EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms N Savvides		The Trustees of the British Museum

Heard at: London Central

On: 30, 31 0ctober, 1, 2 November 2017; & 3 November 2017 (in chambers)

Before: Employment Judge D A Pearl
Mrs J Keene
Mr P Secher

Representation:

For the Claimant: Ms C Lewis (Counsel)
For the Respondent: Mr R Hignett (Counsel)

RESERVED JUDGMENT AS TO LIABILITY

The unanimous judgment of the Tribunal is that:

1 The Claimant was unfairly dismissed pursuant to section 99 EPA 1996 and regulations 10 and 20, Maternity and Parental Leave Regulations 1999.

2 Her claim under section 18 Equality Act for direct pregnancy discrimination succeeds in respect of the deemed withdrawal of her job application; and fails in all other respects.

REASONS

1 By ET1 received on 3 May 2017 the Claimant made claims of automatic unfair dismissal and maternity/pregnancy discrimination. There was a case management discussion on 18 July 2017 and the agreed list of issues specified these claims and is attached, marked annex A.

2 On the first day of this hearing the Claimant submitted an opening argument which relied heavily on regulation 10 of the MPL etc regulations 1999. This regulation had not been specified in the list of issues or in the ET1. Those issues had referred to regulation 20(3), although it is right to note that the circumstances relied upon by the Claimant were said to be within regulation 20(1). There was an application by the Claimant to amend the claim, if so required. Although regulation 10 is embraced within the generality of regulation 20(1), it was clear to the tribunal that no regulation 10 claim had ever been intended (or possibly appreciated) until counsel's involvement. We ruled, after hearing full argument from both parties, that the amendment should be allowed. We also took the view that from a technical point of view it was probably a relabelling matter rather than the addition of a new cause of action, out of time. A more detailed written amendment was then suggested, because at that point in the proceedings Ms Lewis was inclined to further apply to amend by the addition of a free-standing point under European law. At the outset of the second day she informed us that this was no longer pursued.

3 Our principal reason for allowing the regulation 10 claim to be litigated, and for giving leave to amend if it were required, is that the claim arises wholly from the facts that are set out in the ET1. Indeed, the parties' witness statements appear to deal with all the relevant issues that could arise under regulation 10. The short point is that the extant claim under section 18 of the Equality Act and also the automatic unfair dismissal claim under section 99 and regulation 20 involve the Claimant giving evidence about the alternative job that she maintains ought to have been offered to her. In defending the claim the Respondent gives evidence as to why, in its view, the alternative job was not suitable and a number of grounds are relied upon. It is the case that under regulation 10 the tribunal will need to determine whether or not there was a 'redundancy situation', but that again is something which arises from the facts of the case already pleaded and set out in witness statements. Mr Hignett fairly conceded that the Respondent would be able to defend the claim under regulation 10. Accordingly, the tribunal came to the overall view that the balance of prejudice weighed decisively in favour of the Claimant. Were she to be refused the right to argue the regulation 10 case, she would be at risk of losing a valuable claim that arises from the very facts that she has asserted. This considerably outweighs any prejudice to the Respondent, although it is right to say that the only prejudice we can note is the possibility that such a claim could be lost from their point of view; and this is insufficient to defeat an application to amend. Therefore, whether by amendment or otherwise, we are satisfied that the claim under regulation 10 should be an issue for this tribunal.

4 A further complication concerning the legal issues arose during final submissions. We will set this out in more detail in our conclusions but we note at this point that the practical resolution agreed to by the parties was that a framing of the claim by reference to section 18(2)(b) was deferred at this stage.

5 In resolving the issues we have heard evidence from the Claimant and Mr Leighton; and from Mr Tubb, Ms Bristow, Ms Shepherd and Ms Raikes. We have studied a bundle running to about 350 pages together with some further documents that were handed up during the hearing.

6 To a large extent, the facts are not in serious dispute. It is not our function to resolve each and every issue of fact that can be detected in the evidence. What follow are our findings that are relevant to the issues.

Facts

7 Mr Tubb is Keeper of the Museum's Middle East Department. He has set out in detail the history of the Iraq Scheme, a cultural property protection scheme which is administered by the Museum and funded by government. A significant part of the Scheme is that Iraqi heritage professionals are brought over to London to be trained at the Museum. The Claimant has a PhD in archaeology and has extensive training expertise. She was employed as Training Coordinator to work exclusively on the scheme, on a fixed term contract dated 15 March 2016, for one year. The person specification at page 70 states that the main purpose of the job is to provide practical and administrative project support in the design, development and delivery of a training programme based in London and Iraq. It is then said that in the first six months the main purpose of the job is in relation to the creative development programme. In the second six months the main purpose is said to be "to review, evaluate and assess the training programme. Throughout the term, the job will include provision of administrative support …"

8 There is no dispute that the Claimant designed an excellent training programme which ran for 11 weeks when it was first implemented in 2016. The second training program at the Museum was to begin on about 7 January 2017 and by this point it had been decided to cut it down to 8 weeks. As will be seen, the Claimant only worked up to 29 December 2016, at which point she went off sick with stress. It has not been established that this was pregnancy-related at this point.

9 The Claimant notified her manager, Ms Bristow (who had taken over her role in October) that she was pregnant on 15 November 2016. The expected date of birth was 6 April 2017. Ms Bristow congratulated her. Two days later the Claimant spoke to HR. The next day, on 18 November, Ms Bristow spoke to the Claimant about obtaining an extension of her contract as well as obtaining maternity cover for her position. That day, the Claimant informed Mr Tubb about the pregnancy and he also congratulated her. From all of the evidence we find as a fact that none of the witnesses for the Respondent were inconvenienced by the pregnancy; and also that obtaining maternity cover for the Claimant was not only routine but relatively straightforward. Mr Tubb told us, and we accept, that

funding was no problem and there would be no difficulty in finding somebody to cover the job. So far as we can judge, the ethos of those witnesses that we have seen is that they will assist pregnant women as far as they can and they appreciate the legal duties upon managers to do so.

10 The Museum's internal document requesting recruitment authorisation for the Claimant's position of Training Coordinator is dated 7 January 2016, page 77. This specifies that the job is a one-year fixed-term contract and that: "the programme is in a pilot stage. Evaluation will be undertaken at the end of 2016 and resource needs will be reassessed." Mr Tubb explains that as the Scheme is publicly funded posts are subject to annual evaluation. He said that every single role for work that was solely on the scheme was issued on a fixed term basis and was subject to that evaluation.

11 Ms Bristow started working at the Museum as Project Manager for the Iraq Scheme in mid-October 2016. In discussions with the Claimant shortly after this date Ms Bristow made an assumption that the Claimant's role was necessary and that her contract would need to be extended. She therefore put the process in train and obtained the relevant forms from HR. As can be seen from pages141 and 143 she was filling in the same form that we have referred to above, so as to request an extension of the Claimant's fixed term contract for another 18 months. These forms went to Mr Tubb on about 24 November 2016 but he could not authorise the extension as he realised that there had to be an evaluation of the post. As he puts it, he "immediately put the brakes on the role extension pending this process." He comments that Ms Bristow, as a new employee at the Museum, was probably unfamiliar with the evaluation process and we find that this is correct. We also find that Ms Race, Director of International Engagement, also did not know about the evaluation process. Since the Claimant had spoken to both Ms Bristow and Ms Race, there can be no criticism of her for thinking that the extension of her contract was the next step.

12 On 5 December Ms Bristow told the Claimant that her role needed to be evaluated. On 8 December 2016 the Claimant raised a formal grievance about this. She was aggrieved that she had previously been told by others that the renewal of her contract was a formality. She said that the news about the need for evaluation had come as a real shock and had caused her stress.

13 There was a meeting of the Project board on 14 December 2016 and the Claimant's role was evaluated. As well as Mr Tubb and Ms Bristow, the Curator in Middle East and deputy director of the Scheme was present, as was a project support employee and two Lead Archaeologists, as well as Ms Beardon from HR. Three options were discussed. One was to extend the Training Coordinator role but this was rejected for reasons we will come to presently. A second was to make a minor adjustment to the role, but those at the meeting considered that a significant shift in focus was required and this was rejected. It was the third option that was adopted, namely the creation of a new role that would be focused almost entirely on administrative support for the training on the Scheme.

14 The relevant part of the minutes of the meeting are as follows. "General agreement there has not been enough admin support. However, Training links and expertise continue to be needed. There is a need to re-prioritise the tasks contained in the JD. The admin support is quite technical an Arabic speaker is helpful and the tasks can be sensitive and delicate. It could be possible to move this role across to S3 as the focus is implementation not development. It is maintenance as there will be turnover in the group of people. Keeping the programme on track and admin may be more important going forward. It needs an objective review in 2016 and job changes would go via [2 named people] for slotting following Admin Committee. There is an obligation to DCMS to review the role as stated in the original recruitment request."

15 These notes were explained more fully by Mr Tubb in his evidence and the essence of the decision, as we find, was that the training programme had already been devised, had been found to be successful, and there was no need for a revision. It would be the same every following year, subject to minor amendments. The funding for the scheme would be best allocated to a role that was largely administrative. We find that this was a genuine expression of the corporate view. It is consistent with the terms of the job description which drew a distinction between the Claimant's work during the first and the second periods of six months. It has been established in the evidence that from this point the work required of the Training Coordinator was largely administrative. This was a genuine re-evaluation and led to the exercise of regrading the new post within the Respondent's job families.

16 What emerged from the process was the person specification at pages 188 to 192. The new post was to be called Project Coordinator. The main purpose of the job repeated the first sentence to be found in the Main Purpose paragraph on page 70. It then merely added, in substitution for the text we have cited about the first two 6 month periods: "the role is also responsible for reviewing, adapting, evaluating and assessing the training programme." There then are set out key responsibilities under six heads. These need to be read for their full effect and we do not repeat the text here. By comparison with page 70, the first responsibility (and the most important) of developing a training schedule together with the further related responsibilities were deleted. The eight measures of practical support under the second heading are now, for this new role, extended so that they number 12. Heads 3 to 6 inclusive are broadly identical. The five paragraphs under the heading 'what are the main work pressures and challenges?' are identical. Another identical paragraph is under the heading of 'key dimensions' which again specifies that the post holder will not have line management or budgetary responsibilities. A minor amendment was made to performance targets and standards to reflect the need to maintain and deliver the training, as opposed to *design* and deliver the training. We find that this reflected the major change that happened over the course of 12 months, namely that the design and development of the training had already been successfully completed.

17 In due course the Museum's processes assigned the new role of Project Coordinator to a new family for pay purposes, known as S3. This is a pay band which is somewhat lower than the band for the original post. However, we were

told in evidence by Ms Shepherd, who would have been responsible for setting the Claimant's salary in the event that she had taken the new post, that she would have assigned the same salary to it, so that there would be no financial loss.

18 Returning to the chronology, on 19 December 2016 the Claimant was invited to attend a grievance meeting on 9 January. Her MATB1 form is dated 19 December and was submitted on the 29th. On that latter date she was certified ill with stress and the certificate ran until 20 January. On 19 January 2017 Ms Boulton, Head of Press and Marketing, who was dealing with the grievance, gave her decision: pages 183 to 184. She did not uphold the grievance and said she could find no evidence that the "review/evaluation of the role was in any way connected to the announcement of the pregnancy". She considered that there had been communication problems and an assumption made that the role would be needed, which was in part a reference to the detailed evidence that Ms Bristow had given to Ms Boulton. On 20 January the doctor certified absence until 3 February because of "stress and pregnancy-related problems".

19 Between 24 and 31 January 2017 Ms Bristow and the Claimant, who was at home, agreed to conduct communications by email. On the 31st Ms Bristow in an email at page 209 informed her that the second training program that had begun on 7 January was going well and that a more administrative role was now required. The Claimant was invited to apply for the project coordinator role and she was told that otherwise the existing role could not continue. "If no alternative is found, I will write to you to confirm the end of your employment upon the expiry of your contract."

20 The Claimant responded to say that she was very disappointed with the outcome of the evaluation. "Why have I not been offered the new position as a suitable alternative employment given that I have been put in a redundancy situation as a result of this evaluation?"

21 Ms Bristow responded "this is not a redundancy situation." She said that the Claimant was employed on a one-year fixed term contract, the piece of work was completed and the contract was naturally expiring on the agreed end date: page 208. In evidence she told us that this was written on the advice of HR.

22 On 3 February 2017 the Claimant appealed the grievance outcome. On the same date her doctor certified absence until 18 March for "stress related and pregnancy related complications." On 6 February she wrote to Ms Bristow as follows. "My GP and the consultant obstetrician suggested I stay at home while the monitoring of my baby continues and avoid any stressful environments. I will not be coming back to work. Please find attached my GP's statement of fitness work document."

23 Ms Beardon in HR wrote on the same day to the Claimant and stated that the fixed term contract was due to end on 17 March although the Museum would consider alternatives to termination of employment. On 10 February Claimant was invited to an appeal hearing and as she was unable to attend, Mr Leighton

represented her at that hearing. On 17 February the Claimant applied for the Project Coordinator post.

24 On 20 February Ms Bristow sent the letter at pages 223 to 224, although we accept that this was drafted entirely by HR. This confirmed the end of the fixed term contract as the required work to set up a training programme had finished. The new more administrative role was needed "and therefore your role is not renewed. We have given consideration to whether there were alternatives to the end of your fixed term contract that would enable your continued employment with the Museum. However as no viable options have been identified I am now writing to confirm that your employment as Training Coordinator will end upon the expiry of your current fixed term contract due to the reason outlined above." A weekend had intervened between the Claimant's applying for the Project Coordinator and the date of this letter and we find that Ms Bristow did not know on 20 February she had put in an application.

25 On 24 February the Claimant appealed the termination of employment. Her first ground set out her belief that the decision to evaluate the role and not extend it was made because of her pregnancy. She sought to have her current post extended. In her second ground she said that the new post should have been offered to her. She expressly stated that she believed that the termination of her position "… means that my existing post is redundant and as such the new revised Project Coordinator post should have been offered to me as a suitable alternative role. I believe that the failure to do so is also discrimination on the grounds of my pregnancy. It is still possible, however for the Museum to offer me this post, assuming that my appeal [under the first ground] is unsuccessful, and on the basis that the post has now been revised it should now be offered to me." She added that the failure to offer her the job was something she also viewed as an act of discrimination on the grounds of her pregnancy.

26 The appeal hearing was rescheduled and on 28 February the Claimant said that she would not be able to attend "as I have signed off sick by my GP due to stress-related and pregnancy related complications. She asked for her union representative to attend in her place. On the same day she said exactly the same thing in relation to an invitation to attend the interview for the new role on 2 March. An employee in HR suggested that a Skype interview could be arranged and asked if this was an option. On 1 March the Claimant responded and thanked the employee for the offer "… But I'm concerned that the Skype interview would be as stressful and I have no alternative but to decline. However, I wish to be considered for the role." The response was that the Claimant was being considered but that the next stage was an interview "… along with other candidates. Please let me know if there are any reasonable adjustments which we could make to enable … you to take part in an interview."

27 The Claimant said she was grateful for the offer but she could not see how any adjustment could overcome the stress caused by having the interview. "As I have complications with my pregnancy I have been advised by my doctors to avoid stressful situations as much as possible. Given the Museum's knowledge of myself and my performance in my current role, the museum should offer me the job in any case." The response on 3 March thanked her for confirming that

"… You do not feel able to attend and could not think of any reasonable adjustments we can make. I have let the interview panel know that you have withdrawn your application." The Claimant replied and said that it was not true to say that she was withdrawing her application and that she would still like to be considered for the job based on her application in writing. The response the same day was that as she cannot attend an interview, she had not taken part in the full selection process. "We therefore unfortunately cannot take your application any further and consider you to have withdrawn."

28 The new post was orally offered to Ms S on 3 March but she requested a higher salary than was on offer. The upshot of discussions was that it was decided that no higher salary could be offered and the written offer of employment as Project Coordinator was made by letter dated 7 March 2017. It was an offer that was made subject to contract (and other conditions.) There was a separate form for acceptance of the offer and that written acceptance appears to be signed and dated 19 April 2017. There is also an electronic form setting out personal details in the bundle which is signed electronically and is dated 7 March. An argument raised by the Respondent is that this could be viewed as an acceptance of the offer of employment. In any event it is agreed by the parties that by reference to regulations the Claimant's maternity commenced on 6 March

29 An issue arose during the cross examination of Ms Bristow as to whether she could be asked certain questions. After hearing submissions from counsel we allowed the questions. Our reasons are set out at annex B. The substance of the questioning was whether it had subsequently come to light during 2017 that the Claimant had failed to undertake certain duties in her role. It was necessary for Ms Lewis to cross-examine by detailed reference to the weekly sheets in the bundle that set out the training programme commencing on 7 January 2017. We see no need to set out any detailed findings here, but it is clear from the evidence given by Ms Bristow that the Respondent has been unable to establish any significant failure of performance by the Claimant. In the first six weeks of the second training programme there were only two omissions that can be identified. We draw the inevitable inference that the Claimant would, had she been sufficiently fit to attend work in January and February, have done everything that was required in order to complete the training programme in advance. A related issue that has been raised by the Respondent is that she was reluctant to carry out administrative tasks and gave them to other people to do. Again, it is unnecessary to recite detailed passages of evidence. Where Mr Tubb has formed this view it is on the basis of what he has been told by his PA and we are not satisfied that the individual examples amount to anything significant. We consider that some of the duties, such as booking hotel rooms or flights, were shared between team members and in so far as an attempt has been made to establish that the Claimant was reluctant to do these things, we find that there is no reliable evidence before the tribunal for reaching that conclusion.

The Law

30 Section 139 of the 1996 Act provides that an employee is taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to "… (b) the fact that the requirements of that business-(i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish."

Regulation 20 of the Maternity and Parental Leave Regulations 1999 provides that: (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), or (b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

Regulation 10 provides that:
(1) This regulation applies where, during and 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, on 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.

18 of the Equality Act 2010 provides that:
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-(a) because of the pregnancy, or (b) because of illness suffered by her as a result of it…
(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.

Submissions

31 We are grateful to counsel for their submissions, including those made over the telephone on 3 November 2017. Some summary of the submissions is useful. It is first said that the Claimant was employed on work of a particular kind and that the requirements of the Respondent for employees to carry out such work had ceased, as the work of designing and developing the training

programme was no longer needed. It is therefore contended that there was a redundancy situation and this was why it was decided not to renew the Claimant's contract. Next, it is submitted that before the termination of employment on 17 March and by the commencement of her maternity leave on 6 March there was a suitable available vacancy, namely the Project Coordinator role. Therefore within the terms of regulation 10 it is said that the Claimant was entitled to be offered this role before the termination of employment; and that it should take effect under a new contract which complies with regulation 10(3).

32 It is next contended that the Respondent's decision on 3 March to treat the Claimant's application for the new role is withdrawn was unlawful under section 18 as it was unfavourable treatment because of her pregnancy. The next act of alleged unlawful discrimination under this section is not offering her the role of Project Coordinator. The third claim under this head relates to the Claimant's dismissal. In all cases it is said that the effective cause of these two detriments, along with the dismissal, was the pregnancy or the maternity leave.

33 As to automatic unfair dismissal under section 99 and regulation 20, it is said that the reason or principal reason was a reason connected with either the pregnancy or childbirth or maternity leave.

34 The Respondent urges these arguments against the regulation 10 claim. First, that the redundancy situation had arisen before 6 March; and that on 6 March the suitable available vacancy was not available. Mr Hignett argues for acceptance by conduct by Ms S, contending that as the offer had been made on 3 March the vacancy was not available on 6 March, as it was under offer. As an alternative argument it was available until 7 March when it was accepted.

35 Second, the alternative vacancy, i.e. the new job, was not suitable because of the differences under a number of heads. It was such a different job that it was not suitable for the Claimant. By analogy, it was as if a solicitor was seeking to have the job of a paralegal offered to her. It was largely a matter of status. It was a matter of good industrial practice to offer the Claimant an interview, but there was no further obligation to offer her the post.

36 As to the section 18 claim relating to the deemed withdrawal of the Claimant's application, Mr Hignett submits that she could not come to an interview, as would be normal, and that if she had not been pregnant, the Respondent would have done exactly the same. Similar reasoning is advanced for the Claimant not offering the Claimant the new role. As a matter of fact, it is submitted that the Respondent did not believe that there was a redundancy situation.

37 Other submissions emerged during the course of oral submissions and we will refer to some of them below.

Conclusions

Regulation 10

38 We agree with Mr Hignett that the first question, in broad terms, is whether there was a point in time when it was not practicable for the Respondent to continue to employ the Claimant under her existing contract of employment. Bearing in mind the approach of the EAT in Sefton BC v Wainwright [2015] IRLR 90, it is evident that the point in time (or the arising of circumstances, to use Mr Hignett's language) predated 6 March 2017. It may be that the point in time was 31 January 2017, but nothing turns on this. In many cases the point at which it is no longer practicable to employ an employee will arise during her maternity leave. There is, however, no reason in principle why the impracticability cannot arise before her maternity leave, for the purposes of regulation 10. That regulation stipulates that during the period of maternity leave "it is not practicable … to continue to employ her …" We note that in Sefton the tribunal at first instance ruled that the right to be offered the vacancy had arisen during the maternity leave and that it was extinguished either when the dismissal took effect when the maternity leave ended. This latter finding as to the extinguishing of the right was not disturbed by any of the reasoning of the EAT. There is nothing in regulation 10 that states that the impracticability (or, put another way, the rights conferred by regulation 10) must only arise for the first time during the maternity leave. On the contrary, during the period of maternity leave, if it is not practicable to continue to employ the Claimant, then the right is engaged. Here, maternity leave began on 6 March, a date when it remained not practicable to continue to employ her. In our view, she overcomes the first stage of the analysis required by regulation 10.

39 The impracticability that we have referred to must be "by reason of redundancy." This employer asserts that it believed some other substantial reason to apply, but in our view the reasoning is erroneous. Applying section 139 in the light of Safeway v Burrell and Murray v Foyle Meats (1999, HL) it is, in our view, clear that the dismissal of the Claimant, as well as the state of affairs we have described as impracticability, was wholly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind had ceased. This is the very basis of the Respondent's further argument that we address below to the effect that the new post was not suitable for her. The entire tenor of the Respondent's case is that her work of devising and implementing the training programme had finished and those phases were complete. It seems to us clear beyond any doubt that the definition of redundancy is therefore met.[1]

[1] As stated by HHJ Clark in Safeway v. Burrell [1997] ICR 523, subsequently approved in the House of Lords: "There may be a number of underlying causes leading to a true redundancy situation … there may be a need for economies, a reorganisation in the interests of efficiency, a reduction in production requirements, unilateral changes in the employees' terms and conditions of employment. None of these factors are themselves determinative of the stage 2 question. The only question to be asked is: was there a diminution/cessation in the employer's requirement for *employees* to carry out work of a particular kind, or an expectation of such cessation/diminution in the future? (Redundancy.)" The stage 2 question is whether the dismissal is attributable, wholly or mainly, to that state of affairs.

40 We have rejected the Respondent's submission that the circumstances must arise during maternity leave if it is suggested that this means that they must arise for the first time during that period. From 6 March it remained not practicable to continue to employ the Claimant who was, at that time, still in employment with the Respondent. As the reason was redundancy, the question is whether there was a suitable available vacancy at that time? The Respondent maintains that no vacancy was "available" because an offer of the new post had been made to Ms S. However, she sought a higher salary on 3 March and the written offer was not made to her until 7 March when the Claimant had already commenced her maternity leave. This written offer was subject to contract and was not accepted until April. Any suggestion of acceptance of the offer by conduct must fail on the facts we have found.

41 It is irrelevant whether or not there was any appreciation by the Respondent that the Claimant may have statutory rights. On the availability issue, paragraphs 24 and 25 of Sefton are instructive. HHJ Eady QC stated: "the availability of a suitable vacancy for these purposes is a question of fact. A post may be available even if there are economic reasons for the employer not wishing to offer it to the employee in question, see *Community Task Force v Rimmer* [1986] IRLR 203, where the EAT observed … 'The test of availability … Is not expressed to be qualified by considerations of what is economic or reasonable. The Tribunal must simply ask themselves whether a suitable vacancy is available. If it is available, the consequences, however unpleasant, of the employer giving the job to the [employee] are not relevant …'" The judge then went on to observe that if the suitable alternative position is available, the entitlement is not subject to a test of reasonableness. Therefore, even if there is another employee who is better suited for the job, the pregnant employee is entitled to be made the offer.

41 This is in point in this case. There was no obligation to make a written offer to Ms S on 7 March. If we are wrong about this, she had not accepted the previous oral offer and the Claimant's entitlement to be offered a suitable alternative took precedence. Even if an employer felt that Ms S was being treated unreasonably, it was by regulation 10 obliged at this point to offer the post to the Claimant, provided that the next stipulation in the regulation is met.

42 This is that the available vacancy was "suitable." There is no sensible basis, we conclude, for saying that it was not suitable. We adopt all of the reasoning Ms Lewis sets out in paragraph 26 of her closing note. We agree that the Claimant fulfilled all the necessary criteria for the role. On any objective basis she was familiar with the project, had designed important components and, more important, wanted the role even though it seemed to attract a lower salary. Even this point is of little relevance because it has transpired that she would have been paid the same. This last point needs to be taken along with the invitation to an interview that was extended by the Respondent. It is evident to the tribunal that the Respondent thought that it was a suitable role to be offered to her and that the weak attempts made during the hearing to suggest that the Claimant was unfitted to the role are no more than rationalisations after the event. In all respects we hold that this was a suitable role.

43 The claim for automatic unfair dismissal under regulation 20(1)(b) succeeds as the principal reason for the dismissal is that the Claimant was redundant and regulation 10 had not been complied with. This is because during her period of ordinary maternity leave it was not practicable by reason of redundancy to continue to employ her under her existing contract of employment. There was a suitable available vacancy and she was therefore entitled to be offered that alternative employment.

Section 18 claims

44 Both counsel have noted the observations of HHJ Eady QC at paragraph 50 of Sefton. Regulation 10 and section 18 provide different forms of protection, regulation 10 being described as 'special protection'. The submission in that case that breaches of regulation 10 inherently amount to direct discrimination was rejected. Judge Eady observed that it cannot be assumed that the reason why something happened was simply on the basis of the context in which it happened. This is a point that has been made at various times in the authorities, for example in the EAT decision in Amnesty International v Ahmed. The setting in which the treatment takes place will often involve considerations of race or sex but it does not follow that the treatment was because of the protected characteristic.

45 To give our conclusions first, we consider that two of the alleged detriments are not direct discrimination; and that one is such discrimination.

46 **First detriment.** This is that the Respondent treated the Claimant's application for the new role as withdrawn. As is apparent from our findings, this occurred on 3 March 2017 after the Claimant had declined a Skype interview and had relied upon medical advice. The evidence here is undisputed and also straightforward. The Respondent believed that this was not a redundancy situation and it was thought that there was no obligation to offer the Claimant the alternative job, as she had said should happen. Accordingly, it carried out a normal interview process for the new role and invited the Claimant to apply. Interview was essential under the Respondent's normal procedures. The deemed withdrawal of the Claimant's application was solely because she was unable to participate in an interview, whether in person or electronic. This, in turn, was wholly because of her pregnancy-related condition, as the Respondent had been told. It is therefore impossible to conclude as matter of factual analysis that the deemed withdrawal of the application was not because of the Claimant's pregnancy. Although Mr Hignett prefers to say that the reason is that she could not attend a Skype interview, this is merely the manifestation of the true reason, which is that any interview would create the sort of stress that she had to avoid because she was pregnant. There is, in our view, no difficulty in concluding that the Claimant succeeds in this claim.

47 **Second detriment.** This is not offering the role to her. By this point in time the Claimant had commenced her maternity leave and she had the statutory entitlement under regulation 10 to have the role offered. It should have been offered to her because she was pregnant and on maternity leave. The tribunal considers that it is far from easy to say that she was not offered the job because

she was on maternity leave. This is not the operative reason when we look at the facts. The chain of reasoning must, we assume, be much more attenuated and run as follows: the Claimant was not offered the job because Ms S was offered the job; Ms S was successful, at least in part, because the Claimant was not interviewed; the Claimant was not interviewed because she could not attend and the reason for that was her pregnancy. Our conclusion is that this causative reasoning is significantly more remote than for the first detriment and that it is artificial to frame the claim as succeeding under section 18.

48 **Third detriment.** This is dismissing the Claimant by effluxion of time and not renewing the fixed term contract. In reality, this is much the same as the second detriment. She was not, in our view, dismissed because she was pregnant. She was dismissed because the role was redundant and/or because she was not offered the new role in circumstances in which someone else had attended an interview, and performed satisfactorily, when the Claimant herself was unable to attend.

49 We note the cases to which we were referred. O'Neill v St Thomas More School [1997] ICR 33 directs us to an objective test for causal connection. The relevant principles set out by Mummery J include (i) that the approach that question should be simple, pragmatic and commonsensical, a proposition derived from earlier case law. (ii) Out of the whole complex of facts we must look for the effective and predominant cause or the real or efficient cause. Further, (iii) it is sufficient if the pregnancy is *an* effective cause. It is in applying these principles that we have come to the above conclusions. There is a broader argument advanced by Ms Lewis to the effect that we should draw an inference that the Respondent knew that the Claimant would have been successful had she attended the interview, or if her performance of been properly assessed without any need for an interview. This might, indeed, lead us to have a different view as to whether or not the pregnancy was the reason for not being offered the new post, but it requires findings of fact based upon the drawing of inferences that we are not prepared to make. We have concluded that the Respondent's stance was more procedural. It would have employed the Claimant in the new role had she attended and succeeded at the interview.

50 The outcome is that the Claimant succeeds in the two respects we have set out, namely for automatic unfair dismissal under regulation 10 and regulation 20 and also in respect of the first instance of direct discrimination under section 18. We would invite the parties within 14 days of receiving this judgement to write to the tribunal with their proposals for a remedy hearing. They may also wish to set out their views about the further issue that we agreed would be deferred under section 18 and which relates to illness suffered as a result of the pregnancy.

_____

Employment Judge Pearl on 9 February 2018