EMPLOYMENT TRIBUNALS

Claimant: Mrs C Whitfield

Respondent: CVS (Commercial Valuers and Surveyors) Limited

HELD AT: Manchester **ON:** 29 and 30 November 2016

BEFORE: Employment Judge Slater
Mr G Pennie
Mrs C Titherington

REPRESENTATION:

Claimant: Ms L Quigley of Counsel
Respondent: Mr P Maratos, Consultant

JUDGMENT

The unanimous judgment of the Tribunal is:

1. The complaint of unfair dismissal under section 99 of the Employment Rights Act 1996 is well-founded.

2. The respondent was in breach of contract by not offering the claimant alternative employment.

3. The Tribunal has jurisdiction to consider the complaints of unfavourable treatment under section 18 of the Equality Act 2010.

4. The complaints of unfavourable treatment under section 18 of the Equality Act 2010 in relation to failing to offer the claimant suitable alternative employment and manipulating the redundancy process by abandoning a plan to have alternative roles in favour of reducing the number of heads of department from three to two by means of a selection criteria are well-founded.

5. The complaint of unfavourable treatment under section 18 of the Equality Act 2010 in relation to the way in which the claimant was scored against the selection criteria because she had been unable to obtain experience in respect of a particular

new produced as she had been on maternity leave resulting in her dismissal is not not well-founded.

6. There will be a remedy hearing on 14 March 2017 at the Manchester employment tribunal beginning at 10 a.m. with a time estimate of one day.

REASONS

Claims and issues

1. The claimant claimed unfair dismissal, breach of contract, and pregnancy and maternity discrimination. The issues to be determined were as set out in Annex B to the case management orders made on 5 September 2016 as follows:

> *It is agreed that the claimant was dismissed by reason of redundancy whilst she was on maternity leave and in her "protected period". The complaints pursued and the issues in dispute are the following:*
>
> *Unfair Dismissal*
>
> 1. *Did the respondent fail to comply with regulation 10 of the Maternity and Parental Leave etc Regulations 1999 in a way which made the dismissal automatically unfair under regulation 20(1)(b) of those Regulations and section 99 Employment Rights Act 1996?*
>
> 2. *If not, was the dismissal by reason of redundancy unfair under section 98(4) Employment Rights Act 1996?*
>
> *Breach of Contract*
>
> 3. *Was the dismissal of the claimant in breach of a contractual obligation under the respondent's internal redundancy procedures to the effect that employees on maternity leave would be offered alternative employment?*
>
> *Pregnancy and Maternity Discrimination*
>
> 4. *Has the claimant proven facts from which the Tribunal could conclude that the respondent subjected her to unfavourable treatment in relation to any or all of the following matters:*
>
>   a. *Failing to offer her suitable alternative employment;*
>
>   b. *Manipulating the redundancy process by abandoning a plan to have alternative roles in favour of reducing the number of heads of department from three to two by means of selection criteria;*
>
>   c. *By the way in which the claimant was scored against those selection criteria because she had been unable to obtain*

experience in respect of a particular new product as she had been on maternity leave, resulting in her dismissal?

5. *If so, has the claimant proven facts from which the Tribunal could reasonably conclude that this unfavourable treatment was by reason of pregnancy or maternity leave contrary to sections 18(2)-(4) Equality Act 2010?*

6. *If so, has the respondent nevertheless shown that it did not contravene section 18 Equality Act 2010?*

Remedy

7. If any of the above complaints succeed, what is the appropriate remedy?

The Facts

2. The respondent is a national business specialist in rents and rates providing professional advice to occupiers of commercial premises.

3. The respondent has an employee handbook which contains provisions relating to redundancy which include the following:

> "The company reserves the right to make the final decision as to whether or not to offer an available alternative position to a redundant employee. However, in accordance with statutory provisions employees who are provisionally selected for redundancy whilst they were absent on maternity, adoption or additional paternity leave are entitled to be offered any suitable and appropriate alternative employment with the company in preference to other employees who are also at risk of redundancy. This is an absolute entitlement and it applies regardless of whether other employees may be stronger candidates or better qualified. The company is therefore bound to take this into account when deciding to whom to offer an available alternative position."

4. The company accepts that this was a contractual provision. The respondent's HR officer, Ms Cross, informed us that she had not read these provisions and was unaware of them and the statutory provisions relating to redundancy and women on maternity leave until some time into the redundancy exercise with which we are concerned.

5. The claimant's employment with the respondent began on 1 July 2013. Her title at that time was Client Services Manager. In February 2015, she received improved terms, an increase in salary to a basic salary of £43,500 with bonuses on top and some other improvements to terms. By this stage her responsibilities had increased and included management of the field team.

6. In April 2015, the respondent introduced a new service, Business Rent, following the postponement by the Government of the 2015 rate revaluation until 2017 which meant that it was no longer worth the respondent appealing rates.

7. At the beginning of August 2015, the claimant's title changed to Head of Service Delivery for Business Rates. The job description for the claimant's original role was not changed.

8. Alex Lundy was Head of Service Delivery, Business Rent. He was originally appointed on 7 September 2009 as a Rating Auditor. His salary at the relevant time was £35,000. Richard Lucas was Head of Lead Generation. He was appointed on 21 April 2011 as Data Manager and as Head of Lead Generation he had a basic salary of £40,000. The claimant and Mr Lundy reported to Steve Lees and Mr Lucas reported to Tony Dardis.

9. On 10 July 2015, the claimant took a period of annual leave prior to going on maternity leave. Her maternity leave started officially on 3 August 2015. She intended to return to work in April 2016 at the end of the period of paid maternity leave.

10. We were shown, on the morning of the second day of hearing, for the first time, the original job descriptions for Mr Lundy and Mr Lucas. We considered also the organograms of the structure of the business prior to the redundancies. Mr Lucas appeared on the organogram for sales, reporting in to Mr Dardis, the Sales Director. The claimant and Mr Lundy appeared on the organogram for client services, reporting in to the Client Services Director, Mr Lees. An examination of the organograms shows considerable differences in the teams reporting in to the claimant, to Mr Lundy and to Mr Lucas respectively. The claimant has a considerably larger team reporting to her including Deputy Team Managers; Mr Lundy and Mr Lucas do not have Deputy Team Managers in their reporting line. There are differences in the type of employees within the teams. An examination of the job descriptions shows considerable differences in the tasks undertaken by Mr Lundy, the claimant and Mr Lucas. We accept the points made by Ms Quigley in submissions as to the differences in the jobs. For example, the items in the claimant's job description at bullet points 1, 2, 4, 9, 11, 12, 15, 16 and 17, which are to do with client relations and the prestige client portfolio service, are not in the job descriptions of Mr Lundy and Mr Lucas. Mr Lucas has some very different items in his job description, which do not appear in the job descriptions of the claimant or Mr Lundy e.g. bullet points 6, 8, 9, 11, 12, 13 and 14, to do with the use of data and the identification of new sales leads. We note also that Mr Lundy and Mr Lucas were on lower pay rates, perhaps commensurate with the responsibilities for teams that they had compared to those of the claimant, and that there were differences in the types of teams managed by the claimant, Mr Lundy and Mr Lucas.

11. Some time towards the end of 2015, the respondent took the decision to restructure the business. The rent business had not been as successful as hoped. The respondent set out its rationale for the need to cut costs in a paper. The claimant does not challenge the respondent's need to cut costs and make redundancies. A plan was produced for a redundancy exercise. In accordance with this plan, where roles were reducing in number, the respondent was to apply selection criteria with no interviews and slot people into the roles, but where the roles were no more the respondent was to offer alternative roles and interview for these alternative roles.

12. We have seen that Laura Cross began taking advice from Peninsula Business Services on the respondent's behalf about the redundancy process by 23 November 2015. We have seen some documents between Peninsula and the respondent but not all of them; a number of documents were not disclosed as they were found to be subject to legal privilege.

13. Some time in late November or December 2015, Mr Lees and other directors were responsible for producing organograms with proposals for their parts of the business.

14. The respondent business was closed over Christmas and reopened on 4 January 2016. Mr Lees returned to work for one day, on 4 January, and then he was off in the period 5-8 January on compassionate leave following a bereavement. He was back at work on Monday 11 January 2016. On 11 January, we are told that Mark Rigby, the CEO of the respondent, was not in the office. The evidence of Ms Cross in her witness statement that, because of absences, Mr Lees and Mr Rigby were not able to consult over lists of alternative roles proved, under cross examination, to be entirely speculation on her part, based on the dates they were or were not in the office. She did not know whether there had been any communication between them when one of them was not in the office, or whether they had communicated about this on 4 January, when they were both at work.

15. On 8 January 2016, the respondent asked the claimant to attend a business update meeting on 12 January. The claimant was unable to attend this.

16. On 12 January, the company made an announcement of the redundancy programme. As part of the information provided, there was a list of alternative roles, a copy of which was subsequently sent to the claimant. This included the positions of Head of Service Delivery Live and Head of Service Delivery Concluded. At that stage, the proposal was that candidates for these two roles should be interviewed for those positions.

17. On 12 January 2016, Steve Lees, the Client Services Director, telephoned the claimant to inform her about the restructure and that her job was at risk of redundancy. He also informed the claimant that there were to be two Head of Service roles. We accept the claimant's evidence about this conversation with Mr Lees. The claimant asked Mr Lees why her role was at risk, since the titles of the two new roles were the same as her own. Mr Lees told her that a third person was to be involved. She asked why this was. He said it was because sales and service were merging together and so the role responsibilities were to be completely different. He said the new roles would encompass a mixture of all their services, rent and rates, but now one would focus on what they term "live" clients and the other on "concluded" or "completed" clients. He also said there would be other responsibilities different to those of her current role. Mr Lees told the claimant that the new alternative roles were being advertised as such with completely new job descriptions which were not yet finalised but would be in the coming days.

18. The claimant was sent written information about the proposals including an organogram by Faye Barker on 13 January 2016. In her accompanying email, Faye Barker wrote that:

> "In terms of role profiles and salaries we are in the process of putting together this information and will be able to go through this in more detail during the one-to-ones."

19. The organograms produced for the proposed structure included a change in the reporting line: the Head of Service Delivery Live was shown reporting directly to the Client Services Director but with a dotted line to Head of Service Delivery Concluded. The Head of Service Delivery Concluded was shown as reporting to the Sales Marketing Director but also with a dotted line to the Client Services Director. Mr Lundy and the claimant had reported to Mr Lees previously and not to Mr Dardis. Mr Lucas had reported to Mr Dardis.

20. On 13 January 2016, the claimant emailed Mr Lees with some questions about the proposal. This included questioning why there was a need for two Heads of Service Delivery, suggesting that one would suffice. She also commented that it did not seem as if any of sales and service had been combined and questioned how they appeared on the organogram with a dotted line under Head of Concluded. Mr Lees did not reply to this until 18 January 2016.

21. In the meantime, employee representatives were appointed. Alison Doyle, who was in the claimant's team and was a friend of the claimant, was appointed an employee representative.

22. Employee representatives were given documents on 15 January 2016. These included a new list of alternative roles which no longer included the Heads of Service Delivery. The representatives were told that the roles were staying the same but were shrinking in number. There is no record that any explanation for this change was given to the employee representatives and we have no documents which explain the reasons for the change. Selection criteria were produced for various roles, including the Client Services Head of Departments. The document relating to these positions identified Mr Lucas, the claimant and Mr Lundy as being affected and stated:

> "There are three current roles reducing to two. The highest scoring employees will be automatically placed in the roles."

It also noted that length of service would be used in a tiebreaker situation following scoring of other criteria when two or more employees were scored equally.

23. On 18 January 2016, Mr Lees replied to the claimant's questions by email. He wrote:

> "Lead Generation activity has been reduced substantially in the proposals and the remainder will be in the Concluded Client Team. One of its key roles will be to find opportunities for the sales teams to cross sell to existing clients. That is why the Head of Service Delivery (Concluded Team) will report directly to Tony [this was a reference to Mr Dardis]. The reason for two Heads of Service Delivery is that while the role profiles will be rightly the same, the day-to-day deliverables will be different and reporting in to different people."

He continued:

> "The sales and service areas have been brought closer together with both Tony and I taking responsibility for different deliverables. However, I will remain the Board member responsible for client service and satisfaction, hence the dotted line."

24. On 18 January 2016, Alison Doyle wrote to the claimant in her capacity as employee representative. She wrote, "Basically the roles that are staying the same but shrinking in number are Head of Service Delivery…."; she continued to identify other roles affected. She also wrote that these would be matched using the criteria.

25. The claimant emailed Alison Doyle with questions. She wrote:

> "You said the Head of Service Delivery is shrinking in number but we have two Head of Service Delivery positions and two in the roles already i.e. me and Alex."

26. Ms Doyle replied:

> "What I mean by shrinking in number is they have more people than they need – so because they are combining CS and sales/lead generation there are three Heads and two positions."

27. The claimant wrote again to Alison Doyle on 19 January 2016. She questioned whether they were allowed to use length of service as a tiebreaker. She also wrote:

> "If so that's me gone – Alex and Rich are squeaky clean so on points it will be close. So that means I could go! However I will then pull the maternity card."

28. We accept the claimant's evidence that, by this time, she had done research online and looked at the employee handbook. The reference to "maternity card" was a reference to her understanding that the respondent was required to offer her suitable alternative employment because she was on maternity leave.

29. The respondent answered various questions put forward by the employee representatives. These included a question about where and how sales were joining with client services. The reply was:

> "The Concluded Client Team will report to the Sales Director as this will be a key focus area to generate new sales opportunities for the sales team. The CS Director will be responsible for the client service side of the role."

30. At some time, which we are unable to date from the information given to us, new role specifications were produced for the Heads of Service. We accept the claimant's evidence that these were not given at the time to the claimant and she only saw these in the course of preparation for this case.

31. On 22 January 2016, an adviser from Peninsula advised the respondent that they could dismiss an employee on maternity leave if their score was lowest on selection. The note indicates that the information that had been given by the respondent was

that there were three people and two jobs. Nothing is recorded about whether there was any discussion about what jobs the three people did previously.

32. On 29 January 2016, the claimant had a one-to-one meeting with Laura Cross to discuss the selection process. During the course of this meeting the claimant raised the provision at page 37 of the Employee Handbook about maternity policy and redundancy. Ms Cross is reported as replying that, if this was in the handbook, it would stand and she would look into this for the claimant. We note that the original version of the minutes omitted this part of the discussion and it was included after the claimant had raised a query about this omission.

33. The respondent carried out the scoring exercise on the claimant, Mr Lundy and Mr Lucas. We are told that Mr Lees did this exercise. The respondent scored Mr Lundy and Mr Lucas higher than the claimant. Mr Lucas got a score of 42, Mr Lundy a score of 45 and the claimant a score of 39.

34. On 3 February 2016, Steve Lees telephoned the claimant and told her of her own score. At this stage he did not tell her of the scores of the others. He told her that she had scored well on people and clients but her technical was lower as she did not have the skills linked to business rent. He informed her that she had 48 hours to lodge an appeal if she disagreed with the scoring. The claimant did not appeal against the scoring but she did raise a query about the selection and Mr Lees replied to this query as follows:

> "We were assessing suitability for the new role using our knowledge of your past performance and experience at CVS."

35. On 5 February 2016, the claimant was informed by Steve Lees that she had not been placed in either of the Head of Service Delivery roles. The note of the telephone conversation recorded the claimant as saying that she had spoken to ACAS:

> "…in regard to the fact that she was on maternity leave and they had informed her that in their view she should not have been included in this process and should have been appointed to one of the roles. SDL confirmed that he could not comment on what ACAS had told her. However, CVS had taken advice before the process started and that confirmed that the process was appropriate and fair given the circumstances. CVS were aware that CW had additional rights and had CW tied scores with another employee then she would have been given priority over the other person. As it was she had scored less than the other two people and so had not been selected."

36. It appears that Mr Lees was unaware that the respondent's selection criteria stated that length of service would be used as a tiebreak.

37. On 8 February 2016, the claimant emailed Laura Cross saying that she wished to appeal. She wrote:

> "It's an appeal based on the fact that according to the law that I should have been offered one of the roles because I am on maternity and the job role and salary are the same as my role before I left. This is a breach of the law and is

> classed as sex discrimination and also is automatic unfair dismissal so how do I raise this if not by appeal, would it be a grievance instead?"

38. Ms Cross replied on 8 February 2016:

> "Just to give you the heads up, the law only protects you after the provisional redundancy selections have been made. We are legally allowed to apply the selection criteria to yourself and if you score the lowest then we will seek to identify any alternative vacancies. This is where the law protects you as if we had a more suitable alternative (similar level role) you would be given preferential treatment on this. If you want any further information on this please let me know."

39. The claimant appealed by a letter dated 11 February 2016. In this she wrote that she did not believe the respondent had followed the correct legal process for a woman on maternity leave and that this was considered to be unfair dismissal. She referred specifically to regulation 10 of the Maternity and Parental Leave Regulations 1999 and wrote:

> "Given that there were two suitable roles available I feel therefore that this outcome was unfair."

40. By a letter dated 15 February 2016 the respondent confirmed the claimant's redundancy.

41. The appeal hearing was held with Mr Myers on 26 February 2016. The points raised by the claimant in the appeal meeting included that she had scored lower on business rent, having not had an opportunity to learn that as she had not been there. She said that she was not happy when Mr Lundy had been given the project and was worried that eventually the two teams would merge and then she and Mr Lundy would both be put at risk. She said she did not think it was fair that she was not given the opportunity for the pilot scheme. She said Mr Lees told her that it was given to Mr Lundy, who was kind of a team leader at the time, because he wanted the claimant to concentrate on the annuity deadline, which she understood at the time. She felt that, if she had not been marked down because of rent, it might have gone to a tiebreaker and interviews being used and she would have got the job. She also made the point that she did not think the correct process was followed; there were vacancies and she was not offered one. She said that the law states "employees on maternity leave are automatically protected. If the job is similar then it should automatically be given". She said she should not have been put through the stress and made to apply.

42. We find that, in responding to the appeal, Mr Myers did not speak to Mr Lees to find out about the decisions made by Mr Lees. Any information he got about what happened and why, he obtained from Ms Cross in HR. Mr Myers' evidence varied as to whether he spoke to Mr Lees. He did not include anything about this in his witness statement and we would have expected such a significant conversation to be in the witness statement. Initially, he said that he did not speak to Mr Lees and then he sought to qualify that, suggesting he had spoken to Mr Lees informally. We reject that. We consider that such an important conversation would have been included in

the witness statement and that Mr Myers would have given consistent evidence on the point if he had spoken to Mr Lees.

43. Mr Myers did not consider the original job descriptions for the claimant, Mr Lucas and Mr Lundy and he did not do a compare and contrast exercise between their jobs. As noted previously, the information Mr Myers had about what had happened and why was given to him by Ms Cross, although Ms Cross omitted to inform us about this in her witness statement. Mr Myers was informed by Ms Cross that a mistake had been made which led to the change in the Head of Service roles originally being put on the alternative employment list and then removed from it.

44. By a letter dated 10 March 2016, Mr Myers informed the claimant that her appeal was unsuccessful. He wrote in the course of this letter:

> "As you are aware, just before the redundancies were announced and the consultation period began Steve Lees had been absent from the office due to the death of his mother so it was not until he returned that he raised the issue that after reflecting on the proposed organogram there were numerous roles that were in fact the same as before. They therefore had to be removed from the alternative list. Your role was one of these roles."

As noted previously, this information came from Ms Cross. On the basis of Ms Cross' own evidence, she did not get this information directly from Mr Lees; it was speculation on Ms Cross' part. This information also does not accord with the chronology of events. Mr Lees was having conversations with the claimant about new roles after his return to work so, if the explanation given had been correct, one would have expected it to have been corrected prior to the information being given out on 12 January 2016. Mr Lees was in work on 4 and 11 January 2016.

45. In relation to the regulation 10 argument, Mr Myers wrote that it would have been unfair to offer the claimant one of the roles without applying selection criteria as this was taking away an employee's role, not offering her a vacant role and that, only when there was a suitable alternative vacancy, did maternity rules apply. He wrote:

> "I understand that if there were an alternative vacancy then a woman on maternity leave should be given preferential treatment, but there wasn't one available and looking at the facts this was made clear to you and you fully acknowledged this."

46. In relation to the matter of the business rents, Mr Myers wrote that there would have been no guarantees that, if the claimant had not been on maternity leave, she would have been trained in business rent and that this would have been part of her role as the team she left were not trained in business rent and it was kept separate. However, in order to be fair he had reviewed the selection criteria to assess what her score would have been if she had received full marks on business rent. He wrote that she would have scored 42, equal to another employee but, as he had longer service, the role placement would not have changed.

47. The claimant notified ACAS under the early conciliation procedure on 11 March 2016. The effective date of termination was 15 March 2016. The ACAS early

conciliation certificate was issued on 11 April 2016 and the claim presented to the Tribunal on 1 July 2016.

48. We note that a surprisingly small amount of documentary evidence has been disclosed by the respondent. The original job descriptions for the claimant, Mr Lundy and Mr Lucas were clearly relevant to the respondent's argument in this case, but they were produced very late in the day, after being requested by the Tribunal. We saw them for the first time on the morning of the second day of the hearing. We consider that there would have been other relevant documents in existence which have not been disclosed by the respondent. We consider it to be inconceivable that there would have been nothing relevant beyond the documents which have been disclosed. For example, Mr Myers gave evidence that there were conversations about rationalising the departments at weekly executive meetings which were minuted. We have seen no minutes of such meetings. Also, we consider it inconceivable that there would not have been emails between managers about relevant matters. A minor example, perhaps, is that Ms Cross gave evidence that Mr Lees would have emailed his organograms to her. We have seen none of the accompanying emails. We have only seen one version of the organograms. We would have expected there to have been some drafts. It seems very unlikely to us that there was nothing in writing relating to why the two roles in question came off the list of alternative jobs.

49. The only witnesses put forward by the respondent were Ms Cross from HR and Mr Myers who heard the appeal. Ms Cross was not a decision maker. Mr Myers was a decision maker only in relation to the appeal. We did not hear from anyone who could give us evidence about some of the crucial matters, such as the reason for the change from the two jobs being on the alternative employment list and then being taken off this list.

The Law

Unfair dismissal

50. The parts of section 99 Employment Rights Act 1996 relevant to this case are as follows:

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

(a) …..

(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity,

(b) ordinary, compulsory or additional maternity leave,

……..;

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

51. Regulation 10 of the Maternity & Parental Leave etc Regulations 1999 provides that, where, during an employee's statutory maternity leave, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment, the employee is entitled to be offered alternative employment with the employer, where there is a suitable available vacancy.

52. Regulation 20(1)(b) of the 1999 Regulations provides that an employee who is dismissed is to be regarded as unfairly dismissed under section 99 of the Employment Rights Act 1996 if the reason or principal reason for the dismissal is that the employee is redundant and regulation 10 has not been complied with.

53. The question of whether a redundancy situation has arisen should be answered by reference to the standard definition of "redundancy" in section 139 Employment Rights Act 1996: *Secretary of State for Justice v Slee EAT 0349/06.*

54. The relevant parts of section 139(1) Employment Rights Act 1996 state:

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
(a)…..
(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."

55. In *Sefton Borough Council v Wainwright [2015] IRLR 90,* the EAT upheld a decision of an employment tribunal that the council had breached regulation 10 of the 1999 Regulations by failing to offer Mrs Wainwright a new DSM role while she had been on maternity leave and in a redundancy situation. The council had drawn up restructuring proposals. They created a new position (the DSM role) which combined Mrs Wainwright's role with an equally graded position held by her colleague, Mr Pierce. While Mrs Wainwright was on maternity leave, the council put Mrs Wainwright and Mr Pierce formally at risk of redundancy. The council went through a selection process, interviewing both for the role of DSM. They considered that Mr Pierce was the best candidate and offered him the role. Mrs Wainwright was made redundant. The council argued that the obligation to redeploy Mrs Wainwright into a suitable vacancy did not arise until the decision had been made as to which of the occupants of the two merged positions should be given the combined role. The respondent relied on the EAT judgment in *Eversheds Legal Services Ltd v De Belin [2011] IRLR 448* as a basis for arguing that this approach would be fair and proportionate whilst the approach taken by the ET went further than was reasonably

necessary to protect Mrs Wainwright's interests and would have given rise to an unfairness to Mr Pierce.

56. HH Judge Eady QC wrote, in the *Sefton* case, at paragraphs 42 and 43:

> "It is hard to conclude other than that both the Claimant and Mr Pierce had been displaced from their positions once a decision was taken that their posts should be deleted in July/August 2012 and that they were both thus potentially redundant unless they could be engaged in some alternative position. By using the language of "displacement" and "redeployment", the Respondent effectively puts its focus on the process that it decided to operate rather than the redundancy situation in which that process was to take place. That does not assist greatly for regulation 10 purposes.
>
> 43. Moreover, I agree with Mr Sigee that such an approach could be used to undermine the protection afforded by regulation 10. It is largely left open to employers to decide how best to carry out redundancy and restructuring processes. If it is also left to the employer to decide when a redundancy actually occurs – so, to determine when the obligation under regulation 10 arises – it is easy to see how that position might be abused…. "Redundancy" is to be defined for regulation 10 purposes as it is under section 139 of the Employment Rights Act 1996. Once an employee's position is thus "redundant", the obligation under regulation 10 arises."

57. HH Judge Eady QC held that the ET was entitled to conclude that there was a redundancy when the respondent decided that two positions, including that of the claimant, would be deleted from its structure and replaced by one. She wrote, at paragraph 44:

> "The requirements of the Respondent's business for employees to carry out work of that particular kind had ceased or diminished, or were expected to do so. If not provided with a suitable available vacancy, the Claimant's employment would be terminated by reason of redundancy. That position was not, in my judgment, altered by the fact that the Respondent would have slotted either the Claimant or Mr Pierce into the newly created position of DSM, without any wider competition taking place. That did not mean that their previous positions were not redundant; they were. They just had a chance to avoid being dismissed by reason of redundancy by being offered the DSM vacancy."

58. HH Judge Eady QC commented that, if the Respondent had offered the claimant a suitable available vacancy other than the DSM position, it might well have complied with its regulation 10 obligation. However, she did not agree with the respondent's argument that the DSM position was not a vacancy. She wrote: "The fact that a job is only open to a limited pool does not mean that it is not "vacant", as that term would normally be understood; that is, "not presently occupied." Certainly, on the facts of this case, the ET was entitled to conclude that this was a vacancy, and – given the Respondent's concession – one that was "suitable" for the Claimant."

59. At paragraph 46, the judge continued:

> "I can see that the Respondent might not have wanted to give the DSM vacancy to the Claimant in preference to Mr Pierce, but, in my judgment, it was obliged to do so unless it was in a position to offer the Claimant some other suitable available vacancy. This, it seems to me, is the answer to Miss Chudleigh's proportionality point."

60. The judge referred, in paragraph 47, to the *Eversheds Legal Services v Belin* case, for the proposition that the obligation is to do that which is reasonably necessary to afford the statutory protection to the woman who is pregnant or on maternity leave.

> "Doing more than is reasonably necessary would be disproportionate and puts the employer at risk of unlawfully discriminating against others. Here, the protection is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain."

She continued:

> "In order to afford the Claimant the protection she was entitled to under regulation 10 once her position was redundant … the Respondent was obliged to assess what available vacancies might have been suitable and to offer one or more of those to the Claimant. She should not have been required to engage in some form of selection process.
>
> "48. Whether that meant that the Respondent had to offer the DSM position or whether it would have been able to offer some other suitable alternative vacancy, was for it to assess. At that stage, it would have been open to the Respondent to have taken into account the interests of Mr Pierce and its own desire to appoint the best person to the new role of DSM. It might not have been proportionate to have required the Respondent to have offered the Claimant a particular vacancy (such as the DSM role) if something else would also have been suitable and had been offered. On the evidence before the ET, however, the Respondent offered the Claimant nothing notwithstanding, on its own case, the DSM position, which needed to be filled, being a suitable alternative for her."

61. The EAT allowed the council's appeal in relation to a section 18 Equality Act 2010 claim, holding that the tribunal fell into error in assuming that the section 18 question was answered by its finding that there had been a breach of regulation 10. The judge wrote: "In many cases, the answers may be the same. The particular facts of this case, however, allowed for more than one answer."

Conclusions

Unfair Dismissal

62. The same definition of redundancy is to be used for regulation 10 of the 1999 Regulations as for section 139 of the Employment Rights Act 1996. We find, on the facts of this case, that this is a situation where the needs of the business for employees to do work of a kind done by the claimant, Mr Lundy and Mr Lucas

ceased or diminished and, therefore, there was a redundancy situation. The claimant was on maternity leave at the relevant time. The two Head of Service jobs were suitable alternative vacancies. In accordance with regulation 10, the claimant had an absolute right to be offered a suitable alternative vacancy. There is no suggestion that there was any other suitable alternative vacancy offered to the claimant. The claimant should, therefore, have been offered one of the two Head of Service posts; not to do so was a breach of regulation 10. It appears to us that the situation is on all fours with that in the *Sefton* case.

63. We reject the respondent's argument that regulation 10 can somehow be dis-applied because of perceived unfairness or discrimination towards others by its application. The respondent was obliged, in accordance with regulation 10, to offer the claimant a suitable alternative vacancy if there was one. If there had been a suitable alternative vacancy, other than the Heads of Service roles, the respondent may have complied with their obligation by offering the claimant that other suitable alternative vacancy. In the absence of another suitable alternative vacancy, the claimant had a right to be offered a Head of Service post. As the EAT noted in *Sefton*, the rationale for this statutory scheme is because of the particular disadvantage that women on maternity leave suffer in engaging in a redundancy selection process and competing for whatever jobs remain.

64. The dismissal is, therefore, automatically unfair under section 99 of the Employment Rights Act 1996 read with regulation 20 of the 1999 Regulations.

Breach of Contract

65. In relation to the complaint of breach of contract, the contractual terms reflect the statutory provisions. Since we have found there to have been a breach of the statutory provisions, for the reasons we have given, it follows that the respondent was in breach of contract by not offering the claimant one of the positions.

Pregnancy and Maternity Discrimination

66. As noted in the *Sefton* case, it does not automatically follow that, because there is a breach of regulation 10, there is also unfavourable treatment contrary to section 18 of the Equality Act 2010.

67. We consider first the complaint that there was unfavourable treatment by reason of pregnancy or maternity in relation to failing to offer the claimant suitable alternative employment.

68. Between 12 and 15 January 2016, the respondent changed tack, removing from the list of alternative employment the two Head of Service roles. We have had no explanation, supported by evidence as opposed to assertion, from the respondent for this change of tack. The evidence of Ms Cross turned out, on examination, to be mere speculation. We have heard no evidence from anyone at the respondent who could tell us why this change in approach was decided upon. The respondent has disclosed no documents which would shed light on this, although we find it inconceivable that there would have been no such documents.

69. The respondent went further than simply failing to disclose relevant documents. In the appeal outcome letter, the respondent put forward a case which was then also put forward in the respondent's witness statements, giving an explanation for the change in approach which turned out, on examination, not to be founded on any actual knowledge. At best, this was a matter of speculation. At worst, it was an active attempt on the part of the respondent to mislead. Given the lack of information from the respondent, we are unable to assess which it is.

70. We draw adverse inferences from these matters which we consider are sufficient for us to reach the conclusion that the claimant has proved facts from which we could conclude unfavourable treatment in failing to offer her suitable alternative employment because she was on maternity leave. The burden, therefore, passes to the respondent to prove to us that failing to offer suitable alternative employment was not an act of unfavourable treatment because of pregnancy or maternity leave. The respondent has wholly failed to provide us with an explanation. They have failed to show that this was for a non discriminatory reason and the complaint is, therefore, well-founded.

71. In relation to the complaint of manipulating the redundancy process by abandoning a plan to have alternative roles in favour of reducing the number of Heads of Department from three to two by means of selection criteria, there is again nothing to explain why the respondent did this. For the same reasons we gave in relation to the first complaint of unfavourable treatment, we draw adverse inferences and these inferences are such that we conclude the claimant has proved facts from which we could conclude unfavourable treatment in this respect because the claimant was on maternity leave. Once again, the burden passes to the respondent and they have failed wholly to show that their actions were for non discriminatory reasons. This complaint is, therefore, well founded.

72. The claimant says that, by the way in which she was scored against the selection criteria, she was treated unfavourably because she had been unable to obtain experience in respect of a particular new product, being rents, as she had been on maternity leave and this resulted in her dismissal. We are not satisfied on the facts that the claimant would necessarily have received training on rents if she had not been on maternity leave. The original decision to give responsibility and, therefore, training to Mr Lundy and not to the claimant on this area was because Mr Lees wanted the claimant to concentrate on the annuity deadline. This is not said to be anything to do with the claimant's maternity leave. The claimant has not proved facts in relation to this particular complaint from which we could conclude that the lack of training was because of being on maternity leave. This particular complaint is not, therefore, well-founded.

73. The respondent raised on the second day of the hearing a jurisdictional issue relating to time limits for the section 18 Equality Act 2010 complaints. We conclude that the matters complained of were continuing acts of discrimination which continued up to the dismissal. However, if we were wrong on this, we would have found it just and equitable in all the circumstances to consider the complaints out of time. Understandably, the claimant waited for an outcome of the redundancy selection process before taking any action. She gave evidence to us, which we accept, that she did not want to make waves and appeal every part of the process.

The respondent is not prejudiced in any way by the claimant not having taken action until after the outcome of the redundancy selection process. We, therefore, consider it just and equitable to consider the complaints. We have jurisdiction to do so.

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Employment Judge Slater

16 December 2016

JUDGMENT AND REASONS SENT TO THE PARTIES ON

21 December 2016

FOR THE TRIBUNAL OFFICE