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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mrs J Patel	**AND**	Elbi Digital Limited

Heard at: London Central **On**: 2 - 6 December 2019

Before: Employment Judge Brown

Members: Ms T Breslin
Mr D Clay

Representation

For the Claimant: Ms B Patel, Husband/Representative
For the Respondent: Mr S Bellm, Solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. **The Claimant's claims of discrimination because of pregnancy and maternity fail.**

2. **The Claimant's claims of victimisation fail.**

3. **The Respondent did not dismiss the Claimant unfairly.**

REASONS

Preliminary

1. The Claimant brings complaints of pregnancy and maternity discrimination, victimisation and unfair dismissal against the Respondent, her former employer.

2. The parties had agreed a List of Issues as follows:

2.1. Time Limits / Limitation Issues

Were all of the complaints presented within the time limits set out in sections 123 of the Equality Act 2010 ("EQA"). Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures and whether time should be extended on a "just and equitable" basis.

2.2. Unfair dismissal

2.2.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for redundancy.

2.2.2. If so, was the dismissal fair or unfair in accordance with ERA section 98(4) and were the principles in *Williams v Compair Maxam Ltd 1982 IRLR 83* followed, including whether there was any or sufficient consultation, whether the claimant was offered any suitable alternative employment, whether there was fair selection and whether there was a genuine redundancy situation.

2.3. EQA, section 19: Pregnancy and Maternity Discrimination

2.3.1. Did the respondent treat the claimant unfavourably as follows:

2.3.1.1. The Claimant's role of Head of Operations and Finance being given to Mr R Moore with the title of Loveshop General Manager?
2.3.1.2. The use of her maternity cover, Mr Moore, reducing her role.
2.3.1.3. Making her role redundant.
2.3.1.4. Lack of consultation.
2.3.1.5. Giving Mr Moore a role which should have been offered to her as suitable alternative employment. The claimant's case is that she was not given the opportunity to apply for the role.
2.3.1.6. Not dealing with the claimant's grievance in fair manner by failing to comply with the ACAS Code, the grievance officer Ms Vivian Taylor was the subject of the grievance and was the decision maker and the HR Advisor dealt with both the grievance and the appeal and was not impartial – Mr Robin Hall. The claimant's case is that no investigation took place. The appeal officer was also said to be the subject of the grievance (Mr Derek Gannon) and there was a failure to comply with the grievance policy.
2.3.1.7. The claimant's grievance was shared with Mr Moore and Mr Askew which she relies on as a breach of trust and confidence as an act of discrimination.
2.3.1.8. The respondents sought to avoid the protections of the Maternity and Parental Leave Regulations – Regulation 10 by delaying the redundancy process.

2.3.2. Did the unfavourable treatment take place in a protected period and/or was it in implementation of a decision taken in the protected period?

2.3.3. Was any unfavourable treatment:

2.3.3.1. Because of the pregnancy or because the claimant was on compulsory maternity leave;

2.3.3.2. Because she was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave; or

2.3.3.3. In respect of the allegation at 2.3.1.2 because of the claimant's sex.

2.4. Equality Act, Section 27: Victimisation

2.4.1. Did the claimant do a protected act? The claimant relies upon her grievance of 14 June 2018.

2.4.2. Did the respondent subject the claimant to any detriments as follows;

2.4.2.1. Telling the claimant not to come into the office on 12 September 2018.

2.4.2.2. The dismissal, grievance process and the dismissal process.

2.4.2.3. Not paying the claimant in lieu of notice until a letter was sent to the respondent by her legal representative.

2.4.2.4. If so, was because the claimant did a protected act and/or because the respondent believed that the claimant had done, or might do, a protected act?

2.5. Remedy

2.5.1. If the claimant succeeds, in whole or in part, the Tribunal will be concerned with issues of remedy and, in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

3. The Tribunal heard evidence from the Claimant and from Trusha Patel, who accompanied the Claimant to her grievance and grievance appeal hearings, and from Mr Bhavesh Patel, the Claimant's husband.

4. For the Respondent, the Tribunal heard evidence from: Viv Taylor, grievance manager and dismissing manager; Derek Gannon, grievance appeal manager; and Ricky Moore, the Respondent's employee who worked as the Claimant's maternity cover.

5. There was a Bundle of documents. Page references in this Judgment are to page references in the Bundle. The parties made oral and written submissions. The Tribunal gave an oral judgment.

Findings of Fact

6. The Respondent company was founded in 2014 by Natalia Vodianova and Timon Afinsky. Natalia Vodianova is a supermodel and philanthropist. The Respondent company is a technology-based platform which aims to change the way in which individuals, particularly millennials, donate to charity. It was, and is, a technology-led start-up company.

7. The Claimant was employed by the Respondent from 6 March 2015 as Head of Operations and Finance. She went on maternity leave in October 2015. Mr Ricky Moore was appointed as maternity cover for her role.

8. On 21 August 2016 the Claimant raised a grievance saying that she had been discriminated against because of her maternity, page 235. She complained, amongst other things, that the Respondent had attempted to demote her to an Office Manager / Executive Assistant role and that she had been removed from payroll. She also said that she had been promised a pay rise before she went on maternity leave, but this had not been honoured. She copied Mr Moore into her grievance.

9. Derek Gannon had been appointed as Chair of the Respondent in February 2016. Viv Taylor is a specialist in executive coaching, leadership development and career management. Mr Gannon asked her to coach and mentor senior team members for 1 -2 days a week in 2016. She was also engaged on a consultancy basis by the Respondent in August 2016. In August 2016 the Respondent's Chief Executive Officer and other senior managers left the Respondent. Ms Taylor was asked to spend time looking at the Respondent's team and business structure and make proposals to make the business more sustainable. The Respondent had, at its initiation, been provided with £4 million worth of investment by its founders, but that money had been significantly eroded.

10. Ms Taylor took responsibility for the Claimant's grievance on the departure of the Respondent's Chief Operational Officer. She consulted Mr Rob Hall, the Respondent's Employment Law Consultant. He spoke to the Claimant about her grievance. Ms Taylor then met with the Claimant on 5 October 2016 to hear her grievance. The Claimant told her that she had been given a £5,000 pay rise before her maternity leave had commenced, but that this had never been processed. The Claimant asked to return to work 3 days a week after her maternity leave. As a result of the meeting, Ms Taylor and the Claimant agreed that the Claimant would come back to work after the Claimant's maternity leave to her previous job as Head of Operations and Finance. Her new salary would be £46,000 per annum, prorated to 3 days a week, and her job description would remain the same.

11. While the Claimant's grievance was therefore resolved to her satisfaction at that time, the Claimant told the Tribunal that she believed that, in reality, the Respondent wanted to retain Mr Moore in the role of Head of Operations and Finance, rather than the Claimant. She pointed to an email from Mr Moore on 5 October 2016, which she had obtained later through a Data Subject Access

Request (DSAR), page 314. In that email, Mr Moore resigned from the Respondent. He said that he had been prompted to do so by news that the Claimant was looking to return to the Respondent and that there was no a role for her because Mr Moore had been employed into her role. Mr Moore said that he was resigning to avoid any kind of payment. He said, "Following my conversation with Derek and Viv on the matter I realise that Jayna may not be an option for Elbi… I urge you to consider allowing her to return to avoid any kind of financial settlement…".

12. When crossed examined about this email, Mr Moore told the Tribunal that he had resigned for three reasons; he had also been offered more money, for a more responsible role, in a company which shared the Respondent's premises. Mr Moore told the Tribunal that, after he sent the email, he was subsequently told that he should not resign on account of the Claimant's grievance, because there would be room in the Respondent for both the Claimant and for Mr Moore.

13. Both Mr Gannon and Miss Taylor told the Tribunal that they did not recall saying to Mr Moore that the Claimant was "not an option" for the Respondent; they both denied ever having had the conversation with Mr Moore about a "pay-out" to the Claimant.

14. The Tribunal also saw email advice from Mr Hall to Ms Taylor before the Claimant's grievance hearing on 5 October 2016. This letter of advice said that the Claimant was plausible and was looking for a fair and sensible resolution of her issues. Mr Hall said that he believed that the salary increase had indeed been agreed and that, while the Claimant was not entitled to return to exactly the same role, she was entitled to return to a comparable role. Mr Hall reported the Claimant's wish to return part-time, 3 days a week, and to add accrued holiday to her maternity leave, so that she would return in January 2017. Mr Hall recommended that the Respondent confirm the Respondent's position on all these matters. He also commented that the options for the Respondent included the fact that the Claimant might regard the situation as less than satisfactory and might appreciate an opportunity to separate from the company by a settlement agreement, to spend more time with her baby, page 318.

15. The Tribunal noted that Mr Hall's email did not recommend that the Respondent pursue a settlement agreement with the Claimant as a preferred option; nor did his email appear to be responding to a request for advice on settlement from the Respondent. Mr Hall's email advice was simply setting out settlement as a potential option to resolve the grievance. The majority of the email was devoted to the Claimant's return to work and what was required in order to resolve the grievance in that context.

16. On all the evidence therefore, the Tribunal concluded that the Respondent company and Mr Gannon and Ms Taylor were not seeking, as a preferred option, to retain Mr Moore instead of the Claimant. The Tribunal noted that Mr Moore was leaving the company for a better paid, more senior position, in a company which shared the Respondent's workspace. Mr Moore may well have been presenting his decision as in the best interests of the Respondent, rather than in

Mr Moore's best interests, to maintain a good relationship with the Respondent with whom he would still be working in close proximity.

17. The Tribunal was shown private WhatsApp messages, later, between Mr Moore and Ms Taylor on about 6 May 2018. In them, Ms Taylor told Mr Moore about the Claimant's second proposed maternity leave period. Mr Moore asked Ms Taylor how she felt about the Claimant going on maternity leave again. Miss Taylor responded, ".. she has been really open with us actually and has worked hard …". The Tribunal considered that this indicated that Ms Taylor did not react negatively to the Claimant taking maternity leave. The Tribunal noted that, in paragaraph 12 of the Claimant's witness statement, the Claimant told the Tribunal that, at the time of taking her second maternity leave, the Respondent appeared to be supportive of it.

18. Those pieces of evidence supported the Tribunal's conclusion that Ms Taylor and Mr Gannon did not want the Claimant to leave at the end of her first maternity leave, to retain Mr Moore instead. In fact, Mr Hall and Ms Taylor accepted everything that the Claimant said in her 2016 grievance and, following the grievance, the Claimant was welcomed back to work and was viewed as a valuable employee on her return.

19. The Claimant returned to work after her first period of maternity leave on 9 January 2017, on her old job description, pages 327-328. Her job description was divided into three parts: Financial; Legal; and Operations and Office Management. Her financial responsibilities included being the main point of contact for accountants, filing company invoices and receipts, reconciling credit card payments, creating monthly reports to founders and liaising with book keepers. Her legal responsibilities included managing external and internal policies, working with the Respondent's legal team to draft new agreements for freelancers, volunteers and charities, and ensuring that insurance cover was in place. Her operations and office management duties included managing human resources, recruitment, induction, managing operations and responsibility for the customer relationship management system.

20. The Claimant told the Respondent that she was pregnant in April 2017 and that she intended to take maternity leave from July 2017. On 11 May 2017 the Claimant received an email from Kathleen Saxton at the Lighthouse Company, a head-hunter. Ms Saxton said that she was recruiting for a Head of Finance and Business Operations role for the branded enterprise of a well-known sporting personality, page 364. Ms Saxton said that she was contacting the Claimant "from the recommendations we are hearing." She also said, "I understand from mutual contacts that you run a very busy schedule". The Claimant discovered that Ms Saxton was a contact of Ms Taylor and suspected that Ms Taylor was trying to engineer the Claimant's departure from the Respondent. She thought that Ms Taylor was the mutual contact to whom Miss Saxton was referring.

21. Ms Taylor gave evidence to the Tribunal about the way in which head-hunters work. Head-hunters have a research team which conducts searches, on the internet, for people in roles similar to the role which is being recruited for. When subsequently contacting the individuals identified from internet searches,

head-hunters use terms such as, “from recommendations we are hearing”, to flatter them and make them more likely to engage with the recruitment process. Ms Taylor was adamant that she did not make any recommendation to Ms Saxton concerning the Claimant and that the text of Ms Saxton’s email was standard recruitment “puff”.

22. The Tribunal found Ms Taylor wholly credible on this. She had intimate knowledge of the practices and terminology used by head-hunters and she was convincing in her explanation that this email was nothing to do with her.

23. The Claimant went on maternity leave in late June or early July 2017.

24. In about March 2017, the Respondent had obtained a report from the Boston Consultancy Group, which advised the Respondent that it would need to rebuild and relaunch the “app” which the Respondent was using to obtain charitable donations. The Respondent decided that it needed a product manager to manage the production, launch and operation of the app. However, the Respondent had significantly exhausted its reserves and did not have money to recruit a standalone full-time product manager in mid 2017. In summer 2017, Ms Taylor heard that Mr Moore was being asked to reduce his hours, to 4 days a week, by his new employer, Timber Yard. Ms Taylor and Mr Gannon proposed to Mr Moore that he ask to reduce his work at Timber Yard further, to 3 days a week, so that he would be available 2 days a week, both to cover the Claimant’s maternity leave and to do some work on product management of the new app. They proposed that Ms Taylor and Mr Gannon would help out with the Claimant’s Operations work which Mr Moore would not be able to cover.

25. Mr Moore procured an agreement from Timber Yard to reduce his working week to 3 days. He was appointed by the Respondent as Operations Manager, maternity cover, for a fixed term from 19 June 2017 to 29 December 2017, working 2 days a week for £250 per day. The £250 per day rate was the same rate as Mr Moore was paid at Timber Yard, although it represented a higher salary than that which had been paid to the Claimant, pages 395-396.

26. The job description attached to his fixed term contract, page 418 included, Finance, Human Resources and Legal duties. The Claimant pointed out, in evidence, that it also included a specific duty to “support LoveShop processes and documents”, page 419. The Tribunal found that, otherwise, the job description was very similar to that of the Claimant.

27. The Claimant contended that, in fact, her job was diminished during her maternity leave, because Mr Moore was not only doing her job 2 days a week, but was also undertaking other responsibilities; and, while Ms Taylor and Mr Gannon were supposed to be covering the Claimant’s responsibilities for an extra day, their hours were not increased to cover the missing day of her 3-day contract.

28. Mr Moore told the Tribunal that he worked very hard and worked extra hours in evenings and weekends to cover, both the Claimant’s responsibilities, and his work on the new app. Mr Gannon told the Tribunal that he undertook a

lot of work, which would have been the Claimant's work, in relation to Indian partners and a potential office in India, from July to December 2017. The Tribunal accepted their evidence, which was corroborated by Ms Taylor's evidence. All those witnesses said that they did extra work to cover the relevant duties.

29. In Autumn 2017 the Respondent was discussing, with Apple, a proposal that Apple "feature" the Respondent's new app when it was launched in January 2018. The Respondent realised, as a result of these conversations, that, if its new app was successful and attracted hundreds of thousands of users (as it aimed to do, in order to generate advertising revenue), the LoveShop feature of the app would need its own General Manager. The LoveShop was a concept which rewarded people who donated to charity with "Love Coins", which could be spent in the LoveShop on merchandise which had been donated by premium fashion brands. The Respondent realised that, if there were hundreds of thousands of transactions in the LoveShop, this would be a very significant operation.

30. As Mr Moore was present in the workplace while these discussions were taking place, he became aware of the proposal to create a LoveShop General Manager job. He told Ms Taylor and Mr Gannon that he would be interested in it. Ms Taylor and Mr Gannon told the Tribunal that they undertook an interview process with Mr Moore, including Mr Moore giving a presentation and attending two interviews. Miss Taylor referred to interview notes dated 3 November 2017, page 441. The Tribunal observed that the notes appeared, however, to be a general discussion about the role, rather than a conventional question and answer interview process.

31. It appears that Ms Taylor and Mr Gannon then recommended to the Respondent's founders that Mr Moore be appointed to the role. They did not notify the Claimant of the potential role. In evidence to the Tribunal, they both agreed that the Claimant would have known about the potential LoveShop General Manager role, or would have been told about it, if she had been in work and not on maternity leave. Mr Gannon told the Tribunal that there was no reason, in his mind, to notify the Claimant of the potential role while the Claimant was on maternity leave, because the Claimant had her own Head of Operations and Finance role, which he anticipated would continue and, indeed, expand when the new app was successfully launched in January 2018. Mr Gannon said that he was very confident that the Claimant would be coming back to an expanding role.

32. Ms Taylor told the Tribunal that, if the Claimant had shown persistent interest in the General Manager, LoveShop role, then Ms Taylor would have spoken to the Claimant and, perhaps, would have interviewed her for it. However, it was clear from Ms Taylor's evidence that she considered that Mr Moore was a far preferable candidate for the role. She told the Tribunal that Mr Moore had experience and interests relevant to the LoveShop role and app. He had already put forward ideas for the LoveShop app and she considered that the job would require 24/7 attention when the app was launched in January, which Mr Moore was capable of giving. Ms Taylor told the Tribunal that, during her

work with Ms Taylor at the Respondent, the Claimant shown not any interest in product management roles, or in sales roles.

33. Mr Moore told the Tribunal that he had worked as a project coordinator for a "Wheels to Work" scheme before joining the Respondent. He said that, during his time there, he had brought in £1.2 million of funding. He said that he had worked at a national level to leverage the resources of the scheme, to encourage greater discounts on items from manufacturers like Honda. He also told the Tribunal that he had set up and run an e-commerce store to sell vehicles and equipment. In addition, he had embarked on a "hire and go" scheme, using GPS tracking devices and had started developing a tracking app. The Tribunal accepted Mr Moore's evidence on this; it was not challenged by the Claimant.

34. On the other hand, the Tribunal did not have any evidence from the Claimant about the Claimant's expertise in e-commerce activities, or in developing apps, or in sales, or in growing small businesses using technology platforms.

35. The Respondent showed the Tribunal a job offer from Ms Taylor to Mr Moore for the position of General Manager LoveShop dated 8 November 2017. This said that the role would start in January 2018, would attract an annual salary of £70,000 and would be a 5 day a week role, page 442. The letter said,

"Whilst you work out your notice with Timber Yard – we have discussed that you will now predominately focus on managing the project/product relationship with our Moscow development team as activity heightens in the period leading up to the launch.(sic) This is felt by all to be critical for the next 2 months. Derek and I will continue to cover the HR, Finance and Legal elements of the original maternity cover alongside you…

In the period between January 2018 and the return to work date of the Head of Operations and Finance we have agreed that you will focus on your new role but will still cover elements of the Head of Operations and Finance role. If this become untenable we have also agreed that we will revisit this as and when necessary. As previously - Derek and I will assist with the cover". The letter was signed by Ms Taylor.

36. The Claimant challenged the authenticity of this letter, pointing out that it had not been disclosed on a DSAR request by her in Summer 2018, although the letter did mention the Claimant's role as Head of Operations. The Respondent contended that the letter did not contain personal data relating to the Claimant and would, therefore, have not have been disclosed on such a request. The Tribunal disagreed. The letter mentioned the Claimant's role and clearly related to the Claimant and, therefore, was disclosable pursuant to the DSAR.

37. However, the Tribunal concluded that the letter was authentic and was written in about early November 2017. The Tribunal found that Mr Moore was appointed as General Manager of LoveShop, working 5 days a week, from January 2018. On 24 December 2017, Ms Taylor sent a Christmas message to staff, saying that Mr Moore would be the new General Manager of LoveShop in

the New Year, page 484. Mr Moore was signing his emails as Head of Operations and LoveShop General Manager, by the latest, in February 2018. The new app was being launched in January 2018; logically, Mr Moore would need to have been in place by the launch date in order to fulfil the essential duties of his new role. The written job offer dated 9 November 2017 to Mr Moore was consistent with him being offered the job in late 2017 and starting it in January 2018.

38. The Respondent showed the Tribunal the job description for the LoveShop General Manager role. The general description of the role included, "To develop a business strategy for LoveShop and ElbiDrop" and " To develop a P&L (profit and loss) for the LoveShop that is sustainable". Key duties included developing and implementing process for saleability, running ElbiDrop, exploring business efficiencies, managing the product relationship between the brands and LoveShop, managing and agreeing product photos and copy with brands, managing communications surrounding the products and ElbiDrop with users designing and implementing marketing strategies, assessing stock levels, building strong contacts with brand partnerships, developing customer service strategy and being the contact for customer service enquiries, making recommendations for LoveShop product development, working with the Moscow development team, being involved in data analytics for LoveShop and undertaking monthly reporting to the Chair and founders, as well as being involved in marketing and social media strategy for LoveShop. The skills required for the job included "proven experience of retail and e-commerce, building brands and developing and maintaining a strong customer base" as well as sales skills, page 447.

39. The Claimant told the Tribunal that she had previously helped with audits of stock at the Respondent, had produced reports to founders and had experience of processes and implementing process. She said, however, that ElbiDrop had not existed when she was in the business. She also said that she did not undertake marketing.

40. Ms Taylor did not send her Christmas message email to the Claimant. She said that she had sent it quickly and sent it to people in the office, which was an omission on her part. The Tribunal accepted her evidence; it is likely that Miss Taylor was sending many emails, specifically to people in the office, and that she sent this email to the people that she normally sent emails to. She also copied the email to Mr Gannon and the founders, because the email was signed from her and Mr Gannon and the founders, so it was logical that she would copy those people into it.

41. The Claimant had asked to come into work for a "Keeping in Touch" day before Christmas 2017. The Keeping in Touch day was eventually arranged for 9 February 2018. To the Claimant's disappointment, Ms Taylor was unable to attend the office that day. The Claimant pointed out, in cross examination, that there had been a Senior Team Meeting on 7 February 2018 and she contended that she ought to have been invited for her KIT meeting that day. The Respondent contended that, from the agenda of the relevant meeting, one of its principal purposes was to reflect on the first round of ElbiDrop and decide on the

next steps, but the Claimant had not been involved in that, page 490. The Tribunal noted that, when the Claimant did attend work for her KIT day on 9 February, she was scheduled to attend for 2 hours. Furthermore, when she arranged a later KIT meeting and set out the matters she wanted to discuss, page 503, these included KIT days, her working days, outstanding holidays, her salary and maternity pay. These were matters which were specific to the Claimant. The Tribunal considered that it was reasonable for the Respondent not to require the Claimant to attend the Senior Team Meeting on 7 February 2018 during her KIT attendance, when the ST meeting was not primarily discussing matters which the Claimant had knowledge of, and when the Claimant would need to explore matters specific to her. She was only due to attend for 2 hours.

42. In any event, in an email on 14 March 2018, the Claimant said that she had found out, on 9 February 2018, what had been going on since she had been on maternity leave, page 501. The Tribunal was satisfied the Respondent did bring the Claimant up to date with matters in the workplace on 9 February 2018 and that this was the appropriate meeting in which to do so.

43. Mr Moore told the Tribunal that he had informed the Claimant at the February KIT day that he had been appointed as LoveShop General Manager. He was clear in his recollection and said that he had given the Claimant a full run down of everything which was happening at the Respondent. The Claimant challenged his evidence, saying that Mr Moore had later misrepresented a comment that she had made that day about bringing babies into the work place. The Tribunal found Mr Moore's evidence to be convincing; he explained both what had been discussed at the KIT day and why he took seriously the Claimant's suggestion that she would bring her baby to work, in their small open-plan workplace, on her return to work. It found that Mr Moore did tell the Claimant on 9 February 2018 that he had been appointed as LoveShop General Manager.

44. The Respondent's new app was launched in January 2018. Unfortunately, by the end of the First Quarter of 2018, it was clear that the new app had not been successful. It would have been necessary for the app to have attracted about 500,000 regular users in order to be viable, to attract sufficient advertising revenue. It had attracted only 23,000 users. As a result, the Respondent paused the operationalisation of its business and paused its plans to open offices in India and Ghana. Mr Gannon told the Tribunal that, with the failure of the app, in order to keep the business alive, the Respondent needed to attract new funds from donors. The hoped-for funds from Indian donors did not materialise and the business was kept going in 2018 by one £100,000 donation from another donor. Mr Gannon told the Tribunal that, when a start-up is failing, it is easy to see that this is happening; there is less and less work, less money coming in. He said, "You don't need to go through a formal process to see that your business is collapsing".

45. The Claimant did not dispute that the new app had failed and that donor funds were becoming exhausted in the First Quarter of 2018. She had a Keeping in Touch meeting with Ms Taylor on 10 April 2018. The Claimant asked Ms Taylor to be honest about the situation at the Respondent, page 517. Ms Taylor

told the Claimant that the Respondent had not been able to monetise the app and that the Respondent was dependent on donations to keep operationally solvent. Ms Taylor told the Claimant that the Respondent only had enough funding to keep going until mid May 2018. She said that there were a couple of live donation opportunities which might be signed off in the next 8 weeks. At the meeting, Ms Taylor agreed with the Claimant that the Claimant would add accrued holiday to the end of her maternity period, to delay the Claimant's return to work and allow the Respondent to understand its long term financial situation. Ms Taylor said that she would keep in touch with the Claimant about this. Ms Taylor also told the Claimant that the Claimant would return 3 days a week, but that Ms Taylor would need to do an appraisal of how much time the role actually needed, because the Respondent start-up had only 3 employees on its permanent staff and the Claimant's role was necessarily tied to the scale of the Respondent's operation, page 518.

46. Ms Taylor gave an update to the Claimant on issues with her pension on 6 May 2018, page 522. The Claimant replied on 10 May, asking for an update on the status of the Respondent company, because she noted that Ms Taylor had been concerned that there might not be a company and a job to return to at the end of May, page 523. On 11 May, Ms Taylor responded, saying that Hugh and Ilyana, two other contractors or employees of the Respondent, had left. She said, "To be totally transparent and honest … with regard to your forthcoming child care decisions …. – I can't see how the Head of Operations role can remain at 3 days a week. There is less than one day of work to do at the moment with a team of this size". Page 534.

47. On 16 May 2018 the Claimant replied further, saying that her return date was due to be 3 July 2018 and that she was concerned that there might not be a position for her to return to, which the Claimant said she had not been told at her KIT day. She said that she was concerned that she had been required to chase a response in order to be told that, page 526.

48. The Tribunal considered that the Claimant's email was somewhat disingenuous. She had been told in her KIT meeting in April that the business only had funds to operate until May. It would have been obvious from this that there might not have been a role for the Claimant to return to.

49. On 16 May Ms Taylor replied further, saying that the team was now very pared down and that the Respondent's focus was on users of the app and downloads, so that it could attract revenue. She said that, looking at time spent on operational matters, there was no more than one day a week - often significantly less, page 525.

50. Ms Taylor told the Tribunal that she had done an analysis of roles remaining at the company at about the end of April or beginning of May 2018. She said she had done this at the founders' request. Miss Taylor had considered which roles at the company were essential for the business to survive. There were 3 employees at the time, the Claimant, Mr Moore and Mr Askew. Ms Taylor and Mr Gannon were both Consultants working with the company, but Ms Taylor told the Tribunal that she had not been paid for a substantial period of time.

51. Ms Taylor considered that there were two roles which were essential to the company's survival. Mr Moore's General Manager LoveShop role was devoted to attracting users to the Respondent's website, to give money to charities. Ms Taylor said that, without that role, the Respondent would not be able to function. She said that Mr Adam Askew's Director of Philanthropy role was devoted to managing relationships with funds, donors and high net worth individuals. The role involved persuading people to give money, to keep the Respondent running. Ms Taylor considered, that without those two roles, the Respondent would have to close. Miss Taylor said that she did not carry out this exercise on paper - it was obvious that there were only two roles which "drove money".

52. Ms Taylor also told the Tribunal that she had done an analysis of the Claimant's role at around the end of May 2018, page 676f. Miss Taylor agreed that she did not carry out a similar analysis of Mr Moore or Mr Askew's roles.

53. In her analysis, Ms Taylor listed the Claimant's existing tasks and assessed how many hours per month were now required for each task. She decided that, having broken down those tasks, there were now only 8.5 hours work a month to be done on the Claimant's role. The analysis was later sent to the Claimant on 18 September 2018, at the start of the individual consultation period.

54. Mr Gannon corroborated Ms Taylor's evidence that Ms Taylor had undertaken this analysis. The Tribunal accepted the Respondent's evidence that Ms Taylor had considered, in April or May 2018, what roles were critical to the company's survival and had decided that the Claimant's role was not one of those. It also accepted that Ms Taylor had carried out an analysis of how many hours per month were required for the Claimant's role at around this time. As the Tribunal has found, the Claimant did not dispute that the app relaunch had failed and that the company was in severe financial difficulties. In those circumstances, the Tribunal found that it was not surprising that the Respondent decided that revenue-generating roles were critical to business survival and that the Claimant's operations role was not. It also considered that it was highly likely that there was very little operations management work to be done, given how small the company was and how limited the scope of its operations then was.

55. The Claimant wrote once more to Ms Taylor on 2 June 2018, page 528. She said that her maternity cover had been paid more than she had been and that Mr Moore's role had been extended to include a role which had become available as a result of a colleague leaving. She said that she had previously provided a significant assistance to that colleague and, therefore, should have been given the opportunity to apply for that role. She said that Mr Moore's role was suitable alternative employment for her when she was potentially at risk of redundancy. She also said that she had been paid her holiday pay in advance, which suggested that she was being required to return to work, page 529.

56. The Claimant's email was not a formal grievance. On 2 June 2018, Ms Taylor forwarded it to Mr Hall, Employment Consultant, and to Derek Gannon. She said that she had spoken to Mr Moore about it and that he was comfortable with being involved. Ms Taylor replied to the Claimant on 4 June, page 536. She

said that the Claimant had been paid her holiday pay in advance to ensure that the Respondent could pay it while it still had funds in its account, but this had no bearing on the Claimant's return date. Ms Taylor said that the Respondent had decided that it had needed a full-time employee to develop and run LoveShop and that this was a commercial business development role, with a high level of sales, technology and partnership development. She said that Mr Moore had been appointed to that role 5 days a week. Ms Taylor said that, while the Claimant had previously provided general administrative support to another employee in relation to LoveShop, LoveShop was now a global online shop and was a different proposition. Ms Taylor said that small donations from an advisor and a tax rebate were helping to keep the company going until July. Ms Taylor copied her email of response to the Claimant to Messrs Moore, Gannon and Hall.

57. On 7 June Mr Moore asked Mr Hall about removing the Claimant's access to the company systems. Mr Hall replied, saying that this should not be done ahead of the consultation process, as it could imply a decision had been reached, when it had not. He said that it might also imply that the Respondent might not trust the Claimant, page 541.

58. Mr Moore was cross examined about his enquiry to Mr Hall. He said that, as Head of Operations, he was required to manage risk. He said that the Claimant was upset to the point of making a grievance and had full access to all systems, including the Respondent's banking systems. He said that he needed to check whether to manage the risk in this regard, but was told by Mr Hall that he should not. He said that, indeed, Mr Gannon had told him that he was over-thinking the matter and that he should leave it. The Claimant's access was not removed or reduced in any way as a result.

59. The Claimant submitted a formal grievance to Ms Taylor on 14 June 2018. She said that she was upset that Ms Taylor had copied Mr Moore into the reply she had sent to the Claimant. She also said that Mr Moore was no more qualified for the LoveShop commercial business development role than she was and that the Claimant should have automatically been offered the role. She said that Mr Moore's job title had been changed to disguise the fact that he was doing the Claimant's role, page 545.

60. Mr Moore asked Mr Hall to have a telephone call with Ms Taylor and him in the light of the Claimant's email, page 547. Mr Moore and Ms Taylor told the Tribunal that Mr Moore was involved in the grievance only to the extent of arranging meetings, but that he did not participate in the substance of any meetings.

61. Ms Taylor heard the Claimant's grievance in a meeting on 25 June 2018 and was accompanied by Rob Hall, Employment Advisor, page 571. Ms Taylor wrote to the Claimant on 29 June, giving the outcome of to the grievance, page 618. She said that she would not have copied Mr Moore into the Claimant's grievance had she considered that it related to him personally, but that she did not. Ms Taylor said that the Claimant's role had not been reduced and that the General Manager for LoveShop role was a full-time job, distinct from the Claimant's role, and that the Claimant's role had not been absorbed into it. Ms

Taylor said that, as someone who had had a career in talent management for 25 years, she did not agree that the Claimant had the capability to perform Mr Moore's role. She said that the success criteria for the LoveShop General Manager role included delivering a compelling retail experience in the shop, showcasing branded products, developing branded concessions, and testing and defining the Respondent's approach using best technology platforms. Ms Taylor believed that Mr Moore could deliver this. She said that Mr Moore had a wealth of experience in managing a commercial concern at Timber Yard and in developing new brand partnerships. She said that Mr Moore had an aptitude for developing the new app and its launch and for management of the new app feature, ElbiDrop. Miss Taylor said that, at no time during her working relationship with the Claimant, had the Claimant expressed any interest in a more front of house, or direct sales, or business development role, page 622.

62. The Claimant submitted a grievance appeal on 6 July 2018, page 632. She reiterated her complaints and said that Ms Taylor had provided no facts or evidence to support her arguments. She said that Ms Taylor had expressed no remorse and had not attempted to understand the Claimant's point of view. The Claimant asked for an impartial appeal hearing, preferably by a founder. Ms Taylor forwarded the Claimant's email to Mr Hall for advice, page 641. Mr Hall advised Ms Taylor to identify a new Chair for the appeal and new HR support. He said that he considered that the grievance meeting had gone to great pains to explore all the Claimant's issues. He said, having considered the Claimant's appeal letter, he believed that it would not change the outcome, but he said that the appeal chair would have to make a decision on this.

63. The Respondent's witnesses told the Tribunal that the Respondent's founders were not generally available; Natalia Vodianova was very rarely present and Timon Afinsky was available rarely in the Summer - when he did attend the office, it was for about an hour at a time. The Tribunal accepted the Respondent's evidence that, in those circumstances, neither founder was available to attend a detailed grievance appeal hearing and to draft a written detailed grievance response.

64. Mr Gannon had not been involved in the original grievance hearing and had not made the decision on it. In that sense, the Tribunal considered that he was independent from that decision-making process, albeit that he knew that the grievance had been submitted. Mr Gannon told the Tribunal that he kept himself away from the process after the grievance was submitted until the appeal stage, knowing that he might have to hear the appeal. The Tribunal accepted Mr Gannon's evidence on this. It found him to be a frank and honest witness who was aware of his responsibilities to be impartial.

65. Mr Gannon conducted the grievance appeal meeting on 5 September 2018. Mr Hall attended the grievance appeal hearing, despite having advised that an independent HR advisor attend.

66. The Claimant told the Tribunal that Mr Hall intervened and answered questions, saying that the issues raised by the Claimant had already been dealt with in the original grievance hearing. The Claimant's sister-in-law, Trusha Patel,

gave evidence to the Tribunal. She had accompanied the Claimant to the grievance appeal meeting and also told the Tribunal that Mr Hall answered most of the questions.

67. The notes of the appeal hearing were in the bundle. They recorded that the Claimant, Jayna Patel, was present along with Mr Gannon and Trusha Patel the Claimant's sister-in-law as well as Mr Hall. From the notes, it is apparent that Mr Hall introduced the meeting, setting out its purpose and process. The notes then record, by the initials of the speaker, D for Mr Gannon, J for the Claimant, T for Trisha Patel and R for Rob Hall, what the participant said. Most of the notes record the Claimant and Trusha Patel talking and explaining the appeal. Mr Hall is recorded as speaking at various points briefly, as is Mr Gannon.

68. Mr Gannon told the Tribunal that Mr Hall may well have answered questions for him, on occasion, but that Mr Gannon did not feel that Mr Hall did so inappropriately. The Tribunal considered, from the notes of the meeting, that the hearing time was mainly taken up, as was appropriate, by the Claimant and Trusha Patel addressing the grounds of appeal. Whatever Mr Hall's words, he did not prevent the Claimant from setting out her grounds of appeal and explaining them.

69. On 7 September 2018 Mr Gannon sent the grievance outcome letter to the Claimant, page 660. He said that the arrangement at the start of the Claimant's maternity leave, whereby the Claimant's duties were shared between Mr Moore, Ms Taylor and Mr Gannon, did not indicate that a decision had been taken to eliminate the Claimant's role, it was simply a practical arrangement to ensure that the Respondent's objectives were met within the Respondent's constrained resources. Mr Moore's appointment to the LoveShop General Manager was, Mr Gannon said, long in advance of the Claimant's role becoming unviable, so it could not be viewed as a suitable vacancy for the Claimant. It was not a vacancy at any time when the Claimant might reasonably have been considered at risk of redundancy. He said that, while the case for redundancy of the Claimant's position was compelling, no decision had yet been made on it.

70. The Claimant returned to work on 12 September 2018. In advance of her return to work, Ms Taylor emailed her on 7 September 2018, saying the Respondent was having to take a decision about whether to move out of its office space and, bearing that in mind, it would be better for the Claimant to spend her first couple of weeks working from home. Ms Taylor said that both Mr Askew and Mr Moore had been working from home to save travel costs, given the Respondent's financial situation, page 662. The Claimant told the Tribunal that she was not allowed to attend the workplace and was effectively excluded and isolated from it.

71. On 10 September 2018 Ms Taylor told the Claimant that there would need to be a conference call on the day of her return. The Claimant responded that she would prefer to come in, to have the discussion in work, given that Ms Taylor and Mr Moore would be in work, page 664. Ms Taylor replied explaining that nobody would be in the office and why, but that all participants would dial in to the conference call from their respective locations, page 666.

72. On her return to work, the Respondent gave the Claimant two research products on Gift Aid and Data Protection and asked her to make recommendations.

73. The Claimant attended a first redundancy consultation meeting on 18 September 2018. At that meeting, the Respondent gave the Claimant notice of commencement of her individual consultation and provided her with a written "case for consultation and proposed redundancy" of her role. It also provided her with Ms Taylor's assessment of the number of hours that the Claimant's role now required and a redundancy calculation, page 676a. Ms Taylor sent the Claimant written notes of the meeting and told the Claimant that she could pause her project work for the next 2 working days to prepare for the next consultation meeting on 25 September 2018, page 672.

74. The Claimant sent Ms Taylor points for consideration at the next meeting on 25 September 2018, page 690. The Claimant asked for evidence that the Respondent had looked at alternatives to redundancy. She said that other options included job sharing, reduced hours, a pay cut and unpaid leave. The Claimant asked for the LoveShop General Manager job description. She asked what criteria had been applied to select the Claimant's role for redundancy and she questioned why the consultation period had been delayed, amongst a number of other things.

75. Ms Taylor sent the Claimant a written record of the second consultation meeting on 25 September 2018, page 694. Ms Taylor said that the consultation process had been delayed to deal with the Claimant's grievance. She said that the Claimant had not been isolated since returning to work. Ms Taylor said that everyone was being allowed to work from home due to cash flow problems, so that employees did not incur travel expenses. Ms Taylor confirmed that she had not considered the Claimant for the role of LoveShop General Manager at the relevant timer. Ms Taylor's response ran to 10 pages of detailed notes, page 694.

76. A final consultation meeting took place on Monday 8 October 2018. Following this, Ms Taylor confirmed the Claimant's redundancy. In her letter confirming redundancy, Ms Taylor said that the Respondent had been unable to secure suitable alternative employment for the Claimant. Ms Taylor did not specifically address the Claimant's suggestion of a job share, or reduced hours, or alternatives.

77. Ms Taylor told the Tribunal that she had considered these alternative, but was concerned that Mr Moore would leave if his hours were reduced. He had left his previous employer, Timber Yard, when it reduced his hours. In any event, Ms Taylor told the Tribunal that Mr Moore was in the job already, was doing it well and that she considered that the Claimant did not have the skills required for the job. The Tribunal accepted Miss Taylor's evidence on this. It was consistent with the history of the matter. The Claimant had never set out the skills, or experience, which she had, which was relevant to the LoveShop General Manager role. She had not been working in that role when at the Respondent;

her Head of Operations and Finance role was not a sales and e-commerce or product management role. The Claimant did not explain, when at the Employment Tribunal, what skills she had in relation to Mr Moore's role.

78. The Claimant agreed, in evidence, that she had full opportunity to explain all her issues during the consultation process.

79. The Claimant was not paid in lieu of notice at the end of October 2018 following her dismissal, despite the notice of redundancy saying that she would be. The Claimant was not paid until her solicitor wrote in November, asking that the Claimant be paid. The Claimant was paid shortly afterwards. Ms Taylor told the Tribunal, which was not challenged by the Claimant, that the Claimant's pay in lieu of notice and redundancy pay had been ringfenced. This was to ensure that it could be paid, despite the Respondent's financial difficulties. Ms Taylor said that there had, therefore, been no intention to withhold the money from the Claimant.

80. The Tribunal found that the Claimant was aware of the existence of discrimination legislation. She had brought two discrimination grievances against the Respondent 2016 and in 2018. The Claimant contacted ACAS in relation to this claim on 2 December 2018. An ACAS Early Conciliation certificate was issued on 2 January 2019. The Claimant issued the current claim on 1 February 2019.

Relevant Law

Unfair Dismissal

81. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

82. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,*"or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

83. *S 99 ERA 1996* provides that an employee will be regarded as unfairly dismissed if the reason or principal reason for dismissal is of a kind prescribed in the MPL Regulations, or the dismissal takes place is prescribed circumstances, *s99(1) & (2). Reg 20(1)& (3) MPL Regs 1999* provide that an employee is unfairly dismissed where the reason or principal reason for her dismissal is a reason connected with the pregnancy of the employee, the fact that the employee has given birth to a child and/or the fact that she took, sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave.

84. *Reg 20(1)(b) MPL Regs 1999* provides that a dismissal is automatically unfair if the reason or principal reason was that the employee was redundant and *Reg 10 MPL Regs 1999* has not been complied with.

85. Once such a redundancy situation applies, *Reg 10 MPL Regs 1999* gives the employee the right to be offered such a vacancy if it arises, regardless of whether there are other equally qualified, or better qualified, candidates for the post and even if they are equally under threat of redundancy.

86. *Reg 10 MPL Regs 1999* provides,

"(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.
(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer …."

87. It is not enough that there were no suitable vacancies at the time that the employee sought to return to work; the question is whether any suitable vacancies arose at any time after the employee's post became redundant, whenever during her maternity leave that may have occurred.

88. If, when a woman seeks to return to work she is denied the right to do so because of a genuine redundancy situation, and there is no question of alternative work being, or having been available when her post became redundant, the reason for dismissal can be redundancy, subject to the provisions of *Reg 20 MPL Regs 1999*.

Redundancy

89. Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
…
(*b*) the fact that the requirements of that business—
(i) for employees to carry out work of a particular kind,, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

90. According to *Safeway Stores plc v Burrell* [1997] IRLR 200, [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] 3 All ER 769, [1999] IRLR 562, there is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

91. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights*

Act 1996. In doing so, the Employment Tribunal applies a neutral burden of proof.

92. *Williams v Compair Maxam Ltd* [1982] IRLR 83, sets out the standards which guide Tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

93. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

94. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

95. There is no principle of law that redundancy selection should be limited to the same class of employees as the Claimant, *Thomas and Betts Manufacturing Co Ltd v Harding* [1980] IRLR 255. In that case, an unskilled worker in a factory could easily have been fitted into work she had already done at the expense of someone who had been recently recruited. Equally, however, there is no principle that the employer is never justified in limiting redundancy selection to workers holding similar positions to the claimant (see *Green v A & I Fraser (Wholesale Fish Merchants) Ltd* [1985] IRLR 55*, EAT.*

96. In *Taymech v Ryan* [1994] EAT/663/94, Mummery P said, "There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

97. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296*; British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297.

98. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

99. In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that the *Polkey* principle applies not only to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence

to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred, or at some later date. In making an assessment, Tribunals should apply the principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

Maternity Discrimination

100. By *s39(2) Equality Act 2010*, an employer must not discriminate against an employee by dismissing them or subjecting them to a detriment.

101. By *s18(4) EqA 2010* a person A discriminates against a woman if A treats her unfavourably because she is exercising, or seeking to exercise, or has exercised, or sought to exercise, the right to ordinary or additional maternity leave.

102. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

103. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

104. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576.

105. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Employment Tribunal thinks just and equitable.

106. By *s123(3)* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.

107. In *Commissioner of Police of the Metropolis v Hendricks* [2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an Claimant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of

unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.' Paragraph [52] of the judgment.

108. *ACAS Code of Practice 2 Disciplinary and Grievance Procedures (2015)* provides:

[32] If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. …

[33] Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.
…
[42] Appeals should be heard without unreasonable delay…

[43] The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case.

Discussion and Decision

109. The Tribunal took into account the relevant law and all its findings of fact before it came to its decision. For clarity however, it has addressed each issue in the list of issues separately.

Pregnancy and Maternity Discrimination

110. **1. The Claimant's role of Head of Operations and Finance being given to Mr Moore with the title of LoveShop General Manager**. The Tribunal found that Mr Moore's role as LoveShop General Manager was different to the Claimant's Head of Operations and Finance role. Mr Moore's role was a product management role, involving generating sales, assisting in the development of an app, running the online auctions, developing relationships with major brands and being responsible for the app and its success. This was very different to the Claimant's standard HR, Legal and Finance Operations role.

111. The Tribunal found, on the facts, that from the commencement of the Claimant's maternity leave, Mr Moore undertook some of the Claimant's duties and that her other duties were shared between Mr Gannon and Ms Taylor. Mr Moore later undertook the Claimant's duties as well as his own General Manager role, but her duties were distinct from his position. This allegation was not, therefore, sustained on its facts.

112. **2. The use of the Claimant's maternity cover, Mr Moore, reducing her role.** The Tribunal found that the Claimant's role was not reduced during her maternity cover. The Respondent was a very small business with limited funds. Mr Moore covered 2 of the Claimant's days' work from the start of her maternity leave. The extra day's duties were covered by Mr Gannon and Ms Taylor together. It was the unsuccessful app launch and the Respondent's failure to attract customers, followed by the pausing of its expansion plan for India and Ghana and the scaling back of all its operations, to only those relating to

LoveShop and Elbidrop, which resulted in the reduction of the Claimant's role. This was nothing to do with the Claimant's pregnancy / maternity. This allegation also fails on its facts.

113. **3. Making the Claimant's role redundant.** On the facts, the Tribunal found that there was a genuine redundancy situation. The Respondent had run out of funds at the end of the first Quarter of 2018 and it needed to reduce its costs. It needed to retain only roles which were critical to the survival of its business. The Tribunal accepted that the roles which were critical to the survival of the business were revenue-generating roles, and not the Claimant's role, which was a support role. The Tribunal will return to this matter.

114. **4. Lack of consultation.** The Respondent was a very small organisation with very limited resources. It conducted a full grievance process before embarking on a consultation process with the Claimant. There were three consultation meetings and the Respondent responded, in the meetings and in writing, to the Claimant's contributions. The Claimant agreed, in evidence, that she had full opportunity to explain all her issues during the consultation process. The Respondent provided the Claimant with consultation documents, including its rationale for proposing the Claimant's redundancy and its analysis of the reduction in her hours, so that the Claimant could be consulted on these. The Claimant did not contest that her original role had reduced in scope by the start of the consultation period.

115. The Tribunal accepted that the Respondent did consider whether there were alternatives to redundancy and told the Claimant that there were none. The Tribunal did not conclude that the consultation which the Respondent undertook was in any way different because of the Claimant's pregnancy/ maternity leave compared to the consultation that it would have undertaken if the Claimant had not been on maternity leave. Similarly, the redundancy of the Claimant's role was not affected by the Claimant's pregnancy / maternity leave, but was wholly caused by the failure of the app and the genuine redundancy situation.

116. **5. Giving Mr Moore a role which should have been offered to the Claimant as suitable or alternative employment. Not giving the Claimant an opportunity to apply for that role.** The Tribunal found, on the facts, that the LoveShop General Manager role was recruited to before the Claimant's role became redundant, or became in any way at risk of redundancy. Mr Moore was recruited in about November 2017 and started work in January 2018. At that time, the Claimant's role was fully available to the Claimant for her return. Indeed, her role was expected to increase in scope and size due to the anticipated successful launch of the new app, which was going to be "featured" by Apple.

117. The Claimant was not offered the opportunity to apply for the role in November/December 2017. The Tribunal found that that was unfavourable treatment and was partly caused by the fact that the Claimant was on maternity leave. Both Ms Taylor and Mr Gannon accepted that the Claimant would have known, or have been told, about the role, if she had not been on maternity leave.

118. The Tribunal found that the Claimant was aware of the role and Mr Moore's appointment to it, by the latest, on 9 February 2018. She did not take issue with this at the time, nor until it appeared that her own role might be at risk in April 2018. Insofar as there was unfavourable treatment of the Claimant because of her maternity, that happened in November or December 2017 and the Claimant was aware of the facts in February 2018.

119. The Claimant did not contact ACAS in this case until December 2018 and did not issue a claim until February 2019.

120. The time limit for bringing claims to the Employment Tribunal is 3 months. If this allegation was not part of a continuing act of discrimination, it was brought out of time.

121. To be clear, the role of General Manager LoveShop was not vacant, when, at the end of the First Quarter of 2018, the Respondent decided to scale back its operations; meaning that the Claimant's and other roles were potentially at risk of redundancy. It was therefore not a role which the Respondent was required, under *Regulation 10 MPL Regulations 1999* to offer to the Claimant, as it was not vacant.

122. **6. Not dealing with the Claimant's grievance in a fair manner by failing to comply with the ACAS code**. On balance, given the small size of the Respondent and its very limited resources, the Tribunal found that the grievance was handled fairly. The Tribunal considered that the grievance was not about individual people, but about management decisions in the Respondent company. Such decisions, in a small company, were unavoidably taken jointly. The Tribunal noted, in this regard, that the Claimant submitted her formal grievance under [32] ACAS COP 1 to Ms Taylor. Ms Taylor was advised by Mr Hall and addressed each one of the Claimant's contentions in the grievance hearing. Mr Gannon was not involved in the original grievance hearing and was sufficiently independent of it to comply with [43] ACAS COP 1 requirements to be independent. The Tribunal found that Mr Hall was not the decision maker in either hearing and, therefore, his presence did not contravene the ACAS Code of Practice.

123. **7. The Claimant's grievance being shared with Mr Moore and Mr Askew**. Ms Taylor did share the Claimant's grievance with Mr Moore. Nevertheless, Mr Moore was not involved in any decision making on it and neither was Mr Askew. There was no evidence linking the sharing of the grievance to the fact that the Claimant had taken maternity leave. The Tribunal considered, therefore, that while this may have been unfavourable treatment of the Claimant by Ms Taylor, it was not something which was done for a reason connected to the Claimant's pregnancy, or maternity leave, or the fact that the Claimant had taken advantage of maternity leave.

124. **8. The Respondent sought to avoid the protections of the Maternity and Parental Leave regulations.** The Tribunal found that the Respondent did not seek to avoid the protection of these Regulations. The delay in the consultation process was entirely caused by the Claimant bringing the grievance

and the Respondent following standard HR practice in concluding the grievance, before embarking upon a redundancy consultation. This was nothing to do with the fact that the Claimant had been pregnant or taken maternity leave.

125. Accordingly, apart from the Respondent's failure to notify the Claimant of the General Manager role in November 2017 while she was on maternity leave, the Tribunal concluded that there was no unfavourable treatment of the Claimant which was in any sense because of maternity.

126. The Claimant's claim in relation to failure to notify her of the General Manager role was out of time. The Tribunal did not extend time for it. It was not just and equitable to do so. The Claimant was aware of the discrimination legislation had HR experience, but failed to bring the claim for about a year after she was aware of the facts of the potential claim.

Victimisation

127. The Claimant did a protected act by bringing a grievance on 17 June 2018. The Claimant relied on the following detriments:

128. **Telling the Claimant not to come into the office on 12 September 2018.** The Tribunal considered that it was not a detriment to the Claimant not to require her to attend the office when other employees were not required to attend the office either. The Respondent had cash flow problems, meaning that employees might not be paid. Insofar as the Claimant felt isolated at home when she was not required to attend the office, the Tribunal considered that she would have felt no less isolated had she travelled to the office where there was very little work for her to do and no colleagues present. In those circumstances, there was no detrimental treatment of the Claimant in that regard.

129. **The dismissal, grievance process and dismissal process.** The Tribunal has found that the dismissal and the processes leading up to it were the inevitable consequence of the genuine redundancy situation which existed at the Respondent. There was no evidence that the Claimant was subjected to a detriment in respect of them because she had issued a grievance.

130. The Respondent undertook a full and, in the circumstances of a small employer, fair grievance process. This was not an act of victimisation.

131. **Not paying the Claimant in lieu of notice.** The Claimant was not paid in lieu of notice promptly. However, the grievance had ended some time before this. The Tribunal accepted the Respondent's evidence that her pay in lieu of notice and redundancy payment had been ring fenced, in any event, and there was never any intention to withhold the money from the Claimant. The Tribunal was satisfied that the Respondent did not fail to pay the Claimant in lieu of notice for any reason related to her protected act. The claims of victimisation therefore fail.

Unfair Dismissal

132. The Tribunal was satisfied, in this case, that there was a potentially fair reason for dismissal, which was redundancy. For the reasons given above, the Respondent did not fail to offer the Claimant a vacancy when her role was potentially redundant; there was no vacancy at that time.

133. The Tribunal was satisfied that the Respondent had shown that the reason for dismissal in this case was redundancy due to the failure of the app and the requirement to reduce costs. It was not related to the Claimant's pregnancy or maternity.

134. The Tribunal considered whether the Respondent acted reasonably in considering redundancy to be a sufficient reason for dismissal.

135. The Tribunal accepted that it was Ms Taylor's genuine and considered assessment that the Claimant's Finance and Operations role was not critical to the survival of the company. The Respondent genuinely applied its mind to the question of pool and acted fairly in this regard. Ms Taylor's was a logical and sensible decision in the circumstances.

136. The Tribunal concluded that the Respondent's decisions were within the broad band of reasonable responses of a reasonable employer.

137. The Tribunal decided that there was reasonable consultation in this case. There were three meetings. The Respondent provided the rationale for consultation and lengthy responses to the Claimant's points. The Claimant had every opportunity to put forward her arguments in the consultation meetings.

138. There was reasonable consideration of alternative roles. It was within the broad band of reasonable responses for Ms Taylor decide that it was not appropriate, either to bump Mr Moore from the role that he was undertaking, or to reduce Mr Moore's hours, when he was performing the role successfully and the Claimant had never explained the skills and expertise she had which might make her suitable for that role.

139. Taking all those matters into consideration, it was in the broad band of reasonable responses for the Respondent to dismiss the Claimant. The claim of unfair dismissal does not succeed.

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Employment Judge Brown

Dated: 12 December 2019

Judgment and Reasons sent to the parties on:

12 December 2019

For the Tribunal Office