RM

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mrs Nikki Marie Roberts**
(2) Miss Rachael Catherine Sweeney

Respondents: **(1) Effectual Limited**
(2) Mr Jimmy Holder

Heard at: **East London Hearing Centre**

On: **13 & 14 August 2019 and (in chambers) 15 August 2019**

Before: **Employment Judge G Tobin**

Members: **Ms L Conwell-Tillotson**
Mr P Lush

Representation
Claimants: **Mr H Griffiths (solicitor)**
Respondents: **Mr A Rozychi (counsel)**

JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:-

1. **The Employment Tribunal rejects the first and second claimants claims of direct discrimination under s13 Equality Act 2010 pursuant to s18(7) Equality Act 2010.**

2. **The first and second claimant were discriminated against on the grounds of their pregnancies by the first and second respondent, pursuant to s18 Equality Act 2010.**

3. **The case will now be listed for a hearing to determine appropriate remedy.**

REASONS

The case

The claim

1 The claimants issued proceedings on 20 August 2018. They claimed direct sex discrimination, pursuant to section 13 Equality Act 2010 ("EqA"), and also pregnancy

discrimination, pursuant to s18(2) EqA. The details of complaint said that the claimants were warehouse operatives employed by the first respondent from 3 November 2017 and 15 November 2017 respectively, until 10 May 2018. The first respondent employed 4 male and 4 female warehouse operatives at its Pebmarsh site. The claimants contended that on 2 May 2018, the [first] respondent wrote both claimants purporting to dismiss them by reason of redundancy. The claimants contended that their selection for redundancy and subsequent dismissal were on grounds of both their sex and pregnancies. The claimants alleged that 4 female employees were selected for redundancy and 3 of these 4, including the claimants, were pregnant. The first respondent subsequently chose not to proceed to dismiss the fourth female employee (Ms Jo Butler) who was not pregnant. The claimants contended that first respondent dismissed them because they were pregnant. In respect of the sex discrimination complaint, the claimant's identified the following male comparators: Jason Bolt, Ference Samaria, Dale Spinks and Vanya Goddard whom the respondents did not select for redundancy.

2 The first claimant (who shall be referred to as Mrs Roberts for ease of clarity) contends that she notified her line manager, Mrs Bonnie Wright, and the first respondent's Human Resources Manager, Mrs Jenny Animashaun of her pregnancy in a series of text messages sent from 5 March 2018. On 23 July 2018 Mrs Roberts wrote to Ms Linda Holder appealing against her dismissal and raising a grievance. Mrs Roberts' appeal and grievance were dismissed by Mrs M[arie] Holder on 24 July 2018 without conducting an investigation or holding any meetings.

3 Prior to 2 May 2018, the second claimant (Miss Sweeney) contends that she told her line manager, Mrs Wright, of her pregnancy. Miss Sweeney contends that she sent an email to the first respondent's director, Ms Linda Holder, to notify her of issues which had arisen in her pregnancy and she requested a copy of the respondent's maternity policy. Miss Sweeney said that she was sent a notification of dismissal just under 3½ hours later.

4 The claimants contended that the first respondent was aware of both Mrs Roberts' and Miss Sweeney's pregnancy and that the first respondent's decision not to dismiss Ms Butler or any of the male comparators cited above was because Mrs Roberts and Miss Sweeney were pregnant. The claimants explained that the second respondent – Mr Jimmy Holder – was a party to the claim because he is the owner of the first respondent and the claimants were concerned that he may liquidate the first respondent.

<u>The response</u>

5 The Response was received on 31 October 2018. The grounds of resistance are long and detailed, a summary follows. The respondents accepted the dates of employment and the job descriptions quoted by the claimants were accurate. Both respondents deny less favourable treatment on the grounds of sex (the s13 EqA claims) and discrimination on the grounds of pregnancy (the s18 EqA claims)

6 The respondent contended that it employed 6 male and 5 female warehouse operatives at the premises at the relevant time and that the first respondent recruited both claimants specifically because of the operational requirement solely related to a single large customer, a Chinese company called Quality First Group Corporation Limited.

7 The respondents said that in 2018 it suffered 3 successive break-ins at the warehouse premises which resulted in the theft of some managed goods belonging to the

key client (Quality First). The first respondent informed Quality First of this theft and also needed to compensate the customer for the loss of the stored goods and also to pay for extensive enhanced private security. The respondents said that Quality First cancelled the working contract with effect from 16 April 2018. Given the short notice, the respondents were unable to attract new business to replace the loss of their main customer. The directors then held a meeting and agreed that staff would have to be made redundant. The respondents contended that the second respondent undertook a staffing cost analysis and the required number of redundancies were decided upon. The second respondent averred that he had minimal contact with the claimants and that he was absent from the workplace from 20 March 2018 for a period of 6 weeks.

8 The respondents said that 3 male employees were made redundant. These were:

1) Mr Robert Barton on 4 January 2018;
2) Mr Sean Dubarry Spinks on 16 February 2018; and
3) Mr Karl Draper on 20 April 2018.

9 The respondents contended that on 2 May 2018 a meeting was held with the affected workers and the respondents informed them of the reducing work demands and the implications on their employment being terminated by redundancy. Miss Sweeney did not work that day, so she was notified by email. The respondents contend that Ms Sweeney did not provide advance reason for her absence for 1 May 2018 and 2 May 2018.

10 The respondent contends that it made 6 [more] staff redundant at the beginning of May 2018, due to the loss of the Quality First work. These were:

1) Mr Neil Sanderson, forklift truck driver;
2) Liam McIntosh, packing and warehouse operative;
3) Mrs Roberts;
4) Miss Sweeney;
5) Ms Butler; and
6) Ms Joanne Smith, a “freelance worker”.

4 of the 6 were female. The respondents said that Ms Smith was also pregnant at the time of her redundancy (although the respondents say Ms Smith has not made a claim in the Employment Tribunal against them). The respondent contends that all staff were made redundant at that time were provided with materially the same correspondence letter confirming their redundancy.

11 The respondents said that Ms Butler was made redundant along with the claimants. However, approximately 1 month later the first respondent required holiday cover of between 5 and 10 hours per week and, because it assumed Miss Sweeney required more hours, the vacancy was offered to Ms Butler only. Ms Butler‘s previous contract of employment had been terminated and her continuity of employment was broken. The respondents contended that there was no sinister motive for offering Ms Butler this reduced and temporary position.

12 The respondents aver that the claimants were not singled out for their pregnancy status. The respondents assert that there was no rational justifiable economic basis to continue to employ the claimants for a contract which no longer existed, specifically the

claimants were hired for that contract and their recruitment, and ongoing employment and termination by reason of redundancy mirrored exactly that specific customer of the first respondent and the ending of that customer's business. In respect of the 4 male comparators identified by the respondent, the respondent said that Vanya Goddard is a female van driver. Mr Bolt was retained because he was not engaged in warehouse operations as he works as an admin assistant. Mr Samaria and Mr Spinks were employed as forklift drivers, holding relevant certificates.

13 The respondent referred to Mrs Roberts' email of 23 July 2018 and stated it was not aware that the claimant was providing a grievance, etc, and that it understood that Mrs Roberts was requesting further information related to her dismissal. Ms Linda Holder therefore responded the next day with the further information and that no further communication came from Mrs Roberts.

14 The grounds of resistance went into some detail in respect to the respondents' awareness of the claimants' pregnancies, On 20 February 2018 Ms Roberts sent Mrs Wright a personal text message stating that she had just found out that she was pregnant but not to let anyone else know. The respondents placed emphasis on Mrs Roberts' purported indecision about whether or not she would follow through with this pregnancy. Mrs Wright contends that she engaged in a private conversation, so it was reasonable not to mention it to the first respondent's management team. On 26 February 2018
Mrs Roberts informed Ms Wright that there was "no apparent pregnancy", which Mrs Wright took to be part of a continuing personal discussion. Again, the respondents asserted that it was reasonable for Mrs Wright to refrain from informing the first respondent's managers of Mrs Roberts pregnancy and that this was understood by Mrs Roberts to be the case. On 5 April 2018 Mrs Roberts sent a text message to Mrs Wright asking if she "can get some confirmation on where [she] stand[s] with maternity, antenatal appointments etc". The respondents averred that it was reasonable for Mrs Wright to think that Mrs Roberts was *asking prospectively*.

15 The respondent say that Mrs Roberts also had an impromptu and private conversation about her possible pregnancy with Mrs Animashaun, HR Manager, on or around 26 February 2019. The respondents contend that Mrs Animashaun did not pass on this information to senior management because Mrs Roberts stated that she was unsure about continuing her pregnancy. Ms Animashaun received a text from Mrs Sweeney on 5 April 2018 informing her of her pregnancy, but, as with Mrs Wright's response, Mrs Animashaun did not inform the first respondents' managers about her pregnancy either.

16 As Miss Sweeney was absent on 1 May 2018 and 2 May 2018 the first respondent was unable to hold her redundancy meeting and instead notified her by email with an explanatory letter attached. On 2 May 2018 at 11:19 Miss Sweeney emailed Ms Linda Holder to request details of the respondent's maternity policy. Miss Sweeney also stated in the email she wrote in the diary the previous week about her maternity related appointments, although she did not disclose the reason for that visit. Miss Sweeney stated that she explained this to Ms Wright, but that her wages were deducted for the appointment time. The respondents contend that this was evidence that the senior management did not have knowledge of Miss Sweeney's pregnancy and that Ms Holder did not view the appropriate timesheet that made reference to the claimant's antenatal appointment of 27 April 2018 until she processed the wages on 4 May 2018. Ms Holder

reply to the claimant's email on 2 May 2018 that day informing her that she was unaware that she was pregnant, and she attached the respondent's maternity policy. The next communication from Ms Sweeney was an email of 31 July 2018 similarly worded to that of Ms Roberts.

17 The respondents contend that they had no knowledge of the claimants' pregnancies, but that if knowledge is to be imparted to the respondents, the redundancies would still have occurred because it was a necessary operational requirement of the business.

The relevant issues for determination

18 A list of issues was agreed by the parties at the outset of the hearing.

Factual Issues

18.1 Whether the first respondent employed the claimants on a fixed term, to undertake a specific project or, on a rolling term contract.

18.2 Whether either or both respondents were aware that Mrs Roberts was pregnant at the time it dismissed her by reason of redundancy.

18.3 Whether either or both respondents were aware that Ms Sweeney was pregnant at the time it dismissed her by reason of redundancy.

18.4 Whether either or both respondents selected the claimants for redundancy by reason of pregnancy/maternity.

Legal Issues

18.5 Whether in selecting Mrs Roberts for redundancy, either or both respondents subjected her to less favourable treatment on the grounds of sex, contrary to s13 Equality Act 2010 ("EqA").

18.6 Whether in selecting Miss Sweeney for redundancy, either or both respondents subjected her to less favourable treatment on the grounds of sex, contrary to s13 EqA.

18.7 Whether in dismissing Mrs Roberts, either or both respondents unlawfully discriminated against her on grounds of pregnancy/maternity, contrary to s18(2) EqA.

18.8 Whether in dismissing Mrs Sweeney, either or both respondents unlawfully discriminated against her on grounds of her pregnancy/maternity, contrary to S18(2) EqA.

The relevant law

19 The EqA identifies a number of protected characteristics, which includes sex and pregnancy and maternity.

20 Discrimination on the grounds of a person's sex is prohibited under s11 EqA. S13(1) EqA precludes direct discrimination:

> 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.

21 In *Islington Borough Council v Ladele [2009] ICR 387*, the Employment Appeal Tribunal ("EAT") explained direct discrimination as follows:

> The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detrimental treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom background does not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic.

22 S23 EqA provides that there must be no material difference between the circumstances of the comparator and those of the person discriminated against, save as to the protected characteristic.

23 S18 EqA defines what it means to discriminate because of a woman's pregnancy or maternity, as distinct from her sex, in specified situations within work. This protects a woman from discrimination because of her current or a previous pregnancy. It also protects her from maternity discrimination. There is no definition of pregnancy in the EqA. Maternity is defined in s213 EqA, although maternity discrimination is not relevant to these proceedings, as neither claimant was on a period of leave following the birth of their children.

24 S18 EqA provides:

> (1) …
> (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) ….
> (4) ….
> (5) ….
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends–
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
> (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
> (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as–
> (a) It is in the protected period, in relation to her and is for the reason mentioned in paragraph (a) or (b) of subsection (2), or
> (b) It is for a reason mentioned in subsection (3) or (4).

25 The claimants' *protected period* began when their pregnancies began. In this instance both claimants were dismissed when they were both pregnant, i.e. within the protected period.

26 The key difference between the special protection from pregnancy discrimination and the general protection from direct discrimination (under s13 EqA) is that s18 EqA does not require the claimants to compare the way they have been treated with the way a male comparator has been or would have been treated. In contrast, s18 merely requires

that the claimants show that they have been treated *unfavourably* and no question of comparison arises. This recognises the fact, as confirmed by the case law of the European Court of Justice, that pregnancy is a condition unique to women, such that it makes no sense for the claimants to be required to compare their treatment to treatment that would have been accorded to a man in similar circumstances – see *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus 1992 ICR 325* and *Handels-og Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening 1992 ICR 332*.

27 Whenever a claim can be brought under direct discrimination or pregnancy (and maternity) discrimination then it must be brought under s18 EqA as s18(7) stipulates that no claim of direct sex discrimination may be made under s13 based on treatment of a woman that is caught by s18. The effect of this is that claims of pregnancy discrimination during the protected period of a woman's pregnancy must be brought under s18 and cannot be framed instead or as an alternative as a direct discrimination claim. Accordingly, we dismiss the claimants' claims of sex discrimination under s13 EqA by virtue of s18(7) EqA.

28 *Unfavourable treatment* differs from *less favourable treatment* in that the latter denotes some form of comparison. Whilst unfavourable treatment is not defined in the EqA, it is interpreted in line with the familiar legal concept of *detriment.* Both a selection for redundancy and a dismissal constitutes a detriment.

29 In *Interserve FM Limited v Tuleikyte UKEAT/0267/60* the EAT emphasised the "because of" question, i.e. the unfavourable treatment must be *because of* pregnancy etc so the *reason why* question applies to s18 EqA just as much as it did under s13 direct discrimination.

30 S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove fact from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination, and it is then for the employer to prove otherwise.

31 The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA Civ 142, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

(a) has the claimant proved facts from which, in the absence of an adequate explanation, the tribunal could conclude that the respondent had committed unlawful discrimination?

(b) If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

32 The Court of Appeal in *Igen* emphasised the importance of <u>could</u> in (a). The Court of Appeal in *Madarassy v Nomura International plc [2007] EWCA 33* upheld the approach in *Igen* in relation to the shifting burden of proof. The Court of Appeal went on to determine that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

33 The claimants are in any event required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between the detriments and, say, the pregnancies and that they were not merely unrelated events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have clear evidence of unfavourable treatment. It is essential that the employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

34 To summarise, in this case the claimants must prove, on the balance of probabilities, fact from which a (reasonable) Tribunal could conclude, in the absence of an adequate explanation, that the respondents have discriminated against the claimants. The claimants must produce some evidence of discrimination before the burden will pass to the respondents. If the claimant does this then the respondents must prove that they did not commit the act(s). This is known as the shifting burden of proof – once the claimants have establish a prima facie case (which will require the Tribunal to hear evidence from the claimants and the respondents to see what proper inferences may be drawn, the burden of proof shifts to the respondent to disprove the allegations, which will require consideration of the subjective reasons that caused the employers to act as they did. The respondents will have to show a non-discriminatory reason for the difference in treatment should the burden of proof shift.

35 Subject to the statutory defence (which has not been raised and does not apply in this instance), an employer is vicariously liable for any discrimination committed by an employee or agent in the course of employment: s109 EqA. So, the first respondent would be liable for any discrimination committed by its managers or directors. An employee or agent who commits an act of discrimination is also personally liable under S110 EqA and this applies to the allegations made against the second respondent.

The witnesses evidence

36 We (i.e. the Tribunal) heard evidence from the first and second claimants. We shall refer to the claims by name so as to make this determination easier to read. Both Mrs Roberts and Miss Sweeney confirmed their written statements and were cross-examined by Mr Rozychi. They answered questions from the Tribunal.

37 The claimants produced a statement from Ms Joanne Smith which was signed with a statement of truth and dated 24 September 2018. Ms Smith did not attend the hearing, so she was not available to be cross-examined by the respondents' barrister. Although we attached less weight to her evidence, Ms Smith's statement still had some value (as potential corroboration) because of the similarity of her circumstances to that of the claimants. Ms Smith was pregnant around the same time. She said that she was a permanent employee, Mr Jimmy Holder said that she was an independent contractor. Irrespective of whether or not she was an employee Mrs Smith's position or engagement was considered alongside the claimants in the redundancy dismissal of 2 May 2018.

38 Ms Smith stated that Mrs Roberts told Mrs Wright that she was pregnant and then Mrs Animashaun, and that Mrs Animashaun was unforthcoming with information about time off, etc., which is consistent with the text messages we have seen. Ms Smith also corroborated Miss Sweeney account that she told Mrs Wright about her pregnancy in April 2018. It is not clear from her statement whether or not Ms Smith witnessed the claimants

informing Mrs Wright and Mrs Animashaun of their pregnancies, but even if she did not directly see or hear this, we are satisfied that this would be something that pregnant women in a workplace would discuss, so her statement on this point does have some (albeit limited) evidential merit, at least in understanding the situation from April 2018 onwards. Ms Smith gives a fairly detailed account of her time with the first respondent. Perhaps of most significance was her account that there was plenty of work available at the time of her dismissal, which was consistent with the claimants' version of events and which contradicted the respondents' account of a significant downturn in work following the loss of the Quality First contract. Ms Smith said that she did not pursue a claim against the respondents because of her mental health. The fact that she does not pursue a remedy against the first respondent enhances the credibility of her account because she does not have a stake in these proceedings. Ms Smith's reference to the stress of pursuing a claim and her depression is a credible explanation for her non-attendance at the hearing and we draw no negative inference, in the circumstances, from the non-production of any medical report.

39 The claimants also produced an unsigned and undated statement from Mr Carl David Draper. We were informed that Mr Draper was due to attend the hearing (and confirm his statement) but that he had a panic attack on the way to the hearing the first morning. We were told (which was subsequently confirmed) that Mr Draper was an ex-soldier and that he suffered episodes of post-traumatic stress disorder. The claimants provided an email address and copies of a text message from Mr Draper to Mrs Roberts which confirmed the circumstances of his non-attendance in an entirely credible way and disclosed the circumstances about his medical condition. Mrs Roberts also disclosed a number of contemporaneous texts messages (made during the morning and evening of the first day of the hearing) which were entirely consistent with Mr Draper's unfortunate medical episode and explained his non-attendance.

40 In his statement Mr Draper said that he was employed by the first respondent as part of the team of agency staff and that he was told at the end of February 2018 by Mr John Pollard that he was no longer needed. He said that he did not receive any written confirmation of this. Mr Draper said that he had never seen the letter from Mr David Holder purporting to terminate his contract on 20 April 2018. Nor was he issued with the Principal Statement of Terms and Conditions, dated 16 March 2018 contained within the hearing bundle. We note that, of the 10 principal statements disclosed by the respondent, Mr Draper's is the only one not signed so this adds some credibility to his statement. Mr Draper said that he had never seen the P45, which is dated 4 February 2019, although this document confirms his leaving date as 20 April 2018, over 8 months later. Because of Mr Draper unfortunate non-attendance, we were not able to fully reconcile the dispute over allegedly fabricated documents. That said, we accept that Mr Draper's account is sufficient to raise doubts, in itself, about the veracity of the respondents' documents. We make no finding that the respondents have manufactured or falsified documents in Mr Draper's case, we merely determine that there is some doubt about the authenticity of some of the respondents' documentation.

41 After hearing all of the evidence in this case, we determined that both Mrs Roberts and Ms Sweeney were clear in their accounts. They answered questions appropriately and were not prone to exaggeration. Their answers were plausible, and their accounts were not contradicted by the contemporaneous documents. We regarded the claimants as entirely credible witnesses. Where the evidence of Mrs Roberts and Mrs Sweeney conflicted with the evidence given by Mrs Wright and Mrs Animashaun, we preferred the

evidence of the claimants as we were not convinced by the credibility of these 2 respondent witnesses on both of the fundamental aspects of the case, i.e. their knowledge and dissemination of the claimants' pregnancies and their awareness of the cancellation of the Quality First contract or contracts (which we shall explain later).

42 The second respondent provided a witness statement and he was cross-examined by Mr Griffiths. The respondents adduced statements from the following, who also gave oral evidence: Mrs Marie Holder, Mrs Bonnie Wright and Mrs Jenny Animashaun. Again, these witnesses' evidence was challenged by Mr Griffiths and we asked questions to clarify some points.

43 We shall refer to the second respondent as Mr Jimmy Holder for ease of reference. Mr Jimmy Holder's evidence was important because he jointly decided to dismiss the claimants with Mr David Holder and he said that he did not know that the claimants were pregnant. We do not believe his evidence for the reasons we set out below. We also reject Mr Jimmy Holder's account of the loss of the Quality First contract or contracts and his assertion that he matters taken into account in deciding to dismiss the claimants.

44 It is important to emphasise at this point that because a witness may have given an exaggerated or inaccurate account on one aspect of his or her evidence, it did not necessarily mean that they had deliberately misled the Tribunal on other aspects of their account. Where we made findings that a party or witness was unreliable, that was because we did not accept the intrinsic evidence given on such fundamental issues.

45 Mr David Holder did not attend the hearing to give evidence. He had decided to dismiss the claimants with Mr Jimmy Holder and Mr David Holder had communicated the dismissal to the claimants. Accordingly, his evidence was crucial to the case. On 13 May 2019 the respondent's representative applied for a postponement of this hearing on the basis that Mr David Holder was "away", this being a "short break". No further explanation was proffered. The postponement request was refused by Employment Judge Prichard who recognised the importance of Mr David Holder to the respondents' case. EJ Prichard said Mr David Holder could and should have noticed the trial date when it was set on 10 December 2018 and that he was going to have to change his travel plans if he was to defend this case successfully.

46 Mr Rozychi proffered no further explanation as to Mr David Holder's non-attendance at the hearing. We were provided with a witness statement for Mr David Holder which was dated 4 July 2019 and appropriately signed with a statement of truth. We accepted the statement as evidence and said to the parties that (like the statements of Mrs Jones and Mr Draper) we would determine the weight that we give this evidence during our deliberations. We note that Mr David Holder's statement is unreliable in respect of the dismissal of Mr Barton who he said was made redundant on 4 January 2018 (see later). His inaccuracy or untruthfulness on this significant part of the Response did, in his case, diminish his credibility on the other points he gives evidence on. Having fully consider the circumstances of this case, we attach little weight to Mr David Holder's evidence. He has not proffered a satisfactory explanation for his non-attendance. An indicating that he was away on a "short break" is not a good enough reason, particularly given EJ Pritchard's warning. So, where Mr David Holder's statement evidence was disputed, we were reluctant to accept his version of events contained within his statement. This is because his statement has not been subjected to cross-examination or questions

of clarification from the Tribunal, because of his unreliable account that Mr Barton was dismissed by reason of redundancy and because of the circumstances of his non-attendance.

47 Mrs Holder said she was not aware of the pregnancy of either claimant until after their dismissal. She said that she normally attended work 2 to 3 days per week but from 20 March 2018 she had only been working approximately 1 day a week to do the wages. Despite the claimants completing the appropriate signing-in book for their antenatal appointments, Mrs Holder said that she did not consult with this when processing the wages. Mrs Holder said that neither of her daughters (the claimants' line manager nor the HR Manager) told her about the claimants' antenatal appointments or their pregnancies. This is not credible. Even if Mrs Holder had such an uncommunicative relationship with her daughters, it is not credible that they would not have told her of these pregnancies because she needed this information to do her job. In this case, we reject the assertion that the Response makes that not paying employees for their antenatal appointment is evidence of a lack of knowledge of their pregnancies. This is clearly not the case when both Mrs Wright and Mrs Animashaun knew first-hand at very early stages and Mrs Animashaun had previously said that the first respondent would not pay for antenatal appointments without receipt of the MATB1 form. Mrs Holder's whole demeanour did not support such an assertion, although we are careful not to rely upon demeanour alone as this might mask nervousness, for example. That said, this was a fairly small family-owned and family-managed company, where mother, father, son and two daughters worked closely together. Of course, they discussed significant developments within the business, and we do not accept the perfunctory assertions that they did not.

Findings of Facts

48 We made the following findings of fact. We also addressed key matters which we could not determine in our fact finding and we explain why we were unable to make findings of fact on these important points. We did not attempt to resolve all of the disputes between the claimants and the respondents, merely those that we regarded as necessary to determining the issues of this case. Where we consider the appropriate, we set out our reasons for making such findings. In making our findings of fact, we place particular weight on contemporaneous or near-contemporaneous documents and correspondence as a more accurate record of events. The statements of parties and witnesses were, of course, central; however, these statements were written some time after the events in question and through the prism of either advancing or defending the appropriate claims.

49 At the relevant time, i.e. between late-2017 and early- to mid-2018, the management structure of the first respondent company was as follows:

- Mr David Holder was effectively the Chief Executive, he was the son of Mr Jimmy Holder and Mrs Linda Holder;

- Mr John Pollard was the Operations Director;

- Mr Jimmy Holder (the second respondent) described himself in evidence as the Finance Director;

- Mr Baggio Yang was described as the "Chinese Director", or the director with

responsibility for the Chinese contracts;

- Mrs Marie Holder was the Company Secretary, although everyone referred to her by her preferred name of Linda and she appears as Linda Holder in correspondence. Mrs Holder was married to Mr Jimmy Holder. Mrs Holder was a board member according to Mr Jimmy Holder (although Mrs Holder said she was not a board member).

- Mrs Jenny Animashaun was the company's HR Manager who was also the daughter of Mr Jimmy Holder and Mrs Linda Holder; and

- Mrs Bonnie Wright was a supervisor and Mr Jimmy Holder and Mr Linda Holder's daughter.

50 Mrs Roberts applied for a job with the first respondent after seeing an advert on Facebook for various vacancies at their premises. She attended an interview with the first respondent's HR Manager, Mrs Animashaun and was offered the job of "WAREHOUSE OPERATIVE[1]" in a letter from Mrs Animashaun, dated 9 November 2017. The role was described as "PERMANENT[2]". The detailed job offer letter also enclosed a Principle Statement of Terms and Conditions which provided for 25 working hours per week and which was also signed by Mrs Animashaun. Mrs Roberts signed and returned that document that day. The Principal Statement of Terms and Conditions provided (at clause 11) that Mrs Roberts employment would be made permanent at the end of a 3-month probationary period if her performance was of a satisfactory standard. Mrs Roberts said in her statement that no-one told her that the job was a short-term post and she left a permanent job to take up a role which Mrs Animashaun said would be a permanent role. There was no reference in the contractual documents to Mrs Roberts' employment been dependent upon the Quality First contract or any reference to Mrs Roberts undertaking work, either exclusively or predominantly, for that client. Mrs Roberts said in evidence at the hearing that at no stage during her interview, or thereafter during her employment, was she ever told that her employment was dependent upon the Quality First contract or any similar contract or contracts. Consequently, we make, as a finding of fact, that Mrs Roberts was not employed on the Quality First contract or any other related contract or on an exclusive or designated workstream. Mrs Roberts was employed on general work as a Warehouse Operative. Mrs Roberts was employed on a permanent contract and not a "rolling term" contract (whatever that maybe).

51 Miss Sweeney learned of the vacancies with the first respondent from her friend Mrs Roberts and she attended a job interview with Mrs Bonnie Wright. Miss Sweeney said in her statement Mrs Wright told her that the role was permanent with plenty of work. Miss Sweeney was offered the job as a Warehouse Operative in a letter from Mrs Animashaun, which was dated 9 November 2017 and enclosed a Principle Statement of Terms and Conditions, dated 15 November 2017. As with Mrs Roberts' case, the position offered was that of "WAREHOUSE OPERATIVE[3]" and the offer letter said, "This is a PERMANENT[4] role". Neither the job advert nor the contractual documents referred to either employee engaging in work for a specific client or contract and Miss Sweeney's contract provided for working hours of 22½ per week. Miss Sweeney's contract also contained the provision

[1] Mrs Animashaun emphasis
[2] As above
[3] As above
[4] As above

that following satisfactory completion of a probation that the appointment would be made permanent. Miss Sweeney signed both the offer letter and the Principal Statement of Terms and Conditions and started work on 15 November 2017. We make a similar finding of fact to that in respect of Mrs Roberts, specifically that Miss Sweeney was employed as a Warehouse Operative undertaking general work, i.e. not related to any particular customer or workstream. She was employed on a permanent contract, which should have continued until appropriate notice was given.

52 Neither of the claimants (nor any other warehouse employee) were provided with detailed job descriptions.

53 The first respondent had never had an employee that was pregnant go on maternity leave; this was said by Mrs Holder in reply to a member's question at the hearing.

54 On 4 January 2018 Mr Robert Barton was dismissed by Mr David Holder on behalf of the first respondent. According to his dismissal letter, Mr Barton was dismissed for not attending work or contacting his employer, so he was not dismissed for redundancy as contended by the respondents in their grounds of resistance and as stated in the witness statement of Mr David Holder. Furthermore, Mr Barton's dismissal came not long after the employment of Mr Neil Sanderson, Mr Liam McIntosh, Ms Katrina Haynes (nee Best) and Ms Vanya Goddard.

55 We do not accept as a fact that the First Quality contract was cancelled; our detailed reasons are set out in the following determination section below.

56 The claimants' evidence was that Mr Dubarry Spinks was dismissed because he was suspected to be implicated in the thefts from the first respondent's premises (which we accept occurred). The Response contends that Mr Dubarry Spinks was dismissed by reason of redundancy on 16 February 2018. A copy of Mr Dubarry Spinks' dismissal letter purported to come from Mr David Holder stated that this was due to the sudden withdrawal of contracts from China. Mr David Holder does not refer to this dismissal in any detail in his statement and this is inconsistent with Mr Jimmy Holder's evidence as he stated in his statement that the cancellation of the Quality First contract necessitated 6 redundancies (of which Mr Dubarry Spinks was not named). The timing of Mr Dubarry Spinks' dismissal is also inconsistent – Mr Dubarry Spinks was alleged dismissed by reason of redundancy before the Quality First contract was terminated. There is no evidence that the respondents followed any proper redundancy dismissal process (as with the claimants' experience). Given that we have found that Mr David Holders evidence is unreliable in respect of Mr Barton's dismissal, we also find his evidence is unreliable in respect of the dismissal of Mr Dubarry Spinks. We prefer the evidence of the claimants that Mr Dubarry Spinks was suspected of or implicated in the warehouse brake-ins and, on the balance of probability, we reject the authenticity of the purported dismissal letter. We are drawn to the conclusion that the respondents have either subsequently substituted Mr Dubarry Spinks dismissal letter of 16 February 2018 or provided a misleading letter purported to come from Mr David Holder.

57 Mrs Roberts and Mrs Wright were friends and Mrs Roberts told Mrs Wright that she was pregnant on 20 February 2018 by text message. She said that she did not want anyone else knowing for personal reasons. A number of texts followed in relation to personal issues. If there was any doubt that Mrs Wright wanted her pregnancy to go full

term, then such doubts (and the respondents' contention) were unsustainable after 5 March 2018 as on that date Mrs Roberts shared a scan of her 6-week-old foetus with her whats app work group. The whats app group included Mrs Wright and Mrs Animashaun, and Mrs Wright responded to the message by saying: *that's definitely a girl*.

58 On 19 March 2018 Mrs Roberts wrote to Mrs Animashaun asking about maternity information in respect of her contract and this exchange was not at the end of March 2018 as contended by Mrs Animashaun. Mrs Roberts subsequently raised issues in respect of her maternity entitlements and Mrs Animashaun incorrectly advised her that the first respondent was "not able to put anything in motion until we receive the MATB1 form". Furthermore, on 5 April 2018 Mrs Roberts texted Mrs Wright her asking for clarification in respect of her antenatal appointments and her maternity leave generally. Mrs Wright responded by saying she would need to speak to Mrs Holden or Mrs Animashaun or that she would ask on her behalf.

59 Miss Sweeney had been planning for a baby and she said that she had discussed this with Mrs Wright and other staff. Miss Sweeney found out she was pregnant on 3 April 2018 and she informed Mrs Animashaun by text on 5 April 2018. Miss Sweeney said, and we accept, that she also informed Mrs Wright when she was next at work. Mrs Wright disputed that she was ever informed that Miss Sweeney was pregnant before her dismissal. In her statement, Ms Wright referred to a text exchange on 23 April 2018, which gave no mention of her pregnancy:

> Hi bonnie. Just to give u a heads up I was rushed into hospital thursday eve with bleeding. I have to go for a scan tomoz afternoon but doctor has said I need to be on light duties for a bit which I have a letter from him for. I havent told all the others is dont really wanna tlk about it till I ko what is going on xxx
>
> Heyya just seen this, hope you're okay [emoji] thanks for letting me know, there should be plenty to do that's not heavy, if you need a few days off to rest, just let me know it is not a problem xx

60 Whilst there is no explicit reference to pregnancy in her message, the referral to bleeding and a scan and the reluctance of Miss Sweeney to want to discuss this is very clear indication that this exchange was about Ms Sweeney's pregnancy. Mrs Wright's lack of curiosity over Miss Sweeney's condition and her reference to light work confirms our clear understanding that she was well aware of what Miss Sweeney was talking about. On 26 April 2018 Ms Sweeney explicitly referred to a "pregnancy related" doctor's appointment, which was not met with any apparent surprise from Mrs Wright.

61 The dismissing director Mr David Holder said in his statement that he first became aware of Mrs Roberts' pregnancy when he saw the antenatal appointment in the signing-in book in reception. Mr David Holder stated in his statement that he was unsure of the exact date of this. This was likely to be around 19 April 2019 when Mrs Roberts, according to her text to Mrs Animashaun, had a blood test booked by her specialist midwife.

62 Mr David Holder says that he was not made aware of Rachel Sweeney being pregnant. This contrast with Ms Sweeney's evidence to the Tribunal that she told Mr David Holder of her maternity absent when Ms Wright was absent. We accept and prefer the evidence of Miss Sweeney. The Tribunal determines that this was shortly after 26 April 2018 because in the hearing bundle there is a text between Ms Sweeney and Mrs Wright in which she report having to go to the doctors that day for a pregnancy related matter. Ms Wright responds asking her to let Mr David Holder know and Ms Sweeney states later

> Just to give you u an update. Due to having that bleed and ending up in hospital they have wanted me to see a doctor today bout some results we also had a call from my midwife and she wants to see me urgently tomorrow

> at 12 due to the bleed and my operation. Ill let David no that I have to go tomoz. Ill get proof of these appt when I can. Just wanted to keep u in the loop xxx

63 Ms Sweeney was very clear in her evidence, which we accept, that she then reported this maternity related absence to Mr David Holder. So, the dismissal officer spoke to Miss Sweeney about her pregnancy just after 26 April 2018.

64 The claimants were not advised of the loss of the Quality First contract or contracts. Neither Mrs Roberts nor Miss Sweeney were notified of a possible redundancy situation. Neither Mrs Roberts nor Miss Sweeney were consulted about any aspect of the redundancy, that is: the reason that the first respondent needed to reduced headcount; the number of employees affected (i.e. the pool of potentially redundant employees); the criteria for selection for redundancy; the claimants scoring or position within the selection criteria; and whether any suitable alternative employment was available.

65 The claimants' dismissals arose from 1 discussion between Mr Jimmy Holder and Mr David Holder. Mr Jimmy Holder said this discussion was by telephone as he was away from the office recuperating from a medical intervention. Mr David Holder does not refer to when this discussion occurred. Mr Jimmy Holder could not remember when the decisions to dismiss the claimants was made and neither he nor Mr David Holder made any notes of their conversation. Mr Jimmy Holder said that the decision to dismiss was a joint decision, which we accept.

66 On 2 May 2018 Mr David Holder wrote the claimants' dismissal letter. The letters to Mrs Roberts and Miss Sweeney were in identical terms:

> Owing to the sudden withdrawal of contracts from China we have been put in the unfortunate position of having to terminate all of our rework staff's employment with effect immediately.
> As per your contract company give you one weeks' notice. Your wages will be calculated until May 10th and you will not be required to work after today, you will be paid for your weeks' notice on Friday 4th May 2018 and this will include holiday pay if due.
> …

67 No proper dismissal process was followed. Neither Mrs Roberts nor Miss Sweeney were given advanced notification that the respondents were considering dismissing them. They were not invited to participate in the discussion between Mr Jimmy Holder and Mr David Holder nor were they permitted make any written representation for consideration by the dismissal officers.

68 Mrs Roberts was invited to a meeting, but the purpose of this meeting was to communicate her dismissal as the decision had already been made. Mrs Roberts was not warned in advance that she would be dismissed at this meeting and she was not given the right to bring a work colleague or trade union representative with her.

69 Miss Sweeney was not afforded the opportunity of a meeting. She was on authorised annual leave to recovering from medical treatment and was not due to return to work until 7 May 2018. Miss Sweeney was dismissed by Mr David Holder's letter, which was sent to her by email from Mrs Holden almost 3½ hours after her request for a copy of the maternity policy and after querying why her wages had been docked for a pregnancy-related appointment. Neither claimants were offered the right to appeal against their dismissals. The claimants' dismissal took effect on 10 May 2018.

70 Both Mrs Roberts and Ms Sweeney said, and we accept, that there was plenty of

work to do at the time of their dismissal, which is corroborated by Ms Smith. Mrs Robert and Miss Sweeney said, which we also accept, that their dismissals came as a complete surprise and that there was no indication that their employment was to be terminated.

71 It is not possible to establish to our satisfaction how many employees were dismissed in early May 2018 because the respondents did not follow either any redundancy process or any proper dismissal procedures. The claimant contended that 3 female employees were dismissed on 2 May 2018 – the claimants plus Ms Smith – and all were pregnant. The claimants' contended that Ms Butler (who was not pregnant) was not, in fact, dismissed or if she was dismissed, the dismissal was a sham as Ms Butler was swiftly re-employed. In fact, as Ms Butler was not an employee she could not be dismissed, either by redundancy or any other reason.

72 Mr Jimmy Holder said that 6 employees were dismissed by reason of redundancy. 4 women (i.e. the 3 pregnant employees plus Mrs Butler who was not, in fact, an employee) and Mr Sanderson and Mr McIntosh. Mr David Holder's statement was cursory and unconvincing in explaining the selection and rationale for these dismissals. In fact, the dismissal director's statement was identical to his father's statement in that paragraph 10 of Mr Jimmy Holder's statement was directly lifted and transposed to the statement of his son at paragraph 16. Both dismissal officers referred to dismissal letters, in identical terms to the claimants, that they say were sent to Mrs Butler, Mr Sanderson and Mr McIntosh as well as P45s. Mrs Wright said she was not involved in the decision to make staff redundant nor in any dismissal process so she could provide no useful evidence in this regard. In addition, the first respondent's Human Resources Manager, Mrs Animashaun, also said that she was not involved in the dismissal process in any way.

73 Both Mr Sanderson and Mr Mcintosh were employed from the end of November 2017. The claimants said in evidence that Mr Sanderson had a poor attendance record and that was the reason for his dismissal if, in fact, he had been dismissed at this time. The claimants said that Mr McIntosh had not worked in the warehouse for some time. Mr McIntosh's P45 is not consistent with his dismissal notice, recording a leaving date of 1 week later.

74 We are concerned with the integrity of the respondents' witnesses' evidence in general and the genuineness of the respondents' dismissal documentation in respect of Mrs Butler, Mr Sanderson and Mr McIntosh. We note there were no proper redundancy process and we regard the claimants' evidence as reliable. Despite the P45 (which is not evidence of redundancy) we are not satisfied that Mr Sanderson and Mr McIntosh were also dismissed by reason of redundancy. In any event, according to the documents provided by the first respondent, both these male employees were engaged on zero hours contracts (as opposed to the claimants' fixed hours contracts) and neither were on contracts that was stated to be "permanent".

75 Ms Butler was again working for the first respondent by, at least, 23 May 2018.

76 We make no findings of fact in respect of the claimant's post-dismissal correspondence with Mr Holder because there is no allegation of discrimination arising from these exchanges and (correctly) this does not feature on the agreed list of issues.

Determination

Were the claimants employed on a fixed term contract to undertake a specific project

77 Following our findings of fact, the claimants were clearly employed as permanent employees as that is what their contracts of employment said. As well as the contractual documents, we carefully reviewed all of the documents provided by the first respondent in respect of the claimants' working arrangements, which included the staff induction New Starter Forms. There is no reference to the Quality First contract, or any Chinese contracts or contractors in any contractual documents provided by the respondents.

78 As there were no job descriptions contained in any of the contractual documents provided in the hearing bundle for 10 warehouse staff, we determine that none of the first respondent warehouse staff had job descriptions. Job descriptions were not prepared for the redundancy process. Consideration of job descriptions is normally a starting point when considering a fair and non-discriminatory redundancy dismissal process.

79 We found that the claimants were offered the general position of Warehouse Operatives on a permanent contract, similar to Ms Goddard who was employed later, who not pregnant and who was not dismissed. When this was put to Mr Jimmy Holder. He contended that Ms Goddard, Mr Samaria (and others) were also forklift truck drivers. Again, there was no corroboration of this, and such a feature was not mentioned in any contemporaneous or near-contemporaneous documents or any witness statement. This evidence arose in cross-examination when the witness was "on the ropes" struggling to explain a deeply flawed selection process. It was not credible to the extent that it undermined Mr Jimmy Holder's evidence even further. Further, according to the job offer letters or Principal Statement of Terms and Conditions provided by the first respondent, Mr Sanderson, Mr McIntosh and Ms Haynes were engaged on zero hours contracts and Mr Bolt was employed as an Administration Assistant.

80 It was a significant part of the respondents' grounds of resistance that the claimants were recruited specifically to undertake the Quality First contract or contracts yet the statements of the recruiters – Mrs Animashaun and Mrs Wright – did not refer to this. In contrast, the claimants were clear in their evidence to the Tribunal that they were not engaged to work for a single customer or group, or a designated workstream. In evidence, Mrs Wright (and Mrs Animashaun) were insistent that the claimant's worked only on the Quality First contracts. Generally, we preferred the evidence of the claimants because the claimant's accounts were consistent with each other and with both the contemporaneous contractual documents available and their evidence was also consistent with the lack of appropriate documentation.

The respondents' knowledge of the claimants' pregnancies

81 We find above that the claimants' line manager Mrs Wright was told of Mrs Roberts' pregnancy on 20 February 2018. On 19 March 2019 Mrs Animashaun was aware of Mrs Roberts' pregnancy. Knowledge of Mrs Roberts pregnancy was not dependent upon the provision of a MATB1 form and the first respondent's HR Manager was wrong to attempt to deny Mrs Roberts her maternity rights until she provided this form. Mrs Roberts was not so easily fobbed off as, again, on 5 April 2018 she chased Mrs Wright for clarification in respect of her antenatal appointments and her maternity leave generally.

82 The joint decision maker and dismissing officer Mr David Holder was aware of Mrs Roberts' pregnancy around 19 April 2018 at the latest. Mr Jimmy Holder said that he did not know of either Mrs Roberts or Miss Sweeney's pregnancies prior to their dismissal but we do not except this evidence. This was a family firm of less than 20 employees plus management. We just do not believe that Mr Jimmy Holder's 2 daughters or his son did not tell him of the claimants' pregnancies prior to his decision to dismiss these pregnant women. This contention was inherently incredible.

83 Miss Sweeney informed Mrs Animashaun on her pregnancy on 5 April 2018 and Mrs Wright a few days later. Following our discussion of the text exchange of 23 April 2018 above, we regard Mrs Wright's contention that she did not know of Miss Sweeney's pregnancy as wholly incredible. Miss Sweeney was equally very clear in her evidence that she reported her maternity related absence to Mr David Holder. So, we accept, the dismissal officer knew of Miss Sweeney's pregnancy just after 26 April 2018, if not before. Likewise, we reject Mr Jimmy Holder's account that he did not know of Ms Sweeney's pregnancy.

84 The dispute in respect of when Mrs Wright and Mrs Animashaun knew of the claimants' pregnancies and their denial that they did not pass on this information to the first respondent's directors (and their close family members) is opportunistic and unreliable. When combined with the other inconsistencies, we determine that this it is so incredible that it does undermines the value of their evidence on all other points.

85 Mrs Holder said she was not aware of the pregnancy of either claimant until after their dismissal. She said that she worked reduced days from 20 March 2018 and only worked on the wages. Mrs Holder claimed that she was unaware of the conversations, text messages and queries of the claimant's surrounding paid time off for antenatal appointments. She said that neither Mrs Animashaun nor Mrs Wright had discussed this with her or given her any indication that the claimants were pregnant. Mrs Holder said that she did not consult the appropriate signing-in books, where the claimant's recorded their antenatal appointments. Such signing-in books were essential to consider for the wages run. Her account was not credible, and we reject it accordingly

<u>The redundancy situation</u>

86 The respondents contended that a cancellation of the Quality First contract necessitated the redundancy situation. The only corroborative evidence to support this was a letter entitled Notice for Termination of Contract. The letter or notice was not signed or dated, nor was it on any headed notepaper. The letter purported to come from Luo Xiaoliang of 1hcang.com and the letter was stamped "For and on behalf of Quality First Group Corporation Limited" with a space for "Authorised Signature(s)" which was again unsigned. The respondents did not adduce any further evidence from Mr or Ms Luo in respect of the cancelled contract in the form of any confirmatory letter or statement for the Tribunal, or even any exchange of contemporaneous or subsequent correspondence.

87 Other than this single sheet there was no evidence proffered by the respondents to corroborate that the contract had been terminated. Mr Jimmy Holder said that the notice of termination had been emailed but he was not able to produce a copy of the email or identify who the email had been sent to or when. This is surprising given that the respondents were able to put before the Tribunal extensive corroborative evidence in respect of the burglary to the first respondent's premises that supposedly gave rise to the

termination of this contract.

88 Mr Jimmy Holder was not able to produce a copy of the original First Quality contract. He said he received notification about the termination a few weeks before the claimant's dismissal and he was not able to be more precise than a few weeks before May 2018.

89 Mr Jimmy Holder said in evidence that prior to the redundancies of May 2018 the first respondent's head count for warehouse staff was 17 to 18. So, given that the respondents say that there was 4 women and 2 males made redundant in early May 2018 this reduced the warehouse headcount to 11 to 12. Mr Jimmy Holder said that the warehouse headcount subsequently rose by 8 or 9 more, so at the time of the hearing the first respondent employed 20 warehouse staff, which around 15% more that it was prior to the redundancies and over 40% more than the warehouse head count following the redundancy dismissals 15 months earlier. This casts further doubt on both the impact of the Quality First contracts loss and, more significantly the need for redundancy dismissals.

90 Mr Jimmy Holder said in evidence that he was the Finance Director. He said that the loss of the Quality First contract was substantial which gave rise to a loss of 30% to 40% of the first respondent's turnover. When he was asked if he could produce copies of any profit and loss account, cost forecasts or business projections etc, he said that he was not able to do so. He was not able to produce copies of reports to the first respondent's bank nor was he able to produce a copy of any correspondence with, for example, the first respondent's insurers notifying them of the loss of such a major source of work. Mr Jimmy Holder confirmed that the company had board meetings on a monthly basis, but he was not able to produce any minutes or notes of any company meeting that corroborated such a large loss of business. This is surprising in the circumstances. Such information would be relatively easy to provide, and it is suspicious that the first respondent has chosen not to provide such corroborative information, particularly in circumstances where the claimants have never accepted the credibility of this redundancy situation and the claimants' solicitors have written to the Tribunal with concerns over the respondent's disclosure. The failure to produce such corroborative information significantly undermines the respondents' case.

91 This was a small company in which 5 of the 7 managers and/or directors were close family members. Mr Jimmy Holder, Mrs Holder, Mrs Wright and Mrs Animashaun said they did not discuss at all crucial business affairs like the loss of a huge amount of business (up to 40% of their livelihood) and the possible ensuing redundancies. This is not only not credible, but again it undermines the evidence of the second respondent (and that of his wife and daughters) on other matters.

92 Surprisingly, none of the respondents' witnesses were able to identify precisely when the loss of work occurred. Mr David Holder does not proffer any date in his statement. Mr Jimmy Holder said he could not be sure of when the first respondent discovered about the loss of the Quality First contract, but he said this was shortly before the termination of the contract took effect on 16 April 2018. Mr Jimmy Holder was away from the office for 6-weeks from 20 March 2018 because of an eye condition. He said that the first respondent lost the contract because of the thefts from their warehouse. He said the company made efforts to reassure the customer, but this was not successful. Mr Jimmy Holder said that Mr Yang dealt with liaising with the Chinese company, yet there were no documents produced in respect of this customer (other than the Notice for

Termination of Contract) and there is no reference to Mr Yang in any documents provided. We heard no evidence from Mr Yang in circumstances where there was considerable doubt in respect of the cancellation of the Quality First contract.

93 Mrs Holder gave evidence at the hearing after her husband and said that she had no involvements with the redundancies at all. Nevertheless, Mrs Holder said that she knew about the loss of the Quality First contract a couple of weeks before the contract was terminated. So this would be early-April 2018. The Employment Judge referred Mrs Holder to the notice of termination from Quality First and Mr Dubarry Spinks' dismissal letter of 16 February 2018, which refers to the loss of the contracts from China. Mr Dubarry Spinks' dismissal came 2½ months before the Quality First contract was terminated. At that point Mrs Holder said that the first respondent dealt with a lot of Chinese companies and that they had lost 2 contracts out of 10. This was not the case that the respondents set out in the Response and Mrs Holders evidence was not consistent with any of the respondents' witness statements or the preceding oral evidence of the second respondent. Her evidence was not consistent with the notice of termination which referred to termination of "our contract" in the singular. The Tribunal considered that this was a change of story arising from a slip during questioning. The Finance Director and second respondent, Mr Jimmy Holder, never made any reference to a number of companies or losing contracts previous and this was not corroborated in any of the documentary evidence.

94 When questioned on this point, Mrs Wright said that the respondent company dealt with a number of Chinese clients and these included Quality First which was the main one and the biggest client. The first respondent dealt with other Chinese or Hong Kong companies called My Test, Wendi Pengy and HK Parcels. Again, these companies were not referred to in any other documents nor were they referred to in any of the respondent's witness statements. Mrs Wright said that she did not have any detailed knowledge of the contracts but that the major contract loss was for Quality First Group which was in mid-April. Mr Animashaun said that she had no dealings with the redundancy. She said she did not know anything about this despite being HR Manager.

The claimants' selection for redundancy

95 The Response contended that the first respondent employed 6 male and 5 female warehouse operatives. The respondents did not provided evidence on the breakdown of the relevant workforce, which is surprising in a case involving disputed redundancy dismissals. So far as we could ascertain, the information in respect of warehouse staff provided by the respondent was incorrect. From the various witness statements and documents provided in the hearing bundle, we identified 5 female employees and 3 male employees. These were as follows:

Male	Female
Mr Dale Dubarry Spinks	Mrs Roberts
Mr Neil Sanderson	Ms Sweeney
Mr Liam McIntosh	Ms Katrina Haynes
	Ms Vanya Goddard
	Ms Joanne Butler

96 Mr Sanderson, Mr McIntosh and Ms Haynes were employed on zero hours contracts, so their employment status differed significantly from the claimants. This was

relevant for redundancy selection but was not taken into account.

97 There was no employment contract or other contractual documents for Mr Ferrenca Samaria so we infer that he (and others) were independent contractors. The witnesses made reference to casual staff, the job advert referred to this and Mr Jimmy Holder contended that Mrs Smith was a freelance worker.

98 In evidence Mr Jimmy Holder said that the claimants were selected for redundancy on the basis of their length of service and the requirements of the work that they undertook. This supposed criterion was not set out in the witness statements of either of the dismissal decision-makers.

99 From the contracts provided in the hearing bundle, we see that the longest serving members of staff were the claimants. Mr Dubarry Spinks had been dismissed by this stage, and Ms Hayes, Mr Bolt and Ms Goddard were recruited after the claimants.

100 There were no job descriptions for any of the warehouse staff nor had any been drawn up for the redundancy exercise.

101 When it was asked about what discussions were undertaken in respect of identifying a pool of affected employees and the selection of the claimants, Mr Jimmy Holder said that he had a single telephone discussion with Mr David Holder following which they jointly decided to dismiss the claimants. When asked about identifying the roles or work that the claimants had undertaken (i.e. their job description), Mr Jimmy Holder said that Mr David Holder had discussed this with Mrs Wright and Mrs Animashaun. This was contrary to the evidence of both Mrs Wright and Mrs Animashaun, who said that they were not involved in identifying employees at risk of redundancy or in devising any selection criteria. Both Mrs Wright and Mrs Animashaun were clear that they were not involved in the redundancy process in any way. Indeed, Mrs Wright said that the claimants' redundancies had come "out of the blue". It is particularly incredible and becomes even more unconvincing that Mr Jimmy said that he and his son undertook a redundancy selection assessment when the Human Resources Manager (and immediate family member) was kept in the dark. This point is particularly salient given that these 2 directors did not undertake anything resembling a considered and detailed process.

102 When it was pointed out to Mr Jimmy Holder that these purported discussions were not in any of the respondents witness statements, Mr Holder insisted that he was told by his son that these discussions with Mrs Wright and Mrs Animashaun had taken place as part of selecting the claimants for redundancy. We do not accept this. Mr Jimmy Holder made this assertion when he appeared to be backed into a corner at the hearing and the fact that he was so insistent on holding to a demonstrably wrong assertion, merely undermined his evidence further.

<u>The claimants' dismissal</u>

103 The redundancy criterion were never raised or shared with the claimants. In fact, there was no redundancy consultation whatsoever. The claimants were not warned in advance of their dismissals, Mrs Roberts was not offered the right to be accompanied at her dismissal meeting and Miss Sweeny was dismissed by letter without even the benefit of a meeting or hearing. Indeed, the first respondent did not even offer the claimants the right to appeal their dismissal, which a fundamental feature of any fair (and non-

discriminatory) process. Consequently, the dismissal process ignored the fundamental features of a fair dismissal process.

Discrimination

104 Given our findings of fact and above determination, it is quite clear that there are facts, which, in the absence of an adequate explanation, we could conclude that the respondents have committed unlawful discrimination. The list of issues seeks to extrapolate selecting the claimants for redundancy from dismissing the claimants. In the circumstances of this case that is a false distinction because the respondents did not bother to follow any recognizable redundancy selection process. We determine the respondents merely dismissed the claimants and sought some after the event justification.

105 In respect of the shifting burden of proof, the key aspects of this case are as follows:

a. The respondent contended that the claimants were employed to work on a designated contract when they were not.

b. On the balance of probabilities, we were not persuaded that the Quality First Group terminated their contract or contracts with the first respondent.

c. At the time of dismissal, the first respondent had plenty of work, which is further indicated by a business that was expanded further following the redundancy dismissals in May 2018

d. The respondents' case was that the claimants were dismissed around 1 month after the respondents received notification of the Quality First contract termination and 2 weeks after the contract ended. This was sufficient time to notify the claimants of a redundancy situation (if genuine) and then to undertake a proper (and fair) redundancy selection process. There was also sufficient time available and no rational explanation as to why the respondents did not undertake a fair dismissal process.

e. The respondents disregarded any proper redundancy selection process and a fair dismissal process. This is probably the most compelling feature in shifting the burden of proof.

f. Key documents were missing from the respondents' documents and witness evidence for the respondents was unreliable.

106 As the first part of the *Igen* and *Barton* tests have been met, the burden falls upon the respondents to prove that unlawful discrimination was not committed or was not to be treated as committed.

a. For the reasons we set out above, the respondent's contention that the claimant worked exclusively (or even predominantly) on the Quality First contract was unsustainable.

b. We reject the evidence of Mr Jimmy Holder, Mr David Holder, Mrs Wright, Mrs Animashaun and Mrs Holder on all key aspects of this case. In contrast,

we accept the evidence of Mrs Roberts and Miss Sweeney, supported by Ms Smith and Mr Draper. The veracity of the Quality First notice of termination is questionable and the absence of corroborative evidence or information is significant.

c. Even if we were to accept that the Quality First contract (or contracts) was terminated, we do not accept that this had the effect of necessitating the claimants' dismissal. At the time of dismissal, the first respondent had plenty of work. Yet the headcount was reduced by the claimants plus possibly 2 others (Mrs Barton was quickly re-engaged). We prefer the evidence of the claimants that Messrs Sanderson and McIntosh were poor attenders and non-attenders respectively and that the respondents may have used this situation as the opportunity to "clear the decks" and dismiss these perceived unproductive staff members.

d. The respondents did not suggest they had insufficient time to provide for proper consultation and a proper dismissal process.

e. We recognize that this was a relatively small employer, but it was not that small. In addition, the dismissing officers' daughter and sister was the company's HR Manager, who had no input into the redundancy process and dismissal procedure. There was no justification for dismissing the claimants in the manner this manner.

f. For the reasons above, we set out why we were dissatisfied that key documents were not made available to us by the respondents and why we determined that the witness evidence for the respondents was unreliable.

107 The claimants' case was strong, and the respondents have not proved that unlawful discrimination was not committed. We are satisfied that the claimants have proved that they were dismissed as a result of their pregnancies. We determine that there was never a proper redundancy situation.

108 This case will be listed for a hearing to determine compensation and other remedy, if appropriate. A notice of hearing and case management orders will be issued in due course.

Employment Judge Tobin

Dated: 11 November 2019