EMPLOYMENT TRIBUNALS

Claimant: Mrs. Helen Larkin

Respondent: Liz Earle Beauty Co Ltd

Heard at: **Southampton** **On:6,7,8,9 January 2020**

Before: **Employment Judge Rayner**
Mr P Bompas
Mr N A Knight

Representation
Claimant: In person
Respondent: Mr A Young (Counsel)

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Claimant was discriminated against on grounds of pregnancy and maternity contrary to section 18 Equality Act 2010.

3. But for the unfairness and/or the unlawful discrimination, there was a 50% chance that the Claimant would have remained in the Respondent's employment.

4. The Respondent will pay the following compensation to the Claimant

a. Compensation for past loss of earnings	£2,418.28
b. Compensation for future loss of earnings	£4,884.92
c. Injury to feeling award of	£10,000.00 all

5. The total award payable to the Claimant is therefore **£17303.20**

REASONS

6. Oral reasons were given at the end of the hearing. These written reasons are provided in response to a request from the Claimant.

7. The Claimant started wo all rk with the Respondent on 29 April 2013. Her specific role was as channel marketing manager within the digital team. At the point of termination of her employment she had five years continuous service with the Respondent.

8. By her claim, dated 19 September 2018 the Claimant claimed that she had been discriminated against on grounds of pregnancy during a redundancy selection process and that she had been discriminated against on grounds of sex and that she had been unfairly dismissed.

9. The Respondent asserted that the Claimant had been fairly dismissed for redundancy and that it was nothing to do with the Claimant's pregnancy.

10. The issues before us for determination were set out in the case management order of EJ Fowell dated 19 February 2019 and were as follows:

Unfair dismissal

a. Was the redundancy the real reason for the dismissal
b. If so was the decision to dismiss fair; that is was it within the range of reasonable responses open to a reasonable employer in the circumstances?
c. Did the Respondent adopt a fair procedure/ the Claimant challenges the fairness of the procedures in the following respects:
    i. She was informed that her current role was being replaced by one at a more junior level but in fact the person appointed is in practice carrying out substantially the same duties as previously.
    ii. The process was too speedy , so that she
        1. Did not acquire any entitlement under regulation 10 of the maternity and parental leave etc regulations 1999
        2. Did not have sufficient time for proper consultation or to explore alternative vacancies.
    iii. Remarks were made by the decision maker Ms Slaymaker on 30 May 2018 that she should enjoy her tie with her baby

iv. She was not offered an interview in connection with either of the two alternative vacancies,

v. She was not given a fair opportunity to apply for vacancies elsewhere within the group

vi. The company had already recruit to fill her managers role a role for which she could have applied, knowing that redundancies would shortly be made,

d. If it did not use a fair procedure, what were the chances that the Claimant would have been fairly dismissed in any event?

Section 18 : discrimination on grounds of pregnancy or maternity

e. All of the conduct complained of occurred within the protected period and so the issue is whether or not the Respondent dismissed the Claimant (or otherwise treated her unfavorably as set out above) because of her pregnancy?

Findings of Fact

11. We have set out our findings of fact below, and our final conclusions are then set out at the end of the judgment. Where logical to do so, and where necessary to make the judgment clear, we have set out our conclusions within the paragraphs on findings of fact.

12. At the beginning of 2018, the Claimants line manager was Katy Johnson, who was employed as the Digital Marketing Manager.

13. We are told and accept that towards the end of 2017 there were concerns within the business about reduced sales and also about changes in consumer behavior with a reduced number of sales being made in high street shops or shopping centers and an increase in online retail.

14. Consequently, the Respondent considered that it needed to refocus its digital marketing. Therefore, in January 2018 and at the specific request of the Chief Executive Mr Sandeep Vermer, Julie Slaymaker was employed as a Digital Strategist and Consultant.

15. Part of Julie Slaymaker's brief was to review the digital marketing department within which the Claimant was employed. We find that the reason that Julie Slaymaker was taken on was to carry out a review of the business. Because she was only recruited in January 2018, she had to spend some time finding out what the business was all about.

16. At the start of 2018, Mrs Ellsbury was also recruited as head of people and development, the Respondent HR function.

17. We heard evidence from the Claimant herself, and Mrs Ellsbury who was the Respondents only witness.

18. We have not heard any evidence from Julie Slaymaker and no witness statement has been tendered from her, although we have been told by Mrs Ellsbury that Julie Slaymaker was the primary decision maker throughout the process. For example, Mrs Ellsbury told us, and we accept that the key decisions about the new staff structure and about the recruitment into the various posts were those taken by Julie Slaymaker

19. At the start of the process neither Julie Slaymaker nor Lynne Ellsbury had worked with the Claimant, both were new to the organisation and neither therefore had any knowledge about her particular skills or her experience.

20. The Claimant told us and we accept that her role had been changed from the one which she had initially been recruited to, after she had returned to work from her first maternity leave, after the birth of her first child and that some of the tasks that she had been carrying out initially were no longer within her remit. She said and we accept, that her skills and expertise went beyond those which she was utilising within the role which she occupied in the spring of 2018.

21. The Claimant told her manager Katie Johnson that she was pregnant in January 2018. At that point she was about three months pregnant.

22. Katie Johnson contacted HR to ask about the maternity process on 24 January 2018 and the HR assistant, Anna Attrill wrote to the Claimant setting out the

process to be followed for a risk assessment and other matters, on the same day.

23. Julie Slaymaker first met with the Claimant in early February 2018. The Claimant describes this as a meeting set up so that they could discuss Julie Slaymaker coming on board and what her plans for the organization were.

24. The Claimant was told by Julie Slaymaker at that meeting that she wanted the Claimant to work on the strategy for the email channel and also told the Claimant that she had plans to expand this area of work.

25. The Claimant described an open discussion in which the Claimant was being told about those elements of her job that Julie Slaymaker wanted her to focus on going forward. Julie Slaymaker specifically told the Claimant that there would be a great opportunity for the Claimant, and for the Company and talked in terms of an exciting opportunity. Julie Slaymaker told the Claimant they would speak further, and the Claimant left the meeting feeling very positive about her future with the company. We accept the Claimant's evidence as to what was said at that meeting, the tone of the meeting and the positive nature of it.

26. The Claimant did not in fact speak with Julie Slaymaker again about her role but what did happen was that Katy Johnson, the Claimant's manager did speak to Julie Slaymaker and told her that the Claimant was pregnant. The Claimant's evidence which is not contradicted is that this happened at some point later in February 2018 and after the Claimant had met with Julie Slaymaker.

27. At around this time Katy Johnson had carried out an appraisal for the Claimant and had reported the Claimant's abilities and skills as being at grade 4 which was a level indicating that she was achieving and exceeding in all areas. The appraisal reflected the fact that the Claimant had five years' experience in the business and it was what the Claimant rightly describes as a glowing appraisal. This, coupled with a positive meeting with Julie Slaymaker in February 2018, meant that at that point the Claimant considered herself to be in a good position within the business going forward, and in any changes that may take place.

28. Following the initial meeting in early February the Claimant tried to follow up on her conversation with Julie Slaymaker. We accept the Claimant's evidence that she was never again spoken to about her area of work within the business by Julie Slaymaker. We find on the basis of the evidence that we have heard that at the point in time that Julie Slaymaker met with the Claimant , she did see her as being an individual who had a positive role within the company in the future and as somebody who would have opportunities to expand or develop within the company going forward.

29. The Claimant states that after Julie Slaymaker was told of the Claimant's pregnancy later in February 2018, that she lost interest in the Claimant and the Claimant says that there were certainly no further meetings with her.

30. The claimant was subsequently one of the people identified for redundancy, although the work that she did for the company remained necessary to the company.

31. We conclude that there was a change in the view Julie Slaymaker had of the claimants position in the company, and that the change in view took place after JS met the claimant and after JS was told of the claimants pregnancy.

32. In order to determine whether the Claimants pregnancy was a factor in this change in attitude to the Claimant, we have looked at both the fact that no further meetings took place but also how the Claimant and others were treated subsequently and throughout the course of the redundancy process.

33. On the 19 March 2018, the Claimant's manager Katy Johnson gave in her notice to the Respondents.

34. We find that Katy Johnson had been concerned that her team, which included the Claimant, would need to know that she was leaving and when she was leaving, so that they could make allowances for her not being there, and make arrangements to cover her work on an interim basis.

35. Despite the concerns of KJ about the work, her team was not told that she was leaving, and KJ was told not to tell them. We accept the Claimant's evidence that when KJ told her team she was leaving, about two weeks before she left, that KJ also told them that she had expressed her concerns to senior management that the team had not been told that she was leaving.

36. We accept, on the basis of the Claimants evidence that KJ had been specifically asked by Julie Slaymaker not to let anybody in the team know that she, KJ, was leaving. KJ wanted to tell her team that she had resigned and when she was leaving, but she was told not to do so by Julie Slaymaker.

37. The fact that KJ was leaving, and was leaving whilst a reorganization was being planned, meant that there would be a vacancy. We find that once the team were aware that she was leaving, the team asked further questions about that vacancy. KJ told the team that Julie Slaymaker had indicated to her that she already had somebody in mind for the role.

38. In the event, Katy Johnson left the business and the Claimant and her other team members were not formally notified of this fact and no further information was provided. We accept that once the Claimant and other members of her team knew their manager was leaving, they did attempt to set up meetings with Julie Slaymaker in order to discuss the situation but all attempts at meetings were cancelled by Julie Slaymaker and no meetings did take place.

39. Meanwhile, Julie Slaymaker was putting together plans to restructure the business, and the restructuring process was being advanced. Whilst we have seen no evidence predating 22 March 2018 , we have seen an email dated 22 March 2018 to which a structure is attached.

40. The structure is one that had been drawn up by Julie Slaymaker and which was clearly well advanced in terms of Ms Slaymaker's thinking and in terms of the discussion of it within the organisation. Within this structure, the job that the Claimant was doing would be deleted along with three other roles and it is clear that the Claimant's role would be redundant. This is a different situation to that

in mid February 2018, when JS was positive about the claimants future in the company.

41. The structure must have been drawn up before the organisation knew that Ms Johnson was leaving. We make this finding on the basis that Mrs Ellsbury asked for the structure on 21 March and referred to it as having been something that she had seen earlier on in the week. KJ gave her notice on the 19 March 2018.

42. At that point and indeed going forward the Respondent had decided that the manager's role (the role that Katy Johnson had occupied) was going to be retained.

43. Also, between the Claimant meeting Ms Slaymaker in February and 20/21 March that Julie Slaymaker had drawn up a structure which deleted the Claimants post and redistributed the jobs and tasks she did elsewhere to other roles.

44. The result was that the Claimant was placed at risk of redundancy.

45. At this point, the only changes as far as the Claimant was concerned were that the Claimant had told the Respondent she was pregnant, and her manager had told Julie Slaymaker that the Claimant was pregnant. The Respondent was aware of her pregnancy and the date and length of her intended maternity leave. She was intending to start her maternity leave in mid-July of 2018 and was anticipating taking the full fifty-two weeks and returning to the organisation therefore in July 2019.

46. The second change is that Ms Slaymaker had had a few weeks only to review the organisation and to refine a structure.

47. We observe that on those facts alone, it is possible that Ms Slaymaker was influenced by the fact of the Claimant's pregnancy and her imminent maternity leave and we make conclusions subsequently about this in the context and following on from other findings of fact.

48. On 30 May 2018, the Claimant had her first consultation meeting. This meeting followed a group consultation meeting which took place on 29 May 2018. We have considered the timetable of both the original consultation and the subsequent consultation timetable which we see at page 126 of the bundle. We have looked at these for their effect on the Claimant's maternity leave because one of the Claimant's arguments is that she was prevented from gaining the additional protection afforded to pregnant women on maternity leave in a redundancy process because of the chronology of the timetable.

49. We have also considered the timetables because the Claimant maintains the length of the consultation process was too short so that she did not gain the additional statutory protection once her maternity leave started, and we have also considered it in the context of what is said about the vacancy which arose because of Katy Johnson's resignation.

50. The original consultation was due to start on 8 May 2018 with an announcement being made to the team and the first consultation with those affected by redundancy planned to have been on 9 May 2018. We know that the process was in fact delayed and that the first team meeting was on 29 May 2018 and that the Claimant's first consultation meeting was on 30 May 2018. This was with Julie Slaymaker and Ms Ellsbury .

51. The only explanation that we are given for the delay, came in cross examination of the Claimant when it was suggested by Counsel that the delay arose in part because there were two bank holidays in May and there was a need for a whole team to attend. Clearly, the Claimant does not know why there was a delay because she was not party to those discussions and we have received no other explanation for it in direct evidence from the Respondent.

52. The delay did mean that the Respondent was aware of the fact that there was a new vacancy of the manager role by the time the consultation with the Claimant and others started, and had been aware of it since the 19 March. In any fair redundancy process, a reasonable employer would consider whether or not there were any internal candidates who may be suitable to fill a vacant

post, even where that post is a step up. In a fair process, an internal candidate would usually be able to apply for a role, having seen a person specification. The duty on an employer to avoid redundancies does not require an employer to appoint someone to a post if they do not have the skills, but a fair and reasonable process will usually involve considering those who may have the skills necessary.

53. In this case, we find that the claimant had sufficient skill and expertise in her role, and in other roles, to have warranted consideration for the post, and ought to have been given an opportunity to consider whether or not she wanted to apply for it.

54. On 20 April 2018, Julie Slaymaker indicated to the organisation that she had somebody in mind for the post and sought approval for the post to be filled. We accept that there was at this point a need to gain approval to fill any vacant post. We find at this point that Julie Slaymaker had specifically told Katy Johnson not to tell her team that a vacancy had arisen.

55. It has been asserted for the respondent that Julie Slaymaker had at this point considered other possible internal candidates who may be able to fill the post internally and decided that there were no suitable candidates. No direct evidence was called by the respondents to support this assertion.

56. We were also told that the successful candidate was recruited on 17 May 2018 to start on 3 September and that the recruitment was worked by a woman called Pia and that the interview took place by skype on 17 May 2018.

57. However the Respondent's information disclosed as part of the disclosure for this hearing, makes no reference to any potential internal candidates for the role, and there are no interview notes for any unsuccessful candidate and no advert has been provided. The claimant was never told about the vacancy and was never asked if she was interested or given any opportunity to demonstrate her possible skills or suitability for this role.

58. We have seen no evidence of any actual consideration of any person, and nor was there an advert for the post, which the existing employees may have seen.

We find that Mrs Slaymaker had an external person identified and that they were appointed to the post without any consideration of any potential internal applicant. We find that if Julie Slaymaker did consider whether or not other internal individuals were suitable for the post, she did not do so by any fair process and certainly gave no opportunity for the claimant to consider the post and apply for it.

59. This was in the context of a redundancy process which was about to delete posts including the post of a woman who had worked for five years as the direct report of the outgoing manager.

60. In respect of the timing of the appointment and the speed of it, we find that AM (the external person recruited to the post) was recruited on 17 May 2018. Under the original consultation AM would not have been recruited before the start of the redundancy consultation with the claimant.

61. This would have given every opportunity for consideration of internal candidates. Because consultation was delayed, it meant that Julie Slaymaker was able to contact and recruit an external person, who was her preferred candidate for the post , with whom she had worked before, instead of having to actively consider whether or not this might be a post the claimant, a pregnant women, might be interested in applying for. By the time the Claimant was told that she was at risk of redundancy this meant that the role was not vacant and the claimant could not ask to be considered for it.

62. The Claimant argues that she ought to have been considered for that role or that at least she ought to have been given the opportunity to consider applying for the post and we agree.

63. At the point that the post was appointed to and approved by Julie Slaymaker, Lynne Ellsbury and Sandeep Vermer and Julie Slaymaker herself were all well aware that the Claimant's post was earmarked for redundancy along with others, that she was pregnant, and ought to have known that she had skills and abilities which may well make her a suitable fit for the post, or that she may wish to be considered for it.

64. This is unfavourable treatment of the claimant, and we have considered firstly whether there is any explanation from the respondent for this, and then whether, in the light of subsequent findings about Julie Slaymakers attitude to the claimant, that there are facts from which we could conclude, in the absence of an explanation, that there has been discrimination on grounds of pregnancy, or sex discrimination.

65. What explanation have the Respondents given?

66. The respondent asserts that the claimant and others were considered but were not thought suitable. If that is right, and if it was nothing to do with the claimant being pregnant, then the respondent may have a valid explanation for discrimination purposes, and the decision of whether or not to offer a chance to apply for a different role in a redundancy process may be a fair one by the employer.

67. The respondent relies on page 186 as suggesting that there was consideration given to whether or not there were any other candidates available who may be suitable for the managers post. We have been told that there was a requirement to keep an eight percent vacancy rate and to justify all recruitments at various stages throughout the process and we have seen the document at.

68. We do not consider that page 186 is in fact evidence of such a consideration. We understand page 186 to be the VAF recruitment form and on it there is a reference to what looks like an impact statement. The document is difficult to read but we find that it states:

> "Traffic is a key sales driver for LE.com and the planning and implementation to digital plans cannot be absorbed within the current team. The knowledge and skills are also not available elsewhere in the team so this work cannot be absorbed".

69. We note that in the context of the restrictions on recruitment and in the context of cuts being made, that the language used is that of absorption into the current team and on a fair and reasonable reading of what is said and without any

further explanation from Julie Slaymaker we find that the real meaning of this particular sentence is that there is no additional or extra capacity within the team which would allow the existing members of the team to absorb the managers tasks, in addition to their own roles. The statement that the knowledge and the skills are also not available elsewhere in the team, is an indication that there are no other people elsewhere in the organisation who could do the work.

70. We find that this is a statement about the capacity of the existing team to take on extra work in addition to their own work, and not an assessment of the skills or abilities of the existing team members to take on the job of manager as a new role or to apply for it or be considered for it in the context of redundancy.

71. It is a statement that there is a need to fill the post, rather than redistribute the tasks, but it is not a statement that the people currently employed in the team were not capable of doing the job left vacant.

72. We do not accept that these words indicate in any way that there had been any assessment of the Claimant's potential skill or ability to fulfil this role or indeed any consideration of anybody else.

73. Even if we are wrong about that, we find that no enquiry was made about the Claimants abilities and skills in respect of the post. We note at this point that there was no conversation with the Claimant at all. She was not even informed of the fact there was a vacancy and on the Respondent's own evidence and on the evidence of the meeting that the Claimant had with them by the point of consultation both Julie Slaymaker and Lynne Ellsbury required the Claimant's CV in order to assess her abilities.

74. The question is why that was There was an opportunity to bring a person in from outside, but there was also a pregnant woman about to go on maternity leave who was facing redundancy. We find that the Respondent had gone to great lengths to ensure that those at risk of redundancy including the Claimant did not become aware of the vacancy until it was filled by somebody external, known to Julie Slaymaker and somebody as far as we are aware was not

pregnant and not about to go on maternity leave. The Respondents were not only not open with the Claimant but they have taken steps to ensure that the vacancy did not become known to her, and was filled by the time she knew she was facing redundancy.

75. The Claimant claims that she should have been considered for the role or at least given the opportunity to apply. The Respondent says that this is not the case and part of the reason for that appeared to be a suggestion that this was a role that was not available at the point of the consultation. We find that the reason why the role was not available at the point that consultation with the Claimant and others started was because of deliberate and positive steps taken by the Respondent to fill the post albeit that the Respondents was well aware that their own restructuring was about to make four people redundant.

76. We conclude that the Claimant and others should have been told of the potential vacancy and given an opportunity at least to consider whether or not they wanted to make an application for it and that any reasonable employer seeking to avoid the redundancy of long standing staff and operating a fair process would have taken those steps.

77. In reaching this conclusion we have considered the Respondents policies. We have been shown the recruitment policy which does refer to an obligation to consider internal candidates when vacancies arise and in particular, internal candidates who are redeployees who are facing redundancy. We understand from the evidence of Lynne Ellsbury that there was in fact a redundancy policy within the organisation but we have not been shown it. That is a choice of the Respondents but without it we cannot of course see whether or not this was standard practice.

78. We have heard from Lynne Ellsbury that it was the Respondent's practice not to tell members of staff when a senior member was leaving, but she has not told us where that practice comes from, and we do not accept this was in fact the case. We have not been referred to any documentation or any policy document which suggests this and Lynne Ellsbury had only recently started working with the Respondents.

79. We find that there was no such practice and that this was an attempt to excuse a deliberate process of recruiting before telling at risk staff of a vacancy, so that those staff had no chance to apply.

80. The respondent has not called any evidence from anyone who had direct knowledge of this appointment and we find that there is no valid explanation as to why the team were not told of the vacancy; why there was no actual consideration of internal candidates; why there was not advert for the vacant post, and why the appointment was made with such speed, and not in line with the timetable for the redundancy process.

81. By the time the consultation started we find that there had been a change in the attitude of Julie Slaymaker to the Claimant or to the post that she occupied.

82. Secondly, the Claimant had informed the Respondents of her pregnancy and the dates of her maternity leave.

83. Thirdly, there had been a deliberate concealment of the vacancy left by the resignation of Katy Johnson.

84. Fourthly, there had been the recruitment of an external person known to Julie Slaymaker to fill the vacant role at some point in the future. There had been a change in the timetable which made it possible.

85. We find that these are all facts from which we could conclude, in the absence of a valid explanation from the respondent that unlawful discrimination on grounds of pregnancy has taken place. We have found that there is no valid explanation from the respondent for not considering the claimant this vacant post. We therefore conclude that the claimant was discriminated against on grounds of pregnancy in this respect.

86. However if we are wrong that these are facts from which we could draw that conclusion, we also take into account the findings of fact that we make about what happened next in the consultation process. In particular we take account of the findings we make respect of Julie Slaymaker's attitude towards the

claimant claimants pregnancy. We conclude that those findings are an indication of the feelings that Julie Slaymaker had about the claimant pregnancy and her availability to do the job from the point at which she became aware that the claimant was pregnant.

87. We have considered the process of consultation followed by the respondents and the actions in particular Julie Slaymaker. On 29 May 2018, the Claimant and others were told of the restructuring and given the broad outline of the new structure. They were not told of the recruitment to the vacant managerial post.

88. At the first meeting the Claimant reports there was no real engagement with her about any of the roles. We accept her evidence about what was said during the course of that meeting and we accept that she expressed an interest in three roles. One of the roles she expressed an interest in was the email coordinator role and we accept that she was told that this was a role which would be significantly junior to her current role; that would be less well paid and that would not have the same elements as her existing role. We accept her evidence that on the basis of what she was told, she decided not to apply for it.

89. Following the first consultation meeting the Claimant met with Julie Slaymaker by herself. At this meeting Julie Slaymaker made a number of comments about the Claimant looking forward to and enjoying motherhood. We accept the Claimant's evidence as to what was said as set out in her witness statement and note what she said in her evidence, that she had remembered word for word what was said because it stuck with her a year later, and it was the suggestion that she should go and enjoy being a mother. It was suggested to the Claimant by Julie Slaymaker that she would enjoy her time being a mother before eventually looking for new companies to work for, not to get stressed about the redundancy situation and that she needed to put her baby first. This was said at the start of the process, and despite the Claimant stating that she wanted to remain within the company.

90. The Claimant did not consider that this was derogatory and she did not need to. What we conclude is that it was indicative of the thinking of Julie Slaymaker at that point in May 2018, that the claimant would be leaving the organisation

in the foreseeable future and therefore not returning to work with the organisation after her maternity absence and that she should be enjoying motherhood, rather than working.

91. We have had no evidence from JS about this, but looking at the chronology of the consultation; the change in attitude and the approach to the vacancy left by KJ, we conclude that there are facts form which we could conclude, in the absence of an explanation from the respondent, that the reason for JS making these comments, and for assuming that the claimant would not have role going forward, was on grounds of her pregnancy.

92. There is no valid explanation for these comments being made from the respondents. Julie Slaymaker has not been called to give evidence.

93. We conclude that this conversation not only indicated that JS had formed a view at that point that the claimant would not be working for the company in the future, and would need to look for a new job, but that this was, on balance of probabilities, because she was pregnant and about to go on maternity leave.

94. Whilst the Respondent submitted that by itself it would not be enough from which we could draw inferences of discrimination in other areas, we disagree.

95. We think it is clear that the meaning of her words indicated firstly, that as far as Julie Slaymaker was concerned, in May 2018 the Claimant was not going to be retained by the organisation and she was not going to be returning following her maternity leave.

96. Secondly, we find that it is indicative that Julie Slaymaker was thinking about the Claimant's pregnancy and her maternity leave as a factor which would impact upon her remaining within the organisation. On any measure we find that this indicates that Julie Slaymaker had prejudged the process of consultation and the process of looking at alternative work and in her mind was satisfied that the Claimant would not be returning to the organisation and that she would not be redeployed into a different role.

97. We have also taken note at this point of the email exchange in April 2018, between Julie Slaymaker, Lynne Ellsbury and Sandeep Vermer which we see at page 126 of the bundle which is the second page of an email sent by Julie Slaymaker on 28 April 2018. It concerns the preparation for the restructure of the digital team. In a long email, a number of matters are addressed but in particular, it states that:

"Scripts and letters need to be created for:

- The announcement of the restructure with justification and Q and A.
- Consultation for people unaffected and names are given.
- Consultations for people who will be redeployed (Sophie).
- The consultations for people who will be made redundant: Ysaline; Helen; Rodolfo".

98. We find that this, in combination with the conversation that the Claimant had with Julie Slaymaker during the course of that meeting and in the context and the chronology of events, is indicative that Julie Slaymaker at this point in her own mind considered that the Claimant, along with Ysaline and Rodolfo would be made redundant and that Sophie would be redeployed.

99. In respect of the claimant, this was, in part at least, because the claimant was pregnant and about to go on maternity leave

100. We have heard the evidence from Lynne Ellsbury about what she thought about the report and the use of names not roles in it. We accept that Lynne Ellsbury herself recognised that it was necessary to look at roles and not at people. There is no evidence that Lynne Ellsbury did have a conversation with Julie Slaymaker correcting her about this and there is an email chain which follows in which there was plenty of opportunity for Lynne Ellsbury to raise that at that point with JS.

101. However, even if Lynne Ellsbury did, as she said, have a discussion subsequently with Julie Slaymaker about the need to refer to roles and not people, this does not alter our finding that Julie Slaymaker herself on 28 April 2018 had concluded that the Claimant was to be made redundant.

102. We have however cross checked our findings with findings about what happened at the next stage of the process.

103. The Claimant went through two further consultation meetings in a relatively short period of time. The whole process took just over two weeks. It is clear to us that Julie Slaymaker wanted the process to be done quickly and wanted the restructured organisation to be put in place quickly. We find that she did not want people in post, who were not going to be available immediately to do the work.

104. We have reached this conclusion having made the following findings about the process the appointment of Tom Browning to the vacant role of Marketing Effectiveness Manager. We note that Tom Browning was somebody who was also known to Julie Slaymaker and we also note that this was a role which the Claimant was specifically interested in. There were two internal candidates, the claimant and another male employee. At that point, the appointment was subject to an internal process.

105. In order to progress the process of selection to this post, Julie Slaymaker asked a Mr Green to set up a test to assist with the selection process. This was described to us as a gateway test, which the candidates must pass at a specified level in order to be considered for the post.

106. Mr Green did not give evidence but we have been referred to a note that Mr Green wrote after the event and more recently in response to questions he was asked about his recollection of what he was asked to do by Julie Slaymaker, and what was said to him by her at the time.

107. He states that he was asked to meet with Julie Slaymaker and that at the meeting she said she wanted him to draw up a test to test the suitability of

candidates for the particular role. He also says that she advised him that she had a CV for an external candidate and asked him to look at it. When he looked at it he thought it was an excellent CV.

108. It is implicit that he did not at that point see the CVs of either the Claimant or the other man who was applying for the roles. We are not told why he was shown the CV of an external candidate, when the role was being considered for two internal redeployees, because we have no evidence from JS.

109. He also says in his note to the Employment Tribunal that he looked at the tests done by the Claimant and by Rodolfo but that he did not see a test done by Tom Browning. The words used by Julie Slaymaker, as reported by Mr Green, were that he was setting up a test to see whether somebody was suitable for the role. We note that this was a test on one aspect of the role only.

110. The Claimant and her colleague Rodolfo both took the test on 8 June 2018. We accept the Claimant's evidence that the circumstances in which she took the test were very pressurised, that half an hour only was allowed and that although she knew she was to take a test that when she got to it, it was not the type of test that she thought she was going to be taking.

111. The Claimant was at this stage eight months pregnant and under significant pressure from the organisation both in terms of maintaining her existing workload, developing handover notes and trying to deal with looking for alternative work and preparing for the internal test. She tells us and we accept that as a result she did not do as well as she believed she could have done. No account was taken by the organisation of her pregnancy or her workload at all.

112. We conclude that under different circumstances it is highly probable that she would have done better in the test.

113. Julie Slaymaker subsequently asked Mr Green to look at the tests of both the Claimant and Rodolfo. Mr Green marked the test and he indicated that the Claimant had scored five out of twelve. We also note his indication that she

had a grasp of the basic concepts and that she could develop or gain the skills required.

114. On the email of 8 June at page 205 from Julie Slaymaker there is a handwritten note which has not been explained to us. It says that *twelve out of twelve will be required in order to be suitable for the post. Expectation would have been twelve out of twelve if suitable for role*. It also states that *IT set up and monitored so independent*. This must be a handwritten note by either Julie Slaymaker or by somebody else within the Respondents and we take from this that the indication at the time that somebody considered that this score was necessary in order to be suitable for the role. We are not told when it was decided that this was necessary, or why.

115. On 8 June Julie Slaymaker wrote to Lynne Ellsbury stating:

> "given these results I think we can feed back that neither of them have performed well enough to be interviewed for the role given that we need them to hit the ground running and have advanced skills. Do you agree?"

116. We find that the wording used is not of a Respondent positively seeking to ensure that employees facing redundancy are interviewed where they have the skills, or may be able to attain them within a reasonable time. It is an email which suggests an employer using a test as a reason to exclude someone from the process.

117. We note that this email is sent on the same day that Mr Browning was being interviewed for the post. We note that Mr Browning was interviewed on 8 June 2018.

118. We have seen the interview notes completed by a woman called Pia in respect of the interview of TB. We have been told by the Respondent, although not by Pia or anyone else with direct knowledge, that this was an initial interview and that it was only the first stage in the process. In fact, Mr Browning was offered the role on 11 June 2018, which was the following Monday and the

interview notes were in fact only sent to Julie Slaymaker on the Monday. There was no further interview and we find that this was not a preliminary interview.

119. We also have no evidence that Tom Browning did in fact take the test before being interviewed for the role. There is no evidence of any test being done by Mr Browning before his appointment or at any time. Mrs Ellsbury told us that the interview was a first stage but this is not born out on the facts.

120. We have no live evidence from either Julie Slaymaker or Tom Browning about the test and have seen no evidence of the test its self.

121. We have seen no evidence of a test score and we have seen nothing that indicates that the test was passed over or sent to or carried out at all by Mr Browning.

122. The only reference to the test being taken is from Mrs Ellsbury who says that she was sure that Julie Slaymaker *would have* carried it out, not that she knows that she did so.

123. Mrs Ellsbury referred to an email from Julie Slaymaker saying that Mr Browning had achieved a score of eleven out of twelve. This is taken from an email that Julie Slaymaker wrote to Mrs Ellsbury on 6 June 2019, a year after the events. It does not refer to any documentation.

124. In that email Julie Slaymaker says that she got Mr Green to review the scores and sets out the scores of the three individuals. However, as already stated Mr Green, has told us in a note to the Tribunal that he did not review the test of Mr Browning and that he did not see the test of Mr Browning.

125. We don't accept that the test results of TB would have been destroyed by the time the proceedings started or at the point that the first order for disclosure was made as is suggested by the Respondents. We don't accept that the Respondent would have destroyed the test as part of their usual data clean up either after twelve months or at all and we find that in any event the time when

the test should have been taken does not fit in with the alleged 12 month data destruction timetable asserted.

126. We also note from that email that Mrs Slaymaker is able to attach the test that the Claimant did. She had clearly retained Mrs Larkin's test. This was the test of a woman who had left the business twelve months before.

127. We find it extraordinary that she has retained the Claimants test but does not have the one from Mr Browning who was subsequently recruited into the post.

128. We conclude that Mr Browning did not in fact take the test.

129. This was a difference between his treatment and that of the Claimant in an interview process. Whilst the Claimant does not need to prove less favourable treatment in a pregnancy discrimination claim, the way others are treated is factual evidence which may support a conclusion that discrimination could have taken place, so that the burden of proof moves to the Respondent.

130. There is no evidence of any further interview with TB and we find that the interview he had was not, as the Respondents say a stage one interview, but find that the interview with Pia on 8 June 2018 was the only step necessary for the external candidate to be considered suitable for appointment by Julie Slaymaker.

131. In the email it is repeated that the organisation needed somebody to hit the ground running.

132. She also says that Mr Green's assessment of Tom was that he was a much stronger candidate. This can only be based on the comment Mr green made when shown a single CV during the meeting he refers to in his email to the ET. Mr Green had not seen anyone else's CV and he was making a passing comment, not assessing the relative value of the three applicants for the job.

133. We conclude therefore, that no test was carried out, and that Julie Slaymaker knew this. It follows that she proceeded to recruit him without applying the same criteria to him, as had been applied to the Claimant, but used the test as a way of justifying not appointing the Claimant.

134. Julie Slaymaker knew Tom Browning, there were no other external candidates and we conclude that he was her preferred candidate and she made sure he got the job. She wanted someone to hit the ground running, and the Claimant, an internal candidate facing redundancy, was eight months pregnant and about to start maternity leave. She had to take a test as a gateway requirement of a role under strict and specific circumstances.

135. We find that the process had been set up in such a way that the Claimant was bound to fail and that the effect of it was to ensure the recruitment of a male; non pregnant; available; known external candidate. This is indicative of how Julie Slaymaker treated the Claimant and the process throughout. She was prepared to ignore the Claimant's rights and abandon any attempt at a fair process.

Applicable legal principles

136. The claimant has the requisite qualifying period for protection from unfair dismissal and can only be fairly dismissed for a reason falling within section 98 employment rights act 1996 .That section provides that it is for the employer to show the reason or the principal reason for the dismissal and that it is a reason falling within subsection 2 of that section or for some other substantial reason .

137. In this case the employer asserts that the reason for the claimant's dismissal was that she was redundant this is a reason falling within subsection 2.

138. In deciding whether or not a dismissal for redundancy is fair or unfair the tribunal will have regard to the reasons shown by the employer of the determination will depend on whether in all the circumstances including the size and administrative resources of the employer's undertaking employer acted reasonably or unreasonably in treating redundancy as a sufficient reason for

dismissing the employee. This is to be determined in accordance with the equity and the substantial merits of the case.

139. Section 139 of the employment rights act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on business for the purposes of which the employee was employed by him or to carry on that business in the place where the employee was self-employed or the fact the requirements of the business for employees to carry out work of a particular kind or for employees to carry out work a particular kind in the place where the employee was employed by the employer have ceased or diminished or acts are expected to cease or diminish.

140. In this case the employer decided to restructure the part of its business in which the claimant was employed. In doing so structure was drawn up which deleted the post and role that the claimant was employed to do. We reminded ourselves that we must consider whether or not the requirement of the business for the employee to carry out work particular kind had diminished or ceased.

141. If there has been a reduction in the need for the work that the claimant was doing then the consideration of whether the dismissal is fair or unfair will fall within section 98 4 and require a consideration of the fairness in a redundancy case fairness will require consultation with those reflected which includes considering whether or not there are alternative proposals to avoid redundancy and which may include for example consideration of any existing alternative vacancies and of allowing those who are potentially redundant to apply for any vacancies that a candidate wishes to apply for.

142. We remind ourselves that this is not an obligation on an employer to offer somebody facing redundancy any alternative vacant post and that there is no need for an employer to automatically offer an interview in such circumstances if they reasonably believe that the candidate who is facing redundancy is insufficiently skilled. Nor is there any obligation to create a post weekly to suit the skills to redundant candidate may have

143. In ***Samsung Electronics v Monte D'Cruz*** UKEAT/0039/11/DM, the EAT observed that the decision to dismiss for redundancy involves 2 decisions. Firstly the original decision to remove the employee from their job because, for example, the position has been deleted, but secondly a second and separate decision to dismiss that employee. That second decision will involve a decision that no alternative employment is available. The EAT observed that since the end product will be dismissal the process as a whole has to be fair.

144. In that case the EAT referred to the judgement of ***Morgan v Welsh Rugby Union*** [2011] IRLR 376(per HHJ Richardson) and the principles which will apply when considering a situation in which a redundant employee is interviewed for an alternative position.

145. The starting point is to consider the test set down in statute by section 98 (4) of the 1996 Act. A Tribunal is entitled to consider how far an interview process was objective but must keep carefully in mind that an employers assessment about which candidate will best perform in a new role is likely to involve a substantial element judgement. Applying those principles an employer which decides not to offer a post to the claimant but to another employee who is judged to better fulfil the role ought not to be criticised even if it has not followed a process strictly.

146. This does not of course mean, that an employer can make that decision in a discriminatory way or for discriminatory reasons.

147. 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 to consider as part of its deliberations whether an appointment was made capriciously or out of favouritism or on personal grounds. If I as her, we conclude that an appointment was made in that way we are entitled to reflect that conclusion in our findings under section 98 (4) on the overall fairness of the decision to dismiss.

148. We note that the determination of the fairness or otherwise of a process of selecting who is interviewed will therefore be a central part of our determinations as to the overall fairness of the respondent's decision to dismiss in this case.

149. We note that whilst a criticism made by claimant that the process is unclear or that the criteria applied in respect of the post may be unclear, that in itself is unlikely to render a failure to appoint and unsuitable candidate unfair. This is not the same as an unfair process in which internal and external candidates are treated differently or in which the criteria for selection are applied in a different way or in a discriminatory way to claimant and others.

150. The EAT stated in ***Morgan*** and we remind ourselves, that in a redundancy selection exercise the choice of what assessment tools to use in an interview is a matter for the discretion of the employer. If the tools used have been shown to be plainly inappropriate that might be influential in the issue of the fairness of the dismissal.

151. When determining the fairness or otherwise of a dismissal we remind ourselves that we must bear in mind the range of reasonable responses test we remind ourselves that in unfair dismissal claim it is not for the tribunal to substitute its own view of what it would have done. See Darlington Memorial Hospital v Edwards.

152. We have also taken account of ***Octavius Atkinson and sons Ltd v Morris*** [1989]ICR 431 CA.

153. We remind ourselves that if we make a finding of unfairness we must then consider what might have happened had a fair procedure been followed this is the Polkey question. We remind ourselves that there may be a degree of speculation involved in this process but that we must use common sense experience and sense of justice to make the assessment of the likelihood of the claimant being recruited to any of the vacant positions. It is for the employer to reduce evidence on which he wishes to rely but the tribunal must have regard to all the evidence when making that assessment.

The right not to be subjected to unfavourable treatment (pregnancy discrimination)

154. A woman who is pregnant or on maternity leave is protected from discrimination by S.18 of the Equality Act 2010. Such discrimination occurs where an employer treats a woman 'unfavourably' because of the pregnancy or maternity leave - S.18(2)(a) and 18(3) and (4).

155. Section 18 EQA 2010 protects women from unfavourable treatment because of any of four reasons of which two are relevant in this case:

- because of the pregnancy 18(2)a
- because she is exercising or has exercised or has sought to exercise the right to ordinary or additional maternity leave (18(4))

156. A woman is protected from discrimination during the protected period. This is defined by 18(6) and it begins when the women's pregnancy begins, and continues until

- if she has the right to ordinary and additional maternity leave either
- at the end of the period of additional maternity leave,
- or if she returns to work earlier, when she returns to work after the pregnancy.

157. In order to discriminate because of pregnancy, an employer must have knowledge (this is full actual or constructive) of the pregnancy, and there must be an actual pregnancy before the protection applies.

158. In a discrimination claim that the is on the claimant to prove facts from which a tribunal could decide in the absence of any other explanation that the alleged discrimination occurred (EqA 2010 ss 136(2).

159. If the claimant discharges this initial burden of proof then unless the respondent is able to show that the discrimination did not occur and we note remind ourselves that in that this means there must be no discrimination whatsoever, then the tribunal must find that the discrimination has occurred.

160. We remind ourselves of the guidance in ***Madarassy v Nomura*** [2007] ICR 897 CA per Mummery LJ, that

a. the claimant must establish more than a factual difference in protected characteristic and difference in treatment in order for the initial burden to shift to the respondent;
b. what the claimant must approve is facts from which the claimant could conclude that discrimination had occurred. We remind ourselves that a mere file a finding that there is a possibility that discrimination had occurred or that discrimination could have occurred is insufficient we must find facts from which we could conclude that discrimination had occurred
c. in considering the initial stage the tribunal is not prevented from accepting the evidence of the respondent or from drawing inferences from evidence that the respondent produces either in disputing the complaint or in rebutting the complaint.
d. We remind ourselves that we cannot infer discrimination simply on the basis that the respondent has acted unfairly or unreasonably. We were referred to the judgement of the Court of Appeal ***in Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 in this respect.

161. Automatic unfair dismissal (section 99 ERA 1996) A person who is dismissed shall be regarded as automatically unfairly dismissed if the reason or principle reason for the dismissal is of a prescribed kind OR the dismissal takes place in prescribes circumstances. Section 99 is concerned with leave for family reasons and protects employees who is dismissed for a reason relating to pregnancy childbirth for maternity or for a reason relating to ordinary compulsory or additional maternity leave or for exercising a right for time off of antenatal care (section 5).

162. The regulations apply to employees, meaning an individual who has entered into or works under , or where employment has ceased, worked under a contract of employment.

163. An employee who is on maternity leave is afforded special protection against redundancy by Reg 10 of the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312. This provides that where her position becomes redundant during her maternity leave period and there is a 'suitable available vacancy' on terms and conditions that are not substantially less favourable to her, she is entitled to be offered alternative employment. If the employer fails to offer a suitable vacancy and subsequently dismisses her by reason of redundancy, Reg 20(1)(b) MPL Regulations provides that the dismissal is automatically unfair under S.99 of the Employment Rights Act 1996

Conclusions

164. We find that from all of the facts we have found we could conclude in the absence of a valid explanation that there has been discriminant on grounds of pregnancy both in the failure to consider the claimant to for the vacant managerial position and in the treatment of the claimant subsequent consultation process and respect of her dismissal.

165. Whilst we accept that there was a perceived management need for a restructure and whilst we accept that management are perfectly entitled to restructure their organisation as they wish, the question that we asked is whether or not any part of the reason for the variation or deletion of the post was that the Claimant was pregnant.

166. Our conclusion is that whilst Julie Slaymaker may have had the Claimant's pregnancy and maternity in mind at the point that she was drawing up the restructure, and whilst we find there was an apparent change in approach to the role the claimant did, we cannot conclude, that at the point the design of the structure and the decision to delete the claimants post was because of the Claimant's pregnancy.

167. However once the claimants manager resigned and once a vacant managerial position arose, we find that Julie Slaymaker did have the claimant's pregnancy and absence on maternity leave in mind when making decisions about who should be appointed to vacant and a new posts.

168. We conclude that the procedure followed for determining who should be appointed to the managerial post was unfair and discriminated against the claimant on grounds of pregnancy . The respondents have provided no valid explanation for failing to consider the claimant and for failing to give her any opportunity to apply for a vacant post in the course of a redundancy process .

169. We conclude that this is both unfair and discriminatory .

170. The claimant was not offered interviews to vacant posts and we have found facts from which we can conclude in the absence of any explanation that the failure was an act of discrimination . We find that there is no non discriminatory proven explanation from the Respondents before us for any of the acts or failures of Julie Slaymaker or the respondents were widely for the failure interview the claimant ought to give her a fair opportunity to compete with Tom Browning for the vacant position. We Conclude that the treatment of the Claimant in the appointment process to the post Tom Browning was appointed to was on grounds of her pregnancy and was unlawful discrimination.

171. We find that Mrs Ellsbury showed a reluctance to go beyond what was strictly necessary in considering and assisting the Claimant in her search for any external role. We are particularly concerned that there was a misunderstanding about the locations that the Claimant was prepared to work at, and that the HR in a different part of the group of companies were under the impression that location was an issue when the Claimant had specifically indicated that she was prepared to move in order to take up a job.

172. We accept that Mrs Ellsbury didn't mention the fact of the Claimant's pregnancy and whilst we find that Mrs Ellsbury didn't take proactive steps to assist or promote the Claimant, we find that the reasons for the Claimant not being offered an interview in the wider organisation were not the result of unfairness in the process and were not to do with her pregnancy. The reason for her not being offered interviews were to do with the external organisation having concerns about the Claimant. We cannot find that in that respect the respondents process was either unfair or discriminatory

173. We have also looked at the digital email coordinator role and we find initially that there was certainly no encouragement to the Claimant to apply for the role. We also accept that at the outset it was designed in such a way that it would have been a more junior role and perhaps with less content than the Claimant's existing role.

174. We have considered the Claimant's evidence in respect of this and we consider it is entirely possible that she was misled about the content of the role but there is no contemporary evidence that at the point that she was being made redundant the role was other than as set out in the job description.

175. We have no sworn evidence before us about what the role in fact turned out to be either on appointment or subsequently and whilst we accept that the role might have changed subsequently and might have varied from the structure set out in May and June 2018, we accept that from the structure it was intended to be a different role and was at a lower grade and a different rate of pay. Whilst the Claimant was not encouraged to apply for it she could have done so had she wished and she chose not to do it.

176. We have also considered the process of the appeal. We accept that the process of the appeal itself was a fair one reasonably followed but we accept the Claimant's evidence that the appeal was provided with information which was fundamentally flawed both in its reflection of what had happened and in the reflection of the process of recruitment to other roles. This is part of the overall unfairness and had the appeal been provided with appropriate and correct information it is of course entirely possible that it would have come to a different conclusion.

177. Our conclusions are that whilst redundancy was the reason that the Claimant's post was deleted and was the reason for her not having being appointed to another role, d that the decision to dismiss was not fair because of unfairness and discriminatory conduct within the process as set out above.

178. We have looked specifically at the matters set out within the case management order and we have also reread the Claimant's claim form in order

to understand the breadth of the allegations of unfairness. We note the Claimant's allegation that the matter was dealt with too quickly. We find that two week period of time for the consultation was not reasonable or fair in the circumstances and we do not accept that this was a standard or acceptable length of time for this organisation. We note again that we have not been referred to any redundancy policy.

179. We accept, however, that the speed of the process was not designed or intended to exclude the Claimant from becoming entitled to the better protection that women on maternity leave have in a redundancy process.

180. We do find that the speed with which the process was carried out as far as the Claimant was concerned was detrimental to her and that it did mean that she did not have proper or fair opportunities to fully explore any other job that may exist within the wider organisation or to prepare properly for those jobs which she did want to apply for including preparing for a test.

181. We find that Julie Slaymaker in particular wanted to push the process through and was not interested in taking any proper time for dealing with consultation. This was a process which showed that there was no intention on the part of Julie Slaymaker to properly consult. She knew who she wanted to bring into the structure and who she did not want to retain, she made sure that the people that she had identified were appointed.

182. In respect of the conversation on 30 May 2018, we have made findings of fact from which we could conclude that discrimination had taken place both on the basis of that conversation but also on the basis of all the other facts that we have found throughout the chronology in particular in respect of the intention and attitude of Julie Slaymaker.

183. We find that the comments made about somebody hitting the ground running are indicative of an unconscious wish to have somebody in post immediately and not to have somebody in post who was about to go on maternity leave.

184. We have concluded from the facts that we have found that the burden of proof shifts to the Respondent to provide a non discriminatory explanation in respect of the appointment to the vacant managers post and the appointment of Tom Browning in particular.

185. We find that there is no valid non discriminatory explanation from the Respondents which fully explains the Claimant's treatment. We have heard no evidence, and have no explanation at all therefore, from Julie Slaymaker who made many of the relevant decisions.

186. We have looked at the interviews and we find that the Claimant was not in fact interviewed for the two posts she mentions and we also find that she was not given any opportunity to apply for her manager's post when her manager left.

187. We find that the whole process of appointing to the post of marketing effectiveness manager which recruited Tom Browning was woefully inadequate and we find there was a lack of fairness in the process.

188. We conclude that Julie Slaymaker had a prejudicial attitude towards the Claimant from the point that she knew she was pregnant. It may well be that this was an unconscious bias but nonetheless we find that as a result the Claimant was discriminated against on the grounds of her pregnancy in respect of both of the consideration of the vacancy in respect of Katy Johnson; in respect of the vacancy of Tom Browning in the process of the consultation and that therefore the Claimant was unfairly dismissed, it was not a fair dismissal within the meaning of section 98 and that the claimant was discriminated against on grounds of pregnancy and maternity.

189. We have therefore considered what might have happened had the Claimant been treated fairly and in a non discriminatory way.

190. We considered the marketing effectiveness manager role which Tom Browning was recruited to. We find that this was a different role to the one the Claimant had been doing, and we accept that the Claimant's test results were

not perfect, but we also find that the Claimant had wider skills than those she was using in her existing role.

191. Her wider skills and abilities had never been assessed as part of the process, and she was not competing on a level playing field.

192. We conclude that if Julie Slaymaker's in built prejudice towards Mr Browning and against the Claimant were removed that the Claimant had a good prospect of being successful in a fair process, with at a 50% chance of being appointed.

193. In respect of the manager's post that was left vacant we find that given the Claimant's length of service and the skills that she had; the knowledge that she had of the role and the view that both her manager and Julie Slaymaker apparently had of her in February and March 2018 that she would have had a good prospect of being recruited.

194. We find that this was a step up to a manager's role and that the Claimant did not have any direct transferrable managerial experience, and conclude that there would be a slightly less than fifty percent chance of her succeeding.

195. Overall, we find that there as a fifty percent likelihood absent discrimination and absent unfairness that the Claimant would have been retained in some capacity within the Respondent organisation and therefore would have returned to work after her maternity leave.

Remedy

196. On remedy, considering all the evidence before us, we conclude that the Claimant took sufficient steps to mitigate her loss.

197. We find that the Claimant had taken sensible steps to mitigate and had obtained a job that was to start within three months and that she did not then take further steps to mitigate her loss for the remaining period of time she was not working.

198. We find that it was reasonable for the Claimant, having secured suitable alternative employment which mitigated fully her ongoing losses, to wait for that job and to not make any further applications.

199. There is no evidence that there were any suitable jobs which she ought to have applied for, and even if there were, we conclude that it is highly unlikely that the timeframe for application, shortlisting, interviewing and appointment would not have been completed before three months.

200. We find therefore, that the Claimant is entitled to 50% of all past losses which is £2,418.28.

201. We find she is entitled to future loss over four months at 50% of £4,884.92.

202. We have considered injury to feeling we have considered the submissions of both parties and we are of the view that the figure of £10,000 injury to feeling is a reasonable amount to award this case given the findings that we have made and given the evidence that we have heard from both parties.

203. We make that a total award therefore, of £17,303.20.

Employment Judge Rayner

Date 23 March 2020