Case Number: 2301957/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MJ Downs**
Members: **Mrs V Blake**
Ms Y Batchelor

BETWEEN:

Claimant

Louisa Kassell

AND

Respondent

Unilever UK Ltd

ON: **3rd 4th and 5th September 2018 and in Chambers on 6th September 2018**

APPEARANCES:

For the Claimant: **Mr David Green (Counsel)**

For the Respondent: **Mr Andrew Allen (Counsel)**

JUDGMENT

UPON Hearing Counsel for the Claimant and the Respondent
AND UPON the Claim pursuant to Regulation 19 of the Maternity and Parental Leave Regulations 1999 being withdrawn on 3rd September 2018

The unanimous Judgment of the Tribunal is that:-

(1) The Claim for unfair dismissal is well founded
(2) The claim pursuant to Regulation 19 of the Maternity and Parental Leave Regulations 1999 is dismissed upon withdrawal.
(3) The Claim for automatic unfair dismissal pursuant to section 99 (1) (a) of the Employment Rights Act 1996 and Regulation 20 (1) (b) and Regulation 10 of the Maternity and Parental Leave Regulations 1999 is not well founded

(4) The claim of unlawful direct discrimination because of her pregnancy/maternity pursuant to section 13 Equality Act 2010 is not well founded
(5) The claim of less favourable treatment in comparison with a comparable full-time worker pursuant to Regulation 5 of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 is not well-founded

REASONS

The identified issues

1. This is a claim for unfair dismissal and unlawful discrimination brought by way of an originating application received by the Employment Tribunal on 3rd August 2017.

2. The issues were identified by EJ Andrews at the Case Management Preliminary Hearing on 2 October 2017 [41-45]. The Tribunal was enjoined at this hearing to determine liability and, if it is possible, related issues which touch upon limitations to remedy such as *Polkey*, and contribution[1] [44]. In particular:

   2.1 The Claimant says that her **dismissal was automatically unfair** pursuant to section 99 (1) (a) of the Employment Rights Act 1996 (leave for family reasons) and regulation 20 (1) (b) and Regulation 10 of the Maternity and Parental Leave Regulations 1999 (MPL Regs). Was there a suitable alternative vacancy within the meaning of Regulation 10 – and, if so, was it offered to the Claimant?
   2.2 Was the dismissal of the Claimant an act of **unlawful direct discrimination** as the Claimant's dismissal was less favourable treatment because of her pregnancy/maternity pursuant to section 13 Equality Act 2010?
   2.3 Was the Claimant's dismissal an act of less favourable treatment in comparison with a comparable full-time worker on the grounds that the Claimant was a part-time worker and the treatment was not justified on objective grounds pursuant to Regulation 5 of the **Part Time Workers (Prevention of Less Favourable Treatment**) Regulations 2000?
   2.4 **Unfair dismissal** The Respondent says that the dismissal was by reason of redundancy. The Claimant doubts the genuineness of that and also says that the dismissal was not fair or reasonable in any event and, in particular there were problems with selection, consultation and the consideration of alternative employment and the ACAS code was not followed properly.

[1] The case management order had made reference to the ACAS Code but this states that it does not apply to redundancies

2.5 Did the following amount to **unfavourable treatment** pursuant to section 18 of the Equality Act 2010 Act (less favourable treatment as she was on compulsory maternity leave):

2.5.1 the timing of the commencement of the redundancy process (shortly after the Claimant gave birth)

2.5.2 inviting the Claimant to the 22nd March 2017 meeting the day before;

2.5.3 inviting the Claimant to the 6th April meeting the day before; and

2.5.4 inviting the Claimant to the 13th June 2017, on 9th June 2017.

3. The Claimant withdrew the claim pursuant to Regulation 19 of the Maternity and Parental Leave Regulations 1999 on 3rd September 2018 and it was dismissed upon withdrawal.

4. The issues identified for the Tribunal can be reduced to a series of questions (below)

<u>Automatic unfair dismissal</u>

a. Was the Claimant's post redundant?
b. If so, was any suitable alternative vacancy available before the end of her employment on 30 June 2017 on terms or conditions not substantially less favourable to her old job?
c. If so, was she offered that suitable alternative vacancy?

<u>Ordinary Unfair dismissal</u>

d. What was the reason for dismissal? The Respondent says that it was redundancy but concedes that the same set of facts could be described as a business reorganisation.
e. Was it a potentially fair reason?
f. If the reason was redundancy:
    i. Was the Claimant warned and consulted about the redundancy?
    ii. Did the Respondent put its mind to the question of how a pool should be defined and acted from genuine motives?
    iii. Did the Respondent do what it can in so far as is reasonable to seek alternative work?[2]

<u>Direct Discrimination – s13 Equality Act 2010</u>

g. Was the Claimant treated less favourably than a real or hypothetical comparator in being dismissed?
h. If so, was that treatment because she was on maternity leave?

<u>Pregnancy and Maternity Discrimination – s18</u>

i. Did the following amount to unfavourable treatment:

[2] The Respondent relied on *Thomas and Betts v Harding* [1980] IRLR 255 in support of that proposition but the Court of Appeal in that case did not appear to create such a proposition. It is suggested that the origin of it is the words of the statute.

i. The timing of the commencement of the redundancy process starting 6 weeks after the claimant gave birth;
ii. Inviting the claimant on 21 March 2017 to attend a meeting on 22 March 2017;
iii. Inviting the claimant on 5 April 2017 to attend a meeting on 6 April 2017;
iv. Inviting the claimant on 9 June 2017 to attend a meeting on 13 June 2017.

j. If so, was that unfavourable treatment because the Claimant was on maternity leave?

Part Time Detriment

k. Was the Claimant dismissal less favourable treatment than a comparable full-time worker?
l. If so was that treatment on the ground that she was a part time worker?
m. If so was that treatment justified on objective grounds?

The evidence

5. The Tribunal had the benefit of an agreed bundle of evidence – which was approximately 700 pages by the end of the oral evidence.

6. The Tribunal also heard oral evidence on oath from the Claimant, her line manager, Ms Tufo and the manager who heard the Appeal, Mr Clarke. Arrangements had originally been made to hear the evidence of the grading expert, Mr Chan by video link from Canada but it proved possible to avoid this. His evidence was read and submissions made on its contents. The representatives of the Claimant have presented us with a note of the evidence – which is not agreed.

7. At this point it may be useful to say that the parties agreed a cast list which was submitted to us but for these purposes, a relatively short list of relevant people is set out below (aside from the Claimant herself):
   (i) Ronald Chan Senior Compensation Specialist
   (ii) Noel Clarke Vice President (Refreshment) – dealt with appeal
   (iii) Joe Comiskey Innovation Insight & Operations (2C)
   (iv) Jill Ross Vice President Customer Development
   (v) Daniela Tufo eCommerce & Digital Director, UK, Claimant's line manager (she conducted the consultation meetings)

Relevant Facts

8. The claimant worked for Unilever UK which is part of a large multinational organisation. When considering the size and administrative resources available to the Respondent Company, the tribunal has concluded that they should be treated as a large and sophisticated business.

9. The factual matrix is actually largely undisputed. The principal disagreement is about the interpretation of the same. The Tribunal sets out its findings of fact below. The Tribunal has concluded that the witnesses sought to present accurate evidence at this hearing. Both the Claimant and Ms Tufo were impressive witnesses. The Tribunal was very preoccupied by trying to establish the provenance of all the various iterations of the stages of the thinking around the structure of the team and the tables/diagrams illustrating the same. Not all of these were dated. By the time the Tribunal had heard all the evidence, it became apparent that there was nothing that warranted drawing adverse inferences.

10. The facts took place over a relatively short period with the Claimant beginning her maternity leave on the birth of daughter 5th February 2017 and her employment coming to an end on 30th June 2017. There is a fair amount of written evidence. There was a culture of short efficient emails. The parties would have well understood the language contained therein. For the purposes of a trial of the issues before an Employment Tribunal they are pretty condensed and required multiple readings to gain their sense.

Outline

11. The Claimant was employed by Unilever PLC from March 2008 to June 2017 – i.e. for a period of 9 years and four months. Over that time she was engaged in a number of different roles. Up until March 2016, she had been working full-time and thereafter has been working part-time (0.6 FTE) (broadly speaking the Claimant worked on Wednesday, Thursday and Friday [235] but was flexible to meet the needs of the business).

12. The Claimant commenced employment with the Respondent at work level 2A at the Blackfriars office and by 2010 was promoted to level 2B and relocated to Leatherhead. She commenced maternity leave in April 2012 and returned to work a year later following first maternity leave into different but equivalent role. In August 2013 she was promoted to a senior grade Work Level 2C. This is explained further below.

13. The Claimant performed her work to a high level. This was reflected in the outcome of the annual appraisals that she had undertaken. She was considered to have good prospects at the firm and had been recorded as a high performer and identified as having the potential to fast-track to a Directorship position (at work level 3). The Claimant received a performance bonus of and a salary increase on 23rd February 2017.

14. The Claimant commenced her second period of maternity leave on February 2017 – albeit her last working day in the office had been 15th

December 2016 which was the beginning of a period of annual leave which continued until the start of her maternity leave. The Claimant had a daughter on 5th February 2017. Whilst on maternity leave she was made redundant and her contract of employment came to an end on 30th June 2017 – the Claimant having been notified of such on 4th May 2018. At the time that her employment came to an end, the Claimant had been employed as the Digital Transformation Manager within the e-commerce team. The Tribunal concludes that the Claimant's then job was not temporary albeit it may have been transitionary

eCommerce

15. Ms Tufo was the eCommerce and Digital Director UK and had been since the beginning of August 2016. In 2016 the Company were reorganizing by way of programme dubbed, "Connected 4 Growth." The purpose of this programme was to make Unilever's workforce more agile and to increase the company's external orientation and focus. It was also envisaged that it would bring about some efficiencies. We have been provided with materials which would show that this development was a matter of public knowledge and was explained as the way that the Company was responding to the macro-economic pressures facing it. It was presented to the outside world as the biggest change that the Company had been through in ten years.

16. As far as its execution was concerned, Department Leaders were asked – in sequence – to review their structures so as to identify potential enhanced efficiency. Marketing went through this process first and it led to some redundancies.

17. As mentioned above, in August 2016 Daniella Tufo was appointed ecommerce and digital director UK. She was the Claimant's line manager. That same month the Claimant informed her of her pregnancy and her intentions as to maternity leave.

18. Ms Tufo initially just took stock of her new responsibilities as recommended to do by her predecessor in post, Ms Sykes. Ms Tufo had been advised to start looking at the structure of her team and the types of role that were present. This was, in part, because eCommerce had a relatively high headcount in relation to its turnover.

19. Ms Tufo was concerned to look at where there was the most potential for growth. She was influenced by the fact that an extremely high proportion of turnover came from core grocery customers (these might be considered to be the traditional large retailers) and yet the opportunities for faster growth appeared to rest with newer online customers. She was concerned to ensure that the Respondent had sufficiently resourced these areas – including with staff with the required skills.

20. Ms Kassell was as well-versed - if not more so than Ms Tufo - of the necessity for change and the benefits of Unilever being a pioneer. She herself had identified for Ms Tufo the rapid pace of change in the marketplace and the fact that the Respondent was addressing a more fragmented, competitive marketplace

Digital Transformation Manager Role

21. On 1st March 2016 [235] the Claimant moved into the Sales Department to take on the Digital Transformation Manager's role (she had previously worked in Marketing). It is part of the background that she was more of a marketing person in a sales world (Ms Tufo excepted). There was also a rumbling issue as to whether Marketing should pay for her post.

22. The name of the post held by the Claimant had significance. The Digital Transformation Manager role was focussed on transforming Unilever's digital processes, systems and ways of working. This came under the label, "Digital 2.0." This was aimed at building Unilever's Digital systems and included creating a Digital Asset Library or database of Unilever's products – including their product information so they could be used interchangeably by retailers, brand websites and across digital channels. Ms Tufo described transformation jobs as having the feature that, once change has been effected, it is anticipated that they will be adopted by the broader organisation and become, "business as usual" with the likelihood that the individual holding the "transformation" post will move onto something else. This reflects the written material before the Tribunal and it is more likely than not that this is genuine. In times when the establishment of the Respondent is static or growing, this feature may be relatively uncomplicated. It contains more risk for employees in times of tightening establishment.

23. There is meant to be a dialogue across the business about using and retaining skill by way of a quarterly, "People Talent Forum" (for both Marketing and Sales) albeit these kinds of endeavours are also strained when there is retrenchment. There is also an Online Job Portal whereby Unilever vacancies are advertised.

October 2016

24. As of 16th October we know from email correspondence that Ms Tufo was considering planning for maternity cover for the Claimant by way of looking at potential candidates of grade 2C or with the 2C potential so to act up. It became apparent at about the same time that Mr Andrew Apsey (NRS Channel Lead) was proposing to take a sabbatical for a year from 1st February 2017 and another 2C was actively considering alternative opportunities in the business.

25. Ms Tufo informed the VP, Ms Jill Ross that the result of changes in her team was that there were impending gaps for three 2C posts. This included the sabbatical mentioned above, a likely move as well as the post held by the Claimant (in the context of her maternity leave). Ms Tufo wanted to explore the possibility of obtaining cover from marketing (where it was thought that staff might be looking to move elsewhere as they were undergoing reorganisation/reduction in headcount brought about by the Change for Growth (C4G) [277]).

26. The response of Ms Jill Ross [277] was that there was an over–population of 2Cs in the eCommerce team as a result of various historical matters and that there was an opportunity to address these as a result of the three impending moves. The view taken was that the Innovation, Insight and Operations role necessitated a 2C grade but not necessarily the others. This was because there were growing Global and EU resources to draw on and it was envisaged that eCommerce responsibilities would be disseminated to Brand Building through the C4G process. The conclusion was that the team could be re-shaped so it contained just two 2C posts with other responsibilities being taken by a 2B posts who could report to Ms Tufo. This was considered to fit with the Unilever model. Ms Tufo saw the response of Ms Ross as being significant and began consulting HR about what might be possible. Her request was pretty directive in that it envisaged a review of the posts against Company priorities and with comparison being made with other areas (i.e. she adopted the rationale of Ms Ross).

27. In the meantime, Ms Kassell was reporting the status of her work with a view to taking over her responsibilities for the duration of her maternity leave. This showed just how much she had achieved in post [285; 287 – 288].

28. Ms Tufo provided a full response to Ms Ross on 27th October 2016 [289] by addressing the question as to what should be the appropriate structure for the Team. At that point, she had not been tasked with bringing about a headcount reduction. For that reason, the email did not address the question as to what total Full Time Equivalent [FTE] establishment she would be left with (save to the extent to which it represented that 2 posts could be paid for by marketing). However, she did preview likely debates such as whether the Digital 2.0 work could be paid for out of the marketing budget and she provided supporting materials from the US experience. At this stage, Ms Tufo was thinking that the Digital 2.0/Connected World work could be managed by a Grade 2B on the basis that the role was increasingly not concerned with strategic thinking but rather with project management. However, Ms Tufo also told the Tribunal that it was quite likely that – in that model – the

Claimant would have held the 2C post (encompassing Mr Comiskey's work as well) with the 2B reporting to her.

29. At this point some caution is required as Ms Tufo had also described the Claimant's 2016 work as a project management role. However, as she herself added, it was with a view to delivering a "change programme" across the UK business.

30. Ms Tufo produced a series of slides representing how the e-commerce and digital team would evolve. The Digital 2.0 post sat under one of three proposed 2C posts. In that case it was Insight and Innovation and Connected World. The other two were the Pure Play and DTC and the largely unchanged Grocery.com Channel Lead post.

November 2016

31. In November 2016, Ms Ross gave a presentation of her ORG review to Ms Tufo and selected others in management at her level. This set out how Connected 4 Growth would be applied to the Sales function. It envisaged a reversion to 2015 FTE numbers. More specifically it proposed that 20 work level 2 posts would need to be lost from the establishment. E-commerce was identified as being low efficiency and low effectiveness. The presentation envisaged a reasonable amount of autonomy in how this was going to be achieved.

32. Ms Tufo worked and re-worked proposals for reorganising her team. They had the effect of reducing those working at WL2 generally and WL2C, in particular.

33. By 18th November the proposal [at 352] for the reorganization had radical implications for the Claimant's post.

December 2016

34. As December 2016 arrived, the Claimant effected a hand-over which included some emails to Ms Tufo setting out just how much she had achieved (albeit there were residual tasks to be completed). All this only emphasized the Claimant's professionalism.

35. It is worth noting that the Claimant believed Mr Comiskey would cover for her for 8 weeks while a replacement is found [362].

36. The Claimant also made arrangements for staying in touch while on maternity leave [365]. These envisaged that 15th December 2016 would be her last meeting in the office. Her maternity leave was due to commence formally on 6th February 2018 and she envisaged returning to work by 5th February 2018. The Claimant laid out plans for discussions in the first quarter of 2017 about her 2016 performance rating and award

and quarterly catch ups at the end of the subsequent two quarters followed by a scheduled meeting in October and mid-November to discuss plans for return to work [365].

37. The Claimant's own email of 8th December signals her own contribution to the impending C4G process. The work that she did to prepare for the handover meeting on 15th December reflected just how much had been achieved and the ambition of the business adopting Digital 2.0 so it was second nature.

38. The minute of the meeting was distributed by Mr Comiskey. From this it is apparent that there was a reiteration of the importance of Digital 2.0 and its significance for C4G but also that there was an issue as to what were the appropriate resources to give it in 2017. There was a stress on the fact that "owners" need to, "start integrating Digital 2.0 and take ownership of their ecosystem for their brand and ensure it is embedded [422]."

39. By the time the Claimant departed on paid leave, it was apparent that Ms Tufo proposed to run the department with just three employees at Level 2C. She was also considering a reconfiguration of those roles by grouping them under the headings, Now (grocery), New (pure Play) and Next (NRS/DTC – with a Digital Marketing Manager at WL2B reporting into the latter role) [470].

40. This thinking appeared to be aligned with what was being placed in the public domain by the Respondent in January 2016 [476] about the growing importance of innovation and the C4G programme.

41. It is worth noting that by December 2016, the Respondent had adopted a maternity policy. As concerns the problem with which we are concerned, it specified:

"If changes to the area where you work are proposed whilst you are on maternity leave you will be fully consulted at all stages of the process. If your role is redundant you'll be provided with an alternative role where one is available. If you are on maternity or shared parental leave, and are potentially redundant you would not need to take part in any formal selection process for any appropriate vacancies but would have an informal discussion with the relevant line manager(s).

Generally speaking, if a redundancy situation arises before or whilst you are on leave then the process will follow the same or similar timelines as it would do if you were at work. If no alternative role is available, as with all redundant employees you will provided with formal written notice of redundancy."

February 2017

42. The Claimant's child was born on 5th February 2017 and the Claimant began her maternity the follow day [251]. In less than ten days, the Claimant and Ms Tufo were in communication with each other about the Claimant's bonus [478].

43. There was Customer Development Strategy Organizations Review in February 2017. This analysed a number of key trends which showed the necessity for reducing the dependency of the respondent on classic retail and taking advantage of the fragmentation of the market place as well as integrating eCommerce into everyday business. In some cases this involved increasing resources when working with Amazon or direct to customer [DTC] sales but it was plain that 2C roles were to be at the heart of the changes [493]. It envisaged the whole process starting imminently.

44. The detail in the presentation confirmed what had hitherto only been signaled that there was to be a reduction in FTE "headcount" to 2015 levels and Level 2 roles seeing a reduction of twenty posts (as predicted 321 – in fact 18 post were put at risk of redundancy).

45. The decision to roll out C4G and the conclusion that changes to Ms Tufo's department should be announced in the week commencing 20th February created a certain amount of pressure on Ms Tufo. She was thinking about the process, committing the rationale to paper and creating a series of organization charts.

46. Ms Tufo produced a page of reasoning for her Now, New and Next reorganization [470] – with the caution that this was not shared by her but it (appears to be justification for the organization chart that appears at page 470 of the Bundle and, to an extent, unpacks the significance of the developments on the right hand side of the chart).

47. Ms Tufo placed the context of this as being the desire of the company for continuous review with the optimizing of its structure, business growth objectives and priorities – with the aim of delivering the C4G growth model and developing eCommerce as being the key to delivering *accelerated growth*.

48. The document envisaged the Innovation and Capability Lead and the Claimant's Digital Transformation post being combined and re-crafted so that their work would be covered within a new 2B eCommerce Digital Manager post reporting to a 2C responsible for New Revenue Streams (who would be taking up some of the work).

49. The document set out her then rationale (using the particular language of the Respondent) including the fact that she adjudged that the former roles were “capability and future-focused without quantifiable in year growth delivery.” She felt that the slowdown of growth meant that it was necessary to redeploy staff against the *engines of underlying sales growth*. Ms Tufo felt that the work undertaken by both roles had been absorbed by the broader eCommerce team and organization. As concerns the Digital Transformation Role, she was of the opinion that it was a role created to lead the first year of the *roll out* of the internal capability within the UK across the marketing team. However, the second year involved a different job focused on “Business Adoption” of the new capabilities and accelerating the use of the tools that had been created at the end of 2016. She believed that matters had reached the stage where this was really work that needed to be taken on by the entire marketing organization. Ms Tufo saw that in 2017 there was to be a shift to building and delivering and less strategy and vison. This was the foundation for her conclusion that the new post would be 2B rather than the more senior and strategic 2C. The paper concluded by setting out in detail what the new role would cover and possible KPIs.

50. The document represented a snapshot of Ms Tufo’s developing thinking – that she did not share at the time but which appears to be the foundation of her subsequent decisions. She was considering that what was required was less of a “transformation role” and more somebody who could work with the Respondent’s external customers and put Digital 2.0 tools, capabilities and new ways of working into action to *drive growth* or sales/turnover. If this represented quite a quick change – based, as it was, on an assessment of the last 12 months’ of the Claimant’s (hard) work – then she was of the view that the eCommerce team was in an area where it was necessary to “pivot” swiftly to address information, technology and opportunities. This involved a fast pace of change.

51. This Judgment is concerned with the Digital Transformation Role because of the nature of the legal problem that it is determining. However, Ms Tufo also spent time considering the Innovation and Capability Lead post but was concerned that there was some duplication with the Digital 2.0 role and she gave the specific example of the “search champion” seam of work which she now felt was being addressed by the Global team and also it was something that had to be part of the job of each person in the team.

52. For Ms Tufo, the broad outline, objectives and timing of the *C4G* process were effectively imposed on her even if she did have some autonomy as to the precise outcome (i.e. the configuration of her team). It created a dilemma as to how to treat the Claimant. Ms Tufo was concerned about the fact that she was on maternity leave and that, additionally, the

Claimant had only just given birth. On the other hand she thought it inevitable that the Claimant would hear about the process and be caused anxiety. Ms Tufo also wanted to be fair to the Claimant and also to Mr Comiskey – given that at that stage she was concerned that both of them held posts that were at risk.

Consultation on redundancy

53. At the end of the working day on 21st March 2017 the Claimant was contacted by email to request that she join a meeting with Ms Tufo and an HR assistant, Ms Susan McColin-Davy the following day (the Claimant had given birth approximately six weeks before). The Claimant made a special effort to attend – even though it meant that her mother had to look after her daughter in her car in the road outside the office [499 – 500].

54. Once at the meeting, it becomes apparent that it was the first individual consultation for the Claimant to notify her that her job was at risk of redundancy. Ms Tufo relied on talking points that had been prepared for her. The details provided were scant. There was no particular consideration of the fact that the Claimant was on maternity leave but nor did the Claimant make complaint (at the time).

55. The Claimant was told that there was a proposal to merge her Transformation Manager post (0.6 FTE) with the e-commerce Innovation and Strategy role (1.0 FTE). One of the consequences of this was that the Claimant's post was at risk of redundancy and the meeting constituted the first of three consultation meetings.

56. The Claimant asked for the rationale for the redundancies. The Respondent referred to "Connected for Growth" [C4G] – while the Claimant had a good understanding of *C4G,* she could not see what that would justify the redundancy of her post given that e-commerce was meant to be an area of growth.

57. The Claimant was also concerned that she was not provided with the details as to who was in the selection pool for redundancy and the rationale as to why her post was at risk as opposed to any employee not on maternity leave

58. The Claimant wanted to know in addition about the number of redundancies that were proposed. The Claimant also asked for more by way of "definition" of the new role and how she could apply for it. The Claimant was not shown a job description for the revised role or a list of selection criteria. It was said that she would be provided with a list of alternative roles at a later date. The Claimant stressed that she was not considering a return to full-time duties at this time.

59. In the meantime consultation presentations (shared with all) revealed that part of the business rationale was to reduce costs, raise standards and simplify work. The selection pools were generally to be quite narrow being confined to those directly impacted by the proposed changes. The documents made no mention of the significance or otherwise of being on maternity leave. The Claimant noted the stress on diverted resources into growing channels and cites e-commerce as a key growth area [507 – 509].

60. The Claimant then received a further invitation for a meeting on 6th April 2017 with Ms Tufo [510 – 511]. This constituted the second consultation meeting. The Claimant was issued with a letter confirming the main points discussed at the previous meeting on 22nd March 2017. The letter confirmed specifically that the Claimant's post was at risk of redundancy and that should her role be confirmed as redundant a provisional date of 30th June 2017 had been identified as when the Claimant's employment would come to an end. It was confirmed to the Claimant that the proposal was to combine the Claimant's 0.6 FTE 2C role with a 1.0 FTE role and regrade it to a 1.0 FTE 2B role. The Claimant asked for the job-description of the hybrid e-commerce role but was told that it had not yet been written.

61. The Clamant posed various questions to Ms Tufo [513 – 514]. The Claimant was shown a list of available roles on 12th April 2017 but none of them were at the Claimant's work level and location [517]. The Claimant was told that no suitable alternative roles had come up since the previous meeting but that if one matching the grade, location and terms of employment were to come up, they would contact the Claimant directly. The Claimant asked whether she might find a role in e-commerce but was told that was already being restructured to create business unit heads and was configured in such a way that it was felt that these roles were not suitable for her. The Claimant expressed an interest in marketing, commerce and Digital roles.

62. The Claimant was handed [515] an *at risk* letter at the second consultation meeting. It made no reference to the fact that she was on maternity leave.

63. The claimant was emailed the extant vacancies on 13th April. The Claimant asked for the eCommerce job description to be sent to her. Ms Daniela Tufo shared with the Claimant by email details of the proposed new role at her request. The Claimant was informed that Ms Tufo was preparing to advertise this role [518 – 519 and 669]. The details of the post were slightly revised from that which Ms Tufo had produced for herself earlier [498] but bore many similarities. The email that Ms Tufo sent her did not give a particular title to this post but did say that it would

be a re-graded 2B role and would require somebody to fulfill it full-time. The email explicitly described the post as a combination of the 1.0 FTE post undertaken by Mr Comiskey and the Claimant's 0.6FTE post role.

64. The post was made up of four elements, the first of which was Digital 2.0 Programme Coordinator. The other elements were Digital Measurement and Performance Tracking, the eCommerce Playbook and lastly externalizing. This last involved working with customers to build partnership projects which included focus on leading the *holistic search* and *behavioural analytics* and *connected path to purchase projects*.

65. In the meantime, Ms Tufo was engaged in producing a yet further version of her organizational chart [506]. We had trouble establishing the provenance of this but it appears to show that, even during the course of the consultation process, Ms Tufo was working up ever more radical proposals by way of reorganization and the April iteration is what came to pass by 8th May 2017. However, these documents and the thinking that lay behind them were not shared with the Claimant.

66. On 24th April 2017 a list of available roles was shared with the Claimant but none of them were at her work level and location (there were few 2C appointments available and it was not apparent that any were part-time and none were in Leatherhead).

67. On 4th May 2017, the third and final consultation meeting was held with the Claimant in connection with proposed redundancy [523]. Again there was no explicit recognition or discussion of the fact that the Claimant was on maternity leave.

68. The Claimant was informed of the decision to terminate her employment by reason of redundancy. To an extent the meeting mainly just marked the fact that the Respondents had not yet been found the Claimant alternative employment and that if were to continue, the Claimant would leave the Company on 30th June 2017. This was followed up by letter. As with previous correspondence, there was no reference to the fact that the Claimant was on maternity leave.

69. The *C4G* process ran to the same timetable for the Claimant as to other employees in her Team. Of the 18 persons concerned (i.e. "at risk," alternative roles were found for five of them, meaning that there were 13 employees in Customer Development who were made redundant. By the time the process was completed the eCommerce and Digital Team only had three 2C posts. This was actually 2.8 FTE as the "New" post was 0.8 FTE (now 0.9). Mr Comiskey was not employed in the Team and neither was the Claimant and the post of Digital Marketing Manager was unfilled.

70. A comparison of the job description of the Claimant's previous post and that of the new Digital Marketing Manager showed that by the end there

were strikingly low elements of consistency between them. They also have very different key performance indicators [KPIs]. Ms Tufo did say however, that the Respondent had still been prepared to hold the new Digital Marketing Manager role for the Claimant – but the problem was obviously the fact that it was at a lower grade and was full-time.

71. Ms Tufo had determined that the role needed to be full-time not only because the amount of work that the job was covering but also because it was outward-facing i.e. there was a necessity to build relationships with the marketing and media teams of key customers and media partners. This was time-consuming and the speed and comprehensive nature of any response was critical (i.e. the Claimant had to be available five days a week). This was something that the Respondent had learned with its first performance marketing campaign with a particular client. Customers would expect a five day response and it was necessary that the respondent should offer this to them. This decision that the post should be full-time was genuinely made. It was not the purpose of the exercise to shut out the Claimant.

Appeal

72. The Claimant was informed that she had a right of appeal [525 – 526] and on 8th May 2017 the Claimant's appeal was initiated by her lawyer. They wrote an excellent letter setting out the Claimant's understanding of what had happened in the redundancy process and applying the relevant law, they concluded that the Respondent was embarking on a course of action that was unlawfully discriminatory.

73. The letter showed that the Claimant's understanding from the meeting on 22nd March 2017 was that the proposal was to merge her post with that of the 1.0 FTE eCommerce Innovation and Strategy role and create one full-time role. She did not understand clearly that it was to be a 2B (i.e. demoted) grade until her second meeting – when there was still no job description available.

74. The Claimant could not understand the rationale for redundancies in this business critical area. She felt that she was being singled out. And that even by the third meeting there was no understanding of what the situation would be by the time she was due to return from maternity leave.

75. The Claimant's solicitor set out clearly that they felt that the timing of the redundancy process was inappropriate and disrespectful while she was on maternity leave and that – with reference to matters that were in the public domain as well as slides that she had access to, she could not understand how there could be a redundancy in an eCommerce marketing rile. Her Solicitors on her behalf set out that in law the

redundancy was unlawful in six ways (including breaches of the M&PLR 1999).

76. The response was a letter of 18th May 2017 which was unsatisfactory [548 – 549] in circumstances in which we would have expected a constructive response which also invited the Claimant to a meeting to discuss her appeal. The response was rather, somewhat argumentative and included an inaccurate description of the 22nd March 2017 meeting (it implied that it was more informative than it was). It did reiterate that the respondent would hold the new full-time 2B role for the Claimant if she expressed an interest in the same by 23rd May 2017. The letter did not really address the complaint and did not set out how the appeal would be managed.

77. The Claimant's solicitor responded in a very timely way of a letter of 23rd May calling into question whether the new role was all that different from that previously undertaken by the Claimant, and querying the rational for it being full-time) especially against a background in which the Claimant had achieved so much on a part-time basis. It also complained explicitly of the timing of the meeting of 22nd March. It should perhaps be said, that the comments about the timing of the process, were understandable. The caveat might be that these complaints were not actually made at the time.

78. The Claimant was sent on 8th June 2017 her employment termination letter 559 – like so many documents that we have been provided from the respondent it made no mention of her maternity leave.

79. It wasn't until 9th June 2017 that the Claimant finally got a recognisable response to her appeal. The most striking aspect of the correspondence from the Respondent at this stage was that it was surprisingly argumentative and appeared to show a somewhat closed-minded attitude to the points made on her behalf [562].

80. An appeal meeting was finally convened on 19th June 2017. It was conducted by the VP (Vice President) Refreshment UK and Ireland, Mr Noel Clarke accompanied by an HR advisor, Ms Sabina Wojdalska. Mr Clarke had the advantage that he did not have a previous personal connection with the Claimant and he had ten years' worth of experience of managing employees. However, he had only conducted one previous appeal (whilst at Britvic).

81. Given that the background to the appeal was the *Connected 4 Growth* Programme., it can be said that there was a shared understanding that the purpose of the same was to make Unilever's workforce more agile

and to increase the company's external orientation and focus. Mr Clarke was familiar with what was involved in the structural review and reorganisation that *C4G* implied. He had seen the reduction in FTEs within the teams that sat in marketing.

82. The Appeal hearing was organised around the points made on the Claimant's behalf. The model appeared to be that it was for the Claimant to set out what the problem was with the dismissal decision.

83. One of the central points made in the appeal is that there was not a genuine situation of redundancy i.e. there was no diminished requirement from her role as she felt that the area of business in which she was working, (eCommerce) was growing. The Claimant felt the new Digital Marketing Manager role mirrored the responsibilities of her Digital Transformation role. It was simply an evolution of her role which could be performed part-time

84. The Claimant argued that the declaration that her post was redundant was opportunistic because the team had managed without her while she was on maternity leave. From a subjective point of view this was understandable – but actually, Ms Tufo had been considering steps somewhat like this at a much earlier stage.

85. Mr Clarke believed that one of the central thrusts of the appeal was a complaint about the timing of the redundancy process in that the Claimant could not understand why the redundancy process could not have begun when she returned from maternity leave

86. Mr Clarke noted that a feature of the appeal was a complaint to about the failure to offer the Claimant suitable alternative employment – as part of this argument, the Claimant queried whether the Digital Marketing Manager role has been correctly graded at work level 2B and also as to whether it was necessary for it to be a full-time role.

87. The Claimant complained that the new role is full-time without proper explanation and that she has the skills to do the new job (indeed it was being offered to her) but was rendered inaccessible by the requirement to make it full-time.

88. The Tribunal has misgivings that Mr Clarke did not present as a witness who was the confident in his appeal role and that the meeting of 19th June 2017 was somewhat superficial – largely because the Claimant was left arguing into a vacuum. However, Mr Clarke rightly appreciated that there were some gaps in the evidence that he required to determine the Claimant's appeal. The first was that he needed further detail from

Ms Tufo as the Claimant's line manager. In fact, it proved easier to do this by way of an additional document [632 – 634]. The correspondence and minutes of meetings did not provide him with the information that he required.

89. Ms Tufo placed the decision to put the Claimant's post as at risk of redundancy with the wider content of C4G. Effectively this required her to look at her team and identify where efficiencies could be made. Ms Tufo reiterated that 18 roles were identified as being at risk of redundancy within the Customer Development Department and that the Claimant's role was included in this group because the digital transformation project she had been managing had moved to the next phase (in which her work was integrated into the work of others – a word from another context might be appropriate here – there was a requirement for "mainstreaming").

90. Ms Tufo explained that the Digital Transformation Manager role had involved creating a strategy for improving digital processes and managing the transformation of those digital processes (known as Digital 2.0) for their first year. Her belief was that as that "transformation phase" had come to a close and Digital 2.0 has been put in place, that in future, Unilever would be looking to implement new digital processes and digital tools to increase Unilever sales to external clients. In other words the Digital Marketing Manager role would involve delivering marketing plans for new and existing clients. It was this "external" focus which has led her to conclude that this was a full-time role. The Digital Marketing manager would be required to interact regularly with Unilever's existing and target clients and would need to work to their schedules. She envisaged an increase in internal stakeholders as well – as this was an implementation as opposed to a strategy focussed role. The Digital Transformation Manager role had been fairly autonomous whereas she envisaged that the Digital Marketing Manager would be working closely with other teams. The work would need to be done at a speed and pace that required an individual to be committed to it on each work day and not as a part-time worker.

91. Ms Tufo produced the Job Description that had been created for the Digital Marketing Manager (2B) post. It is important to note that the Claimant had only been shown the email of 13th April 2017 [518]. This new JD showed the signs of being [610] a marketing document e.g. "you are a strategy guru." It is potentially significant that the JD says that the Manager is to be the lead interface for the eCommerce Team with the media team and with our external media partners e.g. Google, Spotify etc… (i.e. there was some support for the assertions made by Ms Tufo about it being outward-facing)."

92. Mr Clarke identified that one of the key issues was whether the Transformation and Digital Marketing Manager roles had been correctly graded according to Unilever methodology. To that end he commissioned an assessment of the role to be undertaken by Mr Chan.

93. Mr Ronald Chan is a senior compensation specialist – in other words he is an expert in pay/remuneration for Unilever. He is based in Canada but worked in the UK in 2017. His Canadian origins and the position of his team in the Company mean that they hold themselves out as being about as independent as is possible given that they sit within the Company. The only caveat that needs to be expressed is that Mr Chan had a discussion with Ms Tufo to get the context of the job. Ms Gemma Cory was present from HR but no note was produced – which meant that the meeting was not entirely transparent. However, the documentation he has produced to the Tribunal is reasonably comprehensive and it is not clear that it shows signs that Ms Tufo said things to him that were not said in her appeal statement.

94. Unsurprisingly, the evidence of Mr Chan is that pay structure, benefits, notice periods and other contractual terms are set by reference to work levels.

95. Unilever has a global grading structure. Work level 1 roles are generally entry-level/ *no-management roles*. There are three Work Level 2 roles (2A – C) with 2A being the most junior (i.e. junior management). Work Level 2As and 2Bs will tend to report to 2Cs. Those at WL 2C often report to those of Level 3. Work Level 3 roles carry the title of Director and are often the most senior person within a particular function within a particular country

96. Mr Chan provided a formal job evaluation for the two roles:
    (i) Digital Transformation Role
    (ii) Digital Marketing Role

97. Mr Chan concluded that the Digital Transformation Role was correctly labelled (or evaluated) at a Work Level 2c role. The principal reasons for this conclusion by Mr Chan was the fact that the Digital Transformation Manager was responsible for the strategic development of the Digital 2.0 platform which was consistent with the level of strategy development that was expected of a Work Level 2C position. The Transformation Manager was the sole expert in Digital 2.0 within the-commerce team and responsible for putting Digital 2.0 in place and for improving the internal capability at using digital tools (established under that project); and 2C positions tended to have a longer time horizon rather than focussing on in-year results with clients. It was not anticipated that the transformation

Manager would be judged against in-year results of short-term targets generally.

98. Mr Chan next assessed the Digital Marketing Role as operating at Work Level 2B. He concluded this on the basis that the Marketing Manager's post was focussed on deploying a strategy created by the Transformation Manager rather than creating or developing the strategy. It was focussed on Digital 2.0 tools that were in place and was more consistent with the responsibility of a relatively junior employee. The post holder would not be considered to be the sole expert in Digital 2.0 and the level of accountability expected of the Marketing Manager role was less than that for the Transformation Manager role and expertise was shared across different Managers in the Commerce team It was, in truth, more of a *project management* role and more focussed on in-year results and sales targets (in contrast to delivering change which had hitherto been the Claimant's role).

99. Mr Clarke understood from all this that the Digital Transformation Role at level 2c and Digital Marketing Manager's post had been correctly assessed as a Level 2B role – principally on the basis that that this job focused on executing a strategy as opposed to the creation of the same. The Digital Transformation Manager's role required a level of innovation, leadership and autonomy that would be expected of a work level 2C employee. He noted that it was common when new processes are introduced across the business for the initial change process to be managed by a more senior leader – such as would operate at 2C and then, one the change has been effected, for a more, "business as usual" approach to be adopted. And the work was undertaken by a – relatively - more junior employee (at level 2B and below).

100. Mr Clarke emailed the outcome of the appeal to the Claimant on 5th July 2017. He told her that he had taken time to interview key stakeholders. He gave her a reasoned decision about why he did not uphold the appeal and attached the materials that he had commissioned and had relied upon.

101. As concerns the timing of the redundancy process, Mr Clarke concluded that the Claimant's redundancy was part of a wider exercise across the sales function of the Company. He appreciated that the timing was extremely unfortunate for the claimant given her personal circumstances but that the Company had been anxious to consult her closely so she was treated on a level-playing field with others affected. He apologised for the extra anxiety that this had caused the Claimant.

102. He next turned to the argument that this was not a case of there being a redundancy. Mr Clarke was aware that there were widespread

redundancies across Unilever's sales function pursuant to the *C4G* programme. He concluded that the Claimant's specific role was concerned with the development of a digitalisation strategy that has been put in place and that that her role was no longer required. He found no evidence that she has been selected for redundancy due to her maternity leave.

103. On the issue of the failure to offer the Claimant suitable alternative employment – Mr Clarke found that the list of vacancies that had been identified at that time disclosed nothing that the claimant herself considered suitable. He reiterated the offer that the Claimant could work in the Digital Marketing Manager role on return from maternity leave – albeit he concluded that it had been correctly graded and necessitated being a full-time role.

104. Mr Clarke concluded that the Digital Marketing Manager role would have a large number of external stakeholders as it was involved using Unilever's new digital processes to increase sales through external platforms. He understood that the Digital Marketing Manager would need to be available to interact regularly with key external clients such as Amazon, Ocado and Uber. He could also see that the role was such that it had to look after a portfolio of Unilever brands which would require interacting with internal stakeholders and delivering a large number of responsibilities in short-timescales. This necessitated the job holder being available full-time.

105. Stepping back from the detail, it is important to record that the Claimant's contract of employment had been terminated by reason of redundancy on 30th June and yet she was given the first comprehensive justification by way of the materials that were emailed to her on 5th July 2017 (even then this did not clearly include the organisational charts).

The Applicable Law

Burden(s) of Proof

106. The Tribunal believe that by the time that the submissions had closed, the parties had reached agreement as to the way the burden of proof operated with the questions that we faced, as follows:

(i) 'Ordinary' Unfair Dismissal – the Burden is on the Respondent to show the reason for dismissal and that it is a potentially fair reason. The question of reasonableness in section 98(4) carries a neutral burden;

(ii) Automatic Unfair Dismissal – the employee asserting automatic unfair dismissal has an evidential burden to show — without having to prove — that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that she is advancing. However, once

the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which one of the competing reasons was the principal reason for dismissal – (this is apparent from *Maund v Penwith District Council* [1984] ICR 143, CA).

(iii) Unlawful Discrimination – section 136 Equality Act 2010 provides that, once there are facts from which an Employment Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

(iv) Detriment for Part Time status – by dint of the normal rules of statutory interpretation, it is for the Claimant to show that her redundancy was less favourable treatment than a comparable full time worker; and if so that it was on the ground that she was a part time worker. It is for the Respondent to establish any justification.

Automatic Unfair Dismissal – s99 ERA 1996

107. The statutory and regulatory regime governing this claim is as follows:

Employment Rights Act s99 Leave for family reasons

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

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

…

(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

1999 Maternity and Parental Leave Regulations

Regulation 20 Unfair dismissal

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

(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

Regulation 10 Redundancy during maternity leave

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

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his

successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).
(3) The new contract of employment must be such that—
(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

108. We were referred to the Judgment of the EAT in *Calor Gas v Bray EAT/0633/04/DZM* – albeit there is an argument that its status as an authority is diminished by the fact that it was a case where the Respondent had been debarred so there was not full argument (no reflection on HHJ Ansell). There is also a further complication caused by a concession that was meant to have been made by the Appellant's counsel below which limits its usefulness. Nevertheless, HHJ Ansell say at para 17:

> "We agree with Mr Panesar's submissions that the approach of the Tribunal as regards Regulation 10 should be firstly to consider whether or not it was practicable by reason of the redundancy for her current employment to continue. That would seem to us to involve *t*he employers satisfying a tribunal that it was necessary to implement the redundancy during the period of maternity leave."
> …
> "we cannot accept that the proper interpretation of the Regulation 10 means that the consultation period during which time suitable alternative vacancies can be considered is automatically extended until the employee does return to work. We are reinforced in this view by consideration of Regulation 7(5) of the 1999 Regulations which provides that: "where the employee is dismissed after commencement on ordinary or alternative additional maternity leave period before the time when (apart from this paragraph) that period would end, the period ends at the time of the dismissal".

109. Additionally, as pointed out by the Respondent, the authors of Harvey on Industrial relations and Employment Law say at J.3.C (6) 178.01,

> "If, however, the employer does dismiss the employee for redundancy during her maternity leave, the dismissal will end the maternity period and start the running of time for an unfair dismissal claim. In that event, the continuing duty to offer any available

alternative positions would presumably not apply to any such vacancies that arise thereafter, so that it may be of advantage to the employer to address the redundancy situation when it arises rather than leaving it until the employee seeks to return to work."

110. In *Simpson v Endsleigh Insurance Services Ltd* [2011] ICR 75, HHJ Ansell said [27],

"We would agree with Ms Palmer's view [Counsel for the employer]. The requirement of the suitability set out in regulation 10(2) can only sensibly be tested by the requirement that it is coupled with a new contract of employment, which complies with regulation 10(3)."

111. HHJ Ansell went on to say at [31],

"It seems to us that the tribunal were absolutely correct to focus on an objective decision made by the employers

Suitable Alternative Employment R. 10

112. The regime created by Regulation 10 provides that an employee who is made redundant while on maternity leave is entitled to be offered suitable alternative employment which exists and provides for this to be done in preference to other employees under R. 10. Per *Simpson v Endsleigh, t*he assessment of the suitability of the available vacancies is from the perspective of an objective employer knowing what it does about the employee. Rule 10 may require a person on maternity leave to be favoured but that obligation cannot extend to favouring pregnant employees or those on maternity leave beyond what is reasonably necessary to compensate them for disadvantages occasioned by their condition (see *Eversheds Legal Services Ltd v De Belin* [2011] ICR 1137 at 1148 [29]).

113. This interpretation is fortified by the Judgment of HHJ Eady QC in *Sefton Borough Council Wainwright* [2015] ICR 652, where at para [47] she says, **"**As the appeal tribunal held in *Eversheds Legal Services v De Belin* [2011] ICR 1137, 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."

"Ordinary Unfair Dismissal"

114. The relevant statutory framework is to be found in Employment Rights

Act 1996 – starting with section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(…
(c) is that the employee was redundant, or
…
(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

115. Additionally, the Tribunal is concerned with section 139
(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
…
have ceased or diminished or are expected to cease or diminish.
. . .
(6) In subsection (1) “cease” and “diminish” mean cease and diminish either permanently or temporarily and for whatever reason.

116. Dismissals on grounds of redundancy and for business re-organisation are frequently closely related. It is therefore unsurprising that one of the first cases on the labelling of dismissals concerns this issue.

117. In *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA, Lord Denning MR at 329 D-F said this,

> “The employer has under the *Industrial Relations Act 1971* to “show” the reasons for the dismissal. That is clear from section 24 (6). It must be a reason in existence at the time when he is given notice. It must be the principal reason which operated on the employers' mind: see section 24 (1) (*a*). It should, I think, be known to the man already before he is given notice, or he must be told it at the time. But I do not think that the reason has got to be correctly labelled at the time of dismissal. It may be that the employer is wrong in law as labelling it as dismissal for redundancy. In that case the wrong label can be set

aside. The employer can only rely on the reason in fact for which he dismissed the man, if the facts are sufficiently known or made known to the man. The reason in this case was — on the facts — already known or sufficiently made known to Mr. Abernethy. The wrong label of "redundancy" does not affect the point."

118. This would appear to be authority for the proposition that in certain circumstances, the label attached to a dismissal is not definitive and a tribunal may look behind it.

119. It is obviously important that the substitution of a different label to the same set of facts does not prejudice the Claimant for which see, *Hannan v TNT-IPEC (UK) Ltd* [1986] IRLR 165, EAT Hutchison J at [22]

"It seems to us that one can summarise the distinction between the two lines of authority to which we have referred in this way, that where the different grounds are really different labels and nothing more then there is no basis for saying that the late introduction, even without pleading or without argument, is a ground for interference on appeal; but that where the difference goes to facts and substance and there would or might have been some substantial or significant difference in the way the case is conducted, then of course an appeal will succeed if the Tribunal rely on a different ground without affording an opportunity for argument. For the reasons which we have endeavoured to express, we are persuaded that Mr Field is correct when he says that in the present case the distinction is in truth one of labels and that there are no grounds for thinking the case would have been conducted in any significant way differently or more thoroughly investigated or the cross-examination or the evidence called would have been in any way significantly different had the case, as ultimately relied upon by the Industrial Tribunal, been pleaded or canvassed in evidence.

Redundancy

120. The Tribunal accept that for a dismissal to be by reason of redundancy, a redundancy situation must exist. The three-stage test in *Safeway Stores plc v Burrell* [1997] ICR 523 applies:

120.1 was the employee dismissed?

120.2 if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

120.3 if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

121. This was endorsed in endorsed by the House of Lords in *Murray v Foyle Meats Ltd* [1999] ICR 827 where Lord Irvine said at 829:

"My Lords, the language of paragraph (*b*) is in my view simplicity itself. It asks two questions of fact. The first is whether one or other of various states of economic affairs exists. In this case, the relevant

one is whether the requirements of the business for employees to carry out work of a particular kind have diminished. The second question is whether the dismissal is attributable, wholly or mainly, to that state of affairs. This is a question of causation. In the present case, the tribunal found as a fact that the requirements of the business for employees to work in the slaughter hall had diminished. Secondly, they found that that state of affairs had led to the applicants being dismissed. That, in my opinion, is the end of the matter."

122. In *Pillinger v Greater Manchester Area Health Authority* [1979] IRLR 430, EAT, Slynn J decided that in a workplace (the decision is pretty fact-specific) where a more junior employee was engaged as part of a team to undertake the same work as the Claimant, this does not represent a cessation and diminution of the work.

123. More widely, it is important to recall also the Judgment of Browne-Wilkinson J and members in *Williams v Compair Maxam Ltd* [1982] IRLR 83 from [18]

"First, that it is not the function of the Industrial Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The second point of law, particularly relevant in the field of dismissal for redundancy, is that the Tribunal must be satisfied that it was reasonable to dismiss each of the applicants on the grounds of redundancy. It is not enough to show simply that it was reasonable to dismiss *an* employee; it must be shown that the employer acted reasonably in treating redundancy 'as a sufficient reason for dismissing *the* employee', i.e. the employee complaining of dismissal. Therefore, if the circumstances of the employer make it inevitable that some employee must be dismissed, it is still necessary to consider the means whereby the applicant was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose the applicant, rather than some other employee, for dismissal.

[19] In law therefore the question we have to decide is whether a reasonable Tribunal could have reached the conclusion that the dismissal of the applicants in this case lay within the range of conduct which a reasonable employer could have adopted. It is accordingly necessary to try to set down in very general terms what a properly instructed Industrial Tribunal would know to be the principles which, in current industrial practice, a reasonable employer would be expected to adopt. This is not a matter on which the chairman of this Appeal Tribunal feels that he can contribute much, since it depends on what industrial practices are currently accepted as being normal and proper. The two lay members of this Appeal Tribunal hold the view that it would be impossible to lay down detailed procedures

which *all* reasonable employers would follow in *all* circumstances: the fair conduct of dismissals for redundancy must depend on the circumstances of each case. But in their experience, there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, 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, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

Suitable Alternative Employment and Pool of selection

124. There is no requirement to create a new role in order to offer alternative employment. There is also no rule that there must be a pool. Employers have a good deal of flexibility in defining the pool from which they will select employees for dismissal — *Thomas and Betts Manufacturing Co v Harding* [1980] IRLR 255, CA. The question of how the pool should be defined is primarily a matter for the employer to determine. The pool can be a 'pool of one'. Employers need only show that they have applied their minds to the problem and acted from genuine motives. A tribunal will judge the employer's choice of pool by

asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. The identification of an appropriate pool for selection is an area in which tribunals must take care not to substitute their own view for that of the employer.

125. In *Capita Hartshead Ltd v Byard* [2012] IRLR 814, EAT, Silber J said at [31]:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that

(a) 'It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted' (per Browne-Wilkinson J in *Williams v Compair Maxam Ltd* [1982] IRLR 83 [18]);

(b) '[9]...the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn' (per Judge Reid QC in *Hendy Banks City Print Ltd v Fairbrother* [2005] All ER (D) 142 (May));

(c) 'There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem' *(*per Mummery J in *Taymech Ltd v Ryan* [1994] EAT/663/94, 15 November 1994, unreported);

(d) The employment tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he h*as* 'genuinely applied' his mind to the issue of who should be in the pool for consideration for redundancy; and that

(e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it.

126. The Claimant also urged upon us the Judgment of the EAT in *Robertson V. Magnet Ltd (Retail Division)* [1993] IRLR 512 where Lord Coulsfield said this at [6]:

"As we understand what Lord Bridge said, the exception will normally only be available to the employer where the employer has himself considered whether consultation would be useful, and reached the conclusion that it would not. The speech of the Lord

> Chancellor (at p. 504) seems to be to the same effect. In the present case, there is no hint in the findings of the Industrial Tribunal, nor was there, so far as we can tell from the statement of reasons for the decision, any hint in the evidence that the employers had considered whether or not to consult the appellant and come to the conclusion that it would have been futile to do so. The employers were of course placed in circumstances of difficulty, and were under stress and pressure. Nevertheless, as we understand the position, consultation is a very important requirement in redundancy dismissals, and is one which should not be overlooked or allowed to go by default. Accordingly, whatever the pressures, consultation is one of the points which an employer should consider, and if he does not do so, then normally it is likely that he will be held to have acted unfairly. In the present case it seems to us that that is the position. The employers did not consider consultation and there was certainly no consultation in fact. The circumstances were urgent, but were not so urgent that the employee could not have been given some opportunity to have his say or make his contribution. The majority of the Industrial Tribunal have, in our view, paid attention to the difficult circumstances affecting the employers but have not taken sufficient account of the fact that the employers did not, on the findings, apply their minds to the question of consultation at all. In these circumstances, we have come to the conclusion that there was a failure to consult, that that failure made the dismissal unfair, and that the conclusion of the majority of the Industrial Tribunal was in error."

Discrimination pursuant to Equality Act 2010 ss 13 and 18

127. The relevant statutory provisions are to be found in the Equality Act 2010 and are as follows

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

. . .

(8) This section is subject to sections 17(6) and 18(7).

s18 Pregnancy and maternity discrimination: work cases

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

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

(a) because of the pregnancy, or

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

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

…

128. We reminded ourselves of the Judgment of the Court of Appeal in *King V. The Great Britain-China Centre* [1991] IRLR 513. It is important to note that in some regards it has been overtaken as regards the provisions as to the burden of proof etc… but two points made by Neil LJ are worth citing – at para [38]:

(2) It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption 'he or she would not have fitted in'.

(3) The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal….

129. The Claimant relies upon, *O'Neill V (1) Governors of St Thomas More RCVA Upper School (2) Bedfordshire County Council* [1996] IRLR 372 Where Mummery P said [55],

"In our view, the distinction made by the tribunal between pregnancy per se and pregnancy in the circumstances of this case is legally erroneous. The tribunal may have been led to draw such a distinction as a reflection of the perceived subjective motives of the governors advanced by them in their submissions. The 1975 Act requires the industrial tribunal to decide a case of sex discrimination by having regard to the question whether the treatment complained of was on the ground of sex, not by having regard to the subjective motives of the alleged discriminator. (Consideration of motives is to be avoided.) Dismissal for pregnancy is on a ground of sex. Pregnancy is unique to the female sex. The concept of 'pregnancy per se' is misleading, because it suggests pregnancy as the sole ground of dismissal. Pregnancy always has surrounding circumstances, some arising prior to the state of pregnancy, some accompanying it, some consequential on it. The critical question is whether, on an objective consideration of all the surrounding circumstances, the dismissal or other treatment complained of by the applicant is on the ground of pregnancy. It need not be only on that ground. It need not even be mainly on that ground. Thus, the fact that the employer's ground for dismissal is that the pregnant woman will become unavailable for work because of her pregnancy does not make it any the less a dismissal on the ground of pregnancy. She is not available because she is pregnant. Similarly, in the present case, the other factors in the circumstances surrounding the pregnancy relied upon as the 'dominant motive' are all causally related to the fact that the applicant was pregnant – the paternity of the child, the publicity of that fact and the consequent untenability of the applicant's position as a religious education teacher are all pregnancy-based or pregnancy-related grounds. Her pregnancy precipitated and permeated the decision to dismiss her. It is not possible, in our view, to say, on the facts

found by the industrial tribunal, that the ground for the applicant's dismissal was anything other than her pregnancy. Indeed, there was no finding of fact by the tribunal that the applicant would have been dismissed, even if she had not become pregnant."

130. The Claimant also referred us to the decision of the Court of Appeal in *O'Donoghue V. Redcar & Cleveland Borough Council* [2001] IRLR 615 where the Court of Appeal cited with approval the following paragraph of the Judgment of the EAT below:

> [52]. It may be added that to hold that the appointing panel were "affected" by Miss O'Donoghue's views does not suffice in law where there are other reasons operating such as, here, that she was not an easy person to work with or good with staff. Although *Nagarajan v London Regional Transport* [1999] IRLR 572 HL deals primarily with victimisation on racial grounds, it is proper to expect the "significant influence on the outcome" to which Lord Nicholls refers in paragraph 19 of that decision to be required in a broader class of cases, including the case before us. The tribunal was alive to the need to make an assessment of the importance from a causative point of view, of the particular motives operating during the selection progress; in their paragraph 19 they quote a passage to such effect from *Nagarajan v Agnew* [1994] IRLR 61 extracted from *Briggs v James* [1982] IRLR 502. However, the tribunal (having already held that it might well have been Mr Frankland's intervention that had swung the majority, not improperly, to Mr Cookson) appears to have made no assessment of the relative significance of the influence of Ms O'Donoghue's strong feminist views on the decision to appoint Mr Cookson. There is no express holding that the strong feminist views became a significant influence on anyone's decision as to selection, still less that they operated to such effect on all or on at least a majority of the appointors or on Mr Frankland. Moreover, we are entitled to doubt that a reaction against "strong feminist views" is of itself an indication of the presence of sexual discrimination. Quite apart from the fact that, in a situation in which teamwork was demanded, it might have been that it was against the expression of strong views of any underlying potentially divisive nature that objection was taken, it might be added that it by no means follows that only a woman can hold or express strong feminist views. Discrimination against a woman as the expresser of feminist views is thus not necessarily discrimination on the grounds of her sex.

131. Potter LJ went on to say at [26] of the Court of Appeal Judgment: "The industrial tribunal, in our judgment, correctly directed itself in accordance with the passage in the judgment of the Employment Appeal Tribunal (presided over by Knox J) in *Nagarajan v Agnew and others* [1994] IRLR 61, paragraph 45, which the industrial tribunal set out at paragraph 19 of its decision. The industrial tribunal were clearly of the view that the panel, in arriving at their decision to appoint Mr

Cookson, were actuated by mixed motives, ie Mr Frankland's 'not improper' advice and by the appellant's strong feminist views expressed over a period of years. That was a conclusion of fact by the industrial tribunal for which there was evidence as we have set out. Having heard almost everyone on the panel, the industrial tribunal were not satisfied that the sole reason for the panel's decision was Mr Frankland's advice; it was a mixture of two reasons and the unlawful reason was of sufficient weight to be treated as a cause of Mr Cookson being preferred to the appellant."

132. In *Sefton Borough Council v Wainwright 2015 ICR 652* EAT (HHJ Eady QC and members) *at 662* [50 - 52]*,* the EAT emphasised that there is a difference in how unfair dismissal protection is afforded under R. 10 of the MPL Regs and how protection is afforded against discriminatory (i.e. unfavourable) treatment because of pregnancy/maternity under S.18 Equality Act 2010. HHJ Eady said this,
"[50] Turning to the appeal against the tribunal's conclusion on direct discrimination, I consider Miss Chudleigh is right in distinguishing between how the protection is afforded under section 18 of the Equality Act 2010 and how it is provided under regulation 10 of the 1999 Regulations. The former provides that, if possessing the protected characteristic, a woman does not have to show less favourable treatment; merely unfavourable treatment because of pregnancy or maternity leave. Regulation 10, on the other hand, provides that, during the relevant period, a woman is entitled to special protection and will be treated as unfairly dismissed if this is denied to her.

[51] The claimant's case is put on the basis that a breach of regulation 10 means that there is inherent discrimination (per *Johal v Commission for Equality and Human Rights* 2 July 2010) for section 18 purposes. That, however, goes beyond the language of the statute. It would have been relatively easy for the legislators to provide that a breach of regulation 10 would give rise to a breach of section 18 of the Equality Act 2010 (as is effectively done in respect of unfair dismissal by the operation of regulation 20). The legislators apparently chose not to do so. Instead the language used is that of unfavourable treatment which is required to be because of the protected characteristic.

52 Here the unfavourable treatment of the claimant—her own position being made redundant and not being offered a suitable available vacancy—certainly coincided with her being on a relevant period of maternity leave. I do not, however, accept Mr Sigee's submission that must inevitably mean that it was *because of* it. That seems to me to be assuming the reason why something happened simply on the basis of the context in which it happened. I note that such an assumption is not made in the other authorities to which I have been referred and it does not seem to me to be the way in which section 18 is worded. I accept Miss Chudleigh's submission that the tribunal was therefore obliged to

ask what was *the reason why* the claimant was treated the way she was."

133. The Claimant has referred us to *Clayton v Vigers* [1989] ICR 713, EAT which was a case which (for our purposes) was concerned with section 60, *Employment Protection (Consolidation) Act 1978* which reads, reads:

"An employee shall be treated for the purposes of this Part as unfairly dismissed if the reason or principal reason for her dismissal is that she is pregnant or is any other reason connected with her pregnancy …"

134. Wood J, in that case, left undisturbed a Judgment of the Tribunal below and said, "
"as in *Stockton-on-Tees Borough Council v. Brown* [1988] I.C.R. 410, the background to the decision was the pregnancy or the after-effects of pregnancy, which was part of the reason for the dismissal. It was open to the industrial tribunal to look at the circumstances and to decide what was the reason. We feel that the words "any other reason connected with her pregnancy" ought to be read widely so as to give full effect to the mischief at which the statute was aimed. It was convenient to the employer to dismiss the employee at that time and the excuse was the lack of temporary help."

135. The Claimant also referred us to a Judgment by Burton J in *SG Petch Ltd v English-Stewart* UKEAT/0213/12 which is concerned with Regulation 20 (2).

136. For these purposes we believe it is necessary to set out that wording of Regulation 20 as it was not cited in the Report.
(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—
(a) the reason (or, if more than one, the principal reason) for the d dismissal is that the employee was redundant;
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).
(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—
(a) the pregnancy of the employee;
(b) the fact that the employee has given birth to a child;
(c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66(2) of the 1996 Act;

(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave [or additional maternity leave];
(e) the fact that she took or sought to take—
(i) . . .
(ii) parental leave, or
(iii) time off under section 57A of the 1996 Act;

137. At **[33]** of the Petch Judgment, Burton J says this,
"So far as concerns (c), which we are now addressing, the matter appears to us therefore to relate to matters not previously the subject of authority, albeit the two cases to which we have referred have certain similarities of various kinds. The question can simply be put, described as a "coincidental" decision by the employer in the letter that we referred to in para 15 above: namely, where it becomes apparent, as was accepted, during the maternity leave that there is a redundancy position, ie that the job of the person on maternity leave is superfluous to requirements, then is a decision so reached one that can be said to be, and indeed is, connected with the maternity leave? In the course of argument we put the following suggestion: that if in fact it is not connected with maternity leave, then there is a real problem for a woman taking maternity leave that it may turn out in her absence not simply that someone else is better at the job than she but that her job itself is unnecessary, because it does not need to be carried on by anybody in her absence, thus revealing a redundancy situation such as was the case here. It appears to us that it must be that such a position falls within the rubric "connected with maternity leave".

Part Time Detriment – Reg 5

138. The relevant provisions are to be found in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 at Regulation 5
5 Less favourable treatment of part-time workers
(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—
….
(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
(2) The right conferred by paragraph (1) applies only if—
(a) the treatment is on the ground that the worker is a part-time worker, and
(b) the treatment is not justified on objective grounds.
…

139. In *Hendrickson Europe Ltd v Pipe EAT 0272/02,* the EAT held that an employment tribunal considering whether a breach of Reg 5 has occurred must answer the following four key questions:
a. what is the treatment complained of?

b. is that treatment less favourable?
c. is that less favourable treatment on the ground that the worker is part-time?
d. if so, is the less favourable treatment justified?

Submissions

Submissions on behalf of the Claimant

140. The Claimant argues that the Respondent has adopted an overly narrow definition of work of a particular kind when considering the Claimant's employment in the context of redundancy and that the Claimant held a generalist position (her work was interchangeable with others) and that it is not a redundancy if her work is just given to somebody more junior or otherwise "parcelled out."

141. There is also a challenge to the "pool of one" approach adopted by the Respondent. It is said that it is overly restrictive and that it was a "transparent ruse" to ensure that the redundancy process resulted in her dismissal. Without wanting to be argumentative at this stage, this might seem to ignore the scale of redundancies from this part of the C4G process.

142. There was a connection between the reorganisation undertaken by the Respondent in that it was occasioned, at least in part, by the impending departure of the Claimant on maternity leave and indeed the Claimant's pregnancy and impending period of maternity leave caused the moves which led to her dismissal. The Claimant say that the evidence would show that the die was cast as early as October 2016.

143. The Claimant would contend that the Claimant was dismissed because the Respondent found it more convenient not to replace her during her maternity leave.

144. The Tribunal was enjoined to look at the underlying reason for the dismissal per *Rees v Apollo Watch Repairs PLC* [1996] ICR 466

145. The submissions on behalf of the Claimant make reference to arguments which would support a claim pursuant to Regulation 20 (1) (a) of the MPL 1999 but that is not actually one of the identified issues.

146. The Claimant would say that when an employee's maternity leave prompts her employer to realise that he can manage without her, then her selection for redundancy for that reason will be connected with her maternity.

147. As a matter of causation, the Claimant would contend that had she not been pregnant and not taken maternity leave, she would simply have continued to have managed the Digital 2.0 project, as before. It is said that the emails make clear, her impending absence and the need to *"succession plan"* made her selection for redundancy an inevitability from early on in the process of revising the team's structure (although this does seem to ignore the redundancy of Mr Comiskey).

148. The Claimant argues – based on Calor Gas v Bray that the Respondent should show that redundancy in the maternity leave period was *necessary* (i.e. that there was no practicable alternative), and not that it was reasonable and that this should apply to the Respondent as a whole. It is added that, even if the Claimant's former role in eCommerce was no longer available and that this situation arose early in her maternity leave, there was a strong likelihood that a suitable alternative would arise later in the year-long period of her scheduled absence. It is perhaps necessary to caution that there was no evidence as to this.

149. Concern is also expressed about the sequence of appointment of senior staff and the deletion of posts starting in November 2016. It is argued that if the Respondent is able to avoid the need to offer suitable alternative vacancies by ensuring that they are filled before the Claimant's redundancy consultation process starts – even in circumstances where the existence of those particular roles arises from the same circumstances as the Claimant's redundancy – then the protection of r10 MAPLE1999 would be fatally undermined.

150. As concerns the detriment as a result of the Claimant's part-time status, the Claimant would argue that hers was the only part-time post in the organisation and the deletion of her post creates an inference that she was selected for redundancy because of that status.

151. On the question of the conventional/ordinary unfair dismissal claim, a number of criticisms are made on behalf of the Claimant.

(i) The risk of redundancies arose as early as October 2016 but the Respondent waited until March 2017 to act by which time some posts elsewhere had already been filled.

(ii) The "pool of one" approach is strongly suggestive of an employer who has failed properly to apply his mind to the question of whom to dismiss particularly as the Claimant's role was not "unique" as asserted by the Respondent's The Claimant says that this case is on all fours with *Capita Hartshead Ltd v Byard* [2012] IRLR 814, EAT (the Tribunal is not sure that the factual matrix is that straightforward in this case) and it is necessary to scrutinise the resonating of the employer;

(iii) **Criteria for selection.** the reasons for the selection of the Claimant's role for redundancy was only set out retrospetively. Prior to the consultation process there are simply emails setting out a desire to continue her project with a more junior member of staff..

(iv) **Consultation** - the consultation process was a pro-forma exercise which avoided meaningful engagement between employer and employee.

(v) **Appeal** – the Claimant was not shown the material gathered for the appeal at the request of Mr Noel Clarke and given an opportunity to comment on it.

Submissions on behalf of the Respondent

152. The Respondent makes the general point that the Claimant has not actually advanced that much by way of positive evidence – which is relevant to many if not most of the heads of claim considered individually below.

Automatic Unfair Dismissal

153. On behalf of the Respondent it was submitted that Regulation 10 gives to someone whose role is made redundant whilst on maternity leave, a preferential right to be offered any suitable alternative employment on substantially the same terms and conditions as the old role, where such suitable alternative employment exists, but the Respondent does not accept that R. 10 extends beyond that right. Additionally there is no duty to create a post for an affected employee

154. Further, no obligation is created/triggered pursuant to Regulation R. 10 if no suitable alternative employment on the same terms and conditions exists. The assessment of the suitability of the available vacancies is from the perspective of an objective employer knowing what it does about the employee.

155. The Respondent argued that the Claimant had not actually pointed to any suitable alternative employment that she should have been offered (she rejected the full time 2B post) and gave no indication that she wanted one of the other 2C posts and, in any event, the evidence was that the Respondent had formed an objective conclusion that these posts were not suitable for the Claimant as they involved a very different skill set.

156. If it is argued that the Claimant should be allowed to challenge the decision to make the alternative post one that was full-time, it is significant to note that the tribunal has already concluded that the post needed to be full-time after an objective process of reflection on the needs of the business.

Ordinary unfair dismissal

157. The Respondent's primary case is that the reason for dismissal was redundancy as defined in s139 ERA 1996 in that the requirements of that business for employees to carry out work of a particular kind, had ceased or diminished or were expected to cease or diminish. The Respondent had decided that it no longer needed the quasi-marketing role focused on strategic development of Digital 2.0 / Connected World (post held by the Claimant) nor the Innovation Insight and Operations role.

158. If this is rather a case of business reorganisation, the Respondent relies on the same set of facts and would contend that no unfairness is created.

159. The Respondent would say that the initial impulse behind the new situation at work was the proposal by Ms Tofu that there would be a reduction in duplication and a leaner operation encompassing the area in which both the Claimant and Mr Comiskey operated (reduction of two 2C posts to one 2C post). It is said that this may well not have led to the Claimant's redundancy – as Mr Comiskey was expected to move elsewhere (and if the Claimant had been on maternity leave when it was implemented, she would have had preference anyway). However, the second factor was the C4G company wide structural change – which required reduced headcount and which led to a more radical proposal by Ms Tufo within eCommerce and Digital to delete the two 2C posts.. Either way there was a diminution in the need for employees to carry out work of a particular kind.

160. By the end of the process, the Claimant's role (and that of Mr Comiskey) no longer existed. They argue this demonstrates a diminution of need for employees to carry out work of a particular kind.

161. The Respondent would say that it was legitimate for the Respondent to create a "pool of one" when determining how to respond to the impending redundancy. They approached the problem with genuine motives and should be judged by reference to the range of reasonable responses available to an employer in the circumstances. The identification of an appropriate pool for selection is an area in which the Tribunal must take care not to substitute their own view for that of the employer.

Consultation

162. The Respondent was involved in a process of consultation by the Respondent and they would say that the Claimant has not suggested

what practical difference would have made if she had been provided with more extensive information. Again, the Respondent's actions were within the band of reasonable responses. The Respondent was not obliged to create a bespoke new role for the Claimant. It encouraged her in her job search but nothing was found and the other positions in eCommerce were commercially focused, sales target driven 2C roles and were not suitable alternative employment (nor vacant at the relevant time). They make the point that the Claimant has not actually identified an alternative role that she feels that she should have been offered.

Discrimination ss 13 and 18

163. If there is a breach of the MPL Regulations leading to a finding of unfair dismissal, the Respondent would say that it must not be assumed that this automatically means that the claimant has been discriminated against.

164. In any event, the Claimant was not treated less favourably by being dismissed than Mr Comiskey – who was not on maternity leave and who was dismissed. He is an actual comparator, given that his job was of a similar nature to that of the Claimant or in the alternative, his treatment is indicative that a hypothetical comparator in identical circumstances to the Claimant but not on maternity leave would have been treated in exactly the same way – i.e. dismissed.

165. There is no evidence to support a prima facie case that the Claimant's dismissal took place because she was on maternity leave. In the alternative, if the burden has passed to the Respondent, there is overwhelming evidence that her dismissal took place because the Respondent deleted her role and that of Mr Comiskey and there was no suitable alternative employment available or acceptable to the Claimant.

Pregnancy and Maternity Discrimination – s18

166. The Respondent can see elements of unfavourable treatment in the timing of the redundancy process but otherwise would argue that the Claimant went along with these arrangements at the time. What adjustments the Claimant sought were granted. The respondent would say that the Claimant has not shown causation. They would say that the reason that the redundancy process started 6 weeks after the birth of her baby was nothing to do with her or her maternity leave. It was because that is when it was happening for everyone else affected by the organisational change. Similarly, Ms Tufo's evidence was that the Claimant was invited to meetings on the same timetable as everyone else. It would have been unfavourable (or less favourable treatment) to have treated her any other way.

Part Time Detriment

167. The Respondent would say that the Claimant's dismissal was not less favourable treatment than afforded to Mr Comiskey and she has not

identified any other full time comparator. Further, there is no evidence to support a case that the Claimant's dismissal took place because she was part time. If the burden lies with the Respondent, the Claimant's dismissal took place because the Respondent deleted her role and that of Mr Comiskey and there was no suitable alternative employment available/acceptable to the Claimant.

Application of the facts to the Law

168. At the outset, it is necessary to say that the Tribunal can only arrive at conclusions/give Judgment on claims that were identified as such in the preparation of the hearing. Luckily in this case it was undertaken by EJ Andrews on 2nd October 2017. The Tribunal checked with the parties at the outset of the hearing that the issues were as described. There was some narrowing as a consequence. However, despite reading and hearing submissions which touch on other possible claims, this judgment and the reasons in support thereof is addressed at the issues identified at the preliminary hearing.

169. At the heart of this case are two highly competent women. However, the findings of fact that we have made above are largely determinative of these claims.

Automatic unfair dismissal

170. We have sought to be as systematic as possible in our approach to this case but this does involve starting the application of the facts to the law to one of the most controversial aspects of this case at the outset.

171. The Tribunal finds that the work that the Claimant did was of a particular kind reflected in her job description. She undertook was working in a specialist post whose purpose was to *transform* an element of the Respondent's business. The Claimant's job description as "Digital Transformation Manager" is apt. The Claimant had a commensurate grade and remuneration. The fact that the Claimant had previously undertaken work in other departments of the Respondent's business is not determinative. The Claimant did not just hold down a generic middle-management position for which she could be moved around the business at will. For those reasons we reject the argument that the Respondent adopted an overly narrow definition of work.

172. It is against that background that the Tribunal are content that by 2017, the work that the Claimant did was expected to diminish or cease if it had not done so already. Needless to say, the Tribunal understand that eCommerce was just as important for the business. However, the Claimant's transformation role was coming to an end as the work was "mainstreamed" into many different parts of the business. This was not

like the work of a laboratory scientist being given to a scientist of a lower grade or the work of four actuaries being covered by three. It was more akin to the work of a senior actuary coming to an end after she has designed a whole new system of accounts – with the residual work being undertaken at a lower level because it was more mundane. This was at least in part because of the success and efficiency of the Claimant's own work.

173. On that basis the Tribunal concludes both that it is satisfied that the work the Claimant did either had or was expected to cease or diminish and the Respondent was entitled to conclude the same.

174. It is important to note that this took place against the backdrop that a whole series of other redundancies were being made i.e. this was a contracting business environment (including at level 2C). The decisions that the respondent made were genuinely grounded in their conclusion that the same was necessary for their business to be maintained (or enhanced). This was also against a background of a fast-changing business environment.

175. The Tribunal will deal with the possibility that what was undertaken was a business reorganisation below.

176. A conclusion that the Claimant's post was redundant is a gateway condition to the Claimant's Regulation 10 rights.

177. However, in all the circumstances of the case, there was not a suitable alternative vacancy available for the Claimant and it is not clear that the same has been identified.

178. The Claimant was offered the new 2B post. Her reasons for rejecting it are completely understandable as is the criteria that she has adopted as to what alternative posts she would take up. However, the Claimant was provided with the relevant lists of available posts and has not identified one post as being one for which she should have been selected/appointed.

179. The decision by the Respondent that the new 2B post was to be full-time was a genuine one arrived at after an examination of what the business required. Similarly the appropriate grading for the post was checked by Mr Chan in a process in which he tried to apply objective criteria to the identified problem.

180. The Respondent arrived at a conclusion that the Claimant was not appropriate in skill for the new 2C posts. This was a genuine/objective decision on their part having had regard to the skill set they required. An example of the Respondent's business approach is that they carefully crafted objective job profiles based on an abstract assessment of the

business needs and the skills that would be required to fulfil those posts. When they couldn't recruit somebody for the new 2B post they did not just stage another reorganisation but rather kept the post vacant.

181. No suitable alternative vacancy was available before the end of her employment on 30 June 2017. To the extent that the 2B post might have been a suitable alternative (in other circumstances), it was offered to the Claimant.

182. The Claimant's post was made redundant on 30th June 2017. The Tribunal concludes that it was not practicable by reason of redundancy for the Respondent to continue to employ the Claimant under her existing contract of employment.

183. The Tribunal would add that the redundancy process began for the Claimant at the same time as her colleagues - so everybody was informed at the same time and it also sought to eliminate potential unfairness. This is particularly relevant in a situation in which the Claimant's closest (in seniority) work colleague (Mr Comiskey), was also made redundant. It was not practicable to maintain a post whose work had been completed and the Respondent had arrived at an objective business decision that it was necessary for the Company to operate a slimmer operation.

Ordinary Unfair dismissal

184. The Claimant was dismissed. The Tribunal would conclude that the reason for dismissal was redundancy (as explained above).

185. It is appreciated that there is a possibility that what took place in the department was a business reorganisation. On reflection, the Tribunal concluded that was not the most apt description of the process that occurred. However, if the Tribunal was wrong about that, then it would conclude it was a question of placing a different label to the same set of facts. The procedural safeguards that were provided would be the same and the result the same.

186. Statute provides that this is a potentially fair reason for dismissal. The Tribunal would conclude that the dismissal of the Claimant was caused wholly by the cessation/likely cessation/diminution of work of this kind and the inability to identify an alternative suitable post for the Claimant as none were available at that time.

187. It was within the band of reasonable responses of a Respondent Company in these circumstances to treat the Claimant's post as redundant.

188. When considering the Claimant's selection for redundancy, the Respondent Company applied its mind closely to how best to apply

objective criteria to ensure fairness. Much of the work that was done in this team was specialist (i.e. it was team of specialists – at the higher level and certainly at 2C). It was this that ground the decision of the Respondent to place her in a "pool of one" This was done out of genuine motives. There is no evidence that the Respondent wanted by means of a ruse to lose the Claimant as an employee. The evidence showed she was a diligent and efficient employee.

189. The Respondent was warned about the potential for her post to be made redundant appropriately. By dint of the operation of disclosure for these proceedings we know a great deal about the thinking that had gone on and which led to the decision to warn the Claimant that her post was redundant.

190. Ms Tufo was only appointed the eCommerce and Digital Director UK in August 2016. The Tribunal accepted her evidence that she wanted to take stock first. It was inevitable that she would bring to bear her views about how her Department should best be organised/how duplication could be avoided etc... There was also the influence that was brought to bear by the VP and her desire for efficiencies. However, the actual driver for redundancy was C4G. This was a Company-wide process. It was operating by sequence through the Company. Redundancies had already been made in the Marketing Department. The decision to notify the Claimant as to the potential for her post to be made redundant was occasioned by that and the desire to treat employees in her section equally.

191. The Respondent – because of its processes, was able to provide updated bulletins about what alternative posts were available in the Respondent Company. These provided what was required to assist the Claimant find alternative work. Unfortunately no suitable alternative posts were available.

192. If there was a shortcoming it was with consultation. At the outset the Tribunal had made findings about the implications of the size and administrative resources of the Respondent Company. The Tribunal would expect sophisticated consultation by this Company.

193. The corollary about creating a *pool of one* and the sort of sophisticated arguments that the respondent have reasonably deployed in this case about the Claimant's post is that it would imply that there should be a bespoke, sophisticated process of consultation with the Claimant.

194. The critique of the Respondent made by the Claimant's Counsel that the three internal meetings with the Claimant were largely devoid of information appear justified.

195. It is a legitimate argument to say that – even with all the very extensive evidence now available about this redundancy, that the Claimant has not actually advanced an argument based on an actual alternative post that she could fill. However, it cannot be right that as of the date of her effective date of termination, the Claimant had not been provided with a sophisticated rationale of the proposed re-structure of her Department commensurate with the complexity of what was being proposed – probably including providing the Claimant with organisational charts and job descriptions.

196. The Claimant played her role. She asked intelligent questions in the redundancy process and solicitors acting on her behalf made a timely appeal – the contents of which were excellent. A sophisticated Company should have welcomed the detail provided by the Claimant's solicitor and seen it as an opportunity to test the lawfulness and fairness of their own proposals. In fact it took until 19th June to convene a meeting – where the Claimant was left to address a void. The Tribunal would have expected that the appeal lodged by her solicitor would have alerted the Respondent to the fact that they needed to provide the Claimant with more information. This did not happen until the end.

197. It is striking that Mr Clarke did not feel he was able to deal with the appeal on the basis of the correspondence and paperwork that were existing at that time (this is after dismissal). He felt it was necessary to obtain a proper account from Ms Tufo and gain objective evidence about grading.

198. The Tribunal is of the view that the material that was created to assist the appeal by the Respondent (statement by Ms Tufo and objective grading assessment) was of the sort of sophistication that was required. However, it was just set out in the response to the appeal on 5th July 2017. The Claimant was not invited to a meeting to discuss the same nor provided with any opportunity to respond to this material which would have been new to her.

199. In the unusual circumstances of this case the consultation that was offered by the Respondent up until her dismissal was inadequate and outwith the band of reasonable responses. The deficits were sufficiently serious that the Claimant did not really know what case she was meeting.

200. The explanation provided with the response to the appeal on 5th July 2017 was of the sort that would have founded reasonable consultation i.e. it would have been a starting point.

201. The Tribunal would conclude from the evidence heard at the hearing that it is more likely than not that the Claimant would still have

been made redundant at the conclusion of any reasonable consultation process were it to take place.

202. It is difficult to be sure how long a reasonable consultation process would last – if it had commenced on 5th July 2017. On the basis that the previous consultation had taken approximately six weeks, it is likely that the consultation would have been concluded on 16th August 2019. The Tribunal would welcome submissions from the parties as to the implications of this for an appropriate remedy.

Direct Discrimination – s13 Equality Act 2010

203. The Tribunal appreciates that there is much merit in the points made on behalf of the Claimant that a social stigma would attach to unlawful discrimination because a person is on maternity leave and that the Tribunal must be prepared to make inferences and look behind explanations that are given to establish the underlying reason.

204. Additionally, the Tribunal accepts that it is necessary to explore whether there was a compound reason for dismissal.

205. The Tribunal has already concluded that the reason for the Claimant's dismissal was redundancy. However, it is necessary to address the forceful argument made on behalf of the Claimant that her redundancy was occasioned, at least in part, by her impending departure on maternity leave and/or that it was more convenient not to replace her during her maternity leave.

206. The findings of fact above show that the Respondent was exploring a number of options for the filling of the Claimant's post temporarily while she was on maternity leave. The initial instinct was either to appoint another 2C or somebody who could act up to that post.

207. It is likely that far from this being a case of *out of sight, out of mind*, that it was the Claimant's own presentation as she was about to commence her annual leave in advance of her maternity leave that alerted the Respondent to just how much of her Transformation role she had undertaken and whether there was such a role going forward.

208. The effective cause for the Claimant being put on notice of redundancy on 22nd March was the decision that her post was redundant after close introspection by the Respondent. This was in the context of the C4G process which had led to 18 posts being identified as potentially redundant.

209. The Tribunal concludes that there is no evidence to support a prima facie case that the Claimant's dismissal took place because she was on maternity leave.

210. The Tribunal considers that the argument about a comparator, put forward on behalf of the Respondent is valid when considering the issue. This is that the most obvious/exact really-existing comparator with the Claimant was Mr Comiskey who was not on maternity leave and yet was still made redundant.

211. If the burden passes to the Respondent the Tribunal would conclude that the Claimant was not treated less favourably than a real comparator nor any hypothetical comparator in being dismissed and her dismissal was because her post was redundant and no suitable alternative post had been found for her and not because she was on maternity leave.

Pregnancy and Maternity Discrimination – s18

212. The Respondent concedes that the timing of the announcement of the redundancy process six weeks after she had given birth constituted unfavourable treatment. It is not apparent that the invitation to meetings were unfavourable treatment. The Tribunal reads the Claimant's statement with sympathy but she did not tell the Respondents of her objections to the arrangements that they had made at the time but rather set them out as part of her appeal – by which time, the meetings had long gone. As the Respondent says, the Claimant went along with these meetings.

213. Additionally, causation is absent here. The Claimant was notified of the redundancy process when she was because the Respondent was anxious that the whole Department be told at the same time (and, in particular, the Claimant did not hear by some unofficial channel). The timing of the meetings thereafter was so that change was effected at the same time for all relevant staff.

214. The timing of the commencement of the redundancy process may have amounted to unfavourable treatment but the Tribunal concludes that it was not because the Claimant was on maternity leave.

Part Time Detriment

215. The Claimant complains that she was dismissed because she was a part-time worker. However, the Claimant has not actually advanced evidence of a comparable full-time worker with whom she would seek to be compared. Once again, the most obvious extant comparator was Mr Comiskey (who was full-time) who held the post that might be considered to be the closest fit to that held by the Claimant and yet whose post was made redundant nevertheless.

216. There is no evidence that the Claimant was made redundant and dismissed because she was a part-time worker. If the argument was that the respondent wanted to make savings, the Claimant's post had the

disadvantage that it was only 0.6 FTE and hence only 60% of the savings would be available on the post compared to a full-time worker.

217. It is worth adding that the organisation began with the Claimant holding a 2C post as a part-time employee (0.6) but the final deployment of staff still had one part-time employee holding a 2C post part-time (0.8). This is further evidence that it is unlikely that the Claimant suffered detriment as a part-time worker.

218. Additionally, the Respondent can pray in aid that when they created the 2B post as one that was full-time, that was based on a calculation grounded in business need.

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Employment Judge MJ Downs

Date: 28th February 2019