EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Taylor-Hamieh	**V**	**The Ritz Hotel Casino Limited**

Heard at: London Central

On: 24, 25, 26 February 2020 and 27 and 28 February 2020 (in chambers)

Before: Employment Judge Joffe
Ms L Jones
Mr T Robinson

Representation

For the Claimant: Mrs R Taylor, lay representative

For the Respondent: Ms S Cowen, counsel

RESERVED JUDGMENT

1. The respondent unfairly dismissed the claimant, contrary to sections 94 and 98(4) Employment Rights Act 1996.

2. The respondent treated the claimant less favourably that it treated her male comparator in rejecting the claimant for the position of Business Development Manager Middle East and consequently dismissing her on 4 March 2019 and that treatment was because of the claimant's sex, contrary to sections 13 and 39 Equality Act 2020.

3. The respondent treated the claimant unfavourably because of her pregnancy and proposed maternity leave in rejecting the claimant for the position of Business Development Manager Middle East and consequently dismissing her on 4 March 2019, contrary to section 18 Equality Act 2010.

4. The respondent victimised the claimant by sending her a letter dated 7 March 2019 alleging breach of confidentiality, contrary to sections 27 and 108 Equality Act 2010.

5. The claimant's claim of post-employment harassment related to sex is not upheld.

6. Had there been no unlawful discrimination and no unfair dismissal, there is a 50% chance that the claimant would have been appointed to the role of Business Development Manager Middle East and accordingly would not have been dismissed.

7. The hearing for remedy will take place on **29 and 31 July 2020**. The parties are advised to see whether the matter of remedy can be agreed in part or in whole. If not, the following directions are given:

7.1 By 4 pm on **15 May 2020**, the respondent will send to the claimant any supplemental statement of Mr Herbert on which it wishes to rely dealing with the issue described in our Reasons as 'Polkey 2';

7.2 By 4 pm on **12 June 2020**, the claimant will send to the respondent any supplemental statement on which she intends to rely in response to Mr Herbert's statement;

7.2 By 4 pm on **17 June 2020**, the claimant will send the respondent an updated schedule of loss and any supporting documents.

REASONS

Claims and issues

1. The issues were agreed at a case management hearing on 25 September 2019 and are as follows:

ERA 1996 section 99: Pregnancy or maternity dismissal

i) Was the reason or principal reason for the claimant's dismissal pregnancy? If so the dismissal is automatically unfair.

ERA 1996 section 98: Unfair dismissal

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

iii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, in all the circumstances including the size and administrative resources of the respondent, and in accordance with equity and the substantial merits of the case, did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant? In considering that question, the tribunal shall consider, amongst other things, the consultation process, the selection process and the redeployment process.

EQA, section 13: direct discrimination because of sex

iv) It is not in dispute that the respondent:

a) Rejected the claimant for the position of Business Development Manager Middle East on or before 4 March 2019
b) Dismissed her on 4 March 2019
c) Allowed her colleague Tarik Sheriff a 4 week trial period in that role.
d) Subsequently appointed Tarik Sheriff to that role

v) Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the comparator Tarik Sheriff.

vi) If so, was this because of the claimant's sex?

EQA section 18: pregnancy and maternity discrimination

vii) It is not in dispute that the respondent:

a) Rejected the claimant for the position of Business Development Manager Middle East on or before 4 March 2019
b) Dismissed her on 4 March 2019
c) Allowed her colleague Tarik Sheriff a 4 week trial period in that role.
d) Subsequently appointed Tarik Sheriff to that role

viii) Did that amount to unfavourable treatment?

ix) Was any such unfavourable treatment because of pregnancy or proposed maternity leave.

EQA, sections 26 and 108: post employment harassment related to sex

x) Did the respondent engage in unwanted conduct, namely the sending of the letter to the claimant of 7 March 2019 alleging breach of confidentiality?
yes

xi) Did that conduct arise out of and was it closely connected with their former employment relationship?
yes

xii) If so was that conduct unwanted?
yes

xiii) If so, did it relate to the protected characteristic of sex?

xiv) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Equality Act, sections 27 and 108: post employment victimisation

xv) Did the claimant do a protected act, namely, an allegation at a meeting on 8 February 2019 that her proposed redundancy was because of her pregnancy and/or her sex.

xvi) Did the respondent subject the claimant to the following detriment as a result of the above protected act, namely, the sending of the letter to the claimant of 7 March 2019 alleging breach of confidentiality?

xvii) Did the detriment arise out of or was it closely connected with their former employment relationship?

xviii) If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act? Whilst no comparator is needed for a victimisation claim, the claimant will contrast her treatment with the treatment of Keeley Heenan, Julie Pullen and Kirsty Boumoza.

NB: we observe that there is some repetition in the formulation of this cause of action.

Remedy

xix) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy. In particular, if the claimant is to be awarded compensation, how much should be awarded. Specific remedy issues that arise include:

a) if the dismissal was procedurally unfair, or an act of discrimination, what adjustment, if any, should be made to any

compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed. And/or that the claimant would have been dismissed at a later stage due to the allegations of breach of confidentiality? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; and W Devis & Sons Ltd v Atkins [1977] 3 All ER 40.

b) In relation to any acts of discrimination found to be proven, what compensation would it be just and equitable to award the claimant, bearing in mind the issues set out above.

Findings of fact

The hearing

2. We heard from the claimant and her husband, Mr Abbas Hamieh. We also had two brief witness statements from witnesses who did not appear, Mr Gary Ferrari and Ms Selina Lin, which did not relate to matters relevant to liability. The respondent called Mr Cameron Marvin, director of customer relations, and Mr David Herbert, director of non-gaming operations. We were provided with an agreed bundle of some 779 pages and a small number of additional documents during the course of the hearing. We were not asked to read documents in the second of two ring binders, which were relevant to remedy only.

3. It was agreed with the parties that, if we found that the claimant had been unfairly dismissed and/or that her dismissal had been discriminatory, we would make findings as to the prospects of her being dismissed had there been a fair and/or non-discriminatory dismissal (an issue we called 'Polkey 1'). Consideration of whether the claimant might have been dismissed in any event because of allegations arising from material discovered by the respondent in response to the claimant's DSAR in conjunction with other allegations of breach of confidentiality (an issue we called 'Polkey 2') would be considered at any remedies hearing. This was because the latter would involve considering a significant body of documentary material which was otherwise irrelevant to the issues which we had to decide.

4. During the course of the hearing, an issue arose as to whether we should hear evidence about the departure from the respondent's employment of its former chief executive officer, Mr Roger Marris. Counsel for the respondent made an application under rule 50 of the Tribunal Rules for a privacy order. We refused that application. Our reasons for so deciding are set out in a separate case management order.

Background

5. The respondent is a casino. It provides its services only to club members. It has 190 employees.

6. The claimant was employed by the respondent from 4 May 2016 as a customer relations host. She worked in the customer relations department. The claimant had previously worked for two years in a customer relations role for Cratos casino in Northern Cyprus.

7. The role of customer relations host is to meet and greet and connect with customers, ensure they have a good time at the club and encourage them to stay and gamble; it is also to reactivate lapsed members where possible.

8. At times customer relations hosts were encouraged to walk around the area around the respondent's casino looking for members, including outside other casinos. Some of the respondent's members were members of a number of casinos and one casino might telephone another casino in the case of a member who was seeking to extend his or her credit, effectively for a credit reference.

9. The claimant worked shifts of 2 – 10 pm or 6 pm – 2 am on a rota.

10. We were told and accepted that the gaming industry is highly regulated although we were not told of any particular regulatory requirements relevant to the matters we had to decide.

11. The relevant terms of the claimant's contract of employment included:

    - Requirements in relation to confidential information: by clause 16, the claimant was required not to disclose confidential information or trade secrets as defined, which included 'personal information or affairs of its members'. The restriction is said to apply 'after the termination of your employment without limit in point of time.'

    - Requirements in relation to personal relationships; by clause 17, 'employees are not permitted to meet any client or supplier socially outside Company premises without prior permission of the Casino Director' .

    - At clause 12, an entitlement for the respondent to pay the claimant in lieu of giving notice on termination.

12. Despite the terms of clause 17, the accepted practice in respect of social events was for a customer relations host to inform the duty manager when he or she left the club, as Mr Herbert accepted. Attendance at social events with club members was part of the work of a customer relations host. Hospitality or gifts given to a member or received from a member had to be reported where the value of the gift or hospitality exceeded £100.

13. The management structure at relevant times was that Roger Marris was the chief executive officer. We heard evidence that at some point after the claimant's dismissal he was suspended and that he has recently left the respondent's employment by way of an agreed termination. Cameron Marvin, director of customer relations, reported directly to Mr Marris, as did Julia Fowler, head of human resources and David Herbert, head of non-gaming operations. Mr Herbert and Mr Marris were also on the board of directors.

14. Mr Marris was described by the claimant as someone who had a hand in everything, down to the 'movement of a salt cellar'. Mr Marvin agreed that Mr Marris liked to micro-manage.

15. Although Ms Fowler attended the hearing, no witness statement was produced for her and we heard no evidence from her. There were gaps in the evidence we heard which she could have helped fill and it was unclear to us why the respondent had not called her.

Relevant events

16. The claimant was interviewed by Mr Marris and Mr Marvin. Mr Marris said to the claimant in her initial interview on 17 February 2016 that he felt it would not be appropriate for a female employee to travel on business to the Middle East on her own. It appears that there were two possible jobs available, one of which might have involved such travel, and that the claimant was appointed to the other, which as we understood it was a customer relations host role which the claimant commenced from 4 May 2016 with a view to moving to the online department when that was running. The online department was a members only online casino facility. Mr Dymock was the online director. The claimant's initial contract was for a fixed term of six months.

17. Mr Marvin was present when the remark was made and recalled Mr Marris having said 'something along those lines'; he accepted that the remark was made at the claimant's interview rather than 'at a meal' as described in the respondent's Grounds of Resistance.

18. From 3 November 2016 the claimant was employed on a permanent contract as a customer relations host; at this point she was working for the online department reporting to Andy Dymock. Part of her role involved telephoning club members and seeking to introduce them to the online casino. She also continued to work in the club pitching the online casino product.

19. The claimant was provided with a company mobile phone and she also had company email installed on her personal mobile by the respondent.

20. The claimant said that Mr Marris had a bullying management style particularly towards female staff. She believed he did not like her in particular; he would ignore her when she held out a hand in greeting. She also said that everyone was frightened of him and found him difficult. She said he was very unpleasant and a 'vile man'. Although Mr Herbert told us that during the investigation of the claimant's grievance, Mr Marris had said he held the claimant in high regard, the claimant told us that she was told by several duty managers that that was not the case and Mr Marris had it in for her.

21. The claimant told us that Mr Marris had told Mr Dymock that she was nothing more than a china doll, which she understood to mean that she was only good to look at. We accept that was what Mr Dymock told the claimant.

22. In 2017 there was a redundancy process involving what was a pool of five customer relations host posts, including the claimant's role in online gaming. As a result of that process the posts were reduced from five to two. On 1 January 2018, the claimant transferred back to the club from the online gaming business.

23. During the restructure, a post Business Development Manager ('BDM') Far East was created and the claimant applied for that role. Applicants underwent an interview. Her colleague Selina Lin was appointed. The BDM Far East role had many of the same features as the customer host role but it also involved some travel to the Far East to solicit new members. The claimant said that there were no targets set for Ms Lin in terms of acquisition of new members but that Ms Lin went on some business trips to acquire new business.

24. The selection process amongst the customer relations hosts on that occasion involved considering a variety of criteria based on past performance and scoring each employee based on a scoring matrix. The claimant was told that she received the highest score amongst her colleagues.

25. There was one post of customer relations consultant which was not part of the late 2017 redundancy exercise in the customer relations department. This was held by Zaki El Borhami. We were told that Mr El Borhami is a man of Egyptian origin now aged over seventy who has been involved in the casino business for some forty years. He was employed on a director level salary of over £100,000 because of his network of high net worth Middle Eastern contacts. His role is to attract new high end customers and encourage existing members to visit the club. Mr Marvin told us there was 'technically not much' difference between Mr El Borhami's role and that of the customer relations hosts; he was employed for his experience and whom he knew.

26. Between October and mid December 2018, the respondent went through a budgeting process which led to a decision to delete the two remaining customer relations host roles. This was against a background of a decline in business and a perceived need to increase levels of trade. There were two customer relations hosts in post at that point, the claimant and Tarik Sheriff. Mr Sheriff was appointed to that role in 2016 after having previously worked as a driver for the respondent.

27. We saw documents which we accepted showed that by 21 December 2018 a decision had been made to propose the deletion of both customer relations host roles. The customer relations consultant role remained. The budget then went to the board for approval. We were told that the budget was approved by the board in January 2019.

28. We did not hear from any witness who was actively involved in the proposals to delete the customer relations host roles. Mr Marvin who had been based in Hong Kong since some point in 2017 (to encourage business from the Far East), returned from Hong Kong in January 2019, by which time this decision had been made.

29. It was unclear exactly when and by whom a decision was made to introduce a BDM role for the Middle East and neither of the respondent's witnesses were

able to assist us on that issue. As we have commented, we did not hear from Ms Fowler, who had been more closely involved in the process.

30. On 31 December 2018, the claimant informed Ms Fowler by email that she was pregnant. Her due date was August 2019.

31. Also on 31 December 2018, during the respondent's New Year's Eve party, the claimant said that she overheard Mr Marris saying in respect of herself words to the effect of 'oh my god, look at her arse, do you think she's done something to it, it looks like Kim Kardashian's.' We heard no evidence from Mr Marris, but the respondent submitted that we should not find that the remark had been made as the claimant had made no contemporaneous complaint about it nor had she raised it as part of her grievance. The claimant said that she discussed the remark with Ms Noble, a duty manager, on several occasions and that they both found the comment 'offensive, belittling and misogynistic'. She did not raise a formal grievance. Ms Noble did not advise the claimant to do so. The claimant told us it would have been completely fruitless to make a complaint and the likelihood is that she would have lost her job in due course had she done so, because of the dominance of Mr Marris.

32. We accepted the claimant's evidence that the remark had been made; her account of why she had not made a contemporaneous complaint was credible and we did not think that the failure to refer to the remark in her claim form made her account less credible. She made no substantive complaint about the remark; it was background evidence.

33. On 18 January 2019, Ms Fowler wrote to the claimant to inform her of her maternity entitlements. On 29 January 2019 the respondent carried out a pregnancy risk assessment.

34. On 2 February 2019, the claimant was contacted by a club member, 'Mr C'. She organised a table for him to have drinks with others at a restaurant and bar called the Novikov. She agreed to join him for a drink. We saw text messages between the claimant and Mr C which established the date and the nature of the arrangement. We understood that activities of this kind would be regarded as part of her customer relations work for the respondent. She told Michelle Leese, the duty manager, that she was going for drinks with Mr C. That was the accepted practice. Her husband, Mr Abbas Hamieh, who worked at the time in customer relations for a casino called the Barracuda, was present for some part of this event. The claimant and Mr Hamieh told us that he was collecting the claimant to take her home. The claimant said that both she and her husband had known Mr C since working together at a casino he attended in North Cyprus, Cratos. The claimant and her husband said that when Mr Hamieh arrived to collect the claimant, Mr C had then invited Mr Hamieh to join the party for a drink and he had done so to be polite.

35. The respondent invited us to reject that evidence (as to how Mr Hamieh came to be part of the social occasion), which it said had not been proffered by the claimant during her grievance or in her witness statement. Ultimately this was not a matter which went directly to any issue we had to decide, but insofar as

the respondent's challenge is made to the claimant's credibility more generally, we return to this issue below.

36. We heard some evidence about whether it was acceptable to socialise with club members and other casinos' customer relations representatives. Mr Hamieh told us that at social occasions, a club member / player might be surrounded by twenty casino representatives. Many club members would also be members of other casinos and would go from one to another. Mr Marvin said that he had known of social occasions were there were two to three representatives from several casinos but not 'twenty'. We accepted that there were occasions when representatives of more than one casino would be socialising with club members; this seemed to us to be almost inevitable given the role which the representatives were performing.

37. At some point after 2 February, Mr Marvin could not recall precisely when, although in evidence he (in error) suggested that it might have been January, Mr Sheriff told Mr Marvin that the claimant 'was meeting' Mr C in Novikov restaurant and that he believed her husband was also attending. Mr Marvin told us that he reported the matter to Ms Fowler and assumed it would be investigated; he said would normally have dealt with it himself but he had only recently returned from Hong Kong. He did not receive any feedback nor does he seem to have sought any. No one raised the issue with the claimant or conducted any form of investigation with her prior to her dismissal. When asked why he had not raised the issue with the claimant, Mr Marvin said that it was because it was being dealt with by Mr Marris; it was his understanding that Ms Fowler would have referred the issue to Mr Marris.

38. On 4 February 2019, the claimant had a meeting with Mr Marvin at which she was informed that she was at risk of redundancy. She was given a letter which explained that due to a decline in business levels, the respondent was proposing to remove the role of customer relations host. A consultation period was commencing

39. Mr Sheriff had a similar meeting and was provided with a similar letter.

40. The claimant and Mr Sheriff were informed about the new role of BDM Middle East. There were strong similarities to the customer host role – a significant difference was that the BDM was required to travel to Middle East and seek to sign up new players and meet with existing members and develop market strategy in the Middle East.

41. On 8 February 2019, there was a first individual consultation meeting between the claimant and Mr Marvin. The claimant referred to the comment made in 2016 by Mr Marris about women travelling in the Middle East in this way: '..in the first meeting I had the BDM role was being recruited for, it was about three years ago and before Nick Ostler joined the business, RM said to me that he did not think that I would be a suitable candidate for the role as a woman would not be able to travel to the Middle East on her own.'

42. The claimant is recorded as describing this as a 'slight concern' but the rest of the meeting note makes it clear that it was a relatively significant concern the claimant was seeking to present tactfully. She said she did not feel confident

in this process and that Mr Marris had been quite vocal about a woman not being able to travel to the Middle East on her own. Mr Marvin's recorded response to the claimant raising this concern is: 'That his view [sic]'.

43. The claimant wanted reassurance that she would be treated fairly given that Mr Marris 'has the casting decision'. The notes do not record Mr Marvin having challenged that view; he is recorded as saying: 'You will be treated fairly'. The claimant then queried whether the timing of the redundancy was connected with her pregnancy and Ms Fowler is recorded as saying that the decision 'is around business rationale' and nothing to do with the claimant being pregnant.

44. During the meeting, the claimant is recorded as saying that 'this is a wonderful company run by a wonderful CEO'. She told us that she made eye contact with Mr Marvin who grinned when she made this statement. It was suggested to her in cross examination that she was being untruthful. We accepted that she was trying to say flattering things in circumstances where she believed Mr Marris would play a significant role in the redundancy selection process and was anxious to retain her job; she was pregnant and could not afford to be out of work. Mr Marvin told us that he thought the remark was a bit out of context and insincere but did not take much notice of it.

45. The claimant's willingness to make this remark was relied upon by the respondent as casting doubt on her credibility. It is therefore relevant to say that we found the claimant to be a very straightforward witness who appeared to us to be taking care about the truthfulness of what she was saying. When it was suggested to her in cross examination that she had received feedback from Mr Marvin at the final consultation meeting (a matter we return to below), she was at pains to say that she had no recollection of that and that it was at odds with complaints she had made nearer the time but she could not say with certainty that it had not happened if Mr Marvin was positively asserting that it had. When she was presented with documentary evidence about the decision to propose redundancies having occurred prior to her announcement of her pregnancy, she readily accepted that that was what the documents showed. In that context, her willingness to express flattering opinions whilst trying to retain her job did not seem to us to reflect on her truthfulness as to matters of fact or suggest a tendency to distort evidence in support of her claims.

46. Both the claimant and Mr Sheriff applied for the role of BDM Middle East.

47. At some point during this period, Mr Sheriff reported to Mr Marvin that a VIP customer had informed him that he had been contacted by someone called Abbas at the Barracuda casino. The customer said that the respondent was the only gaming club which had his number. Mr Marvin told us that he informed Ms Fowler of this matter. He believed that Mr Marris was dealing with the matter thereafter. The matter was not raised with the claimant prior to her dismissal.

48. When Mr Herbert was asked what would usually happen in circumstances of this sort, he said that there would be an investigation and the person might be

suspended if there was an ongoing threat in respect of behaviour or security of information.

49. On 25 February 2019, the claimant and Mr Sheriff were interviewed by Mr Marvin and Ms Fowler for the post of BDM Middle East.

50. Both candidates were asked questions from a script. Ms Fowler made handwritten notes. These notes were not provided to the claimant or Mr Sheriff at the time and were subsequently typed up the purposes of these proceedings. It follows that the claimant did not see the notes until some months after the interview,

51. Score cards were drawn up and the claimant and Mr Sheriff were scored in relation to various criteria. They were awarded exactly the same score.

52. Both candidates were asked how they would identify potential new players. The claimant is recorded as saying that she had high profile relatives with access to lots of high profile people and that her sister in law was a television presenter. The candidates were also asked what activities they would undertake to develop new business, particularly in Middle Eastern markets. The claimant said that she would travel, [seek new business] through existing players and through business to business contact with other casinos.

53. Mr Sheriff is recorded as saying in answer to the first question: 'Going out more with customers, trips, going round to houses, phone calls, fish for new customers' and in answer to the second question: 'inviting people, offering something to our customers. Have a better brand than our competitors'.

54. In his witness statement, Mr Marvin said that the claimant gave unconvincing answers about how she would develop new business. He said that Mr Sheriff's answers were more convincing but he did not demonstrate the passion or initiative that the respondent was looking for.

55. We did not hear evidence as to why Mr Sheriff's answers to these questions were 'more convincing'. The comments on Mr Sheriff's score sheet in relation to the strategy 'understanding of how role will change' were: 'No depth to answer or demonstration that they will need to go out and proactively chase new business' and in relation to 'understanding of business strategy' and 'Answer focused on lapsed and existing customers as opposed to development of new customers'. The claimant's comments on the same categories were 'No depth to answer or demonstration that they will need be potentially chasing business' and 'reinvestment of ME business, focussing on a steadier stream'.

56. Although we were told that the claimant's answers were insufficient, we were not told by Mr Marvin what a good answer would have looked like or why Mr Sheriff's answers were better. We were not told what the candidates should ideally have said about developing business in the Middle East. The claimant and Mr Sheriff received both the same score overall and the same score in relation to all individual criteria, including 'business development of new customers' and 'understanding of business strategy'. There is no file note or

other record of why Mr Marvin and Ms Fowler decided to reject both candidates on this occasion.

57. On 27 February 2019, the claimant and Mr Sheriff were informed by letter that not they had not been successful in their interviews.

58. On 28 February 2019, both the claimant and Mr Sheriff were invited to a final one-to one meeting with Mr Marvin and Ms Fowler at which they were invited to raise any further matters before the respondent made a final decision about their redundancies. Mr Sheriff's meeting was scheduled for 4 pm and the claimant's meeting for 5 pm. There was no suggestion in the letter that the BDM role would be revisited at the meeting. The letter suggested the opposite:

'Regrettably, although we have been discussing and investigating alternative work for you within the business, to date it has not been possible to secure any and we have been in unable to identify any alternative to your redundancy.'

59. In an email dated 1 March 2019, the claimant asked for notes from the initial consultation meeting to be provided prior to her final meeting.

60. After receipt of those notes, the claimant said to Ms Fowler in a further email dated 1 March 2019 that she would be raising at the final meeting her belief that the new BDM role was a suitable alternative role. She said that even if the respondent did not think it was a suitable alternative role, she could be trained into the role in less than a month and that she would therefore require 'appropriate and strong reasoning' as why she was not matched or given a trial period, particularly given the fact that she was pregnant.

4 March 2019

61. We were told that on the day of the final consultation meetings and before Mr Sheriff's meeting, Mr Marvin and Ms Fowler made a decision between them that in fact they would give the claimant and Mr Sheriff another chance to prove themselves for the BDM role. Mr Marvin said that they wanted to keep one of the two employees because it would be easier for them to transition to the new role than an external candidate. Neither the claimant nor Mr Sheriff was given any indication that this would be happening and so neither had any opportunity to prepare for the further interview. No script of questions was prepared and there was no scoring matrix or record of how answers given were measured against any criteria for the role.

62. Mr Sheriff had his meeting first and was then asked to await an outcome. In the course of his meeting he was given the opportunity to answer more questions about the BDM role in order to be considered further for appointment to the role.

63. Mr Marvin said that he provided some feedback to the claimant on her first interview at the outset of her meeting. In his witness statement he said that he explained why she had been unsuccessful and in particular that she had made reference to her family being well connected and that she would look to develop new business from those leads. In oral evidence he said that he told her that her answers were not strong enough and that she did not answer to the required level. None of this was noted by Ms Fowler; the claimant was clear that she had no recollection of it.

64. The notes of the final consultation meeting record Mr Marvin as saying: 'This is the final consultation meeting and for you to provide any further comments that you would like to make about the proposed redundancy, we would also like to provide you with a further opportunity to demonstrate why you would be suitable for the BDM role.' The notes as drafted Mr Marvin moved straight from the introduction to the 'interview' which followed with no intervening feedback. We found on the basis of the notes, the claimant's recollection and Mr Marvin's inconsistent evidence that there was no feedback.

65. Mr Sheriff's interview commenced by him being given some feedback: 'You have received our decision regarding the BDM role, during the interview process you did not come across as enthusiastic you are [sic] or how you would go about and bring in new business.'

66. Although Mr Marvin said in oral evidence that the claimant and Mr Sheriff were asked the same questions as previously or 'virtually the same questions', in fact that was not the case. There was significant overlap between the questions asked of each candidate. The claimant was asked how she would develop business, what training she would need, what similarities there were with her existing role and how she would get business in. Mr Sheriff was asked how he would bring in new business, a question about reporting, how much business he thought he would be expected to bring in in the first year and whether he had any training needs.

67. There was then an adjournment of the meeting and when it was reconvened Mr Marvin told the claimant that she was being made redundant. Mr Sheriff had been asked to wait whilst the claimant had her meeting and after the claimant's reconvened meeting, he was told that he was being offered a four week probation period in the BDM role. He was subsequently appointed permanently to that role and remains in position.

68. Explaining that decision, in his witness statement, Mr Marvin said that Mr Sheriff demonstrated a deeper understanding of what he would do in order to target/generate new business for the club. Mr Sheriff's recorded answer in the 4 March 2019 meeting as to how he would generate new business was that he would 'travel, going to night clubs and looking at other things to do'.

69. Both the claimant and Mr Sheriff had originally scored 2 on this criterion 'demonstrates average knowledge and confidence in this area'. It was not obvious how Mr Sheriff's answer in the second interview added anything to his answer in the first interview.

70. Mr Marvin said in oral evidence that he and Ms Fowler decided to appoint Mr Sheriff because he showed enthusiasm. He said that Mr Sheriff put a figure on how much business he thought he would be expected to bring in although his figure was half what Mr Marvin was envisaging. The claimant was not asked this question or any similar question.

71. As to how he demonstrated the enthusiasm, Mr Marvin said that he was more animated in saying he would be good in the role and more hungry for the position.

72. Mr Marvin also said he was influenced by the fact that Mr Sheriff said he would not need training whereas when the claimant was asked what training she thought she would need, she indicated that she would need to be given instruction.

73. In his witness statement Mr Marvin had also said, of Mr Sheriff's appointment: 'I should point out that Mr Sheriff had previous experience / responsibility for developing the Middle East market'. In evidence this turned out to be a reference to the trip which Mr Marvin and Mr Sheriff had taken to the Middle East shortly after Mr Sheriff's appointment. Mr Marvin was unable to say what responsibility for the Middle East market had taken apart from organising the single trip and arranging meetings. It appeared to us that Mr Marvin had overstated Mr Sheriff's experience. It was unclear why he did so, given that the Tribunal was told that the decision was made on performance in interview and not on assessment of past performance.

74. Mr Marvin's evidence was that he made the decision as to whom to appoint to the BDM role without input from Mr Marris and that he disregarded Mr Marris' comment about women travelling to the Middle East and did not agree with it. He said that Mr Marris had instigated the redundancies, but did not have a say in the decision as to who was appointed to the BDM Middle East post. He said that he did not think about what view Mr Marris would take if he appointed the claimant. He said that he had on a previous occasion appointed a member of staff after Mr Marris had intimated that his view was that he should not do so.

75. In relation to the claimant's pregnancy and forthcoming maternity leave, Mr Marvin said that he put that out of his mind when considering who would be suitable for the new position. He did not give any thought as to how the practicalities would be accommodated, such as lack of availability whilst on maternity leave and a likely inability to undertake air travel later in the claimant's pregnancy.

76. On 5 March 2019, the claimant emailed Ms Fowler asking for the notes from her final consultation meeting and asking for specific points she said that she had raised to be recorded including issues about why the BDM role was suitable alternative employment. She said that she had asked why she or Mr Sheriff had not been offered a month trial month period during which appropriate training could be provided. She said that she read from BDM job profile and pointed out that of the seven key responsibilities, five were her current key responsibilities.

77. On 7 March 2019 the claimant was sent a letter confirming her dismissal as of 4 March 2019. Her previous statement of benefits had indicated that she would be paid four weeks pay in lieu of notice and the letter also indicated that she would be paid in lieu. The letter also contained this statement: 'I would like to take this opportunity to remind you that you remain bound by the confidentiality obligations in your contract of employment as set out in clause 16.'

78. On the same day, Mr Marris sent the claimant a letter saying:

'Since the decision to terminate your employment by reason for redundancy on 4th March 2019 it has come to our attention that two of our major players have been approached by the Barracuda.'

79. He went on to say that the respondent had been informed 'from reliable sources':

- That the claimant went to the Novikov with one of the two players, who was introduced to the claimant's husband. Subsequently that player had advised the respondent that he had been approached by the Barracuda and invited to visit. He said that the claimant should have sought approval from Mr Marvin or himself to meet with the member outside the casino. He said the invitation to the claimant's husband would not have been approved given Mr Hamieh's role with the Barracuda.
- The other player, who was a private person, was contacted by phone by 'an individual representing The Barracuda' inviting him to visit. The respondent 'reasonably believed' that this player's telephone number had been obtained from the respondent's systems and provided to a representative of the Barracuda.

80. The letter then reminded the claimant of her obligations in relation to confidentiality and personal relationships and set out a number of clauses from her contract of employment concerning confidentiality, personal relationships, communication policy and data protection.

81. The claimant was told she was required to give undertakings that she would be bound by the undertakings in her contract and that she would not act in breach of those obligations; those undertakings were requested by 9 March 2019. 'in the meantime, all of our rights are reserved.'

82. The letter contained this statement: 'Please be advised that we are conducting further investigations into the matters that have been brought to our attention.'

83. The claimant did not give the undertakings requested and told the Tribunal that she had taken legal advice to the effect that she should not do so.

84. The time line behind this letter was not entirely clear. Mr Marvin was not involved in sending it. Mr Herbert was aware at the time that it was being sent because Mr Marris had mentioned it to him.

85. On 1 April 2019 the claimant sent Ms Fowler a formal letter of grievance and appeal against her dismissal. She alleged that she had been discriminated against in the redundancy process because of sex and pregnancy and said that she had been victimised, harassed, bullied and intimidated since her employment was terminated. The latter complaint related to Mr Marris' letter of 7 March 2019.

86. The claimant addressed the incidents related in Mr Marris' letter. As to the Novikov incident, she said that Mr C had known her husband since 2014. She said that Mr C had been a VIP client of both herself and her husband at the Cratos. 'We were meeting in Novikov for a social evening and I in no way "introduced" him to my husband.'

87. It was suggested to claimant that this sentence in particular was inconsistent with the account given to Tribunal that her husband had been invited in when he was picking her up from work and that the fact that that latter account is not given in the grievance letter indicates that it is a subsequent invention by the claimant and her husband. We did not form that conclusion; the sentence itself is ambiguous in that 'we' could as easily be the claimant and Mr C as it could the claimant, Mr C and Mr Hamieh. In the grievance document, the claimant was addressing an allegation of introducing her husband to Mr C not an allegation that the two had simply been present at the same social event. In those circumstances, it did not seem to us that a failure to refer to the mechanics of how Mr Hamieh came to have the drink with Mr C supported the view that the claimant had subsequently invented those details.

88. The claimant asked why the allegation relating to the member who had been telephoned was only levelled at her. She pointed out that there were other staff members with spouses or partners who worked at the Barracuda. A duty manager at Barracuda had been a duty manager at the Ritz less than six months previously and would have had access to the respondent's database.

89. The claimant concluded by saying that the stress of receiving Mr Marris' 'threatening and intimidating' letter had exacerbated the stress she was feeling as a result of being dismissed whilst pregnant.

90. On 4 April 2019, Ms Fowler wrote to the claimant and told her that her combined appeal and grievance would be heard by Joanne Jones, director of finance operations, on 15 April 2019.

91. On 8 April 2019, the claimant emailed Ms Fowler to say that she would not be attending the grievance hearing in person because she did not wish to put herself under additional stress but that she was happy to answer questions by email.

92. Ms Fowler responded on 9 April 2019 asking the claimant to forward any further details in writing or documents she had.

93. On 10 April 2019, the claimant emailed Ms Fowler setting out additional information for her appeal/grievance hearing. She queried how Ms Jones could make an impartial decision about a grievance concerning Mr Marris, who was her 'superior' and asked that someone else be appointed to hear her

grievance, such as the chairman, Andrew Love, or even the chief finance officer, Sue Kennedy. The claimant said that she was worried about the impact the stress of Mr Marris' letter in particular had had on her health and that of her unborn baby, and said that she had decided, for that reason, not to attend the hearing in person. She indicated that she was happy to answer any further questions.

94. Ms Fowler wrote to the claimant on 12 April 2019 saying that Mr Herbert would hear the claimant's appeal / grievance. He was on the board of directors and in a more senior position to Mr Marvin.

95. On 15 April 2019, the appeal / grievance hearing was held by Mr Herbert in the Claimant's absence. We were provided on the last day of the hearing with notes of that hearing taken by an HR adviser. The note records further actions or investigations which Mr Herbert was proposing to carry out. These involved speaking with Mr Marris, Mr Marvin and Ms Fowler.

96. Although at the time of the hearing, those further investigations had not been made, there appear to be some conclusion already being expressed in the minutes. For example, in respect of the 7 March 2019 letter, the notes record 'the letter is not as Ruth suggests. It is a factual letter written by a concerned CEO that learned that members were potentially poached by the Barracuda where Ruth's husband works in the capacity of customer relations.'

97. Mr Herbert told us that he carried out further investigations by speaking to Mr Marvin and Mr Marris as well as Ms Fowler. He took handwritten notes which were subsequently shredded. The claimant's EC certificate is dated 1 May 2019. It seemed to us to be poor practice not to have retained the notes, which were likely to be relevant to the dispute the claimant had already intimated to ACAS.

98. On 3 May 2019, Mr Herbert sent the claimant an outcome letter. He did not uphold any part of the claimant's grievance or her appeal against dismissal.

99. In relation to the concern raised by the claimant about her selection for redundancy having been influenced by Mr Marris, given his remark about women travelling in the Middle East, Mr Herbert said:

'Whilst Mr Roger Marris, CEO, does recall mentioning in a conversation a couple of years ago that, in his opinion, Middle Eastern men may not be comfortable meeting women travelling alone on casino business to their region, he cannot recall the context within which he made the comment. However, I am of the opinion that Mr Marris held you in high regard and satisfied that his comment was merely an observation of the reality of conducting business in that region and the cultural sensitivities at play and in no was this an indication of your ability to undertake such a role. Nor do I find that his comment suggest that he considers women to be unsuitable candidates for a job which requires travel to the Middle East, as he recalls that it has been the case in our business and others within our industry that women travelling on business to the Middle East are normally accompanied by a male colleague.'

100. We note that the evidence which Mr Herbert had that Mr Marris held the claimant in high regard was that Mr Marris had said so during the investigation.

101. Mr Herbert went on to conclude that Mr Marris had not been involved in the appointment process for the BDM role.

102. Mr Herbert accepted the evidence of Mr Marvin and Ms Fowler that Mr Sheriff had been better able to demonstrate his suitability for the BDM position in his meeting on 4 March 2019. He had seen the handwritten notes of the meetings but essentially relied on what he was told by Mr Marvin and Ms Fowler.

103. In relation to Mr Marris' letter of 7 March 2019, Mr Herbert concluded that the letter simply reminded the claimant of her obligations under her contract and that there was no harassment, intimidation or victimisation and no link with sex or pregnancy. He repeated the assertion in the letter that investigations were ongoing although he had not asked and did not know what those investigations consisted of. He then went on to suggest that the document discovered as a result of the claimant's DSAR raised 'new concerns about [her] conduct.'

104. Mr Herbert told us that he understood from his discussions with Mr Marris that Mr Marris himself had been telephoned by the members referred to in the 7 March 2019 letter 'within hours or days of sending the letter. He felt that he needed to write the letter because he became aware of these incidents.' He said that Mr Marris was upset about being telephoned by the members about these matters.

105. Mr Herbert was asked about the fact that the claimant was paid in lieu of her notice period and said that was normal for the respondent's business where an employee was in a customer-facing role. We accepted his evidence on that point.

106. It is relevant to look at what travel to the Middle East was undertaken by members of the customer relations department. Over the period of the claimant's employment, there was no such travel by any female member of the customer relations department. We had no evidence of travel to the Middle East by any female employee of the respondent in that period.

107. Of the male employees in the customer relations department:

    a. Mr Sheriff went on a business trip to the Middle East with Mr Marvin shortly after he was appointed to the role of customer relations hos;.

    b. Mr Marvin himself travelled to the Middle East;

    c. Mr El Borhami travelled to the Middle East;

    d. An employee named Mr Ostler travelled to the Middle East.

108. Mr Marvin said that one woman – Lindsey Barrett, a general manager and director - had previously travelled to the Middle East. She had left the respondent's employment some five or six years previously.

109. On this subject, Mr Marvin told the Tribunal: 'We wouldn't like a woman travelling on her own to the Middle East but that's not to say it wouldn't happen'.

110. Mr Herbert's evidence was that he was aware no women had travelled to the Middle East and that the CEO (i.e. Mr Marris) would have had to sign off any travel.

Evidence as to performance in the role of customer relations host

111. We were provided with some evidence as to performance of Mr Sheriff and the claimant in the role of customer relations host. The claimant had introduced or 'reactivated' more players than Mr Sheriff in the period 2016 – 2019.

Submissions

112. Both parties provided us with written submissions and supplemented their written submissions with oral submissions. We have carefully taken into account all of the parties' submissions but refer to them below only insofar as is necessary to explain our conclusions.

Law

Automatically unfair dismissal

113. If the reason or principal reason for dismissal is one of a number of prescribed reasons, including the facts that the employee is pregnant or is seeking to take maternity leave, the dismissal will be automatically unfair under s 99 ERA 1996.

Unfair Dismissal

114. The test for unfair dismissal is set out in section 98 Employment Rights Act 1996.

Reason for Dismissal

115. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

Redundancy

116. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

117. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):

'*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

…….

have ceased or diminished.'

118. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not mean, however, that we are obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness

119. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

120. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable

employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

121. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

122. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

123. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer had genuinely applied his mind to the problem. (Capita Hartshead Ltd v Byard 2012 ICR 1256 (EAT)).

124. In selecting employees for redundancy, the selection criteria must be reasonable and not merely based on the personal opinion of the selector. Provided the selection criteria are objective and applied fairly a tribunal should not seek to interfere in the way the individuals are scored or engage in a detailed critique of the scoring (British Aerospace v Green [1995] ICR 1006, CA and Nicholls v Rockwell Automation Ltd EAT/0540/11).

125. In Pinewood Repro Limited v Page UKEAT/0028 the EAT held that fair consultation during redundancy also involves giving an employee an explanation for why they have been marked down in a scoring exercise. Although this was a case primarily concerned with the now repealed statutory dismissal procedures, in Alexander v Brigend Enterprises 2006 IRLR 422, the EAT held that for an employee to understand the basis of the selection made by the employer, the employer should tell the employee the selection criteria and the scores.

126. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including the appeal stage (Taylor v OCS Group Limited [2006] EWCA Civ 702).

127. When selecting amongst potentially redundant candidates for a new role, an employer is entitled to take a more subjective approach: Morgan v

Welsh Rugby Union [2011] IRLR 376 and Samsung Electronics (UK) Ltd v Monte-D'Cruz UKEAT/0039/11.

128. We bear in mind this guidance from HHJ Richardson in Morgan: 'A Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4).'

129. The employer will have to conduct the selection process in good faith and give proper consideration to the applications of the potentially redundant employees: Darlington Memorial Hospital NHS Trust v Edwards and anor EAT 678/95.

Polkey reduction

130. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

131. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view

that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

132. As Elias J said in Software 2000:

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Pregnancy discrimination

133. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends, if the employee 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; if she does not have that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

134. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an ‘effective cause': O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

135. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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. “

136. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts

would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

137. The tribunal can take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

138. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

139. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

140. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

141. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Sex discrimination

142. Direct discrimination under section 13 Equality Act 2010 occurs when a person treats another:
- Less favourably than that person treats a person who does not share that protected characteristic;
- Because of that protected characteristic.

143. The discussion of the law at paragraphs 135 - 142 above is applicable to direct sex discrimination.

144. For an individual to be an actual comparator for the purposes of a direct discrimination claim, there must be no material difference in their circumstances: s 23 Equality Act 2010. Whether the situations of a claimant and her comparator are materially different is a question of fact and degree: Hewage v Grampian Health Board [2012] ICR 1054, SC.

Harassment

145. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

146. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.

147. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

148. An 'environment' may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Victimisation

149. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

150. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

151. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

152. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

153. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

Post-employment discrimination

154. Under s 108 Equality Act 2010, a post-employment claim of discrimination has two elements. The claimant must show that:

- he or she has been subjected to prohibited conduct, i.e. discrimination of a prohibited type;
- despite the termination of the employment relationship, there was still a sufficiently close connection between the prohibited conduct and that relationship.

155. Victimisation is included in s 108 although not expressly referred to: Rowstock Ltd and anor v Jessemey [2014] ICR 550, CA.

Compensation for discrimination

156. In assessing compensation for a discriminatory dismissal, a tribunal should assess what would have happened absent the discrimination: Abbey National plc v Chagger [2010] ICR 397.

Conclusions

157. We reached our conclusions by applying the law we have set out to our findings of fact.

158. It seemed to us logical to consider the causes of action in this order:

- Direct discrimination because of sex;
- Discrimination because of pregnancy / maternity;
- Automatically unfair dismissal because of pregnancy;
- Ordinary unfair dismissal;
- Post-termination victimisation;
- Post-termination harassment.

Section 13: direct discrimination because of sex

Was the treatment of the claimant "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on the comparator Tarik Sheriff.

159. It is not is dispute that the respondent appointed Mr Sheriff to the role of Business Development Manager Middle East (for a four week trial period) and did not appoint the claimant to that role. As a result the claimant was dismissed; Mr Sheriff was appointed permanently to the role.

160. Clearly the claimant was treated less favourably than Mr Sheriff. Is Mr Sheriff an appropriate comparator? The respondent submitted that he was not an appropriate comparator because there was a material difference in his circumstances, which was said to be his superior performance in the 4 March 2019 meeting / interview.

161. We were not persuaded that a matter so inherently subjective as a view about interview performance was capable of amounting to a material circumstance of the sort which would render Mr Sheriff inappropriate to be a comparator. In any event, the respondent did not persuade us as a matter of fact that Mr Marvin had genuinely taken the view that Mr Sheriff's performance on 4 March 3019 was better than the claimant's, because he failed to provide to the Tribunal a consistent and coherent account of how he allegedly reached that view.

162. The quality of an otherwise similarly qualified candidate's performance at interview is generally properly scrutinised when determining whether that person has been preferred because of a protected characteristic, not at the stage of determining whether they are an appropriate comparator.

163. It seemed to us that there was no material difference between the claimant and Mr Sheriff in the context of the recruitment process for the BDM Middle East role. Both were existing customer relations hosts facing redundancy.

164. It is our conclusion, therefore, that the claimant was treated less favourably than Mr Sheriff, who was an appropriate comparator.

Was this treatment because of the claimant's sex?

165. We had no direct evidence that Mr Marvin's decision was tainted by sex discrimination. We also had some significant gaps in the evidence the respondent presented with us; we did not hear from Mr Marris or Ms Fowler. It seemed to us that this was a case appropriately approached by careful application of s 136.

Stage 1: are there facts sufficient to shift the burden of proof?

166. We considered that there were facts from which we could reasonably conclude that the respondent's treatment was materially caused by the claimant's sex. We describe those primary facts below.

167. The first important fact for us was Mr Marris' remark to the claimant about women travelling in the Middle East. This was made in the context of a job interview and the outcome of that job interview was that the claimant was not placed in a position which involved travel to the Middle East. The fact that Mr Marvin and Mr Marris (in the appeal / grievance investigation) remembered that Mr Marris had made the remark and the fact that Mr Marvin said 'that [is] his view' at the meeting on 8 February 2019 reinforced our impression that this was a known and settled view of Mr Marris', on which he would act, rather than a one-off or casual remark, representing a transitory view which might have altered over time.

168. Another relevant set of facts was the facts we found about which employees had in fact travelled to the Middle East during the claimant's tenure; a number of men had travelled and no women. Travel of this sort had to be approved by Mr Marris.

169. Mr Marris was a hands-on CEO who liked to micromanage. We accept that managers below him may have found it difficult to challenge his decisions or behaviour; there was no evidence that Mr Dymock challenged him when he described the claimant as a china doll and Ms Noble did not suggest that the claimant pursue a complaint about the highly offensive remark Mr Marris made about the claimant at the respondent's New Year's Eve party. It appeared to us that, although Mr Marvin had provided an example of when he had taken a different line from that Mr Marris wanted, this was not a course of action which would necessarily be easy for a manager below Mr Marris to pursue on a regular basis. It was significant in this context that Mr Marvin did not contradict the claimant at the consultation meeting on 8 February 2019 when she said that she knew Mr Marris had the 'casting decision' in relation to the BDM Middle East recruitment.

170. Against that background, we also looked at the facts surrounding the appointment process. We accept that, where there is a new role, a somewhat

more subjective approach to selection may be reasonable. The process we were presented with was, however, difficult to understand. It was difficult to see why, having had high level HR involvement throughout, the recruitment decision was ultimately made on the basis of the interviews on 4 March 2019, in respect of which there was no assessment against criteria or record of why Mr Sheriff was selected and the claimant was not. The candidates arrived at the interviews expecting them to be about arrangements for redundancy and were then told that they would be considered again for the BDM Middle East role.

171. In circumstances where the respondent had previously concluded it was appropriate to carry out the process in a well-documented and structured way, with notice to candidates and assessment against criteria, this change to the approach seemed to us to be unreasonable. We did not feel that the unreasonableness was properly explained to us; we well understood that the respondent might take the view that it would benefit from having the continuity of an existing employee moving into the BDM role but that did not explain the apparently sudden change of approach or the method ultimately followed. The failure to call Ms Fowler, the HR professional involved, to explain the thinking and provide corroboration for Mr Marvin's account formed part of the larger body of material from which we considered we could reasonably draw inferences.

172. Also relevant to us was the fact that, leaving aside their substance and quality, there was a lack of consistency in Mr Marvin's explanations as to why Mr Sheriff was the preferred candidate. One feature of that was that, whilst we accepted that it was reasonable for the respondent not to ask identical questions in the final interviews, it was not reasonable for Mr Marvin in evidence to suggest that one reason why Mr Sheriff performed better than the claimant was that he had put a figure on how much business he would be expected to bring in when Mr Marvin had not asked the claimant a question which could reasonably have elicited this information.

173. We accordingly considered that there were facts from which we could reasonably conclude that the claimant's sex had played a role in her non-selection for the BDM role. The change to an unreasonable procedure for selection could have occurred because of pressure from Mr Marris or because Mr Marvin recognised that conducting a reasonable process would not necessarily lead to the desired outcome. This could have been because Mr Marvin, despite what he said to us, shared Mr Marris' views about the suitability of a woman for a role which involved travelling to the Middle East. It could have been because Mr Marris had made clear that he would not accept a woman in the role or simply because of Mr Marvin's awareness that Mr Marris would object to a woman in the role.

Stage 2: Has the respondent proved that the claimant's sex did not play an effective role in the decision not to select her for the BDM role?

174. We considered carefully whether the respondent had provided an explanation for the facts which we have found could lead us to draw an inference of sex discrimination and for the non-appointment of the claimant which satisfies us to the relevant standard that the claimant's sex did not play a role in her non-selection.

175. We found that the respondent had not discharged the burden. The following features were relevant:

- Mr Marvin's inability to give a consistent or convincing account of why he selected Mr Sheriff;
- Mr Marvin's failure to explain what was not adequate about the claimant's answers to questions about how she would recruit new players or obtain new business;
- Mr Marvin's failure to give evidence to the Tribunal about what a good answer to those questions would look like;
- Mr Marvin's failure to point to anything which supported his assertion that Mr Sheriff's answers at the first interview were 'more convincing' than the claimant's;
- Mr Marvin's reliance in evidence on Mr Sheriff's answer to the 'quantity of new business' question which he had not asked the claimant;
- The fact that Mr Sheriff received feedback at the beginning of his interview on 4 March 2019, which gave him material on the basis of which to tailor his answers, whereas the claimant did not;
- The fact that there was no evidence on the face of the notes of Mr Sheriff's second interview (or in oral evidence by Mr Marvin to the Tribunal) which supported Mr Marvin's assertion that Mr Sheriff showed a 'deeper understanding' of what to do in order to generate new business for the respondent;
- The lack of any contemporaneous record, however brief, which records the reasons put forward in evidence for Mr Sheriff's selection;
- Mr Marvin's unsatisfactory evidence about Mr Sheriff's previous experience in the Middle East which we have described in our findings of fact;
- Mr Marvin's purported reliance on an entirely subjective assessment of Mr Sheriff's 'enthusiasm'. Not only was the change from a more objective to a more subjective approach unreasonable but the fact that Mr Marvin only relied on this explanation in oral evidence and the account he gave of what he meant by it did not persuade us that this was the real reason why Mr Sheriff was selected.

176. The limited explanations provided by the respondent as to the other facts we took into account at the first stage did not persuade us that we should not

draw the inferences which we have indicated that we could reasonably draw in the absence of an explanation. There was no evidence that what Mr Marris said to the claimant in the course of a job interview did not reflect his ongoing views on the suitability of women for roles involving travel to the Middle East on the respondent's customer relations business. There was no explanation for the last-minute change to the BDM recruitment process. There was no clear explanation as to why no women had travelled to the Middle East for the respondent on customer relations business.

177. In all of those circumstances, we concluded that the claimant was not appointed to the role of BDM Middle East because of her sex, that is her sex was an effective cause of her non-appointment.

Section 18: direct discrimination because of pregnancy

Unfavourable treatment

178. It appears to us to be indisputable that not appointing the claimant to the BDM Middle East role and dismissing her as a result was unfavourable treatment.

Was the treatment because of the claimant's pregnancy?

179. We have already found that the claimant's sex was an effective cause of her treatment. There may of course be more than one effective cause of treatment.

180. Again, it seemed to us that it was the correct approach in this case to consider this issue by applying s 136 to the facts which we have found.

Stage 1: Are there facts sufficient to shift the burden?

181. It seemed to us that many of the same facts we considered in relation to sex discrimination were relevant here. Essentially, these were the facts which we have set out above about the recruitment process followed by the respondent and the inconsistent and unsatisfactory explanations given by Mr Marvin for his selection of Mr Sheriff rather than the claimant.

182. Taken with those facts, the following facts seemed to us to provide sufficient facts from which we could reasonably conclude that, absent an explanation, pregnancy was an effective cause of the claimant's non-selection for the BDM role:

- The fact that Mr Marvin said that he had given no thought to how the claimant's pregnancy and maternity would be accommodated if she were appointed to the BDM Middle East role. This was relied on by the respondent as showing that Mr Marvin had simply put the whole issue out of his mind when making his decision. We considered that another, and in our view more

likely, interpretation was that Mr Marvin had not given thought to the practicalities because there was never any prospect of the claimant being appointed to the role. Given the respondent's evidence to us about its financial circumstances and the perceived need to increase business from Middle Eastern players, the fact that the claimant was going to be 'out of action' so far as travel was concerned in late pregnancy and then on maternity leave was something that would require some planning to address: how would the role and the necessary travel be covered when the claimant was not available to do it?

- Mr Marvin had recently returned from Hong King apparently to spearhead the push towards Middle Eastern rather than Far Eastern business. It seemed to us inevitable that he would be conscious that his performance would be scrutinised and that he might be subject to criticism if he did not adequately cover the new BDM Middle East role.

183. We should stress that we are very conscious that an employer faced with recruitment or retention of a pregnant employee may be faced with a situation where appointing the pregnant employee will cause some business inconvenience and that conducting a fair and non-discriminatory exercise will involve disregarding that inconvenience. Whether thought is given at this stage to how practically the situation will be managed will not necessarily provide evidence either way as to whether the pregnancy played an impermissible role in the decision-making. On the facts of this case, given our understanding of the situation which the respondent said it was facing and the pressure Mr Marvin would have been under to pursue Middle Eastern business, we consider that his failure to consider how practically the claimant's pregnancy and maternity could be accommodated is material from which, taken with the other relevant facts, we could reasonably conclude that the claimant's pregnancy played an effective role in her non-selection.

Stage 2: Has the respondent proved that the claimant's pregnancy did not play an effective role in the decision not to select her for the DBM role?

184. We were not satisfied that the respondent has proved that pregnancy played no effective role in the decision for essentially the same reasons we have set out at paragraphs 175 - 177 above. We therefore concluded that the respondent discriminated against the claimant contrary to section 18 of the Equality Act 2010.

Automatically unfair dismissal because of pregnancy

Was the reason or principal reason for the claimant's dismissal her pregnancy?

185. We accepted that there was a redundancy situation. In response to the financial circumstances it faced, the respondent decided that it needed to focus on Middle Eastern business. It restructured the customer relations department to remove the customer relations host roles and established a role of BDM Middle East which covered many of the responsibilities of the customer host role but had a significant new focus on travel to the Middle East and acquisition of Middle Eastern business. There was a diminution in the need for employees to do the work performed by the claimant, i.e. the role of customer relations host. We did not find that the redundancy situation was engineered as a result of the claimant's announcement of her pregnancy, given the evidence we have recited above as to the timing of the respondent's at least provisional decisions on budgeting.

186. The proximate cause of the claimant's dismissal was her non-selection for the role of BDM Middle East. We have found, for the reasons set out above, that the claimant's sex and pregnancy were effective causes for her non-selection for the BDM role, however the correct analysis seems to us to be that principal reason for her dismissal was the underlying redundancy situation which was necessarily going to lead to the dismissal of an employee of the respondent in circumstances where there was only one suitable redeployment opportunity. In an ordinary case of unfair dismissal where a redundancy situations leads to a situation where there is a potential redeployment opportunity to which an employee is not appointed for entirely capricious reasons, the principal reason for dismissal is still redundancy. We conclude that the same analysis applies where the selection process is tainted by discrimination.

Ordinary unfair dismissal

Reason for dismissal

187. As we have set out above, we found that there was redundancy situation and that this was the principal reason for the claimant's dismissal.

Was the dismissal fair or unfair in accordance with ERA section 98(4)?

188. We considered in turn the various aspects of a fair redundancy dismissal.

Was there fair consultation?

189. We considered that the process itself, which we have described in our findings of fact, was adequate. There were individual one-to-one meetings with the claimant at which the matters which could usefully be discussed,

were discussed. Primarily this was the availability of redeployment opportunities.

Was there a fair selection process?

190. The claimant argued that the pool from which selection was made should have been widened to include Mr El Borhami, the customer relations consultant, and Ms Lin, BDM Far East. She pointed to the similarities between her role of customer relations host and those roles and argued that all of the roles were interchangeable.

191. We bore in mind that what we are considering is whether a reasonable employer could conclude that the appropriate pool was those filling the customer relations host roles only. We concluded that this decision was within the band of reasonable responses. The BDM Far East role had a focus on travel and acquisition of new business through travel. Mr El Borhami's role seemed to be more similar to the customer relations host roles but we accepted that the role existed essentially because of Mr El Borhami's particular and possibly unique personal characteristics – his network of contacts, his pre-existing relationships and experience. Those special characteristics were reflected in his higher salary. Given in particular, the respondent's need to concentrate on Middle Eastern business, it was reasonable to exclude Mr El Borhami from the pool.

192. We were persuaded that there was a sufficient difference between the BDM Middle East role and the pre-existing customer relations host roles that the exercise of appointment to the BDM Middle East role did not oblige the respondent as a matter of fairness to select one of the customer relations hosts for the role in the way that one would expect to see in a redundancy exercise where a number of identical roles is being reduced, rather than considering Mr Sheriff and the claimant for the role on a redeployment basis.

193. In circumstances where two roles were going and the respondent had reasonably selected a pool limited to those two postholders, there was no question of selection for redundancy. The question of selection arises instead in relation to the issue of redeployment.

Did the respondent make reasonable efforts to redeploy the claimant

194. The only potentially suitable role of interest to the claimant at the point when she was dismissed was the role of BDM Middle East. Did the respondent recruit to this role fairly? We were careful to remind ourselves of the guidance in the case law we have set out above as to the approach we should take in cases where the issue is recruitment to a new role. We concluded that it was reasonable for the respondent to decide to base the appointment on interview

performance rather than past performance in the customer relations host role; this mirrored the process which the respondent had followed when recruiting for the BDM Far East role.

195. We concluded, however, that the selection process was not a fair one:

- The respondent deviated from the process it had apparently considered to be fair (giving candidates appropriate notice of interview, asking the same basic questions and then marking the answers against criteria relevant to the role) and instead selected on the basis of a process whereby, without notice, in a meeting convened for other purposes, the candidates were asked a few questions which were not scored against the original criteria;
- The claimant received no feedback at the start of the interview as to why she had not been selected for the BDM role; Mr Sheriff did. This gave Mr Sheriff a potential advantage in that he was able to tailor his answers to address his perceived deficiencies;
- Mr Marvin purported to rely on Mr Sheriff's answer to a question the claimant was not even asked;
- Mr Marvin purported to select Mr Sheriff at least partly because of a perception of his enthusiasm, the evidence for which was wholly subjective;
- Mr Marvin's evidence did not satisfy us as to why the claimant was not considered to have met the criteria set out at the first stage interview to an appropriate standard in relation to the first interview or the second interview. His evidence did not help us to understand what good answers would have looked like or what was allegedly deficient in the claimant's answers;
- In relation to the selection of Mr Sheriff, there was, as we have found, no consistent account of why he was selected for the role and Mr Marvin's evidence did not persuade us that he had genuinely assessed Mr Sheriff to be the better candidate;
- The selection process was materially affected by the claimant's sex and her pregnancy.

196. We therefore find that the respondent did not act reasonably in treating redundancy as a sufficient reason for dismissing the claimant and her dismissal was unfair.

Post-employment victimisation

Did the claimant do a protected act, namely, an allegation at a meeting on 8 February 2019 that her proposed redundancy was because of her pregnancy and/or her sex.

197. The allegations made by the claimant at this meeting were that:

- She was concerned that her sex would prevent her from being recruited to the BDM role;
- She thought the timing of the redundancy was connected with her pregnancy.

198. The latter is in substance an allegation of a breach of the Equality Act 2010. The former, insofar as we are required to make a finding about it, seems to us to constitute 'doing any other thing for the purposes or in connection with this Act' because it involved the claimant raising a potential breach of the Act and seeking an assurance that that breach would not occur.

199. We therefore find that the claimant did a protected act or acts at the meeting of 8 February 2019.

Did the respondent subject the claimant to the following detriment as a result of the above protected act, namely, the sending of the letter to the claimant of 7 March 2019 alleging breach of confidentiality.

200. There are two questions to consider under this head:

- Whether the sending of the letter constituted a detriment;
- Whether the letter was sent as a result of the claimant's protected act.

Was the letter at a detriment?

201. We concluded that the claimant reasonably took the view that the letter put her at a disadvantage. The letter made allegations against her about matters which had not been raised with her and which she had had no opportunity to rebut. Whilst we accepted the respondent's assertion that the letter was not as threatening as it could have been – there was no express reference to the possibility of legal action; given the reference to investigations, the demand for undertakings and the respondent's reservation of rights, it was not unreasonable for the claimant to believe she might be at risk of further action / sanctions.

Was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

Knowledge of protected act

202. It is a precondition of a finding that Mr Marris acted as he did because of the protected act that Mr Marris had knowledge of that protected act. There must be primary facts from which we can properly infer that Mr Marris had that knowledge. Mr Marris did not of course appear to give evidence and Ms Fowler, who seems likely to have been privy to much of what Mr Marris knew on this subject, did not give evidence despite her availability.

203. We do draw the inference that Mr Marris had the requisite knowledge and our reasoning is as follows:

- Given Mr Marris' tendency to micromanage, we find it inconceivable that Mr Marvin and/or Ms Fowler did not report the claimant's allegations to him. Ms Fowler, who reports directly to Mr Marris, had been present and taken notes at the meeting at which the allegations were raised. The allegations raised the possibility that claims would to be made against the respondent and also contained an allegation about Mr Marris himself. The claimant continued to press the point, for example in her email of 1 March 2019 and we infer that this would also have been shared with Mr Marris by Ms Fowler;
- We can find no other explanation for the timing of the raising of the issues in the letter other than that Mr Marris was aware that the claimant had raised discrimination complaints and might pursue them further, as we explain further below.

Was the letter sent because of the protected act?

204. This seemed to us to be a case where, on consideration of all of the evidence, we were able to make a positive finding as to whether the protected act played a significant role in causing Mr Marris to send the letter and we did not have to resort to a burden of proof analysis.

205. On Mr Marvin's account, the allegations by Mr Sheriff were raised in February in the first instance. Mr Marvin did not himself deal with them and he says he referred them to Ms Fowler and then believed Mr Marris was dealing them. Mr Herbert told us that the normal process in such a case would be to investigate and to suspend where there was a risk in relation to behaviour or security of information. No action at all was taken against the claimant and she was allowed to continue working, with free access to customers and customer information. There was not a shred of evidence produced to us that any investigation at all into the matter had been conducted either before or after the letter was sent. Presumably if anyone had been interviewed, there

would at least have been a note. And if there had been an investigation, no doubt Ms Fowler could have given evidence about it.

206. When questioned by Mr Herbert about the sending of the letter, Mr Marris suggested that he had become aware of the incidents shortly before he wrote the letter as a result of members telephoning him. This is at odds with Mr Marvin's evidence that he informed Ms Fowler and his understanding that Mr Marris would be dealing with the matter. Ms Fowler did not give evidence to fill the evidential gaps.

207. We were not provided with evidence which might have weighed in the balance in favour of the respondent's explanation that the letter was sent simply in the interests of the business and safeguarding customers, such as evidence that similar letters had been sent to other employees in similar circumstances.

208. What do we derive from this evidence and these lacunae in the evidence? It seemed to us that the natural inference to draw was that the information passed on by Mr Sheriff was not regarded as serious or concerning enough to give rise to an investigation or indeed suspension of the claimant but when Mr Marris was looking for something to threaten the claimant with, presumably to deter her from further pursuit of her complaints, these allegations were to hand. The reasons why the information produced by Mr Sheriff might not have caused significant concern included the fact that, in respect of the Mr C allegation, as Mr Marvin acknowledged, it was not uncommon for representatives of more than one club to be present at a social occasion and, in respect of the other allegation, the fact that a duty manager from the respondent was now working for the Barracuda was an at least equally likely source of the telephone number.

209. The fact that Mr Marris gave Mr Herbert what appears to have been misleading information as to how the matters were drawn to his attention supports that inference. Although Mr Herbert's investigation was not, as we found, digging very deep, it might have rung alarm bells for him had he found that Mr Marris was sending the letter in circumstances where the allegations had been known to the company for some time and had not been raised with the claimant.

210. In those circumstances we conclude that the fact that the claimant had done a protected act played a significant part in Mr Marris' decision to send the letter of 7 March 2019.

Harassment related to sex

Did the respondent engage in unwanted conduct, the sending of the letter to the claimant of 7 March 2019 alleging breach of confidentiality?

211. There was no dispute that the letter was sent and we accepted that it was unwanted by the claimant, who disputed the suggestion that she had behaved inappropriately in relation to either of the two members and who felt threatened and stressed by the letter.

Did that conduct arise out of and was it closely connected with their former employment relationship?

212. We concluded that the conduct was so related. The letter was about allegations that the claimant may have behaved inappropriately during her employment in relation to the respondent's customers; it sought on its face to enforce obligations the claimant had arising from her contract of employment.

Did the conduct relate to the protected characteristic of sex?

213. We considered carefully whether we had evidence which suggested that the claimant's sex played a material part in the decision to send the letter. Were there facts from we could reasonably derive this conclusion?

214. We concluded that there were not. The fact that Mr Marris had made several remarks objectifying the claimant as a woman did not seem to us to lead obviously to an inference that the sending of the letter was connected with the claimant's sex. Nor could we see any obvious connection with the fact that Mr Marris had views about whether women should travel on the respondent's business in the Middle East. The claimant's own evidence was that Mr Marris was not pleasant to any of the respondent's employees, although some of his behaviour had sex-specific content such as the remarks about the claimant. There was no evidence that he reserved other types of unwelcome behaviour to female employees.

215. We had regard also to our findings on the issue of victimisation. On the evidence we had, we considered it likely that Mr Marris would have sent a letter of this sort to an employee of either sex in the claimant's circumstances who had made allegations of a breach of the Equality Act 2010.

216. It was accordingly unnecessary for us to go on to consider whether the letter was sent with the proscribed intention or had the proscribed effect.

If the dismissal was procedurally unfair, or an act of discrimination, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed

217. We were conscious of our duty to undertake the inevitably speculative exercise of considering whether the claimant would have been appointed to the role of BDM Middle East had the respondent conducted a fair procedure in which discrimination had played no part.

218. We considered it was reasonable for the respondent to recruit to the role based on performance at interview rather than by assessing performance in the role of customer relations host. We considered whether evidence which existed as to past performance in the customer relations role would assist with our task of assessing how the claimant and Mr Sheriff would have fared in fair and non-discriminatory interviews but were unable to derive any great assistance from that evidence. Although the claimant had introduced or reactivated more customers than Mr Sheriff over the period 2016 – 2019, she had spent part of that period working on the online casino which appeared on the evidence we had to have more of a focus on the introduction and reactivation of new members than the club-based customer relations host role.

219. The evidence we had showed that, when the respondent carried out interviews which were at least structured in an apparently fair and objective way (the 25 February 2019 interviews), the claimant and Mr Sheriff were awarded the same marks, although we were not satisfied that the marking was not affected by unlawful discrimination. We did not have any clear evidence as to what the respondent would have considered good evidence as to an ability to develop new business in the Middle East, which was the key factor in determining suitability for the BDM Middle East role.

220. Looking at all of that evidence, we were not able to say who, out of the claimant and Mr Sheriff, was more likely to have been successful had a fair and non-discriminatory interview process been carried out and in those circumstances, it seems to us appropriate to find that the claimant had a 50% prospect of being appointed to the role had there been such a fair and non-discriminatory process.

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Employment Judge Joffe
12 March 2020
London Central Region

Sent to the parties on:
13 March 2020

For the Tribunals Office