EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss C McKenzie	**v**	A C Flooring Limited

Heard at: Cambridge

On: 30 November 2020 and 1 December 2020
2 December 2020 - Deliberations

Before: Employment Judge Tynan

Members: Ms Linda Durrant and Mr Robert Allan

Appearances
For the Claimant: Ms Laura Robinson, Counsel
For the Respondent: Mr Alexander MacMillan, Counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

RESERVED JUDGMENT

1. The Claimant's complaint that she was unfairly dismissed pursuant to Section 99 of the Employment Rights Act 1996, is well founded and succeeds.

2. The Claimant's complaints that she was discriminated against contrary to Section 18(2) of the Equality Act 2010, are well founded and succeed in so far as:

    a. the Respondent failed to include Aleks Chachaj within the selection pool for redundancy;
    b. the Respondent scored the Claimant for redundancy, taking account of pregnancy related sickness absence;
    c. she was scored unfairly in the redundancy process in relation to her 'length of service' and 'future potential';

d. the Respondent scored the Claimant for redundancy in a way that was inconsistent with the scores received by her in her three-month probation review meeting in relation to the selection criteria of 'performance and skills' and 'experience'; and

e. the Respondent determined that it would not replace Ms Chachaj following her resignation.

3. The Claimant's remaining complaints that she was discriminated against contrary to Section 18(2) of the Equality Act 2010 are not well founded and are dismissed.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 1 July 2019, the Claimant pursues complaints against the Respondent that she was unfairly dismissed and discriminated against on the grounds of pregnancy and maternity and also discriminated against on the grounds of sex.

2. The Claimant was employed by the Respondent for approximately 10 months and accordingly has insufficient continuous service to pursue a complaint of unfair dismissal under Section 98 of the Employment Rights Act 1996. Her complaint of unfair dismissal is that she was automatically unfairly dismissed pursuant to Section 99 of the Employment Rights Act 1996 as the reason, or principal reason, for dismissal is prescribed under Regulation 20 of the Maternity and Parental Leave etc. Regulations 1999. The complaints are denied in their entirety by the Respondent.

3. The Claimant gave evidence in support of her complaints. The Tribunal also heard evidence from Aleksandra Chachaj, a former work colleague at the Respondent. For the Respondent, the Tribunal heard evidence from Angela Douty, Group Director of AC Plc, which is the parent company of the Respondent. All three witnesses had submitted written statements.

4. There was an agreed single Hearing Bundle running to some 243 pages.

5. The case was listed over three days, though in the event the evidence was heard and submissions made within just two days. Counsel each filed written submissions to which they spoke. The Tribunal has re-read their submissions in coming to a Judgment.

Findings

6. The Claimant commenced employment with AC Flooring Plc on 21 May 2018. She was employed as a Purchase Ledger Accounts Assistant, initially reporting into Martin Jones, Management Account. Her direct Line Manager was Christine Paul, Purchase Ledger Team Leader. Ms Chachaj joined the Company on or around the same day. Her job title was also Purchase Ledger Accounts Assistant. After two months with AC Flooring

Plc, the Claimant's and Ms Chachaj's employment transferred to the Respondent. The fact that the Claimant and Ms Chachaj had the same job title (noted in the Company's directory and their email sign off) might suggest that they were doing the same, or broadly comparable roles. However, that is disputed by the Respondent.

7. Ms Douty addressed this issue at paragraph 25a of her witness statement. Her evidence, reiterated at Tribunal, was that Ms Chachaj was an Accounts Assistant within the Sub-Contracts Payment Section reporting to Carlton Queeley and that the Claimant simply provided cover for Ms Chachaj when she was on leave or otherwise absent from work. The Tribunal preferred the evidence of the Claimant and Ms Chachaj on this issue. They were each clear, consistent and detailed in their descriptions of their respective roles. The Tribunal does not accept the Respondent's assertion at paragraph 13 of its Grounds of Resistance that Ms Chachaj did not work and had never worked, in the Purchase Ledger Team in which the Claimant worked.

8. The Tribunal finds that there was significant overlap in terms of their roles which extended beyond Ms Chachaj simply covering for the Claimant when she was absent from the business. The Tribunal finds that they were performing broadly comparable roles and that this reflected in the fact that they had the same job title and, contrary to what Ms Douty said in her evidence, the fact that they both reported to Ms Paul as Purchase Ledger Team Leader. They were expected by the Respondent to be flexible and to cover the workload between them, particularly at peak times, even if they each had specific areas of responsibility. In the case of the Claimant, she focused on "measured works" which involved specific technical skills and experience. Ms Chachaj's focus was the daily paid fitters and the more administrative, less technical, aspects in relation to the measured works.

9. The Claimant may well have had greater technical skills and knowledge than Ms Chachaj and have been more qualified and experienced than Ms Chachaj (as Ms Chachaj readily acknowledged), but the Tribunal accepts their evidence that they worked together as a team.

10. The Claimant and Ms Chachaj were impressive witnesses whose evidence regarding their working arrangements and the roles they performed the Tribunal found compelling. The Tribunal accepts Ms Chachaj's evidence that they undertook Purchase Ledger work together and is reinforced in that conclusion by the Respondent's subsequent employment of Carlton Queeley to take on a wider remit in relation to its sub-contract business, which was intended to free up the Claimant and Ms Chachaj to concentrate on Purchase Ledger activities. The Tribunal notes that one of the Claimant's objectives at her three-month probation review was to be up to speed in payments in and reconciliations, these being tasks which Ms Chachaj also undertook.

11. The Claimant's three-month probation review was with Mr Jones on 22 August 2018 (pages 142 to 145 of the Hearing Bundle). Her attendance and time keeping, as well as her communication skills, were rated as 'Excellent'. Those communication skills were evident at Tribunal. The Claimant was rated 'Good' in terms of Service Delivery, Team Work, Personal Qualities and level of contribution. Her overall performance was rated 'Good', albeit two of the six key areas were rated as 'Excellent'. Mr Jones acknowledged within the probation review form that within just three months, the Claimant had reached a level of being able to teach "measured works" to others. By the time of the probation review, the Claimant had taken five days' sickness absence. Those five days did not stand in the way of Mr Jones assessing the Claimant as having an excellent attendance record.

12. There were no sickness absence records for the Claimant in the Hearing Bundle, a surprising omission given that one of the issues in this case is whether or not the Claimant's redundancy selection scores were adjusted to discount any pregnancy related absences. There was some minor criticism directed at the Claimant in this regard by Counsel for the Respondent in the course of the Hearing. However, of the two parties, it seems to the Tribunal that the Respondent would be more likely to have complete and accurate details of the Claimant's sickness and absence record. The absence of this information at Tribunal was particularly unsatisfactory given that the Respondent was on notice of a potential claim by the Claimant within days of her dismissal.

13. Within a few weeks of the Claimant's three-month probation review, the Claimant was pregnant. On 22 October 2018, she disclosed in confidence to Karen Bayliss, the Operations Manager, that she was pregnant. It seems that the news of the Claimant's pregnancy became more widely known before the Claimant had intended to share this news. The Claimant suspects that Ms Bayliss breached her confidence.

14. The Claimant experienced health related issues during her pregnancy. On 24 October 2018, she was assessed by her GP as unfit for work due to Hyperemesis Gravidarum, a pregnancy complication characterised by severe nausea and vomiting which can lead to severe dehydration. The Claimant was initially certified unfit for work for two weeks, though this was extended by a further week on 6 November 2018. The notes of the Claimant's return to work interview on 12 November 2018 noted that the Claimant had been hospitalised with the condition. No specific action was noted in the return to work interview notes except that the Claimant should *"keep Personnel posted as to status / any issues in office to be advised immediately".*

15. On 1 March 2019, the Claimant was called into a meeting by Ms Douty. Ms Bayliss was also present. We accept the Claimant's evidence that the meeting lasted no more than five minutes. Ms Douty informed the Claimant that there may be redundancies at the Respondent. We further accept the Claimant's evidence that the meeting was rather casual in

nature, in the sense that Ms Douty was imprecise as to what this may mean for the Claimant; she relayed that there was to be a restructure and that the company was seeking to identify which of its employees may have transferrable skills and might be interested to move to other divisions where other opportunities may exist. The Claimant responded constructively to the news, telling Ms Douty at their next discussion on 6 March 2019 that she had performed a variety of tasks and that she would be interested in other potential opportunities. The Claimant was not told at any time during the meeting on 1 March 2019 that she was formally at risk of redundancy. We do not accept Ms Douty's evidence that she specifically informed the Claimant on 1 March 2019 that her role had been identified as potentially at risk of redundancy. The Respondent's own typed notes do not support her account on this point. The Claimant received nothing further in writing following the meeting and she was not provided with a copy of the typed meeting minutes which are at page 167 of the Hearing Bundle (or any handwritten notes from which they were prepared). Nor did the Claimant receive a letter or other written confirmation of what had been discussed.

16. At paragraph 15 of its Grounds of Resistance, the Respondent asserts that during the meeting of 1 March 2019, it was explained to the Claimant that she had been placed in a pool with other Purchase Ledger Assistants because they all carried out the same or similar work and that the Respondent would be carrying out a desk-based selection criteria exercise. The Grounds of Resistance go on to assert that the criteria were explained to all of those at risk. The Tribunal has no hesitation in rejecting the Respondent's case in this regard, which in any event, was not supported by Ms Douty's evidence at Tribunal.

17. The Tribunal is satisfied that paragraph 22 of the Claimant's statement correctly records what happened at the meeting on 1 March 2019, including that the Claimant was informed at the outset of the meeting that it was strictly confidential. The Claimant not unreasonably understood that she was not at liberty to discuss the matter with anyone. The practical effect was to prevent her from finding out more from her colleagues or sharing her thoughts about and experiences of the meeting with others.

18. Whilst the Tribunal does not consider there was any particular imperative to implement redundancies without delay, certainly not within the space of four working days as happened, we accept Ms Douty's explanation at paragraphs 4 and 5 of her witness statement as to the strategic thinking that lay behind the Respondent's decision to focus its resources and activities on Data Centres rather than its flooring business. There was some attempt by Ms Robinson to challenge the underlying business rationale; however, the Tribunal is not well placed to step into the shoes of the Directors and second guess their strategic business decisions, as long as those decisions are not a sham or a cover for unlawful conduct. We think it irrelevant that the parent company, or its Directors, may have received dividends from the Respondent as part of the arrangements to withdraw from this particular business activity.

19. In addition to speaking with the Claimant on 1 March 2019, Ms Douty also met with Ms Paul, the Claimant's Line Manager and with two other employees who worked within the Accounts function, Jayani Kavirathne and Michelle Colman. They were employed, respectively, as an Accounts Assistant and Assistant Accountant, and essentially worked for the Plc. It is entirely unclear to the Tribunal when, how or why Ms Douty arrived at the decision that she should speak with the Claimant and these three others individuals and why others working within the Accounts function such as Ms Chachaj and Mr Queeley were excluded from the process. At paragraph 7 of her witness statement, Ms Douty states that she identified the Respondent's Purchase Ledger Accounts department as an area potentially at risk. Yet it is not in the least clear to the Tribunal that Ms Kavirathne or Ms Colman were in fact part of the Respondent's Purchase Ledger department. Ms Douty's statement does not address whether there were internal management discussions about redundancies and, if so, when these took place. Likewise, there is no reference in her statement to any discussions or planning involving HR. The Hearing Bundle does not include any contemporaneous documents evidencing Ms Douty's thinking or conclusions in this regard.

20. When asked by Ms Robinson why it was that three individuals with job titles, respectively of Purchase Ledger Team Leader, Accounts Assistant and Assistant Accountant were being considered for redundancy together with the Claimant, but not Ms Chachaj who shared the Claimant's job, Ms Douty offered an unpersuasive explanation. Her witness statement deals the issue in an incomplete way. At paragraph 9 of her statement she refers to her extensive knowledge of the business and the Accounts department's activities, yet the Claimant was not challenged in terms of her evidence to the Tribunal that she and Ms Douty had interacted on just one occasion during her ten months at the Respondent. We find that whatever Ms Douty's understanding as to the Group's financial performance she did not have any significant insight as to the detailed work being done by the four individuals who were placed in the redundancy selection pool or how they were performing in their respective roles.

21. As regards Ms Douty's suggestion that the Claimant told her on 1 March 2019 that she was not looking to further her examinations, the Tribunal is very firmly of the view that she did not say this. Since we do not consider that Ms Douty has set out to mislead, we can only conclude that Ms Bayliss was mistaken when she prepared the notes of the meeting. In the course of her evidence to the Tribunal it became clear that Ms Douty was very reliant upon Ms Bayliss' notes in terms of her recollection of events. The Tribunal finds that the Claimant is ambitious and committed to continuous learning and development. We note that she has undertaken AAT Levels 2 and 3 in her own time and at her own expense. She has completed all but two of the exams for Level 3 and, we find, remains committed to securing her Level 3 accreditation.

22. The Tribunal finds that Ms Douty did not engage with the Claimant in any meaningful sense on 1 March 2019. It was a brief meeting involving the provision of limited information rather than a dialogue or consultation. It was abundantly clear from Ms Douty's evidence and answers at Tribunal that she was not someone to actively volunteer information even though she said a number of times at Tribunal that information would have been provided had it been asked for. Her actions did not match her words.

23. The notes prepared by Ms Bayliss of the meeting on 1 March 2019, provide little indication as to the next steps following the meeting, simply that everyone's comments would be taken into account.

24. The next meeting was on Wednesday 6 March 2019 at or around 11 am. The Claimant had no prior warning of that meeting. In that regard there was no evidence before the Tribunal that her three colleagues were treated any differently in the matter. It seems they were all treated equally unsatisfactorily. As with the meeting on 1 March 2019, it was a very brief discussion. The notes, which are at page 169 of the Hearing Bundle, again do not suggest that the Claimant was told that she was at risk of redundancy, though she was told it was a follow up to the 1 March 2019 meeting. Once again, there is no evidence before the Tribunal that the Claimant was treated any differently to her three colleagues in terms of being called to the meeting without prior warning. As on 1 March 2019, there was no dialogue or meaningful consultation, no explanation of next steps and no written confirmation of the outcome of the meeting.

25. We find that the Claimant was not told Ms Douty would be undertaking a selection/scoring exercise, or that she was in a pool with others (or who those others were). The Claimant disputes the accuracy of the notes of the meeting on 6 March 2019, but even to the extent they are relied upon by the Respondent, they do not support that Ms Douty told the Claimant on 6 March 2019 who was in the selection pool with her, what criteria would be used to select for redundancy or how those in the pool would be assessed against the criteria; i.e. how the scoring matrix would operate. At best, the notes evidence that the Claimant was informed that the Respondent would utilise criteria to assess redundancies. As documented, the process was hopelessly vague. At paragraph 11 of her witness statement, Ms Douty suggests that she had determined the criteria between 1 and 6 March 2019. If so, she did not share them with the Claimant, nor the weight that each criterion would carry.

26. Ms Douty accepted during cross examination that paragraph 11 of her witness statement is not supported by the meeting notes. Her evidence in this regard effectively changed. It seems in fact that she scored the four individuals in the selection pool in the two or three hour window between her first and second meetings with them on 6 March 2019. Yet she was seemingly sufficiently confident in her recollection that she signed a witness statement as recently as 25 November 2020 in which she described undertaking the scoring exercise between 1 and 6 March 2019. Having regard to paragraph 15 of the Respondent's Grounds of

Resistance, this means that there have been two significant changes in the Respondent's case and evidence as to communication of information about the redundancy selection process. Ms Douty's inconsistency on this critical aspect of the process is a further reason why we have much greater confidence in the Claimant's evidence as to what happened.

27. The Claimant and Ms Douty met again at or around 2pm on 6 March 2019 when the Claimant was informed that she was redundant. Ms Douty could not recall the timings of the other three meetings, but at most she had three hours in which to complete the scoring exercise, reach a decision and craft the relevant outcome letters. A copy of the letter confirming the Claimant's redundancy is at pages 170 – 171 of the Hearing Bundle. We conclude that three hours, if indeed there was even that much time available to her, did not allow Ms Douty sufficient time to verify each of the candidates' scores or the underlying information on which scores were based.

28. Other than paragraph 11 of her witness statement, which Ms Douty now accepts is inaccurate, there is no evidence available to the Tribunal as to how Ms Douty went about the task of scoring those in the selection pool. Yet that is at the heart of the Respondent's decision to make the Claimant redundant. We find this particularly troubling. For example, Ms Douty expressed her confidence at Tribunal that maternity related sickness absence had been discounted when scoring the Claimant in terms of her attendance record and time keeping. We do not share her confidence on this matter or indeed more generally as regards her approach to scoring those in the selection pool. Her witness statement and her evidence at Tribunal do not reflect the reality of what was a very poorly executed redundancy consultation and selection process. Even when it was glaringly obvious in the course of cross examination that the process had not been robust, Ms Douty continued to express her unshakeable confidence in it. There is something of a reality gap between Ms Douty's perception of the process and the failings which Mr MacMillan quite properly acknowledged in his closing submissions. Whilst this case is not concerned with procedural unfairness, Ms Douty's inability to recognise fundamental shortcomings in the process calls into question her credibility, as well as the quality of her decisions.

29. The Tribunal is not confident that the redundancy scoring was objective or evidence based. Certainly, as regards the Claimant, it lacked input from the Claimant's Line Manager who was herself in the selection pool. There is no evidence that the scores of those in the selection pool were moderated or checked with anyone else. Ms Douty did not discuss them with the Claimant. Indeed, the criteria and scores were never shared with the Claimant who only learned of them in the course of these proceedings.

30. The Claimant's completed redundancy selection form is at pages 163 to 164 of the Hearing Bundle. It is not signed or dated, a further matter for concern, not least given Ms Douty's evidence was that she was using a company template. In which case she departed from the Respondent's

own documented approach by failing to sign and date the assessment or discuss it with the Claimant.

31. The Claimant had worked for the Respondent for 10 months and was awarded a score of 3 for length of service. Ms Douty's evidence was that she should in fact have been awarded a lower score of 2, being the same score given to Ms Colman who commenced employment with the Respondent approximately four months after the Claimant. Ms Paul and Ms Kavirathne were each awarded a score of 5 for three years' service. Ms Douty could not explain how scores had been allocated against this particular criteria, including why the Claimant's score of 3 for length of service had been overly generous.

32. The Claimant was stated on the completed redundancy assessment form to have had 24 days of sickness absence. We find that this includes 15 days absence for Hyperemesis Gravidarum. The Claimant's evidence that she had taken 5 days' sickness absence for laryngitis, two or three days following a car accident and one or two further days sickness absence was not actively challenged during cross examination. If the Claimant had taken 24 days' sickness absence in addition to a further 15 days' absence for Hyperemesis Gravidarum, we would have expected the Respondent to have adduced further evidence in this regard. The Claimant was scored 2 in respect of her attendance record; namely 'below average'. And 4 in respect of her time keeping; namely 'good'. Yet in August 2018 her attendance record and time keeping were said to be 'excellent'. The only material change, since August 2018 that we can discern is that the Claimant had taken 15 days' sick leave because she was impacted by, and briefly hospitalised with, Hyperemesis Gravidarum. Discounting those 15 days, we find the Claimant had 9 days' sickness absence (consistent with her description of her sickness record whilst at the Respondent), yet she received the same score for her attendance record as Ms Colman who had 14 days' sickness absence, and a lower score than Ms Colman for time-keeping. When the Tribunal asked Ms Douty to explain the parameters or bands within which scores were allocated, she struggled to provide any clear explanation.

33. Disregarding the Claimant's pregnancy rated sickness absence, the Claimant's attendance record was much closer to Ms Kavirathne who was given a score of 4 for 7 days' sickness absence. Ms Douty could not articulate how any of the scores were arrived at. The Claimant's score of 3, namely 'average', for performance and skills sits uncomfortably with her scores at the end of her probation period, including that she had 'excellent' communication skills. We find it inexplicable, or at least that Ms Douty has failed to explain, why it was that the Claimant had gone from being assessed as having put in a strong 'good' performance in her first three months to being just 'average'. It is also at odds with a reference provided by Ms Bayliss which described the Claimant as conscientious, able to support across other roles, adaptable, self-motivated and someone who worked hard to gain results. There is no evidence in the Hearing Bundle, and it was not Ms Douty's evidence either in her witness statement or at

Tribunal, that the Claimant's performance had declined. Her qualifications and skills were certainly unchanged.

34. The Tribunal was unimpressed by Ms Douty's attempt to justify the apparent inconsistency between the Claimant's redundancy scores and her three-month probation review by suggesting that others within the selection pool may have had stronger end of probation reviews. When asked further about this, she acknowledged that she had not in fact seen their reviews. In any event, in Ms Paul and Ms Kavirathne's case, assuming they had reviews, these would have been approximately three years earlier.

35. The Claimant has ten years' accounts experience but was given a score of 3, namely 'average', for experience. We consider that Ms Douty was not competent to make that assessment. She evidently did not discuss the matter with Ms Paul and she did not have any material interactions with the Claimant during her employment. It is entirely unclear to the Tribunal how she arrived at the conclusion that she did.

36. As to future potential, this aspect is addressed at paragraph 18 of Ms Douty's statement. If, as we find, the scores given to the Claimant in respect of her performance, skills, qualifications and experience were unjustified, it follows that the score for future potential was unjustified. In any event, the scoring system was opaque and in giving evidence to the Tribunal, Ms Douty could not bring any clarity to the issue when asked about it by Tribunal Member Mr Allan.

37. It is not possible for the Tribunal to make detailed findings in respect of the scores given to the other three individuals in the redundancy selection pool. However, the inconsistencies and deficiencies identified above in relation to the Claimant mean that we cannot be confident to any significant degree as to the quality or accuracy of the scoring undertaken in relation to the others.

38. Of one matter the Tribunal is confident: that the Claimant would have advocated her position and fought her corner had she understood what was happening and the basis on which decisions were to be made.

39. As regards the final meeting with the Claimant on 6 March 2019, regrettably we conclude that paragraph 20 of Ms Douty's statement reflects a degree of wishful thinking on her part, rather than reflective on what was actually discussed. There are no notes of this meeting. We prefer the Claimant's account of this meeting at paragraph 27 of her witness statement and reject Ms Douty's account at paragraph 20. Ms Douty's account is not supported by her own letter of 6 March 2019 confirming the Claimant's redundancy, which contains the first and only documented record of the selection criteria but which makes no mention of the scoring matrix, or the specific scores allocated to the Claimant, or even her overall score. By contrast, the Claimant's account is supported by the email she sent to Ms Douty on 13 March 2019. Amongst other things, the

Tribunal was perplexed by Ms Douty's suggestion that the Claimant had not questioned the make up of the selection pool in circumstances where she had not been told she was in a selection pool, let alone the identities of those who were in the pool with her. The Claimant only realised that Ms Chachaj was not part of the process because she was not at work on 6 March 2019.

40. From beginning to end, the redundancy process took a little over four working days. The Claimant was asked to leave immediately.

41. In her letter of 6 March 2019, Ms Douty confirmed that the Claimant had the right to appeal against her redundancy. On 13 March 2019, the Claimant emailed Ms Douty setting out her concerns. She did not state in terms that she was appealing against her redundancy and Ms Douty did not treat the email as an appeal. Ms Douty sought to address the points raised by the Claimant, but there was no further correspondence between them beyond that email exchange. At or around this time, the Claimant began to experience further complications in relation to her pregnancy necessitating weekly hospital visits. Approximately eight weeks later, she gave birth to her child.

42. On 8 March 2019 Ms Chachaj gave notice resigning her employment with the Respondent. She did so without a job to go to. We accept her evidence at paragraph 17 and 18 of her witness statement as to her reasons for leaving and that Ms Douty had spoken with her and tried to persuade her to remain at the Respondent. Ms Chachaj had not been placed at risk of redundancy as the Respondent evidently considered there was work for her to do, yet on 15 March Ms Douty informed the Claimant that no thought was being given to replacing Ms Chachaj even though, at the same time, Ms Douty had sought to persuade her to remain with the Respondent.

Law and Conclusions

43. Section 99(1) of the Employment Rights Act 1996, provides,

> "(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 dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances."

44. Regulation 20 of The Maternity and Parental Leave etc. Regulations 1999, provides,

> "(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;

…"

45. Section 18(2) of the Equality Act 2010 provides,

"(1) …

(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."

46. Section 13 of the Equality Act 2010 provides,

"Direct Discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

47. In terms of the burden of proof under section 99 and regulation 20 above, where a claimant has been continuously employed for two years at the date of her dismissal, it is not for her to prove her case, she only needs to

produce some evidence to the tribunal to create a presumption in law that the dismissal was for an inadmissible reason under section 99 of the 1996 Act. In such cases it remains the respondent's burden to establish, on the balance of probabilities, the reason for the dismissal.

48. In this case the Claimant had been employed by the Respondent for just ten months when she was dismissed. In Kuzel v Roche Products Ltd [2008] ICR 799, CA, a whistleblowing case under section 103A of the 1996 Act, the Court of Appeal considered the position of an employee with less than two years' service. The Court followed the approach in two earlier Judgments of the Court of Appeal – Maund v Penwith District Council [1984] ICR 143, CA and Smith v Hayle Town Council [1978] ICR 996, CA – namely, that the employee has an evidential burden to show, rather than necessarily prove, that there is an issue which warrants enquiry, and which is capable of establishing the automatically unfair reason being advanced by the employee. In such circumstances the burden may revert to the employer to prove, on the balance of probabilities, which of two competing reasons was the principal reason for dismissal. Kuzel acknowledged that there may be cases in which a tribunal concludes that the true reason for dismissal is one which has not been advanced by either party.

49. At paragraphs 14 and 15 of her submissions, Ms Robinson submits that since section 99 of the 1996 Act is intended as the domestic implementation of Article 10 of the Pregnant Workers Directive, it must at least be arguable that the shifting burden of proof applies to section 99 claims; and indeed that Kuzel should not be followed in section 99 cases, since to do so would be to fail to give full effect to a right derived from EU law. In our Judgment, nothing turns on the point.

50. By analogy with the position under discrimination law, our starting point is that an automatically unfair reason should not be inferred from unreasonable conduct alone. We are not concerned with the procedural fairness or otherwise of the Claimant's dismissal and have been mindful throughout not to conflate sections 98 and 99. Considerations as to the reasonableness of the decision to dismiss are essentially irrelevant. We are concerned with the reason, or at least the principal reason, why the Claimant was dismissed, including the reason or principal reason for her selection for redundancy. Whether, as Ms Robinson submits, we are obliged as a matter of law to draw an inference, this is a case in which we consider that it would be appropriate to draw an adverse inference from our primary findings of fact above regarding the composition of the selection pool and the scores allocated to the Claimant and her colleagues under the redundancy selection criteria. In our judgment, Ms Chachaj's exclusion from the selection pool called for a clear explanation, albeit Ms Douty's explanation was unsatisfactory and unconvincing. Ms Douty's further explanation as to the operation of the redundancy selection scoring matrix was equally unsatisfactory; and her approach and methodology was difficult to discern.

51. At paragraph 13 of his submissions, Mr MacMillan questions why it would have been advantageous to the Respondent to have made the Claimant redundant when it did if it would not thereby avoid having to pay her statutory maternity pay and if, as the Respondent contends, there would have been no job for the Claimant to return to in any event at the end of her maternity leave. Putting aside that the Tribunal has made no findings as to what would or might have happened had the Claimant not been dismissed when she was, his submission overlooks that, consciously or otherwise, the Respondent could have been influenced by the fact of the Claimant's pregnancy and/or her pregnancy related absences, in terms of identifying those within its Finance function who would be retained over the short to medium term. Be that as it may, the Respondent's motivation is not the determining factor under section 99 of the 1996 Act. There is limited appellant case law that directly considers the test for causation under section 99 of the 1996 Act. Ms Robinson submits that the words "or any other reason connected with her pregnancy" are to be interpreted broadly (Clayton v Vigers [1989] ICR 713) and includes pregnancy related illness (Caledonia Bureau Investment and Property v Caffrey [1998] ICR 603). The Tribunal drew Counsel's attention to the decision of the Employment Appeal Tribunal in Intelligent Applications Ltd. v Wilson EAT 412/92. In that case Ms Wilson was made redundant following the reallocation of her duties during her absence on maternity leave. The Employment Tribunal found that there had been a potential redundancy situation in her department for some time. However, the reallocation of duties had taken place because she had gone on maternity leave. There had been no suggestion that the reorganisation would have taken place at that time for any other reason. The EAT upheld the Tribunal's decision that the reason for Ms Wilson's dismissal, which was redundancy, had its origins in, and was therefore connected with, her pregnancy and accordingly was automatically unfair. Whilst in this case the redundancy situation did not arise because, or have its origins in the fact that, the Claimant was pregnant, that does not dispose of the matter in the Respondent's favour.

52. Regardless of the burden of proof, it will be apparent from the Tribunal's findings at paragraphs 31 to 36 above that we find the Claimant's scores in relation to her attendance and time-keeping were materially influenced by her pregnancy-related illness. Her scores in relation to performance and skills, experience and future potential were inconsistent with the Respondent's earlier assessment of these, but in any event lacked clarity and cogency. The scores attributed for length of service were also unclear. The Tribunal is not confident as to the validity or objectivity of the scores allocated to the Claimant's colleagues in the redundancy selection pool, and it is wholly unpersuaded by Ms Douty's explanation as to the reasons for Ms Chachaj's exclusion from the selection pool. Mr MacMillan refers at paragraph 18 of his submissions to Ms Douty's evidence that she had looked beyond job titles to "the clarity of their role in the task they do". However, we do not consider that Ms Douty in fact had clarity as to the work they were doing. We infer and conclude that Ms Chachaj was excluded from the selection pool because the Respondent wished to retain

her services in preference to the Claimant and, whether consciously or otherwise, that this was because the Claimant was pregnant and had experienced pregnancy related ill-health. Furthermore, and in any event, we infer and conclude that the reason or principal reason for the Claimant being selected for redundancy was of a kind specified at regulation 20(3) of the 1999 Regulations. In our judgment, the entire scoring process was tainted, rather than just one or two elements of it. The Respondent has failed to put forward a satisfactory explanation as to why the Claimant was selected for redundancy, including why those in the selection pool received the scores which they did. In our judgment, the reason or principal reason for the Claimant being selected was connected with her pregnancy and in those circumstances, we conclude that she was automatically unfairly dismissed.

Section 18 of the Equality Act 2010

53. Section 18(2) of the Equality Act 2010 provides that a person discriminates against a woman if, in the protected period in relation to a pregnancy of hers, they treat her unfavourably because of the pregnancy, or because of illness suffered by her as a result of it. The operative causal test is *"because"*. Parliament adopted different statutory language when enacting section 18 of the Equality Act 2010 to that contained in section 99 of the 1996 Act. In our judgment the expression *"because"* does not have the same meaning and effect as *"for a reason connected with"*.

54. In Nagarajan v London Regional Transport [2000] 1AC501 Lord Nicholls said,

"In every case it is necessary to enquire why the claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the claimant was not so well qualified for the job? Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator." (our emphasis)

55. In South West Yorkshire Partnership NHS Foundation Trust v Jackson UKEAT/0090/18/BA the claimant was one of several staff put at risk of redundancy; she was on maternity leave. The respondent's HR department sent to her (inaccessible) work email details of redeployment opportunities, with the result that she did not find out about them for several days. Her claim of unfavourable treatment under s18(4) of the Equality Act 2010 succeeded. The tribunal upheld the claim as the Claimant did not get the email 'because' she was on maternity leave. However, the Trust's appeal succeeded as the Employment Appeal Tribunal considered that the tribunal had erred in applying the test for causation. Whilst the unfavourable treatment would not have happened 'but for' taking maternity leave, the tribunal failed to consider 'the reason why' the email was sent to the claimant's work email. It was said by the Employment Appeal Tribunal that the 'reason why' test could be satisfied where a rule is applied which is inherently discriminatory, or where the

protected characteristic has actually operated on the discriminator's mind, namely the point made by Lord Nicholls in Nagarajan.

56. At paragraphs 16(a) to (m) of her written submissions Ms Robinson sets out the alleged unfavourable treatment about which complaint is made. With the exception of sub-paragraph (h) the various matters complained of are well-founded and we accept that they constituted unfavourable treatment. As expressed, sub-paragraph (h) does not seem to the Tribunal to amount to unfavourable treatment; the inclusion of Ms Colman and Ms Kavirathne in the selection pool at least notionally reduced the Claimant's risk of being selected for redundancy.

57. The question for the Tribunal is whether the Claimant's pregnancy was the operative cause of this unfavourable treatment. In our judgment the Claimant's pregnancy was not the reason why she was subject to the procedural failings and unfairness identified at sub-paragraphs (a) to (f) of paragraph 16 of Ms Robinson's submissions. The shortcomings were common to all those in the selection pool. We cannot identify that they impacted the Claimant disproportionately. Section 18 does not, of course, involve a comparative exercise. Nevertheless, whilst the Claimant was evidently treated unfairly, in our Judgment the Respondent's approach in this regard was not inherently discriminatory. By contrast, we consider that the constitution of the selection pool and the Respondent's approach to scoring was tainted by discrimination and that, consciously or otherwise, her pregnancy (and pregnancy related ill-health) influenced Ms Douty's thinking and approach. In the case of the selection pool, Ms Chachaj's exclusion from the pool impacted the Claimant disproportionately and the Respondent has failed to put forward a non-discriminatory explanation for its approach on this aspect. As regards the complaints at sub-paragraphs 16(j) – (m) of Ms Robinson's submissions, the Claimant's pregnancy, and her pregnancy related illness, was the reason why she received the scores she did in respect of her attendance and time-keeping. The Claimant has established primary facts from which the Tribunal could infer, in the absence of a satisfactory explanation from the Respondent, that she was also discriminated against in terms of her other scores and the Respondent's failure to consider the Claimant for the vacancy otherwise created by Ms Chachaj's resignation. We consider that the Respondent has failed to discharge the burden upon it to prove that the Claimant's pregnancy or pregnancy related illness was not the reason for the scores (or the relative scores) which she received in respect of length of service, performance and skills, experience, and future potential, or the Respondent's decision not to replace Ms Chachaj following her resignation.

Section 13 of the Equality Act 2010

58. Ms Robinson submits in the alternative that the Claimant was treated less favourably than a hypothetical comparator in terms of her redundancy. Her submissions do not identify why reliance is placed upon a hypothetical comparator rather than those in the selection pool with the Claimant, and

she has not sought to define the relevant circumstances of the hypothetical comparator. There is a further difficulty in that Section 8.1 of Form ET1 was completed on the basis that the Claimant is pursuing a complaint of sex discrimination. However, in so far as relating to sex discrimination, Section 13 of the Equality Act 2010 does not apply to treatment because of pregnancy or pregnancy related illness during a woman's protected period (Section 18(7)). Mr MacMillan's submissions are effectively silent on the matter of any section 13 complaint.

59. Doing the best that the Tribunal can, we consider that a hypothetical comparator would be a non-pregnant female employee with the same length of service, conduct, performance, time-keeping and attendance record as the Claimant. In which case, we consider they would have been treated equally unfairly in terms of the consultation process, namely in respect of the matters at sub-paragraphs 16(a) to (f) of Ms Robinson's submissions. For the reasons above we do not consider that the matter complained of at paragraph 16(h) of her submissions amounts to less favourable treatment of the Claimant. As we have effectively upheld the Claimant's other complaints under section 18 of the 2010 Act, in the absence of any substantive submissions from either Counsel, we have not reached any further specific conclusion in relation to the complaints in so far as they are pursued under section 13, particularly given that Form ET1 identifies the complaint as being sex discrimination. We do not think this will have any bearing on the remedy to which the Claimant is entitled though may be willing to reconsider this aspect under Rules 70 to 73 of the Tribunals' Rules of Procedure if either party believes it is in the interests of justice that we should do so.

60. There will be a further hearing to determine remedy given our findings and judgment. Notice of that hearing will be notified separately, including any case management orders.

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Employment Judge Tynan

Date: 13 January 2021

25.01.2021
Sent to the parties on: .....
J Moossavi
.....
For the Tribunal Office