Case number: 1306748/2019 (V) Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Ms Kinga Michalewicz	And	Auria Solutions Limited

AT A FINAL HEARING

Held: At Nottingham and via CVP **On**: 19 – 23 April 2021 and in chambers on 3 June 2021

Before: Employment Judge R Clark.
Mrs B Tidd.
Mr M Alabhai.

REPRESENTATION
For the Claimant: Ms Spencer, lay representative (Polish lawyer)
For the Respondent: Mr Thackerar of Counsel

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The claim of automatic unfair dismissal under s.99 of the Employment Rights Act 1996 **fails and is dismissed**.

2. The claim of pregnancy or maternity related discrimination under s.18 of the Equality Act 2010 **succeeds.**

3. Remedy will be determined at a future remedy hearing, if not agreed.

4. The claimant shall pay the respondent's costs of, and associated with, her application to amend the claim abandoned at the hearing held on 22 March 2021, summarily assessed in the sum of **£990**.

REASONS

1. Introduction

1.1 This claim arises from the claimant's dismissal from her role as a production operator. The central issue is whether the claimant's pregnancy or maternity was materially related to, or the principal reason for, that dismissal.

2. Preliminary Issues

2.1 Original claims of breach of contract (Notice) and a claim for a statutory redundancy payment have previously been dismissed upon withdrawal.

2.2 Ms Michalewicz was assisted throughout by a polish interpreter. Arrangements for a second interpreter for other witnesses proved unnecessary.

3. The Substantive Issues

3.1 The claims are brought as automatic unfair dismissal under section 99 of the Employment Rights Act 1996 ("the 1996 Act") and unfavourable treatment under section 18 of the Equality Act 2010 ("the 2010 Act").

3.2 The issues between the parties have been agreed at a previous preliminary hearing. The matters not in dispute are that the claimant was dismissed, that she was dismissed during the protected period for the purpose of the 2010 Act albeit before the commencement of maternity leave, that the employer had knowledge of her pregnancy at the material time and that, at the date of dismissal, she did not have sufficient qualifying service to bring a claim of "ordinary" unfair dismissal. The remaining issues for us on each claim can be stated simply. They are: -

a) Has the claimant proved that the reason for dismissal, or if more than one the principal reason, was her pregnancy or maternity?

b) Was the dismissal because of her pregnancy?

4. Evidence

4.1 We have heard from Ms Michalewicz herself. Ms Michalewicz has served two statements. The first is in her native polish, the second is an English translation of that statement for our benefit. There is no certificate or other indication of the translation, but no issue was taken on this point and we were satisfied by Ms Spencer's assurances of the manner of preparation that it was her evidence. Ms Michalewicz called two ex-colleagues, Ewa Kubiak and Michal Prokopiuk. They both served witness statements in English as each has a reasonable command of English language.

4.2 For the respondent we have heard from Fiona Johnson, HR manager; Azar Ali, the Operations Manager and Mr Gurpal Bassi, the Production and Shift Manager.

4.3 All witnesses adopted written witness statements by oath or affirmation and were questioned.

4.4 We received a small bundle running to 192 pages, the brevity of which meant we could largely overcome the absence of any obvious logical structure to its content.

4.5 Both parties made brief oral closing submissions.

4.6 This is a case where we find it appropriate to say something about the manner in which both parties' cases have been prepared. The claimant's case has, in many respects, been advanced on a misunderstanding of the extent of the protection afforded by the two statutory provisions relied on. The respondent's case has left out obvious and significant details of the process it undertook. This has led to significant gaps in the evidence about what was actually happening. In some respects, the accounts given in live evidence were at odds with the written statements which has led us to exercise significant caution in some key areas of the evidence. Nonetheless, we are grateful to Mr Thackerar for the professional way he advanced the respondent's case and in his dealings with the claimant and her representative.

5. Facts

5.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The respondent was formed in 2017 out of a venture between IAC Group and a Chinese company. It provides interior components to the motor manufacturing industry. A significant client is JLR.

5.3 The respondent operates two plants at Coleshill and Hams Hall. In January 2019 it had a direct headcount of about 470 employees which, in the circumstances we set out below, had to reduce to around 360 during that year. It is a just in time ("JIT") manufacturer and supplier and uses various methods of flexible labour deployment measures to manage the ups and downs of the customer JIT demand. A large part of that is the use of a large body of agency workers in addition to its directly employed workforce. It operates three similar shifts at its sites of mornings, lates and nights. Some sites run those shifts as a fixed pattern, some as rotating.

5.4 The claimant started working for the respondent through an agency in February 2017. Her role was as a semi liner worker requiring duties that included cleaning, finishing, wrapping and stamping leather car parts. This is within a process known as "cut, sew, wrap". We find there was flexibility expected to cover other duties. The direct workforce was made

up of those performing skilled roles such as this and others performing less skilled or less specific roles.

5.5 After about 10 months, the claimant accepted a contract of employment with the respondent commencing on 2 January 2018. She was employed as a “production operator” at the Coleshill site performing essentially the same duties on the same product range.

5.6 The employment was subject to a written contract which included a place of work clause extending to “such other place within a reasonable area which the company may reasonably require for the proper performance and exercise of his duties”. It also included a relocation clause permitting the employer to relocate the employee to another place of work within 50 miles of the normal place of work.

5.7 The year 2018 was unremarkable save for two events. One is that the claimant found out she was pregnant at the end of November. She notified her supervisor. She attended a midwifery clinic on 4 December and her pregnancy was confirmed. We find on or around 5 December she formally notified her employer and provided what she termed a notice about her pregnancy from her nurse which we infer to be the MAT B1 form. We find this employer employs a large number of female workers but in recent years has not had any experience of managing the implications of pregnancy or maternity leave. Nevertheless, her news was greeted with congratulations from her superiors and an expectant mother’s risk assessment was promptly arranged which was conducted on 7 December 2018. A colleague, Ewa Kubiak acted as the translator during this process. One piece of advice arising from that assessment was for the claimant’s work to be varied so that it was “less harsh”, as the claimant termed it. As a result she was moved to the re-worker line instead of the semi-liner line. The main difference seems to be that this move meant she was no longer working with glue.

5.8 The second significant event of 2018 was a decision to relocate the manufacture of the “L462 products” to follow the client’s decision to relocate its assembly of that vehicle to eastern Europe. Whilst this strategic decision was made early in the year, it was subject to delay by the end client’s own timescales. It was not until later in the year that it became settled and work began on the implications of relocating a substantial area of work. In addition, this strategic decision coincided with a general downturn in other orders from customers having a further impact on the business.

5.9 We find the senior management team had been working on the implications of this throughout the year but work commenced in earnest in November/December 2018. We have not seen any notes or plans in respect of that senior management decision making process or the planning for reduced headcount. Some of the live evidence we heard about this process was extremely difficult to follow and at one point Mr Ali, apparently one of the key decision makers, was unable to accurately identify the HR manager in post at the time apparently giving advice to the senior management team on the employment implications. Despite that, we are satisfied there was a genuine need to reduce headcount substantially. Importantly, that included the complete ending of the L462 production in the UK. Subject to any further delays or run down of production, we find this was destined to come to a complete end by the

end of July 2019. The result was that the decision was taken to reduce headcount through a formal redundancy programme.

5.10 Those plans seemed to crystallise around the turn of the year and an announcement was made confirming the need to make redundancies on 29 January 2019. All workers were informed at three separate announcements, one for each of the three shifts. The claimant says the staff were assured that no one would be made redundant. We do not accept that was the case. We find there was a genuine attempt and desire to avoid redundancies but, in view of the scale of the task, we find it wholly unlikely that the formal announcement of such large-scale changes would also announce all jobs were safe. We do, however, expect statements were made that steps would be taken to keep as many of those as possible who wanted to remain in employment. A written "announcement" was made in English at the same time and posted on notice boards. It sets out the situation and the plan. We accept a lot of the necessary head count reduction would be lost through the cessation of temporary or agency staff, but it was known that this would not be sufficient by some distance. Nor could it be ruled out that a small number of specialist agency staff might need to be retained to deal with the run-down of production. So far as directly employed staff were concerned, it identified that around 73 jobs would be lost including 20 from 120 indirect employees, 6 from 50 salaried staff and around 47 from 303 direct employees, that is production workers.

5.11 This employer categorises direct staff as those involved in production, indirect are those supporting production such as maintenance, and salaried such as typical office and management roles.

5.12 We find the consultation gave notice of a system for finding alternative employment. The election of employee representatives did not apply to the claimant as she worked in an area subject to trade union recognition. The election of employee representatives was principally in respect of salaried staff.

5.13 There is a dispute as to whether the staff were individually issued with any correspondence as a result of this announcement. The claimant says she did not receive anything. Ms Johnson, in her oral evidence, says she sent letters to everyone. On this issue, as with many in this case, we have not been provided with any documentation demonstrating the correspondence. We have no doubt that Ms Johnson wrote some letters but we frankly preferred the claimant's evidence that she did not receive any further written correspondence relating to the consultation or threat of redundancy at that stage. Not only have we not been provided with any copy letters, but the respondent's positive case set out in the witnesses statements does not assert this fact and actually asserts a contrary fact which was that the written announcement was put up on notice boards around the site.

5.14 The announcement included a proposal for a 4-week collective consultation process to determine how to select staff for redundancy including pools and selection processes. We find it more likely than less likely that consultation on this took place with the staff representatives. However, we have not been shown anything to support the fact of, still less the content of, any such collective consultation meetings. More specifically, there is nothing we can see which demonstrates how the respondent arrived at its pooling and selection

process which we find was ultimately left to the shift and operational managers. We find there was no discussion in any consultation meetings about what would become the "out of process" procedure, to which we return later.

5.15 The respondent had completed a statutory notice in form HR1 on 24 January 2019. It identified UNITE the union as the recognised trade union. It confirmed 80 redundancies to be made out of 473 staff between 28 February and 5 April 2019. The reasons stated were the lower demand for products and transfer of work to another site or employer which we find to be consistent with the announcements and surrounding business environment.

5.16 We were told the respondent adopted four phases of measures to avoid redundancies. That needs qualifying. The first initial measure was to cancel agency worker contracts. This was followed by an invitation for voluntary redundancy. We do not know the exact effect of these measures and the respondent's evidence is thin on what happened. Doing what we can with the fluid oral evidence, it seems this offer of voluntary redundancies actually drew a large number of interested employees. It is not clear whether that drew enough to avoid compulsory redundancies all together, but the initial plan was that phase three would be the compulsory redundancies. We had assumed that what would, in due course, become the phase in which the claimant's dismissal on ground of redundancies unfolds. We simply can't say on the evidence adduced as at times we were told that the original plans were achieved but a new pressure for reductions arose, and at other that this was part of the initial plan for reductions.

5.17 Whether part of the original plan or not, it seems there was still a need for a reduction of staff related to the relocation of production to Eastern Europe and continuing pressures on other aspects of the business. What we had understood then to be the compulsory redundancy stage had a new phase introduced. That was the dismissal of any employee with under 2 years' continuous service. We had initially understood this to mean that length of service had become an initial selection criterion for those facing compulsory redundancy. We were wrong. The respondent's evidence is that this was outside the planned redundancy programme and not part of any selection criteria. Its position seemed to be that it was a means of reducing the impact of the redundancy process on the longer serving employees (i.e., with more than 2 years' service) who might then have to go through compulsory redundancies. This is what it refers to as an "out of process" decision. It took some time for the confusing evidence to begin to explain what this "out of process" procedure was an alternative to. Again, doing the best we can, it seems to be simply a case that the employer took the view that it can terminate at will at any time before the employee has reached 2 years' service. The local label for this event being "out of process" meant any procedural steps expected by any of its relevant policies or procedures did not happen. That includes advance notice and a right to appeal the decision.

5.18 Through the early spring of 2019, we therefore accept the respondent was managing the reduction of workforce in anticipation of the move, whilst at the same time trying to maintain the demands for production, albeit reducing, at the existing site.

5.19 From her perspective, the claimant says from the initial announcement things started to change for the worse. We find much of that perception arose from a misunderstanding of the situation and the misplaced belief that because she was now an employee, her job was secure. There were, however, changes being made that affected the claimant and the respondent began trying to redeploy staff, particularly those engaged in the areas soon to cease production such as those working on the L462 products.

5.20 One option was to follow the work. It might be expected that there would be limited take up of redeployment to Slovakia, but we find this was an option made available to affected staff nevertheless.

5.21 The company operated two sites at Ham Hall and Coleshill. Whilst we find there was limited scope for redeployment, some opportunities did exist. We reject the claimant's contention that there was a third site at Elmdon Estate. Elmdon was the site of a separate employer, IAC. However, because IAC was a minority shareholder of the respondent and because both operated in similar markets, there was an informal and symbiotic arrangement put in place. This arrangement supported both the respondent's need to reduce employees and IAC's growing need. It had just taken on a new line of work requiring similar "cut, sew wrap" skills to those in decline at the respondent's premises. One significant difference between the respondent's operations and those at Elmdon Estate was that whilst both operated a 24 hour, three shift system, the respondent's shifts were fixed whereas Elmdon operated rotating shifts.

5.22 The evidence we heard of the attempts to relocate other employees does not show any inconsistency at all with the claimant's own experience. Mr Prokopiuk was first offered alternative work on a nights at Hams Hall. We do not accept he was told there was no alternative or that if he did not want to work the night shift his employment would be terminated. It is clear his refusal of that position was very quickly followed by another offer to join IAC at Elmdon. In fact, Mr Prokopiuk was offered new employment after only a week.

5.23 Similarly, Ms Kubiak was offered work in IAC group but declined it. Three days later she was offered work at Hams Halls site in a different section and started to work there from March 2019 until it also closed down. She returned to the agency and was redeployed to the Elmdon site from June 2019. She was taken on as a direct employee of the IAC group in January 2020.

5.24 The claimant was offered employment with IAC in Elmdon. This work, however, required the claimant to work the rotating shift pattern that IAC operated. She says she did not know this until she arrived at the site. Night shifts were a problem and she declined. She described the work being too difficult and exhausting. By this time she was some way into her pregnancy and the travelling alone was a tiring part of the day. She reported her difficulties after around 3 days to the manager. She was, instead, offered work with the respondent at the Hams Hall factory but would have to work night shifts. She agreed to try it. The claimant also said she asked her manager if she could take a vacancy created on the morning shift following the retirement of a previous worker. The claimant says she was told "if night shifts do not suit her she should dismiss herself". We do not find her account of this

exchange was accurate. We accept the respondent's evidence that in the circumstances of the case at that time, employees in production leaving their employment voluntarily were not replaced and certainly that they did not leave a "vacancy" behind. In any event, an adjustment was made for the claimant in respect of not working nights.

5.25 There is, however, one key difference in the employer's considerations for potential redeployment of the claimant was that, on some occasions, we find her pregnancy operated on the minds of her managers to reject alternative vacancies without enquiry of her or any specialised adviser. At no point after the initial risk assessment was that risk assessment revised or repeated in the context of either the alternative roles she did explore or the others that might have been available for her.

5.26 The claimant alleges that a colleague of hers, Catalina, who was also pregnant was dismissed. We do not know anything more about that circumstances of this case and cannot draw any inferences from this allegation.

5.27 On 20 February, Ms Michalevicz was signed off sick. The respondent takes issue with the claimant's alleged reasons for absence. It accepted it was initially related to pregnancy but says it was latterly as a result of an infection of her lower respiratory tract. We are satisfied that the circumstances are such that the pregnancy remained an operative reason for her absences even if during that time she contracted specific ailments attributing a specific diagnosis.

5.28 However, we do not accept the claimant was put under pressure by the respondent as she alleged. The claimant says she was constantly contacted by the employer asking when she was coming back to work. We find the employer had an absence monitoring system operated principally by HR and that it was to be expected that periodic contact would be maintained to keep dialogue open, particularly when there were likely to be substantial changes and developments arising on both sides. One such contact was in early March when the claimant received a text message from Rebecca in HR asking when she was coming back to work so they could discuss her maternity plan.

5.29 Far from improving, the claimant's condition deteriorated and in March she was admitted to hospital for 7 days due to an infection related to her pregnancy. She was discharged home for a few days before returning to work.

5.30 During her absence, a meeting had been arranged for 9 March and rearranged for 12 March. The claimant attended with a colleague who translated for her. It is one of the few interactions we have seen documented. The claimant describes it as a nice meeting with a discussion about her plans for return. She was told there was work for her to do on return. She informed the employer that she was waiting for an appointment with her GP about her health and ability to return to work. She was given information and asked to attend the next meeting having thought about her maternity plan. The notes of that meeting are consistent with the claimant's evidence that nothing was said to her indicating she was at risk of being dismissed. She felt confident about her employment. The topics discussed at the meeting did include the maternity plan and options for returning to work. During the meeting the

claimant confirmed not receiving the original letter as she had been in hospital due to her pregnancy. The purpose was expressed as being to obtain a clearer understanding of her current absence and her anticipated return and whether any adjustments could be made to assist. Mr Bassi said he was willing to accommodate the claimant. In the meantime, the change removing nightshifts was to continue until her maternity leave commenced.

5.31 For completeness we address two peripheral matters arising in the evidence. First an issue arose about the claimant's change of address to Nottingham, which was some distance to drive to work. The claimant confirmed she was fine with the travelling, and nothing more turns on that. Secondly, there was text sent by the claimant referring to her "dismissal". We accept that was, in fact, an error of translation and was meant to convey her absence, not dismissal. Mr Bassi explicitly assured the claimant that she was not dismissed and that they wanted her to enjoy her pregnancy until the baby came.

5.32 We have no timeline before us of the decline in the work at the plant generally and specifically in respect of the plan for transfer of the L462. What then happened we were told in various aspects of oral evidence which did not give a clear and coherent picture of exactly what happened. The most we have is that the respondent says collective consultation meetings had continued during this time with the TU as the headcount was reduced in line with the reducing need for staff on the L462 line. We have not seen any record of that consultation, or the selection process now said to have been agreed and it is difficult to piece together the events that mark the transition from the original redundancy plan and to the "out of process" dismissals.

5.33 At the meeting, the claimant had given Mr Bassi the impression that she would be returning the following week. She did not. She obtained a further week's fit note and then another one before finally attending her GP on 31 March 2019. At this time the advice was given that she could return to work on 1 April 2019. She did and, as advised at the previous meeting, she attended the Hams Hall factory at 7am and she began work as normal on a day shift.

5.34 Towards the end of that first shift, at about 2pm, she was called into the office unexpectedly but assumed it would be to discuss something about her maternity plan. She was met by Mr Bassi who dismissed her saying "I am sorry I have to dismiss you, there is no work for you to do". In some aspects of its case, the respondent has described this as a meeting to explain the redundancy selection, that she was represented by her chosen colleague, Agniezska. It cannot be both part of the redundancy process and at the same time outside it. It is also clear to us Agniezska was there to translate and not in the capacity as a work colleague companion.

5.35 We have seen the notes of this meeting. The meeting was extremely brief and the notes reflect it. The claimant says it lasted 5 minutes which seems to us entirely plausible. It is understandable why the claimant feels the situation to be at odds with the meeting she had been in only 2 ½ weeks earlier. The notes and the claimant's recollection are broadly consistent. It was at this meeting that we come across that phrase of "out of process" meeting for the first time in the chronology. The claimant was positively told she could not

appeal the decision to terminate her employment for that reason. We have not seen the process that is being referred to and the industrial members of the tribunal have not heard that phrase before. As we have said, the respondent's witnesses found it difficult to explain it to us. The respondent accepted a formal process, and a right of appeal would ordinarily apply to a redundancy dismissal.

5.36 The claimant's company sick pay was extended for the entirety of her absence. The dismissal was confirmed in writing and she was paid her notice in lieu as well as accrued holiday pay. Despite the express restriction on appealing, she tried to challenge the decision but did not get any response.

5.37 The contemporary documentation tells us nothing about the situation between 12 March when Mr Bassi met the claimant about her absence and maternity and 1 April when she was dismissed. The respondent's case is based on a hierarchy of measures aimed at avoiding compulsory redundancies, or at least amongst those with more than 2 years' service. We accept that the claimant fell into this category of being an employee with less than two years' service. What we have before us to explain how these out of process dismissals happened comes from the oral evidence of the respondent's witnesses and was not consistent. We reach the following findings of fact on what happened during this period from March 2019: -

a) First, we accept that Ms Michalevicz was not the only employee with less than 2 years' service whose employment was terminated under the so called "out of process" procedure. We cannot be certain of the exact number due to errors in the spreadsheet provided by the respondent evidencing this but, despite that, we are satisfied it was around 40.

b) Whatever we might think about this process, ***in itself*** it is a reason which does not engage with the claimant's pregnancy and we are therefore satisfied the claimant's employment was destined to come to an end at some point that summer in a way that was neither discriminatory or unfair.

c) We accept Mr Bassi was managing his shift teams under pressure to balance a wind down of production yet maintain what levels of production were still needed. He was directly involved in the attempts to find alternative work for potentially displaced employees including the claimant.

d) Alternative roles were thin on the ground but did exist. The claimant's skill set was focused on cut, sew wrap on the L462 products but we find other work and other unskilled work existed albeit it may have itself been short lived as the production closed.

e) We find some agency staff had been retained on the L462 despite the initial cessation of agency work due to their particular skills.

f) We find consideration of one potential suitable alternative role was rejected due to her impending maternity leave and the belief she would not become proficient in it until that role itself came to an end at the site.

g) We find other possibilities were rejected by Mr Bassi due to his assumption of suitability due her state of pregnancy. Other respondent's witnesses gave similar evidence indicative of an assumption about what the claimant could or could not do due to "her condition".

h) We accept much of that thought process was conducted in a benevolent frame of mind, but it was based on lay assumptions. There was no reference back to the expectant mother's risk assessment or referral to the specialised adviser that had performed that original assessment. There was no consultation with the employee herself about alternative options.

i) We find at no time was there any review of the risk assessment upon taking up alternative roles she was placed in during February.

j) We find Mr Ali made the high-level decisions about numbers. He did not make the decision about which individual was selection to meet those numbers. Thereafter, we find Mr Ali would instruct his shift managers, such as Mr Bassi, to select from their teams which individuals would go. At that level, the shift manager had to make their decision as to who went or stayed based on the need for work within a reducing headcount.

k) Mr Bassi evidence was that it was his decision who to pick from the pool at any week. The basis on which one was picked over others is not clear. This is one of the many significant gaps the case as oral evidence suggested the respondent was working to some form of "skills matrix". Of all the gaps we encountered, this was potentially the single most important matter which had not been put before us or even disclosed and was not referred to until it slipped out in oral evidence. We have no basis for finding what it is, what it contains or looks like nor, importantly, how the claimant's own skills faired in that matrix against the roles potentially available.

l) We do find that the claimant's pregnancy related absence meant she was treated differently in whatever the ongoing assessment of the skills matrix entailed. In short, she was ignored during that period as if she did not exist on the payroll only to be dismissed on the first day she returned to work. In the absence of any meaningful evidence on this process, it is more likely than not that her being ignored as the workplace changed over those weeks was to her disadvantage in any consideration being given for alternative roles.

m) Whether this "out of process" procedure was part of the wider redundancy exercise or not, we find that not all those dismissed under it were dismissed at the same time and the effective dates of termination of the 40 or so dismissed ranged from late March to 31 July 2019.

n) There is nothing put before us by the respondent to explain why the claimant's employment ended on 1 April as opposed to any other date within that range. Equally, there is nothing to explain why she was dismissed without notice, as opposed to working her notice.

o) We do accept, however, that there was a conclusion of the process in absolute terms by on 31 July 2019. We can therefore find that whatever else is missing from the explanations about the claimant's dismissal, her employment would have come to an end on that date when the L462 came to an end and the effect of the "out of process" decision was finally concluded.

6. Law

6.1 Section 18 of the 2010 Act provides, so far as is relevant: -

(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.

(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.

6.2 It can be seen that the structure of how this form of prohibited conduct is made out contains the following elements: -

a) That the woman is subject to unfavourable treatment

b) That that unfavourable treatment occurs during the protected period

c) that the reason for that unfavourable treatment is any one of the four prohibited grounds, namely pregnancy (s.18(2)(a)); illness suffered as a result of the pregnancy (s.18(2)(b)) being on compulsory maternity leave (s.18(3)) or a desire or attempt to exercise her rights to ordinary or additional maternity leave (s.18(4)).

6.3 There is no dispute the allegations in this case take place in the protected period as defined and the further deeming provision under subsection 5 is not needed.

6.4 As with all discrimination where the causal link is based on a test of "because of", the question is to identify what it was that consciously or subconsciously caused the alleged discriminator to act. The protected characteristic must in some material way influence the actions or decisions. That can sometimes be difficult in pregnancy cases as the mere fact of pregnancy can often be causally relevant but not necessarily causally determinative. What we mean by that is that it is not a "but for test". Unless it is clear that the reason for the treatment was because an overtly or inherently discriminatory criterion has been applied, consideration must be given to whether the fact that she was pregnant influenced the mind of the relevant decision maker. (See *Interserve FM Ltd v Tuleikyte [2017] IRLR 615*; *South West Yorkshire Partnership NHS Trust v Jackson UKEAT/0090/18*).

6.5 The burden of making out those essential elements rests with the claimant. She may discharge that burden by satisfying us outright that the "because of test" is made out on the on the evidence on the balance of probabilities in the ordinary way. Alternatively, she may rely on s.136 of the 2010 Act so far as that shifts the burden in certain circumstances. It provides: -

> ***136.Burden of proof***
>
> ***(1)This section applies to any proceedings relating to a contravention of this Act.***
>
> ***(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 that the contravention occurred.***
>
> ***(3)But subsection (2) does not apply if A shows that A did not contravene the provision.***

6.6 In short, the claimant need only prove a prima facie case. If she does prove facts from which we could conclude, in the absence of any other explanation, that the reason for the treatment was a prohibited ground, we turn to the respondent to prove that the treatment was not for that reason. The extent to which the protected characteristic is relevant to that test remains low. The respondent must show that the reason for the treatment was "in no way whatsoever" because of the protected characteristic. If it remains present in any material way, the respondent will not have discharged that burden and, if it fails to do so, we are left with the conclusion that pregnancy is the reason why the treatment occurred. In those circumstances the law requires us to conclude that the claim succeeds.

6.7 Section 99 or the 1996 Act provides, so far as is relevant: -

> ***99 Leave for family reasons.***
>
> ***(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—***
>
> ***(a)the reason or principal reason for the dismissal is of a prescribed kind, or***
>
> ***(b)the dismissal takes place in prescribed circumstances.***
>
> ***(2) In this section " prescribed " means prescribed by regulations made by the Secretary of State.***
>
> ***(3) A reason or set of circumstances prescribed under this section must relate to—***

(a)pregnancy, childbirth or maternity,

(aa)…,

(ab)…,

(b)ordinary, compulsory or additional maternity leave,

(ba) – (d) …,

and it may also relate to redundancy or other factors.

(4)…

6.8 The reference to "for the purposes of this part" refers to an earlier provision in Part X at section 98(1) which sets out potentially fair reasons for dismissal. Section 99 therefore provides the circumstances which will amount to an automatically unfair reason when deciding the reason for dismissal. It remains the case, however, that were there is more than one reasons in operation, the task is to identify the principal reason.

6.9 As the claimant lacks the necessary qualifying service to bring a claim of unfair dismissal under the ordinary principles of fairness set out in section 98, two consequences follow. The first is that the question of fairness rests entirely on the reason or principal for dismissal. If we conclude that reason is the automatically unfair reason relating to pregnancy, the claim succeeds. If we conclude it is any other reason at all the claim fails and even if we found the actual reason to be a potentially fair reason such as redundancy, there is no jurisdiction to go on to consider the fairness of that reason by the ordinary principles under section 98(4).

6.10 The second consequence is that the respondent does not carry the legal burden of proving its reason for dismissal as it would in an ordinary claim of unfair dismissal. We have no jurisdiction to determine a claim of unfair dismissal by the claimant unless the reason for dismissal is the proscribed reason. The legal burden of proving that reason falls on the Claimant (**Smith v Hale Town Council [1978] ICR 996 CA**).

6.11 The prescribed regulations referred to in Section 99 are the **Maternity and Parental Leave Etc. Regulations 1999** ("MAPLE"). The right in section 99 needs to be read alongside two potentially relevant regulations. Regulation 20 supplements the meaning of automatic unfair dismissal and provides: -

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

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

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

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

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

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

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

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

(a)the pregnancy of the employee;

(b)- (g)…;

6.12 Regulation 10 engages when a pregnant employee's existing job becomes redundant during her maternity leave. The protection afforded by that regulation does not engage in this case as the claimant had not yet commenced maternity leave at the material time.

7. Discussion and Conclusions

7.1 The two statutory provisions before us may appear to pose the same question, namely, what is the reason for the claimant's dismissal? In fact, the legal analysis is subtly different and the application of the shifting burden only applies to the claim under the 2010 Act. That becomes particularly relevant in this case as we have reached two significant conclusions on the evidence. The first is that we are satisfied there was a genuine redundancy situation applying to all the decisions this employer was taking in respect of the claimant's employment. There was a diminishing need for work of a particular kind, that is production operative, up to 31 July 2019. Alternatively, the programme of reductions leading up to 31 July was in anticipation of a complete cessation of the need at the place where the claimant was employed. Either analysis brings this state of affairs within the provisions of s.139 of the 1996 Act to amount to a redundancy situation. We have considered this further as at times the respondent appeared to be saying this was not a redundancy due to its notion of "out of process" procedure linked specifically to employees with under 2 years' service. We have concluded nothing turns on this as we are satisfied the reason for that procedure was itself a state of affairs falling within s.139 of the 1996 and because this is not a case where the respondent has a legal burden to establish a potentially fair reason in any event.

7.2 The second significant conclusion we reach is that we are satisfied that her pregnancy was a factor influencing certain decisions, particularly in respect of the availability or suitability of alternative employment opportunities that might have been available to her during the decline of the L462 work and the fact of her pregnancy related absence through February and March 2019 leading to her dismissal on the first day she returned to work.

7.3 Those two critical conclusions unfold in slightly different ways under the two statutory tests we have to apply. Key to both is the fact that we are satisfied this employment would have ended, unrelated to her pregnancy, by 31 July 2019. There are, therefore, two operative reasons materially affecting the reason for her dismissal on 1 April 2019 namely redundancy and her pregnancy.

7.4 When we apply those conclusions to the test under the 1996 Act, we have to decide whether the claimant has proved her pregnancy was the principal reason. In answering that we have had particular regard to the following factors:-

a) Initial steps were taken to secure he health and wellbeing with a prompt risk assessment.

b) Steps were taken to secure the claimant's employment within the initial redeployment options at a time when the employer knew of the pregnancy

c) The indications given by Mr Bassi about his future hopes for the claimant's employment in the absence/maternity review meeting were genuine.

d) The extent to which her pregnancy status infected the decision making was not malicious.

e) The redundancy was a substantial exercise involving the closure of an entire area of production.

f) There was no realistic scope for employment to continue after 31 July 2019 at the latest.

7.5 We have concluded pregnancy played a part in the process that led to the claimant's dismissal on 1 April 2019, as opposed to any other date around that time but that the principal reason was redundancy. For that reason, the claimant has failed to prove that pregnancy was the principal reason.

7.6 The material date falls before the commencement of any form of maternity leave and we are satisfied was not in any way related to the intention to take maternity leave. As a result, the specific provisions in Regulation 10 of MAPLE do not engage to provide any additional protection or assistance to her claim.

7.7 We then turn to analyse the result of the same conclusions through the prism of the 2010 Act.

7.8 There is no dispute that a dismissal on 1 April 2019 amounted to unfavourable treatment.

7.9 This is not a case where we are able to say the claimant has proved on the balance of probabilities that the treatment was because of pregnancy. However, we are satisfied that she has proved facts which show that her pregnancy status was having a material influence on the process that was otherwise unfolding. The two key areas we have identified relate to the decisions taken about her suitability for alternative work, potentially subconsciously, but based on lay assessments of "her condition" and also the stark contrast between the discussions in early March about her maternity plans and her dismissal on her first day back at work. During that absence, it seems decisions had been taking place concerning the balance of demand and workforce but for which she had been excluded from consideration because of her pregnancy related absence.

7.10 It follows that we are satisfied that they are facts from which we could conclude that the reason for the unfavourable treatment was her protected characteristic at the time. Section 136 requires us to then turn to the respondent to show it was in no way whatsoever material to the decision. Faced with the situation this respondent was in, we might anticipate it would be possible to discharge that shifted burden. We might anticipate being taken through the detail of how the respondent managed the declining workforce against a continuing demand for certain products; how it structured its different work and the various skills requirements; and how the claimant met or did not meet those required skills, in particular by being taken through the apparent "skills matrix", mentioned only in passing in oral evidence. We might anticipate some evidence to explain the variation in the dismissal dates amongst those apparently dismissed under the "out of process" procedure because they had less than 2 years' service. We do not have this in any convincing sense. The evidence advanced has been confused. We have, where it was appropriate to do so, accepted substantial aspects of the respondent's evidence that has been poorly set out. For example, the simple list of those dismissed under the out of process procedure was itself so confusing as to require supplementary evidence for it to make sense. In other respects, the evidence has remained contradictory and confused. In short, we are not satisfied that the respondent has discharged the burden.

7.11 For those reasons, we have to conclude that the claimant's pregnancy was a material reason affecting her dismissal on 1 April 2019, even though it takes place within a much broader redundancy situation.

8. Remedy

8.1 The claimant is entitled to compensation flowing from her discriminatory dismissal. That will be determined at a remedy hearing, if necessary, but we encourage the parties to take all reasonable steps to reach agreement between themselves. In that regard we make the following observations on the evidence before us already. We do, however, stress that these are no more than observations to assist the parties in their attempts to resolve matters. Both will have opportunity to address us in evidence and submissions on these points at any future remedy hearing.

8.2 First, there would appear to be financial loss. We will have to apply the just and equitable principals to loss and only compensate for actual loss suffered by the discriminatory act. Those principles were confirmed in Chagger v Abbey National plc and another [2009] EWCA Civ 1202 CA. For present purposes, that means the financial losses associated with the discriminatory act cease to flow, at the latest, on 31 July 2019 when we have concluded the redundancy exercise would have concluded, or at least the reduction of workforce of those with under 2 years; service, and her employment would therefore have come to an end without reference to any pregnancy. Within that there will need to be credit for the payment in lieu of notice and any other mitigation.

8.3 The claimant also claims injury to feelings. We will be required to assess the evidence of that and apply the principles established in **Vento v Chief Constable of West Yorkshire Police [2003] IRLR 102, CA** and associated authorities. This is an award of compensation

for injury, not punishment for discrimination. Injury has to be proved and quantum is to be assessed with some regard to the general level of damages awarded in personal injury cases. The Vento guidelines provide brackets. The unintentional nature of the discrimination and, the one off event and the fact that the employment was heading towards an inevitable termination would, at this stage, suggest to us we are likely to be assessing injury to feelings well within lower Vento band.

9. Costs

9.1 We have inherited the responsibility to determine a costs application made by the respondent. It arises from an application to amend her claim to include a claim for ordinary unfair dismissal for which an urgent preliminary hearing was convened before EJ Faulkner on 22 March 2021. The parties attended and the application was abandoned at the hearing.

9.2 In summary, the background is this. On 17 August 2019, the claimant presented her claim to the Midlands West Employment Tribunal. It included a claim for unfair dismissal. On being transferred to this region, a telephone preliminary hearing conducted on 18 February 2020 before EJ Jeram. At that hearing, the question of the claimant's continuous service was explored in detail and Ms Spencer conceded that the claimant did not have the necessary continuous service to bring a claim of ordinary unfair dismissal. The remaining issues were identified and case management orders made through to a final hearing in April 2021, that is the hearing before us. On 8 March 2021, about 6 weeks before the final hearing, Ms Spencer made an application to amend the claimant's claim to include a claim for ordinary unfair dismissal. It was premised on the basis that the claimant's previous agency placement before being employed by the respondent should amount to continuous service as it was in the same building doing essentially the same work. On 9 March, the respondent objected setting out reasons why and that it would seek its costs of responding to the application. The application was maintained and came before EJ Faulkner at the preliminary hearing on 22 March. He got as far as considering the merits of the application itself and explaining the legal issues. He concluded that the facts on which the application was based was known to the claimant from the outset. The application was then abandoned at the hearing. Costs were deferred to this final hearing principally as there was no schedule before EJ Faulkner. There were some supplementary case management orders made but not such as would have justified a hearing in themselves.

9.3 Before us the application for costs was renewed, supported by a schedule claiming £990 plus VAT. The respondent has set out its application based on rules 76(1)(a) "conducting the proceedings unreasonably" and 76(1)(b) that a claim of ordinary unfair dismissal had no reasonable prospect of success.

9.4 In her submissions on behalf of the claimant in response to the application, Ms Spencer urged the tribunal not to exercise its discretion to award costs and that "they" were not able to pay it. That limited ground of resistance was directly in response to the tribunal's summary of the three key stages of the relevant tests to apply before making a costs order which we expressed as (1) whether the power was engaged, (2) if so, whether we should

exercise the discretion to make an order and (3) what order to make. All of which can be informed by any information available about the paying party's ability to pay under rule 84.

9.5 The claimant had already sent a response in correspondence dated 16 April which we took into account. That included the fact that she had withdrawn the application and some details of her, and indeed Ms Spencer's, limited ability to pay and costs order.

9.6 Considering everything before us, we grant the application for the order to pay costs. It appears by Ms Spencer's submissions that the claimant may accept the power to make an order was engaged. In any event we are satisfied it amounted conducting the claim unreasonably and that its substance carried no reasonable prospect of success. The application was made over a year after the issue was clearly addressed in terms with which the claimant had agreed and was brought only 6 weeks before the final hearing without convincing explanation. Nothing had changed between then and the application. The fact it was abandoned at the hearing did not save the costs of it being unnecessarily incurred. The question is then whether we should make the order. There is nothing about the respondent's conduct that would give reason not to. It had clearly set out to the claimant why the application was futile and warned of its costs application. As for the claimant, she is represented. In this jurisdiction Ms Spencer appears as a lay representative but she is, however, a well-informed lay representative being a Polish lawyer currently studying to cross qualify to practice in England and Wales. The claimant was on notice of the futility of the application and yet maintained it. We do consider it is appropriate to exercise our discretion to make an order.

9.7 In reaching that decision whether to make the order, and in assessing the amount of costs to be paid, we have had regard to the financial means provided. There is no doubt the claimant is of limited means generally but the question of ability to pay has taken on a new complexion following our conclusions on liability and the remedy consequences that will follow. The means do not deter us from making the order or the following terms of it

9.8 The application itself is modest. Ms Hewitt is a grade A solicitor claiming 4.4 hours at £225 per hour. That is within the revised guideline hourly rates for this area. About half relates to the hearing itself, the rest is preparation and associated correspondence. All appears to us to be entirely reasonable. This is not a wasted costs order, although it potentially has the flavour of such. The order will be made against the claimant and will be made in the full amount. The only adjustment we make is that the respondent is clearly a VAT registered business and its VAT liability for its solicitor's costs is something it can account for in the ordinary way. We therefore include in the judgment an order the claimant pay the respondent the net sum of £990.

EMPLOYMENT JUDGE R Clark
DATE 30 July 2021

JUDGMENT SENT TO THE PARTIES ON

2 August 2021

……...……

AND ENTERED IN THE REGISTER

……...……

FOR SECRETARY OF THE TRIBUNALS