RM

EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Gugliotta**

Respondent: **All Saints Retail Limited**

Heard at: **East London Hearing Centre**

On: **30 & 31 July and 1 & 2 August 2019**

Before: **Employment Judge Crosfill**
Members: **Ms K Labinjo**
Mr P Pendle

Representation

Claimant: Mr J Cook (Counsel)

Respondent: Ms G Leadbetter (Counsel)

JUDGMENT having been sent to the parties on 11 September and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Respondent, All Saints Retail Limited, is a fashion design and retail company. The Claimant, Mrs Silvia Gugliotta, was employed by the Respondent as a Product Developer between 9 May 2016 and her dismissal on 12 February 2018. At the time of her dismissal the Claimant was pregnant. She says that failures to secure, or find her, a role in the business resulting in her dismissal were an acts of discrimination contrary to the Equality Act 2010 and resulted in a dismissal which was automatically unfair contrary to sections 94 and 99 of the Employment Rights Act 1996. She also brings claims under sections 47C and 48 of the Employment Rights Act 1996.

Procedural matters

2 The issues in the case had been agreed between the parties following a preliminary hearing that took place before REJ Taylor on 3 September 2018. The case management order and agreed list of issues were in the tribunal bundle and we will not set them out again here. In our discussions and conclusions below, references to the list of issues are made using the paragraph numbers of the agreed list of issues found at pages 50-54 of the bundle.

3 At the outset of the hearing the Respondent renewed an application to adduce the evidence of Emma Siddalls via a 'videolink'. That was opposed by Mr Cook on behalf of the Claimant. The reason for the Respondent seeking to use a video link to adduce Ms Siddalls' evidence was that she was abroad having taken annual leave to join her family on their summer holiday. She had not been told of the tribunal dates before she booked that holiday although they were known to the Respondent. The Respondent had arranged for Ms Siddalls to have access to the bundle and her witness statement. She was available to give evidence via Skype and had a room where she would not be disturbed. The Respondent argued that she was an important witness and that there would be little prejudice in her giving evidence by video link. Mr Cook argued that personal attendance and live evidence remained the default position. He pointed out that the hearing had been listed for some time and said that the fact that had not been communicated to Ms Siddalls in clear terms did not provide a good reason for her not attending. He suggested that it was inevitable that the quality of the evidence would be affected.

4 The Tribunal ruled that, provided a clear skype connection could be obtained, we would permit evidence to be given by that method. We considered that it was premature to assume that the link would be of poor quality. Whilst the Respondent had not acted quickly and the reasons for needing to use skype were unimpressive, we considered that provided that the video link proved robust, the balance of prejudice favoured the Respondent. Ms Siddalls was an important witness in their case. In the event, Ms Siddalls gave her evidence on the second day of the hearing in the morning. The Skype connection proved to be robust we are all able to hear each other throughout the hearing and whilst we did not necessarily have the clearest view of each other there were certainly no technical difficulties with receiving that evidence.

5 We were provided with an agreed bundle and, in the course of the hearing, with the agreement of the parties, some additional documents were added to the back of the bundle. In all the bundle ran to 425 pages.

6 As is now normal, the Tribunal took time to read the witness statements prepared by the parties and the documents referred to in those statements before hearing any evidence. We completed our reading by 14:00 on the first day.

7 We then heard from the following witnesses.

7.1 We heard from the Claimant herself,

7.2 From the Claimant's husband, Mr Max Kreijn,

7.3 For the Respondent, Ms Emma Siddalls; and

7.4 Mr Wil Beedle; and

7.5 Mr Marc Kilbourn; and

7.6 Ms Marian Duxbury.

8 The evidence concluded on the third day of the hearing. We then heard submissions on behalf of both parties. Both counsel had reduced the majority of their decisions to writing and there was a very broad agreement between them as to the relevant law. We will not refer to each of those submissions in the course of this judgment but we will refer to the competing arguments when reaching our conclusions below.

Findings of fact

9 We have not made findings of fact in respect of the whole of the evidence presented but have restricted our findings to those matters important to the decisions we had to make to determine the issues in the case.

10 The Claimant's skills and experience are relevant to the matters we have to decide. The material parts of her employment history are as follows. From August 2013 to May 2016 the Claimant was employed by the well-known fashion brand 'Burberry' as an Accessories Product Development Co-ordinator. In that role she worked across a number of different design teams as a Product Developer. In May 2016 she was head hunted to join the Respondent's organisation within its handbags product category. She was based in the Respondent's head office in London. Whilst the Claimant was undertaking her role as a product developer for handbags she got to know, and developed a good working relationship, with Emma Siddalls who was at that time the Senior Freelance Footwear Designer. In around February 2017, Emma Siddalls discussed with the Claimant the possibility of joining her team in women's footwear. This was an arrangement which suited both the Claimant and Emma Siddalls. The Claimant in her evidence categorised this as a promotion. We would suggest that the more neutral term would be a 'development opportunity' for the Claimant. However, it is clear to us, at least at the time, that Emma Siddalls recognised the Claimant's potential as a Product Developer.

11 During the time that the Claimant was working for the footwear department in her role of a Product Developer she acted as the go-between the head office and, what was then the sourcing office in Portugal. That office was situated in Poland near the same locations as the factories that were making the shoes ultimately purchased and sold by the Respondent. The Claimant had contact with the sourcing office but also some direct contact with the factories themselves. In her work, the Claimant interacted not only with the Respondent's employees at the sourcing office but also with people who worked at the factories actually producing footwear.

12 On 26 September 2017 the Claimant met with Emma Siddalls. The context of the meeting was that the Claimant had attended a sales meeting or conference in Italy which had not expressly been authorised by Emma Siddalls. Although apparently unauthorised, the fact that the Claimant went to Italy did not raise any significant concerns about her performance and viewed objectively appears to us to have been an example of the Claimant using her initiative rather than doing anything improper. In the course of the meeting, the Claimant raised the possibility of getting a pay rise and, on 26 September 2017, she sent Emma Siddalls an email setting out what she saw as a list of her achievements. When Emma Siddalls gave evidence, she did not accept that the Claimant's work was quite as broad as she suggested in her email. She did accept that she had not contradicted what the Claimant had said at the time. From that we conclude that there was not a significant gap between what the Claimant claimed to do and what she did or was expected to do. To some degree Emma Siddalls suggested that an issue in that list of work was the fact that some of the Claimant's initiatives amounted to stepping on the toes of the sourcing function in Portugal. We find that the fact that the Claimant sought to extend her duties would suggest that she was capable of undertaking roles broader than she was in fact employed to do. Whilst Emma Siddalls put forward the Claimant's request for a pay rise, she was not given one at the time. We find that, during this period, the Claimant was enthusiastic in taking on her role and, to some extent performing beyond it. The fact that the Claimant would occasionally encroach beyond her own responsibilities caused some minor friction.

13 On 17 October 2017 the Claimant informed her Line Manager and her team that she was pregnant. She then sent a more formal e-mail to the Respondent's Human Resources Department giving the news that she was pregnant. She received a prompt reply from Rebecca Hood in that department, which was on the face of it very friendly, starting with the phrase "wow amazing news 😊". Rebecca Hood attached to that a copy of the management guidelines, a form of notification of pregnancy and a pregnancy risk management form. The Claimant was required to complete the first part of her pregnancy risk management. When she did so she indicated that there were no risks with the physical aspects of the role but she did check the "yes" boxes when asked whether her role involved meeting challenging deadlines, changing demands of priorities and high degrees of concentration. In respect of the general work condition she indicated there were no obvious risks and she also indicated that her doctor or midwife had not given her any advice in respect of doing her work. She made no suggestions herself on the form about mitigating any risks.

14 The management guidelines surrounding a pregnancy risk assessment suggested, or at least envisage, that once an employee has completed the first section that there would be a meeting between the employee and their manager to discuss this. In this case that did not take place and the Claimant left the form on Emma Siddalls' desk and Emma Siddalls, without meeting the Claimant, simply signed it off. When Emma Siddalls gave evidence before us she told us that she had noted that the Claimant had not made any comments on the form or suggested that there were any difficulties. Working from her own experience of having two pregnancies in the same workplace, she did not consider there is any risk which she needed to address. We accept that it was her own prior experience which caused Emma Siddalls to deal with the pregnancy risk assessment in the manner which she did but note that this was certainly not in the manner envisaged by the policy.

15 At some point prior to 25 October 2017, a trip had been organised to visit the suppliers and sourcing team in Portugal. The Claimant had been expecting to go on this trip and she showed us her diary which show that that had been a possibility. She had previously been on two or three similar trips. On this occasion the Claimant was told that there was no budget for her to attend. We find, because in fact it is common ground and indicated on the Claimant's own diary, that the purpose of the trip was to look at the prototypes. We accept the evidence of Emma Siddalls that this was principally a designer's meeting. As such we accept that it is unsurprising that Emma Siddalls and Hee Sue Seo, the Assistant Designer, would attend. In her cross-examination the Claimant broadly accepted the position put forward by Emma Siddalls that there was no hard and fast rule about who should attend a particular overseas meeting. We find that the indication that the Claimant might attend had been provisional and we accept that any organisation with budgetary constraints would need to take those into account. It is no surprise to us that the Claimant was disappointed not to go on this trip as no doubt such trips were a welcome break from the routine of the office.

16 Some months prior to October 2017 the owners and directors of the Respondent had been discussing the possibility of outsourcing both the design and sourcing of the footwear range. Wil Beedle, who is the Chief Creative Director told us, and we accept, that the Respondent held discussions with a number of companies before settling on one company 'GBG' as being the preferred option. He told us, and we accept, that he was personally opposed to this, we find principally because he gave away some creative control.

17 On 30 October 2017 Wil Beedle sent an email to Eleni Chatzivasilou which is found at 124b of the agreed bundle. He writes as follows:

> *"Hi Eleni,*
>
> *As you will be aware we are licensing our footwear business to GBG.*
>
> *Effective immediately the below positions will become redundant:*
>
> *All men's and women's footwear design product development and technical.*
>
> *Please advise how best to approach the team.*
>
> *Re: design*
>
> *GBG group has offered to hire Emma Siddalls and hopefully Hee-Sue too."*

18 When Wil Beedle gave evidence he initially used the phrase 'certainly' to describe the prospects of the outsourcing taking place. Once it became apparent to him that he might be criticised for keeping at least some of the employees in the dark he shifted from that position. At one point he engaged in a semantic argument suggesting his reference to 'effective immediately' was contingent on some further formality. He later watered down his 'certainty' to merely 'likely'. In this regard his evidence was unsatisfactory. We find that by 30 October 2017 a commercial deal had been struck and only the formalities were awaited. We are confident that that was the case as the Respondent had entrusted GBG with its Q4 range as early as November 2017. It was clearly confident that the deal would proceed.

19 Wil Beedle shared the information about the proposed outsourcing with Emma Siddalls who in turn confided in Hee Sue Seo. It had been envisaged that the Respondent will continue to work with both those designers as they were reluctant to forsake all creative control. GBG had no knowledge what Wil Beedle described as the Respondent's 'handwriting' by which we understand he means design style. As such both of the designers had the option of continued employment. Other employees whose jobs were placed directly at risk because of the outsourcing decision were not informed at this stage. That was a wider selection of employees than just the Claimant. We find that the reason for this is that the Respondent was looking after its own commercial interest. Wil Beedle told us that his concerns were that employees would become unsettled and possibly leave. The effect of this decision was the employees kept in the dark until very much later. It does not appear to have occurred to Wil Beedle or the HR team that good employment practice would normally include warning employees of an impending redundancy situation.

20 From as early as July 2017 a proposal had been discussed at board level to eliminate all of the local sourcing offices in Hong Kong, China, India, Turkey and Portugal and repatriate the entirety of the sourcing function to the UK Head Office. By no later than the end of October 2017 these proposals were adopted and Mark Kilbourn, the Production Director, was placed in charge of the restructure. He prepared an initial structural chart in support of the budget proposal which is then approved by the Respondent's board. As part of that new structure he created six new roles each carrying the job title of 'Product Developer'. The six roles were each identified by reference to a particular product category.

21 On 9 November 2017 Scott Anderson who was the Menswear Director had been fully appraised of this new structure. He took the decision to advice his team of the possibility of new roles within the organisation. He sent an email to his team in the following terms:

> *"Hi,*
>
> *Just to let you know that as an extra support to the business Marc is building a team of PDs to be located in the London office under the Production department to be a link between Design, Sourcing, Vendor and Merch[andising] to help the process between tech pacts and product in store to ensure every product is performing as well it possibly can with regard to costings, margin and quality.*
>
> *As the team builds and successful candidates come on board I'm sure we will all build dynamic and productive relationship with them to help smooth the process.*
>
> *Any questions you can speak to me directly."*

22 By this e-mail Scott Anderson gave the members of his team a heads up about the possibility of roles emerging from the restructure. As a consequence, two employees, Robert Hamilton and Claire Ford, expressed an interest in the new Product Developer roles. Neither of them had any direct product development experience although each of them had design experience in the particular categories of the roles they expressed an interest in. They both approached and spoke to Mark Kilbourn. We find he appointed them both after a brief and informal interview process being little more than a conversation. In the case of Robert Hamilton, the appointment was made without Mark Kilbourn even asking for a copy of his CV. Robert Hamilton was appointed to the product category of Outerwear and Tailoring. Claire Ford was appointed the category of 'Denim' on a temporary basis until the expiry of her fixed term contract which was due to expire in, or around, March 2018.

23 The Claimant told us, and we accept, that she had done some preparatory work for a meeting due to take place on 30 November 2017. In particular, she had prepared some presentation boards. In the event she was not asked to attend that meeting. The Claimant said that this was to be a 'menswear' meeting. We find that this meeting concerned work outside the Claimant's ordinary remit. When Emma Siddalls gave evidence, she was asked about this meeting. She had no particular recollection of this meeting but told us that attendance to such meetings was often limited in order to restrict the number of voices in the room. That seems to us to be entirely sensible. Whilst we accept the Claimant's case that she might have expected to attend because she had made a contribution, we do not find it unusual that she was not asked to do so on this occasion.

24 By as early as November 2017 knowledge of the outsourcing to GBG had begun to spread within the organisation. On 8 November 2017 Wil Beedle followed up his email of 30 October 2017 by sending a further e-mail to Eleni Chatzivasiliou, he wrote:

> *"Hi Eleni,*
>
> *Please let me know your thoughts on the below when you have a moment.*
>
> *The design team and PD team are aware of the transition and seek updates. I've held them at bay for a week but I feel I owe them an update so I would like to handle with correct protocol.*

Melanie can speak for the tech side of things as we may require those services longer to secure product in store on transition".

25 Eleni Chatzivasiliou responded to Wil Beedle on the same day informing him that the Respondent would need to follow its redundancy policy and consult for a 30 day period.

26 On 1 December 2017 the Claimant attended a meeting with the Footwear team, the Merchandising team and the Global Merchandising Director, Tiffany Wong. During that meeting Tiffany Wong let slip that "GBG will start from Q4". That was overheard by the entire footwear team. This confirmed to the Claimant what she already had suspected that things were happening behind the scenes without any involvement from her. This led to discussions between the footwear team about what was happening and the Claimant was sent some pictures by Hee Sue Seo with some samples that had been prepared by GBG. All this related to work which should normally have involved the Claimant and heightened her suspicions about what was happening.

27 On 5 December 2017, a meeting was held with about 30 employees and chaired by Wil Beedle. At this meeting Wil Beedle announced the restructure that had been overseen by Marc Kilbourn. This restructure threatened the jobs of some 70 employees worldwide. The Claimant decided that she would make a recording of that meeting. We accept that she did so because she was very suspicious about the changes that had been occurring behind her back. As a Tribunal we were surprised and disappointed in the manner in which Wil Beedle felt it appropriate to make this announcement. As was put to him by Mr Cook somewhat delicately, he had punctuated his announcement with expletives. In fact, he swore continuously throughout the meeting. When asked by Mr Cook whether he thought that was appropriate he sought to justify this by saying that in his view the employees were angry and frustrated and would not be impressed by a 'management cold fish'. He went on to claim that the Respondent had a high employee satisfaction in responses to its surveys and good employee retention. We consider that Wil Beedle lacked any insight about his own actions. He may have got away with such behaviour on some occasions and with some people but the scope for causing real offence by such unprofessional language is enormous and we do not condone it.

28 At the conclusion of the meeting the Claimant asked Wil Beedle a specific question about her own position. Wil Beedle suggested in his evidence before us that this was an inappropriate forum to do so, we do agree. An announcement had been made about changes to the organisation and a responsible manager would have taken a concern raised by an individual employee seriously. The Claimant asked about the role of product developers and Wil Beedle said, or said words to the effect that: *"we are looking into a different approach in footwear and we had ongoing discussions internally and externally based on finding what is the best solution. As soon as we find what the best solution is we will let you know"*. We find that this was misleading at best. The reality is, as we found above, that by this time a solution had already been found in respect of the footwear department. We considered that Wil Beedle had been quite deliberately evasive. However, he did then go on to suggest that the Respondent would rather use *"the great talent we have in the business within the new structure".* He went on to suggest as the Claimant was already working in London it would be an easy transition for her to find a new job. He suggested that the Claimant spoke to Marc Kilbourn, the Production Director, to see what the different options were and get some detail upon them.

29 Immediately after the meeting of 5 December 2017 the Claimant sent an email to Marc Kilbourn. In that e-mail she said:

> *"We've just received the sad but understandable news about the new restructuring of the Sourcing teams.*
>
> *Wil announced there is instead a new team of Product Developers in all categories, although I haven't seen these advertised. He suggested to speak to you about the Footwear structure.*
>
> *Would you let me know if possible to meet up and discuss this in detail."*

30 The Claimant at the same time also spoke to Emma Siddalls about wishing to work within the new structure. That caused Emma Siddalls to send an email to Marc Kilbourn on 6 December 2017 in which she said:

> *"Hi Marc,*
>
> *I hope you don't mind me contacting you, I am the Woman's Footwear Designer here at All Saints. I'm sure that you are being inundated with questions regarding the transition into the new production model!*
>
> *You may be aware that from October deliveries onwards it is likely that we will have adopted a licence agreement, but meanwhile, it would be good to have any advice on the strategy and processes we should adopt so that we can ensure the smooth and effective running of our category through q2 production and q3 development and production and into the further transition.*
>
> *Currently our own PD, Sylvia is still working within the design team, and it may be an opportunity to look at her role and how she can best contribute?"*

31 We find that from the information in Emma Siddalls' email and from what he knew more generally, Marc Kilbourn was aware of the licensing arrangements in 'Footwear' and that these placed the Claimant's role at risk of redundancy. It was therefore an important email that would have put a responsible manager on notice that an employee's job was at risk. When coupled with the Claimant's own email it is surprising that Marc Kilbourn did not reply. Marc Kilbourn told us, and we would accept that is the case, that he was very busy at the time. We would also accept that he was travelling abroad because he needed to implement his plan to close the local offices. That said, we have no doubt that he would have access to his email on a regular basis and find it inconceivable he had not been aware of these two emails. His failure to respond reflects very badly on his abilities as a manager. Marc Kilbourn says in his witness statement, when discussing his failure to respond to the Claimant, that he cannot recall if she was pregnant at the time. In his oral evidence he accepted that he saw her in the office and said 'sitting here right now I cannot recall if I noticed it [that the Claimant was pregnant]'. The Claimant was by then visibly pregnant and it would have been surprising if he was not aware of it and we find on the balance of probabilities that he was. The fact that he knew the Claimant was expecting a child makes his failure to address her concerns all the more inconsiderate.

32 On 11 December 2017 Marc Kilbourn circulated a revised strategy chart. That chart shows six product development roles. At that stage he is able to name Sarah Burton as the Product Development person for Knitwear and Jerseys (Plain) and Laura Felton

had been appointed as the Product Developer for Wovens and Jerseys (Graphics). As we have found above, the Product Developer role for Outwear and Tailoring had been given to Robert Hamilton and the Product Developer role for Denim had been given to Claire Ford. Two positions on that organisational chart were shown as been vacant. A Product Developer for the category of 'Leather' and an additional vacancy for a Product Developer for 'Non-Apparel'.

33 Marc Kilbourn gave us evidence that even before the announcement had been made he placed these two product development positions in the hands of a recruitment consultant. The arrangement appears to have been somewhat unconventional. We were not provided with any documents produced as a consequence of instructing a recruitment consultant. Marc Kilbourn told us that he wanted to keep the fact that there were roles available with the Respondent a secret as the announcement about the restructure had not then been made. He says that any recruitment or advertisement would not have identified the Respondent.

34 Sometime later in early January 2018, the Claimant became aware of an advertisement placed on a recruiter's website. That advertisement was for a Product Developer and it is expressed in entirely generic terms referring to experience in 'ladies, mens or accessories'. It is not restricted to any specific category. A guideline salary of £50 - £55,000 was suggested. The Claimant told us, and we accept, that she telephoned the recruiter enquiring about the role. She was told both that it was a role with the Respondent and that it was a product development role including working with accessories. That role then apparently coincides with the vacant position on Marc Kilbourn's organisational chart @Produc t Developer – Non-Apparel'.

35 Marc Kilbourn told us he had not authorised a recruiter to place any vacancy on the internet. We find that very unlikely. It seems that Marc Kilbourn had a close working relationship with a recruiter with whom he had worked in the past. He accepts that he discussed vacancies at the Respondent in around September 2017. He says that whilst the advertisement was in generic terms he made it clear to the recruiter that experience was required in specific product categories. He suggested that it was decided to advertise the generic position and then to sift through CV looking for experience in the particular product category which was required. We find that a particularly odd suggestion. If particular category experience was essential for a role, it is a simple matter to have explained that in the job advertisement or job description. A failure to do so would waste the time of any non-qualified candidate but also waste the time both of the recruitment agency or Respondent's Human Resources team have to sift through CVs looking for required experience. We conclude that it is far more likely and more likely than not that the Respondent would have accept an application from a well-qualified candidate with more general experience or product development. Whilst we accept that a high degree of experience might be expected, we found Marc Kilbourn's evidence that specific product knowledge would always be required to be unsatisfactory.

36 Having accepted the Claimant's evidence of her conversation with the recruiter we make a finding of fact that at least at some early stage the role of a Product Developer 'Non-Apparel' was actively promoted and placed in hand of the recruiters. That said, we accept Marc Kilbourn's evidence that this was a role which he later abandoned as being unnecessary. There was no evidence that anybody was recruited into this role at the material time. We have looked carefully at the evidence adduced by the Claimant that in October 2018 a role with some similarity was advertised by the Respondent but that does not offer our conclusion. The fact that a need for a role similar to the Claimant's emerged

8 months after her dismissal does not provide strong evidence to support her suggestion that that role was always available and no real support for her belief that somebody must have been appointed to that role in the intervening period. There is simply no evidence before us to rebut the Respondent's case that nobody was appointed at that stage into that relatively senior position.

37 On 12 December 2017 the Claimant obtained a copy of Marc Kilbourn's new structure chart from a colleague. She identified her own role as being the Product Developer – Non- Apparel and was concerned to see that her name was not placed against that role (in contrast to other Product Developers) but the letters tbc were against that role. The Claimant spoke to Emma Siddalls but did not get any clear information about what was going on. Concerned by this, she wrote a long e-mail to Rebecca Hood a member of the HR team. She complained that the women's footwear role was entirely omitted from the structured chart prepared by Marc Kilbourn. She drew attention to efforts of obtaining information and she drew attention to her pregnancy and her anxiety about what was going on. She complained that she knew that others had been recruited to Product Developer roles but that she had not received any straight answers. She received a short reply from Eleni Chatzivasilou where she said:

> "*Dear Sylvia,*
>
> *I hope you are well.*
>
> *Becky made me aware of your email and we understand how important it is to give you an update as soon as possible.*
>
> *There will be official announcement to the business next week therefore we do not know the details as yet.*
>
> *Dipika from my team will be in touch when we know more. I understand you are on holiday as from today. Do you want us to communicate with you during your annual leave or would you rather prefer when you return to the office and if so what is the day you return back to work?"*

38 Eleni Chatzivasilou had been privy to the fact of the outsourcing arrangement and that the Claimant's role was a risk of redundancy and had been since October. The email is little more than a holding response. The Claimant received a similar short email from Rebecca Hood which assured the Claimant of communications update would be made in the following week. No such update took place.

39 The Claimant was feeling increasingly stressed. In addition to the uncertainty about her role she was also very busy at work. She worked late into the evening on 15 December 2017. Her husband who arrived to pick her up from work was so concerned about her wellbeing that he took a photograph of her. The Claimant went to see her General Practitioner on 18 December 2017 when she was signed off with stress and anxiety.

40 The Claimant returned to work on 2 January 2018. The Claimant sent Mark Kilbourn a follow up email to her original email on 9 January 2018. She simply forwarded her previous email but once again she got no response. At that stage he had ignored or neglected to deal with her e-mails for about 1 month.

41 On 3 January 2018 the Claimant had booked a meeting with the Human Resources team to discuss her maternity leave. She did not hear from the Human Resources team about her pregnancy since 31 October 2017. She also wanted an update since she perceived that nobody in the business was keen to speak to her. She met with Rebecca Hood and took the opportunity to explain her concerns. She highlighted that she had tried to speak to Marc Kilbourn and to Wil Beedle and she had previously contacted Human Resources and heard nothing back from any of them. Rebecca Hood replied she had to check with Eleni Chatzivasilou and that if there were any updates she would hear them directly from her department. The Human Resources department were well aware of what was going on and that the Claimant's job was in fact at risk of redundancy. A deliberate decision had clearly been taken to keep the Claimant and others in the dark about an outsourcing agreement that had been entered into.

42 By early January 2018 the Claimant had become aware through leaks and slips that her existing role was threatened by the licensing agreement with GBG. It was an almost open secret at that stage. In early January the Claimant was told that she was not going on a further trip to Portugal. Again, she was understandably disappointed by this. She learnt that a merchandiser, Christina Carvalho, was going instead. We find the most likely reason for this was the fact that a decision had been taken perhaps as early as October 2017 that her particular role as 'go between' the office and Portugal was going to be redundant. The announcement of that was imminent and that it seems to us to provide the most convincing explanation of why the existing arrangements would change.

43 On 9 January 2018 a meeting took place where various employees, principally designers, were trained on some new software. Neither the Claimant nor Emma Siddalls were invited to that meeting. The Claimant says, and we accept, that she was told that Wil Beedle had given an instruction that the footwear team should not attend.

44 At some point later in the same day the Claimant was sent an e-mail which revealed that the suppliers in Portugal had been told that q4 orders were being cancelled. Later on she overheard Emma Siddalls talking with Christina Carvalho about a planned trip to Portugal that the Claimant had expected to go on. The Claimant says, and we accept, that when she approached the conversation ceased.

45 In the evening of 9 January 2018 just before leaving work, the Claimant engaged in a conversation with Emma Siddalls. She secretly recorded that conversation because she was at this stage convinced she has been kept in the dark about the outsourcing of footwear. She pressed Emma Siddalls for information. We have listened to that recording. At the end of the conversation Emma Siddalls reveals that the licensing agreement has been reached and the Claimant's and her own job was at risk. She refers to them both being 'jobseekers'. The Claimant has suggested that the tone used by Emma Siddalls was inappropriate. We cannot agree. We find that the tone used was mild. We recognise that for the Claimant her worst fears had been confirmed. Later in the evening Emma Siddalls sent the Claimant an email apologising for blurting out this information.

46 On 10 January 2018 the Claimant was, at fairly short notice, invited to a meeting. The meeting was notionally conducted by Emma Siddalls but she was supported by Dipika Pindoria. We find that, in reality, Emma Siddalls' role in this meeting was initially scripted by the Human Resources department. The Claimant was finally formally informed that her role was at 'risk' of redundancy. In fact, a decision had been taken to delete her role months before. She was told that there will be a 30 day consultation period

ending on 9 February 2018 and she was also informed that there was an aim to find alternative vacancies. The Claimant, quite understandably in our view, protested that she had been looking for answers for at least a month. She was handed a list of vacancies. That list omitted at least one product development role, that in the category of leather, which was acknowledged to be vacant. It made no reference to any product development role in apparel which we have found had by that stage been abandoned.

47 A meeting was scheduled for 11 January 2018 between the Respondent and GBG this was described as a 'kick off meeting'. The Claimant was not invited to this. We do not find this surprising as whilst the meeting impacted the Claimant the principal purpose of the meeting was to explain the Respondent's design requirements to GBG. We find it was not a general handover meeting and not one the Claimant could reasonably expect to attend even if she had been expected to stay in the business.

48 Both Emma Siddalls and Wil Beedle had included in their witness statement passages which suggested licensing agreement with GBG was only finalised on 9 January 2018. When each gave evidence, before adopting their witness statements, they sought to amend them by accepting the final trade mark licencing agreement had been signed off on 13 December 2017. We accept that Emma Siddalls had no knowledge whatsoever when the agreement was actually signed off. She had been too far away from such commercial decisions. That said, she should not have permitted her statement to be served where she was not sure of the truth of its contents.

49 We did not accept that Wil Beedle was unaware of the true position because he was copied into an email sent on 18 December 2017 where there was express reference to the licensing agreement being signed off 'last week'. In that email chain he was privy to discussions about how the redundancy process will be handled. We considered that in his case by signing and exchanging a witness statement giving the date of 9 January 2018 he attempted to give an impression that employees were notified of changes at the earliest opportunity when he knew that was not the case. The Claimant's solicitors had pressed for disclosure of the commercial arrangement and that had been resisted. Eventually we were provided with a redacted document which shows the agreement was signed on 13 December 2017. We have already found above that the commercial reality was that the Respondent was committed to the outsourcing arrangements some months before the agreement was formally completed.

50 On 16 January 2018 the Claimant wrote to the Respondent setting out her complaints that she had been side lined and stating that she believed the reasons for this was her pregnancy or the fact she was to take maternity leave. About the same time or shortly afterwards she had contacted ACAS for the purposes of early conciliation.

51 On 23 January 2018 there was a further meeting billed as a consultation meeting which was again conducted by Emma Siddalls supported by Dipika Pindoria. There was some discussion that the Claimant's complaints during that meeting as it commenced with the Claimant reading out a version of her grievance letter. The meeting also dealt with the issue of alternative roles. In the course of the meeting, Dipika told the Claimant that she should express an interest in any role that she wanted. After the meeting the Claimant sent an email expressing the interest in the product development role that she had been told about. Arrangements were then finally made for her to have a discussion with Marc Kilbourn.

52 On 25 January 2018 the Claimant met with Marc Kilbourn. She had been asked to provide a copy of her CV. Two product development roles were discussed, 'Denim' which was shortly to be vacated by Claire Ford (who was coming to the end of her contract) and Leather. The Claimant accepted during that meeting, and before us, that the Denim role was not suitable for her. There was also a further discussion about a role as a Fabric Buyer Costings Manager. The Claimant believed that she could do that job as well. Marc Kilbourn, in the course of that meeting, expressed a firm view that the Claimant did not have the skills or experience for either role. The Claimant pushed back and suggested she did. The meeting ended with Marc Kilbourn asking her to demonstrate what she said further by reference to her CV. She asked for the job descriptions and we accept her evidence that she was told to download these from the internet. The Claimant then prepared a commentary on each job description. This job description for the Product Development Leather role made no mention of category specific experience. Like all of the advertisements we were shown for product developers, it was entirely generic in its nature. We accept that this led the Claimant not to address the issue of 'category experience' in any great detail.

53 During this period the Claimant was again suffering from stress and was working at home. There were a number of attempts to arrange a further meeting between the Claimant and Marc Kilbourn. On one occasion the Claimant spent a day waiting to be contacted via videolink. Whilst there were some unfortunate delays we are not satisfied they were deliberate. That said, given the past failures some more thought should have been given to making this a priority. Ultimately there was a short telephone meeting between the Claimant and Marc Kilbourn.

54 Having considered the documents produced by the Claimant Marc Kilbourn restated his opinion that the Claimant had not demonstrated sufficient relevant experience for either role. He particularly emphasised the need for category experience. Marc Kilbourn agreed to set up a meeting with the womenswear and menswear directors but in fact he took no steps to do so. We find that he had concluded that the Claimant had not have the requisite skills or experience for the two roles in which she had expressed an interest and that prompted his decision to take matters no further. Marc Kilbourn produced two emails that set out his contemporaneous views. In the first sent on 31 January 2018 he said:

> *"For the record I asked for her CV, not to prepare a CV. We discussed roles currently available, of which I dismissed the Denim PD role due to no experience, and she didn't want one to explore the assts roles. Due to having some experience in fabric I asked her to elaborate so we could gauge suitability, and that leather she should put forward where she thinks she has relevance for the role, even though I explained that her CV focus on footwear and didn't demonstrate enough experience in this area, which I also relayed when we spoke.*
>
> *I'll go through her comments and advise thoughts vs other candidates to determine suitability".*

55 He then followed that up by a longer email in which he said as follows:

> *"Hi all,*
>
> *I have reviewed the details provided by Sylvia looking at specifically two roles, the fabric manager and the leather PD. She stated a lot of very generic comments to*

requirements that are relevant in isolation, but when put into context of a specific category aren't as relevant. I explained on the phone the product development was very category specific, and her CV was very footwear based, and to expect her to be able to suddenly pick up the development for leather category is not realistic (and would be a huge risk given the size of the category for the business), as she won't have vendor process experience in this area. On her comments she has copy and paste the PD role JD for denim that specifically states 'to manage the day to day product development of the denim collection' but has replaced with 'to manage the day to day product development of the RTW collection' and not replaced denim with leather. The role is very leather specific, which she has no experience in, and her CV due to the lack of experience would suit her more to a leather asst role and not an experienced leather PD. Again, in the 'what skills do I need' area she stated she has five years PD experience, but again this is in footwear and not leather (jackets). She has copy and pasted again from denim PD 'proven experience with a product development role within the fashion industry ideally with a focus on denim', and has left off the last part about focus on the category. The key to all this is that Sylvia has no PD experience in the leather category we need for the business."

He then went on to make similar comments in respect of the fabric role.

56 A suggestion was then made by the Human Resources department that Mr Kilbourn give such a feedback back to the Claimant herself. He declined to do so; his emails starts with the following sentence:

"As this is a slightly different scenario, with potential ramifications of the decision, I would think it better communicated from your department I have highlighted my reservations and the fundamental basis for the decisions that unfortunately Sylvia does not have the experience to the level required for the positions we have available. Her experience and skills set is in footwear and whilst she has laid out some generic experience in the following dates and communicating with a vendor, she doesn't have any leather (RTW Jackets) experience."

57 In one respect Marc Kilbourn's criticisms of the Claimant's experience is inaccurate. He places a heavy emphasis on her only having footwear experience whereas the bulk of her experience over her career had been in accessories. Nevertheless, that does not fundamentally undermine the concerns that he has expressed about a lack of specific experience. We accept that, notwithstanding our reservations about some of Mr Kilbourn's evidence, the view set out in those emails were his honest opinions. We further accept that the leather role was a very important role for the Respondent as it included flagship products. Some skills required were quite specific to the production of these garments and are somewhat different to the production of shoes. Whilst we believe that it was a role which the Claimant might well have adapted to over time, we accept that Marc Kilbourn wanted somebody who could hit the ground running. We accept that he honestly believed that appointing the Claimant to either of the roles they discussed would be too great a commercial risk.

58 We find that the product development roles were wider than the role done by the Claimant in that they encompass a greater part of the sourcing role that had previously being done by others. We further note the indicative salaries for those roles were significantly higher than that earned by the Claimant, the Claimant being on about £38,000 and the indicative salaries for those roles being £50 - £55,000 in the job adverts that we

have seen. Marc Kilbourn told us that as a matter of fact some of the people appointed were paid quite a lot more than that. That would suggest that whilst the role is that of a product developer which was similar to the Claimant's existing title the roles were broader and carried greater responsibilities. As a matter of fact, the Claimant now works at a similar level. The fact that she has been able to step up to such a role is a great credit to her but does not affect our conclusion that Marc Kilbourn had a rational honest belief that she was not immediately suitable for the two roles that were discussed.

59 The Respondent sent a letter to the Claimant on 2 February 2018 refuting the concerns raised by the Claimant in her grievance letter of 16 January 2018. After that the Claimant attended a final meeting on 12 February 2019. That final meeting was chaired by Ms Eleni Chatzivasilou. The Claimant was simply told that her role was redundant and that as no alternative role had been found. She was dismissed. That was confirmed in a letter to her dated 13 February 2018 which reads as follows:

> *"Further to the final consultation meeting that took place on Monday 12 February 2018, it is with regret that I am writing to confirm that your employment is being terminated by reason of redundancy. This is due to the entire footwear category been taken over by an external licensing company GBG. Unfortunately, we have not been able to find alternative employment during the consultation period and therefore your employment with the company has been terminated with effect from 12 February 2018."*

60 The Claimant appealed the decision to dismiss her. That appeal was heard by Marian Duxbury. Although we accept that not all of the points that we have been considering above were canvassed by the Claimant in that meeting, she did complain about being kept in the dark about the outsourcing that affected her job. Any person taking an independent approach to the evidence would have agreed with the Claimant that the matter had been badly handled. As such are disappointed at the lack of rigour on the appeal. We find that Marian Duxbury, who had never done an appeal hearing before, and who had no equalities training, was simply out of her depth. In reality, she just held the company line and dismissed the appeal against dismissal for the same reasons as set out in the Respondent's letter of 13 February 2018.

The law

The burden and standard of proof

61 The standard of proof that we must apply is the civil standard that is the balance of probabilities. In other words, we must decide whether it is more likely than not that any fact is established.

62 The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act, the material parts of which are:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

63 Accordingly, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**. Most recently in ***Base Childrenswear Limited v Otshudi*** **[2019] EWCA Civ. 1648** Lord Justice Underhill reviewed the case law and said:

> *17. Section 136 implements EU Directives 2000/78 (article 10) and 2006/54 (article 19), which themselves derive from the so-called Burden of Proof Directive (1997/80). Its proper application, and that of the equivalent provisions in the pre-2010 discrimination legislation, has given rise to a great deal of difficulty and has generated considerable case-law. That is not perhaps surprising, given the problems of imposing a two-stage structure on what is naturally an undifferentiated process of fact-finding. The continuing problems, including in particular the application of the principles identified in Igen Ltd v Wong [2005] EWCA Civ. 142, [2005] ICR 93, led to this Court in Madarassy v Nomura International plc [2007] EWCA Civ. 33, [2007] ICR 867, attempting to authoritatively re-state the correct approach. The only substantial judgment is that of Mummery LJ: it was subsequently approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37, [2012] ICR 1054. In Efobi v Royal Mail Group Ltd [2017] UKEAT 0203/16, [2018] ICR 359, the EAT held that differences in the language of section 136 as compared with its predecessors required a different approach from that set out in Madarassy; but that decision was overturned by this Court in Ayodele v Citylink Ltd [2017] EWCA Civ. 1913, [2018] ICR 748, and Madarassy remains authoritative.*
>
> *18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> > *(1) At the first stage the claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
> >
> > > *"56. … The bare facts of a difference in status and a difference in treatment only indicate 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.*

> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. …"*

(2) If the claimant proves a prima facie case the burden shifts to the respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:

> *"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."*

He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.

64 Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' see ***Chapman v Simon*** **[1994] IRLR 124** see per Balcombe LJ at para. 33 or from 'thin air' see ***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**.

65 Discrimination cannot be inferred only from unfair or unreasonable conduct **Glasgow *City Council v Zafar*** **[1998] ICR 120**. That may not be the case if the conduct is unexplained ***Anya v University of Oxford*** **[2001] IRLR 377, CA.** Whilst inferences of discrimination cannot be drawn merely from the fact that the Claimant establishes a difference in status and a difference in treatment see ***Madarassy v Nomura International plc*** **[2007] ICR 867** 'without more', the something more *"need not be a great deal. In some instances, it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred"* see ***Deman v Commission for Equality and Human Rights*** **[2010] EWCA Civ. 1279** per Sedley LJ at para 19.

66 Where there are a number of allegations each single allegation of discrimination should not be viewed in isolation, but the history of dealings between the parties should be taken into account in order to determine whether it is appropriate to draw an inference of racial motive in respect of each allegation ***Anya v University of Oxford***.

67 The burden of proof provisions need not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ. 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said:

> *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"".*

Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution

and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

68 The burden of proof in respect of the detriment claims brought under Section 47C of the Employment Rights Act 1996 require the Tribunal to apply Sub-section 48(2) of the Employment Rights Act 1996 which provides that 'On a complaint under subsection (1), (1ZA), (1A) or (1B) (which includes a complaint under Section 47C) it is for the employer to show the ground on which any act, or deliberate failure to act, was done'.

69 Where a person with less than 2 years continuous service brings a claim of unfair dismissal relying upon an automatically unfair reason for their dismissal then they bear the burden of showing that that reason was the reason or principle reason for their dismissal see ***Maund v Penwith District Council*** **[1984] IRLR 24**.

Pregnancy and maternity discrimination – Equality Act 2010

70 In certain circumstances the Equality Act 2010 protects individuals against discrimination because of pregnancy and maternity leave. The material parts of the relevant provisions are as follows:

> *"18 Pregnancy and maternity discrimination: work cases*
>
> *(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
>
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –*
>
> *(a) because of the pregnancy, or*
>
> *(b) because of illness suffered by her as a result of it.*
>
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*
>
> *(4) 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.*
>
> *(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).*
>
> *(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 a reason mentioned in paragraph (a) or (b) of subsection (2), or

(b) it is for a reason mentioned in subsection (3) or (4).

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B) –

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B) –

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment…

(3)….

(8)…."

71 When deciding claims brought under the Equality Act 2010 a Tribunal is required to have regard to the Statutory Code of Practice produced by the Equality and Human Rights Commission. The present version of that code says this about claims under Section 18 of the Equality Act:

"No need for comparison

8.19 It is not necessary to show that the treatment was unfavourable compared with the treatment of a man, with that of a woman who is not pregnant or with any other worker. However, evidence of how others have been treated may be useful to help determine if the unfavourable treatment is in fact related to pregnancy or maternity leave.

Example: A company producing office furniture decides to exhibit at a trade fair. A pregnant member of the company's sales team, who had expected to be asked to attend the trade fair to staff the company's stall and talk to potential customers, is not invited. In demonstrating that, but for her pregnancy, she would have been invited, it would help her to show that other members of the company's sales team, either male or female but not pregnant, were invited to the trade fair.

Not the only reason

8.20 A woman's pregnancy or maternity leave does not have to be the only reason for her treatment, but it does have to be an important factor or effective cause.

Example: An employer dismisses an employee on maternity leave shortly before she is due to return to work because the locum covering her absence is regarded as a better performer. Had the employee not been absent on maternity leave she would not have been sacked. Her dismissal is therefore unlawful, even if performance was a factor in the employer's decision-making.

Unfavourable treatment

8.21 An employer must not demote or dismiss a woman, or deny her training or promotion opportunities, because she is pregnant or on maternity leave. Nor must an employer take into account any period of pregnancy-related sickness absence when making a decision about her employment.

8.22 As examples only, it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period for the following reasons:

- *the fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed-term contract;*
- *the pregnant woman is temporarily unable to work because to do so would be a breach of health and safety regulations;*
- *the costs to the business of covering her work;*
- *any absence due to pregnancy related illness;*
- *her inability to attend a disciplinary hearing due to morning sickness or other pregnancy-related conditions;*
- *performance issues due to morning sickness or other pregnancy-related conditions.*

This is not an exhaustive list but indicates, by drawing on case law, the kinds of treatment that have been found to be unlawful."

Detriment claims – Section 47C of the Employment Rights Act 1996

72 The Employment Rights Act 1996 provides further rights in relation to pregnancy and maternity leave. Section 47C of the Employment Rights Act 1996 and the regulations made thereunder provide a right not to be subjected to a detriment on various prescribed grounds. The material parts of that section say:

"47C Leave for family and domestic reasons.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to –

(a) pregnancy, childbirth or maternity,

(b) ordinary, compulsory or additional maternity leave……"

73 The regulations referred to in Section 47C are the Maternity and Parental Leave etc. Regulations 1999. The 'prescribed reasons' referred to in Section 47C of the Employment Rights Act 1996 are those set out in regulation 19. The material parts of that regulation are:

"19.-(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee -

(a) is pregnant……

(4) Paragraph (1) does not apply in a case where the detriment in question amounts to dismissal within the meaning of Part X of the 1996 Act."

74 The words 'done for a prescribed reason' in Section 47C and 'for any of the reasons' in regulation 19 are interpreted as meaning that any detriment will be unlawful if the reason for the act or omission complained of was materially influenced by the improper reason ***Fecitt v NHS Manchester*** **[2012] IRLR 64**.

Unfair dismissal – Employment Rights Act 1996

75 Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee. Sub-section 108(1) provides that that right does not apply to employees with less than 2 year's continuous service. Sub-section 108(3) disapplies that where the reason for dismissal is for an 'automatically unfair' reason. Automatically unfair reasons for dismissal that relate to pregnancy and maternity leave are set out in Section 99 of the Employment Rights Act 1996. The material parts of Section 99 are as follows:

"99 Leave for family reasons.

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

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

(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity……..

(b) ordinary, compulsory or additional maternity leave,

and it may also relate to redundancy or other factors.

(4) ……

(5) Regulations under this section may –

(a) make different provision for different cases or circumstances;

(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.

76 The relevant regulations are the Maternity and Parental Leave etc. Regulations 1999. The material regulation in respect of dismissals is regulation 20. The material parts of that regulation read:

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

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

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

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee;

(b) ….

(c) ….

(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave;

(e) the fact that she took or sought to take –

(i) additional maternity leave;

(ii) ……(iii)

(f) –(g)…"

(4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

(5) Paragraph (3) of regulation 19 applies for the purposes of paragraph (3)(d) as it applies for the purpose of paragraph (2)(d) of that regulation.

(6) …(8)

77 The expression 'connected with' was considered in ***Clayton v Vigers*** **[1990] IRLR 177** which was decided under previous legislation but the reasoning remains applicable. In that case a submission that 'connected with' required a causal connection was rejected and a broad interpretation of those words was favoured.

Discussions and conclusions

78 The detriments relied upon by the Claimant are the same in both her claim under the Equality Act 2010 and her claim under section 47C of the Employment Rights Act 1996. In respect of claims under both pieces of legislation we need to determine whether the Claimant was treated in the manner she alleges and thereafter we find in her favour look at the reason for that treatment. It is therefore most convenient if we deal with the claims on a detriment by detriment basis. We have used headings which referred to the paragraphs of the list of issues in which the factual allegations relied upon as detriments are set out.

79 Where necessary we make additional findings of fact and each heading. In particular we set out our findings as to the reason for any treatment we have found was potentially unlawful. We shall make it clear when we make such additional findings of fact.

80 Mr Cook properly reminded us that we should be careful not to deal with the Claimant in a fragmented manner which would mean that we lose sight of the overall picture. He quite properly relied upon ***Anya v University of Oxford*** **[2011] ICR 847** in support of that proposition. Whilst that authority deals with discrimination claims we see no reason why the same principle should not apply in detriment claims brought under the Employment Rights Act 1996.

81 In respect of the claims under the Equality Act 2010, set out within our findings of fact are a number of instances where we have rejected the Respondent's witnesses' evidence and perhaps more instances where we have been highly critical of the manner in which the Claimant was treated. Below we uphold a number of instances where the Claimant was subjected to a detriment. The focus then turns to the reason for that treatment. In considering the question of whether the burden of proof has passed to the Respondent we are prepared to assume that, without having regard to the Respondent's explanation, the repeated poor treatment of the Claimant is sufficient to pass the burden of proof to the Respondent in respect of each case where we find a detriment has been established. We have assumed that the burden was therefore on the Respondent to show that the treatment was in no sense whatsoever because of pregnancy or maternity reasons.

Paragraph 1.1.1 - the First Portugal Trip

82 We have found that the Claimant had been told that she may well be included on the business trip to Portugal on 25 October 2017. We would accept that such business trips were an interesting part of the Claimant's work and that being told that she could not go on a particular trip when she expected to do so would be disappointing. We are prepared to assume that this would amount to a detriment for the purposes of these claims.

83 We set out above that we accepted the evidence of Emma Siddalls as to the reasons why the Claimant was not asked to attend that particular trip. The trip was principally for the designers and budgetary constraints meant that the numbers had to be kept low. We have regard to the fact that there was no hard and fast rule who would go on such meetings and find that such changes within the organisation were common place. Despite the fact that Emma Siddalls' recollection was general and not specific we accept that it was a genuine and sensible business decision that the two designers should attend on this particular trip. The Respondent has satisfied us that these business reasons were the only reasons for this decision as such, this allegation does not succeed under either statutory scheme.

Paragraph 1.1.2 – Not informing the Claimant about the changes proposed on 9 November 2017

84 This allegation relates to the fact that on 9 November 2017 the Respondent's menswear director sent out an email giving what we would describe as a heads up to his particular team about the new roles and the organisation. In doing so he placed them at an advantage. The corollary of that is that the Claimant suffered a detriment by not been included in that email communication. She lost out because two roles which she might have had the opportunity to apply for were filled before she got the opportunity to do so. As such we are satisfied that she suffered a detriment.

85 Turning to the reason for that treatment and placing the burden of proof. Where on the Respondent we are satisfied that this was a particular manager giving his particular team a heads up. We take account of the guidance set out in the code which reminds us that while no comparator is necessary in a claim under section 18 of the Equality Act 2010 the treatment of others might evidence the real reason for the treatment. In this case a

wider group than just the Claimant was placed at the same disadvantage by the actions of the manager. There is nothing to indicate that the Claimant was singled out from this poor treatment because of her pregnancy, she was just not in the menswear team. Despite the fact that we did not hear from that manager we are satisfied that the reason that the Claimant was not given the same advantage was nothing to do with her pregnancy and everything to do with a manager favouring his team. The Claimant in her list of issues suggests that Emma Siddalls did not treat her as favourably. If it is necessary to make a finding as to the reasons for that we are satisfied that Emma Siddalls was under the impression that the new structure was at that stage confidential. She did not disclose details of the new structure widely in the team although it is likely she confided in Hee Sue Seo. We are entirely satisfied that her reasons for not telling the Claimant were that she believed that she was not permitted to share the information generally.

Paragraph 1.1.3 – Exclusion from the meeting of 30 November 2017

86 We have accepted that the Claimant was not invited to a meeting that took place on 30 November 2017 in circumstances where she had done some preparatory work for the meeting. We have accepted the evidence of Emma Siddalls that there were generally good reasons why not everybody in a team would attend a meeting in order to reduce the number of "voices in the room". We have found that there was no particular good reason why the Claimant should attend a meeting in a different product category simply because she done some of the administrative preparatory work. We do not find that she could reasonably have expected to attend that meeting as a matter of course. A detriment requires an employee to show that a reasonable employee would think they were placed at a disadvantage. In this case we do not think the Claimant could reasonably believe she had been disadvantaged. That is not to say that she did not believe this was the case as her suspicions were heightened by the lack of information she was given around this time.

87 If it were necessary to make a finding as to the reason for the treatment we are entirely satisfied that there were good business reasons as described by Emma Siddalls for not asking the Claimant to attend this particular meeting.

88 Paragraph 1.1.4 – Closing down the discussion about the GBG outsourcing following the meeting on 1 December 2017

89 On 1 December Tiffany Wong let slip the fact that GBG will be taking over 'from Q4'. We would accept that that was extremely unsettling for the Claimant and was something that she could reasonably consider a detriment. In addition, the fact that the conversation was, as we accept, 'shut down' would have added to the worry felt by the Claimant. This too could reasonably be considered a detriment.

90 It seems to us inherently improbable that Tiffany Wong made slip because the Claimant was pregnant (that was not really the case advanced by the Claimant). Despite not having heard from Tiffany Wong the overwhelming inference from the reaction was that she was careless in letting go of a bit of information that had up to that point been kept quiet. We accept Wil Beedle's evidence that there was a concern that if employees were kept in the loop they might leave at a time of their choosing. We accept that because as we see it is an admission of selfishness at the employee's expense and consistent with the general highhandedness exhibited by Wil Beedle. The outsourcing

affected a number of employees other than the Claimant (who had also been kept in the dark). Taking these matters together we are satisfied that nothing said by Tiffany Wong was by reason of the Claimant's pregnancy.

91 We have accepted that the conversation was 'shut down'. That is exactly what would be expected had there been an accidental slip of information that was being kept from employees. We must ask why the conversations were cut down and whether the Claimant's pregnancy was a material reason for that. We are entirely satisfied that the conversation was shut down because managers had decided that the outsourcing decision would not be announced at that time. It had nothing to do with the Claimant's pregnancy and affected a wider group of employees than just her. For these reasons this allegation cannot succeed under either jurisdiction.

Paragraph 1.1.5 – Wil Beedle telling the Claimant that changes were 'possibly' being made on 11 December 2017

92 We have found above and repeat here that Wil Beedle actively mislead the Claimant about whether her role might be affected by the outsourcing decision. By 11 December Wil Beedle knew full well that the Claimant's role would no longer exist once GBG took over the Women's Footwear business. Telling the Claimant that that was a 'possibility' was simply untrue. We are satisfied that that amounted to a detriment.

93 We turn to the reasons for the treatment. We are satisfied that a decision was taken by Wil Beedle and others to hold back the announcement of the outsourcing agreement. The effect of the outsourcing affected all of the employees in the Department and the Claimant was not alone in being kept in the dark. Wil Beedle has explained the decision as being a desire not to cause employees to leave. We accept that the reason for keeping the outsourcing secret was the selfish desire to maintain stability for the Respondent's commercial benefit. The reason had nothing to do with the Claimant's pregnancy. As such this claim cannot succeed.

Paragraph 1.1.6. – The Claimant not appearing on the new structure chart

94 We have accepted that on 11 December 2017 a new structure chart was circulated where the Claimant's name did not appear. We would accept that this would make the Claimant fearful that she might lose her job and as such it was a detriment.

95 We turn to the reasons for not including the Claimant's name on that chart. The chart was drawn up by Marc Kilbourn. He was responsible for moving the entire sourcing function back to London and drawing up a new structure. The structural chart he produced had no product developer role for footwear. It did have a product developer role for 'non-apparel' but that was not intended to cover footwear. At the time the chart was produced a decision had already been taken to outsource the footwear to GBG. Marc Kilbourn did not include the Claimant's existing role because it would no longer exist. That had been known to the Respondent, if not the Claimant, for some months. We are entirely satisfied that the reason and the only reason that the Claimant's name and existing role did not appear on the restructure chart was that a decision had been made to outsource footwear production. That is not a reason connected with the Claimant's pregnancy. Insofar as the Claimant assumed that the Product Developer Non-Apparel role was her

role she is simply wrong about that. It was a proposed new role and not her existing role. That explains why she was not allocated to that job in the chart. These are commercial reasons and are in no sense whatsoever that the fact that the Claimant was pregnant or was going to go on maternity leave.

Paragraph 1.1.7 – Exclusion from the 'kick off meeting' on 10 January 2018

96 Whilst we would not have, and have not, accepted that not being invited to meetings would necessarily amount to a detriment. However, in the particular circumstances where the Claimant did not know for sure, but very strongly suspected, her role was to be outsourced being excluded from or not being invited to any departmental meeting would be of concern to her. We are prepared to accept that not attending this meeting was a detriment.

97 We find that there were two reasons why the Claimant was not invited to that meeting. The first was the nature of the meeting itself. It was as we found above essentially the opportunity for the Respondent to introduce its design requirements to its new licensee. The Claimant was not a designer nor was her role at a level where she could be expected to contribute to that discussion. As such her attendance would not benefit the Respondent and was unnecessary. The second reason was that by this stage those people arranging such a meeting knew the Claimant would disappear when footwear was licensed to GBG. She had not formally been informed of this. We are satisfied that these were the only reasons why the Claimant was not invited to that meeting and that it was nothing to do with the fact that she was pregnant or might take maternity leave.

Paragraph 1.1.8 – exclusion from a meeting on 9 January 2018 which included software training

98 We accepted that the Claimant was not invited to the software training meeting. We are prepared to accept that that could be seen as a detriment.

99 On the Claimant's own evidence the instruction given was that the footwear team would not receive this training. That instruction was given by Wil Beedle who had known for months that the Footwear team would soon cease to exist. We are satisfied that the reason, and the only reason for the decision that was taken was that the training was given only to people who it was envisaged would be using it. That was principally designers. However even Emma Siddalls was not included. We find whether fair or not a decision was taken to exclude the footwear team because it was at best uncertain that they would ever use the software. That is not a good reason but it is not a reason connected to maternity or pregnancy.

Paragraph 1.1.9 – Events during the afternoon of 9 January 2018

100 The allegation concerns events on the evening of is that that took place in the evening of 9 January 2018 where the Claimant overheard a conversation with Ms Siddalls and a colleague about a further trip abroad and the cancellation of some products which she was not aware. The Claimant complains that a conversation was immediately shut down and Emma Siddalls moved away from her. We have broadly accepted the

Claimant's account that a conversation about Portugal and the suppliers was truncated when she approached or joined the other two employees. We would accept that being excluded like that is a detriment.

101 Turning to the reason for that treatment, the reality of the situation was that Emma Siddalls had known for some months that the Claimant's role was at risk of redundancy. She had known for some months about the licensing agreement, and that it was imminent. She was placed, by others, in an invidious position where she was asked to keep a secret where she perhaps felt uncomfortable doing so. In relation to these future arrangements, Emma Siddalls was aware that the Claimant's role was to be made redundant in the very near future (in fact it was about to be announced the following day) because of the outsourcing to GBG. We find that it was those facts and those reasons which caused her (a) to be embarrassed and shut down conversations and (b) to exclude her from some future activities which Emma Siddalls were well aware were soon to be transferred to GBG that is not because the Claimant was pregnant or expected to go on maternity leave.

Paragraph 1.1.10 - the events of the evening of 9 January 2018

102 In the evening of 9 January 2018, the Claimant recorded a conversation with Emma Siddalls who, to use her own words, blurted out the fact that the licensing agreement had been put into place. The Claimant has suggested Emma Siddalls spoke in a loud and annoyed voice. We have not found that to be the case. In fact, Emma Siddalls was pressed for information by the Claimant who, quite understandably, was very anxious for information about what was going to happen. We find that the reason Emma Siddalls told the Claimant the truth finally was because she was pressed to do so.

103 Having rejected the suggestion that Emma Siddalls spoke to the Claimant in an inappropriate manner we have real doubts that being told that there was a risk of redundancy where that was true could be considered to be a detriment. It is arguable that having important information 'blurted out' rather than formally conveyed is a detriment. On the assumption that it could be a detriment we have gone on to consider whether the reason for that treatment was the Claimant's pregnancy or maternity. We are satisfied that the outsourcing was a genuine business decision taken with no consideration of the Claimant's personal circumstances (we deal with this further below). That outsourcing decision did have the effect that the Claimant's existing role would no longer be necessary. We have found that there was a decision to keep most of the employees in the dark about the outsourcing and its effects. The Claimant was not singled out in this respect (noting that we do not need to find a comparator). We find that the reason Emma Siddalls blurted out the information about the outsourcing was that she recognised that the Claimant was putting 2 and 2 together. She was unwilling to lie and when pressed by the Claimant she told the truth. We are satisfied that the fact that the Claimant was pregnant or might take maternity leave had nothing to do with the decision. It was just that keeping the Claimant in the dark was untenable and unacceptable to Emma Siddalls.

Paragraph 1.1.11 – Events following the Redundancy Consultation meeting on 10 January 2018 'freezing out'.

104 In the list of issues the Claimant identifies four separate features of her work where she says that she was marginalised or excluded. The first three relate to the Claimant's duties. Essentially the Claimant complains in each of these allegations that her role is removed from her. The first three of the Claimant's complaints are all specific to footwear. There was some dispute as to the extent to which the Claimant's role was

reduced but Emma Siddalls accepts that the Claimant was not copied in to all of her e-mails after the redundancy situation was announced. We accept the Claimant's case that she was no longer invited to contribute to a 'Critical Path' for future production of footwear or calendar invitations for the following year. We accept that she could have viewed each of these as a detriment.

105 In respect of the first three issues the reason for the treatment put forward by Emma Siddalls was the fact that the outsourcing agreement had been put in place. That meant that the Claimant would not be involved in any of the footwear work going forwards. As such her marginalisation was because of the outsourcing decision. We accept that evidence. It is quite clear to us that once the outsourcing decision was taken the Claimant's role would effectively disappear. There was still work that she could be doing but that would disappear. The marginalisation that she complains of was not by reason of her pregnancy or maternity but was a direct consequence of the business decision that had been taken for commercial reasons.

106 The fourth complaint suggests that, after the redundancy meeting, Emma Siddalls no longer sat near her but worked in other parts of the office. Emma Siddalls did not accept she did that and had suggested that she moved around the office fairly randomly. We find that the previous good relationship between the Claimant and Emma Siddalls had been badly eroded. The first reason that the relationship had been eroded was that, for many months, Emma Siddalls, together with other members of the management team, had kept the fact that the Claimant's job was at risk a secret from her. We find this was a matter which troubled Emma Siddalls. As the Claimant got closer and closer to the truth it would have been more and more embarrassing for her. This led to her 'blurting out' the truth on 9 January 2018. That had been followed up by the first consultation meeting where Emma Siddalls was notionally responsible for telling the Claimant that there was a possibility she would be dismissed. That would have done nothing to improve the relationship.

107 We thought that both the Claimant and Ms Siddalls were trying to assist us when talking about seating arrangements and do not accept that Emma Siddalls deliberately intended to sit away from the Claimant. However, she may have done so more often than she did in the past because of the fact that she recognised that the Claimant viewed her with suspicion. We accept that the Claimant would have perceived this as a detriment.

108 We find that the reason for Emma Siddalls' actions as we have found them to be was not in any sense the Claimant's pregnancy or maternity but the discomfort caused by Emma Siddalls having kept a secret from the Claimant and latterly being charged with the process that might lead to her dismissal.

<u>Paragraph 1.2 – Being omitted from the restructured business</u>

109 The next allegation at 1.2 is perhaps one which was not pursued as forcefully as the following allegation which concerns alternative roles. We have treated this as an allegation that the Claimant's role was not preserved because of a reason connected with her pregnancy or maternity. We would accept that a reasonable employee would view their role being outsourced as a detriment.

110 We find that the Claimant's role fell squarely within the work that was being outsourced to GBG. It is precisely that role that work that the Respondent wished to entrust to somebody else. The decision to outsource or restructure the business in that

form was taken before the Claimant announced she was pregnant and we find that was taken for business reasons. We would reject any suggestion that the decision to outsource the footwear business was in any way connected with the Claimant's pregnancy or intention to take maternity leave. It was taken at board level and had major ramifications for the business.

Paragraph 1.3 – denying or refusing the Claimant suitable alternative employment

111 Mr Cook focused on this complaint and it was this allegation which caused the Tribunal the greatest difficulty. We were impressed with the Claimant's employment record and we had the benefit of knowing that the Claimant is now working at a high level job. We therefore looked carefully at the reasons why, when the Claimant's existing role disappeared, she was not found some other role in the business. Mr Cook highlighted the difficulties that the Claimant had had in seeking information having been ignored by Marc Kilbourn for a lengthy period. He pointed out the difficulties the Claimant had in addressing requirements not set out in generic job descriptions. He suggested that the burden of proving the reason for any treatment was not discriminatory must pass to the Respondent. He invited us to conclude that the reasons put forward by the Respondent for not appointing the Claimant to the roles in which she expressed an interest were weak and that we should conclude that they were tainted with discrimination.

112 We considered it necessary to look at each occasion where the Claimant missed out on opportunities to find an alternative position. The first occasion when the Claimant was not considered at all relate back to allegation 1.1.2 which is when the Director of the Menswear Department first gave his team the heads up about the product development roles. We have accepted that the Claimant missed an opportunity because of that. We set out our conclusions in respect of that and do not repeat them here. The behaviour was regrettable but not discriminatory. We would note that one of these roles 'Denim' was a role that the Claimant later accepted was not suitable for her.

113 The other opportunities for redeployment were those discussed (eventually) with Marc Kilbourn. The Claimant does not specifically allege that Marc Kilbourn's failure to engage with her was itself an act of discrimination or a detriment however we shall briefly deal with this as it was a matter that was the subject of some evidence before us. We have made findings above that Marc Kilbourn effectively ignored the Claimant for a period well over a month. Have found that he had knowledge of the Claimant's pregnancy. We accept that Marc Kilbourn was busy and was travelling abroad a great deal during this period. We consider that a very poor excuse for not at least acknowledging one of the Claimant's emails. However, when looking at the reason for this treatment we are satisfied that simply indicative of the high-handed approach that was taken by the managers and in particular Mark Kilbourn who were simply untroubled by the worry and concern caused by their reorganisation to the employees. We are satisfied that the reason for the treatment had nothing whatsoever to do with the fact that the Claimant was pregnant or might take maternity leave.

114 The opportunities that the Claimant discussed with Marc Kilbourn were the Denim role, the Leather role and the Fabric and Trim Buyer role. In addition, Marc Kilbourn asked the Claimant whether she would be interested in any of the available assistant roles that the Claimant quite reasonably declined. We have set out above that the Claimant accepted that the Denim role was not suitable for her and in those circumstances, it was unsurprising that she was not offered that job.

115 We deal firstly with the Product Developer-Leather role. Had this been a matter for us on the evidence that we heard we would have concluded that the Claimant was quite capable of growing into this role although she did not have any product specific experience. However, the question for us is whether the reasons put forward by Marc Kilbourn were genuine reasons not tainted by considerations of anything connected with pregnancy or maternity.

116 We have criticised Marc Kilbourn for neglecting the Claimant and consider that he lacked the courage to explain his reasons to the Claimant when the opportunity was suggested by the Human Resources Department. We would accept that there is sufficient evidence from which an inference of discrimination could be inferred and therefore the burden passes to the Respondent to show that the reasons they have given were in no sense discriminatory.

117 We accept Marc Kilbourn's evidence that the leatherwear category was in a particularly important product category for the Respondent. We note that the salary awarded to the successful candidate was far in excess of the salary that the Claimant earned at the time and was towards the top end of the salaries awarded to Product Developers. We consider that he could reasonably hold the view that it was a much broader role than that done by the Claimant and was at a much more senior level. We find that he could, and did, honestly believe the Claimant's experience and skill set did not make her suitable for the job. In short, we find that the reasons he set out in his emails were his genuine reasons and that his decision that the Claimant was not suitable for the Leather role was the only matter which caused him not to offer the Claimant the job.

118 We reach the same conclusions in respect of the Fabric and Trim Buyer role. Again this is a role which we believe the Claimant could have done perhaps with a little training. However, Marc Kilbourn has satisfied us that his reasons for not appointing the Claimant to this role were exclusively those set out in his email which can be summarised as being that the Claimant lacked sufficient experience to undertake the role. We accept that the Claimant's pregnancy or the fact she might take maternity leave played no part in either decision.

119 We have seen the CVs and qualifications of the two individuals who were ultimately appointed to these roles and would accept that they had greater skills and experience specific to the roles that they were appointed to do. That reinforces our conclusion that Marc Kilbourn acted reasonably and honestly informing his opinions which in turn reinforces our conclusion that he acted without any hint of discrimination.

120 The final opportunity for alternative work was that Marc Kilbourn had suggested to the Claimant that he would speak to other managers to explore whether the Claimant could be accommodated. We are highly critical of him for making a promise which she then did not fulfil but have concluded that his reasons for doing so were that he genuinely believed that there was no role available for which the Claimant was sufficiently qualified.

121 The role which was not discussed with Marc Kilbourn was the 'Non-Apparel' role that had appeared on his structure chart at the beginning of January. The Claimant had suggested that this was her existing role as she had been recruited to work in a non-apparel role. We do not agree that this role was ever a role undertaken by the Claimant at the time of the restructure. That restructure took into account the outsourcing exercise and did not include employees in footwear which included the Claimant. We would however accept that the Non-Apparel Product Developer role which was advertised would

have been eminently suitable for the Claimant and that none of the objections raised by Marc Kilbourn would have applied. That said we are satisfied that that role was never in fact filled and was abandoned before the Claimant had any discussions with Marc Kilbourn. We are satisfied that the decision to abandon the role was nothing to do with the Claimant's pregnancy or maternity. We have found that the role was never filled or recruited for.

122 For the reasons set out above, we have concluded that the reasons for not finding the Claimant alternative employment were nothing whatsoever to do with her pregnancy or the fact she might take maternity leave. We might not have taken the same decisions as the Respondent but that does not mean that their decisions were discriminatory.

Paragraph 1.4 – The dismissal

123 Our findings on the dismissal will inform our decision in respect of the claim under Section 94 and 99 of the Employment Rights Act 1996. This particular allegation is the only matter relied upon by the Claimant that is not put forward as a 'detriment claim' under Section 47C of the Employment Rights Act 1996 as dismissals are specifically excluded from that protection by reason of Regulation 19(4) – see above. To succeed under Section 99 the Claimant must show that the reason, or if more than one, the principal reason for dismissal was a reason connected with pregnancy or maternity leave. As such the test for 'causation' is considerably higher than in the other claims.

124 The reason for a dismissal is the facts known or opinions held by the decision maker. We did not hear directly from any person who accepted that they took the ultimate decision to dismiss the Claimant. That does not mean that there was no evidence of the reason for the dismissal. It was quite clear to us and we have found that the decision to outsource the footwear department was taken by the board of the Respondent. We have further found, which was not resisted by the Claimant, that part of the decision making process was for good business reasons and was not discriminatory.

125 The effect of the outsourcing was that the Claimant was displaced from her role and, if her services were to be retained she needed to be accommodated in some other role. Above we have looked at the various stages in the search for alternative roles and concluded that the decision not to appoint the Claimant to any vacancy was not discriminatory or connected with pregnancy or maternity leave in any way.

126 It was canvassed before us that, even if there was no role for the Claimant, the Respondent could have kept her on to see what was available after her maternity leave. We agree that was a possibility but not a straightforward one. However, we find that the Respondent did not give that possibility a moment's thought. That does not lead to the conclusion that the decision to dismiss was discriminatory.

127 We are prepared to assume that the burden of proof lies on the Respondent (which it does not in the unfair dismissal claim). From our findings that the Claimant was displaced from her role by a non-discriminatory outsourcing decision and that thereafter she was not discriminated against when exploring alternative roles and finally from the fact that redundancy was cited as the reason for dismissal, we have drawn inferences and concluded that that ostensible reason given at the time was the true and exclusive reason for the dismissal and that the Claimant's pregnancy or maternity played no part in the Respondent's reasons for the dismissal.

128 Those conclusions mean that the Claimant's claims, so far as they relate to dismissal, do not succeed, either under Section 18 of the Equality Act 2010 or under Part X of the Employment Rights Act 1996 (unfair dismissal).

Paragraph 1.5 – The appeal

129 The appeal was not handled well. It was not thorough, it did not examine many of the points put forward by the Claimant and our findings above are that Marian Duxbury was following the company line. She took the approach that the Claimant's role disappearing coupled with a failure to find work, meant her dismissal was inevitable. In that limited respect we have agreed with her. Our criticisms relate to the wider concerns that the Claimant raised about her treatment which could have been and ought to have been acknowledged.

130 We accept Marian Duxbury's evidence that she genuinely believed that the Clamant was redundant and that the decision to dismiss her was correct and was not discriminatory. Whilst we find she could have gone further than she did to acknowledge some obvious shortcomings we find that her reasons for not doing so were in no sense whatsoever informed by the Claimant's pregnancy or maternity. Insofar as there were failings they principally stemmed from a lack of experience.

131 These written reasons are based on oral reasons given extempore and occasionally in our oral reasons and here we referred only to pregnancy. Where we have done so it is shorthand for the full consideration that we engaged in. In each respect we were alive to the fact that the Claimant's case was not only that she was treated badly because of her pregnancy but also her argument that it was her forthcoming maternity leave which caused her to be treated in that way.

132 At the conclusion of our oral reasons we expressed our sympathy to the Claimant at the way she was treated. We pointed out that, had she had sufficient continuity of service to bring a claim of ordinary unfair dismissal, the outcome would almost certainly have been different. We expressed a hope that the Respondent would learn from the criticisms we have made of its conduct. Warning and consulting with employees at the early stages of a redundancy process is an important procedural step. Keeping employees in the dark for commercial reasons is unkind and unfair.

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Employment Judge Crosfill
Date: 24 January 2020