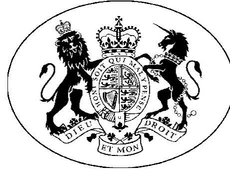

EMPLOYMENT TRIBUNALS

BETWEEN

Mrs S Sandher	**AND**	**The Curve Group**
Claimant	**Respondent**	

HELD AT Birmingham (By Telephone) **ON 15 - 17 and 19 February 2021**

EMPLOYMENT JUDGE Self
Mrs M Rance
Mr B Allen

Representation

For the Claimant: Mr J Heard - Counsel

For the Respondent: Ms N Owen - Counsel

RESERVED JUDGMENT

1. The Claim of unfair dismissal is well founded but the Claimant would have been dismissed on the same date in any event and so no compensatory award flows therefrom.

2. The remaining claims are all dismissed.

REASONS

1. By a Claim lodged at the Employment Tribunal on 1 March 2019 the Claimant seeks compensation from the Respondent for a number of claims detailed below in the Agreed List of Issues. In their Response the Respondent denied all claims.

2. We have heard oral evidence from the Claimant on behalf of herself and from the Respondent we heard oral evidence from:

   Mrs Catherine Coggins – HR Manager

   Ms Della Wolfe – Co-Founder of Respondent

   Ms Lauren Hunter – Divisional Managing Director for Recruitment Process Outsourcing

   Mr Simon Pridgeon – Divisional managing Director for HR and Support Services

   Ms Lyndsey Simpson – Co-Owner of the Respondent.

3. We were given an agreed bundle of documents for use at the hearing and have carefully considered such documents as we have been taken to therein. We have also had the benefit of written closing submissions from both counsel which they added to orally.

4. This matter was listed for three days. We heard oral evidence on days 1 and 2, closing submissions on the morning of day 3 and concluded our deliberations in chambers on a fourth date at the end of the week. Judgment was reserved.

5. As stated above the parties had agreed a list of issues before the start of the case which is replicated below so far as is relevant for liability. It was clear from the outset that we would not have sufficient time to deal with remedy and so the parties were told that the evidence should focus on liability at this hearing, but we would consider any issues of Polkey if it arose.

6. The List of Issues is as follows:

<u>Maternity/Pregnancy discrimination – s.18 EqA 2010</u>

1. Was the Claimant subjected to unfavourable treatment? The Claimant alleges the following unfavourable treatment:

   a. Not being consulted with about the creation of the Head of Recruitment Services role on the Aldermore account (which C understood the job title to be Head of Client Services);

   b. Not being consulted with about organisational changes generally, for example, other redundancies had taken place prior to the Claimant's redundancy consultation process starting;

c. On 19 Oct 18, Della Wolfe told the Claimant that she would not have a job on her return to work;

d. Dismissal.

2. If so, was that unfavourable treatment because of the Claimant's pregnancy (during the protected period set out at s18(1) EqA); because the Claimant was on compulsory maternity leave and/or because the Claimant was exercising, seeking to exercise, or had exercised or sought to exercise, her right to ordinary or additional maternity leave? (It is conceded by R that dismissal amounts to unfavourable treatment; it is disputed that the reason for that treatment was pregnancy/maternity leave).

Jurisdiction

3. Does the unfavourable treatment set out in paragraph 1 above constitute conduct extending over a period?

4. If not, are any of the detriments brought out of time?

5. If so, is it just and equitable to extend time?

Redundancy during maternity leave – Reg. 10 MAPLE 1999

6. During the Claimant's ordinary or additional maternity leave was it not practicable, by reason of redundancy, for her to remain employed under her existing contract of employment?

7. If it was not practicable, was there a suitable available vacancy during the Claimant's ordinary or additional maternity period? C relies upon Head of Recruitment Services (Client Services) on the Aldermore account & other Account Director roles (the roles Lauren Hunter, Anna Clapton & Belinda Marklew had moved to) as being suitable available vacancies. Specifically:

    a. Was the work to be done in the available role of a kind that was suitable and appropriate for the Claimant to do in the circumstances; and

    b. The provisions as to the capacity and place in which the Claimant is to be employed, and as to the other terms and conditions of her employment, were not substantially less favourable to her than if she had continued to be employed under the previous contract?

8. If so, did R fail to comply with reg 10 so as to make that dismissal an automatically unfair dismissal – reg 20(1)?

Detriments – Reg. 19 MAPLE 1999

9. Was the Claimant subjected to a detriment? The Claimant relies on the detriments set out in paragraphs 1a-c above.

10. If so, were those detriments done because the Claimant was pregnant, had given birth and/or took, sought to take, or availed herself of the benefits of ordinary maternity leave or additional maternity leave?

Jurisdiction

11. Did those detriments constitute a series of detriments?

12. If not, are any of those detriments brought out of time?

13. If so, was it reasonably practicable for the Claimant to have brought those claims in time? If not, were those claims brought within such further period as was reasonable?

Automatic unfair dismissal – Reg. 20 MAPLE 1999/s.99 ERA 1996

14. Was the reason or principal reason for the Claimant's dismissal for reasons connected with the Claimant's pregnancy, the fact that she had given birth and/or the fact that she took, sought to take, or availed herself of the benefits of, ordinary maternity leave or additional maternity leave?

Ordinary unfair dismissal – s98 ERA 1996

15. Was the Claimant's dismissal fair in accordance with s.98(4) ERA?

16. Was the reason one of the potentially fair reasons listed in s98(2) ERA? R relies upon redundancy as a potentially fair reason. C contends that the decision to dismiss her was pre-determined.

17. Did R act reasonably in treating redundancy as a sufficient reason for dismissing C? Specifically:

18. Applying *Williams v Compare Maxam Ltd* [1982] ICR 156:

    a. Was the Claimant sufficiently warned and consulted about her redundancy?

b. Were the selection criteria objectively chosen and fairly applied (including pooling)?
c. Was any suitable alternative work available and did the Respondent reasonably consider such suitable alternative work?

19. Was the decision to dismiss the Claimant within the band of reasonable responses?

20. Was the Claimant's dismissal procedurally fair, including a fair consultation process?

Remedy

21. What level of injury to feelings, if any, should the Claimant be awarded?

22. What level of compensation for any proven discrimination, if any, is just and equitable?

23. Should any compensation be reduced to reflect the fact that the Claimant might have been dismissed in any event, applying *Polkey*?

24. Did the Claimant mitigate her loss?

7. The Respondent, who trades as The Curve Group, is a Company that provides HR and Recruitment Services to a range of companies. The co-founders were Jeanette Ramsden and Della Wolfe and they and Lyndsey Simpson are the co-owners of the Respondent.

8. The Claimant worked for the Respondent between 29 June 2011 and 8 February 2019. The Claimant was an Account Director in the Recruitment Process Outsource division of the Respondent and was part of the leadership team below The Executive Committee who comprised of the Finance Director, the three co-owners and the three Divisional Managing Directors (DMD). In the Claimant's Division the MD was Miss Lauren Hunter.

9. The evidence we have heard indicates that the Claimant was a good employee who had no disciplinary or performance issues at work and had perfectly good relations with both her peers and her managers. In particular she had a good relationship with Mrs Wolfe. There is nothing that would suggest that there would be any reason for the Respondent, all things being equal, to want to rid themselves of the Claimant's services or have any motivation for doing so.

10. We have been provided with evidence that the management of the Respondent is largely female and there are a number of employees working at the Respondent who have children and their needs are said to be appropriately accommodated. There was no challenge to that evidence from

the Claimant. There were no examples given where childcare issues or maternity leave had caused problems or issues previously.

11. The Tribunal has not been privy to much of the back story to this case and the focus has been very much on matters that were during and after the Claimant's maternity.

12. In or around August 2017 a decision was made that there would be a new management level created and that would be the DMDs detailed above. The role was advertised on 15 September 2017. Miss Hunter applied and following an interview was appointed on 16 October 2017 and took up the role on 1 November 2017. This was just before the Claimant went on maternity leave on 2 January 2018, but it should be noted that the Claimant took annual leave in December and so there was little time when the Claimant actually reported into Miss Hunter.

13. In her grievance the Claimant alleged that in July 2017 the Claimant informed Ms Ramsden that she was pregnant and then, in August, when she was informed of the restructure and the creation of the roles in the previous paragraph, she "was actively discouraged by Ms Ramsden not to apply for the role due to (her) pregnancy" and made comments to the effect that the Claimant would not be wanting to travel due to having a small baby.

14. The Claimant also alleged in the grievance that Mrs Wolfe had told her that Miss Hunter's appointment was a fait accompli and the Claimant asserted that this was because she was going on maternity leave.

15. If true these statements would be an appropriate foundation for establishing a preconceived idea on the part of two co-owners that the Claimant's pregnancy and maternity were an impediment to progression in the Respondent organisation and that the protected characteristic in this case could be an active issue in their subsequent alleged treatment of the Claimant. The allegation was rejected on both the grievance and the appeal.

16. Whilst potentially relevant background in respect of demonstrating a state of mind that could have infected later decisions the matter was not pursued in this hearing and indeed in this litigation. We have considered the Claim Form and its attachment in which the Claimant sets out the Claim and that matter is not raised therein. We have also considered the Claimant's witness statement and again this alleged incident is not raised as background or, indeed, at all.

17. It is a matter for the Claimant as to how her claim is put and she has been legally represented throughout. We have not heard sufficient evidence from the Claimant to consider whether these incidents took place and accordingly they are not proven on the balance of probabilities. In passing, however, we note that the Claimant has been assiduous with her challenge of the Respondent's actions towards her when she believes that they have fallen below what she considers to be acceptable standards. What she described in her grievance would have been blatant and crass discriminatory behaviour and we find it almost inconceivable that the Claimant would have simply accepted such comments had they actually occurred without making a contemporaneous complaint.

18. We leave the matter there as we can make no further assessment on what was actually said. We are left with a situation where the Claimant was not appointed to a role which the Claimant could have done according to Mrs Wolfe and which she would have been short listed for and the reason she was not appointed was because she did not apply for it. Once in situ it was inherently unlikely that a well performing incumbent would be bumped out of the role especially when the Claimant ad an opportunity to apply at the outset.

19. The Claimant states that before maternity leave her relationship with her colleagues was good both in and out of work. Again, we accept that was the case.

20. The Claimant went on maternity leave on 2 January 2018 and her role was undertaken by Anne-Marie Gothard on a fixed term maternity leave cover basis. When the Claimant left she had a number of accounts. She was responsible for the PIB Group, IESA and a big deal with Aldermore bank was about to be struck and it was understood that she would account manage that when she returned from maternity leave.

21. The Claimant spent time off on maternity leave. In the early part of that time up to May we find that there was little contact, but the Claimant had access to work emails if she wished and had newsletters sent to her. That level of contact was acceptable to both parties. The Claimant describes a meeting in May 2018 with Mrs Wolfe which she describes as "an informal catch up". Mrs Wolfe had been the Claimant's manager for 6 years and stated that she had a "strong relationship" with the Claimant, and it was clear to us that she had a healthy respect for the Claimant's abilities and liked her.

22. In the course of that "catch-up", which the Tribunal view as a social occasion as opposed to any form of work commitment or meeting, the Claimant described that Mrs Wolfe asked her if she was going to have any more children which she asserts was a question that she should not have been asked. Mrs Wolfe was questioned on that point and she explained that the Claimant was explaining how she was struggling as a new mum and the question alleged was asked in that context as opposed to a work context.

23. We prefer the account of Mrs Wolfe in respect of this conversation because it fits into the context of the meeting more readily and do not accept that the question was asked so as to inform the Respondent about the Claimant's future work plans and what the Company might need to do. We do not consider that anything within that conversation could properly being construed as supportive of a hostility or caution by the Respondent towards those with childcare responsibilities or those who took maternity leave or the Claimant personally.

24. It appears that 2018 was not a good year for the Respondent in terms of contracts within the RPO division. In April 2018, the Respondent was notified that PIB Group were ending the contract and they continued and ended in June 2018 (61D and 61E). The Claimant was informed of this by email on 61E and Miss Hunter offered the Claimant the chance to talk things through.

25. In February 2018, the Respondent was told that JLT their biggest client was going to require a retender for their contract. The Claimant had little to do

with this contract on a day- to- day basis but if the contract were lost there would be a major loss of revenue across the RPO division and this loss crystallised in September according to the Exco notes and members of the Quest Board which included the Claimant were told on 13 September. (61H).

26. Meanwhile the Aldermore contract continued to be developed. It started in May and there was a recruitment exercise for what was initially called the Head of Client Services and which became Head of Recruitment Services. This was the individual who the Respondent would embed in the Aldermore office and would report back to the Claimant upon her return. Catherine Buck was appointed to do that role and she was hired in July 2018 and started in September 2018.

27. The evidence was that several other candidates had been put forward but had been rejected. It seems to be accepted that Ms Buck was a more highly qualified candidate and had particular experience within the banking sector which was precisely what the client were seeking. That profile was not readily apparent at the start of the search.

28. The Claimant suggests that the Respondent deliberately over recruited for this position in order to make it easier to squeeze her out in due course. The Respondent asserts that this was a client that they had taken five years to land and whom they were seeking to accommodate with a candidate that was acceptable to Aldermore.

29. We prefer the Respondent's evidence on that issue. It is apparent that Aldermore had a very clear idea about what their requirements were and as it took almost 5 years to land them as a client that speaks volumes of the work that was required to meet their needs. That process continued once the contract had been started and ultimately the client will dictate the level of individual they wish to have on board to implement the strategy they desire. The Tribunal do not accept that the Respondent was involved in any form of Machiavellian dealings designed to facilitate the exit of the Claimant. As stated above the Claimant was well-respected and good at her job and there was no cogent evidence to support the Claimant's theory that there was a scheme designed to cause her detriment afoot.

30. There was a discrepancy in terms of timing in relation to when this decision was made. Miss Hunter's statement at para 13 states that the Respondent was informed in October 2018 that they no longer wanted to have an Account Manager attached to the account. The tenor of Ms Simpson's evidence was that this view was expressed far earlier in the year when they were recruiting for the role.

31. We find that no final decision had been made about the Account Director role at the time of recruitment and the decision not to have an Account manager only finally crystallised in October when Miss Buck's capabilities became clear.

32. The Claimant was also concerned about the fact that the change of name also had a bearing on the level of individual appointed. It was her position that the change of name took place around the time of the recruitment. The Respondent's position was that in actual fact it was part of a wider renaming

of roles that took place in the business generally either just before or just after the Claimant started her maternity leave. They asserted that the change from Client to Recruitment was to assist the impression that the individual in the role was embedded in the organisation.

33. We again prefer the Respondent's evidence on this point and do not accept that the renaming was linked to setting up the Claimant for redundancy or to cause her any detriment at all. Again, there is no evidence that through the course of this year matters were contrived so as to secure the Claimant's dismissal. The evidence that we have heard suggests organic change which is typical of the world of business and the timing was incidental to the Claimant's absence on account of maternity.

34. The reality was that the work that the Claimant had been employed to do prior to her maternity leave had greatly shrunk with the loss of the PIB role and the decision by Aldermore that they did not need the additional role the Claimant was due to fulfil. Further the Respondent were in a position where they had also lost a substantial amount of income said to be £1.1 million net fee income. Miss Hunter explained that these were the reasons for deciding that the cost base needed to be reduced (para.14). The Tribunal considers that the Respondent has demonstrated a sound business basis for doing so.

35. The JLB, PIB and Aldermore changes would have happened regardless of maternity leave. The Aldermore decision is wholly understandable and flows from their change of view as to who their internal candidate was to be.

36. The other account that the Claimant dealt with was IESA and Miss Hunter stated that the figures on this account were in decline and there did not seem to be a realistic prospect for recovery (para.15). It was estimated that the work for the Claimant to do in this contract would be half a day a week and that is reflected in what actually did take place in 2019-2020 (76). The Tribunal has considered whether it would be practicable to employ someone for effectively half a day a week and conclude that it would not be feasible. We also do not accept that there was a need for an individual to do that job on their own and realistically it would need to be absorbed into other's portfolios. Miss Hunter also stated that, prior to instigating any form of redundancy process she spoke with sales and established there were no big contracts in the pipeline to replace those that had gone. This would have been a reasonable enquiry to make before considering any redundancies.

37. Miss Hunter explained in her statement that there were other reductions made and other individuals at lower levels were swapped to other divisions. There is a dearth of documentation in respect of these decisions. There are apparently no emails or notes of meetings in respect of any of the steps that Miss Hunter outlines she took. There is nothing in respect of the "multiple" 1 to 1s with Ms Ramsden or Miss Hunter's discussions with the Finance Director or the Sales Director. No documents were originally disclosed in respect of the other headcount reductions discussed at para 17 of her statement nor indeed is there any documentation, emails, letters, or meetings in which Aldermore Bank's requirements are outlined.

38. The headcount reductions are in fact detailed in the Exco Minutes at p.271 which were produced late in the hearing. It is noteworthy that those changes

as well as the fact about the Claimant's "redundancy" all appear at the same time and so would indicate that the decisions in relation to all of them took place at the same time and were under a heading of "JLT restructure" which suggests that the loss of JLT was a substantial part of the need to review costs and staffing levels.

39. We requested to see the full Exco minutes as opposed to the extracts provided by the Respondent. There is no indication in the reports that Miss Hunter put to Exco of any change of strategy and/or there not being a need for the Claimant in the Aldermore account nor apparently is there any written communications upon the topic.

40. Miss Hunter's statement seems to suggest that the decision to place the Claimant at risk of redundancy came following the Exco meeting in October. She states that there was a discussion about whether or not there were any sustainable part time positions and there was a general conclusion that they "could not sustain an Account Director for that volume of work and accordingly the Claimant was at risk of redundancy" (para. 20 Hunter).

41. Despite the lack of documentary evidence and whilst expressing some surprise that there is so little we have carefully considered Miss Hunter's evidence and accept it. We accept that she made diligent enquiries before considering redundancies. Miss Hunter was a clear witness who was not shaken in cross examination. We accept that there was a thorough review undertaken and that at the Exec Committee meeting in October a view was taken that there was not a sufficient volume of work for the Account Director role and accordingly a decision was made to place the Claimant at risk of redundancy.

42. The Claimant asserts that she wanted to come in and do more days around August / September time and in particular to start building relationships with stakeholders, but Miss Hunter told her to delay those actions until November and December. The Claimant considers this to have been a deliberate act to keep her out of the business and of a predetermination of her redundancy. The Respondent asserts that is not the case. The Tribunal is satisfied that the Respondent was still in the process of assessing the situation in August and September and there was no conscious desire to keep the Claimant out of the business for the reasons stated by the Claimant.

43. We do know that there was a meeting between Mrs Wolfe and the Claimant on 19 October 2018. Mrs Wolfe explained, and the Claimant agreed that they had had a good historical relationship and it was thought that she would be the best placed person to explain what the situation was, and she decided to do it over lunch as she felt it was the "kind" thing to do.

44. The Tribunal has no doubt that this meeting was motivated only by good intentions and was an attempt to deliver bad news in the best way possible. It was not the sort of meeting being partly social and casual in nature where precision of language was likely. Miss Wolfe was acting as a friend a messenger and a co-owner. On balance we believe that the Claimant was told that the job that she was expecting to come back to was not there anymore and there will be a process after which she may be made redundant.

45. We further note that in the grievance which was lodged in December 2018 the Claimant asserted that Ms Wolfe had said that it was "unlikely" that there would be a position for her. We note that is different to the specific allegation made in this case which is recorded as being that she "would not" have a job. We are satisfied that there has been a shift in the Claimant's position as to what was said which renders her account of the meeting unreliable.

46. The Tribunal are quite satisfied that the same approach would have been attempted by Miss Wolfe even if the Claimant had not have been on maternity leave.

47. On 12 November, the Claimant was notified by letter that her role was at risk of redundancy and that her role was the only one at risk. The Claimant was invited to a consultation meeting on 14 November and at that she was entitled to be accompanied. She was advised that a final decision would not be made until consultation had been completed. The Claimant described this as a template letter and that is in all likelihood what it was (66) but we can see no problem with drafting from templates.

48. The consultation meeting took place on 14 November and was said to have lasted around 50 minutes. Ms Hunter took the meeting, and she was given HR support from Ms Coggins. There is no issue taken with the notes, but they are short for that length of meeting extending to just over one side of A4.

49. From the notes we do have which we accept as being accurate it is clear that was a two-way conversation, and the Claimant was able to put across her views and concerns.

50. On 26 November (p.70) the Claimant sought more information from to help her understand the reason for the redundancy and to enable alternative solutions to be put forward. Ms Coggins sought to confirm a date for the next meeting and put forward an option of 4 December. At the same time, she agreed to get the Claimant the further information. The Claimant was reluctant to agree to a meeting before having had time to review those documents and "raise more questions".

51. On 29 November Ms Coggins explained that she was still trying to pull off the required information but was keen to get a meeting in the diary and suggested 5 or 12 December. On 4 December, the Claimant explained that she was not available for those suggested dates and indicated that whilst she had had some information she had not had it all. The information was provided on 5 December and the Claimant was offered the 12th or the 14th for the next meeting.

52. On 10 December, the Claimant indicated that the 14th of December looked to be achievable for a meeting and asked for a number of further pieces of information. Following the Claimant's conversation Ms Coggins sent an email of invitation and in that email outlining the vacancies in the Respondent and indicating that there had been three redundancies so far that year.

53. There was no confirmation from the Claimant that she would attend and so on 13 December Ms Coggins chased the matter up. The Claimant indicated that she had a temperature and flu but hoped that she would be better by the

following day. The Claimant confirmed that she was too ill to attend on the following day and the consultation meeting was put back until 3 January 2019.

54. On 17 December, the Claimant lodged a grievance notwithstanding her illness alleging that she had been discriminated against on the grounds of her sex and maternity / pregnancy. This was the first time that the Claimant had raised such allegations. On 20 December, a grievance meeting was fixed for 8 January 2019. The next redundancy consultation was rearranged to follow after the grievance meeting.

55. On 7 January, the day before the meetings referred to in the previous paragraph the Claimant stated that she was "poorly" and would not be able to attend the meetings the following day. She had been asked to confirm her attendance 4 days earlier.

56. On the same day Ms Coggins suggested that the meeting took place over conference call but if that were not available then the next date would be 14 January. The Claimant wrote back to say that she had some availability in the week commencing 21 January or "childcare permitting" on week commencing 28 January.

57. We do not accept that the Respondent was trying to rush through the redundancy process. The Respondent were seeking to keep matters on track and to deal with matters reasonable and proportionately. We consider that it was the Claimant who was actively trying to delay the process because she knew that the likelihood was that the end of the process may well be her dismissal and because felt affronted and worried. Whilst we do not suggest that the Claimant was not telling the truth about her illness and availability the Tribunal can see that the delay in the process was exclusively caused by a range of actions and factors that emanate from the Claimant.

58. We do not consider that Ms Coggins response at p103 to be in any way unreasonable. She was right to point out the delays caused by the Claimant and also to reflect on the fact that the illnesses relied upon had not been supported by any evidence at that point and were not specific.

59. There is some further correspondence which exhibits the increasingly rancorous atmosphere and ultimately it is agreed that the meetings will take place on 23 January. The Claimant provided medical evidence to support her medical condition, but the second consultation and grievance still takes place by way of video conference.

60. Within the consultation meeting the Claimant states that she considers that the way she has been treated could constitute constructive dismissal in that she feels that she should have been given the Senior role at Aldermore and that the pool of candidates for redundancy was just her (p.113). Ms Hunter explains why she has a different perspective.

61. The grievance meeting was held first with Mr Simon Pridgeon and lasted for approximately half an hour. Mr Pridgeon interviewed Ms Wolfe and Ms Ramsden as well and also took steps outlined at page 127.

62. On 7 February 2019 Mr Pridgeon sent the Claimant the outcome to her grievance. He made clear findings of fact as to what had taken place in

relation to the application process for the MD of RPO role and did not accept the Claimant's account that she wished to be considered for that position. Whilst dismissing the Claimant's grievances Mr Pridgeon found that the grievance was at best misconceived and at worst malicious. The Tribunal does not consider that the Claimant acted maliciously. The grievance may have arisen on account of the fact that the Claimant was at risk of redundancy, but the Tribunal has little doubt that the Claimant genuinely believed that which she was saying and to call the raising of this grievance malicious is a step too far.

63. On 8 February Ms Coggins communicated to the Claimant that following the consultation the decision had been made to make her role redundant and that the dismissal would take place immediately with pay being paid in lieu of notice.

64. On 13 February 2019, the Claimant appealed the decision to dismiss her in which she raised the issues of discrimination she had raised before and stated that:

"***I feel the decision was determined before 19 October when I was advised by Della Wolfe and the following three months have been an exercise in box ticking to ensure you followed a redundancy process"***

65. On the same date the Claimant appealed her grievance. Lyndsey Simpson was appointed to hear the appeals to both matters and the date for the meetings were set for 26 February 2019. We have considered the notes of those meetings and listened carefully to the evidence of Ms Simpson who was a highly credible witness and gave her evidence in a very clear and cogent manner. We are satisfied that Ms Simpson gave the Claimant every opportunity to address her and also that she listened to the concerns which had been expressed and looked into them. She interviewed Ms Hunter after the meeting to clarify some points and gathered a lot of other information set out at page 166 of the bundle. The appeal was undertaken professionally and thoroughly.

66. The outcome was sent on 12 March 2019. Ms Simpson expressed sorrow that the Claimant had been made redundant and the Tribunal accepts that sentiment was a genuine one. Ms Simpson had little difficulty in finding that the Claimant's conduct had not been malicious as expressed by Mr Pridgeon. The specific points raised by the Claimant in relation to the appeal were dealt with in some detail. Around the redundancy process approximately nine vacancies around the country were communicated to the Claimant for her to apply for if she so wished and she applied for none. Ms Simpson made clear findings in respect of other complaints the claimant had made.

67. The Tribunal has carefully considered the allegation at paragraph 64 which is at the root of the Claimant's case and do not accept it. Whilst a decision had been made that the Claimant was not going to get any of the MD roles if there had have been any suitable and available roles which the Claimant wanted had have arisen then the respondent would have pleased to retain her. As stated before the Claimant was well-thought of, and the Claimant has shown no ulterior motive for why matters would be manipulated to show the Claimant the door.

68. We have considered all the evidence and form the view that the events that led to the Claimant's redundancy happened on account of the normal course of day-to-day business dealings without any nudging or manipulation by the Respondent. Ideally the Claimant who was deemed a good worker would have come back to a busy role and the fees would have continued to flow. Instead, contracts were not renewed and /or the needs were changes which led to the gradual erosion of the Claimant's job role. There were no suitable alternative jobs which the Claimant could undertake.

69. Had the Claimant come up with a good idea or an alternative role then we consider that the Respondent would have happily kept her on. The Claimant did not offer any valid alternatives. The Claimant represented at this hearing that she would have been prepared to take a more junior role. That is not supported by the evidence at p.158 during the grievance / redundancy appeal where a number of roles are put to the Claimant and she rejected them all.

70. Having said that we do not consider that pooling with others of her level / MD level was considered at all. The Respondent have not demonstrated to our satisfaction that they had that breadth of vision. Having said that we did consider evidence that we heard and are satisfied that even if pooling had have been undertaken the Claimant, whose primary role had gone, would have been dismissed because of the fact that others were undertaking their roles to a good standard, they were all doing roles which were different in terms of specialisation than the Claimant and because of the need for stability at a difficult time and that each of the Claimant's peers had already been selected for their roles because of greater skill sets in other areas.

71. Time Limits have been raised as an issue and any Claim prior to 9 October 2018 would be out of time subject to consideration of whether or not they are a continuing act. We note that period contains the whole of the redundancy process. If matters are not deemed to be part of a continuing act then we would need to consider whether it would be just and equitable to extend time or in so far as the detriment claims are concerned whether it would have been reasonably practicable.

72. The Law

The relevant statutory provisions for unfair dismissal are contained in the Employment Rights Act 1996 and are as follows:

94 (1) An employee has the right not to be unfairly dismissed by his employer.

and

98 (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment….

(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 employer's 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.

73. The first consideration for the Tribunal needs to be whether the reason for dismissal is a potentially fair one as set out in the statute above and the burden of establishing that lies with the Respondent. In this case the Respondent asserts that the reason for dismissal was redundancy.

74. Redundancy itself is defined, so far is relevant for these proceedings within the Employment Rights Act 1996 as follows:

139 (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 kind, or

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

have ceased or diminished or are expected to cease or diminish.

75. When considering the fairness or otherwise of redundancies pursuant to section 98(4) ERA there is no statutory guidance available but there is guidance on how to approach the task in case law. In Williams v Compare Maxam Ltd (1982) ICR 156 the EAT laid down guidelines that a reasonable employer might be expected to follow in making a redundancy dismissal. It is not for the Tribunal to impose its standards and ask if the employer should have behaved differently but rather it needs to ask itself whether ***"the dismissal lay within the range of conduct that which a reasonable employer could have adopted."***

76. So far as is relevant in this case factors considered in Compare Maxam that a reasonable employer might be expected to consider is:

    a) Whether employees were warned and consulted about the redundancy

    b) Whether selection criteria were objectively chosen and fairly applied;

    c) Whether any alternative work was available.

77. Often an employer will need to identify the group of employees from which those who are to be made redundant will be drawn. It is from this group or pool that the employer would apply any relevant selection criteria. If the question of a pool is not considered then the dismissal is likely to be unfair (Taymech v Ryan EAT 663/94.

78. In considering the pool an employer would normally consider whether other groups of employees are doing similar work to the group from which selections were made and whether employee's jobs are interchangeable. When considering any pool, the Tribunal will need to consider whether the pool was one which fell within a band of reasonable responses available to an employer in the circumstances. It must not substitute its own view.

79. Warning of redundancy is clearly understood and consultation should be engaged in so as to facilitate a genuine two-way communication about ways that redundancies might be avoided and any other issues around the redundancy process.

80. Finally, an employer should always consider the possibility of redeploying a Claimant somewhere else within their organisation so far as is reasonable by considering any vacancies elsewhere in the organisation.

81. When considering redundancy dismissals and the procedural aspects of them the Tribunal must consider what effect a procedural failing has had on the situation and that will be relevant to the amount of compensation. If there is a procedural failing that would render the dismissal unfair pursuant to section 98(4) ERA, but the Tribunal also needs to consider what difference the failing made.

82. Maternity / Pregnancy Discrimination – Section 18 Equality Act 2010 reads as follows:

    18 (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

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

    (a) because of the pregnancy, or

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

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

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

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

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

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

(a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or

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

83. Section 18 EqA applies to unfavourable treatment and therefore requires no comparison with the treatment given to others. Whether treatment is unfavourable is a question of fact and according to the EHRS Code of Practice on Employment at para 5.7 to mean being placed at a disadvantage.

84. To be unlawful pursuant to section 18(4) the unfavourable treatment needs to be "because" (in this case) the Claimant was exercising her right to maternity leave.

85. Section 136 of the EqA which deals with the burden of proof applies to section 18 claims and relevantly provides:

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

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

86. The fundamental question in a direct discrimination case is what the reasons for the impugned treatment were. That question is fact and context sensitive and gives rise to two types of cases that have been identified in the authorities: "Criterion" cases and "Reasons why" cases.

87. In Criterion cases where the criterion is inherently based on or clearly linked to the protected characteristic, it is the criterion or its application that constitutes the reasons or grounds for the treatment complained of and there is no

need to look further. The above approach is appropriate to a direct discrimination claim under section 18 EqA.

88. What must be shown is that the reason or grounds of the treatment, whether conscious or subconscious, must be absence on maternity leave and the mere fact that a Claimant happens to be absent on maternity leave is not enough to establish unlawful direct discrimination under section 18.

89. In cases that do not involve any inherently discriminatory criterion and where the discriminatory grounds exist because of a protected characteristic that has operated on the alleged discriminator's mind or thought processes to some extent (consciously or subconsciously) the discriminatory reason for the conduct need not be the sole or even the principal reason for the treatment. It only needs to be a contributing cause in the sense of a significant influence.

Reg 10 MAPLE 1999

90. This provision reads as follows:

10(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.

91. The question of whether a redundancy situation has arisen should be answered in reference to the statutory definition of redundancy pursuant to section 139 ERA. If a suitable alternative vacancy exists i.e., a vacancy that is suitable, appropriate, and not substantially less favourable than the employee's previous job and the Respondent fails to offer it then the dismissal will be automatically unfair under section 99 ERA if the reason for dismissal is redundancy (Reg 20(1)(b) MAPLE).

Detriment pursuant to Section 47C (1) ERA 1996

92. The statutory provision (so far as is relevant) is as follows:

47C (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

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

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

93. The right is not to be subjected to any detriment for having exercised maternity leave. The mere fact that a detriment arises is insufficient and there must be a link between the employers acts or failure to act and the exercise of the right. The Detriment does not have to show that the detriment was deliberately inflicted.

Conclusions

Section 18 Claims

94. Our findings of fact in relation to the claim at 1(a) of the List of issues is set out at paragraphs 26-33 above. The Tribunal can see no reason why the Claimant should have been "consulted" about the creation of the Head of Recruitment Services role. We also do not accept that it was "created" as such. The position just developed over time driven by an outside body. This is not a criterion type of case and we do not consider that there has been unfavourable treatment but even if it was unfavourable treatment it had no link whatsoever to the Claimant exercising her right to maternity leave.

95. As to the claim at 1(b) the Tribunal can see no reason why the Claimant would have been consulted about other changes in the organisation such as other redundancies. There was wide ranging loss of revenue. Opportunities were taken to make changes at lower levels prior to any consideration of the Claimant's position. We do not see this as unfavourable treatment of the Claimant in terms of the manner it was delivered and even if it was she was at a level too junior and also not directly involved in those work streams to be consulted. This is not a criterion type of case and we do not consider that there has been unfavourable treatment but even if it was it had no link whatsoever to the Claimant exercising her right to maternity leave.

96. As to the Claim at 1 (c) we do not accept that Ms Wolfe told the Claimant that she would not have a job on her return to work i.e., that she would be dismissed, and our finding of fact is set out at para 44. She was told that the job she expected would not be there and that she may be made redundant. It was not definitive as the Claimant asserts and factually is not made out. This is not a criterion type of allegation and we do not consider that there has been unfavourable treatment in the way it was delivered although accept that a general indication that she was being placed at risk would have been accepted as unfavourable treatment. In any event it was it had no link whatsoever to the Claimant exercising her right to maternity leave in either the message itself or the way it was conveyed.

97. The Claimant was dismissed because she was redundant. That situation would have arisen regardless of her maternity leave because of the way business evolved over that year. This is not a criterion type of case and whilst we accept that being dismissed was unfavourable treatment it had no link whatsoever to the Claimant exercising her right to maternity leave.

98. In all of the above situations we take the view that there is insufficient evidence to shift the burden of proof but in any event even if it did, we consider

that the Respondent has demonstrated to our satisfaction that any of the actions or omissions alleged were not linked to the Claimant's maternity leave in any way alleged.

Redundancy during maternity leave claim Reg 10 MAPLE 1999

99. The Claimant accepted in cross examination and in the internal process that there was a potential redundancy situation, and we agree with that view. Due to erosion through the fall off of the contracts the Claimant was responsible for and because of other large contracts being lost there was a redundancy situation and in those circumstances we find that it was not practicable for the Claimant to remain employed under her existing contract of employment.

100. We are satisfied that at the time that it was not practicable for the Claimant to remain employed because of redundancy there were no roles available as the three roles that the Claimant identifies were all taken and had individuals in post. We also agree with the points made by the Respondent's counsel in her skeleton argument at para 29 that the Claimant did not really consider that she should have been given any of the roles specified in the List of Issues.

101. We find that there were no available vacancies and so the Reg 10 Claim is dismissed.

Detriments Reg 19 MAPLE

102. We dismiss these claims. We do not accept that the Claimant has proven that what she alleges for the reasons set out in the preceding paragraphs. Taking the issues as drafted we do not consider the matters raised (which have been proved as taking place) were detriments as a reasonable worker would not consider that they had any right to be consulted about the matters set out in the list of issues. We accept that being told that she was at risk of redundancy would be a detriment but as with the other two matters we do not accept that the Claimant was subjected to those actions because the Claimant was on maternity leave. The Head of Recruitment Services role was created because of pressure by Aldermore and the lack of consultation about other structural changes would have been the same regardless of maternity leave. Della Wolfe would have had the same conversation whether the Claimant was on maternity leave or not.

Unfair Dismissal

103. We are satisfied that the reason for dismissal was redundancy because the Claimant's job had effectively disappeared over the course of the year because of contractual losses and the specific requirements of clients. That is a potentially fair reason for dismissal.

104. We have formed the conclusion that the dismissal is an unfair one on procedural grounds because the Respondent did not consider adequately whether or not the Claimant should be pooled with the Divisional Managing Directors or others at her level. We have concluded that the dismissal was unfair following Taymech v Ryan EAT 663/94 which we have cited above.

105. Having said that we are equally clear that even had the Respondent considered that particular option it would have made no difference at all to the outcome and the Claimant would still have been made redundant. The role at Aldermore had been filled according to the specification of Aldermore and in the

parlous situation the Respondent found themselves in they would not have made a change there for fear of upsetting a hard-won client. So far as the other roles were concerned there were established well qualified individuals in each of those roles and we accept that in any form of comparison there would have been no change following any form of selection process. We also agree with the points made by the Respondent's counsel in her skeleton argument at para 29 that the Claimant herself did not really consider that she should have been given any of the roles specified in the List of Issues.

106. We disagree with the Claimant's view of the consultation and do not accept that it could be described as tick-box. She was given every opportunity to put forward suggestions but was negative within the process and did not put forward any realistic suggestions.

106. All reasonable efforts were made to bring alternative roles to the Claimant, but she rejected them all. We do not accept that she would have accepted roles which were not close to her home.

107. The Claimant has been unfairly dismissed because we consider that the decision not to even consider a wider pool was outside a band of reasonable responses. The remainder of the process and decision making was. We find however that the Claimant would have been dismissed at exactly the same point even if the material unfairness we have identified was rectified. There is no compensatory award that flows from the unfair dismissal.

108. We have made findings on each of the claims substantively. In respect of time limits we do not consider that the matters raised at 1(a), 9(a) to be part of any form of continuing act to the matters that took place post October. The Tribunal considers that it would have been reasonably practicable for the detriment claim at 9(a) to have been brought in time and so it does not have jurisdiction to bring that claim. So far as 1 (a) is concerned the Tribunal does not consider that the Claimant provided any clear and cogent evidence as why it would be just and equitable for time to be extended and so it does not have jurisdiction for that claim either. The findings we have made in respect of these acts are ultimately in respect of them as background facts.

Employment Judge Self

18 May 2021