



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Shipp (nee Canning)

Respondent: City Sprint UK Ltd

Heard at: London Central

On: 21, 24 – 28 May 2021
9 & 10 June (in chambers)

Before: Employment Judge H Grewal
Mr R Miller and Mr P Secher

Representation

Claimant: Ms H Williams, Counsel

Respondent: Ms A Ahmad, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of unfair dismissal is well-founded and the Tribunal makes a basic award of £715 and no compensatory award.

2 The Tribunal has jurisdiction to consider the complaints of pregnancy/maternity discrimination (under section 18 of the Equality Act 2010) about acts that occurred between February and May 2019, and that those complaints are well-founded;

3 The complaints of maternity discrimination (set out at paragraph 2 b-l, o, q and r in the Reasons below) about acts that occurred between the end of July 2019 and 30 March 2020 are well-founded and the Tribunal orders the Respondent to pay the Claimant compensation in sum of £25,000 (for injury to feelings);

4 The Respondent is to pay interest of £5,000 on the injury to feelings award.

4 The complaint of indirect sex discrimination (under section 19 of the Equality Act 2010) is well-founded. The Tribunal awards no additional remedy for that.

5 The complaints of victimisation (under section 27 of the equality Act 2010) are not well-founded.

6 The complaint of breach of contract is well-founded and the Tribunal orders the Respondent to pay the Claimant damages in the sum of £5,000.

REASONS

1 In claim forms presented on 28 February 2020 and 24 July 2020 the Claimant complained of sex and pregnancy/maternity discrimination, breach of contract and unfair dismissal.

The Issues

2 The issues to be determined were clarified at a preliminary hearing on 4 January 2021 and in further particulars provided by the Claimant. It was agreed at the outset of the hearing that the complaints and issues that we had to determine were as follows.

Harassment related to sex

2.1 Whether the comments set out in paragraph 6 of the Grounds of Complaint in the second claim were made between February and May 2019. It is disputed that Mr Gisbourne suggested that colleagues place a wager on “*how much weight Sally will put on.*” It is accepted that the other comments were made.

2.2 Whether by making the comments the Respondent subjected the Claimant to unwanted conduct related to sex which had the effect of creating a hostile, degrading, humiliating or offensive environment or violated her dignity.

2.3 Whether the Tribunal has jurisdiction to consider those complaints having regard to the time limits for bringing such claims.

Direct maternity/pregnancy discrimination

2.4 Whether the Respondent treated the Claimant unfavourably because of her pregnancy and/or because she was exercising or sought to exercise her right to maternity leave by doing any of the following:

- a. Making the comments set out in paragraph 6 of the Grounds of Complaint in the second claim;
- b. Failing to consult with her in respect of the restructuring while she was on maternity leave (including failing to inform her of the change of her line manager);

- c. Failing to explore new roles with the Claimant during her maternity leave whilst the Respondent discussed new roles with male members of the management team including awarding pay increases to certain male members of staff who did not have group executive or executive team responsibilities;
- d. Deciding to put the Claimant at risk of redundancy in September 2019 and proposing that she take a role that was in effect a demotion;
- e. Pre-determining the Claimant's redundancy and proposing a superficial consultation;
- f. Failing to provide and details about the alternative role, Director of Marketing, until October 2019 and compiling the job description in the way that it did;
- g. Removing the Claimant from the Executive Team organigrams and the marketing email distribution;
- h. Mr West's conduct of the meeting on 3 October 2019;
- i. Failing to respond to the Claimant's concerns outlined in her email of 11 October 2019;
- j. Informing her at the meeting on 6 November 2019 that Director of Marketing role would involve a 20% pay reduction despite an increase in targets and the role being essentially the same as the one she undertook before she went on maternity leave;
- k. Informing her at the meeting on 6 November 2019 that the Director of Marketing role would require her attendance at the London office 4 days a week when the same requirement was not impose on her male counterparts;
- l. Insisting that the role would entitled Director of Marketing when that title reflected a lower level of seniority compared to her male colleagues;
- m. Requiring her to attend a grievance hearing in Surrey in December 2019 despite being aware that she was based in Wiltshire and had a 5-month old breastfed baby;
- n. Mr Westgarth conducting the grievance hearing in the manner he did and reaching the outcome that he did;
- o. Informing her in March 2020 that she would have to make a flexible working request if she did not want to or was unable to attend the London office 4 days a week;
- p. The outcome of the grievance appeal;
- q. Informing her in March 2020 that the proposed salary for the Director of Marketing role might be negotiable when the Claimant had maintained that any salary reduction was not appropriate as the role had not changed.

r. Dismissing the Claimant.

2.5 Whether the Tribunal has jurisdiction to consider any complaints that were not presented in time.

Direct sex discrimination

2.6 In the alternative, whether the Respondent directly discriminated against the Claimant because of sex by doing any of the acts at paragraph 2.4 (above) and by deciding to make her redundant on 13 March 2020, issuing a notice of dismissal on 30 March 2020 and terminating her employment on 30 September 2020.

2.7 Whether the Tribunal has jurisdiction to consider any complaints that were not presented in time.

Indirect sex discrimination

2.8 Whether between November 2019 and March 2020 the Respondent applied a provision, criterion or practice ("PCP") that the new role (Director of Marketing) required the post holder to work in London four days a week.

2.9 Whether that PCP put women at a particular disadvantage when compared to men and whether it put the Claimant at that disadvantage.

2.10 If it did, whether the Respondent can show it to be a proportionate means of achieving a legitimate aim.

Victimisation

2.11 It is accepted that the Claimant's grievance of December 2019 was a protected act. Whether the following acts occurred and, if they did, whether they amounted to a detriment:

- a. Dismissal;
- b. Inviting the Claimant to attend a grievance hearing in Surrey when she had a 5 month old baby;
- c. Allocating an unsuitable grievance manager (P Westgarth) who was dismissive and made the Claimant feel that she interrogated and intimidated during the grievance meeting;
- d. A poor, unsubstantiated and partial grievance outcome;
- e. The conclusion in the grievance outcome that the inappropriate comments lacked any intent or discriminatory effect and the failure to concede that point and take remedial action;
- f. The offer of £3,500 for the deduction from the Claimant's wages rather than the full amount;
- g. The failure to properly address the Claimant's concerns about the job description;
- h. The grievance appeal outcome.

2.12 If the Claimant was subjected to any of the above detriments, whether it was because she had done a protected act.

Unfair Dismissal

2.13 Whether the Claimant's dismissal was unfair under section 99 of the Employment Rights Act 1996 read together with Regulation 20(1)(a) and (3) or 20(1)(b) of the Maternity and Parental Leave etc Regulations 1996, i.e. whether the principal reason for her dismissal was that she took maternity leave or that she was redundant and regulation 10 had not been complied with.

2.14 If not, whether there was a potentially fair reason for the dismissal. The Respondent's case is that the Claimant was redundant.

2.15 If the Claimant was redundant, whether the dismissal was fair under section 98(4) of the Employment Rights Act 1996.

Breach of contract

2.16 Whether the Respondent's failure on the termination of the Claimant's employment to pay her the sum of £5,000 in respect of a salary sacrifice in 2018 was a breach of contract.

The Law

3 Section 18 of the Equality Act 2010 ("EA 2010") provides,

- “ ...
- (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.
- ...
- (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.
- ...
- (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).”

4 In determining the issue of causation the Employment Tribunal must ask itself the “reason why” question in relation to the unfavourable treatment alleged – why was the Claimant treated in the manner complained of? It is not sufficient for the “but for” test to be satisfied for there to be a finding of discrimination under section 18 – **Indigo Design Build & Management Ltd v Martinez [2014] UKEAT/0020/14/0007** and **South West Yorkshire Partnership MHS Foundation Trust v Jackson [2018] UKEAT/0090/18**. In **Blundell v The Governing Body of St Andrew's Catholic Primary School [2007] UKEAT/0329/06** the EAT held that failing to give a teacher the opportunity to put forward her preferences for the class that she wanted to teach because she was absent on maternity leave amounted to direct sex discrimination.

5 Section 13(1) EA 2010 provides,

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

Sex is a protected characteristic. On a comparison of cases for the purposes of section 13 or 19 there must be no material difference between the circumstances relating to each case.

6 Section 19 EA 2010 provides,

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant characteristic of B’s.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant characteristic of B’s if –

(a) A applies, or would apply, it to persons with whom B does not share that characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

Sex is a relevant protected characteristic.

7 Section 26 EA 2010 provides,

“(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of –

(i) violating B’s dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

...

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

Sex is a relevant protected characteristic.

8 Section 27 EA 2010 provides,

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) because B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

...
(c) *Making an allegation (whether or not express) that A or another person has contravened this Act.*"

9 Section 136(1) and (2) EA 2020 provide that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must conclude that the contravention occurred unless A shows that A did not contravene the provision.

10 Section 123(1) EA 2010 provides that proceedings may not be brought in the employment tribunal after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of that period (section 123(3)(a)).

11 Section 99(1) of the Employment Rights Act 1996 ("ERA 1996") provides,

"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."

12 Regulation 20 of the Maternity & Parental Leave etc Regulations 1999 ("MAPLE Regs 1999") provides,

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

...
(3) *The kinds of reasons referred to in paragraphs (1) and (2) are reasons connected with –*

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

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

13 Regulation 10(1) and 2 MAPLE Regs 1999 provide that where during an employee's maternity leave her role becomes redundant and there is a suitable alternative vacancy, the employee is entitled to be offered the alternative role under a new contract of employment which complies with paragraph 3 of regulation 10. Paragraph 3 provides that the work must be suitable in relation to the employee and appropriate for her to do in the circumstances and its terms and conditions are not substantially less favourable than her old contract.

14 Section 98(1) and (2) ERA 1996 provide that the onus is on the employer to prove the reason or principal reason for the dismissal, and that if the employer proves that

the employee is redundant that is a potentially fair reason. Section 139(1) ERA 1996 provides that an employee who is dismissed shall be taken to be dismissed for redundancy if the dismissal is wholly or mainly attributable to the facts that the requirements of that business to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

The Evidence

15 The Claimant, Patrick Gallagher (former Group CEO), Gerard Keenan (former Group CFO) and Justin Moore (former Chief Sales Officer) gave evidence on behalf of the Claimant. The following witnesses gave evidence on behalf of the Respondent – Gary West (CEO), Paul Westgarth (Consultant doing work for the Respondent), Rosie Bailey (Commercial Director), Simon Parsons (Director of IT) and Georgina Kilcoyne (Head of HR). The documentary evidence comprised a little over 700 pages. Having considered all the oral and documentary evidence, the Tribunal make the following findings of fact.

Findings of fact

16 The Respondent's business consists of two main distinct brands that provide different services – City Sprint and On the Dot. City Sprint is a UK same day business to business delivery service providing tracked courier delivery with offices and service centres all over the country. On the Dot ("OTD") was launched as a brand in 2015 and provides business to consumer delivery services. Retailers used OTD to undertake deliveries from their stores to their customers. There is a third brand called Transworld.

17 From May 2018 another company in the Group, On the Dot Technologies Ltd ("OTD Tech Ltd"), became responsible for the technology for the Respondent and a significant amount of time and money was invested in developing a new technology platform.

18 The Claimant commenced employment with the Respondent on 6 September 2010. In July 2016 she was appointed Marketing Director. On 1 January 2018 her salary was increased to £100,000 p.a. As Marketing Director the Claimant was responsible for marketing for all three brands. The Claimant held a budget for all the brands and was responsible for all marketing spend, internal and external communications, public relations, website design and content and competitor and customer insight. The vast majority of her time was devoted to the CitySprint brand. From May 2018 to April 2019 the Claimant's remit to look after the OTD brand reduced from a digital point of view because that became the responsibility of the newly appointed Chief Revenue Officer for OTD Tech Ltd, but she remained responsible for PR, events and branding of OTD.

19 The Respondent has been backed for a number of years a private equity firm, Lloyds Development Capital Ltd ("LDC"), and had covenants with its banks. In 2018 the Respondent was close to being in breach of its covenants with the banks and was coming under increased pressure to achieve costs savings in the business. Mr Keenan and Mr Gallagher asked senior employees whether they would be willing to

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accept a temporary reduction in their salaries to achieve immediate savings and to reassure both the Board and the lenders. Messrs Keenan and Gallagher were also on the Board. Mr Keenan told them that the reduction was only for 2018 and would be repaid at a later point if they either left the business, for whatever reason, or if the business was refinanced or sold or received additional funds. The Claimant agreed to a reduction of 20% for 3 months (March to May 2018).

20 In October 2018, after the Claimant became a member of the Group Executive team, her title changed to Group Marketing Director. She did not receive a pay increase and there was no substantial change to her duties.

21 As Group Marketing Director the Claimant was a member of two executive teams – the CitySprint Executive team and the Group Executive team. The former comprised Paul Gisbourne (CEO), Justin Moore (Chief Sales Officer), Rosie Bailey (Director of Customer Management), Simon Parsons (Director of IT), Craig Eddy (Director of Operations), Ella Coombs (Director of Finance) and the Claimant. The latter comprised Patrick Gallagher (Group CEO), Gerard Keenan (Group CFO), Paul Gisbourne, Justin Moore, the Claimant, Santosh Sahu (CEO of OTD Tech Ltd) and Darren Taylor (Chief Development Officer for OTD Tech Ltd).

22 The Claimant was one of four persons who reported to Patrick Gallagher, the Group CEO. The others were Gerard Keenan, Paul Gisbourne and Santosh Sahu.

23 In 2019 after a failed attempt to sell the business LDC felt that significant costs savings needed to be delivered and that the business was not taking all necessary steps to ensure that it maximized its value.

24 In early 2019 LDC replaced the Chairman of the Respondent with Jonathan Halford. The previous Chairman was paid in full the salary he had foregone in 2018. In April 2019 the Board appointed Rubicon Transformation Partners (“RTP”) to work alongside the existing management team to reorganise the business and secure additional funding for the business. Mr Halford recommended RTP and LDC approved its appointment. Mr Halford was a 50% shareholder in RTP. The other shareholder was Gary West. Three individuals from RPT were brought in to work with management. One of them was Gary West. They had 3-4 months to present an alternative plan to shareholders and lenders. The banks wanted debt brought down and more investment from LDC. They were not about to call the debt in.

25 In February 2019 the Claimant told some of her colleagues that she was pregnant. Craig Eddy asked her when she had stopped taking contraception and how she thought that her pregnancy would affect her long-term career prospects. In May 2019 in an executive team meeting Mr Eddy told her *“when you have to leave that little one at nursery, you won’t want to come back.”* Darren Taylor and Paul Gisbourne asked her whether her pregnancy had been planned. Mr Gisbourne also remarked that that they should put a wager on how much weight she would put on during her pregnancy. The Claimant found these comments offensive and humiliating. She considered whether she should make a formal complaint but decided against it because she did not want her maternity leave to be marred by the issue and she was wary about making complaints against senior members of the Group in circumstances where there had already been some allusion to the effects of her pregnancy on her career prospects.

26 The Claimant had several conversation with Rosie Bailey about these comments. Ms Bailey noticed that she was upset and frustrated by the comments and was concerned about the impact that her pregnancy might have on her career. The Claimant also raised the matter informally with Georgina Kilcoyne, Head of HR, before she went on maternity leave. Ms Kilcoyne offered to speak to members of the executive team about it but the Claimant said that she would deal with it herself. On 28 May 2019 the Claimant told Mr Gisbourne about the comments that Mr Eddy had made and that she thought that they were inappropriate.

27 The Claimant started her maternity leave on 10 June 2019. She was due to return to work in March 2020. Her daughter was born around 25 June 2019.

28 Shortly before 22 July 2019 Mr Halford informed Patrick Gallagher, who was on holiday at the time, that the Board had decided to dismiss Gerard Keenan. Mr Gallagher made it clear that he did not agree with the decision, and he repeated that at a Board meeting convened over the telephone. On 22 July 2019 the Board dismissed Mr Keenan. On 23 July Mr Gallagher, Paul Gisbourne, Darren Taylor, and Justin Moore resigned. Messrs Gallagher and Moore were put on garden leave. Messrs Gisbourne and Taylor were required to work out their notice. On 29 July Santosh Sahu was made redundant. The effect of that was that there was no-one from the Group Executive team left in the organisation other than the Claimant who was on maternity leave.

29 On 1 August Mr Halford made an announcement to all the staff. He said that the Board had reviewed its strategy in light of more challenging conditions and had concluded that the time was right to introduce new leadership. He said that Messrs Gallagher and Keenan had stepped down and that Gary West had been appointed interim Group CEO while they looked for the right permanent candidate to join at the appropriate time. In addition, the Board had appointed a new CFO. He said that Mr Gisbourne would be working closely with Mr West and the new CFO in the coming weeks.

30 On 1 August Mr Gisbourne sent Gary West an organisation structure diagram which showed the Claimant as the Group Marketing Director. He said that the Claimant was on maternity leave at the time and was being covered by Jerrica Tomlinson (Head of Marketing).

31 No one at the Respondent contacted the Claimant to inform her of the changes or to consult with her as the sole remaining member of the Group Executive.

32 On 22 August the Board presented in broad terms the new structure created by RPT to the lenders. The new structure had six functions reporting into the CEO. These were Finance, IT, Chief Operating Officer, Customer and Colleague, Sales and Account Management and Business Solutions. Marketing and Call Centres were part of Customer and Colleague. At that stage the roles within the functions and those filling the roles had not been identified. Under the new structure OTD as a brand would continue but investment in OTD Technology Ltd and the development of the new technology platform would stop and the technology would come back into the Respondent.

33 The Claimant had been trying to meet Mr Gisbourne for coffee for a while and they met on 6 September. Mr Gisbourne told her that Gary West had prepared some

organisational charts for a presentation to lenders but said that he did not know whether her name was on them. He gave her the impression that there would be a role for him in the organisation although he had resigned. This caused the Claimant to be concerned that there might be changes that would affect her but that no one had spoken to her about them.

34 On 15 September the Claimant informed Jerrica Tomlinson and someone else in her team that she would come in on 20 September for a KIT day and copied in HR.

35 During September Mr West had discussions with Mr Gisbourne, Georgina Kilcoyne and Jerrica Tomlinson about the new structure and the presentation of the roadshows to the staff.

36 On 16 September 2019 Ms Kilcoyne sent Gary West an email in which she raised a number of issues. One of them related to the Claimant. She said,

“Sally-Anne Canning – Group Marketing Director. We need to make this role redundant and offer her Marketing Director. Jerrica will be leaving in July. Your thoughts – What is Jerrica’s title?”

Mr West’s response was,

“My original thinking was JT would become Director of Marketing and then recruit when she leaves next year. Don’t want both on payroll and unlikely Sally keen as has not engaged to date?”

In his evidence Mr West said that he had *“had no engagement with”* the Claimant and that Ms Tomlinson was *“the obvious choice as she was Head of Marketing.”* He was used to executives picking up the phone to introduce themselves and he had had *“no exposure”* to the Claimant while he was there. That overlooked the fact that the Claimant was on maternity leave at the time and no one at the Respondent had contacted her as the most senior person left in the business to inform her of, or discuss with her, the huge changes that were taking place. As far as Mr West was concerned, the Claimant who was not present at the workplace had no role in the new structure. She did not feature in his restructuring plans.

37 On 19 September Mr Gisbourne spoke to the Claimant on the telephone and informed her that he had accepted a role as Chief Operating Officer. He said that they had had discussions about the structure and there was a role for her, but did not give her any more details.

38 The new structure was to be announced on 20 September 2019.

39 On 19 September Ms Kilcoyne sent the Claimant an email about her visit to the office the following day. She said that Gary West, the new CEO, wanted to meet her and asked her what time she would be there.

40 Later that evening she sent an email to Mr West in which she told him what he had to say to the Claimant the following day. He was to tell her that her role was at risk of redundancy as it was proposed to disband the whole Group Executive team. There was a role that might be suitable alternative employment. The role was Director of Marketing and it would be based in London. They would enter into a two

week consultation period with her and she would receive a letter from HR that day. She concluded by saying,

“Do not ask her if she is coming back to work!!!”

41 The following morning the Claimant informed Ms Kilcoyne that she would not be able to attend that day as her baby daughter was unwell and she had to take her to the doctor. Ms Kilcoyne then advised Mr West that they should immediately send her a letter advising her that her role was potentially redundant before the announcement of the new structure as she did not want a constructive dismissal claim because of non-consultation.

42 At 1.24 p.m. on 20 September Ms Kilcoyne sent the Claimant a letter from Mr West. The letter was headed “Potential Redundancy – Consultation”. In the letter Mr West said,

“A review has been undertaken with the full support of the senior management team, our shareholders and our lenders. The 3 key pillars that underpin this plan will ensure that our business is equipped to deliver the strategy and that the correct funding is in place.

These 3 pillars:

- support the development of attractive and relevant new markets but more importantly, a renewed focus on our core customers and core service proposition*
- provide the right organisational and streamlined management structure to deliver the strategy, but with increased ownership and clarity on execution*
- focus on existing and appropriate technology to support our core business requirement that can be consistently executed nationwide*

As a result of these decisions a new, more relevant and less hierarchical Operating Board has formed and it is proposed that the existing Group Executive dissolved. [sic]

I am therefore very sorry to inform you of the potential redundancy of your role as Group Marketing Director. What this means is that effective immediately, until Friday 4th October 2019, CitySprint will undertake an official consultation with you regarding the potential redundancy. I would, however, like to discuss the Director of Marketing role with you, so please let me know when you would be available to discuss this.”

43 At 3.13 p.m. the same day Jerrica Tomlinson sent to all the employees of the Respondent and OTD Tech Ltd an email from Mr West about the restructure. It contained the information (quoted above) that had been given in the letter to the Claimant. It set out the structure of the new Operating Board (the new name for the Executive Committee of the Respondent). It comprised Mr West (Interim CEO) and five persons who reported to him. They were John Dewhurst (Finance Director), Paul Gisbourne (Chief Operating Officer), Mike Trimlett (IT Director), Rosie Bailey (Business Development Director) and Darren Taylor (Business Solutions Director). In

his new COO role Mr Gisbourne was paid the same as he had been in his CEO role. Messrs Trimlett and Taylor and Ms Bailey got new job titles and an increase in pay.

44 The Claimant responded to Ms Kilcoyne's email at about the same time as the announcement was being made. She said that she was really shocked and surprised to have received the email. There had been no communication with her before she received the email and there had been no formal meeting set up with Mr West for that day. She then asked a number of questions which included when were formal announcements going to be made, what other roles were part of the consultation process, what new roles were created in the structure and she asked to the new organisation chart and the job descriptions and reporting lines of all the new roles and of the Director of Marketing role that had been referred to in the letter. She concluded by saying,

"After 9 years with the company and as a member of the Group Executive Team, receiving an email like this out of the blue whilst on maternity leave is not an acceptable way of dealing with a situation such as this."

45 Ms Kilcoyne responded that they had intended to bring up to "speed on the developments within the business since going on maternity leave" at the meeting with Mr West that day. She said that she would get answers to the Claimant's questions in due course.

46 On 23 September Mr West sent Ms Kilcoyne an email about various persons on the old Citysprint Executive Team and those on the new team. In respect of the Claimant he said that he would leave it to her to advise. Ms Kilcoyne suggested that they invited her to a meeting.

47 In the week starting 23 September Mr West and senior team did roadshows explaining the new structure to the employees. By this stage they had created the roles that would report into each of the individuals on the Operating Board, and there were separate organisation charts for each of the functions on the Operating Board. There was a Director of IT Operations role reporting to the IT Director and a Director of Business Solutions role reporting to the Business Solutions Director. There was not on any of the charts a Director of Marketing role. There was a Head of Marketing role (the one occupied at the time by Jerrica Tomlinson) which reported into Director of Colleagues/Clients which in turn reported into the COO role.

48 On 26 September the Claimant discovered that she had been removed from the Marketing email distribution list. She had remained on the list when she went on maternity leave and only discovered that she had been removed from it around 26 September when someone on the list sent her an email about an email that had been sent to everyone on the distribution list but she had not received it. That was of significant concern to the Claimant as she believed that it was not an accident but someone had deliberately taken the step to remove her. It coincided with the organisation chart that had no role for her.

49 On 27 September Ms Kilcoyne reminded Mr West that they needed to meet with the Claimant following week week (the consultation period was due to end on 4 October). He responded that he could meet with her on the Wednesday or Thursday the following week (2 or 3 October).

50 On 30 September Ms Kilcoyne offered those two dates to the Claimant. The Claimant responded that she could only attend on the Thursday. She inquired if the meeting was intended to be a formal consultation meeting and made the point that she would need the answers to the questions before she attended that meeting. Ms Kilcoyne responded that at the meeting Mr West would take the Claimant through "*the vision and the plan*" and that they would extend the consultation period by two weeks to give her the opportunity to digest the information and then ask any questions that she had.

51 On 3 October the Claimant had a meeting with Mr West. Mr West showed her a paper copy of the presentation that they had used the week before. He explained the three pillars again. He explained that the development of the technology platform was being stopped. He showed her the organisation chart that showed the new executive team (which they called the Operating Board). He did not show her the separate charts for each of the individual functions. She noticed that there was no mention of Marketing or the Director of Marketing role on the chart that he showed her. She asked him about the Director of Customer and Colleague role and he said that that was an interim role for about 6 months. He said that Marketing, HR and Customer Experience would support into that role. He said that the Director was already in place. He was called Paul Westgarth and Mr West had worked with him before. Mr Westgarth was having a meeting with the Claimant's team next door to where she was having her meeting with Mr West. He said that he did not know where HR or Marketing would be reporting in six months' time – it might be to the CEO, it might be to the COO. He said that he had heard nothing about her and did not even know when she had gone on maternity leave or when she was due to return. The Claimant asked why as a senior leader she had not been spoken to about the organisational changes in the same way as other members of the Executive team. Mr West replied that some of them had been involved, not in the organisational design, but what would happen in the functions. The Claimant asked how roles were chosen and people were selected for roles and who else was going through a consultation process. Mr West's response was that if she wanted to talk about process and technicalities she should speak to Ms Kilcoyne about that. He did not have a job description for the Director of Marketing role and said that they would probably not fill the role for six months and it would probably report to the CEO or the COO. When the Claimant asked about the terms and conditions for the role, he said that she should speak to Ms Kilcoyne about that. In respect of remuneration he said that "open" to discussion but "we will have a look as more interested in getting the right fit."

52 Paul Westgarth remained in that role for a year as a consultant.

53 After the meeting on 3 October Ms Kilcoyne and others in the HR team looked at various websites for generic marketing director roles and compiled a job description for Director of Marketing by copying what they saw on the websites. It did not deal specifically with the Respondent's business. Ms Kilcoyne's evidence was that normally HR would do a basic draft and then the specific details and responsibilities would be provided by the managers who were looking to fill the roles. There was no input from Gary West in the creation of the job description. The job description did not fill in the box to indicate to whom the role would report. On 7 October Ms Kilcoyne sent the Claimant the job description for Director of Marketing. She accepted that in terms of seniority and status, Director of Marketing was at a lower level than

Marketing Director. She also sent the Claimant the documents that had been used for the presentations to the staff.

54 On 11 October the Claimant sent Ms Kilcoyne an email. She said that having reviewed the job description and the organisation charts she was really concerned as to the whether the role existed at all. She said that the job description read more “*like a generic job advert rather than a job profile specific to CitySprint.*” She also remarked on the fact that the Director of Marketing role did not feature in any of the organisation charts in the presentation given to the whole company and that the only marketing role referred to in them was the Head of Marketing role which was Jerrica’s role. She also said that it was not clear why the process had been so different for her compared with other members of the Executive teams and queried whether it was because she was on maternity leave. She was concerned that she was being disadvantaged by not physically being in the office.

55 Ms Kilcoyne met with the Claimant on 6 November 2019. At that meeting she formally offered her the Director of Marketing role but was unable to confirm to whom she would report or what her responsibilities would be. She was unable to tell the Claimant what her budget or targets would be. The Claimant asked whether the role would be part of the Operating Board, Ms Kilcoyne did not know the answer. Ms Kilcoyne did, however, inform her that if she accepted the role she would be paid £80,000 a year and would have to attend the Respondent’s London office 4 days a week. Ms Kilcoyne was unable to explain to the Claimant how her responsibilities would be different from what she did before and why her pay was being reduced by 20%.

56 On 21 November Ms Kilcoyne sent the Claimant an email to answer the questions that she had raised at the meeting. She said that the role would report to the CEO but would not be part of the Operating Board. It would be responsible for marketing throughout CitySprint and its service lines. She said that a job description “more befitting” the role would be put together shortly. The budget and the targets for digital marketing would be the same as the previous year. She explained the 20% reduction in salary by saying,

“This is a new role and salary is commensurate with this role, there is no longer group level so the remit for this is lesser.”

Other employees who had lost their Group Executive positions but had been retained in different roles (Paul Gisbourne and Darren Taylor) did not have their salaries reduced. Ms Kilcoyne told the Claimant that the consultation period would be extended to 5 December.

57 On 3 December 2019 the Claimant raised a formal grievance about the process used when she was put at risk of redundancy, the lack of proper and meaningful consultation and the decision to unfairly demote her with an associated pay reduction. She said that she believed that she had suffered sex, pregnancy and maternity discrimination. She set out in detail particulars of why she believed that she had been subjected to discrimination. She included in her grievance the comments that had been made to her by her male colleagues at the start of her pregnancy. She concluded by saying,

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“All the other people reporting to the CEO have been given the titles of “XXX Director” or a “Chief XXX Officer” (not the “Director of XXX” title which is now being used only for the level reporting in to these roles) and are on the operating board. It seems very ‘convenient’ that the only person who has been demoted from the operating board level, is the person who was on Maternity Leave at the time the decisions were made and therefore was not able to discuss and demonstrate value delivered to the business by her department.”

68 On 6 December Ms Kilcoyne advised the Claimant that Paul Westgarth would investigate and hear her grievance. Ms Kilcoyne and Mr Westgarth exchanged comments on the Claimant’s grievance. In respect of her complaints about the title of the role and it not being on the Operating Board, they commented,

“If it reports to the CEO it should be Marketing Director ... should we concede this? I think we should but should it be on the Operating Board then? Is John Dewhurst on Operating Board.”

69 On 13 December Ms Kilcoyne invited the Claimant to a grievance hearing with Mr Westgarth at the office in Redhill in Surrey at 1 p.m. The Claimant responded that as a breastfeeding mother of a 5-month old baby driving from Wiltshire to Redhill and back again (normally a 5-6 hour journey) on one of the busiest travel days of the year (the Friday before Christmas) was not feasible. The hearing was then rescheduled to take place in London on 9 January 2020.

70 The Claimant contacted ACAS on 16 December 2019 and commenced Early Conciliation.

71 On 2 January 2020 Mr Westgarth asked Ms Kilcoyne whether the company would be liable for from the conduct of the previous Executive team in *“making sexist comments about her pregnancy.”* Ms Kilcoyne responded that that they would be liable.

72 The grievance hearing took place on 9 January. The Claimant was accompanied by Simon Parsons. It was decided that the Claimant would go through her written grievance. The Claimant said that on 20 September she had received a letter telling her that her role was at risk of redundancy and that an hour and a half later the new structure had been announced to all the employees, the Executive team had been replaced by the Operating Board and her role was not on it and she said that her role had been made redundant without any consultation with her. Mr Westgarth said to her *“That’s your assertion.”* It was a fact. When the Claimant went through her grievance Mr Westgarth said things like *“I have a personal opinion”* and *“I could argue it but I am not going to because that’s not what I am here for.”* Mr Parsons stated that his team was based in London and he was only required to work 2 days a week in the London office.

73 On 10 January Mr Westgarth sent an email to Paul Gisbourne, Rosie Bailey, Darren Taylor and Ms Kilcoyne and asked them questions about the comments that the Claimant had said were made about her pregnancy between February and May 2019. They responded and confirmed that largely the comments had been made (other than Mr Gisbourne making a comment about having a wager on how much weight the Claimant would put on) and that she had complained informally about

them to Ms Bailey, Mr Gisbourne and Ms Kilcoyne before she went on maternity leave.

74 Mr Westgarth sent the Claimant the grievance outcome on 28 January 2020. He did not uphold any of her grievances. He accepted that some of the comments about her pregnancy about which she had complained had been made. He said that they could be deemed to be insensitive, particularly if taken out of context, but that they were not “*discriminatory in intent*” or “*in effect*” because the individuals concerned had had no influence or bearing on the circumstances which had led to the grievance. He explained why she had been told about the reorganisation by email on 20 September rather than in person (i.e. because she had not attended the office for a KIT day on 20 September) but did not deal with the substance of the Claimant’s complaint which was that no one had communicated with her about the changes prior to that date. He said that the role of Director of Marketing did exist and was “*of fundamental importance to the delivery of the new strategy.*” Hence it reported to the CEO. However, they did not “*currently see it as an Operating Board*” role. If she did not see it as a suitable alternative role they would need to recruit someone else to it. He said that other members of the Executive team who had been offered roles “*were not party to preliminary deliberations*” and had, therefore, not been “*advantaged ahead of*” her. In respect of her complaint of the requirement to spend 4 days a week in the London office his response was “*This is an offer of alternative employment and those are the terms and conditions*”. He said that the role managed a team that was based in the London office. He said that Mr Parsons’ team was based in London but he also worked with the IT Project Team which was based in Redhill. Hence, he spent 2 days a week in London and 2 days a week in Redhill.

75 ACAS issued the Early Conciliation certificate on 30 January 2020.

76 The Claimant appealed against the grievance outcome on 6 February 2020. The Respondent’s Grievance Appeal Policy provides,

“The Chief Executive, or his nominated candidate – who was not previously involved – will hear the appeal. This manager will be at either the same or at a more senior level to the manager who made the grievance decision. In the rare circumstances where this is not possible, alternative arrangements will be made.”

Messrs West and Westgarth decided that Rosie Bailey should hear the appeal. On 14 February Mr Westgarth sent Mr West an email in which he said that he had “*briefed Rosie*” on hearing the Claimant’s grievance appeal. Ms Bailey was a member of the former Executive Committee who had managed to secure a more senior and better paid role which was on the Operating Board in the new structure. She was also the person to whom the Claimant had complained about the comments made by her colleagues about her pregnancy and Ms Bailey had provided evidence about that to Mr Westgarth.

77 The grievance appeal hearing took place on 27 February 2020.

78 The Claimant presented her first claim to the Employment Tribunal on 28 February 2020.

79 On 4 March Ms Bailey sent a draft of her outcome letter Ms Kilcoyne and then to Messrs West and Westgarth and asked them to review it. It appears that the changes that were made to it were made by Ms Kilcoyne.

80 On 10 March Ms Bailey sent the outcome to the Claimant. She said that the company accepted that the comments about her pregnancy had been made and that some of them were inappropriate. However., the individuals who had made them had not played any part in determining the new structure of the business. She said “*the current senior team are fully committed to equal rights*” and “*the organisation’s culture has changed significantly for the better in the last six months.*” She did not agree that the Claimant had been treated any differently from the other members of the former Executive teams during the restructure process or that her maternity leave had had any impact on the delivery of information. She accepted that the job description provided so far had been very formulaic and invited her to contribute to a rework of the job description. She said that were happy to discuss the proposed salary for her new role to find the right solution. However, the role would not be part of the Operating Board and the Claimant would be required to work 75-80% of the week in the London office.

81 The Claimant and Ms Bailey had arranged to meet on the morning of 13 March 2021. The Claimant sent her an email to say that there was no point in having a meeting as she fundamentally disagreed with the outcome and because Ms Bailey had indicated that a number of important points about the new role were not up for discussion, i.e. it would not be a Board position and the requirement to work 4 days a week in the London office. Ms Bailey responded that if she did not want to work 4 days a week in the London office she would need to submit a flexible working request by close of business on Monday. The Claimant’s maternity leave was coming to an end and she was due to return to work the following week.

82 On 18 March 2020 the Claimant wrote to Ms Bailey. She said that Ms Bailey had effectively dismissed all her legitimate grievances and continued,

“due to the way that the whole process has been handled over the last 6 months, my trust and confidence in the organisation has irrevocably broken. I am extremely aggrieved that the majority of my maternity leave (nearly 6 months) has been put into complete disarray and I have been put under immense stress and anxiety in one of the most important times in my life.”

83 She said that she believed that the new role being offered was the same as her old role and that the arbitrary 20% salary reduction was just a way to change her terms and conditions rather than a real redundancy situation. The fact that the Respondent was now saying that she could have an input into what the role should be and the salary could be up for discussion indicated the her role had never really been made redundant and that the new role did not really exist as an alternative. She could not understand how, if the Respondent had made a role redundant as it was no longer required by the business and it was offering her an alternative role, it could not identify what the alternative role was. She felt that the requirement to spend 4 days in the London office had deliberately been put there as a barrier to her being able to accept the role. She concluded that for all those reasons the proposed role was not acceptable as an alternative.

84 On 30 March 2020 the Respondent wrote to the Claimant to inform her that her employment would be terminated as the role of Group Marketing Director was redundant. She was given six months' notice which would expire on 30 September 2020. She was not advised that she had a right of appeal,

85 On 8 April 2020 Mr Westgarth asked Ms Kilcoyne whether the Claimant had definitely rejected the Director of Marketing role, and Ms Kilcoyne confirmed that she had. He responded to that by saying,

“In terms of the role which SA [the Claimant] turned down, we are now clear to appoint an alternative candidate, but they can't be on the Board as that would open the way to a constructive dismissal accusation from SA. They could of course be promoted to the Board after say 6 months. Appreciate now isn't the time but we need to factor that point into our thinking once, I suggest, the crisis is over.”

86 On 25 June 2020 Mr Westgarth sent Mr West an email about a conversation he had had with Jerrica Tomlinson about the marketing function after she returned to New Zealand in the middle of August. He said that she had proposed splitting the marketing function into two parts – Marketing Operations and Brand Control – and her remaining as head of the latter after she returned to New Zealand. Mr Westgarth's view was that the proposal was a pragmatic solution in the short to medium term. He continued,

“Moving forward in developing your structure strategy, with Sally Anne still in the wings we need to be cautious of appointing a specific Director of Marketing on to the Board.”

87 The Respondent appointed a Director of HR and she started in her role in July 2020. That role was on the Operating Board. Ms Kilcoyne, as Head of HR, had reported to Mr Westgarth.

88 Ms Tomlinson returned to New Zealand in the middle of August 2020. She continued as Head of Brand as a consultant working 3 days a week.

89 Mr Westgarth's role as Director of Customer and Colleague came to an end in September 2020. He continued doing part-time project work for the Respondent after that.

90 The Claimant's employment terminated on 30 September 2020.

91 The Claimant started looking for work when she was given notice of termination at the end of March 2020. However, due to the Coronavirus lockdown, which started at the same time, she found it difficult to find work and a nursery where she could leave her daughter. She decided, therefore, to offer her services as a consultant. On 25 August 2020 she incorporated a company called Badbury House Consulting Ltd of which she and her husband were directors. On the same day her company signed an agreement with Inpost (UK) Ltd to provide marketing consultancy services three days a week for three months starting from 1 October 2020. From 1 October to 31 December Badbury House was paid £30,000 for the consultancy services provided by the Claimant. The company paid the Claimant a gross salary of £2,500 per month.

On 15 December the consultancy agreement was extended to 31 March 2021. In that period the Claimant's company was paid £30,750 for its consultancy services. The contract had continued beyond the end of March 2021 and at the time of the hearing the Claimant was in the midst of negotiating further project work.

92 In her schedule of loss sent to the Respondent and the Tribunal on 7 December 2020 the Claimant said that she had set up her own company to provide consultancy services and that the contract that she had at the time was due to end at the end of December 2020. She declared her income from consultancy work to be £6,794.40 net. She disclosed her payslips from her company but not the contract and the invoices. The first reference to the fact that her company had invoiced a little over £60,000 for six months' work was in an updated schedule of loss dated 14 May 2021. The company will have to pay corporation tax, employer's NI contributions and PAYE for the Claimant's pay. The Claimant's annual net salary with the Respondent was £61,908.08.

Conclusions

The comments made before maternity leave

93 We considered first the complaints about the comments made by the Claimant's colleagues before she went on maternity leave (the issues at paragraphs 2.1 – 2.3 and 2.4 above). These comments were made between February and May 2019 by Messrs Eddy, Gisbourne and Taylor. The rest of the Claimant's complaints all relate to the restructuring of the most senior level of management and of the way in which she was treated in the course of that process. That started in July 2019 and ended with the Claimant's dismissal on 30 March 2020. The primary decision-maker in that process was Gary West, supported by Paul Westgarth and Georgina Kilcoyne. We concluded that the two sets of complaints are about two different acts of pregnancy/maternity discrimination, perpetrated by different individuals at different times. Therefore, the complaints about the comments were not presented in time.

94 We then considered whether it would be just and equitable to consider them. They were presented about 6 months after the time limit for presenting them expired. The Claimant's reasons for not presenting those complaints earlier were the same as for not pursuing them formally internally at the time. The comments were made just before the Claimant went on maternity leave. The Claimant's primary concern and focus at that time was the birth of her baby and caring for her new baby. She did not want to spend her maternity leave embroiled in litigation. Furthermore, in circumstances where senior colleagues had already made comments about how her pregnancy might affect her long-term career prospects, we can understand why she might have been very reluctant to commence tribunal proceedings against her employer at that stage. From September 2020 the Claimant's focus was to ensure that she had not lost her job. There was no prejudice to the Respondent. The Claimant had raised the complaints in her internal grievance and the Respondent had investigated them at that time. We concluded that in all the circumstances of the case it would be just and equitable to consider those complaints.

95 The comments were made because the Claimant was pregnant and was going to exercise her right to maternity leave. The only issue for us was whether they

amounted to “unfavourable treatment”. A single isolated comment made by one person might not have, but having regard to the number of comments made, the nature of the comments and the fact that they were made by three male colleagues and the fact that the Claimant was so upset by them that she raised the issue with three different people, led us to conclude that they amounted to unfavourable treatment. In the alternative, they amounted to harassment related to sex. The comments were unwanted and they had the effect of creating a humiliating and degrading environment for the Claimant. That was her perception and it was reasonable for the conduct to have that effect.

Restructure and redundancy

96 The rest of the Claimant’s complaints relate to the restructure that led to her not having a role and subsequently being dismissed. We concluded that all those complaints are about an act extending over a period of time and had been presented in time.

97 We considered next the Claimant’s complaints about failure to consult with her about the restructure of the business and to explore new roles with her between 23 July 2019 and 20 September 2019 (issues at paragraph 2.4 b and c). It was not in dispute that between those dates the Claimant was the most senior person left in the organisation after all the others on the Group Executive Board had resigned or been dismissed. It was also not in dispute that during that period nobody at the Respondent and, in particular, Mr West who was primarily responsible for the restructure, contacted the Claimant to inform her of the changes or to consult with her about them. However, Mr West had discussions with those who were in the office; he had discussions with Paul Gisbourne, Mike Trimlett, Darren Taylor, Rosie Bailey, Georgina Kilcoyne and Jerrica Tomlinson. By 20 September the first four of those individuals had been offered and accepted new roles that were to be on the new Operating Board. Mr Gisbourne was demoted but retained his salary; the other three were given bigger roles and their salaries were increased. The Claimant had no role in the new structure. It was clear from the email exchange between Mr West and Ms Kilcoyne on 16 September 2019 that, as far as he was concerned, she had no role in the organisation and was not coming back to work. He had already earmarked Ms Tomlinson, who was in the office and with whom he had had dealings, for the most senior role in marketing. There is a stark difference between the way the Claimant was treated and the way her colleagues who were working were treated, and the only explanation for the Claimant, the most senior person in the organisation at that time, being totally ignored and written out of the organisation, is the fact that she was on maternity leave. In Mr West’s words, he had “*had no engagement with*” and “*no exposure*” to her. The Claimant was treated unfavourably because she was on maternity leave.

98 We also concluded that Mr West’s position, namely that there was no role for the Claimant in the organisation, remained unchanged after 20 September, and that the redundancy consultation was a sham. Although the Claimant was told that there was a Director of Marketing role which the Respondent wished to discuss with her, that role did not appear on the new structure which was shared with employees on 23 September 2019, there was no job description for that role when Mr West had a “consultation” meeting with the Claimant on 3 October, he did not know to whom the role would report or what the terms and conditions of the role (including the pay) were. All the evidence indicates that no such role existed. Thereafter, HR compiled a

generic job description for a Director of Marketing role by copying from a job description on websites without in any way linking it to the Respondent's business or needs. All of this flowed from and was inextricably to the fact that Mr West had decided that there was no role for the Claimant in the new organisation because she was on maternity leave. The Respondent treated the Claimant unfavourably by declaring her role to be redundant and going through a sham consultation process (issues at paragraph 2d – 2i above), and did so because she was on maternity leave.

99 We found, furthermore, that Mr West offered the role on the terms that he did to make it unattractive to the Claimant so that she would refuse it. Although Ms Kilcoyne had originally said that the Claimant should be offered the Marketing Director role, Mr West had changed it to Director of Marketing. Although he accepted ultimately that the role would report to the CEO, he maintained that, unlike all the other roles that reported to the CEO, it would not be on the Operating Board. The discussions between Ms Kilcoyne and Mr Westgarth on the Claimant's grievance show that they considered that if the role reported to the CEO it should be Marketing Director and on the Operating Board. Our conclusion that that was done to deter the Claimant from accepting the role is supported by the later emails that show that the Respondent was prepared to have that role on the Board once it was clear that the Claimant did not want it but was wary of doing it to soon as it would lead to the Claimant complaining about it. He also decided that the salary for the role would be 20% less than what the Claimant had previously earned. No one was able to explain to the Claimant how the new role was different from her old role and how they justified a 20% reduction in salary. The fact that she was no longer Group Marketing Director was not relevant. Her salary had been £100,000 when she had been Marketing Director. Mr Gisbourne's role changed from CEO to COO but he did not have to take a salary cut. Mr Taylor lost his Group Executive position but he did not have to take a salary cut. Finally, the Claimant was told that she would have to attend the London office 4 days a week. The rationale for that was that her team was based in London. That had always been the position but no one had insisted before that she had to attend the office in London 4 days a week. Mr Parsons' team was based in London. He did not have to work in London 4 days a week. That condition was attached to the role to make it unattractive to the Claimant. All those hurdles were put in the Claimant's way because Mr West had decided that there was no role for her in the organisation (issues at paragraphs 2j, k and l) above. He had made that decision because she was on maternity leave at the time of the restructure.

100 In the alternative, the matters at paragraph 99 (above) were acts of direct sex discrimination. In respect of each of them, the Respondent treated the Claimant less favourably than her male colleagues and it has not provided any satisfactory or credible explanation for the less favourable treatment.

The grievance

101 It was not in dispute that in her grievance of 3 December 2019 the Claimant complained of sex, maternity and pregnancy discrimination and that it amounted to a "protected act" under the Equality Act 2010. It was also not in dispute that in the course of the grievance and the appeal, her complaints were not upheld. The position at the end remained the same – the Claimant was being offered a lower role with a reduced salary with a condition that she had to be in the London office 4 days a week when no one could tell her how that role was different to the one that she had previously held. Neither Mr Westgarth nor Ms Bailey could have approached the

matter with an open mind. The Claimant's complaints were essentially about decisions made by Mr West. Mr West was engaging Mr Westgarth's services as a consultant and they had previously worked together. Ms Bailey had benefitted from the restructure and reported to Gary West. He was the CEO. The comments that Mr Westgarth made to the Claimant in the course of the hearing were not indicative of someone approaching the matter with an open mind. He failed to deal with some of the Claimant's complaints (for example, the fact that no one had communicated with the Claimant about the restructure prior to 20 September) and some of his conclusions were illogical or had no clear basis (for example, the Director of Marketing role would report to the CEO and was of fundamental importance to the delivery of the new strategy, but they did not see at that time see it as an Operating Board role or she had to work 4 days a week in London because those were the terms and conditions). Ms Bailey was briefed by Mr Westgarth before she embarked on the appeal and she sent her outcome to Messrs West and Westgarth to review. It was difficult to see how she could conclude that the Claimant had not been treated any differently from the other members of the former Executive teams or that the senior team was fully committed to equal rights. We concluded that they both approached it in the way they did because they were both in subordinate positions to Mr West and felt unable to reach decisions that would be critical of him. They did not do so because the Claimant was on maternity leave or because she had done a protected act.

The dismissal

102 The Respondent's case is that the reason for the dismissal was that the Claimant's role of Group Marketing Director ceased to exist because the Group Executive ceased to exist. With the exception of Patrick Gallagher and Gerard Keenan, all the others in the Group Executive had roles on the Executive team of either the Respondent or OTD Tech Ltd. The technology development carried out by OTD Tech Ltd ceased to exist after the restructure but the OTD brand continued being a part of the Respondent's business. Hence the OTD Tech Ltd Executive team became redundant. However, the Executive team of the Respondent did not. There still needed to be a senior management level for the Respondent (whether it was called the Executive Team or the Operating Board). That level did not cease to exist. Until October 2018 the Claimant had been Marketing Director of the Respondent. The title had changed when a Group Level was created above the Executives of the two companies within the group. The Claimant's responsibilities as Marketing Director did not.

103 The onus was on the Respondent to prove that the Claimant's role was redundant i.e. that the requirements of the business to carry out the work that she had been carrying out (as set out in paragraph 18 above) had ceased or diminished or were expected to cease or diminish. The Respondent's case was that it no longer required someone to carry out the Claimant's previous role (Marketing Director) but that it required someone to carry out a different marketing role (Director of Marketing). However, it was unable to explain to the Claimant or to us how that role was different from the Claimant's existing role or what aspects of it would not be a feature of the new role. The Respondent failed to prove that the Claimant's role was redundant. We concluded that it offered the Claimant the opportunity to carry out the same role but with a different title, lower status and less pay. The Claimant, unsurprisingly, refused to do that and the Respondent dismissed her. There was no potentially fair reason for her dismissal.

104 We concluded that the principal reason for the dismissal of the Claimant was that the Respondent had concluded that there was no role for her in the organisation because she was on maternity leave at the time when the restructure took place. Mr West's view was that Jerrica Tomlinson, who was covering for the Claimant while she was on maternity leave, could continue in that capacity until she left, when they would recruit someone else to that role. The Claimant's role existed but there was no longer a place for the Claimant in the business. The Claimant's dismissal was unfair under section 99 of the Employment Rights Act 1996 and maternity discrimination under section 18 of the Equality Act 2010. The Claimant was not dismissed because she had raised the formal grievance. The outcome would have been the same even if she had not raised that grievance.

Indirect sex discrimination

105 It was not in dispute that the Respondent applied a provision, criterion or practice ("PCP") that the Director of Marketing would have to work in the London office four days a week. We accept that that PCP put women (more of whom have primary responsibility for childcare) at a disadvantage compared to men and that it put the Claimant at that disadvantage. The Respondent failed to prove that that PCP was a proportionate means of achieving a legitimate aim. All the evidence indicated that that was what Mr West wanted and, therefore, that was how it had to be. Mr Westgarth did not in his grievance outcome give the Claimant any explanation as to why that was necessary other than to say that those were the terms and conditions. We concluded that the complaint of indirect sex discrimination was well-founded.

Breach of contract

106 We have found that at the time the Claimant agreed to a temporary reduction of her salary, it was agreed that the salary that was foregone would be repaid if she left the business for whatever reason. In accordance with that agreement, when the Chairman left in early 2019 he was repaid in full the salary that he had foregone in 2018. The failure to repay to the Claimant the amount that she temporarily gave up in 2018 was a breach of the contract into which she entered when she agreed to do that.

Remedy

107 The Claimant was entitled to a basic award of £5,440. She had been paid redundancy pay in the sum of £4,725. She is, therefore, entitled to a basic award of £715.

108 The Claimant's loss of earnings (including pension contributions) to the date of the hearing was £41,695.66. The company set up by the Claimant, of which she was the director and employee, had received £60,750 from October 2021 to 31 March 2021. The contract that it had with Inpost had continued beyond the end of March 2021. Even taking into account the company's obligations to pay tax and NI contributions, we concluded that the Claimant had not suffered any loss of income to the date of the hearing. On the basis of what the Claimant had been able to earn to date, we also concluded that it was unlikely that there would be any future loss. We accepted that the Claimant's was to work as an employee rather than as a consultant. We saw no reason why that should not be possible in the not too distant

future. In the meantime it was reasonable for the Claimant to mitigate her losses by doing consultancy work as she had done so far. We, therefore, made no award for loss of earnings.

109 We then considered what award should be made for injury to feelings. The Respondent argued that the award should be in the lower band of the Vento guidelines and that the maximum appropriate award would be under £15,000. In the Claimant's schedule of loss it was stated that it should be the highest amount of the top band of the Vento guidelines - £45,000. In her closing submissions, the Claimant's counsel argued that it should be in the middle to high bands in the Vento guidelines.

110 The Vento guidelines provide that the sums in the top band (currently £27,400 - £45,600) should be awarded in the most serious cases, such as where there has been lengthy campaign of discriminatory harassment on the grounds of sex or race. The middle band (currently £9,100 to £27,400) should be used for serious cases, which do not merit an award of the highest level and that the lower band (currently £900 to £9,100) is appropriate in less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

111 In the present case, we have found that a number of comments were made by the Claimant's colleagues before she started maternity leave and that they cumulatively amounted to pregnancy/maternity discrimination. The most serious ones were those that made the Claimant feel insecure about the impact that maternity leave might have on her future career. The Claimant was upset by the comments and raised them with three senior colleagues. There was then further maternity discrimination between the end of July 2019 and 30 March 2020, of which the Claimant first became aware on 20 September 2019 when she received an email out of the blue that her role was at risk of redundancy and saw a restructure in which she had no role. That came as a complete shock to her. There then followed six months in which the Claimant fought back against what she clearly perceived as maternity discrimination and went through a sham consultation process. The larger part of the Claimant's maternity leave was spent fighting to try to maintain her job. Her evidence was that she had *"been placed under immense stress and anxiety during the last 6 months of my maternity leave, which had tarnished what should have been a cherished period in my life."* That which she had feared had come to pass. There cannot be anything worse for a woman on maternity leave to find out that she has lost her job because she was on maternity leave and then to have to spend her maternity leave fighting to get her job back. We concluded that this was a serious case of maternity discrimination and the appropriate award was towards the top of the middle band. We awarded the Claimant £25,000 for injury to feelings. We were not satisfied that there were grounds for making an additional award for aggravated damages.

112 We did not consider it appropriate to increase that award for any failure to follow the ACAS Code of Conduct on grievance procedure. We awarded interest at 8% per year on the period between February 2019 (the beginning of the act of discrimination) and August 2021 (the date of calculation). That is for a period of 2.5 years. We award interest in the sum of £5,000.

Employment Judge - Grewal

Date: 19/08/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

19/08/2021

FOR THE TRIBUNAL OFFICE