EMPLOYMENT TRIBUNALS

Claimant: Mrs L Gadd

Respondent: The Governing Body of Kingsway Park High School

Heard at: Manchester **On:** 26-29 April 2021
12 August 2021
(in Chambers)

Before: Employment Judge Feeney
Mr A Egerton
Dr H Vahramian

REPRESENTATION:

Claimant: Mr H Anyiam, Counsel
Respondent: Miss L Quigley, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claims of unfair dismissal contrary to sections 94,98 and 99 Employment rights Act 1996 fail and are dismissed.

2. The claimant's claim of pregnancy discrimination in relation to her dismissal contrary to section 18 Equality Act 2010 fails and is dismissed

3. The claimant's claim the respondent acted in breach of section 47C Employment Rights Act 1996 and regulation 19 MAPLE fails and is dismissed

4. The claimant's claim the respondent acted in breach of Regulation 10 Maple fails and is dismissed

REASONS

Introduction

1. The claimant brought a claim of unfair dismissal, dismissal because of pregnancy/maternity and direct sex discrimination under section 18 of the Equality

Act 2010. The claimant claimed that the reason she had been made redundant was because of her pregnancy and/or maternity leave.

2. The claimant also made a claim under section 47C of the Employment Rights Act 1996 that she suffered detriments because of her pregnancy, namely not being offered alternative posts (as set out below).

3. The respondent submitted that the restructuring exercise that resulted in the claimant's redundancy was perfectly legitimate and her pregnancy had no influence over it whatsoever. They pointed out that a male in the same role as the claimant had also been put at risk of redundancy with the claimant as well as other members of staff in different jobs, and that the claimant was offered suitable alternative employment and unreasonably refused it.

The Issues

4. The issues in this case need careful consideration. In the claimant's claim form the claims were set out as:

Unfair Dismissal contrary to section 98 Employment Rights Act 1996

(1) The claimant does not accept the reason for dismissal was redundancy. She says the true reason was her pregnancy or commencing maternity leave;

(2) That dismissal was unfair in all the circumstances;

(3) The dismissal was outside the band of reasonable responses;

(4) The respondent failed to meaningfully consult with the claimant at any stage; and

(5) The respondent unreasonably failed to consider or offer suitable alternative employment.

Dismissal because of pregnancy contrary to section 99 Employment Rights Act 1996

(6) The claimant claims she was dismissed because of her pregnancy/maternity leave.

Direct Discrimination because of pregnancy contrary to section 18 Equality Act 2010

(7) The claimant was treated less favourably in being dismissed because of her pregnancy or commencement of maternity leave.

Pregnancy-related detriment contrary to section 47C of the Employment Rights Act 1996 and regulation 19 of MAPLE

(8) The claimant was subjected to a detriment, that she was not offered the role of (i) home tutor, and (ii) TA2 apprentice.

(9) The claimant was also subjected to a detriment as she was not offered the role of TA2 on a flexible part-time basis.

(10) The claimant states the reason for these detriments was because she was pregnant.

Breach of the redundancy/maternity provisions under regulation 10 MAPLE

(11) The claimant was made redundant during her maternity leave and was not offered suitable alternative employment.

5. These issues were then considered, as is usual, at a preliminary hearing case management which took place on 24 April 2020. At this stage the issues were summarised as:

(1) A claim for unfair dismissal under section 29 Employment Rights Act 1996 ("ERA");

(2) A claim of automatic unfair dismissal under section 99 ERA;

(3) Pregnancy and maternity discrimination contrary to section 18 of the Equality Act 2010;

(4) Detrimental treatment relating to pregnancy and/or maternity leave pursuant to section 47C ERA, and regulation 19 of the Maternity and Parental Leave Regulation 1999 ("MAPLE");

(5) Breach of regulation 10 of the Regulations (failure to offer suitable alternative vacancy).

6. These issues were broken down as follows:

Section 98 and 99 of the Employment Rights Act 1996

(1) What was the reason for the claimant's dismissal and was it a potentially fair one in accordance with section 98(1) and (2) of the Employment Rights Act 1996? The respondent asserts the reason was redundancy:

(i) Was there a genuine redundancy situation or not pursuant to section 139 of the Employment Rights Act 1996?

(ii) If so, was redundancy the reason for the claimant's dismissal or not?

(2) Was the reason, or if more than one reason the principal reason, for the dismissal the fact that the claimant was pregnant or due to take maternity leave contrary to section 99 of the Employment Rights Act 1996?

(3) If the reason for dismissal was redundancy, did the respondent act reasonably or unreasonably in treating it as sufficient reason for dismissing the claimant and in accordance with equity and the substantial merits of the case? In particular:

(a) Was the decision to dismiss predetermined or not?

(b) Did the respondent engage in meaningful consultation or not?

(c) Did the respondent make reasonable efforts to identify suitable alternative employment or not?

(d) Did the respondent follow a fair procedure or not?

(4) If the claimant was unfairly dismissed and the remedy is compensation, what adjustment (if any) should be made to the compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? (See **Polkey v A E Dayton Services Limited [1987]** House of Lords)

Pregnancy and Maternity Discrimination – section 18 Equality Act 2010

(5) Was the reason why the claimant was dismissed because of:

(a) the fact she was pregnant; or

(b) the fact that she was intending to exercise her right to maternity leave or not?

Section 47C Employment Rights Act 1996 and regulation 19 of MAPLE 1999

Home Tutor

(6) Did the role of Home Tutor exist or not during the period the claimant was at risk of redundancy or during her notice period?

(7) If so, did the respondent fail to offer the claimant the said role or not?

(8) If so, was the reason because of the claimant's pregnancy or the fact she was seeking to exercise ordinary maternity leave or not?

TA2 Role

(9) Did the role of TA2 apprentice exist or not during the claimant was at risk of redundancy or during her notice period?

(10) If so, did the respondent fail to offer the claimant said role or not?

(11) If so, was the reason the claimant was not offered the said role because of her pregnancy or the fact she was seeking to exercise ordinary maternity leave or not?

Regulation 10 Maternity and Parental Leave Regulations 1999

(12) Was there a suitable available vacancy such that the claimant was entitled to be offered a new contract of employment which complied with paragraph 3 of regulation 10?

7. At the date of this List of Issues the claimant is unable to identify whether any or all of the roles of TA3, TA2 and Home Tutor could be considered as suitable alternative vacancies for the purposes of regulation 10, and she claims never to have been provided with sufficient detail. The claimant will update the respondent relating to this issue following disclosure. The issue will require the Tribunal to decide the following:

(1) Was the work to be done suitable in relation to the employee and appropriate for her to be done in the circumstances? If so,

(2) Were the 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 substantially less favourable to her than if she had continued to be employed under the previous contract or not?

8. There was no further amendment to those pleadings.

9. I asked the claimant's counsel on the first day whether the issues had changed, and he confirmed that these were still the issues.

10. The respondent stated that their position regarding possible alternative roles was:

(1) There was no role of Home Tutor;

(2) The role of nurture teacher was unsuitable as it required the candidate to be a qualified teacher, which the claimant was not;

(3) The role of TA3 they considered was suitable alternative employment, but the claimant declined it;

(4) TA2 was not in existence;

(5) The apprentice contract was temporary training and was half the claimant's salary and therefore was not appropriate.

The claimant accepted there was no role of Home Tutor.

11. The claimant responded that she had turned it down because she had to work over five days rather than the four days that she wished to, but the respondent said no to that. This issue had not been referred to in the claimant's witness statement nor in her pleadings nor at the preliminary hearing case management. Accordingly, this was not an issue which the Tribunal could adjudicate on.

12. In addition, we should note under "issues" that in the claimant's witness statement she alleged that two individuals who had not been mentioned in her pleadings or at the preliminary hearing case management (GC and JT) had taken against her when she became pregnant and had influenced the process to ensure that she was made redundant. In closing submissions Mr Anyiam appeared to resile from this proposition but in any event this was not a proposition that had been put forward at any time prior to the delivery of the claimant's witness statement. Accordingly, the respondent submitted that this was not a matter which the claimant

could rely on, although in order to move matters forward, they did cross examine on this issue.

13. Miss Quigley pointed out that the case now being put forward was significantly different to the one that was pleaded. This also explained why the matters raised in the claimant's witness statement were not addressed in the respondent's witness statements, as until her witness statement was received, they had no idea that these matters regarding GC and JT were being alleged.

14. Further, it had not been identified that any issue arose regarding the hours of the TA3 role in the pleadings, but it had now been referred to in the claimant's witness statement. Again, the respondent was reasonably unaware this was an issue and therefore had not brought any evidence to clarify that matter.

Witnesses

15. For the claimant, the claimant herself, and Rebecca O'Neill, teacher ex-employee of the school.

16. For the respondent: Mrs D Ball, headteacher; Mr John Tootill, Head of English; Mr D Roberts, Chair of Governors; and Mr J Hamid, tutor.

Credibility

Claimant

17. We have taken into consideration that the claimant may well have prepared her witness statement without any assistance form a legal advisor but the claimant is an intelligent person and we would have thought she would be aware that to advance in her witness statement a completely different case from that in her pleadings does not assist her case. It was clear that the claimant had mulled over events after submitting her claim and then put all her emphasis on her belief that GC and JT had turned against her because of her pregnancy, implying GC was generally not sympathetic to pregnant staff as she had no children and making some very hurtful accusations about GC and JT – in particular that they had influenced the decision to make her redundant. These were mainly speculation as the claimant had had disclosure and she would have been aware there was absolutely no physical evidence of this in the documents. The speculative nature of the claimant's evidence, the presentation of a different case on a number of levels made us lack confidence in the claimant's evidence and how accurate her perspective was.

Ms O'Neill

18. We have given detail in our decision about our view of Ms O'Neill's credibility. Indeed, Ms O'Neill was not happy with the witness statement which had been submitted. The issue again was speculation. In the event her evidence did not assist us.

The respondent's witnesses

19. Mrs Ball was measured, thoughtful and entirely credible.

20. Mr Tootill: Mr Tootill's only controversial remark was that he had had nothing to do with the redundancy process however he had had an early conversation with HT about the usefulness of the posts in question. He had simply forgotten this, there was no cover-up of the fact. It was clear the Head of Maths had also been involved in exactly the same way. He answered the questions regarding his and his partner's alleged cold-shouldering of the claimant with dignity in the light of having to reveal personal details. We found him a credible witness.

21. Mr Hamid: we found him to be a credible witness. He had sent some supportive texts to the claimant when he did not really understand what her claim was about. It would be expected with a friend. There was nothing which contradicted what he said in evidence.

22. Mr Roberts: was an uncontroversial in our view and a credible witness.

Findings of Fact

23. The claimant began working for the respondent school in 2015. The school had been in existence since 2010 when it was formed out of two failing schools.

24. The role of English Tutor was not one requiring someone to be qualified as a teacher, and the duty of the role was to support achievement standard of English for specific students, either working with them on a one-to-one basis or in very small groups. Students had to be taken out of other subjects to do this work. At the time the core subjects of English and Maths were prioritised over other subjects, and the school wished to maximise its results in these two subjects so in 2011 English and Maths Tutor roles were put into the staffing structure by the Head Teacher, Mr Deborah Ball.

25. In January 2019 the claimant advised the respondent she was pregnant.

26. In 2016 the Government launched a new initiative called "Progress 8". This changed the landscape so that every subject counted and as a result the Head Teacher began thinking that the tutor roles were no longer, as she put it, "fit for purpose", and in 2019 she proposed a new staffing structure which had the roles removed. There were other roles which were changed and removed in the Head Teacher's plans.

27. The claimant had been working for the respondent since 13 August 2015 in a full-time position working 37 hours a week, which was a Grade 6 post, and there was an equivalent Maths Tutor, Mr Hamid, and a Learning Mentor/Academic Tutor. The Maths Tutor did the same job as the claimant but in the Maths arena.

28. In 2018 the Learning Mentor Academic Tutor job became vacant, but the school did not fill it because the Head Teacher was thinking about the Progress 8 changes and therefore did not want to make a permanent replacement. The person in that role left on 31 August 2019. This role was made redundant too in the May restructure.

29. The rationale behind removing the tutor posts was that because all subjects now counted it was not feasible to take students out of lessons in other subjects to receive the support. Rather the school would recruit more qualified English and

maths teachers in order to run smaller classes and in that way support those who were struggling.

30. Before finalising her proposal, the Head Teacher consulted with the Heads of Maths and English, who agreed the role was no longer fit for purpose, therefore Mr Tootill as the Head of English was consulted over these proposals. In cross examination he explained why he had taken the view that he was not involved in the redundancy process. He stated that he had had a discussion with the Head Teacher where he gave his opinion on the viability in the light of Progress 8 of these roles, and he agreed that he did think that they were no longer feasible going forward. However, that was his opinion and the decision whether to take that a step further was entirely up the Head Teacher and the Board of Governors and he had no further involvement after that. In addition, the Head of Maths must also have given the same opinion.

31. The Head Teacher told the Heads of Maths and English that she would speak to the claimant and Mr Hamid before the proposal went out to all staff as she thought it was courteous as they would be upset and it was better to speak to them than to just receive an email. She saw all the other colleagues at risk in the same way, not just the claimant and Mr Hamid.

32. The Head Teacher sent an email to the claimant and Mr Hamid on 15 May inviting them to a catch-up meeting and she hoped to see them at the end of the day, and she did not state what the purpose of the meeting was. She saw Mr Hamid and the claimant at around 3.00pm and she explained what was going to happen: that they were not the only members of staff at risk of redundancy, and she was aware that this would be very difficult for them personally. She encouraged them to seek support from their line managers and stated that if any vacancies came up that were suitable alternatives they would be offered these posts, and that this often had actually been the case as other staff might decide for opportunities elsewhere.

33. It was the claimant's case that at this meeting the Head Teacher told them they were definitely being made redundant, however taking the claimant's evidence into consideration as a whole we think is what she heard in her mind. It was clearly from the context a proposal at this stage, having reviewed the document that ultimately went to the Board of Governors, and it would be for the Governors to ultimately decide. Mr Hamid gave evidence that Mrs Ball advised it had to go to the board of governors and that she used the words ‘may be redundant’

34. The other workers who were looked at whose jobs would either be deleted or downgraded were the Head of Visual and Performing Arts, the Head of ICT and the Second in ICT. The Temporary Achievement Mentor as she had already handed in her notice and was finishing on 31 July, so that post was vacant. As referred to above that post was also redundant although there was no actual person to be made redundant.

35. On 16 May the Head Teacher sent an email to Mr Tootill and Mr Westerman, the Heads of English and Maths, asking them to provide support to the claimant and Mr Hamid as she was aware what a stressful time it would be for them. She was hoping that she would be able to keep them and that there would be vacant posts suitable for them. There was no complaint whatsoever about the work of either the claimant or Mr Hamid. Mrs Ball was not aware at that juncture that under Maternity

regulations in a redundancy situation the claimant was entitled to eb offered any suitable alternative vacancy.

36. Unfortunately, Mrs Ball had not been in a position to advise the claimant of her maternity entitlement at the meeting but agreed she would get in touch with the local authority. The claimant wanted to know if she would get her contractual maternity pay or just statutory and had a feeling that she should be offered an alternative job without having to compete for it. Mr Tootill attempted to get some informal advice for the claimant regarding her pay and employments rights.

37. Mrs Ball rang the Local Authority and left two messages. The claimant chased this up and Mrs Ball rang somebody in HR again and they explained about the claimant's maternity rights. The Head Teacher spoke to the claimant about it when she met her accidentally on 17 May in GC's office, when she asked the claimant if she was happy to speak in front of GC and the claimant responded that she was. The claimant was advised she would receive statutory maternity pay if made redundant and she was also advised that there was a level 3 Teaching Assistant post available and that if her role was made redundant as she was pregnant she would automatically be entitled to that role as suitable alternative employment.

38. The claimant advised she would probably be returning from maternity leave some time in June or July 2020 but did not make a comment on the role and the Head Teacher assumed that she would accept that role.

39. On 22 May the Governors agreed the new structure subject to consultation, and the key changes that were being proposed were:

(1) Reducing Learner Managers' posts from three to two;

(2) The removal of four posts: Maths Tutor, English Tutor, Academic Tutor, Head of CPA;

(3) Grade changes to the posts of Head of ICT and Second in ICT;

(4) The change in the role of Associate Member of Staff to SIMS Manager;

(5) Creating new posts – Second in Social Sciences, SEN Teacher, Nurture Teacher (0.6), Head of Drama, Exam Teacher and Student Receptionist.

40. The governors were not told the claimant was pregnant when making this decision, the claimant thought they should have been made aware of this however a redundancy process is about the roles not the individual – although that comes into consultation – therefore we do not agree that the board of governors should have been given the information as part of the redundancy process.

41. An email was then sent out by Mrs Ball on 23 May which started a 25 day consultation period. Staff were invited contacted Mrs Ball or any member of the senior leadership team if they needed anything clarifying. There were no individual meetings arranged at this point, consultation was with the unions.

42. In respect of the Nurture Teacher, this had been trialled and had worked really well supporting special educational needs students, so the Head Teacher decided to make this a permanent role.

43. The respondent employed a Head of Resources, Mr Kieran Done ("KD"). He was tasked with undertaking consultation meetings with the claimant and other affected employees. He left in November 2019 to take up another post nearer to home, and the respondent had been unable to access his emails. As a result there were no minutes of any meetings with the claimant.

44. On 3 June 2019 the claimant emailed KD asking for clarification of the TA3 role and her maternity leave. KD that day sent the claimant a copy of the job description and confirmed the role would be covered during her maternity leave. There was no delay in KD responding to the claimant.

45. The 3 June email from KD stated:

> "Hi Lisa
>
> The JD is a generic one from the council. Please find a copy attached. A TA contract is 30 hours per week. A grade 5.17 salary is £21,589 pro rata and is £11.19 per hour. You would automatically step into the role on 1 September 2019. We would then need to cover you as a TA whilst you're on maternity. You wouldn't need to come into school for any training however you are entitled to KIT days so if you wanted some training or shadowing then you could use those. Yes, moving to a new post means an amendment to your contract. Please let me know if you need anything else."

46. On the 24 June the claimant emailed KD and asked for a contract to consider, he advised that Mrs Ball was working on it. The claimant asserted that he never provided any further information on this but she provided an undated email where he referred to the rate of pay the hours etc and stated he had been waiting to find out whether she would be placed at the top of the grade. By 11 July the claimant had refused the role.

47. On 25 June 2019 the claimant emailed the Head Teacher wanting advice in respect of teacher training. It was part of the claimant's claim that the school had clamoured for her to undertake teacher training over the years she had been employed but she felt she was not ready for it, then the minute she raised this after she was pregnant they went cool on the idea.

48. After the formal consultation with all the staff ended the Chair of Governors on 27 June 2019 wrote to the claimant to confirm that the claimant was at risk of redundancy and she would have the opportunity to be considered for suitable alternative employment.

49. On 1 July 2019 Kieran Done wrote to the claimant inviting her to a meeting to discuss the redundancy situation and suitable alternative employment. This did take place but there were no minutes of this meeting. Mr Hamid was offered the role as maternity cover TA3 for the claimant, as the respondent was expecting the claimant to return after maternity leave and take up that post. He accepted that role.

50. Mrs Ball arranged a meeting with the claimant to discuss teacher training where the claimant says she told her she was interested in the TA3 role but needed more information. She did not raise any issue about undertaking the role part-time or compressed hours.

51. Mrs Ball said she would support her in undertaking teacher training through the school's direct route, i.e. being trained in the school, and the Head Teacher said that the claimant said she would be in touch during the maternity leave That would start in September 2020, so Mrs Ball felt confident the claimant would be continuing in employment and would be part of the school going forward. i.e. she was assuming the claimant would take the TA3 role. There was no indication the school had gone 'cool' on the idea.

52. The consultation meeting and explanation meeting took place on 4 July. KD had enclosed with his 1 July 2019 letter a pro forma to complete in relation to suitable alternative employment. As far as we know, the claimant did not complete this, however Mr Hamid did. The claimant said she did not understand this was a formal consultation meeting. The claimant says she asked if she could work part-time on her return or have some flexibility but that replied he had to be done as 30 hours over 5 days. We have no evidence from KD but note the claimant refers later to the unlikelihood of this being possible therefore this was not as clear cut as the claimant suggests.

53. The meeting with Mr Hamid took place on 8 July and again was conducted by KD.

54. Following the meeting with her the claimant wrote to KD on 11 July stating that:

> "Thanks for the details of the TA post, however now I have had the time to consider this role I have decided not to accept. The unlikelihood of flexible working hours or a part-time position along with the drop in salary means that the role isn't really suitable therefore I would like to take redundancy. Please let me know what the redundancy package will be. Thanks again for looking into the details of this role for me."

55. KD replied by 12 July 2019, saying the claimant's redundancy estimate is £2,140.64. She had also asked him for the redundancy policy and he provided that also. Accordingly, the claimant's redundancy was processed.

56. Regarding the possibility of undertaking the role part time as there were no minutes nor any email exchange with Mrs ball about the issue the only evidence regarding this is the claimant's email of 11 July. The email says 'unlikelihood'.

57. The Head Teacher in evidence to the Tribunal said that she did have a discussion with KD about part-time hours some time in July. She said that she told him that they could not make a decision at this time but it was already 30 hours rather than 37 hours, and that the school at this point in time could not commit to part-time working because it was a year away and a lot could change, but no decision had been made and the claimant could have made a flexible working request at the appropriate time. This is essentially confirmed by the claimant to some extent because she says she does not say it had been completely ruled out in her email to KD. We had no evidence from KD understandably as the issue of

working part-time had not been raised in the claimant's claim only in her witness statement.

58. In evidence to the Tribunal the claimant said she had actually asked for compressed hours, i.e. to do the 30 hours in four days to save her childcare costs on the fifth day, but this had never been mentioned before and was not put to Mrs Ball that this is what she would had asked for, neither was it mentioned in the claimant's email of 11 July. Mrs Ball said all KD asked her was about whether it could be part-time, and he definitely did not say that she wanted to do her hours over four days although she did ask if he could ask the claimant to be more specific. Mrs Ball said that was never raised. She thought that was an unlikely prospect as the children were in five days a week and it did not seem feasible that a TA could be doing only four days a week, however that was never something that was put to her.

59. This was put to the Head Teacher at tribunal and she said that maybe it could be done but that it might have to be 25 hours, but it would have to be done when the children are there i.e. in the school, so 25 hours over four days or 30 hours over five days. She said no school would make a decision in July 2019 about a situation which was not going to arise until September 2020. The Head Teacher asked KD to convey that to the claimant and he told her that he had discussed that with the claimant. However, it is not clear when this could have happened. There is no record of a meeting between the claimant and KD after 4 July 2019.

60. There were no other suitable jobs for the claimant. The Head Teacher confirmed that there was no Home Tutor job. The Nurture Teacher needed to be qualified, the apprenticeship was far below the claimant's abilities and was temporary, so it was likely to be finished before the claimant returned from maternity leave. The claimant accepted this in cross examination.

61. Accordingly, the claimant was made redundant from 31 August. She was offered the right to appeal but the claimant did not appeal. Mr Hamid was then offered the TA3 post on a permanent basis.

62. In respect of the claimant's new allegations in her witness statement that GC and Mr Tootill turned against her after she was pregnant, and that they influenced the Head Teacher, the Head Teacher was adamant that GC and Mr Tootill had nothing to do with the process.

63. In respect of the claimant's evidence regarding GC, this was supported to some extent by her witness, Rebecca O'Neill. However, Rebecca O'Neill's witness statement gave no specific examples of the alleged coldness towards the claimant after she became pregnant, and although her evidence was that she herself left the school because GC turned against her also, possibly because she was still friends with the claimant, this was essentially irrelevant if we were satisfied that GC had nothing to do with the decision. We were satisfied, even though we did not hear from GC as it was clear from the documented process and from Mrs Ball's evidence and Mr Tootill's evidence that she was not involved.

64. In addition, Mr Tootill's involvement was strictly limited, and as it was mirrored by the Head of Maths could not be said to be influenced by the claimant's pregnancy, it was the professional opinion of both of those Heads of Department that the roles were no longer required. Accordingly, we find that the process was not influenced

by either GC or Mr Tootill whether or not they turned against the claimant told them she was pregnant. Mrs Ball said she saw absolutely no evidence of this.

65. In addition, Mr Tootill and GC were going through personal difficulties which they did not share with anyone, which was not in Mr Tootill's witness statement because he was unaware until the claimant's witness statement was received that these allegations were being made.

66. In respect of this allegation, Mr Tootill denied it. He pointed out that he had helped find out what the maternity pay position was for the claimant by ringing his father on 15 May; that there were text messages showing that GC supported the claimant. He advised that on 7 June 2019 his sister had a brain tumour and his appetite for socialising reduced from that stage, so it is possible that there was a difference from around then.

67. In relation to her "leaving" do, Mr Tootill said this went perfectly normally (the claimant had said that it was "awkward"); everyone expected to attend did so; he gave a speech and thanked the claimant and hoped that she would still join in. There was no sense of awkwardness and presents were given. The claimant even sent GC a card thanking her for her support while she was employed by the respondent.

68. In respect of Rebecca O'Neill's allegations that GC had changed towards her, because she was the claimant's friend Mr Tootill (who was GC's partner) stated that as far as he knew they had been trying to get together for dinner but it had never happened, and that when Rebecca O'Neill told them that the claimant planned to take the respondent to court she had said it was to give them a heads up. Mr Tootill said there had been a change September-December 2019, but it had nothing to do with the Employment Tribunal. There was a faction and he did not know what it was about, but it was nothing to do with him or GC. He said Ms O'Neill had once said to him that she knew that she catastrophised about matters implying he believed she had read more into it than it deserved.

69. We find that there was a change because of the difficulties Mr Tootill was going through but the email traffic showed GC being supportive. We therefore find that this was nothing to do with the claimant's pregnancy. The claimant did not bring a claim in relation to the alleged treatment by itself only that GC and JT took against her and influenced the process which we have found was not correct.

70. We were advised in submissions that the issue of GC and John Tootill disliking the claimant because of her announcing her pregnancy has been withdrawn. We say though here that had it not been we have found this to be wholly unsubstantiated. Clearly the claimant and Ms O'Neill had this perception. Ms O'Neill's perception was based on absolutely nothing: it was possibly an elaboration of her own situation, but she had no evidence that this happened to the claimant. Ms O'Neill expressed her opinion without having any evidence, she did not give any specifics regarding what social occasions the claimant was not invited to that she had been before. She accepted that the fact that Mr Tootill's sister had got a brain tumour may well have affected how GC and ST behaved. She also accepted that she had no involvement in the redundancy process, she was not aware of the thinking behind it and that at no time had JT or GC said to her that they had any involvement in the redundancy. Although she had speculated about a number of

things, Ms O'Neill had no evidence at all on which to base her speculations. Accordingly, we have found her witness statement wholly unreliable.

71. In addition, we did find the claimant's witness statement very unreliable as the claimant also speculated because of unrelated factors, so even if it was true that GC and JT grew colder to the claimant after January, there was absolutely no evidence that that had an impact on the claimant's dismissal, and no claim was brought in relation to sex discrimination or harassment as a stand alone claim against those two individuals.

72. We believe it was appropriate to express our findings on this issue as it was raised in a public forum.

The Law

73. The claimant relies on the following sections of the Employment Rights Act and the Maternity and Parental Leave Regulations ("MAPLE") 1999 and the Equality Act 2010.

74. Section 99 of the Employment Rights Act 1996 states:

> "(1) An employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if –
>
> (a) the reason or the principal reason for the dismissal is of a prescribed kind; or
>
> (b) the dismissal takes place in prescribed circumstances.
>
> (2) In this section 'prescribed' means prescribed by regulations made by the Secretary of State.
>
> (3) A reason or set of circumstances prescribed under this section must relate to –
>
> (a) pregnancy, childbirth or maternity."

75. This is cross referenced to regulation 20 of the Maternity and Parental Leave Regulations 1999 ("MAPLE 1999"):

> "(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if –
>
> (a) The reason or principal reason for the dismissal is of a kind specified in paragraph (3);
>
> (b) The reason or principal reason for the dismissal is the employee is redundant and regulation 10 has not been complied with.
>
> (2) An employee who is dismissed shall be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –

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

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

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

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

(a) the pregnancy of the employee;

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

(c) the application of a relevant requirement or relevant recommendation as defined by section 66(2) of the 1996 Act;

(d) the fact that she took or sought to take or availed herself of the benefits of ordinary maternity leave;

(e) the fact that she took or sought to take –

(i) additional maternity leave;

(ii) parental leave;

(iii) time off under section 57A of the 1996 Act.

(f) that she declined to sign a workforce agreement for the purpose of these Regulations.

(4) Paragraphs 1(b) and 3(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

(5) Paragraph 3 of regulation 19 applies for the purposes of paragraph 3(d) as it applies for the purposes of paragraph 2(d) of that regulation.

(6) Paragraph (1) does not apply in relation to an employee, if –

(a) Immediately before the end of her additional maternity leave period or, if it ends by reason of dismissal, immediately before the dismissal, the number of employees employed by her employer added to the number employed by any associated employer of his did not exceed five;

(b) It is not reasonable for the employer …

(7) Paragraph (1) does not apply in relation to an employee if –

(a) it is not reasonably practicable for a reason other than redundancy for the employer to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances; and

(b) an associated employer offers her a job of that kind; and

(c) she accepts or immediately refuses that offer.

(8) Where in a complaint of unfair dismissal any question arises as to whether the operation of paragraph (1) is excluded by the provisions of (6) or (7) it is for the employer to show the provision in question was satisfied in relation to the complainant."

76. To summarise, an employee will be deemed to be automatically unfairly dismissed by reason of pregnancy and/or maternity leave:

(1) If the reason or principal reason for the dismissal is paragraph (3), which in this case would be (a) pregnancy, or (b) the fact the claimant was planning on taking maternity leave, or (d) planning on taking additional maternity leave; or

(2) The principal reason is redundancy but regulation 10 of MAPLE has not been complied with; and

(3) That the principal for dismissal is redundancy and the reason for selection was pregnancy or maternity leave.

<u>"Ordinary" Unfair Dismissal</u>

77. In a redundancy dismissal a genuine redundancy situation is set out in section 139 of the Employment Rights Act 1996, and one of the grounds is that there is a reduced requirement for employees to carry out work of a particular kind. When considering the fairness of a redundancy dismissal the leading case is **Williams v Compair Maxam** and the guidelines of the court that:

(1) The employer must give as much warning as possible to give time to consider relevant facts, possible alternative solutions and find alternative employment;

(2) Consult the unions, in particular in relation to the selection criteria;

(3) Agree selection criteria is objective;

(4) Seek to ensure selection is made fairly in accordance with these criteria; and

(5) Consider whether there is alternative employment that could be offered.

78. In this case the issue was really about alternative employment, although there was an allegation of lack of meaningful consultation with the claimant.

79. Section 18 of the Equality Act 2010 states that:

(1) This section has the effect for the purpose of the application of Part V to the protected characteristic of pregnancy and maternity.

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

(a) because of the pregnancy; or

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

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

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

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

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

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

(b) If she does not have that right at the end of the period of two weeks beginning with the end of the pregnancy.

80. Regulation 10 of MAPLE states:

"Redundancy during maternity leave

(1) This regulation applies where during an employee's ordinary or additional maternity leave period it is not practical by reason of redundancy for her employer to continue to employer her under her existing contract of employment.

(2) Where there is a suitable available vacancy the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor or an associated employer under a contract of employment which complies with paragraph (3) and takes effect immediately on the ending of her employment under the previous contract. The new contract of employment must be such that –

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances; and

(b) its provisions as to the capacity and place in which she is to be employed and as to the other terms and conditions of her employment are not substantially less favourable to her than if she continued to be employed under the previous contract.

Regulation 10 expressly applies only when the claimant is on ordinary or additional maternity leave." (The respondent submits this is not engaged as the claimant did not commence ordinary maternity leave during her employment).

Respondent's Submissions

81. The respondent's submissions were as follows:

(1) The claimant had submitted a case that the redundancy was a sham and her pregnancy/maternity was the reason for her dismissal.

(2) In **Abernethy v Mott Hay & Anderson [1974]** the reason for dismissal of an employee is said to be "a set of facts known to the employer or maybe of beliefs held by him which cause him to dismiss the employee". The burden of proof rests with the respondent to establish a potentially fair reason for dismissal.

(3) The respondent submitted that it was relevant to discern who made the decision to dismiss. They say it was Mr Roberts, the Chair of Governors, who made the final decision to make the claimant's role redundant, but he did not know the claimant was pregnant as the restructuring was about posts and not individuals. The initial proposal was that of the Head Teacher. Accordingly, there was no influence exerted by GC or JT.

(4) The respondent had rational grounds for making the redundancies.

(5) There was school-wide consultation and individual consultation.

(6) The claimant was not treated any differently by DB because of her pregnancy or maternity.

(7) The claimant was offered suitable alternative employment.

(8) It was reasonable of the school to defer a decision on whether the job could be done in less hours than the claimant wanted or in compressed hours, although it was not accepted this was suggested - the claimant has never advanced this contention before the hearing.

(9) In respect of the claimant's contention that the plot was to get rid of the claimant and ensure Mr Hamid was retained, this is wholly unsupported by the evidence and the facts. He gave evidence that he was treated exactly the same and was told that the TA role was the claimant's and that he would only be offered it on a temporary basis as maternity cover.

82. In respect of the claimant's contention that she did not take the TA3 role because the school would not offer it on a part-time basis, the claimant had never made this claim at any point during her pleadings or until she mentioned it slightly in her witness statement. In any event, it was entirely reasonable of the school to say that a decision could not be made at that point in time.

Claimant's Submissions

83. The claimant's submissions were limited and accordingly I asked a number of questions of counsel to ascertain what matters were still being pursued. The claimant's submissions were:

(1) That the school's rationale should be questioned as the need for restructuring arose in 2016/2017 and yet the timing was in May 2019 when the claimant was pregnant. As a result, she suffered a detriment because she was pregnant.

(2) Further or alternatively the refusal of the respondent to allow the claimant to work flexibly on her return from maternity leave in the alternative TA3 post was not a justified proportionate reason. (Shaw vs CCL Ltd EAT

84. Counsel submitted, "In the light of the above" it is submitted that the claimant was dismissed from her job unfairly".

85. To clarify the claimant's submissions, I asked the claimant's representative, in relation to paragraph 4 regarding the compressed hours point, that that was not a claim the claimant had made either in her pleadings or at the preliminary hearing case management. He stated, "why did the redundancy not take place until 2019 when Progress 8 was raised in 2016?". As this did not appear to answer the question I asked, I left it there and asked him to elaborate on his submissions. He then said he relied on:

(1) The delay in the restructuring exercise;

(2) That DR did not know the claimant was pregnant (the claimant believes he should have done);

(3) At the time the process started Mrs Ball had not obtained any information regarding the claimant's maternity allowance;

(4) That the exercise was because the claimant was pregnant;

(5) Regarding the TA3 job, the claimant did raise whether she could do it over four days with the same hours, and was categorically told "no";

(6) That the respondent had failed to obtain any evidence from KD. They could at least have obtained a witness statement if they could not access any records;

(7) The claimant's section 18 claim was the same as her section 99 claim.

86. Regarding "ordinary" unfair dismissal, it was unfair because of:

(1) the failure to offer the claimant the TA3 job compressed hours; and

(2) that there was no response.

Respondent's Reply

87. The respondent replied as follows:

(1) The claim put in submissions is not the claim the claimant brought;

(2) The reason for dismissal – it is clear the claimant's case is that the real reason was pregnancy;

(3) In relation to detriment, the pleadings refer to the TA2 role being refused on a part-time basis, not the TA3 role;

(4) That the matters now being raised by the claimant had never been raised before, not even at the beginning of the hearing, although some had been foreshadowed in her witness statement and the respondent had attempted to meet the allegations regarding GC and JT;

(5) That in any event there was no mention in the submissions or the oral submissions that the redundancy had been orchestrated by JT and GC;

(6) The claimant completely lacked credibility after fundamentally changing her claim in raising the alleged plot by GC and JT and raising the part-time/compressed hours point which had never been raised before;

(7) That the claimant was also misleading regarding her dealings with Kieran Done who had in fact responded quickly to her;

(8) There was no section 47C claim re the TA3 post being undertaken part-time, nor in relation to condensed hours;

(9) There was no reason to call KD as it was not understood that that was an issue at all in the claimant's claim;

(10) No issue has been raised in relation to "ordinary" unfair dismissal at all. No factual dispute has been raised in the submissions or cross examination;

(11) That there was sufficient consultation. There was an open invitation in the redundancy letter to consultation in addition to the consultancy with KD;

(12) In relation to the compressed hours/part-time, the claimant had not brought an indirect sex discrimination claim and the case referred to by the claimant was in respect of a flexible working request and indirect discrimination claim, not claims under any of the sections referred to above in the claimant's claims.

Claimant's Reply

88. The claimant's representative confirmed that the case that GC and JT had influenced the process was withdrawn but it was still significant that they had no record regarding Kieran Done's interviews with the claimant.

Conclusions

89. The Tribunal has found that the respondent embarked on a genuine redundancy exercise in 2019. In respect of why there was a delay between the Government's proposal on Progress 8 in 2016 until 2019, we accept Mrs Ball's explanation that she needed to wait and see if it was going to be a definite proposal. She then needed to consider what needed to be done and then to formulate a plan. There was no evidence that there was any connection whatsoever with the claimant's pregnancy in devising these plans, because:

(1) There was a gap anyway between when the school found out the claimant was pregnant and when this was devised;

(2) It was accepted there was no evidence whatsoever that Mrs Ball had any animus against the claimant;

(3) Mr Hamid was also placed at risk;

(4) other members of staff were put at risk.

90. Accordingly, we find it is simply unsustainable to suggest that the school would go through an elaborate redundancy procedure that involved five or six other people in order just to ensure that the claimant was made redundant, when there was no evidence whatsoever that anyone who was pregnant had previously been treated differently or had been forced to leave, etc. ,and no evidence of the claimant being treated differently to anyone else being made redundant..

91. We do not draw an inference from the delay between Progress 8 and the implementation of the redundancy exercise, the school was entitled to consider their effect.

92. The decision to make the claimant redundant was ultimately put into train by the Board of Governors who did not know the claimant was pregnant. Whilst there was no reference to the **Jhuti** case etc in the claimant's submissions, to be fair we have considered that it is possible that the Head Teacher could have made up a case on the basis of the claimant's pregnancy which the Board of Governors, in their innocence, rubberstamped, however we do not obviously accept this was the case as we have found above that Ms Ball was completely rational in her decision to implement these changes and also that she was not in the least bit influenced by the claimant's pregnancy.

93. In relation to whether the outcome of the redundancy exercise was predetermined because Ms Ball said in the initial interview with the claimant and Mr Hamid that they would be made redundant, we find that the claimant has wholly misinterpreted this situation. The Head Teacher being entirely reasonable, saw the claimant and Mr Hamid before the official announcement went forward, and given Ms Ball's experience we do not think that she said that Mr Hamid and the claimant would definitely be made redundant, but that they were at risk of redundancy and that if it went through their jobs would end on 31 August. We find Ms Ball's evidence on this

much more convincing than the claimant's evidence, who would have been extremely upset by the matter being raised. In any event, it was not ultimately for the Head Teacher to decide whether the claimant had been made redundant or not.

94. In relation to whether there was a lack of meaningful consultation as far as this is still pursued, as we received no submissions on this from the claimant we find whilst the consultation was not exemplary it was certainly sufficient for the claimant to make up her mind what she wanted to do. KD's invitation made it clear anything could be discussed albeit it concentrated on the TA3 position. In the earlier period any member of staff could have spoken to SLT or the headteacher about the proposals. Trade union consultation had taken place.

95. If we are wrong and the consultation was not meaningful or sufficient, we find that under **Polkey** the claimant would still have been made redundant within the same timescale as any additional consultation would have taken place in June and July. The claimant was paid to the end of her contract and then she was paid contractual maternity. Accordingly, even if the process had taken longer a few weeks longer there would be no loss.

96. We also find the TA3 role was suitable alternative employment and accept as the claimant did that the other jobs either did not exist or were unsuitable. We also accept the respondent's legal point that the automatic entitlement only arises once maternity leave has started and therefore in fact this claim is legally unsustainable in any event. Therefore, the detriments claim under section 47C and any claim under Regulation 10 must fail.

97. Although the claimant, we accept, has made no claim in relation to a part-time TA3 role (whether a drafting error, or confusion we note no amendment request was made) and certainly not in relation to it being offered on a flexible basis we have considered that for the sake of completeness and find that it was entirely reasonable of the school to delay any decision on any sort of part-time arrangement until September 2020 or some time in advance of that, and not commit to such a decision in July 2019. It may well have been that a more suitable job came up for the claimant in that period. It may well have been there was somebody who was interested in job sharing that role. It was simply far too speculative to make a decision, and indeed we find the claimant's own email supports that by saying it was "unlikely", it does not say it had been definitely refused. We accept that it may have been difficult to accommodate compressed hours as the work took place when the children were physically at school so had to be done between 9 and 3/3.30 pm. Very fairly Mrs Ball said that 25 hours was a possibility over four days i.e. six and a bit hours a day but it is unlikely this would have assisted the claimant as this would reduce her salary further. In any event no such claim was made in the context of any of the pregnancy related claim, unfair dismissal nor a free standing indirect discrimination claim.

98. We find it quite surprising that the claimant did not simply accept this job and wait and see what happened, and if there was no progress turn it down in or around September 2020. This would have enabled her to have been paid at least for a few weeks and then over the summer in July 2020 whilst she undertook a trial period, for example, or sought to find out whether she liked the job ,negotiated over the hours or made a formal flexible work request.

99. In addition, we note that KD offered the claimant the possibility of shadowing and training by using her KIT days and the claimant showed no interest in this, which may have given her a better idea of whether she could have undertaken the job on 30 hours or not. Whilst we realise that the issue was the cost of childcare, it may well have been that the claimant's situation itself would have changed over those 12 months while she was on maternity leave and that family members may have become available to undertake childcare for her on the fifth day.

100. In relation to other matters that we presume the claimant is suggesting we draw inferences from, such as the Head Teacher not knowing what the claimant's maternity pay situation was, we do not take this into account as an adverse inference as it is very clear what the chronology and the genesis of the decision which led to the claimant being made redundant was. In addition, the school agreed to pay the claimant her contractual maternity pay which technically they were under no obligation to do, which rather overshadows the failure of the Head Teacher to be aware of the maternity pay position on 15 May.

101. In summary we find the claimant was fairly made redundant and that her redundancy was entirely unconnected with her pregnancy. Further she was offered suitable alternative employment and unreasonably refused it therefore Regulation 10 Maple 1999 is satisfied. In relation to pregnancy related detriments the claimant accepted the jobs she relied on either did not exist or were unsuitable. Accordingly, her claims fail and are dismissed.

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Employment Judge Feeney

26 October 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 October 2021

FOR THE TRIBUNAL OFFICE