

**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: S/4100303/17**

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**Held in Glasgow on 2, 3, 4 and 5 October 2017**

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**Employment Judge: Lucy Wiseman**  
**Members: Mr I Ashraf**  
**Mr A McFarlane**

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**Ms Jenna Storie**

**Claimant**  
**Represented by:**  
**Mr M Briggs -**  
**Solicitor**

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**Clyde Property Ltd**

**Respondent**  
**Represented by:**  
**Mr G Mitchell -**  
**Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Employment Tribunal (by a majority with the Employment Judge dissenting) decided the claimant was automatically unfairly dismissed because the respondent breached Regulation 10 of the Maternity & Parental Leave Regulations 1999. The respondent shall pay compensation to the claimant in the sum of £29,461 (Twenty Nine Thousand, Four Hundred and Sixty One Pounds).

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**REASONS**

**E.T. Z4 (WR)**

1. The claimant presented a claim to the Employment Tribunal on 20 February 2017 alleging she had been unfairly dismissed because she had exercised the right to take maternity leave and not for reasons of redundancy as asserted by the respondent. The claimant also argued that if there was a redundancy situation, the respondent failed to offer her the suitable alternative vacancy of Senior Financial Controller in breach of Regulation 10 of the Maternity and Parental Leave Regulations 1999.  
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2. The respondent entered a response admitting the claimant had been dismissed for reasons of redundancy but denying the dismissal had been unfair or automatically unfair. The respondent denied the post of Senior Financial Controller was a suitable alternative vacancy.  
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3. We heard evidence from the claimant; and from Mr Gary Thomson, Managing Director and joint owner of the respondent business; Mr Alistair Black, Head of Consulting at Johnston Carmichael; Mr David Dunwoodie, Senior Financial Controller and Mr Bill Cullens, joint owner of the respondent business, now retired. We were also referred to a jointly produced bundle of documents.  
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4. The issues for the Tribunal to determine are:-  
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  - i What was the reason for the claimant's dismissal: was it redundancy as asserted by the respondent, or because she had exercised the right to take maternity leave?  
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  - ii If the reason for dismissal was redundancy, was the claimant selected for redundancy because she was on maternity leave?
  - iii If there was a redundancy situation, was the post of Senior Financial Controller a suitable alternative vacancy in terms of regulation 10 of the Maternity and Parental Leave Regulations 1999;  
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  - iv Did the respondent breach regulation 10 (above) by failing to offer the claimant the suitable alternative vacancy and

v If there was a genuine redundancy situation and the claimant was genuinely selected for redundancy, was there a fair dismissal.

5 5. We, based on the evidence before us, made the following material findings of fact.

**Findings of fact**

10 6. The respondent is an estate agency business with branches across central Scotland, and a head office in Glasgow where the accounts team/function is based.

15 7. The respondent employs 130 employees, approximately 70% of whom are female. The respondent has significant experience of employees being on, and returning from, maternity leave and adopts flexible practices in respect of working hours, returning to work and time off.

20 8. The claimant commenced employment with the respondent on 2 March 2009 as a Trainee Accountant. The claimant commenced on a salary of £20,000, which increased to £24,000 on 1 May 2010.

25 9. The claimant was offered and accepted the post of Financial Controller on 8 April 2011 (page 79). The claimant's salary increased to £28,000 on 17 November 2011; £30,000 on 1 April 2013; £36,000 on 1 May 2014 and £40,000 on 16 January 2015.

30 10. The claimant was paid bonuses of £1000 on 23 March 2015; £500 on 29 October 2015 and £2000 on 29 March 2016.

11. The claimant did an Accountancy degree at University. The respondent paid for the claimant to undertake a training programme through the Chartered

Institute of Management Accountants (CIMA), to qualify as a Management Accountant.

12. The structure of the accounts team in 2016 was:-

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- Financial Director – Rosalind McCulley (the claimant's sister)

- Financial Controller – the claimant

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- Accountant – David Dunwoodie

- Accounts Assistant – two

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- Letting Accounts Assistant – four (with one post being temporary to cover the claimant's maternity leave).

13. Mr David Dunwoodie joined the respondent in September 2014. Mr Dunwoodie obtained a degree in Chemistry and was accepted on to the KPMG graduate scheme in 2010. He undertook qualifications with ICAS and qualified as a Chartered Accountant in 2013. Mr Dunwoodie worked in the KPMG audit department which involved inspecting client businesses, ensuring accounting practices were correct and compiling an audit report for the audit partner. The fees charged to clients meant there was pressure to be accurate in reporting.

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14. The claimant's role was marginally senior to that of Mr Dunwoodie's role in the respondent's structure. They carried out many of the same tasks and provided cover for each other when on annual leave. Mr Dunwoodie did not report to the claimant. By Spring 2016 the claimant and Mr Dunwoodie spent approximately 40% of their time maintaining the accounts system, ensuring it was accurate and carrying out reconciliations. Approximately 20% of their time was spent preparing for the month end process which involved collating information from branches and preparing management accounts. 10% of time

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was spent on tenant deposits. Mr Dunwoodie and the claimant also prepared the quarterly VAT return, the quarterly non-resident landlord return to HMRC and the monthly Arla reconciliations.

5 15. The claimant had responsibility for day to day management of the accounts team, and carried out their appraisals. The claimant appraised Mr Dunwoodie once.

10 16. The property market in Scotland has, for some time, been flat and fragile and has been affected by uncertainties including Brexit, Independence, Land and Building Transaction Tax changes and the poor economic conditions. The respondent's business is dependent on volume of sales and letting.

15 17. Mr Gary Thomson and Ms Fiona Hindshaw, Operations Director, having had regard to the market conditions and a downturn in volume of work, undertook a review of branches in the Spring of 2016. They sought to make efficiency savings by amending structures, not filling vacant posts and cancelling the opening of a second branch in Edinburgh. The accounts function was the last function to be reviewed.

20 18. Mr Thomson was informed by Ms McCulley, Financial Director, that she was pregnant and would be on maternity leave from November 2015 until November 2016. It was agreed, in preparation for Ms McCulley's maternity leave, that payroll, IT and HR would be outsourced externally.

25 19. Ms McCulley had had a period of maternity leave for six months in 2012. The claimant covered some of Ms McCulley's duties during the first and subsequent maternity leave, but Ms McCulley continued to provide support and guidance when she attended work on many "*keeping in touch*" days.

30 20. The claimant informed Mr Thomson, in January 2016, that she was pregnant. The claimant used annual leave for two weeks prior to commencing her

maternity leave on 14 June 2016. The claimant was due to return to work on 14 June 2017.

21. The claimant was aware her sister had agreed favourable maternity pay rates with Mr Thomson, and so she asked Mr Thomson for a similar arrangement. Mr Thomson confirmed by email of 19 April 2016 (page 104) that the first six weeks of maternity leave would be paid at 90% of basic salary, and thereafter the claimant would be paid a corresponding annual salary of £22,000 for the remaining 46 weeks of her maternity leave. Mr Thomson had initially suggested a salary of £20,000, but agreed to the claimant's request to increase this to £22,000.
22. Mr Thomson is not an accountant, and so he decided to instruct Johnston Carmichael consultants to advise on the structure and value for money of the accounting function. Mr Alistair Black, Head of Consulting, met with Mr Thomson in April 2016 to understand the purpose of the task which was to look at the processes and systems in the finance department and identify opportunities for improvement (page 115). Mr Black's key contacts were Mr Thomson, and the claimant.
23. Mr Black produced a report in July 2016 entitled Review of Business Processes and Systems (page 121). Mr Black, in that report, set out his observations regarding the work carried out by the accounts team and his conclusions. He found the team created many spreadsheets based on extracting information gathered from a variety of sources, and that this caused a lot of duplication of effort, checking by senior members of the team and a reliance on paper records. Mr Black considered the current systems had grown on an ad hoc basis and that there was considerable scope for streamlining systems and reducing manual effort. Mr Black set out a six stage process to address matters which recognised that having made efficiencies there may be a reduction in the number of people required.
24. Mr Thomson had suspected, prior to instructing Mr Black, that the accounts team was top-heavy and that efficiencies could be made. He was surprised,

upon receiving Mr Black's report, to learn just how inefficient the accounting function was. He understood from the report that there were currently very labour intensive paper systems in place and that this could be improved by using existing online applications. Mr Thomson noted the process detailed by Mr Black to address the situation, but he decided not only to put efficiencies in place, but also to immediately restructure the team because it was clear it was top heavy.

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25. Mr Thomson proposed a new structure (page 232) which deleted the posts of the three accountants (Financial Director, Financial Controller and Accountant) and replaced them with one Senior Financial Controller post. The Senior Financial Controller post sat at a higher level than the posts of the claimant and Mr Dunwoodie, but below that of Ms McCulley. The post-holder would be the only Accountant in the respondent business, and accordingly the post carried with it a higher status and seniority than the claimant and Mr Dunwoodie had previously had. The post attracted a salary of £50,000 and required skills in strategic management, utmost attention to detail, professionalism and a need to bring ideas regarding application of IT and IT systems.

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26. Mr Thomson wrote to the claimant (and Ms McCulley and Mr Dunwoodie) on 1 September 2016 (page 233) to inform her of the risk of possible redundancy. The claimant was advised her post was being made redundant. The letter invited the claimant to a consultation meeting to discuss the reasons for redundancy and the proposed criteria to be used should two individuals apply for the same alternative employment. The claimant was also provided with a copy of the announcement of redundancy and the current and proposed structures.

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27. Mr Thomson did not consider the post of Senior Financial Controller to be a suitable alternative vacancy in terms of Regulation 10 of MAPLE, and he therefore did not offer this post to the claimant.

28. The first consultation meeting took place on 5 September. The claimant met with Mr Thomson and Ms Hindshaw was present to take notes (page 235). Mr Thomson made reference to the challenging marketplace and the need to made efficiencies in the head office functions. He confirmed there was no longer a need for as many posts in the finance structure, and that the claimant's post had been made redundant.
29. The claimant made no comment on the proposed new structure or the scoring criteria, and challenged Mr Thomson whether there was any point in going through the procedure because she thought his mind was already made up. Mr Thomson assured the claimant that was not the case, and he asked whether there were any posts in the new structure which the claimant would want to be considered for, or apply for. The claimant responded "no".
30. Mr Thomson asked the claimant whether she wanted to provide him with more information regarding her skills and experience, but she made no comment or response. The claimant refused to engage in the consultation process and told Mr Thomson she thought it was all unfair.
31. The claimant was invited to attend a second consultation meeting to discuss any further opportunities for alternative employment. The meeting took place on 9 September and notes of the meeting were produced at page 239. There was, during this meeting, reference to the Senior Financial Controller post. Mr Thomson told the claimant the basic salary would be £50,000 and that there would be various benefits and a bonus depending on performance. The claimant requested a job specification for the post and was advised there was not one.
32. Mr Thomson expressed surprised that the claimant had not asked about this post or applied for it. The claimant queried the start date of 1 October, and Mr Thomson assured her that her maternity leave would continue as planned if she was offered the role and that he would arrange for appropriate cover until she returned from maternity leave. Mr Thomson further confirmed that



there would be a scoring process if more than one person applied for the post, and that he would carry out the scoring process and review it with applicants individually. It was agreed Mr Thomson would contact the claimant once he had carried out the scoring exercise.

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33. The claimant and Mr David Dunwoodie wished to apply for the post of Senior Financial Controller. Mr Thomson scored selection criteria in respect of each of them. The criteria used were professionalism, relevant qualifications and experience, commercial awareness, people skills, attention to detail, length of service and outstanding disciplinary warnings. The weighting attached to each criterion was 4, 3, 3, 3, 2, 1 and 1 respectively.

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34. Mr Dunwoodie was scored 4 for professionalism (16 points); 5 for relevant qualifications and experience (15 points); 4 for commercial awareness (12 points); 4 for people skills (12 points), 4 for attention to detail (8 points); 1 for length of service and 5 for no outstanding disciplinary warnings. He scored a total of 69 points.

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35. The claimant was scored a 3 for professionalism (12 points); 4 for relevant qualifications and experience (12 points); 3 for commercial awareness (9 points); 4 for people skills (12 points); 3 for attention to detail (6 points); 3 for length of service and 5 for no outstanding disciplinary warnings. She scored a total of 59.

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36. Mr Thomson met with the claimant on 21 September to discuss the scoring, and a note of that meeting was produced at page 257. The claimant had an opportunity to challenge the scores she had been given, and Mr Thomson agreed to increase the score for professionalism from a 3 to a 4, and to increase the score for attention to detail from a 3 to a 4. This increased the claimant's overall score to 65.

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37. Mr Thomson considered Mr Dunwoodie's qualifications and experience to be marginally better than the claimant, particularly as Mr Dunwoodie had

5 experience of working with other companies and brought that experience to the respondent. Mr Thomson also considered Mr Dunwoodie's experience brought with it more commercial awareness, whereas the claimant's experience had been almost entirely with the respondent, and she had not had an opportunity to demonstrate the full range of skills.

10 38. Mr Thomson advised the claimant that she had scored less than the other candidate, but that no firm decisions had been made yet. He asked the claimant whether, if she was not successful in getting the Senior Financial Controller post, she would be interested in any other accounts posts. The claimant confirmed she would be interested in the Accounts Assistant role with a salary of £23,000, and understood that if another candidate came forward for that post there would be another scoring exercise.

15 39. Mr Thomson subsequently sent a lengthy email to the claimant on 21 September confirming David Dunwoodie had scored more than the claimant and was the preferred candidate for the post of Senior Financial Controller. Mr Thomson confirmed the Accounts Assistant role was a full time position on a salary of £23,000 and he asked the claimant to confirm if she wished to be considered for the role, and if so, another scoring exercise would be undertaken. The email clarified that if the claimant was successful in gaining the Accounts Assistant role, her maternity pay would be half the salary for that position until she returned to work.

25 40. The claimant responded to the email to say that she did not consider one day to be a reasonable length of time in which to respond, and she confirmed she would be in touch the following week once she had had time to properly consider her options.

30 41. Mr Thomson responded to say he took on board her comments and asked her to come back to him early next week.

42. Mr Thomson tried to phone the claimant on Monday 26 September, but got no response and so left a voicemail message. He subsequently emailed her at 13.05 asking her to come back to him by close of business that day.
- 5 43. Mr Thomson did not hear from the claimant and so he emailed her on Tuesday 27 September, and attached a letter inviting the claimant to a formal meeting on 29 September (page 265).
- 10 44. The meeting in fact took place on 30 September. The claimant attended and was accompanied by her sister Ms McCulley. Ms Hindshaw attended to take notes, which were produced at page 267. The claimant told Mr Thomson that she still had not had sufficient time to consider the options. The claimant, when asked how much time she needed, responded that she could not answer that question.
- 15 45. Mr Thomson sent an email to the claimant following the meeting on 30 September (page 269) in which he stated he thought the claimant had been given sufficient time to consider the options and he noted the delay was having an impact on other staff. He asked the claimant to indicate by email, by Monday 3 October at 10am, whether she wished to apply for a lower post 20 in the new structure, and if so, to indicate the post she wished to apply for. The email concluded by stating that if he did not hear from the claimant, he would assume she did not wish to apply for any other post in the structure.
- 25 46. The claimant did not get in contact with Mr Thomson.
47. The claimant was, by letter of 4 October (page 270) advised that her employment would terminate by reason of redundancy. The letter confirmed the claimant was entitled to receive payment of 7 weeks' notice (£5,384.61 gross) and a statutory redundancy payment (£3,353).
- 30 48. The claimant exercised the right to appeal against the decision to terminate her employment. The letter (page 273) set out four grounds of appeal: (a) the

claimant did not believe there was a need for redundancies; (b) she should have been offered the Senior Financial Controller role because she was an employee on maternity leave and it was a suitable alternative vacancy; (c) the scoring criteria were unfair and placed her at a disadvantage because she was an employee on maternity leave and (d) she had been placed at a disadvantage because she was on maternity leave and the arrangements she had agreed with Mr Thomson were to be changed if she was successful in obtaining the Accounts Assistant role. Also the timescales for responding to Mr Thomson were too tight in circumstances where she had a new baby.

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49. Mr Bill Cullens was asked by Ms Fiona Hindshaw to hear the claimant's appeal. He was provided with a copy of the reports from Johnston Carmichael, the redundancy announcement, the scoring assessments, the current and proposed structures, the notes of the consultation meetings, copies of correspondence, the letter of dismissal and the letter of appeal.

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50. Mr Cullens was concerned to read the claimant thought she had been treated unfairly because of her maternity leave. Mr Cullens had always prided himself on the fact the respondent company supports pregnant employees and employees on maternity leave. Mr Cullens spoke to Mr Thomson to ask him about the points the claimant had raised.

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51. The appeal hearing took place on 19 October. Mr Cullens and the claimant were in attendance, and the notes of the meeting were taken by Ms Hindshaw (page 277). Mr Cullens dealt with each of the appeal points. He explained the rationale for, and the need to make, redundancies. He explained the job of Senior Financial Controller was not considered by the respondent to be a suitable alternative vacancy. The role was a more senior role than the claimant had previously done, and there was a salary of £50,000.

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52. Mr Cullens told the claimant that in response to reading the letter of appeal, he had met with Mr Thomson to ask him about the scoring process and in particular whether the claimant had been marked down on professionalism

because she was on maternity leave, and childcare commitments may affect flexibility. Mr Cullens told the claimant that Mr Thomson explained he had marked the claimant initially as a 3, but revised this to a 4, because the claimant's timekeeping was poor and this set a bad example when someone is in a senior position. Mr Cullens noted, in relation to qualifications, that the claimant and Mr Thomson had had a discussion regarding the fact the claimant had not done any Continuing Professional Development and this had been reflected in her score.

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10 53. Mr Cullens confirmed the scoring criteria had been provided by the respondent's representative and were in line with ACAS guidelines. The claimant voiced her concern that the process left her feeling Mr Dunwoodie was always going to get the job.

15 54. The claimant felt, with regard to the timing, that she had been given insufficient time to consider things properly, because she was at home with a new baby and she wanted to seek advice. Mr Cullens reviewed the paperwork and concluded it appeared the claimant had simply not responded to Mr Thomson to confirm she wanted to be considered for the Accounts Assistant post.

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55. Mr Cullens informed the claimant, by letter of 1 November (page 282) of the outcome of the appeal. He set out each appeal point, and an explanation of his decision.

25 56. The claimant's employment terminated on 4 October 2016.

57. Mr Thomson received a formal Proposal for improving processes and systems from Mr Black on 29 September 2016 (page 287) and a post-implementation review of the finance function following process improvements in March 2017 (page 291). The latter review report noted that all information relating to each property was now held within a database, and could be analysed and reported on without the need for multiple spreadsheets. KPI reports could be quickly and easily produced both by

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branch management and head office to report on performance across the company. The full automation of these functions meant that the time which had previously been spent gathering information and compiling spreadsheets had reduced by 90%, enabling the company to achieve considerable cost savings through headcount reduction.

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58. The report also noted that changes to the management structure within the Finance department had not only delivered cost savings, but the team now worked much more efficiently and were managing the workload without major strain on the remaining members. The team had reduced from 9 posts (albeit one was a temporary post to cover for maternity leave) to 5.5 posts. The changes meant the Senior Financial Controller could allocate more time to analysis and interpretation of financial data and use this to provide insight and guidance to the management team.

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59. The claimant has, since dismissal, been looking for alternative employment. The claimant applied for the post of Finance Manager with the Department for International Development on 25 October 2016. She was not interviewed for the post and her application was confirmed as unsuccessful on 8 November 2016. The claimant applied, and was interviewed for, the post of part time Financial Controller on 7 April 2017, but was not successful.

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60. The claimant made four applications for jobs in April 2017, two in July 2017 and six in August 2017. The claimant successfully applied for a Finance Analyst post in July 2017. She starts employment on Monday 9 October 2017 on a salary of £32,000.

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### **Credibility and notes on the evidence**

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61. We found the claimant to be a credible witness although she clearly believed the whole exercise had been created and carried out by Mr Thomson for the purposes of terminating her employment, and she was not willing to countenance any other view. The claimant's position was demonstrated

when she refused to participate in the first consultation meeting and did not take the opportunity to ensure Mr Thomson knew of the full range of her skills and experience. The claimant also believed her accountancy qualification (CIMA) was better than Mr Dunwoodie's ICAS qualification because her qualification was industry based. The claimant argued that she had more experience than Mr Dunwoodie on the basis she had longer service with the respondent.

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62. We also found Mr Black, Mr Cullens and Mr Dunwoodie to be credible and reliable witnesses who gave their evidence in a straightforward and honest manner. Mr Dunwoodie, in particular, gave considered explanations regarding the roles carried out by himself and the claimant, the efficiencies made and the criteria used in the assessment.

15 63. We found Mr Thomson was not an entirely credible witness: he tended to make general assertions which, when tested, he backed off from or varied his position. For example, he initially suggested the employment of the claimant had been down to Ms Culley, Financial Director, and the claimant's sister. Mr Thomson accepted that in fact the claimant had been interviewed by two people neither of whom were Ms McCulley. Further, Mr Thomson suggested bonuses had been paid to the claimant by Ms McCulley, but he subsequently accepted that Ms McCulley had made the proposal to him to authorise. We took from this evidence that whilst Mr Thomson was aware of the salary increases and bonuses paid to the claimant, he acted on Ms McCulley's lead.  
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25 We also formed the opinion that the claimant was to some extent protected by Ms McCulley in her position as Financial Director.

64. Mr Thomson also appeared reluctant to answer some questions put to him in cross examination, and instead adopted the practice of asking himself a different question which he then answered. There was, it appeared, a reluctance to concede even the merest point: for example, whether criteria used in the assessment were subjective or objective.  
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65. Mr Briggs invited the Tribunal to find Mr Thomson had, on occasion, been dishonest in his evidence. Mr Briggs referred to Mr Thomson's evidence that he had sought guidance from Mr Black regarding the scoring of relevant qualifications and experience, and the proposed new structure. Mr Thomson had varied his position regarding these matters when cross examined about them. Further, Mr Black had not supported Mr Thomson's account when he gave evidence. We acknowledged Mr Briggs' submission and considered the examples referred to were examples of Mr Thomson making general statements from which he subsequently backed off. We did not form the impression Mr Thomson was being dishonest and considered this was more a case of Mr Thomson seeking to put the best possible spin on his evidence. We considered we were supported in that view by the fact that if Mr Thomson had been being dishonest, he would not have backed off from, or altered, his position.

66. We should state however that these issues regarding Mr Thomson's evidence led the Tribunal to carefully scrutinise what he said.

67. There was reference during the evidence to an incident in 2013 where the claimant's computer was subject to a fraud and £60,000 was lost to the respondent (albeit the sum was subsequently recovered). The evidence suggested Ms McCulley had circulated an email/memorandum to staff asking them to ensure computers were turned off or locked when the member of staff left their workstation. There was no certainty regarding what happened to the claimant's computer but it appeared a fraud occurred when she left her workstation. Mr Thomson had no direct involvement in this incident because Ms McCulley dealt with it. The claimant was not subject to disciplinary action. We made no findings regarding this matter because there was insufficient evidence regarding what actually occurred and the incident was not material to the matters which subsequently occurred in 2016.

### **Claimant's Submissions**



68. Mr Briggs submitted the claims brought by the claimant related to unfair dismissal and discrimination on the grounds of pregnancy and maternity. The claimant believed the reason for her dismissal was not redundancy, but was because she was on maternity leave. If the Tribunal found there was a genuine redundancy situation, the claimant believed she was selected for redundancy because she was on maternity leave. If the Tribunal was against Mr Briggs on both of those arguments, the claimant relied on Regulation 10 of the Maternity and Parental Leave Regulations 1999 (MAPLE) which provides that where, during an employee's maternity leave, it is not practicable by reason of redundancy for an employer to continue to employ an employee under her existing contract of employment, there is a requirement to provide suitable alternative employment. Alternative employment will be suitable where the work to be done is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances. The claimant believed the post of Senior Financial Controller was suitable alternative employment and should have been offered to her: it was not, and accordingly the dismissal is automatically unfair.
69. Mr Briggs referred the Tribunal to the case of **Sefton Borough Council –v- Wainwright [2015] IRLR 90** and in particular to paragraphs 40 – 49 where the correct approach for Tribunals to adopt regarding interpretation of this right was set out.
70. Mr Briggs referred to Sections 18 and Part 5 of the Equality Act 2010 which provide that an employer will discriminate against an employee where the employer treats them unfavourably because of their pregnancy or because they have exercised the right to maternity leave.
71. The burden of proof was on the claimant to establish sufficient facts from which the inference of discrimination could be drawn. If the claimant was successful in doing so, the respondent was then required to demonstrate that there was another, not unlawful reason for the unfavourable treatment.

72. Mr Briggs invited the Tribunal to accept the claimant's evidence which, it was submitted, was given in a straightforward consistent manner. The claimant's knowledge and experience of accounting procedures and professional qualifications was largely consistent with Mr Black. The Tribunal was invited, in any conflict between the evidence of the claimant (and Mr Black) and Mr Thomson, to prefer the evidence of the claimant and Mr Black.
73. Mr Thomson's evidence was, it was submitted, vague and inconsistent: he had been evasive and repeatedly failed to answer straightforward questions. He refused to concede even the most obvious of points, for example which criteria were subjective and objective.
74. Mr Briggs submitted Mr Thomson's evidence had been given dishonestly. He had, for example, given very clear evidence that he had sought guidance in respect of the scoring criterion "*relevant qualifications and experience*" from Mr Black, and deferred wholly to his advice. Mr Thomson was clear that that advice had led him to score Mr Dunwoodie higher than the claimant for that criterion. Mr Black denied the suggestion that Mr Thomson had spoken to him about the scoring. Mr Briggs invited the Tribunal to prefer the evidence of Mr Black given he was a third party with no interest in the outcome of the proceedings.
75. Mr Thomson had similarly claimed that he had received guidance from Mr Black regarding the proposed restructure and the reduction of accountants from 3 to 1. Mr Black denied he had had any involvement in this.
76. Mr Thomson had been unable to support his position with documentary evidence and, where documents did exist, they tended to contradict his position. For example, Mr Thomson told the Tribunal that Ms McCulley had had "*everything to do*" with hiring the claimant, but the documents disclosed the claimant had been interviewed by other people. The bonuses paid to the claimant were confirmed in writing by Mr Thomson and not Ms McCulley. Mr Thomson's assertion the roles carried out by the claimant and Mr Dunwoodie

were similar was not borne out by the structure chart which showed the claimant above Mr Dunwoodie.

5 77. Mr Briggs submitted Mr Thomson's evidence had been wholly unreliable and invited the Tribunal to attach no weight to any of his evidence.

10 78. There was a dispute between the parties regarding the respective roles of the claimant and Mr Dunwoodie. Mr Briggs invited the Tribunal to accept the claimant's role had been superior to that of Mr Dunwoodie, and this finding had been supported by the following facts:-

- the claimant's role attracted a higher salary;
- the claimant's role was displayed as being above that of Mr Dunwoodie on the structure chart;
- the claimant appraised Mr Dunwoodie;
- the claimant appraised other members of the accounts team and
- the claimant had line management responsibility for the accounts team.

20 79. In addition to the above, the claimant took on responsibility for processing payroll payments each month with Mr Thomson. Mr Dunwoodie did not do this until the claimant went off on maternity leave. Further, the claimant took on responsibility for being signatory for the Bank in Ms McCulley's absence, and Mr Dunwoodie only took this on when the claimant went off.

25 80. The claimant assumed responsibility as the main point of contact for the following organisations when Ms McCulley went off on sick leave:-

- RBS;
- HMRC;

- BDO;
- Consilium;
- Clyde & Co and
- Sysnet.

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81. Mr Dunwoodie only assumed this responsibility when the claimant went off on maternity leave.

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82. It was submitted these facts demonstrated the claimant's role was at a higher grade than Mr Dunwoodie.

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83. Mr Briggs also invited the Tribunal to find there was no redundancy situation and the claimant was dismissed because she was on maternity leave. Mr Briggs noted there were three Accountants positions in the accounts department and the two most senior roles were occupied by women. These roles were condensed into one role whilst the two women were off on maternity leave. The successful candidate for the remaining post was the most junior member of staff who was male. It was submitted these facts were sufficient to enable the Tribunal to draw an inference that the reason for the claimant's dismissal was that she was on maternity leave.

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84. The respondent claimed to have made redundancies on the basis of a report by Johnston Carmichael, but the report had not recommended reducing the headcount in the department. The report instead recommended a six stage process, stage six of which was to monitor man-hours and consider making redundancies. As at the date of dismissal, the respondent was only at stage three, and would not have completed implementation of all the stages until December 2016. Mr Briggs submitted the report had no bearing on the decision to make redundancies, and accordingly the Tribunal was invited to treat the report as being irrelevant or a smoke screen created by the respondent to give the impression of there having been a redundancy situation.

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85. Mr Briggs submitted the respondent had failed to demonstrate there was a redundancy situation and could not show the reason for dismissal was redundancy. Further, the respondent could not discharge the burden of proof in terms of the inference of discrimination the Tribunal was entitled to draw from the primary facts. In the circumstances the Tribunal should find the claimant was discriminated against.

86. Mr Briggs' alternative position, should the Tribunal find there was a redundancy situation, was that the claimant was selected for redundancy instead of Mr Dunwoodie because of her maternity leave. The claimant had been scored against Mr Dunwoodie, who was her junior in the organisation and he had been with the company for a shorter period, had a less relevant professional qualification, less relevant employment experience and a university degree which related to a different subject. It was submitted these facts were sufficient to allow the Tribunal to draw an inference that the claimant was discriminated against in the redundancy scoring assessment. The respondent was unable to discharge the burden of proof in respect of this matter because the evidence of Mr Thomson had been wholly unreliable. The Tribunal was invited to find the claimant should have been appointed to the role of Senior Financial Controller.

87. Mr Briggs' alternative position should the Tribunal find there was a redundancy situation and the claimant was fairly selected, was that the dismissal was unfair because the claimant should have been offered the suitable alternative vacancy. Mr Briggs invited the Tribunal to find the role of Senior Financial Controller was a suitable alternative role and the claimant ought to have been deployed into that role.

88. The respondent's position was that the role was not a suitable alternative vacancy, but, it was submitted, the respondent had been unable to establish this fact. The position appeared to be that the claimant had issues with time-keeping and had made some administrative errors, but, it was submitted, this did not make her unsuitable for the role. Furthermore, if the claimant had

scored more highly than Mr Dunwoodie, she would have been the preferred candidate for the post, and in those circumstances it was absurd to adopt the position that the role was not a suitable alternative role. Mr Briggs acknowledged Mr Thomson had suggested it would not have been an automatic appointment to the role if the claimant had scored higher than Mr Dunwoodie, but he submitted Mr Thomson's evidence on this had been vague and not supported by any documentary evidence.

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89. Mr Briggs submitted that in all the circumstances the post of Senior Financial Controller was a suitable alternative post and the claimant should have been offered this vacancy.

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90. If the Tribunal was not with Mr Briggs on any of the above positions, his final submission was that the dismissal was unfair.

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91. A schedule of loss had been provided (claimant's documents page 16). The award for injury to feelings had been put in the upper section of the mid-band because the claimant had been put through a process to make it look like a redundancy exercise and a fair dismissal, when she had a new baby, and the upset, distress and financial problems this had caused merited an award at that level.

### **Respondent's submissions**

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92. Mr Mitchell referred to Section 139 Employment Rights Act which sets out the definition of redundancy. In particular, Section 139(1)(b)(ii) provides that an employee who is dismissal shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business 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.

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93. Mr Mitchell referred to the cases of ***Safeway Stores plc –v- Burrell 1997 IRLR 523*** and ***Murray –v- Foyle Meats Ltd [1999] ICR 827*** where the House

of Lords made clear that the phrase “*work of a particular kind*” did not mean work for which a particular employee was employed, but rather the focus should be on the requirements of the business for employees to do work of a particular kind.

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94. The EAT in the **Safeway Stores** case formulated a three stage test for applying Section 139:-

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1. was the employee dismissed, if so

2. had the requirements of the business for employees to carry out work of a particular kind ceased or diminished, and if so

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3. was the dismissal of the employee caused wholly or mainly by the state of affairs identified at two above.

95. Only if the answer to all three questions is “yes”, will there be a redundancy dismissal.

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96. Mr Mitchell reminded the tribunal that it was not entitled to look behind the employer’s decision or require it to justify how or why the diminished requirement has arisen, provided it is genuinely the reason for dismissal (***Association of University Teachers –v- University of Newcastle upon Tyne [1987] ICR 317***).

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97. It was submitted that it was clear in this case that there was a redundancy situation. Mr Mitchell invited the Tribunal to accept the evidence of Mr Black in full and in particular his view that the accounts team was “*a very large team for the size and complexity of the organisation*”. Further, he said that the position now, with one Senior Financial Controller, was “*a more appropriate structure for a business of that type*”. Additionally, the HR, IT and Payroll functions had been outsourced, and given this together with the flat market,

there were, it was submitted, several drivers for a proposal to make redundancies.

- 5 98. Mr Mitchell referred to **Taylor –v- OCS Group Ltd [2006] IRLR 613** where the Court of Appeal stressed that procedural issues should be considered together with the reason for the dismissal. The two impact upon each other and the Tribunal’s task is to decide whether, in all the circumstances, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss.
- 10 99. Mr Mitchell also referred to the cases of **Iceland Frozen Foods Ltd –v- Jones [1982] IRLR 439** and **British Leyland Ltd –v- Swift [1981] IRLR 91** which set out the band of reasonable responses test. Mr Mitchell submitted it was not for the employer to prove that he acted reasonably (**Post Office Counters Ltd –v- Heavey [1989] IRLR 513**). It is for the Tribunal to have regard to the actual wording of section 98(4), and to remind itself that there is no burden of proof on either party: thereafter the tribunal must apply the band of reasonable responses test.
- 15 100. The Tribunal was also referred to the cases of **Williams –v- Compare Maxam Ltd [1982] ICR 156** and **Polkey –v- A E Dayton Services Ltd [1988] ICR 142**.
- 20 101. Mr Mitchell referred to the evidence heard by the Tribunal, and invited the Tribunal to find the evidence of all of the respondent’s witnesses to be credible and reliable and to prefer their evidence in any dispute with the claimant. The claimant’s evidence had not been supported by any other witnesses and, significantly, key passages of her evidence had not been put to the respondent’s witnesses.
- 25 102. It was noted the claimant had very little business, commercial or accounts experience before commencing employment with the respondent. The claimant’s sister had an involvement with her recruitment and with the
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increases to the claimant's salary which had gone up out of proportion to the market.

- 5 103. The complexity and level of the claimant's tasks and responsibilities were not substantially increased during her period of employment. The claimant was the author of many of the "*controls*" and spreadsheets criticised by Mr Black; and a large proportion of her work appeared to be processing and checking. The claimant was overly reliant on paper systems, lacked commercial awareness and perpetuated many of the inefficiencies identified by Mr Black.
- 10 104. The claimant was regularly late for work and regularly made mistakes with management accounts packs. The claimant left her PC logged on when she left her workstation in 2013 which allowed a £60,000 fraud to be perpetuated.
- 15 105. Mr Mitchell invited the Tribunal to accept the claimant's role and that of Mr Dunwoodie were entirely interchangeable, and he helped the claimant with Accounting Standard issues. Further, the claimant did not cover the Financial Director role at any time.
- 20 106. Mr Dunwoodie was the only accountant in the business in the period from June 2016 onwards.
- 25 107. Mr Mitchell invited the Tribunal to accept the respondent had openly undertaken an analysis of efficiencies in May/June 2016. The respondent made an announcement regarding redundancies and commenced consultation on 1 September 2016. There were three consultation meetings and a formal meeting. The consultation exercise lasted for just over one month. The claimant failed to engage in the consultation process and Mr Thomson had tried to encourage her to engage. It was submitted there was
- 30 adequate consultation in this case.
108. The selection criteria adopted by the respondent were fair and appropriate. The scoring carried out by Mr Thomson was appropriate and reasonable. Mr

Mitchell reminded the Tribunal that they must exercise care and not substitute their view as to the appropriate scores in relation to any of the criteria. Furthermore, the fact some of the criteria were subjective is not, of itself, a ground of challenge. Mr Mitchell noted the claimant had, in her evidence, 5 accepted she had not provided more information to Mr Thomson regarding her qualifications, experience or timekeeping. Mr Thomson required to score the claimant and Mr Dunwoodie on the information he had at the time. The claimant failed to provide any information relating to her experience despite being asked. The evidence provided by the claimant to this Tribunal regarding 10 her skills and qualification had not been provided to Mr Thomson, and should not be taken into account by the Tribunal.

109. A fair and reasonable redundancy procedure requires an employer to consider whether it has any vacancies that would be suitable for employees 15 who would otherwise be made redundant. There is no obligation on an employer to create a new role for a redundant employee. In addition to this, there is a separate duty on employers to offer any suitable alternative vacancy to an employee who is on maternity leave when the redundancy occurs, in terms of Regulation 10 of MAPLE.

20 110. Mr Mitchell submitted there was no suitable alternative vacancy in this case. The respondent reasonably assessed that the role of Senior Financial Controller was not suitable as it was a clearly significantly higher role in terms of tasks and responsibilities than the role that the claimant had been carrying 25 out. The claimant's role of Financial Controller was process-driven and had few responsibilities and required little analysis of figures. The claimant had no authority to see the staff costs, which form the biggest costs in the business.

30 111. The new Senior Financial Controller role is the most senior role and the only Accountant in the company. The claimant herself accepted the Senior Financial Controller role was higher than her role. Mr Mitchell invited the

tribunal to accept that it was a significantly higher role in terms of duties and responsibilities in a number of respects including:—

- 5           •       using full visibility of staff costs to fed into analysis of overall profitability and strategy;
- systems development;
- efficiency development;
- 10          •       development of IT systems and
- being the responsible person and first point of contact with BDO regarding audit and payroll and with the Bank, HMRC, BDO and Arla etc.
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112. The post was a considerable “*step up*” for both Mr Dunwoodie and the claimant.

20 113. The respondent, it was submitted, was allowed to take into account the claimant’s work experience when considering suitability. Mr Thomson’s evidence was that even if the claimant had scored higher than Mr Dunwoodie, he had legitimate concerns regarding the claimant’s suitability for the role and this related to whether she could do the additional tasks, her work ethic, the mistakes she had previously made and whether she would be able to cope.

25 Mr Thomson also referred to the claimant’s timekeeping.

114. Mr Mitchell noted the claimant had not brought any witnesses to support her position. Mr Mitchell invited the Tribunal to note and carefully consider other evidence as to the claimant’s lack of work experience and professionalism in a number of respects – for example, lateness in coming to work, lack of commercial experience, little or no continuing professional development (CPD), poor attention to detail. The Tribunal were also invited to consider the

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issue of Mr Dunwoodie having to help out the claimant in respect of Accounting Standards and the claimant not having completed any substantial CPD in her entire time with the respondent.

- 5 115. It was submitted the respondent was entirely correct to find that the Senior Financial Controller post was clearly not a suitable alternative vacancy and as such Regulation 10 of MAPLE did not engage. Mr Mitchell clarified that the fact there had been a scoring process did not mean, of itself, that the Senior Financial Controller post was a suitable alternative vacancy: any employee at risk of redundancy could have applied for that post.
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116. Mr Mitchell further clarified that Regulation 10 of MAPLE did not engage in relation to the Accounts Assistant post because the terms were substantially less favourable and the claimant did not indicate she wanted this post despite repeated requests for her to clarify her position.
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117. Mr Mitchell referred to the case ***Sefton Borough Council –v- Wainwright [2015] ICR 652*** where two equally graded posts had been amalgamated into one equally graded post. The new post was accepted by the employer to be a suitable alternative vacancy in terms of MAPLE. The employer’s appeal to the EAT argued that in terms of timing of the new post and the period of maternity leave, Regulation 10 of MAPLE was not engaged. The employer was not successful with that argument. The EAT, however, noted at paragraph 25 that “*the question of suitability requires an assessment on the part of the employer*”.
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118. In ***Simpson –v- Endsleigh Insurance [2011] ICR 75*** the EAT held that the Tribunal had not erred by focusing on the objective decision made by the employer as to whether or not a vacancy was suitable, taking into account the employee’s personal circumstances and work experience, given that there was no requirement for the employee to engage in that process.
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119. Mr Mitchell submitted that given Regulation 10 of MAPLE did not apply, it was for the Tribunal to consider matters based on the usual principles relating to Section 98 Employment Rights Act. If the Tribunal considered Regulation 10 of MAPLE did apply, that the respondent attempted to offer the claimant the Accounts Assistant post, but the claimant frustrated that genuine attempt.
120. The claimant had made a number of claims that the dismissal was in some way related to her pregnancy and/or maternity leave. Mr Mitchell submitted there was no evidence at all from which the Tribunal could find facts to lead to/infer this conclusion. The only fact was that the claimant was on maternity leave, and this was not sufficient.
121. Mr Mitchell referred to the case of ***Maksymiuk –v- Bar Roma Partnership UKEATS/17/12*** where the Tribunal found that the reason for dismissal was a redundancy situation affecting the respondent’s need to employ bar staff such as the claimant. They also found that neither the claimant’s pregnancy nor any matters associated with pregnancy played a part in the respondent’s decision to dismiss the claimant. The claimant appealed and was represented by learned Counsel. Mr Mitchell invited the Tribunal to have regard to paragraphs 32 and 33 of the EAT Judgment where it was stated: *“That the claimant was pregnant and told the respondent so is necessary to set the scene for possible discrimination, but does not in itself create any inference. Inferences may not be drawn from claims or asserted fact but from findings.”*
122. Mr Mitchell reminded the Tribunal of the fact Ms Angela McGinn had been off on maternity leave, was due to return to work but got pregnant again and had a second period of maternity leave. Ms McGinn had recently returned to work.
123. Mr Mitchell submitted the Tribunal should make a finding that the dismissal was by reason of redundancy and a fair dismissal in terms of Section 98 Employment Rights Act, and dismiss all of the claims made by the claimant. This was a case where the issue of pregnancy had no bearing on matters.

124. If the Tribunal upheld any of the claimant's claims, Mr Mitchell noted the schedule of loss had been produced on the basis of a salary of £40,000, but the claimant was on a salary of £22,000 during her maternity leave. The claimant had had a modest pension with the respondent, but would benefit from a public sector pension in her new employment. The figure relied upon by the claimant for injury to feelings was, it was submitted, too high given any breach by the employer was a technical breach.

125. Mr Mitchell also invited the Tribunal to note the claimant had started to apply for jobs in November and accordingly she must have felt ready to return to work at that time. There were issues regarding mitigation of loss and the claimant had made only 12 applications for posts in a 15 month period.

### **Discussion and Decision**

126. The first issue to be determined by this Tribunal is the reason for the claimant's dismissal. The claimant invited the Tribunal to believe she had been dismissed because she was on maternity leave: the respondent asserted the claimant had been dismissed for reasons of redundancy.

127. We had regard to the terms of Section 139 Employment Rights Act which sets out the definition of 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 -*

*(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.”*

5 128. We were referred, and had regard to, the cases of **Safeway Stores plc –v- Burrell and Murray v Foyle Meats Ltd** (above) where the House of Lords made it clear that the reference in Section 139 to “*work of a particular kind*” did not mean work for which a particular employee was employed, but rather that the focus should be on the requirements of the business for employee/s to do work of a particular kind as opposed to the contractual requirements in  
10 relation to a particular employee.

129. We next asked ourselves the three-stage questions formulated in the **Safeway Stores** case. The first question is: was the employee dismissed? There was no dispute in this case regarding the fact the claimant was  
15 dismissed. The second question is: had the requirements of the business for employees to carry out work of a particular kind ceased or diminished? We, in considering this question, had regard to a number of factors.

130. The first factor to which we had regard was that the housing market in  
20 Scotland has been in a relatively flat position for a number of years. Mr Briggs challenged the 10 Year Property Market Report produced by the Registers of Scotland (page 199) and argued the picture was not as poor as the one painted by the respondent. There is no doubt the market has fared better in some areas than in others, however the many news and newspaper articles produced (pages 117 – 198) all ran with the theme of the decline in the  
25 housing market. We had no difficulty, against that background, in accepting the respondent’s position that the housing market was a flat, difficult market.

131. The second factor to which we had regard was the fact that Mr Thomson and  
30 Ms Hindshaw had carried out a review of all branches to look at the structure and whether any efficiencies could be made. This was accompanied by the fact vacancies were not filled, and the opening of a second branch in

Edinburgh was shelved. The last department to be reviewed was the head office accounting function.

5 132. The third factor to which we had regard was that Mr Thomson instructed an independent third party, Mr Black of Johnston Carmichael, to evaluate and report on the structure, capability, cost and value for money of the finance and accounting team. In particular Mr Black was asked identify the nature of the work undertaken by the Finance Director, and compare this to the level of senior financial management believed to be appropriate for the size and 10 complexity of the business.

133. The Summary set out in Mr Black's review report (page 126) set out his conclusions as follows:-

15 *"The review has identified a number of areas where significant improvements can be made. These can be summarised as follows:-*

- *streamlining of the main finance and administrative processes;*
- *better use of systems (Sage, The App) and reducing the 20 number of spreadsheets that are in use;*
- *reducing the reliance on paper records (for example, duplicating copies in different coloured boxes);*
- *ensuring staff are properly trained and have access to 25 appropriate reference documents and*
- *automating production and improving availability of 30 management information for branch managers and the senior management team.*

*By reducing the amount of time currently tied up in non-value add activity (for example, duplication, cutting and pasting between*



*spreadsheets etc) you will be in a position to review the current structure of the finance and administration team required to support Clyde Property's continued growth, with the expectation that fewer posts will be required within this part of the organisation and year on year cost savings can be made."*

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134. The report prepared by Mr Black concluded, in no uncertain terms, that there were a number of inefficient practices within the accounts team: for example, the production of spreadsheets, cutting and pasting information from different sources into the spreadsheets, checking the accuracy of information and using some paper based systems. The report set out a six stage process to address these inefficiencies. Mr Briggs sought to argue that there could not be a redundancy situation until the stages had been completed and a reduction in man-hours identified. We could not accept that submission. We considered it was clear, upon receipt of the report, that the accounts function was very inefficient, it was top-heavy and time was being taken up carrying out functions which could be done at a lower level. We accepted Mr Thomson was entitled to rely upon, and act on, that information. This was particularly so given the report was prepared in July 2016 and it was evident the accounts team had absorbed, and was undertaking, the work of the Finance Director and Financial Controller.

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135. The fourth factor to which we had regard was the fact the accounts department had nine employees, being a Finance Director, Finance Controller, Accountant and six assistants one of whom was a temporary employee taken on to assist when the claimant went on maternity leave. The new structure required fewer employees to carry out the work and included a Senior Financial Controller and five assistants.

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136. We, having had regard to all of the above factors, concluded the requirements of the respondent business for employees to carry out work of a particular kind (accountancy work) had ceased or diminished. The HR, IT and payroll

functions had been outsourced and the respondent business did not require three qualified accountants to carry out the work in the department.

5 137. Mr Briggs submitted the report by Mr Black had no bearing on the decision to make redundancies, and that it was only commissioned by the respondent to conceal the true motive in dismissing the claimant because she was on maternity leave. We could not accept that submission. We accepted Mr Thomson's evidence that accounting is not his strength and although he suspected the department was top-heavy, he required some expert advice and commissioned that from Mr Black. Mr Thomson did not act on his 10 suspicions, nor did he instruct Mr Black to look at reducing numbers in the accounts function.

15 138. Mr Black, in his evidence to this Tribunal, confirmed his opinion that the accounts department was top heavy, and did not need three accountants to carry out work which was not particularly complex. He further confirmed that one accountant was correct for the size and complexity of the business.

20 139. Mr Briggs invited the Tribunal to find the real reason for the claimant's dismissal was because she was on maternity leave. We considered there was no basis for such a finding, and no facts from which such an inference could be drawn. This was particularly so given the fact the respondent's workforce is predominantly female (approximately 70% of employees are female). The respondent is an organisation which is used to having 25 employees take maternity leave, and provides flexibility for employees returning to work after maternity leave. There was no dispute regarding the fact one employee in the accounts team has had a double period of maternity leave and returned to work. Ms McCulley had a period of maternity leave in 2012 and thereafter returned to work. Ms McCulley negotiated an increased 30 maternity payment with Mr Thomson and the claimant, relying on this, did likewise.

140. We decided the reason for the claimant's dismissal was redundancy in terms of Section 98(2)(c) Employment Rights Act.

141. The next issue for this Tribunal to determine relates to the provisions of Regulation 10 of MAPLE. Regulation 10 provides:-

*(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 alternative 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."*

142. The claimant argued the role of Senior Financial Controller was a suitable alternative vacancy and accordingly she was entitled to be offered that role

without having to compete for it against Mr Dunwoodie. The respondent's position was that the role of Senior Financial Controller was not a suitable alternative vacancy. The issue for this tribunal to determine is whether the role was a suitable alternative vacancy. We acknowledged, having had regard to the case of **Sefton Borough Council v Wainwright** (above) to which we were referred, that if there is a suitable alternative vacancy which is available, then the entitlement is not subject to a test of reasonableness or competition. The suitable alternative position has to be offered under Regulation 10 notwithstanding the fact there might be another employee facing redundancy, but not pregnant or on maternity leave, who might be better suited to it. It was stated in that case that employees who would otherwise gain the protection of Regulation 10 should not be required to undertake some form of competition in order to exercise the right.

143. We also noted from the above case that the question of suitability of a post requires an assessment on the part of the employer. Further, it was stated in the case of **Simpson –v- Endsleigh Insurance Services Ltd** (above) that the Tribunal had been correct to focus on an objective decision made by the employer regarding the suitability of a role. There is no requirement on the employee to actually engage in the process, although the employer would have to consider what it knew about the employee's personal circumstances and work experience. His Honour Judge Ansell noted that it appeared that at the end of the day it is up to the employer, knowing what he does about the employee, to decide whether or not a vacancy is suitable.

144. We noted, having had regard to these cases, that the task of the Tribunal is to assess the suitability of the available vacancy from the perspective of an objective employer, rather than from an employee's perspective.

145. The role of Senior Financial Controller was to be the only accountant role in the respondent's organisation following the restructuring. The post-holder would, accordingly be solely responsible for all accountancy within the respondent company. The role, in terms of status and seniority, sat between

the claimant's role and the role of Financial Director. There was no dispute regarding the fact the role was at a higher level than the claimant's previous role, and attracted a salary of £50,000 which was £10,000 more than the claimant's current salary.

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146. There were a number of tasks for which the Senior Financial Controller would be solely responsible, and these included (but were not limited to):-

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- quarterly NRLL and VAT returns
- the ARLA reconciliation;
- monthly financial pack/management information preparation;
- dealing with day to day queries;
- the day to day management and performance of the accounts team;
- the corporation tax return;
- the statutory accounts process;
- preparation of P11Ds and
- cost analyses, including staff costs for the whole business.

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147. There was also an expectation that the post-holder would:-

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- liaise with the external IT company, including coming up with improvements to the IT system and implementing and testing improvements and feeding back to the IT company;
- participate in strategic management decisions;

- bring ideas to the Directors to improve systems and reduce costs and
- provide professionalism and the utmost attention to detail.

5 148. There was no dispute regarding the fact the claimant had undertaken and/or  
assisted with some of the tasks set out above: for example, preparation of  
the monthly financial pack of management information and doing the ARLA  
reconciliation. There was also no dispute regarding the fact that during Ms  
McCulley's maternity leave in 2012 and 2016, the claimant had undertaken  
10 some of the tasks associated with her role, albeit she was overseen by Ms  
McCulley during the days she came to work notwithstanding her maternity  
leave.

15 149. Two members of the Tribunal (Mr Ashraf and Mr McFarlane) decided the post  
of Senior Financial Controller was a suitable alternative vacancy in terms of  
Regulation 10 MAPLE, and accordingly the post had to be offered to the  
claimant who was, at the time of the redundancy, on maternity leave.

20 150. The members of the Tribunal reached their decision because, whilst they  
acknowledged there were some elements of the role which differed from the  
claimant's previous role, they did not consider the differences were such (or  
at a level) which could not be undertaken by the claimant.

25 151. The members noted Mr Thomson had voiced reservations regarding the  
claimant's ability to carry out the duties of the new post, and had referred to  
her leadership skills, lateness for work and errors in the monthly financial  
reports prepared for the management team. However, the members  
considered no evidence had been presented to support this position and  
aspects of Mr Thomson's evidence had not been reliable.

30 152. The members of the Tribunal concluded the role of Senior Financial Controller  
was a suitable alternative role in terms of Regulation 10 MAPLE. The  
claimant was entitled to be offered that role and the respondent's failure to

do so was a breach of Regulation 10, which rendered the dismissal automatically unfair.

5 153. The Employment Judge did not agree with the decision of the members regarding Regulation 10 MAPLE. The Employment Judge noted Mr Thomson did not consider the role to be a suitable alternative role for the claimant for four principle reasons. Firstly, the role was to operate at a higher level in terms of status and seniority within the organisation, and the post-holder would be solely responsible for all accountancy. The claimant had always worked in a  
10 structure where she was overseen and protected by her sister, Ms McCulley, and Mr Thomson had reservations regarding the claimant's ability to be a lone post-holder and to take on the additional tasks of the new post. Furthermore, in the capacity of a post-holder with sole responsibility for all accountancy, Mr Dunwoodie had provided guidance to the claimant regarding accounting  
15 standards (whereas the claimant had provided initial guidance to Mr Dunwoodie regarding various functions carried out specific to the letting of property).

20 154. Second, the new post required involvement in strategic decision making and the claimant had no experience of this. The claimant's previous role had involved a large amount of time (at least 40%) checking the accuracy of figures and processing information. The efficiencies introduced meant all tasks were computerised and there was no need for spreadsheets to be produced. Branches were responsible for inputting correct information to the  
25 system and whilst there would be an element of checking for accuracy, this would be at a much reduced level than previously. These efficiencies freed up time for the senior member of the team to work on accountancy tasks and strategic direction.

30 155. Third, the claimant had presided over a hugely inefficient system of producing spreadsheets, checking and cutting and pasting information and using paper based systems. The claimant had voiced her opinion that she "*did not think there was a need to change*". The new role required the post-holder to come

up with improvements to the IT system, to implement and test those ideas, feed back to the IT company and to bring ideas to the Directors to improve systems and reduce costs. The post-holder would be expected to operate at a much higher level regarding IT systems.

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156. Fourth, the new post required strong leadership skills and Mr Thomson had concerns regarding the claimant being regularly late for work, which did not set a good example to the team. Further, there was no dispute regarding the fact the monthly financial pack produced by the claimant for the management team, often contained errors and Mr Thomson considered this was not a positive indicator of a higher level role being suitable for the claimant.

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157. Mr Briggs suggested to Mr Thomson in cross examination that if the claimant had either been the only candidate for the role, or if she had scored more highly than Mr Dunwoodie, she would have got the job and, therefore, it must be a suitable alternative role. Mr Thomson accepted that it was "*possible*" the claimant may have got the job, but it was not automatic. Mr Thomson's evidence was that he had concerns regarding the claimant's suitability for the role and these concerns would have to have been considered even if she had been the only candidate or the highest scoring candidate.

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158. I reminded myself that the question is not whether I considered the claimant was a suitable person for the role. I must look at the objective decision made by Mr Thomson regarding the suitability of the role. The work, in terms of Regulation 10 MAPLE, must be both suitable in relation to the employee and appropriate for her to do in the circumstances. I acknowledged there were elements of the role which would have been both suitable for the claimant and appropriate for her to do. However, I considered the fact the role was at a higher level in terms of status, seniority and salary than the claimant's post; that it would be the sole accountancy role in the company and it included responsibility for additional tasks and strategic input and decision-making which were tasks in which the claimant had no experience, rendered the post a not suitable alternative role.



159. I concluded the role of Senior Financial Controller was not a suitable alternative role and accordingly, in terms of Regulation 10 MAPLE, the claimant was not entitled to be offered that role. I decided there was no breach of Regulation 10 MAPLE.

160. The next issue I considered, having determined that Regulation 10 MAPLE was not breached, was the fairness of the dismissal. The claimant invited the Tribunal to find that she had been scored less than Mr Dunwoodie in the scoring assessment because she was on maternity leave.

161. I were referred to the case of **Williams –v- Compair Maxam Ltd** (above) where the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under Section 98(4). The case concerned a redundancy situation where the employer recognised a trade union, and therefore whilst not wholly relevant, it is still helpful to have regard to the principles. It was stated that (in cases where employees are represented by an independent trade union recognised by the employer) reasonable employers will seek to act in accordance with the following guidance:-

- *the employer will seek to give as much warning as possible of impending redundancies;*
- *the employer will consult the union as to the best means by which the desired management result can be achieved, and will seek to agree with the union the criteria to be applied when selecting employees to be made redundant;*
- *the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record or length of service;*

- *the employer will seek to ensure that the selection is made fairly in accordance with these criteria and*

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- *the employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.*

162. The claimant was notified, by letter of 1 September 2016, that there was a possibility of redundancy. The claimant had a short period of time to absorb this information and the consultation announcement (page 228) which explained the rationale for the redundancies. The claimant was also provided with a copy of the current and proposed structures, which made clear the three accountants' posts were being deleted from the structure, and replaced with one post (senior financial controller). Ms McCulley, the claimant and Mr Dunwoodie were accordingly in the position of being redundant unless suitable alternative employment could be identified.

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163. The respondent established selection criteria to be used if more than one person applied for a suitable alternative post. The criteria were provided to the respondent by their legal advisors and included a mixture of subjective and objective criteria, with the weightings to be applied to each criterion. Each criterion also provided examples of the matters to be taken into account when assessing that criterion.

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164. Mr Thomson met with the claimant for three consultation meetings on 5, 9 and 21 September. The first meeting was an opportunity for Mr Thomson to explain in more detail the need for redundancies and the change to the structure within the accounts team; and, to answer any questions the claimant may have in relation to these matters. Mr Thomson clarified the process which was to be followed, and invited the claimant to provide information regarding her skills and experience or comments regarding the selection criteria to be used. The claimant did not engage constructively in the first consultation meeting. The claimant queried whether there was "*any point*" in

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going through the procedure and told Mr Thomson she thought his mind was already made up. The claimant did not provide any information to Mr Thomson regarding her skills and experience and did not make any comments regarding the process or the selection criteria.

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165. Mr Thomson, at the second consultation meeting, specifically noted the claimant had not expressed any interest in any of the posts on the new structure. The claimant, in response to this, asked about the Senior Financial Controller post, and was informed the salary would be £50,000, with private medical care and bonuses depending on performance. There was no job specification for the role. The claimant invited the tribunal to accept she did not know what the role entailed. We concluded that whilst the claimant did not know the detail of what the role comprised, she would have had a very good understanding of what was required given the fact the Senior Financial Controller role was going to be the only accountancy role in the company. The second consultation meeting ended with Mr Thomson understanding the claimant wished to be considered for the role and with the claimant understanding there would be a scoring assessment made if there was more than one expression of interest for that post.

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166. Mr Thomson was, at the same time, conducting consultation meetings with Mr Dunwoodie (and Ms McCulley). His expectation was that they may all be interested in the Senior Financial Controller post.

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167. Mr Thomson carried out the scoring assessment for the claimant and Mr Dunwoodie, and then met with them each again to discuss the scoring. Mr Thomson increased two of the claimant's scores during the third consultation meeting. The claimant scored 4 for relevant qualifications and experience (total 12 points). Mr Dunwoodie scored a 5 for that criterion, giving a total of 15 points. The claimant challenged this score during the consultation process and told Mr Thomson she considered her qualification was the best given it was an industry qualification. The claimant acknowledged that she could have done continuing professional development but had not done so. Mr Thomson

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noted Mr Dunwoodie was a chartered accountant (ICAS) and that he had also had experience of working (carrying out audits) in a range of companies. Mr Thomson declined to increase the score for this criterion.

5 168. The Tribunal heard a great deal of evidence about Highers and the fact the claimant had done an Accountancy degree whereas Mr Dunwoodie had done a Chemistry degree. We acknowledged Mr Thomson may have noted these factors, but the material point when assessing this criterion focussed on the accounting qualification and the experience which each brought to their work.  
10 Mr Thomson placed marginally more weight on Mr Dunwoodie's qualification and more weight on the fact Mr Dunwoodie had, whilst working with KPMG, carried out audits for a wide range of employers. Mr Thomson assessed that this gave Mr Dunwoodie the edge over the claimant in terms of the experience he was able to bring to the respondent company. The claimant had joined the  
15 respondent as a trainee accountant and all of her experience (with the exception of two years with City Refrigeration) had been with the respondent company. The claimant was essentially a product of the respondent with no outside experience to draw on.

20 169. Mr Thomson also scored the claimant less than Mr Dunwoodie for commercial awareness. The claimant scored a 3 for this criterion (total 9 points) whereas Mr Dunwoodie scored a 4 (total 12 points). The claimant did not particularly challenge this score during the consultation process. She accepted that within the structure at the respondent company, she had not  
25 had an opportunity to show off her skills. Mr Thomson considered Mr Dunwoodie was more commercially aware given his involvement in auditing for a variety of employers.

170. The claimant sought at this Tribunal to argue she had accepted a 3 because  
30 Mr Thomson told her no-one scored a 5 during the assessment, and on this basis the claimant accepted she would not have scored the top mark of 4. I did not find this to be an entirely credible explanation, and I noted the claimant did not bring forward any information at the time of meeting Mr Thomson to

demonstrate that she had commercial awareness such as to merit a higher score.

5 171. The claimant's principal challenge to the scoring process carried out by Mr Thomson was that she scored less because she was an employee on maternity leave. The claimant argued that in circumstances where her qualification was "better" than Mr Dunwoodie's and where she had worked for longer in the company and therefore had more experience, then the only reason for scoring less than Mr Dunwoodie must have been because she was  
10 on maternity leave. The claimant invited the Tribunal to accept that she had initially scored a 3 for professionalism (increased to a 4), which included good work ethic/flexibility because she was an employee on maternity leave with potential childcare commitments in the future. Further, the claimant argued that Mr Dunwoodie had scored more highly on qualification and experience  
15 because he was not an employee on maternity leave.

172. I in considering these matters, noted firstly that they were not put to Mr Thomson in cross examination. The only question asked of Mr Thomson in cross examination was that he had marked the claimant down because she  
20 would not have been able to start in the Senior Financial Controller role for nine months. Mr Thomson denied this suggestion and noted there had been a discussion regarding this matter during the consultation process, and that he had confirmed to the claimant that if she was successful in getting a post, her maternity leave would continue as planned and a temporary replacement  
25 would be found to cover the post.

173. The second point I noted was that no evidence was placed before the tribunal regarding any proposed childcare commitments or the respondent's approach to flexible working, beyond a general statement that the respondent  
30 prides itself on flexibility during and after maternity leave. Mr Thomson produced emails from two employees (pages 298 and 299) the first of which referred to it being "a massive help knowing that I will be returning to work with flexible hours to suit", and thanking Mr Thomson for all his support prior

to her maternity leave, with the added reassurance of support both financially and with such good flexibility. The second email also thanked Mr Thomson and Ms Hindshaw for all they had done, and in particular enabling her to return to work part time initially.

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174. The third point I noted was that in assessing qualifications and experience Mr Thomson took into account the qualifications and experience gained by the claimant and Mr Dunwoodie. The claimant's qualifications and experience were not impacted by maternity leave taken in 2016. There was no suggestion, for example, that the claimant had missed an opportunity to gain experience, qualifications or training because she had been on maternity leave.

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175. I acknowledged the claimant was off on maternity leave, but beyond that fact there was no other evidence or inference to be drawn to support the claimant's position. The evidence before the Tribunal related generally to the way in which the respondent treats pregnant employees. All of that evidence suggested compliance with the statutory framework, support and flexibility regarding returning to work. The claimant had negotiated an enhancement to payments to be made during her period of maternity leave and had no issue with Mr Thomson until the redundancy exercise.

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176. I concluded, having had regard to all of the points set out above, that there was no evidence, either direct or by way of inference, to support the claimant's position that her scores were less than those of Mr Dunwoodie because she was off on maternity leave.

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177. I reminded myself that it is not for this Tribunal to substitute its view as to the appropriate scores to be given in relation to any of the selection criteria. Mr Thomson gave sufficient explanation to justify the scores given to the claimant and Mr Dunwoodie and I concluded the selection of the claimant was carried out fairly in accordance with the scoring process.

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178. The next issue to be considered is suitable alternative employment, and within the context of redundancy this requires an employer to consider whether it has any vacancies that would be suitable for employees who would otherwise be made redundant. This requirement is separate to the requirements set out in Regulation 10 MAPLE. The respondent approached the issue of suitable alternative employment on the basis the employees at risk of redundancy could apply for posts of their choosing in the new structure: in reality this meant the claimant could apply for the post of Senior Financial Controller and Accounts Assistant as they were the only available posts. Further, if more than one person applied for a post, an assessment process would be carried out.

179. I have dealt with the Senior Financial Controller post above. The claimant also had an opportunity to apply for an Accounts Assistant post. There was no dispute regarding the fact this was a job at a lower level in terms of status, responsibility and salary than the post previously held by the claimant. Mr Thomson, at the consultation meeting on 21 September, asked the claimant if she would like to be considered for any other accounts posts in the structure, and when the claimant confirmed she would, he advised that the next post down would be the Accounts Assistant role, with a salary of £23,000. The claimant noted this and the fact that if more than one person applied there would be a scoring process for the role.

180. Mr Thomson sent a lengthy email to the claimant following the consultation meeting on 21 September, in which he referred to the Accounts Assistant role and stated *“if you would like me to consider you for this role then please indicate this to me by close of play tomorrow, Thursday 22 September”*.

181. The claimant responded to this email (one hour later) to say she did not think one day was a reasonable length of time to respond to the email, and stated she would *“be in touch next week”* once she had had time to properly consider the options. Mr Thomson responded to acknowledge her comments and ask her to come back to him early next week.

182. Mr Thomson phoned the claimant and left a voicemail on Monday morning, and followed this up with an email asking the claimant to get back to him by close of business that day regarding the options she wished to pursue. The claimant did not get in touch. Mr Thomson sent an email the following day inviting the claimant to a formal meeting.

183. The claimant told this Tribunal that she had not got back to Mr Thomson because she had been trying to get legal advice regarding her agreement with him that a salary of £22,000 would be paid during her maternity leave, but the proposal was that this would reduce to half of a £23,000 salary should she be successful in obtaining the Accounts Assistant post. I did not doubt the claimant may have been trying to get legal advice, but I could not accept this delayed her getting back to Mr Thomson. I considered the claimant could have asked Mr Thomson for more time, or she could have indicated she wished to be considered for the position, which would have given her more time to seek advice. The claimant in fact did nothing and I considered it not unreasonable for Mr Thomson in those circumstances to proceed to the formal meeting on 30 September. I noted that even at that meeting the claimant did not tell Mr Thomson she wanted to be considered for the post: the focus of the discussion was on the claimant's position that she had not had sufficient time to consider her position, but when asked how much time she needed, the claimant was unable to say. Mr Thomson in fact afforded the claimant a further weekend to consider the position, but in the absence of a response from her, he proceeded to terminate her employment.

184. I concluded the respondent had considered and made available to the claimant the option to apply for two posts in the new structure. There was no suggestion that there were other posts in the respondent organisation which were suitable alternative employment and should have been made available to the claimant.



185. I next considered whether the respondent had followed a fair procedure when dismissing the claimant. The **Polkey** case (**Polkey –v- A E Dayton Services Ltd**) made clear that in a case of redundancy, the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. I have dealt with each of these matters above, together with arguments advanced by the claimant. I concluded for the reasons set out, that the respondent followed a fair procedure when dismissing the claimant.

186. I decided, having had regard to all of the points set out above, that the reason for the claimant's dismissal was redundancy, which is a potentially fair reason falling within Section 98(2)(c) Employment Rights Act; and that the dismissal was fair in terms of Section 98(4) Employment Rights Act.

187. I have set out above the claimant's arguments that (i) the redundancy situation was a smokescreen created to cover up the real reason for dismissal which was because the claimant was on maternity leave; (ii) the claimant was selected for redundancy because she was on maternity leave and (iii) there was a breach of Regulation 10 of MAPLE. I have also set out my reasons why I did not accept those arguments. I concluded that neither the claimant's pregnancy nor any matters associated with pregnancy played a part in the respondent's decision to dismiss the claimant.

188. I acknowledged this was a case where the roles of three employees were deleted from the structure, and they were placed at risk of redundancy; and, the successful candidate for the new post was a man, resulting in two employees on maternity leave being made redundant. These facts were akin to the facts in the case of **Maksymiuk –v- Bar Roma Partnership** (above) to which we were referred, where an employee was dismissed by reason of redundancy shortly after she had announced that she was pregnant. There had been a downturn in work which had led to a proposal to make

5 redundancies. The claimant in that case was the only employee to be dismissed. The EAT, having heard extensive arguments regarding the Equality Act provisions relating to pregnancy, and the burden of proof, acknowledged the facts of the case were messy but there had been no discrimination. At paragraphs 32 and 33 it was stated that “*the claimant was pregnant and told the respondent so is necessary to set the scene for possible discrimination, but does not in itself create any inference. ... Inferences may not be drawn from claims or asserted facts, but from findings.*”

10 189. I concluded there was no evidence from which the Tribunal could find facts to support the claimant’s position that her dismissal was in some way related to her pregnancy and/or maternity leave, and, the fact the claimant was on maternity leave did not of itself create any inference. I decided to dismiss the complaints brought in terms of Regulation 10 MAPLE and the Equality Act.  
15 My decision is, however, a minority decision.

190. The decision of the Tribunal, by a majority (the Employment Judge dissenting) is that the dismissal of the claimant was automatically unfair because the respondent breached the terms of Regulation 10 MAPLE when  
20 it failed to offer the claimant the post of Senior Financial Controller.

191. The claimant is entitled to an award of compensation. The representatives agreed the claimant’s salary in the post of Financial Controller was £40,000, and that gross weekly pay was £769.23 and net weekly pay was £576.97.  
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192. The claimant is not entitled to a basic award in circumstances where she has received a redundancy payment.

193. The claimant is entitled to a compensatory award. The majority of the  
30 Tribunal, in calculating this award, had regard to the loss of earnings in the period from the date of dismissal (4 October 2016) to the date of this Hearing 5 October 2017. They noted that in the period from 4 October 2016 until 14 June 2017 (the end of the period of maternity leave) the claimant expected to

be on a salary of £22,000. They calculate that during this period of 34 weeks, the claimant has lost earnings of £10,812 (being £318 net per week x 34 weeks).

5 194. The claimant, in addition to this, has lost earnings in the period from the end of her maternity leave (14 June 2017) until the date of this Hearing. This is a period of 16 weeks. The claimant would, if she had been offered the role of Senior Financial Controller in accordance with Regulation 10 MAPLE, have accepted that offer, and started in that post on 14 June 2017 on a salary of  
10 £50,000. They calculated the claimant lost earnings in this period of 16 weeks of £11,538.88 (being £721.18 net per week x 16 weeks).

195. We calculated the claimant lost earnings in the period from the date of dismissal to the date of this Hearing of £22,351.

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196. The majority of the Tribunal considered that an adjustment had to be made to that figure to reflect the fact the claimant had an opportunity to be considered for the post of Accounts Assistant, which was a position in which she had initially expressed an interest. The claimant recognised that by  
20 continuing her employment (even if she had no real interest in this post) meant the arrangement she had agreed with Mr Thomson regarding increased maternity pay would continue (albeit it at an amended rate). If the claimant had been considered for this post, a further scoring exercise would have been carried out because she would have been one of two people  
25 interested in the post. The members concluded there must have been a 50% chance the claimant would have been successful in getting this post.

197. The salary for the Accounts Assistant post was £23,000. Mr Thomson informed the claimant that if she was successful in getting this post, her  
30 maternity pay would be half of that salary. The members calculated, therefore, that for the period from (say) 4 October 2016 to 14 June 2017, the claimant could have expected a salary of £11,500, and that the loss of

earnings in that period would have been £5,639.58 (being £165.87 net per week x 34 weeks).

- 5 198. There was however only a 50% chance of the claimant getting the Accounts Assistant job, and therefore the members decided it would be just and equitable to reduce the sum of £22,351 (above) by 50% of £5,639.58, which gives a figure of £19,531.
- 10 199. This figure must also be reduced to take into account the fact the respondent made a payment in lieu of notice of £4,078. The members calculated taking this sum into account would produce a revised figure of £15,453, (being £19,531 less £4,078).
200. The claimant has, in this period, also lost pension contributions of £358.
- 15 201. The members next had regard to future loss. The claimant, as stated above, would, have accepted the post of Senior Financial Controller on a salary of £50,000. The claimant has been successful in getting another job which she starts on Monday 9 October. She will be earning a salary of £32,000. There is a difference in salary of £18,000 per annum. This Tribunal did not hear any  
20 evidence regarding promotion prospects for the claimant. The members noted the claimant is going to work for a large public sector organisation and considered, based on their industrial experience, that there will be a number of opportunities for promotion, incremental and salary increases.
- 25 202. The members considered six months' future loss would be just and equitable in this case and we calculate this sum to be £6,750 (being 50% of £13,500 net).
- 30 203. The members also made an award of £400 in respect of loss of statutory employment rights.
204. The members next turned to consider an award in respect of injury to feelings. The claimant invited the Tribunal to make an award of £12,000, uplifted by

£1,200 to £13,200, which is at the upper end of the middle band of *Vento*. The members accepted the claimant was upset at being made redundant, but considered the breach of Regulation 10 of the MAPLE Regulations was a technical breach not based on the fact the claimant was on maternity leave, but on the fact Mr Thomson did not consider the Senior Financial Controller role to be a suitable alternative role. The reasons why Mr Thomson did not consider the role to be a suitable alternative had nothing to do with the claimant being on maternity leave. The members concluded that in these circumstances the award for injury to feelings should be at a lower level than that suggested by Mr Briggs. The members, having had regard to the Presidential Guidance decided to make an award for injury to feelings of £6,500.

205. Mr Mitchell invited the Tribunal to find the claimant had not mitigated her losses insofar as she had not applied for many positions and could have found alternative employment at an earlier date. The members acknowledged the claimant applied for a post in October 2016, and did not make any further applications until April 2017. The claimant offered no explanation why she had not applied for any posts during the period November to April.

206. The members noted there appeared to be a great many accounting jobs available in the Glasgow area (140 in July 2017) but accepted the claimant had to consider the location of jobs because her baby will be in nursery, and she had no audit experience.

207. The members concluded, with regard to this matter, that they did not have sufficient evidence to make a reduction for failure to mitigate losses.

208. The Tribunal (by a majority) decided to make an award of compensation to the claimant of £29,461 (being £15,453 + £6,750 + £358 + £400 + £6,500).

Employment Judge: Lucy Wiseman  
Date of Judgment: 14 December 2017  
5 Entered in register: 15 December 2017  
and copied to parties

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