EMPLOYMENT TRIBUNALS

Claimant: Mrs H Bhatia-Patel

Respondent: Palladium International Limited

Heard at: London Central (conducted by video using Cloud Video Platform)

On: 6, 7, 8, 9 & 12 April 2021

Before: Employment Judge Khan
Ms A Ewing
Ms J Marshall

Representation
Claimant: Ms I Egan, Counsel
Respondent: Ms M Tutin, Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that all the complaints fail and are dismissed.

REASONS

1. By an ET1 presented on 4 April 2019, the claimant brought complaints of automatic unfair dismissal and maternity or sex discrimination. The respondent resists these complaints.

The issues

2. We were required to determine the issues listed below which were agreed by the parties in advance and refined by us following discussion with them during the final hearing:

   2.1 Breach of regulation 10 of the Maternity and Parental Leave Regulations ("MPL") and automatic unfair dismissal (regulation 20(1)(b) MPL) and section 99 of the Employment Rights Act 1996 ("ERA"))

(1) The claimant was on maternity leave from 18 September 2017 – 16 August 2018.
(2) It is agreed that it was no longer practicable by reason of redundancy for the respondent to continue to employ the claimant as a Grade 5 Humanitarian HR Officer under her existing contract of employment.
(3) From what date? The claimant says from 14 August 2018, at the latest. The respondent says from 21 August 2018.
(4) Were there any suitable alternative vacances available which should have been offered to the claimant? The claimant alleges that she should have been offered, without competition, the Grade 6 roles of HR Advisor or Roster Talent Coordinator. In respect of these roles: Was the work done suitable and appropriate for the claimant to do in the circumstances?
(5) It is agreed that these roles were not substantially less favourable.

2.2 Automatic unfair dismissal (regulations 20(2) MPL 1999 and section 99 ERA)

(1) It is agreed that the principal reason for the claimant's dismissal was because her role was made redundant.
(2) It is agreed that the circumstances constituting redundancy applied equally to Stephen Didlick who was in the same undertaking, held a position similar to the claimant and was not dismissed by the respondent.
(3) Was the principal reason for which the claimant was selected for redundancy connected with the fact that she took additional maternity leave?

2.3 Maternity discrimination (sections 18(4) and 39(2) of the Equality Act 2010 ("EQA"))

(1) Did the respondent treat the claimant unfavourably in dismissing her because she exercised the right to maternity leave?

2.4 Direct sex discrimination (section 13 EQA)

(1) Alternatively, was the claimant treated less favourably than a comparator in materially the same circumstances in respect of the respondent's decision not to offer her the Grade 6 role of HR Advisor which resulted in her dismissal? The claimant relies upon Stephen Didlick as an actual comparator.
(2) If so, was any less favourable treatment because of the claimant's sex?

2.5 Limitation (sections 123(1)(a) & (b) EQA)

(1) For the purposes of early conciliation and the calculation of the relevant time limits, day A is 10 February 2019 and day

B is 10 March 2019. Any complaint about something which happened before 11 November 2018 is potentially out of time.

(2) In respect of the complaints brought under the EQA, when did the alleged treatment upon which the claimant relies occur? Are the acts or omission based on a series of unconnected acts or a continuing state of affairs?

(3) If any of the acts or omissions are out of time, would it be just and equitable to extend time?

The evidence

3. The hearing was a remote public hearing, conducted using the Cloud Video Platform (CVP) under rule 46. In accordance with rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal.

4. We heard evidence from the claimant. By agreement, the witness statement of Pav Alam, an Industrial Officer of the Public and Commercial Services union, was taken as read.

5. For the respondent, we heard evidence from: Gabriella Waaijman, formerly Director of Humanitarian & Stabilisation Operations Team (HSOT); Natasha Vakhrameeva, HR Manager for HSOT (EMEA Business Partnership); and Gillie Slater, Legal Director.

6. There was a hearing bundle of 225 pages. By agreement, we added a five-page email chain.

7. We also considered written and oral closing submissions.

The facts

8. Having considered all the evidence, we find the following facts on the balance of probabilities. These findings are limited to points that are relevant to the issues in dispute.

9. The respondent is an implementer of international development programmes working with donors and governments around the world.

10. The claimant was employed by the respondent for three years from 21 September 2015 to 11 November 2018, her employment having transferred from Crown Agents on 1 November 2017. She was initially employed as a Grade 5 (Low) HR Support Officer and promoted to the Grade 5 (High) role of Humanitarian HR Officer on 26 June 2017. The claimant was on maternity leave from 18 September 2017 to 16 August 2018.

11. At all relevant times the claimant was engaged in work supporting the Humanitarian Emergency Response Operations and Stabilisation (“HEROS”) programme which provides humanitarian emergency

response operations management and stabilisation support to the former Department for International Development ("DFID"), now part of the Foreign, Commonwealth & Development Office, and the Stabilisation Unit ("SU"). The claimant was based in the HR sub-team within the Humanitarian Stabilisation Operations Team ("HSOT") whose function was to recruit candidates for a database for subsequent selection and deployment by DFID under the HEROS programme. There were therefore two selection processes, an initial process through which humanitarian experts were recruited for a database held by HSOT and a second process through which these experts were recruited for specific contracts held by DFID or the SU and onward deployment.

12. The claimant's employment transferred together with HSOT colleagues in November 2017 when the respondent won the tendering process and took over the HEROS contract from Crown Agents.

13. We accepted the respondent's unchallenged evidence that although it was initially awarded the contract in January 2017 a legal challenge in relation to this tendering process meant that the respondent did not take over this contract until November 2017. This resulted in a hiatus in all recruitment activity undertaken by Crown Agents between January and June 2017.

14. The claimant was initially employed as an HR Support Officer for around 18 months. This was a 'Low' Grade 5 as was confirmed following a benchmarking exercise in 2016 together with an annual basic salary of £26,250. We find that this was an administrative role in which the claimant was required to provide administrative support to the core team recruitment process, including in relation to inductions, the annual performance process, and contracts; to support the HR Manager in the administration of HR systems and data management; and to coordinate and improve the security clearance process and manage the on-boarding process. These duties were set out in the job profile.

15. The claimant was appointed into the role of Humanitarian HR Officer with effect on 26 June 2017. As was confirmed by Sanji Shah, Head of HR, HSOT, this was a Grade 5 post with a starting basic salary of £30,450. We accepted the claimant's unchallenged evidence that this was a 'High' Grade 5 post. We find that this was also an administrative role.

16. The claimant was employed in this role for less than three months before she commenced maternity leave in September 2017. Chantelle, the outgoing Humanitarian HR Officer, left in April 2017 and was not replaced until the claimant's appointment into this role, two months later, on 26 June 2017. We do not accept the claimant's evidence that she jointly covered this role for the two months preceding her appointment because this assertion is contradicted by the contents of an undated appraisal document drafted by the claimant and Ms Shah, before she went on maternity leave in September 2017 in which the claimant referred to clearing a backlog in processing applicants to join

the database that had arisen due to the two-month gap between the departure of her predecessor and her appointment.

17. As the job profile set out, the focus of the Humanitarian HR Officer role was to maintain the database of humanitarian experts and manage end-to-end recruitment and selection of these experts onto this database. Although one of the targets set out in the appraisal was for the claimant to maintain and expand the database, the claimant's comments in the same document illustrate a focus on updating and maintaining the information held in relation to the experts already on the database and not on expanding the pool of experts. This also reflects a draft note at the end of this document listing priorities which included "Update the database" but did not refer to expanding it. This document also highlighted that the claimant's line manager, Ashton Dickens, would need to upskill the claimant on the database i.e. to train her "on how the database works, how to use the matrix and understand the skills/knowledge required for each role".

18. Although this appraisal referred to the task of interviewing of experts to be added to the database, in commenting on the steps taken to achieve this objective the claimant did not refer to conducting interviewing but steps taken to arrange them and Ms Shah's comments referred to CV analysis but not interviewing. This is consistent with the job profile which listed the following tasks: "advertisements, shortlisting, interview scheduling, and information gathering". These were all essentially administrative tasks which did not require the claimant to exercise independent judgement or strategic decision-making.

19. In her oral evidence, which we do not accept, the claimant said that she was given or was required to undertake additional tasks or duties which demanded a greater degree of expertise and responsibility:

    (1) The claimant said that she deputised for Ms Shah for two months in March and April 2016 or 2017. We do not find it likely that that someone in an administrative role would have been given responsibility for deputising for the Head of HR for two months. It is notable that the claimant was unable to recollect which year she says she did this. We accepted the respondent's evidence that Ms Shah was a very hands-on manager which meant that she had oversight of most of the work that her department was responsible for. It is therefore likely that Ms Shah undertook non-managerial tasks in addition to her management role. We find that if the claimant was required to complete any additional tasks in Ms Shah's absence these were limited to discrete non-managerial tasks. This was not the same as deputising for the head of her department.
    (2) The claimant also said that she was involved in making recruitment decisions together with senior colleagues and DFID representatives to appoint experts for deployment. She said that she sat as a decision-maker on around 50-60 selection panels in her first year as an HR Support Officer. We do not find that this is likely. This was not consistent with the terms of the claimant's job description, nor with the way in which the team worked when the

respondent took over the HEROS contract (our findings on this are set out below at paragraph 20). The claimant did not refer to this in her witness statement. Nor do we find, as will be seen, that she referred to having any interviewing-experience when she was interviewed in October 2018. This was a notable omission, given that this was a key requirement for one of the Grade 6 roles the claimant had applied for.

(3) The claimant also said that she provided general HR advice to colleagues on a daily basis. Although the HR Support Officer job profile referred to the production of a monthly HR Bulletin and assisting the HR Manager to update HR policies and procedures, it did not refer to the provision of general HR advice. Nor was there any reference to this in the Humanitarian HR Officer job profile. It is notable that the 2017 appraisal document identified, in relation to the HR Support Officer role, the target of launching an HR Bulletin by the end of May 2017 for which the claimant required training in order to meet. There is nothing in this document which suggests that the claimant received such training or that this target was achieved. We therefore find that it is unlikely that the claimant provided general HR advice to colleagues.

(4) She also said that she was involved in the process and strategy for recruiting consultants. Although the job profile referred to the need to identify and utilise innovative approaches, as we have noted, the focus of the claimant's appraisal was on updating the database and not on considering the steps necessary to expanding it.

We therefore find that the claimant's evidence in relation to the additional work she was required to do lacked credibility. We find that she overstated the nature of the work was required to do in both Grade 5 roles. We do not therefore find that the claimant had a hands-on HR role which involved making joint decisions with DFID on the selection of experts for deployment into the field nor that she was required to provide general HR advice to colleagues on a regular basis.

20. The respondent's witnesses were unable to directly contradict the claimant's oral evidence in relation to the work duties she was required to perform in the Humanitarian HR Officer role because they were only able to comment on how her team functioned from 1 November 2017 when the respondent took over the HEROS contract. However, we accept their evidence that the work performed by the claimant's team from this date and also those of her colleagues who performed equivalent duties to her was starkly at variance with the claimant's evidence. In relation to the recruitment of experts, DFID would request a humanitarian adviser. An advert would be sent to the contractors on the database. Respondents would be reviewed for their availability, skills match and security clearances. A shortlist of potential candidates was made and sent to DFID who identified which candidates they wished to interview. The HR team would then set up the logistics for the interview process. DFID conducted the interview and made the selection decisions. A different team within HSOT dealt with the

logistics for the deployment of successful candidates. The HSOT HR team was not involved in making these selection decisions.

21. We accept the evidence of Natasha Vakhrameeva, who became HR Manager for HSOT in July 2018 and was involved in the tendering process that under the new contract DFID wanted the respondent to be the supplier of a service with greater decision-making involvement in the recruitment of experts. We find that when the HEROS contract was put out for tender, DFID emphasised the need to expand and diversify the available expertise on the database including regional and local experts. This was a new focus for the contract which had not been delivered under the previous one. We find that this is consistent with the respondent's evidence that under the previous contract there was a static database of experts which had been managed reactively and the new focus on establishing a more diverse population required a different, more innovative and strategic, approach and accompanying skill set.

22. As part of the respondent's bid to win the HEROS contract it committed to cut staffing costs by 20%. We accepted the oral evidence of Gabriella Waaijman, then Director of HSOT, that this meant that the respondent was committed to making redundancies from the point that it took over the contract because it was evident that the reduction in headcount required by DFID could not be met by attrition alone.

Redundancy consultation

23. Ms Waaijman emailed HSOT staff on 25 June 2018 to invite them to a meeting three days later to discuss a proposed restructure which was needed to deliver this cost saving. Ms Waaijman confirmed that a restructure was necessary to achieve a 20% reduction to the core team. She discussed some of the timelines for this process and explained that the restructure itself was still being considered and would involve input from affected staff. A memo recording the contents of this meeting on 28 June 2018, was circulated to all HSOT staff afterwards. This referred to a contractual commitment to deliver a reduction in staff numbers from the current headcount of 82 HSOT employees, all of whom had been transferred, to 65 in year 1 and 62.5 in year 2. This also referred to the "overall aim to create a better balance between decision-making capability and execution". Ms Waaijman explained that the SMT had discussed the outlines of a new structure and there would now be a period of engagement with each team with the new structure to be confirmed in August 2018 and in place by 1 November 2018 which was when the new contract year began.

24. This was followed by a second meeting with the HR team on the same date. In addition to Ms Shah and a second manager who were soon to leave, and the claimant, there were three other permanent employees in the team: Stephen Didlick who had been initially recruited as the claimant's replacement in the HR Support Officer role and who then provided the claimant's maternity cover, Denise Breed and Rebecca Clark. There were also two other members of the team on fixed-term contracts. We were taken to Ms Waaijman's script for this meeting. She

told the team that because Ms Shah and another manager were leaving, Ms Vakhrameeva would be taking over as interim manager from 13 July 2018. As part of the wider restructure the team would be reduced from a whole time equivalent ("WTE") of seven to five. Those on fixed-term contracts which were due to end on 31 October 2018 would not be renewed. The new structure would not be finalised until early August 2018 to enable Ms Vakhrameeva to gain an understanding of what the team needed to deliver and the skills required to achieve this. There would be a greater emphasis on talent acquisition and talent management which related to the imperative to expand and diversify the available expertise on the database. Ms Vakhrameeva would therefore be consulting with colleagues individually before a final decision was made on a new structure for the team. This meant that staff would not be placed at risk of redundancy for several weeks. We accept Ms Waaijman's oral evidence that a decision had not been made at this stage on a new structure for the HR team because Ms Vakhrameeva had not taken over interim management of the team nor assessed what form the new team would take.

25. Ms Shah emailed Ms Waaijman on 27 June 2018 to ensure that the claimant and two other colleagues on maternity leave were able to participate remotely in the all-staff meeting. The claimant and the two other colleagues were copied in to this email. Although it was not apparent from the version of the relevant email in the hearing bundle we find that it is likely that Ms Shah used their personal email addresses because one of these colleagues replied later that day from her personal email address and wrote to Ms Waaijman on 9 July 2018 copying in the claimant and others using these addresses, and Ms Shah also emailed Ms Waaijman on the same date to the same recipients and in the same email chain in which she confirmed that this had been copied to their personal email addresses. The claimant was therefore made aware of this all-staff meeting on 27 June and 9 July 2018. Notably, in this second email, Ms Shah emphasised the need to involve these colleagues on maternity leave in the consultation process not least to avoid the risk of discrimination claims. Ms Waaijman replied to the claimant and others on the same date to confirm that the notes on the restructure meetings would be sent to their personal email addresses and their input sought where appropriate. The email correspondence dated 9 July 2018 which was copied to the claimant's personal email address referred to the memo of the all-staff meeting on 28 June 2018. The claimant neither complained that she did not receive this memo nor requested a copy.

26. Similarly, Ms Shah emailed Ms Waaijman on 27 June 2018 in relation to the consultation meeting with the HR team the next day about ensuring remote access for the claimant, Ms Breed who would be on leave and also herself. She suggested that her VMR could be used or alternatively the meeting was rescheduled when more of the team were available. Once again, Ms Shah copied this to the claimant's personal email address. This included the original appointment invite for this meeting which had not been sent to the claimant initially.

27. Despite Ms Shah's prompting the respondent failed to ensure that the claimant (and other staff on maternity leave or otherwise on leave) were able to access these meetings. Although we accepted Ms Waaijman's evidence that dialling-in was not an option for the first meeting because of the venue in which it was held and also that Ms Shah tried to use her VMR at the start of the second meeting without success, she did not take any other steps to ensure the claimant was able to access these meetings or that the content of either meeting was sent to her. Ms Waaijman agreed in her oral evidence, that it was possible that she failed to take any steps to update the claimant. We find that this is likely.

28. At around this time the claimant contacted Ms Shah when she confirmed that her maternity leave would end on 16 August 2018 and it was agreed that she use up her accrued leave and return to work on 1 October 2018. This was confirmed by Ms Shah in writing on 3 July 2018.

29. The claimant came into work for a KIT day on 16 July 2018 which coincided with Ms Vakhrameeva's first day with the team. She was therefore able to attend a team meeting led by Ms Vakhrameeva, now their interim manager, who explained that she had been brought in to deliver a new way of working i.e. there would be a focus on expanding and diversifying the database. They then had a one-to-one meeting when Ms Vakhrameeva asked the claimant about her role and the work she had being doing before she went on maternity leave and about the work she enjoyed and wanted to focus on when she returned. We do not find that Ms Vakhrameeva told the claimant that there was no intention to make any redundancies because Ms Waaijman had already made it clear to staff that redundancies were likely and Ms Vakhrameeva was tasked with conducting a strategic review which was likely to result in redundancies. Although the claimant said that this meeting lasted 10 to 20 minutes we prefer Ms Vakhrameeva's evidence that it lasted for between 45 and 60 minutes because she said that she had allocated one hour for this meeting and overall her evidence was cogent, credible and reliable in a way that we found the claimant's to be lacking.

30. This was the only occasion when the claimant and Ms Vakhrameeva met in person before the new HR team structure was agreed and prior to the claimant's return to work in October 2018. They agreed to speak again on 9 August 2018 via Skype. The claimant was by this date in Canada. We accept her evidence that she called Ms Vakhrameeva several times without answer. By this date, the claimant had emailed Ms Vakhrameeva, on 3 August 2018, to request a further period of leave from 11 – 23 October 2018.

31. Ms Vakhrameeva held a team meeting with the HR team on 14 August 2018. An email was circulated to the team the day before via Mr Didlick's email address. We do not infer from this that Mr Didlick and Ms Vakhrameeva were working closely together, as the claimant contends. We accept Ms Vakhrameeva's evidence that she delegated this task to Mr Didlick because he had access to the requisite email addresses. The claimant was unable to attend this meeting remotely because of a pre-

arranged family commitment. She emailed Ms Vakhrameeva on the same date to confirm that she would be unable to dial-in to this meeting and she requested a note of the meeting or a Skype call on 17 August 2018. This was the day after her maternity leave ended. Ms Vakhrameeva replied to confirm that a summary of this meeting would be circulated and she agreed to arrange a call with the claimant on 17 August 2018. The timing of this consultation meeting was therefore predicated on the claimant's availability and her stated preference, as this contemporaneous email correspondence shows, and was not based on a decision to delay this until the claimant's maternity leave had ended (notwithstanding Ms Vakhrameeva's witness evidence to the contrary).

32. At the meeting the next day with the remainder of the HR team, save for Ms Breed who was on annual leave, Ms Vakhrameeva presented a slide of an organogram setting out a new structure for the 'Talent Team HSOT' which had the following five positions: a Talent Manager (Grade 8), an HR Advisor (Grade 6), two Roster Talent Coordinators (Grade 6) and an HR Administrator (Grade 5). Ms Vakhrameeva said that she completed this new structure on the 13 or 14 August 2018, we find it likely that it was completed on 13 August 2018 which is when the meeting invitation was sent out to the HR team. Although Ms Vakhrameeva's evidence was that a final decision on this new structure was not made until after she had spoken individually to each member of the team, we find that this decision was made on 13 August 2018 and conveyed to the team the next day when Ms Vakhrameeva also held the first of the individual consultation meetings. As Ms Vakhrameeva conceded in oral evidence, those present at the meeting on 14 August 2018 would have understood from the organogram that their posts had been deleted so that they were now at risk of redundancy.

33. During their call on 17 August 2018, Ms Vakhrameeva told the claimant that because of the restructure of the HR team her role was at risk of redundancy. Although the claimant said in oral evidence that she was upset by this as she assumed that because of her maternity leave she was protected and would be redeployed automatically into another role, we do not accept this evidence because the claimant did not raise this issue until she saw an email written by Ms Waaijman on 1 October 2018. Nor do we accept the claimant's evidence that she asked Ms Vakhrameeva if they could postpone this discussion to another date when she was calmer and when she could arrange union representation because this was not in her witness statement, we have found that other parts of her evidence lacked credibility and we accept Ms Vakhrameeva's oral evidence that she was surprised by how upbeat the claimant sounded during this call.

34. The claimant was now on annual leave and not due to return to work until 1 October 2018.

35. Ms Vakhrameeva emailed the claimant and her other three colleagues in the team who were also on permanent contracts, Mr Didlick, Ms Breed and Ms Clark, on 21 August 2018, to confirm that they had been put at risk of redundancy. The organogram together with job

descriptions for the new roles were provided. They were told that although these roles would be advertised they would be given priority and would be guaranteed an initial interview for any roles they were applied for. They would also be required to complete two short psychometric assessments.

36. In her oral evidence the claimant agreed that the reason for the deletion of these four roles was the restructure which was being implemented as part of the respondent's wider commitment to DFID to reduce overall headcount. We accept the respondent's evidence that this restructure was a response to DFID's desire to change the way the service was delivered with stronger and more proactive management and accountability within the HR team. We also accept Ms Vakhrameeva's evidence that the focus of the new Grade 6 roles was the ability to work independently and strategically which she saw as being necessary to meet this new way of working. This was consistent with the flatter i.e. less hierarchical structure for the new team. We also find that in deciding on this new structure and in placing staff at risk, Ms Vakhrameeva concluded that none of the team, including the claimant, had the requisite skills, aptitude or experience to carry out the Grade 6 roles. She did not therefore consider slotting the claimant, or any of her colleagues, into these new roles. She had arrived at this assessment by focussing on the "contract deliverables" and by considering the current roles being performed in the team. This had been the exercise she had conducted between 16 July and 13 August 2018 which had included her meeting with the claimant. As Ms Vakhrameeva subsequently explained:

> "Palladium carries a great financial risk as the delivery key milestone KPIs, namely regionalisation, compliancy, and diversification of the database. We understood that none of the internal applicants had the relevant experience in those three key elements."

The financial risk to the business if these KPIs were not met was that the respondent would not receive the full payments under the contract. We also accept the respondent's evidence that the new Grade 6 roles required experience of managing challenging contractors and clients and change management expertise to deliver an aggressive database growth plan. As we have found, the imperative to diversify and expand the expert database required a new approach and different skills than under the previous contract.

37. Although Ms Vakhrameeva sought to apply the inherited grading to the new roles without fully understanding how this grading system worked, so that her approach was more pragmatic than systematic, we find that the higher grading of these roles reflected her genuine assessment that the new roles were objectively at a higher level than grade 5 because of the additional requirement for independent and strategic working.

38. The claimant applied for the Grade 6 roles of HR Advisor and Roster Talent Coordinator on 8 September 2018. In her oral evidence, which we accepted, Ms Vakhrameeva said that the starting salary for these

roles was in the range of £30,000 - £35,000. The claimant's current salary was at the lower end of this range at £30,450. The claimant says these roles were similar to her substantive role in terms of duties and functions. She did not apply for the Grade 5 role which had a starting salary of £20,000 and therefore around £10,000 lower than the claimant's current salary.

39. We accepted Ms Vakhrameeva's oral evidence that despite the similarities between the claimant's substantive role and the new roles in the respective job descriptions and salary, these new roles were substantively different and required greater independent decision-making and strategic thinking, and experience of change management, which was emphasised by the list of core competencies enumerated in the job descriptions, and they also required specific expertise which the claimant lacked.

40. The job description for the HR Advisor role provided that the primary purpose of this role was to provide an end to end HR support service for internal clients with a focus on providing a full generalist HR service to the core team of employees. It had a dual reporting line to the respondent's HR and the HSOT Talent Manager. We do not find this was a suitable role for the claimant based on her Grade 5 work experience:

    (1) It had a "significant degree of autonomy" and the requirement to work independently. For example, the post-holder would be required to make and implement decisions without going through the head of department.
    (2) It required the provision of generalist advice to the core team. We have found that the claimant had not been required to provide general HR advice in either of her Grade 5 roles. She had been situated in a small team completing defined process-driven tasks. She had been unable to publish the HR bulletin because she required training to do this. This new Grade 6 role required a greater breadth and application of HR knowledge and expertise.

41. Nor do we find that the Roster Talent Coordinator was a suitable role for the claimant. The job description for the Roster Talent Coordinator role provided that the

> "primary purpose of this role is to provide an end to end talent management service, you will be responsible for leading on talent acquisition and managing the relationships with the roster members. Identifying and sourcing the best talent in the market and building a strong and diverse specialist network, through advertising, networking and headhunting. Supporting and executing a strong talent strategy will be a core part of the role…"

We find that compared with the claimant's current role (and previous one):

(1) It required a greater degree of autonomous and independent working and to lead on talent acquisition and management.

(2) This job description reflected the requirement for a greater strategic focus which corresponded with the need to diversify and expand the database. The role required the holder to "Grow and maintain the roster membership [i.e. database of experts] to an agreed level". The job description for the claimant's Humanitarian HR Officer referred the need to maintain the database and not to expand it. As we have noted, although the 2017 appraisal document identified the goal of expanding the database to ensure that the narrower operational objectives were met, the action which the claimant committed to take was focused on ensuring that information on the database was accurate. This was a purely administrative task. Although the claimant said that she had recruited 300 candidates to the database, without giving any specific details, we accepted Ms Vakhrameeva's evidence, which we found to be more credible, that there were 150 candidates on the database and this number needed to be tripled. We find that a review of the claimant's appraisal would not have suggested that the claimant had the experience or capacity to expand and diversify the database as required.

(3) It required a strong track record of interviewing which we have found that the claimant lacked. It also required experience of headhunting.

(4) It required generalist HR knowledge. We have found that the claimant's evidence that she provided general HR advice in her HR Support Officer role was not credible.

42. The claimant emailed Ms Vakhrameeva on 19 September 2018 to have a short discussion to gain a better understanding of what the respondent was "looking for out of these roles". In her reply, Ms Vakhrameeva's focus was on the interview itself, she confirmed that the claimant would be interviewed by herself, Joost Verwilghen, Project Operations Director, and Camy Aw, an Administrative Officer. There would be a mix of skills, experience and competency-based questions. She would be interviewed for both the roles she had applied for. Ms Aw would be in contact to provide some assistance with interview preparation. She gave the claimant the option of three dates for the interview the following week. The claimant responded that she was not available then and suggested 2 October 2018 which was the day after she returned to work. She did not follow-up her request to discuss the job roles which we find Ms Vakhrameeva had overlooked inadvertently. It was agreed that the claimant's interview would take place on 3 October 2018.

43. The claimant was provided with a guidance document on competency-based interviews. This highlighted the STAR (i.e. situation, task, action and result) method for answering questions. As the claimant agreed in oral evidence, this guidance emphasised the importance of preparation. The claimant had an interview preparation session by telephone with Ms Caw on 28 September 2019 which she says was cut short and was limited to advice on presentation. However, Ms Aw offered the claimant a second session which she declined. She told Ms Aw that she wanted

to speak to Ms Vakhrameeva. She did not, however, attempt to make contact with Ms Vakhrameeva directly.

44. The claimant says that whilst she understood the new reporting lines in the new structure the job descriptions were vague and she did not fully understand what the respondent wanted from the new roles. As we have noted, the job descriptions for the new Grade 6 roles emphasised the focus on talent acquisition and management (Roster Talent Coordinator) and the provision of a full generalist HR service to the core team (HR Advisor). They also underscored the need for change management experience, and a more strategic approach. We have found that the claimant was told by Ms Vakhrameeva at the meeting on 16 July 2018 that the focus was on expanding and diversifying the database. It was not clear to us that anyone else who was applying for the Grade 6 roles had been provided with information in relation to the terms on which the respondent had won the HEROS contract nor any information about the specific targets the team was required to meet under this contract. In her oral evidence, the claimant agreed that Ms Vakhrameeva's reply on 19 September 2018 made clear that she would need to come prepared to the interview to demonstrate the core competencies. We find that the claimant had sufficient information from which to prepare for this competency-based interview.

45. The claimant returned to work on 1 October 2018. She saw an email exchange dated 11 July 2018 in which Ms Waaijman had referred to a mechanism for raising any concerns in relation to the redundancy process by those placed at risk. The claimant emailed Ms Waaijman later that day to request more details about this process. She was now i.e. for the first time concerned that she had not been slotted into one of the new posts and was instead being required to undergo a competitive interview. Ms Waaijman did not respond.

46. Although the claimant said that she also tried to contact Ms Vakhrameeva directly we do not find that she did because there was no email and the claimant's evidence was unclear and she was unable to recall whether or not she attempted to telephone Ms Vakhrameeva.

47. On her return to work, the claimant had no access to email or a work phone. We find that arrangements had not been taken to resolve this prior to this date because the claimant had been on annual leave. It is notable that in an email dated 19 September 2018 the claimant referred to IT issues with her laptop and was asked to come into the office so that this could be resolved. The claimant said that she would try to make some time that week to do that. She did not. We accept Ms Vakhrameeva's oral evidence that DFID was responsible for providing laptops and the respondent was not in a position to replace the claimant's work phone because of TUPE-legacy issues and the claimant was able to use her personal phone in the meantime and claim back expenses.

The claimant's interview on 3 October 2018

48. The claimant was interviewed by Ms Vakhrameeva, Mr Verwilghen and Ms Aw on 3 October 2018. The interview lasted two hours.

49. We accept the respondent's evidence that the claimant's answers were limited and revealed her lack of relevant experience and expertise. It is notable that in her oral evidence, the claimant said that she gave generalised or broad answers. She did so, despite having reviewed the job descriptions for both roles and the guidance on competency-based interviews. When asked to provide an example of managing shareholder expectations she referred to providing timesheet support; and she was unable to provide a coherent illustration of when she had dealt with a challenging situation involving others or her involvement in change management. We have not accepted the claimant's oral evidence that she referred to her experience of interviewing. We have found that her evidence that she conducted 50 – 60 interviews in her first year lacked credibility. We accept Ms Vakhrameeva's evidence that the claimant made no mention of this at her interview. Nor was this recorded in either her contemporaneous note of the interview nor by the other two panellists. We do not find it likely that the panellists colluded to manipulate their interview notes as the claimant contends. We also take account that Ms Vakhrameeva, when giving oral evidence, was prepared to concede that the claimant had cited the three examples set out in her witness statement that were not recorded in her interview notes. However, we do not infer from this the claimant referred, and Ms Vakhrameeva and her colleagues failed to record, to interview experience because this was one of the key requirements and therefore of central relevance for the Roster Talent Coordinator role. It is notable that one of the panellists recorded that one of the claimant's answers contained "too much information on people" and another panellist noted in summary "right level? x → admin".

50. Ms Vakhrameeva gave the following explanation, which we accept, in connection with the claimant's subsequent grievance:

> "Under the new terms of contract, and therefore highly required in the new positions, the competencies would be to: manage stakeholders and contractors, to proactively seek solutions and resolve complex issue [sic]. The new [Roster Talent Coordinator] position will cover client management, full responsibility for 360 recruitment and headhunting for niche skills globally etc. In Harleen's response during the interview there was no demonstration of competencies required for the role."

51. The claimant was one of four candidates to be interviewed for the Roster Talent Coordinator role and one of two interviewed for the HR Advisor role. Mr Didlick was the other candidate. For the former, she was awarded the lowest score of 16 out of 30. Two external candidates were appointed to fill the Talent Roster Coordinator roles who scored 26 and 25. For the HR Advisor role, the claimant scored 17 out of 30. Mr Didlick, who achieved a score of 26, was appointed into this role. The claimant achieved the highest score out of all the candidates in the

psychometric tests. The respondent decided not to rely on the psychometric test results.

52. We do not find it likely that Mr Didlick's substantially higher score was the result of any advantage he may have had over the claimant because he worked throughout the period of her absence, was able to attend the consultation meetings on 18 June 2018 and 14 August 2018 or because he worked alongside Ms Vakhrameeva from 16 July 2018. Although the claimant alleged in oral evidence that she knew that she had a higher skills set than Mr Didlick, that he had been treated favourably because of general interactions she had witnessed between Mr Didlick and Ms Vakhrameeva and that the interview scores had been manipulated to achieve the premeditated outcome of appointing him to the HR Advisor post, we found that this evidence lacked specificity and credibility. None of this detail was contained in the claimant's witness statement. This was a competency-based interview with reference to the relevant job descriptions. We have not found that the scoring was biased nor manipulated. Nor do we find that the decision to discount the psychometric test results in circumstances in which there was a significant variance between the claimant's scores and those of the highest scoring candidates reveals or even suggests any bias but rather a focus on the competency-based interviews and the respondent's confidence that this was the best way to identify the most suitable candidates for these roles.

The decision to dismiss the claimant

53. A week later, on 10 October 2018, the claimant met with Ms Vakhrameeva and Ms Waaijman when she was told that she had not appointed into one of the Grade 6 roles and she would be dismissed by reason of redundancy. We accept that the claimant was told that she lacked the interpersonal skills to form necessary relationships within the team and wider DFID because she referred to this feedback in her appeal letter dated 15 October 2018. Ms Vakhrameeva said that the claimant came across as personable which we find to be a superficial evaluation and not the same as having the requisite skills to develop key relationships.

54. We find that the decision to dismiss the claimant was taken between the date of her interview on 3 October 2018 and this meeting, a week later. No steps were therefore taken to implement this decision before this date. Although this decision stemmed from the claimant's interview and her failure to secure one of the new Grade 6 roles it is likely that it required approval from Ms Waaijman. There were no other potentially suitable roles for the claimant. We do not find that the Grade 5 HR Administrator role was suitable not least because there was a £10,000 difference in pay between this new role and the claimant's substantive role. Although Ms Vakhrameeva intimidated in her oral evidence that the respondent would have considered pay protection, this was not considered at the time and we do not find it likely that in the circumstances of this restructure Ms Waaijman would have agreed to this level of pay protection.

55. The claimant was on annual leave from 11 – 23 October 2018.

56. On 11 October 2018, Ms Vakhrameeva emailed the claimant to confirm that her employment would be terminated by reason of redundancy. She offered to meet with the claimant for a debrief session. The claimant requested written feedback on 12 October 2018. Ms Vakhrameeva replied that she had not demonstrated a "high enough level" of the required competencies. She repeated her offer to arrange a feedback meeting.

The claimant's appeal

57. The claimant submitted an appeal on 15 October 2018 in which she asserted that the Roster Talent Coordinator role was "almost identical" with her current role and therefore amounted to a suitable alternative role. She also complained that the interview outcome was "potentially discriminatory" because she had been disadvantaged because Ms Vakhrameeva had had less time to observe her at work as she had been on maternity leave. As we have noted, the claimant had been on annual leave between 17 August – 30 September 2018 which accounted for a greater proportion of her absence from work during Ms Vakhrameeva's tenure. She requested a copy of her interview notes.

58. The claimant went to the office on 26 October 2018 to speak to Ms Vakhrameeva to ensure that a personal email she had sent to her in error was deleted. We do not find that the claimant's evidence that Ms Vakhrameeva told her that things may have worked out differently had she known her better was credible. The claimant had not been appointed into either of the Grade 6 roles because of her interview scores from all three panellists.

59. The claimant's appeal was scheduled to take place on 6 November 2018. The day before this hearing, the claimant received the scoring and feedback from her interview.

60. This appeal was heard by Gillie Slater, Legal Director, on 6 November 2018 when the claimant was accompanied by Pav Alam, her PCS representative. Having sought some clarification from Ms Waaijman and Ms Vakhrameeva, Ms Slater dismissed the claimant's appeal. In her report confirming this outcome, Ms Slater concluded that:

> "the differences between old roles and the new roles could have been expressed more clearly in the Job Descriptions. However, Palladium is clear that the roles do differ and, from the information provided, it is also clear that Palladium spent time and effort explaining to the staff the strategy behind the restructuring and also the new role requirements."

Although Ms Slater concluded that special access arrangements had been made to ensure that the claimant was consulted about the restructure during her maternity leave, as Ms Waaijman conceded, this was based on information she provided which was misleading because it failed to make clear these arrangements had not been effective. Ms

Vakhrameeva also provided information to Ms Slater, including a timeline which referred to an individual telephone call with the claimant on 28 June 2018 and also the call she had scheduled with the claimant on 9 August 2018. Neither of these calls took place. We do not, however, find that Ms Waaijman or Ms Vakhrameeva intended to mislead Ms Slater but this was a result of a lack of due diligence and they genuinely but mistakenly relied on incomplete and therefore inaccurate information. For example, in relation to the 9 August 2018 call, we accept Ms Vakhrameeva's oral evidence that she relied on a diary entry and not her direct recollection of a discussion on that date and proceeded on the assumption that the call had been made.

61. The claimant agreed to take garden leave. Her employment ended on 11 November 2018 when she received a redundancy payment in the sum of £4391.78.

Relevant legal principles

Automatic unfair dismissal – maternity leave

62. Section 99(1) ERA provides that:

> *An employee shall be regarded for the purposes of this Part as unfairly dismissed if –*
>
> *(a) the reason or principal reason is of a prescribed kind, or*
> *(b) the dismissal takes place in prescribed circumstances.*

63. The relevant prescribing regulations for these purposes are the MPL Regs. Under regulation 20(1)(b) an employee will be regarded as unfairly dismissed for the purposes of section 99 ERA if the reason or principal reason for dismissal is redundancy and regulation 10 has not been complied with. Regulation 10 provides that:

> *(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employee to continue under her existing contract of employment.*
>
> *(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before then end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).*
>
> *(3) The new contract of employment must be such that –*
>
> *(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and*
> *(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than she had continued to be employed under the previous contract.*

64. If regulation 10(1) MPL is engaged and a suitable vacancy exists for the purposes of regulation 10(3) the employee is entitled to be offered this vacancy under regulation 10(2) and a failure to do so will render a dismissal automatically unfair (regulation 20(1)(b) MPL and section 99 ERA).

65. Regulation 20(4) provides that paragraph (1)(b) will only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

66. Both limbs of regulation 10(3) must be satisfied for the obligation under 10(2) to be triggered (see Simpson v Endsleigh Insurance Services Ltd [2011] ICR 75, EAT) i.e. it must be suitable both in terms of job content and also equivalence or comparability of terms and conditions. In assessing whether a vacancy is suitable for these purposes, a tribunal must make an assessment from the perspective of an objective employer based on what it knew, or ought reasonably to have known, about the employee's personal circumstances and work experience.

67. Alternatively, regulation 20(2) provides that a dismissal will be rendered automatically unfair if:

> *(a) the reason (or, if more than one, the principal reason) is that the employee is 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).*

68. The prescribed reasons under regulation 20(3) include those connected with the fact that the employee took, sought to take or availed herself of the benefits of, ordinary or additional maternity leave.

69. A tribunal is entitled to conclude that there was a redundancy, so that regulation 10 is triggered, at the point at which the employer has decided on a new structure in which an employee on maternity leave has been placed at risk of redundancy (see Sefton Borough Council v Wainwright [2015] ICR 652, EAT).

Maternity discrimination

70. Section 18(4) EQA provides that:

> *A person (A) discriminates against a woman because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.*

71. On causation, the 'but for' test is not applicable. The tribunal must consider whether the claimant was treated unfavourably because she took or sought to take maternity leave. This requires some causal connection (see Johal v CEHR UKEAT/0541/09) and it is not enough for this to be part of the background. It must be an effective cause of the

treatment complained of (see O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor [1996] ICR 33, EAT).

72. A failure to comply with regulation 10 MPL does not mean that a dismissal will be automatically discriminatory and a tribunal must still go on to consider the question of causation (see Sefton).

Direct discrimination

73. Section 13(1) EQA provides that:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably that A treats or would treat others.*

74. There are two elements in direct discrimination: the less favourable treatment, and the reason for that treatment (see Glasgow City Council v Zafar [1998] IRLR 36, [1998] ICR 120).

75. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or "effective cause". The basic question is "What, out of the whole complex of facts before the tribunal, is the 'effective and predominant cause' or the 'real or efficient cause' of the act complained of?" (see O'Neill).

76. The test is what was the putative discriminator's conscious or subconscious reason for treating the claimant unfavourably (see Nagarajan v London Regional Transport 1999 ICR 877, HL).

77. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

Detriment

78. Section 39(2) EQA provides that:

> *An employer (A) must not discriminate against an employee of A's (B) –*
> *…*
>
> *(d) by subjecting him to any other detriment.*

79. A complainant seeking to establish detriment is not required to show that she has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

80. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

81. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Burden of proof

82. Section 136 EQA provides

> …
>
> (1) *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.*
> (2) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

83. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must first establish a prima facie case. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination; and something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

84. In many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN). Accordingly, the burden of proof provisions have no role to play where a tribunal is in a position to make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870, SC).

Discussion – the operation of regulation 20(4) MPL

85. There was a dispute between the parties in relation to the operation of regulation 20(4) MPL. The parties were ordered to provide additional written submissions on this point which we have considered.

86. Ms Egan, for the claimant, contends that if regulation 20(4) MPL applies then it would preclude the claimant from relying on regulation 20(1)(b) MPL because the claimant's dismissal was notified and effected after the protected period. She also contends that regulation 20(4) must be disapplied because it is not possible to read this provision in a way that is compatible with retained EU law i.e. Article 10(1) of the Pregnant Workers Directive 92/85/EEC ("PWD") read together with Paquay v Societe d'Architectes Hoet & Minne SPRL C-460/06, [2008] ICR 420, ECJ.

87. For the respondent, Ms Tutin's primary submission is that regulation 20(1)(b) can be read purposively to apply to a decision to dismiss which has been taken and takes effect during and/or ends the employee's ordinary or additional maternity leave period. Her secondary submission is that even if it is necessary for regulation 20(4) to be disapplied to give effect to Article 10(1) PWD read together with Paquay then this will not

assist the claimant in reviving her complaint under regulation 20(1)(b) because the respondent did not take any steps preparatory to the claimant's dismissal during the protected period.

88. Article 10(1) AWD provides:

> *Member States shall take the necessary measures to prohibit the dismissal of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8 (1), save in exceptional circumstances not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided the competent authority has given its consent*

89. In Paquay the ECJ determined a referral made by a domestic court which included the following question:

> *"Must article 10 of Directive 92.85 be interpreted as only prohibiting the notification of a decision of dismissal during the period of protection referred to in paragraph (1) of that article or does it also prohibit taking the decision of dismissal and attempting to find a permanent replacement for the employee before the end of the period of protection?"*

It is relevant that in that case the employer took the decision to dismiss the worker and also took the step of advertising for her permanent replacement in the protected period. The ECJ held that the scope of Article 10(1) PWD applied not only the notification of a decision to dismiss a woman for a proscribed reason within the protected period but also the taking of preparatory steps for such a decision before the end of that period, which included, in that case, searching for and finding a permanent replacement.

90. The parties agree that Parquay was given domestic effect by the insertion of section 18(5) EQA which provides that

> *if the treatment of a woman is in implementation of a decision taken in protected period, the treatment is regarded as occurring in that period (even if the implementation is not until after the end of that period).*

No such amendment was made to the relevant provisions relating to unfair dismissal i.e. section 99 ERA read with regulation 20 MPL.

91. There has been a long-established requirement for domestic courts to interpret domestic law purposively to give effect to EU directives (Marleasing SA v La Comercial Internacional de Alimentacion SA Case-C106/89) and where necessary, because this is not possible, to disapply an offending domestic provision: R v Secretary of State for Transport Ex p Factortame Ltd (No 2) [1991] 1 AC 603, in which Lord Bridge said this:

> "it has always been clear that it was the duty of a United Kingdom court, when delivering a final judgment, to override any rule of

national law found to be in conflict with directly enforceable rule of Community Law…"

92. Post-Brexit, the supremacy of retained EU law is maintained, in specified circumstances, as regards pre-exit domestic legislation. Section 5(2) European Union (Withdrawal) Act 2018 ("EUWA") provides

> *…the principle of the supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day*

93. Accordingly, domestic courts (save for the Supreme Court and the Court of Appeal) and tribunals must interpret the validity, meaning or effect of retained EU law in accordance with retained case law and retained general principles of EU law.

94. It is agreed that under the relevant provisions of EUWA, Article 10(1) AWD is retained EU legislation and must be interpreted by this tribunal in accordance with Paquay which is retained EU case law and also that the retained general principles of EU law remain applicable.

95. We are satisfied that regulation 20(4) MPL is in conflict with Article 10(1) AWD and are fortified by the observations of HHJ Auerbach in Harvey on Industrial Relations and Employment Law [408] – [408.1] which Ms Egan referred us to. It is plain to us that regulation 20(4) fails to give effect to the purpose of protecting pregnant employees from dismissal in circumstances in which an employer has made a decision to dismiss and has taken preparatory steps for the dismissal in the protected period but where such a decision does not take effect until after the protected period and so does not have the effect of bringing the ordinary or additional maternity leave to an end.

96. We are also satisfied that preparatory steps for dismissal are those steps taken to implement such a decision. This is because (1) the focus of the protection afforded to pregnant workers by Article 10(1) is dismissal; (2) the relevant reference in Paquay was predicated on the circumstances of that case in which the decision to dismiss and steps taken to replace the worker permanently in the protected period had been taken in the protected period (and the notification and date of dismissal had fallen outside it); (3) this is consistent with the wording of section 18(5) EQA which the parties agree gave domestic effect to Paquay which deems steps taken *to implement a decision taken* in the protected period as being in scope.

97. We therefore find that to give effect to Article 10(1) AWD, regulation 20(4) MPL must be disapplied in circumstances where during the protected period an employer has made the decision to dismiss and taken steps to implement this decision even when such a decision is notified and takes effect after the protected period has ended.

Conclusions

Automatic unfair dismissal (regulations 10 & 20(1)(b) MPL and section 99 ERA)

98. The claimant accepted that there was a redundancy situation because of which it was no longer practicable for the respondent to employ her as a Humanitarian HR Officer. We have also found that the relevant date is 13 August 2018 which is when Ms Vakhrameeva decided on the new structure for the HR team as a result of which the claimant's post was deleted and she was at risk of redundancy. The claimant was on maternity leave on this date. Although she was not notified of this until 17 August 2018, which was the day after her maternity leave had ended, and at a timing of her choosing, the claimant's colleagues had already been put on notice that they were at risk.

99. This complaint fails because of our finding that the decision to dismiss the claimant and any steps taken by the respondent to implement this decision were not made until after her interview on 3 October 2018 when she was not appointed into one of the Grade 6 roles she had applied for. This was outside the protected period. We do not find that putting the claimant at risk of redundancy was a step taken in implementation of a decision to dismiss her. Although the claimant's dismissal stemmed from the decision to put her at risk of redundancy her dismissal was not an automatic consequence which flowed from it. Had the claimant demonstrated the requisite core competencies, in the way that Mr Didlick did, it is likely that she would have been appointed into one of the new roles. Accordingly, the claimant's dismissal does not fall within the circumstances in which we have found regulation 20(4) MPL must be disapplied.

100. For completeness, had we been required to make findings on this, we would not have found that there were any suitable vacancies available which should have been offered to the claimant. The claimant alleges that she should have been offered, without competition, either of the Grade 6 roles of HR Advisor or Roster Talent Coordinator. It is not in dispute that these roles were not substantially less favourable than the claimant's High Grade 5 role. The issue in dispute between the parties and on which it would have been necessary for us to make findings is whether the work done in either of these roles was suitable for the claimant based on her work experience.

101. It is clear that no consideration was given by the respondent to the claimant's prior work experience with a view to assessing whether any of the new roles were suitable for her. In her oral evidence, Ms Vakhrameeva said that this would have been unfair to the claimant's other colleagues. She therefore failed to conduct such an exercise. We remind ourselves that a tribunal is required to make an assessment from the perspective of an objective employer based on what it knew or ought to have known about the claimant's personal circumstances and work experience. We have found that Ms Vakhrameeva carried out an assessment of the work being performed by the claimant's colleagues, which included the work being done by her maternity cover, and

concluded that neither of the new roles were on a par because they were more strategic and required greater independent working. We have found this led Ms Vakhrameeva to designate the two roles in question as Grade 6 whereas the claimant's current and preceding roles were both on Grade 5. We find that had Ms Vakhrameeva considered whether either of the Grade 6 roles was suitable on the basis of the claimant's previous work experience it is likely that she would have concluded that neither role was suitable. We have found that whilst there were some similarities there were also key and central differences between the roles the claimant had done and the Grade 6 posts. We have found that the claimant lacked the requisite experience of providing generalist HR advice and also the requisite experience of interviewing and headhunting and change management. We would also have taken account of the claimant's interview answers (not scores) in respect of which we have found that she was unable to demonstrate that she met the core competencies or had the expertise required for these roles.

102. For completeness, we have found that the Grade 5 HR Administrator role was not suitable because it had a starting salary which was more than £10,000 lower than the claimant's and it was unlikely that the respondent would have sanctioned this level of pay protection.

Automatic unfair dismissal (regulations 20(2) MPL and section 99 ERA)

103. It is agreed that there was a genuine redundancy situation and that this was the reason for the claimant's dismissal. It is also agreed that the circumstances constituting redundancy applied equally to Mr Didlick who was in the same undertaking, held a position similar to the claimant and was not dismissed by the respondent.

104. We do not find that the principal reason for the claimant's selection for dismissal was one connected with the fact that she took additional maternity leave. We have found that the reason for her selection was that she failed to demonstrate at interview that she was able to meet the core competencies for either of the Grade 6 roles she applied for. We have found that the claimant's interview answers revealed that she lacked the requisite skills and expertise required for these roles. There were other candidates who were awarded higher scores and who were appointed. There were no suitable roles into which the claimant could have been redeployed.

105. The claimant relies on her lack of current experience in the workplace, that she had never worked for the respondent, she did not have a working relationship with Ms Vakhrameeva, had very limited information about the respondent's bid for the HEROS contract, the new direction of the HR team and the DFID targets and the alleged failure to prepare her for interview.

    (1) We do not find that these factors which the claimant says placed her at a disadvantage are factors which the respondent relied on to dismiss the claimant.

(2) In respect of the claimant's interactions with Ms Vakhrameeva, she was only one of the three members of the interview panel. It is notable that she was scored consistently by all three members of the panel.
(3) We have found that Ms Vakhrameeva did discuss the new ways of working and new focus for the HR team at the meeting the claimant was able to attend on 16 July 2018. We have also found that the job descriptions for both Grade 6 roles emphasised what was required for each role.
(4) We have found that steps were taken to support the claimant with interview preparation, however, she declined the opportunity of a follow-up session with Ms Aw.
(5) Overall, we do not find that it is likely that the claimant's lack of current workplace experience or experience of working with the respondent or Ms Vakhrameeva were factors which were directly causative of the claimant's poor interview answers which revealed that she lacked the core competencies and expertise required for these roles.
(6) It is notable that neither of the two external candidates who were appointed into the Talent Roster Coordinator positions had worked for the respondent before, or alongside Ms Vakhrameeva, nor had they been provided with any information about the respondent's successful bid for the HEROS contract, the new direction of the HR team or the DFID targets. They had been provided with the job description for the role they had applied for.

Maternity discrimination (sections 18(4) & 39(2) EQA)

106. This complaint fails because the respondent has provided a cogent non-discriminatory reason for its decision to dismiss the claimant. The claimant did not demonstrate the required competencies at interview. Other candidates for the same roles achieved higher scores and demonstrated that they had the requisite competencies. There were no alternative and suitable roles into which the claimant could be redeployed.

107. It is not therefore necessary to apply the burden of proof provisions. However, for completeness, we have considered the following:

(1) We do not find that the failure to make effective arrangements to enable the claimant and other colleagues who were also on maternity leave to participate in the meetings on 28 June 2018 or make any follow-up arrangements in relation to the consultation process, or the late notice of the consultation meeting on 14 August 2018 or the late provision of interview notes before the claimant's appeal hearing were conscious decisions taken because the claimant had taken maternity leave nor that they evince an unconscious bias against the claimant.
(2) We have found that the timing of the consultation meeting between the claimant and Ms Vakhrameeva on 17 August 2018, being the day after the claimant's maternity leave ended, was at

the claimant's behest as substantiated by the contemporaneous email correspondence.

(3) We have found that the claimant was offered more interview preparation which she declined. She was also provided with written guidance on competency-based interviews.

(4) We do not find that the claimant's extended absence from the workplace or lack of a working relationship with Ms Vakhrameeva or the respondent was something which had a conscious or unconscious effect on the scores she was awarded by the panel. We have found that the claimant had sufficient material from which to understand what each role required and failed to demonstrate that she had the requisite skills and expertise for these roles and there were other candidates who did. Nor do we find that the panel gave any consideration to whether the claimant required additional training and did not therefore, either consciously or unconsciously, treat this as a factor when they scored the claimant's interview answers.

(5) We find that the failure to grant the claimant access to a work phone or laptop between 16 August and 1 October 2018 was because of her extended annual leave and also because of factors outside of the respondent's control.

(6) We have found that the inaccurate and misleading information which Ms Waaijman and Ms Vakhrameeva gave Ms Slater reflected their genuine but mistaken recollection of events based on incomplete records. This was not deliberate and nor do we find it evinced an unconscious bias against the claimant.

Direct sex discrimination (section 13 EQA)

108. This complaint is brought on the basis of the failure to select the claimant for the role of HR Advisor following a competitive selection process resulting in her dismissal by reason of redundancy. The claimant withdrew the allegation of sex discrimination relating to the failure to offer her this Grade 6 role without competition and also the failure to offer her the Talent Roster Coordinator role.

109. Mr Didlick was appointed into the Grade 6 role of HR Advisor following the competitive selection exercise. The claimant was not. The respondent agrees that Mr Didlick was in materially the same circumstances as the claimant. We do not find that the claimant's sex was a significant or effective cause of the decision to select Mr Didlick and not the claimant for this position. We have found that it was because of the claimant's interview performance in which she failed to demonstrate the required competencies. As we have also found, Ms Vakhrameeva was a credible witness of evidence whereas the claimant was not credible at all times. We do not find that that the scoring exercise was biased because of the claimant's sex nor manipulated to conceal this. We have accepted the scores. The respondent has therefore provided a cogent non-discriminatory reason for this difference in treatment which was that Mr Didlick was awarded a higher score at interview, was able to demonstrate the core competencies and his suitability for this Grade 6 role.

110. For completeness, in relation to the grounds on which the claimant relies for there being something more to establish a prima facie case of discrimination, we do not accept the claimant's evidence that she had a greater relevant skillset than Mr Didlick because we found her evidence in relation to her own experience and skillset lacked credibility. Nor have we found that Ms Vakhrameeva treated Mr Didlick more favourably than the claimant. The claimant failed to provide any specific examples to substantiate this allegation (other than the sending of the email to the team on 13 August 2018 which we did not find supported the claimant's case) and we accepted Ms Vakhrameeva's evidence to the contrary.

111. For these reasons all the complaints fail and are dismissed.

Employment Judge Khan

22.08.2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

23.08.2021..

FOR EMPLOYMENT TRIBUNALS: OLu