was not engaged until the decision had been taken as to who was the best candidate for the new role - in effect, the claimant was not “redundant” until the respondent had determined who would be slotted into that role and only at that point would the respondent become obliged to offer a suitable vacancy. It was held that this interpretation would undermine the protection offered by Regulation 10. Applying the Section 139 ERA definition, the tribunal was entitled to conclude that the claimant was redundant when the respondent decided that two positions would be replaced by one.
Unfavourable treatment of a claimant whilst on maternity leave does not of itself amount to unfavourable treatment “because of” pregnancy or maternity leave as Section 18 EqA requires.

Simpson -v- Endsleigh Insurance Services Limited **[2011] ICR 75 (EAT)**

Regulation 10(3)(a) and (b) must be read together in determining whether an available vacancy is “*suitable*”. It is for the employer to decide whether a vacancy is suitable knowing what it does about the employee in terms of the employees work experience and personal circumstances. If a suitable vacancy exists, the employer must offer it. There is no obligation on the employee to engage with the process. The EAT expressed doubt as to whether an employer would choose to test suitability by assessment and interview.

45 **Decided Cases: The Creation of a Pool for Selection**

Taymech Limited –v- Ryan **EAT 633/94**
Thomas and Betts Limited –v- Harding **[1980] IRLR 255 (CA)**
Hendy Banks City Print Limited –v- Fairbrother **EAT 0691/04**

In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from whom those who are to be made redundant will be drawn. In assessing the fairness of a dismissal, a tribunal must look to the pool from which the selection was made since the application of otherwise fair selection criteria to the wrong group of employees is likely to result in an unfair dismissal. If an employer simply dismisses an employee without first considering the question of a pool the dismissal is likely to be unfair. Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal. They need only show that they have applied their minds to the problem and acted from genuine motives. However, tribunals must be satisfied that an employer acted reasonably. A tribunal will judge the employer's choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances.

46 **Decided Cases: Constructive Dismissal**

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**

An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**

Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**

It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**

The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself

(unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**

The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**

The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**

Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**

The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**

The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the

employment tribunal's analysis as to whether there has been a fundamental breach, but it is not a legal requirement. Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Price –v- Commissioners for Revenue and Customs **UKEAT/0518/10/JOJ**

Where the conduct complained of amounts to delay there are two questions to be addressed; firstly, was there reasonable and proper cause for the delay? And secondly, if not in was the delay conduct by the employer calculated or likely to destroy or seriously damage the relationship of trust and confidence? These questions are not to be, answered by reference to the standard of the reasonable employer but based on the tribunal's own objective assessment.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others
[2011] IRLR 420 (CA)

A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**

This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment in response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

Kaur -v- Leeds Teaching Hospitals NHS Trust **[2018] EWCA Civ 978 (CA)**

In this case the Court of Appeal affirmed its earlier decision in ***Omilaju***: where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: -

(a) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered his or her resignation?
(b) Has he or she affirmed the contract since that act?
(c) If not, was it nevertheless a part (applying the approach explained in ***Omilaju***) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of trust and confidence.

Hadji -v- St Luke's Plymouth **(2013) UKEAT 0095/12**

This case provides a recent re-statement of the law on affirmation: -

(a) The employee must make up his/her mind whether to resign soon after the conduct of which he/she complains. If he/she does not do so he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.
(b) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay.
(c) If the employee calls on the employer to perform its obligations under the contract or otherwise initiates an intention to continue the contract; the Employment Tribunal may conclude that there has been affirmation.
(d) there is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts.

Walker v Josiah Wedgewood & Sons Ltd **[1978] ICR 744**

Even where an employee has established a fundamental breach of contract, the burden remains upon him or her to prove that he or she resigned because of the breach.

The Claimant's Case

Section 18 EqA

47 Although at the outset of the case the claimant relied on several allegations of unfavourable treatment which she claimed amounted to breaches of Section 18 EqA, by the time of his closing submissions Mr MacPhail relied on only one such allegation - namely: –

"*Failing to inform the claimant that the Bristol/Leeds QSS role could potentially be undertaken in Birmingham and/or failing to offer the claimant that role*." (See Paragraph 24 above.)

48 The case advanced was that it was unreasonable for the respondent not to advise the claimant of the potential for this role to be undertaken in Birmingham; and at that no explanation had been offered for this unreasonable treatment. Accordingly, applying ***Bahl***, the tribunal could properly infer that the reason was one of the reasons proscribed by Section 18 EqA.

Automatic Unfair Dismissal

49 The claimant's case is that if, at the point of her resignation, the respondent was in breach of Regulation 10 MPLR, then the claimant's resignation crystallised an automatically unfair (constructive) dismissal by virtue of Regulation 20(1)(b). The claimant's case is that the respondent was, at the time of her resignation, in breach of Regulation 10 by its failure to offer her the Business Analyst role.

50 Quite apart from the specific reliance on the interaction between Regulation 10 and Regulation 20(1)(b), the claimant's case is that the respondent acted in repudiatory breach of the contract; and that the reason for the respondent's conduct was a reason proscribed by Section 99 ERA. Accordingly, her constructive dismissal was automatically unfair. The alleged breaches are: –

(a) Failing to adopt, or consider, a wider pool for redundancy selection.
(b) Delaying in providing the grievance hearing minutes for review and providing them on the day before the claimant's due date.
(c) Failing to offer the claimant the Business Analyst role.
(d) Breach of Regulation 10 or alternatively, Regulation 18 MPLR.
(e) Failing to arrange a consultation for the week commencing 28 August 2017.
(f) Failing to arrange for a return to work by the due return to work date of 13 September 2017.

"Ordinary" Unfair Dismissal

51 The claimant relies on the conduct set out at Paragraph 49(a) – (f) above. Even if it cannot be established that the respondent acted as it did for a reason proscribed by Section 99 ERA, then, absent a potentially fair reason for such conduct, the constructive dismissal is unfair by reference to the provisions of Section 98 ERA.

The Respondent's Case

Section 18 EqA

52 The respondent's case is that, even if, which it does not admit, it can be said to be unfavourable treatment to have failed to advise the claimant of potential flexibility in the location of the QSS role, there is no possible basis to conclude that the reason for this unfavourable treatment was because of the claimant's pregnancy or maternity. There is no basis to suggest that an employee looking at possible redeployment but who was not pregnant or absent on maternity leave would have received any more information than was provided to the claimant. Further, an explanation had been advanced by Ms Kendall: namely, that she would only pursue the possibility of flexibility in location if the employee had expressed an interest in the vacancy - which the claimant had not.

53 In any event, the respondent argues that this claim is inevitably out of time. The treatment complained of must have occurred prior to Mr Godding's meeting with Ms Kendall on 13 July 2016. The claim was presented on 24 November 2017: no case has been advanced by the claimant as to why it would be just and equitable to extend time.

Automatic Unfair Dismissal

54 The respondent's case is that Regulation 10 MPLR was never engaged. This case is advanced by the respondent on two bases: –

(a) The requirements of Regulation 10(1) did not apply: the respondent had expressly agreed to continue the claimant's employment under her existing contract of employment until the end of her maternity when a consultation process which had been expressly suspended would resume. The claimant's position within the organisation was unique; one possible outcome of the consultation was that her position would have been retained; all options remained open; no decisions had been made.
(b) The requirements of Regulation 10(2) have not been established: the respondent does not accept that the Business Analyst role was *suitable*; the burden of proof to establish this lies with the claimant; and she has not discharged that burden.

55 The respondent denies that the conduct alleged in Paragraph 47(a) – (f) amounts to a repudiatory in breach of the employment contract - whether the allegations are taken individually or collectively. The respondent's case on each of the allegations is set out in detail below, but, for the purposes of the claim for automatic unfair dismissal, the respondent's case is that there is no basis to suggest that it behaved as it did *because* of the claimant's pregnancy or maternity. Accordingly, even if it was in repudiatory breach, absent proof of

causation there could be no finding of automatic unfair dismissal pursuant to Section 99 ERA.

Alleged Breaches – Constructive Dismissal

56 In response to the individual allegations in Paragraph 47 the respondent's case is as follows: -

(a) The question of pooling is a matter for the respondent. The evidence of Mrs Burt was that the respondent had conscientiously considered the position but concluded that as the claimant's position was unique it was not appropriate to pool her with others. Furthermore, the claimant's complaint regarding this was considered in her grievance, the final outcome of which was communicated to her in Ms May's letter of 9 March 2017. The claimant did not resign in response to this decision. Accordingly, this allegation can only contribute to a constructive dismissal if combined with other later breaches.

(b) Whilst the respondent concedes that the timing may have been unfortunate, Ms Omeri submits that it is absolutely absurd to conclude that this was a breach of the implied term of trust and confidence especially having regard to the fact that Ms Harris acknowledged that the claimant may wish to review the notes at a later date. The alleged delay from the date of the meeting on 7 June 2016 to the sending of the notes on 4 August 2016 was not so excessive as to amount to a breach. Finally, the same point applies: the claimant did not resign at this point and the allegation can therefore only contribute to a constructive dismissal if combined with other later breaches.

(c) The respondent does not accept that the Business Analyst role was a suitable alternative vacancy; although it was willing to explore this possibility. Accordingly, the failure to offer the role cannot contribute to a constructive dismissal. So far as Regulation 18 is concerned, the respondent's position is that the claimant was able to return to her previous role: the role had been expressly preserved pending her return when a consultation process would resume. The respondent's case is that it did all it could to promote the claimant's return, but it was clear from the solicitor's correspondence that the claimant was unwilling to return to work and resume the consultation process.

(d) On 29 August 2017, Mr Morris had indicated that the respondent would be in touch direct with the claimant to arrange for a consultation meeting. In her response of 7 September 2017, the claimant's solicitor Ms Linton made it clear that communications should be through her. She did not take up the respondent's suggestion of a consultation meeting.

(e) The correspondence rested with a letter from Mr Morris for the respondent dated 11 September 2017 inviting the claimant to engage in a conversation as to the suitability of the Business Analyst role; or

alternatively, to pursue further consultation about her existing role. The response from Ms Linton on the 13 September 2017 was that she would take instructions and communicate her client's final decision in due course. The next communication was the claimant's letter of resignation.

57 It is the respondent's case that the events after the 25 July 2017 were entirely innocuous and incapable of amounting to a breach of the employment contract. In her letter of the 25 July 2017, Ms Kendall had confirmed that the claimant would not be required to attend a formal interview in connection with the Business Analyst role; thereafter all communications were between solicitors and the option to explore that role further or to return to work and resume the consultation process were clearly available to the claimant. On the basis that those events were entirely innocuous they cannot amount to the last straw and applying the principles of ***Omilaju*** and ***Kaur*** there can be no question of constructive dismissal.

Discussion & Conclusions

Alleged Breaches of Regulation 10 & Regulation 18 MPLR

58 We find as a fact that no decision had been taken as to the continuation or otherwise of the claimant's existing role at the time she commenced her maternity leave. The respondent expressly (and principally for the claimant's benefit so as to enable her to receive her enhanced maternity payments) left the consultation process in suspension; the decision as to the future of the claimant's existing role was not to be made until the end of the consultation process which would resume when the claimant returned to work after maternity leave. An employee in the claimant's position would justifiably complain if the decision had in fact been taken in advance of the conclusion of the consultation process. We find that that was not the position here; the respondent, through Mrs Burt and Ms Kendall acted with conspicuous good faith; it remained an option that the claimant's role would be preserved indefinitely.

59 This finding is not undermined by the respondent's failure to review the claimant's salary in January 2017 or by Ms May's explanation for this. The continuation of the role was under review and was the subject of a suspended consultation process; the role was unique; and, in our judgement, it was hardly surprising that the question of salary review was deferred until the consultation process was concluded.

60 Accordingly, we find that the requirements of Regulation 10(1) MPLR were not met in this case. The position had not been reached whereby it was *not practicable by reason of redundancy* for the respondent to continue to employ the claimant under her existing contract of employment.

61 For the same reason, the requirements of Regulation 18(1) MPLR were met in this case: the claimant was entitled to return to the job in which she was employed before her absence and it was made clear in correspondence that the respondent was willing for her to do so. At the point of her return, the suspended consultation process would resume.

62 Mr MacPhail cautioned the panel against the above finding on the basis that such a finding would invite unscrupulous employers to simply postpone a final decision to prevent an obligation arising under the provisions of Regulation 10 MPLR. Of course, he is right: unscrupulous employers may and often do seek to circumvent the provisions of Regulations. However, we make an express finding in this case that the suspension of the consultation process and therefore the postponement of a decision was genuine. The case of the hypothetical unscrupulous employer would involve a decision having already been made although not communicated or announced.

63 It follows that we find that Regulation 10 MPLR is not engaged in this case as the circumstances required by Regulation 10(1) did not arise. In addition, in our judgement, the circumstances required by Regulation 10(2) did not arise either.

64 At no stage prior to her resignation did the claimant suggest that the Business Analyst role was suitable for her. Indeed, she specifically asked that it be offered to her for a trial period initially. Even when she gave evidence before us, she did not assert that the role was suitable - she specifically identified the possibility that something unknown to her might render the role unsuitable such that she could not continue with it. In correspondence, Ms Kendall described the role as a *reasonable* alternative role; she never stated that it was *suitable*; she stated that she believed that the respondent's Chief Operating Officer, Mr Brian Pearse would support the claimant's transfer to that role. But, only two individuals could determine whether the role was *suitable* - those were the claimant and Mr Hobson.

65 It is the claimant who alleges a breach of Regulation 10: the burden of proof is therefore upon her. She must establish before us, on the balance of probabilities, that the role was suitable. She has adduced no evidence before us as to the role itself or as to her suitability for it. Therefore, she has not discharged the burden of proof. Applying Regulation 10(2) we also, we find that Regulation 10 was not engaged in this case.

Alleged Breaches – Constructive Dismissal

66 We have considered each of the alleged breaches of contract in turn our findings are as follows: -

(a) The question of pooling is one for the respondent. The respondent's obligation is to conscientiously apply its mind: we are satisfied that this was done here. If the claimant had been expressly dismissed by reason of redundancy, then, in our judgement, it may have been appropriate for the tribunal to scrutinise whether the respondent's decision as to the appropriate pool for selection was within the range of reasonable responses. But, in this case, the claimant was not dismissed: our judgement is that it would be necessary for us to find bad faith on the respondent's part to conclude that the creation of the pool for selection was a repudiatory breach of the employment contract. Bad faith is not alleged in this case, and we find that Mrs Burt and Ms Kendall always acted in good faith.

(b) There is no suggestion that there was any deliberate intention to cause the claimant unnecessary distress by the timing of the sending to her of the notes of the grievance meeting. It was in explained in Ms Harris' letter that the reason for the delay was that Mr Godding had been engaged in other meetings relating to the grievance. Further, showing empathy for the claimant, Ms Harris specifically allowed for the possibility that she may not wish to review the notes immediately but may prefer to wait until after the birth of her baby. In our judgement, even if the respondent demonstrated a degree of insensitivity in this matter, it does not begin to amount to a breach of the contract of employment.

(c) We have already explained why, in our judgement, the respondent had no obligation to offer the claimant the Business Analyst role. Independent of the obligation created by MPLR, in our judgement, the failure to offer this role could only amount to a repudiatory breach of the employment contract if the respondent acted in bad faith; or the claimants fit to the role was clear and compelling. The respondent was willing to work with the claimant regarding the possibility of her moving to that role; the claimant declined to engage.

(d) For the reasons given in Paragraphs 58 - 65 above, we find there was no breach of either Regulation 10 or Regulation 18 MPLR.

(e)(f) We are satisfied that the respondent attempted to arrange both for the claimant's return to work; and for a consultation meeting. (As well as a discussion about the Business Analyst role.) All attempts were rejected by the claimant's solicitor.

67 Further, in our judgement, the alleged breaches at (e) and (f) above are, in our judgement, wholly innocuous bearing in mind that the respondent was fully engaged in correspondence with the claimant's solicitor. They are incapable of amounting to breaches of the employment contract. Accordingly, applying ***Omilaju*** and ***Kaur***, even if the matters complained of at (a) and (b) were potential breaches of the employment contract, they could not ground a claim for constructive dismissal.

68 In the circumstances, our conclusion is that the respondent did not at any time breach the contract of employment: and, absent such a breach, there can be no question of constructive dismissal.

Automatic Unfair Dismissal

69 It is therefore unnecessary for us to consider further the question of automatic unfair dismissal contrary to Section 99 ERA. But, for the avoidance of doubt, it has certainly not been established that any of the conduct complained of occurred because of the claimant's pregnancy or maternity.

Decision

70 For these reasons, the claims for unlawful discrimination and unfair dismissal are dismissed.

Employment Judge Gaskell
2 October 2018