EMPLOYMENT TRIBUNALS

Claimant: Miss Coralie Tooke

Respondent: Dr Andrew Bradley and Mrs Kairen Bradley t/a Capella Home and Gift

HELD AT: Leeds via Video **ON:** 4th, 5th, 6th November 2020 and 17th December 2020 (in Chambers for deliberations)

BEFORE: Employment Judge Eeley
Mr D Eales
Mr G Harker

REPRESENTATION:

Claimant: Ms E Cadbury of Citizens Advice Bureau
Respondent: Mr G Knowles, Counsel

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant's claim of automatic unfair dismissal contrary to section 99 of the Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999 fails and is dismissed.

2. The claimant's claim of "ordinary" unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 succeeds and is upheld.

3. The claimant's claim of pregnancy and maternity discrimination contrary to sections 18 and 39 of the Equality Act 2010 succeeds and is upheld.

REASONS

Background

1. By a Claim Form presented to the Tribunal on 24th March 2020 the claimant brought claims of ordinary unfair dismissal, automatically unfair dismissal (on pregnancy/maternity grounds) and pregnancy/maternity discrimination contrary to section 18 of the Equality Act 2010. The issues for determination were as identified in the Case Management Order of Employment Judge Brain dated 28th May 2020.

2. The Tribunal received written witness statements and heard oral evidence from the following people:

   (a) The claimant;

   (b) Pollyanna Williams;

   (c) Both named respondents;

   (d) Gillian Ward; and

   (e) Laurie Tebbut

   The Tribunal was presented with an agreed bundle of documents and read those pages to which they were directed by the parties. The Tribunal received oral submissions from both representatives, supplemented by written submissions on behalf of the claimant.

Findings of Fact

3. The claimant was employed by the respondents as a sales consultant between 28th of April 2017 and 31 December 2019. For the majority of her time with the respondents she worked from shop premises in Settle. The Settle shop was operated by the respondents trading as a partnership under the trading style "Capella Home and Gift". There was a further shop in Windermere which was operated by "Capella Windermere Ltd", of which the respondents were the sole directors and shareholders. During her time with the respondents the claimant was employed by the partnership which operated the Settle shop.

4. Between July 2018 and March 2019, the claimant agreed to work for one day a week at the Windermere shop but she was not employed by the limited company. Rather, she was treated as on secondment to the Windermere shop. The two businesses are treated as associated employers as Capella Windermere Ltd was controlled by the respondents. This was not disputed by or on behalf of the respondents during the Tribunal hearing.

5. The claimant started work from 28th April 2017 (her initial contract of employment was at page 43 of the document bundle). She was working four days per week at that time. Her role was that of a sales consultant and her job title did not change during her employment with the respondents. In reality, the claimant ran the shop in the absence of the respondents. She effectively ran it with managerial oversight from

Dr and Mrs Bradley. She was not involved in the high-level planning and development of the business. That was the province of Dr and Mrs Bradley, as a partnership. However, she was running the shop on a day to day basis and, to that extent, operated at a more senior level than that of a shop assistant.

6. The claimant says she was asked by customers, friends and family if Capella was for sale at the start of 2018. Her account is that she asked the respondents about it and they denied it. They told her that they would not be opening another shop if they wanted to sell the business and that she should tell people that it was not for sale. The Tribunal heard evidence from Dr Bradley about his attempts to market the business for sale during the course of the claimant's employment. We accept his evidence about this. His account was that the shop was initially put on the market with a local agent on a 'non-confidential basis' from April 2018. This attempt to sell the business was unsuccessful and the Bradleys were unhappy with the services of the agent. They instructed that agent to take the business off the market at the end of 2018. In around April 2019 it came to their attention that the sales advertisement was still visible online and so they instructed the agent to take the advert down. They subsequently decided to make a second attempt to sell the business. This time they instructed a London based agent who put it on the market on a so-called confidential basis from June 2019. We accept Dr Bradley's evidence about when the business was being marketed for sale. He accepted that it was entirely possible that adverts for the sale of the business remained online even after the closure of the shop and during the course of the Tribunal proceedings.

7. On about 14th March 2018 the claimant requested a pay rise as she felt she had taken on more responsibility within the shop (page 45). The context for this is that the claimant was in the process of buying her first home and she was struggling to save the funds for the purchase. She had also been offered cleaning work at £12 per hour which she had started to consider as an alternative to her earnings from the respondents. In addition, the claimant had also developed a hobby into a small side business called "Arty Lark" selling "pebble art" picture frames in order to boost her income. The claimant met Mrs Bradley for a coffee to discuss the pay rise and to see if she could sell some of her craft items in the shop. This was agreed (e.g. sample invoice page 49). At this time Mrs Bradley agreed to the pay rise from the end of one year's service and also said the claimant could have a £75 per month allowance to buy goods from the shop (e.g. page 46). The claimant's salary was increased to £10 per hour.

8. At around this time the claimant says that Mrs Bradley told her that the respondents had plans for opening another shop and possibly making the claimant manager of one of the shops. She also asked Miss Tooke if she would be interested in buying the business in the distant future. The claimant's response was that she did not know and that her priority at the time was buying a house. The Tribunal accepts that the Bradleys did not indicate to the claimant that any sale of the business was imminent. Rather, there was an acknowledged intention to retire from the business at some point in the longer term. No definite time frame was discussed and the sale was not said to be taking place in the near future.

9. The Tribunal accepts that in early 2019 the claimant received a phone call in the Settle shop from someone wanting to speak to the owner about the sale of the business. Later that day Mrs Bradley came into the shop and the claimant passed

the message on. The claimant once again questioned if the business was for sale and Mrs Bradley denied it. The claimant witnessed a phone call from Mrs Bradley to Dr Bradley in which Mrs Bradley told her husband about the call the claimant had received and said something about it being an old advert which they would make sure was taken down immediately. The claimant says this is the first time that the Bradleys had effectively admitted that the shop had been on the market. However, at that point they assured her that they were no longer planning on selling and that they wanted to continue with the business.

10. The Windermere shop opened in July 2018. The claimant worked one day per week at the Windermere shop from July 2018 until March 2019. This increased her working time from four days per week up to five. She remained on a five-day working week until she stopped work for maternity leave. The claimant had initially agreed to work one day per week at Windermere for a period of six months but in the end the arrangement continued for over nine months in total. During the period that she worked at both shops she received a single payslip. Her work at Windermere was referred to as a secondment and her petrol money for travel to Windermere was referred to as "secondment" on her payslips (e.g. pages 47 and 48). The evidence to the Tribunal was that payments of petrol money or travel expenses were only made where the employee was having to undertake extra travel in order to undertake work as part of a secondment. Travel to and from the employee's main place of work would not attract payment of petrol money/travel expenses. In any event, the claimant disputed the reasonableness of the sums offered by way of travel expenses for her work in Windermere. She felt that the rate paid was inadequate and entered into correspondence with the respondents to this effect.

11. The claimant recruited a friend called Pollyanna Williams to work at the Windermere shop. They had previously worked together at Laura Ashley. Pollyanna started work at Windermere as soon as the shop opened in July 2018. Pollyanna confirms that when Windermere opened in July 2018 she worked Monday to Wednesday in the shop and Thursday from home; the claimant worked one day (usually a Thursday) and the other staff or the Bradleys covered Friday-Sunday. When the claimant took another day in Settle and stopped working in Windermere, Pollyanna worked Monday to Thursday in Windermere and Friday to Sunday was covered by other staff or the Bradleys. Both Settle and Windermere were usually only staffed by one employee at any given time. Pollyanna also questioned whether the business was for sale during the course of her employment and was reassured that it was not.

12. The claimant became pregnant in January 2019 and informed Mrs Bradley of the pregnancy after her 12-week scan. A schedule of claimant's time off for pregnancy-related appointments etc can be found at page 64 of the bundle.

13. Mrs Bradley suggested that the claimant should go back to working full-time in Settle in April 2019 and the claimant was happy to do so. It made attending her midwife appointments easier and was more comfortable for her than driving to Windermere whilst pregnant. Her work at Windermere ceased at that point.

14. In April 2019 the claimant negotiated a further pay increase to £10.50 per hour (page 55). This recognised her relative seniority within the workforce but she was not

formally promoted to a management role, as such. Her job title remained that of 'sales consultant'.

15. On 14th June 2019 the claimant gave notice of maternity leave [p61]. In the document she stated that she had *"been advised by my midwife that I must not be lifting/carrying and also not to sit or stand for too long. I have noticed over the last couple of weeks I needed to sit down/rest a lot more than usual so have been splitting up my day by sat down and stood up jobs. However, I've been having the problem with my sciatic nerve and wondered if we could get a chair/stool with a back support on it in the shop? (I sound like an old lady I'm sorry ha ha)."*

16. The claimant took holiday for three weeks from 7th September until 27th September 2019 before she started maternity leave (page 62). The claimant commenced maternity leave on 28th September 2019. She gave birth to her baby on 30th September 2019. She intended to take maternity leave and return to work in the first week of July 2020.

17. The respondents arranged for a "locum" to cover the claimant's maternity leave. This was a lady called Conny Bell who started work on 7th September 2019. Prior to that locum cover she had already worked occasional days for the respondents to cover staff holidays between July and September. Once the claimant went on maternity leave the other staff members working at the Settle shop were Gillian Ward, John Robinson and Laurie Tebbutt. Gillian worked variable hours and John Robinson worked half days a week. In the Windermere shop the employees were Beth Parkinson and Pollyanna Williams (until she left in October). When Pollyanna left her employment at the Windermere shop she was not replaced. Laurie Tebbutt covered odd days in both shops as and when needed.

18. When the claimant started maternity leave in September there was no discussion with her about the respondents' plans to sell the business. The claimant talked about returning to the shop after her maternity leave and there was nothing to indicate that she would not be returning to work after maternity leave.

19. Whilst on maternity leave the claimant heard from a colleague and from a friend that Capella was closing. She says that she was never told by the Bradleys that the shop was up for sale. In cross examination the claimant denied that the respondents' retirement plans had been discussed with staff. She accepted that she thought they would retire at some point but there was nothing to suggest that this was imminent. She would have thought they would tell her if retirement was imminent when her maternity leave started. No time frame was ever discussed.

20. The first material communication between Dr Bradley and the claimant during maternity leave was the email of 24th of October (page 71). That email confirmed that: Capella had been up for sale during the second half of the year; that this was based on Dr Bradley reaching retirement age in January 2020; that they had not yet found a buyer and that if they did find a buyer they would strongly recommend to the new owner that they continue to grow the business with the current team. It confirmed that if the respondents did not find a buyer by the end of 2019 they would be closing Capella Home and Gift and that this would mean redundancies for the team. Dr Bradley confirmed that in those circumstances he would write to the

claimant before the end of November giving her four weeks' notice as required by her contract and detailing arrangements for finalising employment. He closed the email by confirming that they were working hard to find new owners and requested that the claimant keep the situation confidential. The last paragraph is *"if you would like to come into the shop at any time to ask questions we would be only too pleased to meet up."*

21 The respondent points out that there was then a delay of two weeks between the respondent's email of 24th October and the claimant's response on 6th November. The Tribunal's view is that, taken in the proper context, this was not an unreasonable delay. The claimant was a new mother and her partner had been involved in a serious accident and had fractures to both feet. The claimant's caring responsibilities were therefore significant. In the Tribunal's view the respondent was not entitled to assume that the delay meant that the claimant was not interested in avoiding redundancy. This is particularly so given that she subsequently did engage in email correspondence and asked in terms about the impact of redundancies on her future employment.

22. The claimant responded to the respondents' message via email dated 6th November 2019 (at page 72). The message reads: "*Sorry it's taken me a while to reply I got a lot going on and Dan has had an accident and has broken both feet so life is a little chaotic right now. Flissy is doing amazing though thank you! I hope both you and Kairen are keeping well. I'm pretty disappointed that it's taken you this long to contact me about your plans with Capella. You put in your email "as you may already know Capella has been for sale" and yes it came to my attention several times over the last year through seeing it advertised, receiving phone calls and word-of-mouth but whenever Polly or I questioned it with yourselves it was denied and we were told the business was definitely not on the market. Over the last couple of months, I have again heard same rumour from several people before actually hearing it from yourself. I find it quite upsetting that I was warned I would be losing my job through other people rather than you informing me of your plans earlier when the rest of the team were informed considering I've played a major part in Capella the last 2 1/2 years. I have received messages from customers asking what is going on and I'm saddened to hear that Capella are having a closing down sale before the end of November, which was when you stated you'd let me know if you were giving me a month's notice. I presume from hearing this that no buyer has been found and redundancy will therefore be taking place. I would like to know what this means for me, how this affects my maternity leave and also if both shops are closing? I also had done the eight pebble pictures which were needed for the shops so would like to know what you would like me to do with these? Look forward to hearing from you et cetera et cetera*"

23. In cross examination it was put to the claimant that she didn't say she wanted to work at Windermere in her email of 6th November. Her explanation was that she wasn't aware that this was an option. She also wasn't aware that other employees at Settle were going to be working at Windermere. She went on to explain that she had a lot going on and a lot on her mind at this point. She accepted that she didn't ask for Windermere employment but points out it hadn't been offered. This is entirely consistent with her later correspondence. Indeed, the respondents' correspondence of 11th November (see below) made it clear that continued employment at Windermere was not an option. The claimant was entitled to take the respondents at their word in this regard.

24. It was also put to the claimant that it took her 110 days to raise the issue of employment at Windermere with the respondents. In response she confirmed again that she had a new baby her and her partner had had a severe accident. She also did not know what her rights were. She had contacted ACAS at the beginning of December who referred her to the Citizens Advice Bureau. She could not get to see the CAB until January and it was only after a couple of meetings that she was passed to her current representative and she realised she had a case and should do something about it. She asserts that she didn't know she could raise a grievance or ask about alternative work until she spoke to her current representative. The Tribunal considers that this explanation is reasonable in all the circumstances.

25. Dr Bradley's response to 6th November email was dated 11th November 2019 (page 73). He confirmed that they could not rule out finding a buyer for Capella Settle right up to the last minute so he would write at the end of November if they were still in the position of closing at year end. He also responded to some of the claimant's questions as follows: *"We can understand your confusion as there was a period around 2018 when Settle was on the market. It was then definitely taken off. The combined business was on the market in the latter part of 2019. We don't brief any of the team on these aspects as, unless there is a real prospect of a sale, there is no benefit to anyone. It has never been a secret amongst the team that we would retire sooner or later."… "Whatever the rumours, after private discussions with the landlord we only decided to close Capella Settle on 22nd October-and informed all the staff within a 24-hour period."… "Only Capella Settle may close-they are quite separate businesses. If no buyer is found by the end of November we must give people a month's notice of closure. I will write to you at that time with an update on what that means for you. Even after that a buyer maybe found-we can't predict the future."*

26. We accept the claimant's evidence that her folder in the group email address was deleted before the respondents made her redundant. At the time she thought it was accidental but later suspected that it indicated that the respondents had already made a firm decision that she would be made redundant. Given the respondents' view at that time that they could treat the two shops as entirely separate businesses for the purposes of the redundancy and redeployment and their view that they did not have to consider redeployment at Windermere, the Tribunal accepts that the Bradleys probably did think that the claimant would be made redundant on closure of the Settle shop and would not be redeployed elsewhere. The deletion of the email folder probably did indicate that dismissal was predetermined to that extent.

27. On 5th November the claimant received an email from a mailing list with details of a closing down sale due to relocation and confirmation that Capella was closing its doors on 24th December. She says she also continued to receive several emails about closing down offers between then and the end of December.

28. On 7th November 2019 the claimant found an advertisement for the Windermere business online (pages 107-116). The advertisements clearly note that key staff and infrastructure are already in place and that they are not owner dependent. It states that the business was set up by the vendors some 6 years ago and had moved to its current location over the last 18 months. The claimant says that this last point clearly contradicts what Dr Bradley had said about them being two separate businesses. She points out that the advert also advertises the business as a going concern with

seven-day staff cover and that at the time this was not the case as there were only part-time members of staff there. There is a further advertisement at pages 99-105 of the bundle. This appears to be the confidential sale advertisement, as described by Dr Bradley in his evidence. It also confirms that key staff and management are in place and confirms that there are two locations which the vendors intend to sell together, although they may consider selling them separately. The Tribunal considers that at all relevant times the Bradleys did look at the shops as two separate businesses and therefore, as a matter of fact, they did not think that they had to look at redeployment of staff from one shop to another as an alternative to redundancy. This is evident from what they said and wrote during the course of the redundancy process. The Tribunal also considers that these advertisements have to be taken for what they are: advertisements designed to appeal to potential buyers. Their contents have to be viewed in that light. They say what they say in order to try and achieve a sale. They also indicate that the respondents were aware that staff could be transferred to work between the two businesses, even if they did not think that they were under any obligation to do so.

29. The claimant says that on 15th November she was told by a mutual connection that the respondent had already decided to close Settle and the building was up for rent on Rightmove and the shop had a big closing down sale sign in the window.

30. On 30th November the claimant received notification of redundancy in a group email (page 75). The email confirmed that the shop would close for good on 31st December 2019 and that there would be redundancies for the team. It confirmed that the respondents would write to each staff member individually with their November payslip detailing the implications and arrangements for finalising their employment including aspects such as redundancy pay, maternity pay and holidays.

31. The claimant received her individual notification of redundancy in an email dated 1st December (page 76). It confirmed the payments owed to the claimant and closes with the paragraph: *"if you would like to discuss any of the points above please let me know a suitable date that we can meet."* The claimant's case is that she was not physically consulted about her situation and although there was an invitation to meet if there was anything she wished to raise (see email of 1st December) she was under the impression that there were no jobs available as she had seen that everybody was being made redundant courtesy of the group email of 30th November. She also felt that the status of the Windermere shop was completely confused at that point in time. In her view, at that time it looked as though the Windermere shop might be closing. We accept that this is what she thought at the time based on the information she had available to her from various sources.

32. There was no meeting between the claimant and either of the respondents to discuss any of the issues arising from the proposed redundancy. Nor was there a phone call. There was no discussion of any alternatives to termination of the claimant's employment. The respondents clearly felt that the claimant could, would or should contact them to arrange a conversation (either face to face or by phone) to discuss any queries that she might have. They left it with her to take the initiative and initiate any such direct conversations or two-way consultations.

33. The respondents did not offer the claimant the right to appeal against the decision to terminate her employment.

34. During the course of the hearing much was said about the claimant's attitude to working at the Windermere shop, both before and after her maternity leave. It was noted that the claimant had in fact travelled to work in Windermere over a period of nine months instead of the six months she had initially agreed. The claimant also enjoyed working back in the town where she had grown up and where she already knew people. The journey to Windermere from home was geographically further for the claimant than travelling to Settle (43 miles each way). It may well be that the use of a bypass reduced the difference in travelling time somewhat.

35. The Tribunal finds that the claimant did not have any issue, per se, with working at Windermere. She was happy to travel. The journey, although longer than the commute to the Settle shop, was not an unreasonable or particularly arduous one. It is the sort of journey that many employees living in more rural areas may have to make in order to get to and from work. However, one of the main purposes of a job is to earn a living. Thus, the claimant's willingness to travel and work in Windermere depended on the number of hours available and the applicable rate of pay. In short, the job would have had to have made economic sense for her to consider it. We find that, if the prospect of working at Windermere had been put to her she would have considered the offer on its merits and worked out whether she would have benefitted from retaining a job on the terms on offer or whether the alternative employment would actually have left her out of pocket. It is relatively straightforward for a claimant to say, "any job is better than no job" but, in truth, that is not always the case. It depends on the financial considerations whether it is worth travelling further for work viewed in light of a claimant's other personal and family commitments. We also accept that, during her pregnancy, the claimant started to find the extra travel to Windermere more uncomfortable. However, that was, by definition, a temporary state of affairs. The respondents were not entitled to assume that, even after she had her baby, she would not want to travel to Windermere. They would have been able to conclude for themselves that the physical discomfort would no longer be a problem.

36. The Tribunal also notes that the respondents had other members of staff working at Windermere who also travelled from Settle to get to work. There was one member of staff who worked part-time who lived in Windermere. All the rest of the staff had to travel from Settle daily. In January 2020 the Windermere shop was largely staffed by Settle residents (see rotas pages 90 to 95). As far as the Tribunal can tell from the evidence it has heard, Gillian, Conny and Laurie did the same physical job as the claimant when they worked at Windermere but without the management element. They effectively acted more as shop assistants.

37. The claimant asserted in evidence that she began to feel excluded from the business once she started her maternity leave. She pointed out that Gillian received recognition for what she had done for the business in the email at page 83 but the claimant did not receive such recognition. The Tribunal accepts that this was somewhat tactless on the respondents' part. The claimant also said that she was excluded from a belated Christmas meal in relation to Christmas 2019. The Tribunal finds that, in fact, there was no staff Christmas meal in the usual way in 2019. Instead, there was an informal and belated gathering at a pub after the staff had helped to clear out the Settle shop for the respondents. It was an ad hoc gathering

to thank those who had assisted with the closing of the shop rather than the usual Christmas party. Whilst the claimant may well have felt hurt at being excluded from this, the Tribunal accepts that this was not intentional on the respondents' part. The Tribunal does not infer from the lack of invitation to the claimant that she was, in fact, being excluded from the workforce any more than would flow naturally from the fact that she was not actually at work when the shop was closed and so was not involved in the work to close the shop. She was just not present and, to that extent, was overlooked by the respondents.

38. The respondents closed their business in Settle with effect from 31st December 2019. The claimant was dismissed whilst on maternity leave**.**

39. On 11th February 2020 the claimant emailed the respondent (page 80). She complained that the respondent had acted unfairly, that she had not been offered any alternative work or an explanation why this wasn't possible. She asserted that other members of staff had taken on roles within Windermere (including Conny who was covering the claimant's maternity leave). She complained about the lack of a meeting to discuss redundancy and the lack of any direct contact with her by the respondents. She complained about the deduction of holiday pay. She asserted that she was looking to recover her holiday pay and compensation for being unfairly treated. In cross examination the claimant accepted that she sent this email after she had spoken to her CAB representative (Miss Cadbury) and had been advised to engage in early conciliation. The claimant accepted that this was the first time that she mentioned suitable alternative employment and working at Windermere to the respondents.

40. The respondents' response to the claimant's correspondence was an email dated 12th of February (page 81). In that email Dr Bradley noted that he was surprised to hear from the claimant at this late stage given the lack of any further comments or questions raised by her since 6 November 2019.He pointed out that he had offered specifically to meet the claimant to discuss any details (in his email of 30th of November) and the claimant had not taken up this offer. He confirmed that he had explained that Windermere was a separate business, a separate legal entity and a separate employer and that he believed he was under no obligation to offer employment to those made redundant from the Settle store. He confirmed that if the claimant was not satisfied with his response and had advice to suggest that the respondents had made a mistake then she should ask her advisers to write to the respondents and they would pass it on to their solicitor for review.

41. In cross examination it was put to the claimant that she had been told by the respondents to get her legal advisers to write to them and it was queried why she had not done so. Her response that she sent her emails to ACAS and they told her what to do and that she was just following that advice.

42. The Tribunal finds that at the relevant time Dr Bradley genuinely thought that the two shops were separate businesses and that he was under no obligation to do more to redeploy staff between the two sites. It is a question for the Tribunal to address (below) whether that understanding was legally correct and whether the respondents were in fact under any further legal obligations during that period.

43. The claimant's next correspondence with the respondents was the email dated 14th February 2020 (page 82) where she asked the respondents to deal with ACAS from then on. She stated her understanding of her legal position and made it clear that she felt she had special protection under the 1999 Regulations as a woman on maternity leave. She also made it clear that she felt that Capella Windermere and Capella Settle were either the same company or associated employers. In response Dr Bradley asked for the ACAS contact details and was advised that ACAS would be in touch once they had copies of all the emails.

44. The Tribunal's attention was drawn to the rota documents for the Windermere shop which were contained in the bundle. The Tribunal was assisted by the handwritten annotations at pages 90-95. It appears from that evidence that:

    (a) During January 2020 29 working days were covered by employed staff and one day was covered by Mrs Bradley. The staff worked 7, 8, 12 and 2 days each, respectively. There was a total of 30 working days available.

    (b) During February 2020 16 working days were covered by employed staff and 11 days were covered by the Bradleys. The staff worked 7 and 9 days each and the Bradleys covered 10 and 1 days each. A total of 27 working days were available.

    (c) During March 2020 12 working days were covered by employed staff. They worked 5,5 and 2 days respectively. The Bradleys worked 4 days in the shop. There was a total of 16 working days available.

45. Based on a five-day working week the claimant would normally have worked approximately 22 days per month. This means that January and February 2020 would have had approximately full time work available for the claimant if the view were taken that that Bradleys should not be permitted to do some of the work themselves and that all of the available hours should be given to the claimant. On the other hand, if the owners were entitled to do some or all of the work and only employ others where necessary then a full-time job was only available for the claimant in January and not in February or March 2020.

46. As previously stated Conny effectively provided cover for the claimant when she started her maternity leave (page 85). She was not paid at the same rate as the claimant (£8.50 as opposed to £10.50). She was made redundant with effect from 31st December 2019 (page 86). She started working at the Windermere shop on 2nd January 2020 (page 90) and did 12 days in total in January, including every Thursday. She was no longer working for the respondent in February. The respondent says that this was because she had decided the job was not for her and that the days worked in January were "taster" days to see if she wanted to work in Windermere going forwards. The claimant says that Conny left because she wanted to travel, not because of anything which the respondents said or did. Whichever party is correct, it is apparent that Conny chose to leave the respondent's employ and this implies that there would have been a job for her in February had she wanted it. It appears that once Conny left her days were generally covered by the owners of the business working in the shop with Laurie Tebbutt filling in on occasional days.

47. Gillian Ward took a part time role at Windermere working two days per week at £8.50 per hour. The respondent's case is that this was not offered to her as part of the redundancy consultation but that she approached the respondents after the New Year and started work on 7th January 2020. Either way, taking account of the

Christmas holiday period there was effectively no break in her time working for the respondents: she finished in Settle at the end of 2019 and started in Windermere in the first full working week of 2020.

48. Only one member of staff who worked in the Windermere shop from 2020 was actually living in Windermere. The rest all commuted from Settle.

49. The Windermere shop was closed between 17th March and 3rd July as a result of the pandemic lockdown. The two-part-time staff were on furlough. Those part timers would have worked 9 days each in the month of June and were paid furlough on that basis (p119,120). A decision was taken to close the Windermere shop. The two staff at Windermere were made redundant at the end of July and trading was due to cease completely by the 27th September 2020. The claimant's view is that she would have been able to return to work at the end of her maternity leave at the beginning of July until the shop closed down in September 2020.

50. The parties agree that in March/April 2020 the respondents offered the claimant another job. The claimant says that she turned it down because she felt quite hurt by the respondents' treatment of her since she began maternity leave. She did not feel comfortable going back to work for the respondents given the way the relationship had developed and the way her employment had been terminated. Her perception that she had been excluded from the Christmas meal added to her discomfort.

The law

Automatic unfair dismissal

51. Section 99 of the Employment Rights Act 1996 (so far as relevant) states:

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

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

(b) the dismissal takes place in prescribed circumstances.

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

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

(a) pregnancy, childbirth or maternity, …

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

(c) parental leave, …

And it may also relate to redundancy or other factors…."

52. The relevant regulations are the Maternity and Parental Leave etc Regulations 1999. The applicable provisions (so far as relevant) are:

20 Unfair Dismissal

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

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

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

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

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

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

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

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

(a) *the pregnancy of the employee;*

(b) the fact that the employee has given birth to a child;

(c) the application of a relevant requirement, or a relevant recommendation, as defined by section 66 (2) of the 1996 Act;

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

10 Redundancy during maternity leave

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that-
(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and
(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not

substantially less favourable to her than if she had continued to be employed under the previous contract.

53. Guidance on the proper interpretation of the regulations is provided by the judgment in Simpson v Endsleigh Insurance Services Ltd [2011] ICR 75. Both limbs of regulation 10(3) need to be satisfied before an employee is entitled to be offered alternative employment under regulation 10(2). The requirement to offer a suitable available vacancy under regulation 10(2) is contingent upon the new terms and conditions not being 'substantially less favourable' to the employee. If any of the terms and conditions associated with the vacancy are substantially less favourable, the employee is not then entitled to be offered the position, even if the work is otherwise suitable and appropriate for her. Less favourable terms may, of course, also indicate unsuitability. The EAT also made it clear that it is for the employer to decide whether a vacancy is suitable, 'knowing what it does about the employee', in terms of the employee's work experience and personal circumstances. The EAT did not consider that the employee was required to engage in the process of determining suitable vacancies for her, although she may well wish to have some involvement.

54. The suitability of a job is a question of fact to be decided in light of the individual employee's circumstances. The 1999 Regulations refer to work that is suitable in relation to the employee and appropriate for her to do in the circumstances. A tribunal can take into account any additional domestic problems caused by having a young baby e.g. if there is an issue over increased travelling time to get to a job in a different location. However, suitability should be judged from the perspective of an objective employer, not from the employee's perspective. It is up to the employer, knowing what it does about the employee's personal circumstances and work experience, to decide whether or not a vacancy is suitable and there is no requirement for the employee to engage in this process.

Ordinary unfair dismissal

55. In determining a claim of ordinary unfair dismissal section 98 Employment Rights Act 1996 confirms that it is for the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons for dismissal set out within the section. In this case the respondents assert that the dismissal was for redundancy as defined by section 139 Employment Rights Act 1996 thus:

"(1) 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-

(a) the fact that his employer has ceased or intends to cease-

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business-

(i) for employees to carry out work of a particular card, or

(ii) for employees to carry out work for particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"

56. The claimant was dismissed. She accepts that there was a redundancy situation and that the redundancy was the primary reason for dismissal. The Tribunal must therefore consider whether the dismissal was fair within the meaning of section 98(4) Employment Rights Act 1996:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

58. In considering the fairness of the dismissal the Tribunal will apply the test of the range of reasonable responses and will not substitute its own judgment for that of a reasonable employer.

59. In a redundancy unfair dismissal, the issues to be addressed are generally those identified in Williams v Compair Maxam Ltd [1982] ICR 156 namely whether the employer has acted reasonably and in accordance with the following principles:

(1) whether the selection criteria were objectively chosen and fairly applied;

(2) whether employees were warned and consulted about the redundancy;

(3) whether, if there was a union, the union's view was sought, and

(4) whether any alternative work was available.

60. Polkey v AE Dayton Services Ltd [1988] ICR 142 established that a failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile'. With regard to redundancy dismissals, this meant, in the words of Lord Bridge, that 'the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation'.

61. In Mugford v Midland Bank [1997] IRLR 208, the EAT summarised the state of the law as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

62. In this case all the employees who worked at Settle for the respondents were in fact dismissed for redundancy. Therefore, the issues of a correct pool for selection, fair selection criteria or the fair application of selection criteria do not arise on the facts of this case.

63. In considering whether an employer has acted fairly in considering alternative employment for an employee at risk of redundancy the Tribunal must not substitute its own view for that of a reasonable employer. The range of reasonable responses test still applies.

64. It may sometimes be appropriate for employers to consider the availability of alternative employment not only within the particular company in which the employee is employed but also within other companies in the same group. The IDS Employment Law Handbook (Vol 9 paragraph 8.190) refers to the unreported case of Euroguard Ltd v Rycroft EAT 842/92 GTS Ltd, and confirms that the EAT took the view that there might be circumstances in which it would be appropriate to look beyond the immediate employer to other companies within the group when considering the availability of alternative employment. In that case the affairs of the company in the group, at least in regard to the appointment and redundancy of staff at the employee's level, were closely integrated: the same individuals were involved and the same policy applied. The EAT concluded that the tribunal had been entitled to find the claimant's dismissal unfair. IDS Handbook goes on to note, however, that where there is evidence that the companies within a group operate autonomously, it will not be open to a tribunal to conclude that an employer should have allocated an employee to a vacant position within an associated company (Parfums Givenchy Ltd v Finch EAT 0517/09).

65. In some cases, all employees may be dismissed and then asked to reapply for a new job. Whilst that is not strictly what happened in this claimant's case (as there was no specific recruitment exercise to allocate work at Windermere once Settle closed) it may still be instructive to consider the guidance of the higher courts in these sorts of cases in examining how the respondents went about filling staff positions at Windermere. Several cases indicate that in such cases, where the question under consideration is the appointment of employees to a new post rather than the selection of which employee will be made redundant from a pool of "at risk" employees, the strict principles in Williams v Compair Maxam are not directly applicable. The guidelines do not apply to selection for alternative employment, where the issue is whether the employer has taken reasonable steps to find alternative employment for the employees. However, the employer is at least obliged to conduct the selection process in good faith and give proper consideration to the redundant employees' applications. A degree of objectivity is still important

but the task is more a task of selection for recruitment than selection for redundancy. This may give the employer more room for discretion and the exercise of its own judgment. In the end, the Tribunal must apply the test in section 98(4) 'unvarnished.' (see guidance in: Akzo Coatings plc v Thompson and ors EAT 1117/94; Darlington Memorial Hospital NHS Trust v Edwards and anor EAT 678/95; Ralph Martindale and Co Ltd v Harris EAT 0166/07; Morgan v Welsh Rugby Union 2011 IRLR 376; EAT Samsung Electronics (UK) Ltd v Monte-D'Cruz EAT 0039/11) The yardstick will always be the range of reasonable responses.

66. It will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position. The EAT suggested in Barratt Construction Ltd v Dalrymple 1984 IRLR 385 that a senior manager who was prepared to accept a subordinate post rather than being dismissed should make this known to his or her employer as soon as possible, although the EAT did not lay down any hard and fast rule to this effect. Employers still have an overall duty to consult employees. Whether an employer's failure to offer an at-risk employee an inferior position will render a dismissal unfair will depend on the circumstances of the case. Other divisions of the EAT have accepted that employers might be expected to offer an alternative job even if it involves demotion and should not readily assume that the employee will reject it. In Fulcrum Pharma (Europe) Ltd v Bonassera UKEAT/0198/10 the EAT stated that the starting point might be the element of consultation with the senior employee to ascertain his or her views on a possible demotion, thus linking the question in to the overall consultation requirement. Where such alternative employment is available, the employers must ensure that sufficient information is given to the employee to enable him to make a realistic decision about whether to accept the job or not (Modern Injection Moulds Ltd v Price [1976] IRLR 172).

67. Since the reasonableness of a dismissal is dependent on the situation known to the employer at the time of the dismissal, the appearance of an alternative job after the employee has been dismissed cannot make the dismissal unfair. However, where an employer knows that work will become available in a short time it may be unreasonable to dismiss an employee for redundancy.

Section 18 claim

68. Section 18 of the Equality Act 2010 states:

"(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably-

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

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

…..

(5) the protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends-

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;

(b) if she does not have that right, at the end of the period of two weeks beginning with the end of the pregnancy."

68. In determining a claim of section 18 discrimination the comparison between the claimant's case and that of a comparator is not required. The claimant need only establish "unfavourable treatment" which is "because of" the pregnancy or maternity leave. The EHRC Code of Practice at paragraph 8.19 confirms that although the use of a comparator is not necessary in a section 18 claim, evidence of how others have been treated may be useful to help determine if the unfavourable treatment is in fact related to pregnancy or maternity leave.

69. Paragraph 8.22 of the EHRC Code also provides useful examples. It confirms that it will amount to pregnancy and maternity discrimination to treat a woman unfavourably during the protected period because of the fact that, because of her pregnancy, the woman will be temporarily unable to do the job for which she is specifically employed whether permanently or on a fixed term contract or because of the costs to the business of covering her work. Further useful examples are given at paragraph 8.23 which include the failure to consult a woman on maternity leave about changes to her work or about possible redundancy.

70. Pregnancy/maternity need not be the sole reason for the dismissal or failure to offer alternative employment. The question is whether it was "an effective cause" of the alleged act of discrimination. This does not necessitate a "but for" causal relationship. It is sufficient if the protected characteristic had a "significant influence" on the outcome (Nagarajan v London Regional Transport [1999] IRLR 572). The Tribunal is asked to look for the "reason why" the employer acted as it did. What was the conscious or unconscious reason? (Chief Constable of West Yorkshire Police v Khan[2001] UKHL 48, [2001] IRLR 830, [2001] ICR 1065). What, out of the whole complex of facts … is the "effective and predominant cause" or the "real and efficient cause" of the act complained of?' (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372*).

71. Motive is irrelevant. Likewise, discrimination need not be intentional. It is possible to discriminate unconsciously or because of a stereotypical assumption.

72. Section 136 governs the burden of proof in discrimination claims. It states:

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

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

73. Paragraphs 15.32- 15.35 of the EHRC Code state:

> 15.32 A claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred.
>
> 15.33 An employment tribunal will hear all of the evidence from the claimant and the respondent before deciding whether the burden of proof has shifted to the respondent.
>
> 15.34 If a claimant has proved facts from which a tribunal could conclude that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend the claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal must find that the act was unlawful.
>
> 15.35 Where the basic facts are not in dispute, an employment tribunal may simply consider whether the employer is able to prove, on the balance of probabilities, that they did not commit the unlawful act.

74. Guidance on the correct approach to the burden of proof was set out in Igen Ltd v Wong [2005] IRLR 258 as approved in Hewage v Grampian Health Board [2012] IRLR 870. Its continued applicability was confirmed in Efobi v Royal Mail Group [2019] IRLR 352 where Elias LJ stated:

> "'First, the burden is on the employee to establish facts from which a tribunal could conclude on the balance of probabilities, absent any explanation, that the alleged discrimination had occurred. At that stage the tribunal must leave out of account the employer's explanation for the treatment. If that burden is discharged, the onus shifts to the employer to give an explanation for the alleged discriminatory treatment and to satisfy the tribunal that it was not tainted by a relevant proscribed characteristic. If he does not discharge that burden, the tribunal must find the case proved."

Conclusions

Automatic unfair dismissal

75. The claimant accepts that this was a redundancy situation. The claimant accepts that this was the primary reason for the dismissal. So, the question posed by the claimant in this case is:

> Did the respondent automatically unfairly dismiss the claimant by failing to adhere to the obligation to offer her an alternative role under the 1999 MAPLE regulations? The claimant's case is that there was a suitable alternative vacancy available in Windermere and she was entitled to be offered that alternative employment. She asserts that the respondents' failure to offer that alternative role means that she was automatically unfairly dismissed. The respondents' case is that there was no suitable alternative vacancy at Windermere which met the requirements of the 1999 regulations. Therefore, the claimant was not automatically unfairly dismissed.

76. The automatic unfair dismissal complaint hinges on whether there was an obligation to offer alternative work at Windermere pursuant to regulation 10 of the 1999 Regulations. The Tribunal has concluded that there was no such obligation as there was no such suitable alternative vacancy for the claimant on the facts of this case.

77. There was clearly some work available at Windermere doing some form of shop assistant duties from January 2020. However, there was no 'vacancy' as such. The claimant is essentially arguing that a job should have been created for her from all the available hours of work at Windermere. She effectively says that the hours should have been 'totted up' to create a suitable role. The Tribunal has considerable doubt as to whether regulation 10 actually requires an employer to create a role from the available work in order to offer it to an employee on maternity leave. Regulation 10(2) refers to a 'suitable alternative vacancy' and not to suitable alternative work. This could be read as implying that the job "role" or "post" needs to be both suitable and available not just that suitable alternative "work" needs to be available. If there were an obligation to offer "work" rather than a "vacancy" one would expect the regulations to say so in terms. Furthermore, an obligation to create a job role from the available work whenever there is a pregnant woman at risk of redundancy would significantly tie the hands of an employer as to how it was permitted to restructure its business in a redundancy situation. The Tribunal is mindful of the fact that these regulations apply to businesses of all sizes. It would be unrealistic and unreasonable in, say, a large restructuring exercise, to say to an employer that they can restructure the business as they see fit save that they must collate available work duties and create vacancies for those returning from maternity leave when, otherwise, no such vacancies would exist within the new structure. Likewise, in this case, the pattern over the first few months of 2020 was that the directors did more of the hands-on work at Windermere themselves. This reduced the costs to the business as they were not paid employees and reduced the need for paid employees to man the shop. This was a reasonable approach for them to take and the Tribunal is unable to find that they were required to pay employees to undertake this work when they could do it at less cost to the business.

78. In any event, even if we are wrong about the need for there to be an existing suitable "vacancy" as opposed to suitable available "work" we still conclude that the claimant's argument must fail on the facts of this case. Any role at Windermere would have been substantially less favourable to the claimant than if she had continued to be employed under the previous contract. In particular:

    (a) She would have been employed at a lower hourly rate (£8.50 as opposed to £10.50).

    (b) She would have had to travel further to Windermere rather than Settle. This would have taken longer and cost more.

    (c) Petrol money was not payable for an employee's main job, only when they were doing a secondment. The claimant would therefore have been forced to meet the increased travel costs out of her own money. Given that she had complained that the petrol money previously paid was insufficient, it is hardly likely that she would have been satisfied with this.

    (d) The available work was of a lower status than the claimant had previously enjoyed. Although her job title had remained the same, she had taken on a more managerial role than other employees within the business prior to her maternity leave. This seniority would not have been preserved at Windermere either in terms of pay or status.

    (e) The role was unlikely to be full time. Even if all the available hours were given to the claimant, the number of hours undertaken by paid employees reduced over time.

The above factors indicate that any role at Windermere would be substantially less favourable than her previous post and would not meet the requirements of regulation 10(3)(b) even if the work were suitable and appropriate within the meaning of regulation 10(3)(a).

79. The Tribunal heard a good deal of argument about whether the respondent was entitled to assume that the claimant would not be interested in working at Windermere based on its previous knowledge of her circumstances. In reality, the issue does not arise because the work at Windermere would have been (on any objective reading of the evidence known to the respondent) substantially less favourable than her previous post. Therefore, the obligation to offer the post would not arise for the purposes of the automatic unfair dismissal claim. In any event, we remind ourselves of the guidance in Simpson, above, to the effect that there is no requirement to get the employee to engage in consultation or an assessment as to whether the role is suitable. The employer is entitled to consider the circumstances as they know them to be. Whilst the respondents would not have been entitled to rely on the discomfort of travelling to Windermere in concluding that the vacancy was not suitable (given that this problem was pregnancy related) their knowledge of the claimant's other circumstances was relevant and would have rightly strengthened their view that there was no obligation to offer a post in Windermere. They knew that she now had significant caring responsibilities for her baby and that she had financial outgoings such as a mortgage. They knew that she could not take a job at any cost. It had to make some financial sense and travelling further for less pay would not make financial sense. The Tribunal is therefore content that the respondents were entitled to conclude that there was no job they were required to offer the claimant pursuant to regulation 10, given their knowledge of the claimant's circumstances.

Ordinary unfair dismissal.

80. The claimant was dismissed by reason of redundancy, which is a potentially fair reason.

81. The Tribunal has concluded that the dismissal was procedurally unfair. The respondents did not offer the claimant the right of appeal. This is a cornerstone of any fair procedure. Furthermore, the respondents did not arrange any two-way consultation meetings with the claimant, whether by telephone or in person. The Tribunal considers that the onus is on the employer to offer a fair consultation process and not on the employee to demand one. Therefore, the mere fact that they indicated, in emails, that they were willing to discuss the case further with the claimant if she asked for a meeting or a phone call is not sufficient. They should have offered specific consultation meetings and calls. If the claimant had then refused to participate then the respondents would have discharged their duties to the claimant and criticism might have been levelled at her (depending on her reasons for not engaging).

82. The broader context of the case should also have been borne in mind. This was an employee who was on maternity leave and thus somewhat 'out of the loop' in terms of general updates regarding the business. Had she still been at work she would doubtless have known more about the changes at Windermere and Settle. Instead she was on maternity leave and was therefore more dependent on her employers to keep her in touch with developments and inform her of future plans regarding

the businesses. She would not know, unless told, what was happening to Windermere and what the staffing arrangements were going to be. This is the sort of discussion that really needs to be had in person or by phone. This is underlined by the fact that the respondents never really satisfactorily answered the questions which the claimant did raise in her emails. The claimant specifically raised the fact that she had not been offered any alternative work or offered any explanations as to why this could not have been a possibility. She referred to others working in Windermere, including her maternity leave cover, Conny (page 80). Whilst the respondents did make clear in correspondence that they viewed Windermere as a separate business (and therefore felt they were under no obligation to offer employment there) the respondents did not clarify who was staffing Windermere and on what basis. There could have been discussions about whether, irrespective of whether Windermere was a separate business, there was work available there which the claimant could be offered or which could be kept open for her pending the end of her maternity leave. The respondents ignored the claimant's queries about the working of the Windermere shop. The respondents probably did think that they were two separate businesses and that there was no obligation to offer the claimant work at Windermere. However, had there been a consultation call, meeting or an appeal there could have been a full exploration of this issue including an explanation of who was working at Windermere and whether the claimant could be offered a contract there. The claimant could have actively considered her options for 2020 and what her preferences were.

83. The next question which arises is whether the respondents discharged their duty to take reasonable steps to offer the claimant alternative employment rather than dismiss her. Clearly, there was no ongoing opportunity to work at Settle as the shop closed at the end of 2019. The Windermere shop continued trading through to September (with closure periods connected to the Covid 19 lockdown). This was a separate legal entity. However, the two businesses were associated employers as the partners in the Settle business were the sole directors, and therefore in control of, the company which ran the Windermere business. As a matter of practicality Dr and Mrs Bradley could make decisions about who was offered employment at Windermere (and on what terms) in the same way they did for Settle. They could, therefore, decide to offer the claimant some form of ongoing employment at Windermere. There was clearly a need and an intention to employ staff at Windermere from the beginning of January 2020. It cannot be said, therefore, that any vacancy only arose after the date that the claimant's dismissal took effect.

84. However, the legal question for the Tribunal is not whether the respondent 'could' have redeployed the claimant at Windermere but rather whether it was 'outside the range of reasonable responses' for them not to do so. On the facts of this case the redundancy situation took effect at the end of 2019. The need for staff in Windermere arose and was ongoing from the start of January 2020. At that time the impact of the pandemic could not reasonably have been foreseen and the parties could not have known that a lockdown would occur or that a furlough scheme would be implemented. As at the start of 2020 it was anticipated that the claimant would take her full maternity leave entitlement and would not return to work in any capacity until the start of July 2020. The claimant was therefore not available to work at Windermere immediately after the redundancy. It does not appear that any specific selection criteria were deployed by the respondents to determine who would work at Windermere. This seems to have been very much an ad hoc arrangement with work being distributed amongst previous employees on a sort of 'first come first served' basis. There is no evidence of any particular decision

being taken by the respondents as to who would transfer and who would not and on what basis. It does appear that Conny (the maternity leave cover) was expected to continue working at Windermere and it was her decision to leave the respondent's employment. It appears that the respondents never considered that the claimant could or should be offered a job at Windermere. Part of their reasoning was no doubt their understanding that it was a separate business such that there was no obligation to transfer her across. Another relevant factor was probably the fact that the claimant was not available to start work immediately and so was not able to do the work as soon as it needed doing. To that extent the claimant was just not up for consideration. It did not occur to the respondents.

85. Had the respondents seriously considered redeploying the claimant what would have happened? In order to retain her in employment they would have had to offer her a post at Windermere on the basis that it would be covered for her during maternity leave and kept open for her pending her return to work in the Summer. This would have necessitated offering Conny the opportunity to keep working until the end of the maternity period and, once Conny left, considering getting other staff to cover the claimant on a temporary basis. The respondents certainly could have decided to do this but is it outside the range of reasonable responses for them not to have done so?

86. On balance, the Tribunal has concluded that the respondents did not act outside the range of reasonable responses when they failed to redeploy the claimant to Windermere or to keep a job open for her pending the end of her maternity leave. It was open to the respondents to take the view that the closing of the Settle shop drew a line under the claimant's employment. This is particularly so as they were looking to sell Windermere and were entitled to staff it in the most cost-effective manner pending sale. They were entitled to take the view that the business owners would themselves carry out an increasing portion of the work at the shop so that the need for paid employees would further diminish into the new year. The respondents acted reasonably in concluding that any need for employees at Windermere was itself likely to be a diminishing one and possibly a short term one. The Tribunal is mindful that it must not substitute its own view for that of the reasonable employer or dictate the way in which a particular business should have been run. Whilst the Tribunal may have wished the claimant to be redeployed (even with the risk of a further redundancy later in 2020) it cannot say that it was outside the range of reasonable responses for the respondent not to do this.

87. If the Tribunal had concluded that it was unfair of the respondents not to offer the claimant alternative employment it seems that there would nevertheless have been a limit to the financial losses which the claimant could claim as compensation. First, it appears that she was in fact paid her outstanding maternity pay by the respondent (although the Tribunal would have had to have heard further evidence and submissions to establish whether there was any shortfall). Second, it appears to be agreed between the parties that the claimant was offered an alternative job in March/April but refused to take it. There would have been a very real question about whether the claimant had failed to take reasonable steps to mitigate her losses in those circumstances. Third, if she had been offered and taken alternative employment it appears that her loss of earnings claim would be limited to a period of one month. The respondents had started doing more of the work themselves (as they were entitled to do as owners of the business) and only retained two-part time employees. Those two employees were themselves made redundant at the end of

July. Thus, the claimant would have returned from maternity leave only to be made redundant a matter of weeks later. It is not clear how many hours of work would have been available for her during the month of July 2020.

88. In light of the foregoing the Tribunal has concluded that the dismissal was procedurally unfair but that following a fair procedure the respondents would have been able to dismiss the claimant fairly in any event. The substantive decision not to offer alternative employment at Windermere did not fall outside the range of reasonable responses open to the respondents.

Discrimination

89. The alleged act of discrimination in this case also relates to the question of alternative employment. The claimant's case is that she was unfavourably treated by the respondents because she was dismissed in circumstances where there was a suitable alternative vacancy which ought to have been offered to her, working in Windermere. It is her case that the respondents' failure to offer that alternative was because she was on maternity leave during the protected period and that this was unfavourable treatment because of pregnancy/maternity.

90. Given the chronology of events set out above the Tribunal has concluded that if the claimant had not been on maternity leave at the end of 2019 she would have been more "present" in the minds of the respondents when they were making arrangements to close Settle and arrange staff for Windermere. Other employees were present in the workplace and helped to close down the Settle shop. They also met for an impromptu gathering at the pub in January. The reason the claimant was not invited was essentially because she was not present at the end of the Settle business. However well-intentioned the respondents were, the claimant was essentially "out of sight and out of mind". The same was true when the respondents made decisions about who would staff the Windermere shop going forwards. There was a cadre of employees who had helped at Settle and who lived in Settle. They were offered the opportunity to work in Windermere, even though they would have to commute to Windermere in the same way the claimant would have done. Chief amongst them was Conny, the locum who had been engaged to cover the claimant's maternity leave. The respondents did not take the opportunity to consider asking her to cover the rest of the claimant's maternity leave. They did not consider the prospect of the claimant working in Windermere in 2020 at all. As previously stated, they did not actively consult with the claimant at all. It may well be that they felt that she had "enough on her plate" in caring for a new baby and looking after her injured partner. They may have been well intentioned but had she not been on maternity leave she would have been present in the workplace at the end of 2019 and would have been an obvious choice to take on at least some of the hours at Windermere, especially given her previous more senior status at Settle.

91. Paragraph 8.20 of the EHRC Code of Practice on Employment gives a useful example as follows: *"An employee dismisses an employee on maternity leave shortly before she is due to return to work because the locum covering her absence is regarded as a better performer. Had the employee not been absent on maternity leave she would not have been sacked. Her dismissal is therefore unlawful, even if performance was a factor in the employer's decision making."* This example is comparable to the claimant's case. The Tribunal accepts that there were factors at

play other than the claimant's maternity leave. Her maternity leave was not the sole reason for the respondents' decision. They were looking at business convenience and who was available to work at the beginning of 2020. They also believed that because the two shops were separate businesses then they did not have an obligation to consider redeploying the claimant from one shop to the other (even though they in fact did this for other members of the Settle workforce). They may have thought that working in Windermere would not have been financially attractive to the claimant. However, it was a material factor in their decision making that she was absent on maternity leave at the time they made the decision and was not physically present to ask questions and make her case for continued employment. Had she been present and available to work at the required time the Tribunal concludes that it is more likely than not that she would have been offered at least some work at Windermere. Her maternity leave had a significant influence on the outcome, it was the real and efficient cause of the respondents' actions in not offering her work in Windermere.

92. In the circumstances set out above it is not strictly necessary for the Tribunal to resort to the burden of proof provisions (s136) to resolve the case. However, had it been necessary to do so, we would have found that the following facts would have shifted the burden of proof to the respondent to show that there was no discrimination:

(a) The claimant was on maternity leave at the time the decisions were made about who to employ at Windermere in 2020. She was the only employee in that situation.

(b) The respondents required employees to work at the Windermere shop from the beginning of 2020. Other employees who had worked at Settle in 2019 transferred, without a meaningful break (save for the Christmas/ New Year holidays) to work in Windermere.

(c) All bar one of the employees working in Windermere in 2020 had to commute from Settle to Windermere as the claimant would have had to do.

(d) The other employees were working up to the end of 2020 and so were more likely to be seen and spoken to in person by the respondents. The claimant was only communicated with via email. The respondents were aware that the claimant was a new mum and effectively said in evidence that they did not want to pester her during maternity leave.

(e) Whilst on maternity leave, the claimant's work was covered by Conny. She was given work at Windermere in 2020. So, the maternity cover locum was redeployed but the employee on maternity leave was not.

(f) The claimant was not invited to the ad hoc January gathering at the pub.

(g) The respondents knew that the claimant had new caring responsibilities for her baby and that she had had to care for her injured partner. They also knew that she had financial commitments, such as a mortgage.

93. The Tribunal is satisfied that the respondents were unable to demonstrate that their actions were 'in no sense whatsoever' on grounds of pregnancy/maternity. They could not discharge the burden of proof on them. The claimant was absent because of maternity leave and her absence was the main reason she was not asked to

transfer to Windermere. She was not physically present to be asked her preferences. The respondents needed employees to work at Windermere from the beginning of 2020 and not just from the end of June, when the maternity leave was due to end. The claimant was not communicated with, other than by email. This was at least partially because the respondents did not want to overburden a new mother. Again, this is inextricably linked with her pregnancy and maternity leave. They were happy to employ her maternity cover without any real break from 2019 into 2020. Conny would not have been working for them at the end of 2019 if she had not been covering the claimant's maternity leave. The claimant did not have the same opportunities to explore and discuss alternative employment with the respondents because she was not present at the shop on a regular basis. Whilst the respondents may have acted for a mixture of motives they were unable to satisfy the Tribunal that the claimant's pregnancy or maternity leave was in no sense whatsoever the reason for their actions.

Disposal

94. In light of the above, the claims of ordinary unfair dismissal and section 18 discrimination succeed. The parties did not really address us on the issue of remedy and therefore a remedy hearing is required in order for the Tribunal to hear relevant evidence and submissions. The Tribunal will list the case for a further one-day hearing to determine the issue of remedy. Should the parties resolve that issue by agreement prior to the hearing they will need to notify the Tribunal accordingly.

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Employment Judge Eeley

Date: 15th January 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON
Date: 19 January 2021