THE EMPLOYMENT TRIBUNALS

BETWEEN

Mrs Natasha Cranley ***Claimant***

and

Mporium Group plc ***Respondent***

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 10, 11, 13 (in chambers) and 14 June 2019
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS:** Mr Richard Pell and Mr Stephen Godecharle

Appearances:
For the Claimant: Ms Karen Moss of Counsel

For the Respondent: Mr Michael Lee of Counsel

JUDGMENT

Our unanimous judgment is as follows:

the claim of automatic unfair dismissal is dismissed;

And we declare as follows:

the Respondent has subjected the Claimant to unfavourable treatment and detriment due to pregnancy / maternity contrary to sections 18 and 39 of the Equality Act 2010;

the Respondent has subjected the Claimant to pregnancy / maternity detriment contrary to section 47C of the Employment Rights Act 1996 and regulation 19 of the Maternity & Parental Leave Regulations 1999;

the Respondent has subjected the Claimant to less favourable treatment on the grounds of part-time working, contrary to regulation 5(1)(b) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

REASONS

1. In the course of this hearing, we heard evidence and the claimant from the Chief Executive Officer of the Respondent, Mr Nelius de Groote.

2. There was little argument between the witnesses as to the material facts which, we find, follow very largely the undisputed Chronology provided by counsel for the Claimant at the start of the hearing,

3. The respondent has a technology company that delivers high-performance digital advertising campaigns. It currently employs some 37 people of whom 35 are based in London and 2 in Manchester.

4. The Claimant was employed as an Administrative Assistant. Her employment commenced on 6 September 2016. Her duties were interchangeable with those of an employee entitled Office Manager and comprised general administrative, reception, office management and personal assistant ("PA") duties.

5. The Office Manager's role was performed, when the Claimant started employment, by Ms Hermione Logue. However, in December 2016, Ms Logue left the business.

6. In February 2017, the Respondent employed Ms Julia Radschun in the position which Ms Logue had vacated several months earlier.

7. Ms Radschun, like Ms Logue, was employed to work 5 days a week. Her salary was £35,000 p.a. whereas the Claimant was employed to work 3 days a week (Tuesdays, Wednesdays and Thursdays) at a salary of £27,000 p.a.

8. Because the duties that Ms Radschun and the Claimant performed were interchangeable, they each kept the other informed of their activity by copying the other into their emails and having catch up meetings, at the start of the day, of some 10 to 15 minutes and, at the end of the day, of some 5 to 10 minutes.

9. The PA duties that the two women performed comprised the provision of assistance to Mr Barry Moat who, at the time of both their appointments, was the Chief Executive Officer (*CEO*) of the Respondent.

10. In May 2017, the Claimant informed Mr Moat that she was pregnant.

11. On 8 August 2017, Mr Moat became the Chairman of the Respondent group – there appears not to have been a previous incumbent of this position – and Mr Nelius de Groot moved from the position he had held as Chief Operating Officer (*COO*) of the Respondent to occupy the CEO role.

12. Mr de Groot is a man who organises himself and eschews any need for a PA. In consequence, when he took over the CEO role, he brought a critical eye to the staffing of the role of Administrative Assistant / Office Manager. On 24 August 2017, he had a meeting with Ms Radschun and either after or during the meeting he recorded a couple of bullet points:

    - Cover the desk and the door
    - Coms – business info

13. On 28 August 2017, he had a meeting with the Claimant that led to him noting the following bullet points:

    - No overall comms
    - Good working environment

- Julia fully up to speed
- Heading off on 6 Oct
- Christmas Party etc

14. The last two of these bullet points were prefaced with the word "Barry" referring to Mr Moat. The penultimate bullet point referred to the Claimant's plans for when she would cease working ahead of her maternity leave. She had a period of annual leave that she had not taken but intended to take from Tuesday 10 October 2017 ahead of her official maternity leave starting on 8 November 2017. As she did not work Mondays and Fridays, this meant her last day of service ahead of annual and maternity leave would be Thursday 5 October, hence she would be "Heading off on 6 Oct".

15. During these meetings, Mr de Groot formed the view that there was a degree of overmanning in the Administrative Assistant / Office Manager function which would become more prominent as and when the duties that the two women continued to perform for Mr Moat, now in his position as Chairman, ceased because Mr de Groot had determined to speak with Mr Moat to get his agreement to end his reliance on a PA to perform such duties.

16. On the morning of 1 September 2017 at 0908 hours, the Claimant emailed Mr Moat seeking, firstly, some slight reduction in her working day to allow her – now some 10 weeks away from her Estimated Date of Delivery – to avoid the rush hour on the Underground at the end of the day and, secondly, some rearrangement of her seating arrangement in the office, again because of her pregnancy.

17. Mr Moat replied to this email at 0952 hours by suggesting the Claimant speak to Mr de Groot about her requests when next she was in. He copied his reply to Mr de Groot.

18. That same day at 1101 hours, Ms Joeline Smith, who carried out both a financial and an HR role within the Respondent company, contacted an organisation called "HR*Online* in partnership with BrightHR" at the behest of Mr de Groot to obtain some advice on the following HR issue. She wrote:

> The company has been restructured. A lot of movement in roles. CEO has moved into the Chairman role and the COO has moved into CEO role.
>
> EE works three days per week and is PA. Have another lady who does five days per week and she is PA/office manager - looks after all the senior management team.
>
> We are looking to make Natasha's role redundant. She's going on mat leave on 05/10. I don't know this works. She has short service so shouldn't be an issue.

19. This elicited the following response:

> Explained very risky if she relates to the fact that she was made redundant due to her pregnancy. Would have a claim for discrimination. Would advise to pool the two EEs together and treat as though she had long service.
>
> EE will qualify for SMP is due date is 09//2017
>
> Dear Joeline,
>
> Thank you for your enquiry.

> The first step is to build a compelling business case as to why you need to consider redundancy. Redundancy, loosely speaking, is the ending of or reduction of work, of work a particular kind or in a particular location.
>
> We need to build a business case as it forms the backbone of the consultation process and that will assist us to advise you on hype best to approach your case. It should be sufficiently detailed for us to advise and also for any outside parties such as the tribunal to be able to understand what the business needs to do, why and why you have no choice.
>
> The business case is likely to be based on either economical, technical or organisational reasons and detail required will depend on which of these it is. If it is financial, for example, we will need to understand the financial position including profit and loss, forecasts etc. If it is due to reduction of the work of a particular kind, by how much has it reduced on the reasons for it. In all cases we need to know what alternatives there are to redundancy no matter how unlikely to show that this has been duly considered.
>
> Please can you also send over two organisation charts pre- and post-redundancy; with the individual(s) start dates, dates of birth but including job titles rather than names of the post holders. We use this to understand what you were trying to do, to assist you with redundancy costs and also we can identify any possible areas of challenge before you start consultation.
>
> We also require any information that you feel would be relevant to the process regarding individuals in question, specifically, do you believe the employees could argue their redundancy was on the basis of other grounds e.g. Their background, recent complaints, membership of the trade union etc
>
> …
>
> In a redundancy situation in order to fairly terminate employment you must hold a period of consultation. This usually involves you having a minimum of three meetings with the employees (usually over a fourteen-day period) but we can discuss this further if you have concerns.
>
> …

20. Ms Smith sent to HR*Online* two organisation charts that showed only one change in the structure of the company as shown "Pre-Redundancies" with that shown in "Post Redundancies", that one change being the elimination of the "Admin Assistant" role reporting to the CEO. The role of "Office Manager" reporting to the CEO remained in both charts.

21. Ms Smith also sent a document entitled "Redundancy reasoning and background information". The writer of the document referred to there being currently "2 office managers, one part time 3 days per week and one full time" and to there only being the need for one full-time position. The writer went on:

> We do not feel that there is an alternative role within either mporium Ltd or other members of the mporium group where alternative employment can be offered.

22. The writer referred to the Office Manager role being the only one affected by this process:

> affecting both Julia Radschun and Natasha Cranley, Julia is currently full time and Natasha currently works three days per week and is due to go on maternity leave in October with the baby being due on early November.

23. The document set out details of the two post holders including, for Ms Radschun:

> Issues to consider: Just passed 6 months' probation and is due for a pay review

and, for the Claimant:

> Issues to consider: Natasha is pregnant and will be going on maternity leave 5th October with baby being due mid-November.

24. Further correspondence allowed HR*Online* to learn that the Claimant was considered capable of doing the full-time role and that the reason for there being no PA role with the new CEO was that the new CEO (Mr de Groot):

> is much more organised and capable that the previous who very much needed someone to organise his life.

25. By 5 September 2019, HR*Online* were sending Ms Smith documents that contained scoring matrix for the Respondent to pool the Ms Radschun with the Claimant to show how the Claimant "has been selected for redundancy".

26. We saw these matrices as filled in for both Ms Radschun and the Claimant on 6 September. We regarded them as generic in nature and not targeted at the roles being performed by the two women. On the basis of her slightly longer service, the Claimant scored one point more than did Ms Radschun.

27. The forms when returned to HR*Online* elicited this response at 1009 hours on 6 September:

> On reviewing the only factor that separates is 1 point based on their service which means that it arrives at Julia would be who would be selected for redundancy.
>
> I understand that you were looking at Natasha to leave the business however it would come out as unfair to do so based on that selection criteria.
>
> You could look at the settlement agreement for Natasha which is where you would offer you some money for her to exit the business and not be able to claim against you – this is dependent on her accepting the offer though – if this is something you would think would benefit then let me know and I can send more details.

28. At 1351 hours on 6 September, Ms Smith reported the advice she had received to Mr de Groot as follows:

> Re Natasha – after a lot of going back and forth with HR*Online* they have advised best solution would be to do a settlement agreement with Natasha, as it is just one year's service we are not obliged to offer any settlement figure other than her own contractual rights but to make the deal more appealing would be better especially with her being pregnant and protecting the company from any issues re unfair discrimination. Perhaps an additional one month pay would be more than enough.

29. Mr de Groot responded at 1543 hours the same day with:

> Are they suggesting we have to go the full distance with lawyers etc? If so, I think this needs more discussion. There is no discrimination, we just need one PA who can work full time.

30. To this, Ms Smith replied at 1617 hours with:

> Yeah I agree with Natasha and to be honest really disappointed with them over their advice, I think you or we have an off the record chat with her and see if we can come to a mutual agreement, I don't think it will come as any shock to her, if we can mutually agree then there is no need for legal requirement.

31. Mr de Groot continued the email conversation at 1729 hours saying:

> Thanks, from my perspective, proposing to put a settlement agreement in place puts us at more risk.
>
> Did they provide clarity on the impact on her maternity leave? As discussed, I want to ensure that they are not disadvantaging Natasha.

32. Ms Smith replied the following day at 0948 hours with:

> We are legally allowed to have an off the record discussion with her and it and will not put us at risk in any way as she and us will not be able to refer to this should she not accept and we have to take an alternate route.
>
> Re maternity we would still process for maternity pay throughout her leave and then claim this back from HMRC.

33. There may or may not have been discussions after this exchange regarding a settlement agreement but, consistent with the purpose of *without prejudice* discussions, we were not informed of the same.

34. The Claimant was called to attend a meeting on 13 September 2017 with Mr de Groot and Ms Smith. She was given no warning as to what the meeting was about. She was asked about her workload and responded by saying that it varied: sometimes she was busy and at other times not. She was told that the company was considering reducing the team from two Administrative Assistants to one full time. In her witness statement, the Claimant said she was then asked whether she would consider changing the terms of her employment to full-time.

35. In neither her statement, nor in that of Mr de Groot, do we find the precise nature of her answer to this question concerning the change to full-time work given. Curiously, she was not asked about this in her oral evidence. However, the Claimant produced rather late in the day a supplementary statement to account for the late disclosure of a document entitled “Notes of Meeting” which relates to the 13 September meeting. She had created this document on 12 October 2017 making use of notes she had made in the immediate aftermath of 13 September meeting and had put in an email sent to her husband’s then work email address. We did not see the email from which she derived her account of the 13 September as it appears in “Notes of Meeting” but her account does not mention her being asked that question.

36. The “Notes of Meeting” document does refer to the Claimant being asked by Mr de Groot as to what arrangements were made when she first started to work for the Respondent. Mr de Groot’s account of her answer was that her initial discussion with Mr Moat had centred around her doing a full-time role. However, with a small child at home, she felt her routine (working 3 days and having 2 days off) provided her with a good balance between home and work. Mr Moat had become comfortable with her working 3 days per week.

37. We doubt whether the Claimant was asked on 13 September if she was prepared to change to full-time work. She certainly was asked that question in the meetings which followed. The question concerning the arrangements that were made for her to work part-time touch on the issue of working full- or part-time. Therefore, it would have been easy for the Claimant, in retrospect, to have assumed she was asked in that meeting whether she would change her employment from part- to full-time.

38. The discussion at the 13 September meeting itself came as a shock to the Claimant, a point she made both during the meeting and implicitly in an email, sent to both Ms Smith and Mr de Groot and copied to Mr Moat, after the meeting. In that email, she described herself as both confused and somewhat stressed. In consequence, she indicated she thought it best both for her health and that of the baby that she went home that afternoon "to absorb the information".

39. Mr de Groot responded with:

> Natasha,
>
> As discussed, the intent was never to cause confusion or stress. That is equally true for you and for your baby.
>
> However, I felt it was necessary and appropriate to update you regarding our thoughts relating to staffing for your function.
>
> Very sorry to hear that you feel you need to head home, but I very much appreciate you letting us know.

40. On 19 September 2017, Ms Smith sent the Claimant a letter formally confirming that the Claimant's position as Office Manager / PA was at risk of redundancy. Miss Smith also informed the claimant that:

> It is also proposed that the Office Manager / PA role is a full-time position, and we would like to discuss this with you as part of a consultation process.

41. The consultation meeting was fixed for Wednesday 27 September 2017. At this meeting with the Claimant accompanied by a work colleague and Mr de Groot being accompanied by Miss Smith, Mr de Groot referred to the Claimant having described her workload as "light" at the meeting on 13 September, a matter which the Claimant disputed.

42. The Claimant raised the point about the timing of the proposal given that she was shortly to commence maternity leave. Mr de Groot explained the decision was part of a wider review. It was a business decision, not one aimed at her personally, which needed to be taken, in his view, sooner rather than later, thereby avoiding stress from uncertainty that would otherwise ensue for the Claimant, for Ms Radschun and for the Respondent company.

43. The Claimant queried as to whether there had been any change in the work level from when she had been hired. Mr de Groot explained his view that the role of Office Manager / PA had "always potentially been overstaffed" because the anticipated growth in the business had not materialised. Two people had been employed, he asserted, in anticipation of business growth that had not happened.

44. Mr de Groot told the Claimant that only one full-time position would remain after the redundancy exercise was completed. If the Claimant wished to be considered, she would have to commit to being employed in a full-time role. Would she wish to be employed in a full-time role? The Claimant said she was not able to confirm either way as she was so close to her maternity leave. Indeed, she thought being asked such a question when she was about to go on maternity leave to be inappropriate.

45. Mr de Groot said he had considered other roles in the Respondent company but he did not believe there was an obvious fit for her. In response to his question, the

Claimant said she had not identified any suitable alternative roles for her but she needed more time to think about it.

46. Mr de Groot assured the Claimant that her statutory maternity pay would still be honoured regardless of any outcome. The Claimant explained she needed time to consider the situation. Mr de Groot was particularly keen to know whether the Claimant was prepared to work full-time and so acceded to her request that she stay at home pending a further meeting.

47. A further consultation meeting took place on 3 October by telephone, the Claimant having reported that she had been signed off work because of stress. In discussion, Mr de Groot established that the Claimant considered there to be times when the workload was light and other times when it was heavy. As to the proposition that there was only the work for one full-time member of staff in the role of Office Manager / PA, the Claimant asked what evidence Mr de Groot had of the role being overstaffed. He responded that he had his observations. The Claimant regarded that as being no evidence. Mr de Groot queried whether the Claimant's workload was driven by Mr Moat's presence. The Claimant's answer - that sometimes the work was busy and sometimes it was not - allowed Mr de Groot to conclude, from his knowledge that Mr Moat would need much less attention, that the Claimant's work would only decrease. The meeting ended after Mr de Groot had explored with the Claimant whether she had further thoughts on coming back in a full-time role after her maternity leave was over. The Claimant explained that she did not think it was appropriate to discuss changing her contract when she was about to go on maternity leave.

48. The Claimant emphasised her view that it was not appropriate to discuss changing her contract when she was about to go on maternity leave by raising a grievance on 3 October 2017. She put her concerns in an email address to Mr de Groot and Ms Smith:

> Nelius /Joeline
>
> I am writing to raise a formal grievance.
>
> The circumstances which has led me to submit this grievance is that I believe I've been treated unfairly, and suffered discrimination on the basis of sex, and more specifically in respect of my being pregnant. This is largely associated with the redundancy process currently being undertaken, but also include actions in the lead up to this process.
>
> The specific reasons for the grievance include, but is not limited to the following:
>
> - I believe I'm being made at risk of redundancy because I'm pregnant.
> - The redundancy consultation process has not been conducted properly or fairly and has been designed to be prejudiced against me.
> - The informal meeting on 13 September 2017 has been given weight within the process, yet the meeting was supposedly 'off the record', with no prior warning given of the meeting, and no formal notes or minutes taken.
> - The consultation program process has been limited to me only, demonstrating a clear prejudice against me (despite there being other staff within the Office Manager/PA).
> - No selection criteria for redundancy has been established or provided at any stage of this process.

- The process has been artificially expedited by the company to be concluded prior to my going on maternity leave (as acknowledged in the meeting minutes dated 27th September 2017).

I would like to note that the actions above directly cause detriment to my health and well-being, as demonstrated by my being signed off from work with stress (see previously provided medical certificate dated 29th September 2017.

I look forward to receiving a response on this matter

49. Mr de Groot responded on Thursday, the 5th of October. He wrote:

Thank you for your email, the contents of which are acknowledged.

As the grievance pertains to an ongoing redundancy process, which has not yet been concluded, I feel it is important to consider and respond to your representations as part of this process. I appreciate that after the conclusion of this process there may still be the need to follow the grievance procedure.

I wish to be clear that both PA/office managers will warrant of the possibility of redundancy. As you are aware, the proposal is for there to be one full-time equivalent PA/office manager and for this to be by one person on a full-time basis. We formally consulted with you first on this as it seemed reasonable as you currently work on a part-time basis. We wanted to know your thoughts on this proposal and whether you would consider working full time. You did not have any comments to make on the proposal that the role is one full-time person but did say that you were unable to confirm whether or not you would be able to work full time. You wanted to give this some thought, so we held a second consultation meeting and this remained your position.

Considering that the proposal is that there is one PA/office manager role on a full-time basis, and your contract is currently part time we do require you to confirm whether or not you would agree to a contract on a full-time basis. If you are, then we will (as has always been the intention) be arranging further consultation meetings with you and Julia to discuss the selection criteria. I also wish to be clear that it is common practice to have an initial informal discussion to give notice of a potential redundancy and then to proceed to a formal consultation process. You have had the opportunity to make representations during this process, which had been taken into account.

Redundancy processes can be stressful, and this process has been put in place to achieve a result which will lead to greater business efficiency. As such, we are keen to reach a conclusion swiftly, provided there has been adequate time for representations to be taken into account. As you have mentioned, the process is causing you stress and we consider it to be in everyone's interest for it to be resolved prior to you going on maternity leave. This should not be seen as an indication that the decision is going to be that you are made redundant, it is just that we want a resolution before this time.

As discussed with you during consultation, the timing for this process is due to my appointment as CEO and I have been looking at a number of areas where business efficiencies can be achieved. To be absolutely clear, the timing is not linked to your pregnancy.

To move matters forward, I would request you to confirm whether or not you would agree to a contract on a full-time basis by close of business on Monday 9 October.

Nelius

50. The Claimant replied by email sent on 9 October 2017 at 1759 hours. She wrote:

Thank you for acknowledging my email and content.

I will consider your response accordingly, however I would strongly suggest that the grievance be addressed prior to the continuation of any redundancy process.

> In response to your question regarding my employment contract, my position remains on changed. I am not in a position to confirm whether or not I would accept a full-time contract, given that I am about to go on maternity leave. Furthermore, I think it both unreasonable to be pressured into making this decision so close to the end of my pregnancy, and continually being pushed on this issue is contributing to the stress and associated illness I am suffering.
>
> Natasha

51. Mr de Groot, as he explained in his statement, then decided to take the decision to dismiss:

> 75. Due to the fact that the claimant stated in her grievance that the process was causing her stress, I thought it best to resolve the redundancy process as swiftly as possible. As I have explained above, I did not think the situation could be left unresolved in any event. It affected not just the Claimant and the Company, but also Ms Radschun, and I did not consider it reasonable to leave the position up in the air. Again, my decision was not influenced by the Claimant's redundancy or her maternity leave.
>
> 76. Following our various consultation meetings, I arrived at my conclusion and sent a letter to the claimant on 19th October 2018 confirming that I had unfortunately come to the decision that her role was to be made redundant. I didn't take this decision lightly as I understood and was sympathetic to the Claimant's position. However, the decision was based purely on business reasons and was necessary in order to effect the changes to streamline the business and to attempt to reduce unnecessary costs.

52. The letter of dismissal gave the Claimant 3 months' notice and encapsulated the reasons for dismissal as follows:

> As has been explained to you during the consultation process, following my appointment as CEO I have been reviewing the business for areas where efficiencies can be achieved; my review has not just focused on the administrative function. From the review, I considered the administrative function to be currently overstaffed. As you are aware, there is currently both a full-time and part-time administrative Assistant and this is not considered to be necessary and it was proposed that mporium requires only one full-time equivalent. I have considered your representations on the proposal and decided that it is in the best interest of the business to proceed with the proposal.
>
> The administrative function is therefore to be streamlined and it has been concluded by just one full-time resource is required. mporium requires one full-time resource for continuity so that a more efficient and effective service can be provided to the board and to mporium's business contacts. You did not have any representations on this aspect of the proposal.
>
> You are asked to confirm whether you would be able to work full-time, however you are unable to provide any assurances here. Therefore, as the requirement is for one full-time PA your part-time role is to be made redundant. We considered whether there were any other suitable alternative positions available, but unfortunately there were not.

53. Mr de Groot said in his statement:

> 80. At no point during the consultation process did the claimant indicate that she was interested in a job share with Ms Radschun, nor did Ms Radschun indicate to me when I spoke to her that this was of interest to her. However, in order to avoid the inevitability of making a redundancy, I did consider the possibility of a job share. However, on analysing this, it was clear to me that this simply wouldn't work as part of our business structure. In short, sharing the administrative work between two part-time employees would have led to a lack of continuity which I believed would have resulted in further inefficiency. Continuity in the administrative function is important from the perspective of employees, clients and investors: meetings are often scheduled and rescheduled at short notice. If a job share were to be implemented, it would have involved the claimant and Ms Radschun conducting a comprehensive handover process several times a week. Creating efficiency was the

primary reason for contacting a review of staffing across the business in the first place, so it would have been contrary to the overall objective, to implement an inefficient job share model for the administrative function. I did not, therefore, specifically raised the possibility of a job share with Ms Radschun. Again, my view on the possibility of a job share was based purely on the best interests of the business and had nothing to do with the Claimant's pregnancy or maternity leave.

I did not assume that because the claimant worked part time and are worked full time that the claimant would be the one to be made redundant. As I have explained above, I repeatedly discussed for the claimant whether she wanted a full-time role. And she indicated that she did, as I explained to her during the process, I would have begun formal consultations with

The Law

54. Mr Lee, counsel for the Respondent, has provided us with a skeleton argument for closing submissions containing a very helpful resumé of the relevant legal principles which we should bear in mind when considering the claims. Ms Moss, counsel for the Claimant, provided us with written submissions covering the law as well in respect of which she told us there was "considerable agreement". We do not propose to repeat all that we were told about the law here: suffice for us to say that we happily adopt counsel's researches and seek to comply with the guidance the quoted authorities provide.

Discussion

55. We have been provided with an agreed list of issues and we have attempted to work through them seriatim.

56. We are satisfied that the Respondent has demonstrated the sole or principal reason for the Claimant's dismissal to be redundancy within the meaning of section 98(2) of the Employment Rights Act 1996.

57. The remaining questions set out under the heading "Automatic unfair dismissal" are ones which we do not need to answer.

58. The second heading is "Unfavourable treatment and detriment due to pregnancy/Maternity". It reads as follows:

> 3. Did the Respondent subject the Claimant to direct pregnancy/maternity discrimination, contrary to sections 18 and 39 of the Equality Act 2010? In particular:
>
> a. Did the Respondent subject the Claimant to unfavourable treatment? The Claimant contends that it did so by allegedly:
>
> i. Putting her solely at risk of redundancy and not putting Ms Radschun at risk of redundancy.
>
> ii. Not offering her the full-time position being undertaken by Ms Radschun as an alternative to dismissal.
>
> iii. Asking her to commit to her return to work pattern following maternity leave prior to the commencement of her maternity leave.
>
> iv. Relying upon her inability to commit to full time work as a reason to dismiss her.
>
> v. Not exploring alternative arrangements of job sharing and/or work load changes.
>
> vi. Not approaching Ms Radschun regarding her capacity to reduce her hours or job share in the future.

vii. Not addressing her grievance adequately.

viii. Dismissing her.

ix. Not offering her an appeal against her dismissal.

x. Not paying her for her outstanding holiday carried from 2017 or accrued 2018.

59. We conclude that the Respondent did subject the Claimant to unfavourable treatment on all ten points save for the second point. However, when we came to issue 3(b) which asks:

> If so, did the Respondent subject of the Claimant to that unfavourable treatment because of her pregnancy and/or because she was seeking to exercise her right to ordinary or additional maternity leave?

we reached the answer "No" in respect of all the ten points save for the third. Thus our conclusion was that the Respondent had subjected the Claimant to unfavourable treatment by asking her to commit to her return to work pattern following maternity leave prior to the commencement of her maternity leave and that the Respondent did so because she was seeking to exercise her right to ordinary maternity leave.

60. We took the view that the statutory provision of maternity leave is designed to provide an employed woman who is pregnant with a feeling of security and, therefore, peace of mind before, during and after the maternity leave. The pressure applied to the Claimant ahead of her maternity leave to answer whether she wanted to work full-time impacted negatively on her health. The Claimant had made the Respondent aware that discussions about potential redundancy caused her to suffer stress but Mr de Groot choose to press for an answer to the question as to whether she could commit to full-time work on her return from maternity leave. It may be that he considered a delay in obtaining an answer would remove uncertainty for the Respondent, Ms Radschun and the Claimant but it was at the expense of putting the Claimant under stress.

61. The Claimant regarded it as inappropriate that she should be asked such questions so close the start of her maternity leave and we agree. She wanted to exercise her right to ordinary maternity leave with the peace of mind that the statutory framework is designed to ensure. Mr de Groot was unwilling to allow her to defer her answer until the end of her maternity leave: he pressed the Claimant for an answer immediately. We consider the fact that the Claimant wanted to exercise her right to ordinary maternity leave was the cause of, or materially contributed to, Mr de Groot choosing to press her for an answer immediately.

62. The agreed list of issues moves on to "Pregnancy / maternity detriment". Here, we considered the answers we provided to "Unfavourable treatment and detriment due to pregnancy/Maternity" contained our answers to the questions posed therein. We considered the Respondent, in the shape of Mr de Groot, subjected the Claimant to a detriment by pressing her before the start of her maternity leave for an answer as to whether, when she returned from maternity leave, she was prepared to work full-time. The Claimant's pregnancy and / or her seeking to avail herself of the benefits of ordinary maternity leave was the cause of, or a contributing factor to, Mr de Groot choosing to press her for an answer ahead of her maternity leave.

63. We move on to the issues set out under the heading "Less favourable treatment of part-time workers". Our conclusion was that the Respondent did subject the Claimant to less favourable treatment on grounds of part-time working, contrary to regulation 5(1)(b) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, by subjecting the Claimant to a detriment in the manner alleged, that is:

    i. Putting her solely at risk of redundancy and not putting her part-time colleague Ms Radschun at risk of redundancy; and

    ii. Making her redundant and not her full-time colleague Ms Radschun.

64. Ms Radschun was not considered for redundancy because, as Mr de Groot told us, she was working full-time and he considered there was only work for one full-time worker. As the complement of staff servicing the function of Office Manager / PA amounted to 1·6 staff, Mr de Groot simply targeted the ·6 – in other words, the part-time worker. In so doing, he treated the Claimant less favourably that he treated her full-time colleague, Ms Radschun, and he did so simply because she was the part-time worker.

65. Mr Lee argued that the decision to employ a single full-time employee for administrative support and to consult with the employee holding the part-time post, was justified on objective grounds which he specified as being to ensure the Respondent's business was run as efficiently as possible and to avoid an unnecessary consultation process with Ms Radschun.

66. In considering Mr Lee's submission, we remind ourselves of the Supreme Court's guidance on the concept of objective justification that was delivered in O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs [2013] I.C.R. 499 where the Court said this:

> **Objective justification**
>
> 43. The Part-time Workers Directive , like the Fixed-term Work Directive , is unusual in allowing the justification of direct discrimination against part-time workers. Clause 4.1 of the framework agreement (quoted at para 14 above) prohibits treating part-time workers less favourably than comparable full-time workers, solely because they work part-time, "unless different treatment is justified on objective grounds". Regulation 5(2) of the domestic 2000 Regulations (quoted at para 17 above) is to the same effect. However, clause 4.2 of the framework agreement sets out the general principle that "where appropriate, the principle of pro rata temporis shall apply". Regulation 5(3) is to the same effect. Hence the usual expectation is that part-time workers will receive the same remuneration and other benefits as comparable full-time workers, calculated on a pro rata basis, unless there are objective grounds for departing from this principle.
>
> 44. There is, however, little guidance from the Court of Justice as to what might constitute such objective grounds, other than that which we have been given in this particular case [2012] ICR 955, paras 64–66:
>
> > "64. …the concept 'objective grounds' … must be understood as not permitting a difference in treatment between part-time workers and full-time workers to be justified on the basis that the difference is provided for by a general, abstract norm. On the contrary, that concept requires the unequal treatment at issue to respond to a genuine need, be appropriate for achieving the objective pursued and be necessary for that purpose: see, by way of analogy with clause 5.1(a) of the Framework Agreement on Fixed-term Work , *Del Cerro Alonso [2008] ICR 145* , paras 57 and 58.
> >
> > "65. Since no justification has been relied on during the proceedings before the

> court, it is for the referring court to examine whether the inequality of the treatment between full-time judges and part-time judges remunerated on a daily fee-paid basis may be justified.
>
> "66. It must be recalled that budgetary considerations cannot justify discrimination: see, to that effect, *Schönheit v Stadt Frankfurt am Main (Joined Cases C-4/02 and C-5/02) [2003] ECR I-12575*, para 85, and Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol (Case C-486/08) [2010] ECR I-3527 , para 46."

45. The first sentence of para 64 means no more than that it is not enough for a member state to provide for the difference in treatment in its law (or enforceable collective agreement): see *Adeneler v Ellenikos Organismos Galaktos (Case C-212/04) [2007] All ER (EC) 82; [2006] ECR I-6057* . The fact that regulation 17 of the domestic 2000 Regulations excludes fee-paid part-time judicial officers from the protection given by the Regulations is neither here nor there. The second sentence of para 64 repeats the familiar general principles applicable to objective justification: the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so.

46. The opinion of *Advocate General Kokott [2012] ICR 955* , para 62, is slightly more expansive:

> "The unequal treatment at issue must therefore be justified by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see *Del Cerro Alonso [2008] ICR 145* , para 58, and Angé Serrano v European Parliament (Case C-496/08P) [2010] ECR I-1793 , para 44."

This court proposes to follow the guidance given by the Court of Justice and the Advocate General in those passages.

67. The objective justification of ensuring the Respondent's business was run as efficiently as possible seems to us to be the equivalent of saying that budgetary considerations justify treating part-time workers less favourably. But budgetary considerations cannot justify discrimination, as the ECJ reminded us and as the Supreme Court quoted with approval in its paragraph 44 quoted above. Avoiding an unnecessary consultation process with Ms Radschun is, in our view, the equivalent of taking into account budgetary considerations as being the objective justifications.

68. Thus, we are against Mr Lee in the concept he promotes. We do not consider that running the business as efficiently as possible can constitute objective justification. However, if we are wrong about that, we should add our view of the factual basis on which Mr Lee mounts his case. He cited the Claimant's own evidence that up to 25 minutes per day might be spent on handovers. The Claimant's complete answer to the question as to how much time was spent on handovers between her and Ms Radschun was as follows:

> Julia and I had handovers every day. We would have a catch up 10 to 15 minutes in the morning and 5 to 10 minutes at the end of the day. These catch-ups were face to face. Sometimes by email.

69. This was in the context of the Claimant working 3 days per week alongside Ms Radschun who worked 5 days per week with there being 6 handovers, one at the start and one at the end of each working day that the Claimant and Ms Radschun

both worked. Cumulatively, the time being spent on the two daily handovers was up to 25 minutes per day times 3. That time would have been spent with each informing the other about what had happened or was about to happen in their respective working days.

70. But where the two people were not working alongside each other but working, in effect, consecutive shifts of 2½ or 3 days duration, the handovers that would be required in a week would actually be two in number – with one informing the other of what had happened over the previous 2½ or 3 days or was scheduled to happen over the next several days. It clearly necessary for there to be the transfer of information but, however it might be organised – face to face, by email or by telephone, it did not necessarily follow that there might be more than 75 minutes spent on this task in the week, that being the time that the 6 handovers might take when the two women both worked at the same time.

71. Therefore, we were not persuaded that more time would be spent on handovers than were spent during the time that the Office Management / PA was being fulfilled by 1.6 staff.

72. The final two headings in the agreed list of issues were “Unlawful deductions from wages (holiday pay)” and “Remedy”. We were informed by the parties that certain payments had been made which rendered it unnecessary for us to consider the former and, as this hearing only dealt with liability, the remedy that flows from our findings on the preceding issues will have to be dealt with at a further hearing if the parties are not able to reach agreement.

Signed:

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EMPLOYMENT JUDGE STEWART

On: **10 July 2019**

DECISION SENT TO THE PARTIES ON

12 July 2019

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FOR SECRETARY OF THE TRIBUNALS