EMPLOYMENT TRIBUNALS

Claimant: **Ms S Gonzales**

Respondent: **Panache Lingerie Ltd**

Heard by CVP in Sheffield **On: 27, 28, 29 and 30 September 2021**
3 November 2021 (in chambers)

Before: **Employment Judge Brain**
Members: **Mr C Childs**
Mrs S Norburn

Representation

Claimant: **In person**
Respondent: **Mr J Feeny of Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaint (brought under section 18 and 39(2)(c) of the Equality Act 2010) that she was unfavourably treated because of pregnancy and/or that she proposed to take maternity leave fails and stands dismissed.
2. The claimant's complaint (brought under section 99 of the Employment Rights Act 1996) that the reason or the principal reason for her dismissal related to pregnancy or maternity leave is dismissed.
3. The claimant's complaint (brought pursuant to sections 94 to 98 of the 1996 Act) that she was unfairly dismissed succeeds.
4. Upon the complaint referred to in paragraph 3 and upon a consideration (pursuant to section 123 of the 1996 Act) of what the Tribunal considers just and equitable in all the circumstances to award by way of a compensatory award, there is a 75% chance that had a fair procedure been followed by the respondent the claimant would have remained in employment in the capacity of a sales support merchandiser.

REASONS

1. This matter was heard over four days between 27 and 30 September 2021 inclusive. At the conclusion of the fourth day of the hearing, the Tribunal reserved judgment. We now give reasons for the judgment that we have reached.

Introduction

2. The respondent is one of the world's leading designers and manufacturers of D+ lingerie with offices in the UK, America and China. The claimant worked for the respondent from 19 May 2008 until 31 October 2020. She worked as part within what was referred to as the respondent's 'sales structure.'

3. On 20 July 2020, the claimant notified the respondent that she was pregnant with her second child. The key decision makers within the respondent knew of her pregnancy.

4. The claimant makes the following complaints:

   4.1. That she was unfairly dismissed from her employment. This is a claim brought under sections 94 to 98 of the Employment Rights Act 1996. This is often referred to as an "*ordinary unfair dismissal"* complaint.

   4.2. That the reason or (if there is more than one reason) the principal reason for her dismissal was that she was pregnant and/or intended to take maternity leave. This is a complaint brought under section 99 of the 1996 Act. Dismissal of an employee because of pregnancy, childbirth or maternity is amongst the category of cases commonly known *"automatically unfair dismissal"* complaints.

   4.3. That she was unfavourably treated by the respondent because of pregnancy and/or because she was seeking to exercise a right to ordinary or additional maternity leave. This is a complaint brought under the Equality Act 2010. Her complaint is that the respondent discriminated against her by unfavourably treating her. The unfavourable treatment was the dismissal of her which may constitute discriminatory conduct pursuant to section 39(2)(c) of the 2010 Act.

5. The Tribunal will consider the issues in the case and the relevant law in due course. The Tribunal will firstly make findings of fact. After a consideration of the relevant law and the issues, the Tribunal shall then set out the conclusions reached by applying the relevant law to the factual findings in order to determine the issues.

6. The Tribunal heard evidence from the claimant. She also produced witness statements from the following:

   6.1. Alex Taylor. He is the claimant's husband.

   6.2. Magdalena Muskala. She was an employee of one of the respondent's commercial customers.

6.3. Elaine Reed. She also was an employee of one of the respondent's commercial customers.

6.4. Tara Jones. She is a former employee of the respondent.

6.5. Alysha Leeson. She too is a former employee of the respondent.

7. The Tribunal did not hear any live evidence from any of the claimant's five witnesses. Their evidence being untested by way of cross-examination inevitably impacts upon the weight to which the Tribunal is able to give to this testimony. The Tribunal derived little assistance from this material (save in respect of one issue upon which Mr Taylor gives evidence: see paragraph 44 below).

8. The Tribunal heard evidence from the following witnesses called on behalf of the respondent:

8.1. John Power. He is the managing director of the respondent.

8.2. William Montague. He is employed by the respondent in the capacity of finance director.

8.3. Beth Kilato. She is employed by the respondent in the capacity of HR manager.

8.4. Derek Laing. He is employed by the respondent as the operations director.

Findings of fact

9. Following a round of redundancies in October 2020, the respondent's global sales structure was in the form diagrammatically represented in the document within the bundle at page 545. Prior to that redundancy round, the structure was as diagrammatically shown in the document at page 544. For convenience, we shall refer to these as the *'old structure'* and *'new structure'.*

10. The old structure had Mr Power in overall charge as managing director. Beneath him sat the global sales director. At the material time with which we are concerned, this was Denise Shepherd. She took up the global sales director role in 2013. Beneath her sat:

10.1. Sales manager – international. This was Lee Newsome.

10.2. Sales manager – UK. This was Mandy Dixon.

10.3. Sales manager – Germany. This was Phillip Larger.

10.4. Sales consultant – France. This role was not UK based.

10.5. Customer service manager – Michelle Hammond.

10.6. UK and international sales support manager -This was the role held by the claimant.

11. Beneath the claimant sat three UK and international sales support merchandisers. The merchandisers at the material time were Oriane Amin, Angela Agosto and Natalie Kamara.

12. The claimant commenced her career with the respondent as a merchandiser. On 16 February 2012 she was offered the role of sales support manager (page 79). On 5 February 2016 the claimant's job title

changed from *'sales support manager'* to *'UK and international sales support manager'.* Notice of the change of title (signed by Mrs Shepherd and the claimant) is at page 84.

13. The key accountabilities for the sales support role may be seen in the document within the bundle at pages 80 to 83. Although undated, it appears that this document was issued to the claimant in February 2012 (as the job title is stated to be *'sales support manager'*).

14. The claimant summarises her sales support manager duties in paragraph 7 of her witness statement. These reflect the responsibilities in the document at pages 80 to 83. Here she says that the role *"involved managing the order book from order entry to order fulfilment, customer relations, customer retention and more exposure working with UK sales executives and sales managers collectively reporting to the global director and finance director. During this time, I remained in contact with key account customers attending presentation and biannual board meetings, still attending internal product presentation meetings, customer product presentation meetings and the occasional visit to exhibitions if a key account was planning on attending the event."*

15. When the job title changed to that of UK and international sales support manager, the claimant says that her responsibilities changed. In paragraphs 13 and 14 she says that, *"my team was reduced to managing UK and international sales support merchandisers and my line manager became the global sales director, Denise Shepherd. The changes made to my role included becoming a direct report of Denise Shepherd, global sales director".*

16. She goes on in paragraph 15 to say that *"My role as UK and international support manager (please see bundle 1 document 17 pages 80 to 83) although not explicitly mentioned still involved the management of key accounts of UK markets but was further extended to work with the international sales manager and the international key customers. My role's responsibility was to support the global sales director and the sales team achieve business growth by driving profitable sales, this was done alongside supporting my team in running the daily operations of key accounts working very closely with Lee Newsome, international sales manager and Mandy Dixon, UK sales manager either through my team or directly. Collectively, with Denise, Lee and Mandy we planned ways we could achieve targets based on customer and stock analysis. The sales support department developed customer and company analysis around the product brands to assist the sales team with customers. I was actively supported by the team in the fulfilling of customer and business requirements such as allocation of stocks, availability reports and product offer for discounted product offers."*

17. In paragraph 16, she says that, *"My role spanned from assisting the global sales director in agreeing budgets with the stakeholders and the sales teams, managing operational processes and systems to ensure order capture and delivery met customer requirements, assessing new opportunities with the key and new customers. Through analysis and guidance from the global sales director, develop or manage the development of sales opportunities for the sales team. As I worked at*

Panache from the bottom up so to speak, I had a good understanding of the business, product, systems and customers. I had the skills capable of covering the day to day handlings of my team workload, customer service team as well as offering cover for UK and international sales managers."

18. When giving live evidence before the Tribunal, the claimant was asked by the Employment Judge to explain the difference between the roles of the sales managers and the sales support managers. She said that, *"sales are responsible for targets, to get sales in. Support is the retention of the customers on supporting the sales team by way of analysis of customer information and ensuring that sales are completed. Sales is the face of the business. They have to go out to sell the new collections."*

19. Mr Feeney did not cross-examine the claimant upon any aspects of those parts of the witness statement cited concerning the make-up of her role. We therefore find that the claimant's role at the material time (during 2020) has been accurately described by her within the salient parts of her witness statement and in the evidence given before the Tribunal under questioning from the Employment Judge.

20. On 10 January 2019, the claimant commenced a period of maternity leave following the birth of her first child. Before she went on maternity leave in January 2019, the claimant had been covering Oriane Amin's duties as a merchandiser when she (Ms Amin) had gone on maternity leave. When the claimant was absent during her maternity leave, her work was covered in part by Natalie Kamara.

21. Accordingly, there was no question that the claimant was able to undertake the merchandiser role. Indeed, she had undertaken this role at the commencement of her career with the respondent in 2008 until she achieved promotion in 2012. She had recent experience of the role by virtue of having covered Ms Amin's role. Mr Power and Miss Kilato readily agreed that the claimant was capable of undertaking the merchandiser role.

22. On 2 January 2020 the claimant returned to work following her (first) period of maternity leave. On 17 September 2019 she had made a flexible working request in anticipation of her return to work. She requested a change to her working pattern. She wanted to work 36 hours (from 8.15am to 5.45pm over a four days' week, instead of working a 37.5 hours' week between Monday and Friday).

23. Denise Shepherd and Beth Kilato met with the claimant (remotely) on 15 October 2019 to discuss the flexible working request. The notes are at pages 93 to 102. Mrs Shepherd rejected the claimant's request (pages 103 and 104). She set out her reasoning in her letter dated 19 November 2019. Mrs Shepherd proposed instead reducing the claimant's hours to 30 hours over five days a week. This was unsuitable for the claimant because of childcare arrangements.

24. A further discussion took place on 10 December 2019. Mrs Shepherd then proposed that the claimant's working hours would be adjusted to a 34.5 hour work over a five days' working week and that her working hours would be between 8.50am and 4.15pm for four days and 8.15am and

12.45pm on the fifth day. Mrs Shepherd's letter containing her proposals is dated 16 December 2019 is at pages 119 to 121.

25. The proposal was for the change to be temporary and for the claimant to revert back to her normal working hours with effect from 1 April 2020. Disappointed with this, the claimant appealed against Mrs Shepherd's decision. Her letter of appeal dated 30 December 2019 is at pages 122 and 123.

26. Mr Laing dealt with the claimant's appeal.

27. On 3 January 2020, the claimant met with Mr Laing to discuss her appeal. Following the appeal hearing, he wrote to her on 20 January 2020 (pages 135 to 137). He did not uphold her appeal. Amongst his reasons for the rejection was that the sales support department was in a period of transition. He said in his letter that, *"The business is expecting efficiencies from better processes and improved use of the available technology eg Pepperi, B2B and Power Bi, but those efficiencies remain to be seen and will need you, as sales support manager, in the office as much as possible as we go through the transition."* Some of these efficiencies (in particular Power Bi) was aimed at automating the respondent's information systems in order to reduce the need for manual input into the provision of information from sales support to the sales team.

28. The claimant's perception is that the respondent's handling of her flexible working request and her decision to appeal Denise Shepherd's decision *"had a negative impact on my employment at Panache which later contributed to the decision to make me redundant":* (paragraph 60 of her witness statement).

29. It is not in dispute that the claimant worked for the first three months of 2020 on the temporary work pattern agreed with the respondent following her flexible working request. She then reverted back to her full-time hours (working 37.5 hours over five days, Monday to Friday) with effect from the end of March 2020.

30. The coronavirus pandemic began to have a significant impact during March 2020. In paragraph 4 of his witness statement Mr Power says that, *"The impact and effects from the coronavirus were, like other business, felt almost immediately. On 20 March 2020, I notified all staff in a company-wide letter that there had been an immediate and significant downturn in business and demand which required the business to take action to safeguard its future and avoid having to make redundancies. Facing such a crisis on a global scale was totally unprecedented to every employee of the respondent. As such, as a business we were looking to implement short time working (three days a week) with effect from 1 April 2020 (pages 138 – 139). However, this did not come into effect given the introduction of furlough and the Coronavirus Retention Scheme on 21 March 2020. As a business we took the decision to utilise this scheme instead of the proposed short time working. At its peak, I believed we furloughed about 80% of our employees due to the immediate impact and effect of the coronavirus. The consequences of not taking up furlough would have been catastrophic for the respondent and had it not been for furlough I believe categorically we would have been out of business in a matter of a couple of months after achieving 40 years in business."*

31. The claimant gives evidence in very similar terms to that of Mr Power in paragraph 65 of her witness statement. The account given by Mr Power in paragraph 4 of his witness statement is therefore accepted by the Tribunal.

32. The claimant says (in paragraph 66 of her witness statement) that on 23 March 2020 she received a text message from the NHS to say that she was clinically vulnerable and must shield. She therefore left the office and resolved to work from home.

33. On 26 or 27 March 2020, the claimant says that *"Denise [Shepherd] called to advise that out of her direct reports all the sales team, customer service team and the UK and international support team will be furloughed except for herself, me, the customer services manager and the German customer sales support co-ordinator".* There is no dispute that around 80% of the respondent's workforce was placed upon the furlough scheme while the remaining 20% (including the claimant) remained at work.

34. Mr Montague gave some further insight in paragraph 6 and 7 of his witness statement. This was as follows:

"(6) The advent of the coronavirus was unprecedented and the cashflows of the respondent have been and continue to be uncertain to predict. Lockdown restrictions were put in place in all of our major markets in March 2020. As finance director of the respondent, in April 2020, I prepared financial forecasts covering the period to June 2021. The board's best estimate at the time was for revenue to be down by 82% in the quarter April 2020 to June 2020. For the year to June 2021 our financial forecasts assumed revenue would steadily increase from minus 70% in July 2020 to minus 10% in June 2021. These forecasts also assumed a significant reduction in the cost base of the business but still showed a loss before tax of £1,041,000 in April to June 2020 and £603,000 in the year to June 2021.

(7) As a result of the financial pressures there was a cancellation of all discretionary expenditure and using the furlough scheme staff numbers were reduced down to a skeleton staff. Working capital was managed by cancelling or deferring outstanding purchase orders for inventory and where possible agreeing extended payment terms from suppliers and landlords. Despite these measures the forecast still showed the need to secure additional funding and therefore in April 2020 Panache restructured its UK banking facilities with Barclays Bank and secured an additional £2m loan through the government's coronavirus business interruption loan scheme (CBILs)."

35. Mr Laing gave some insight into the impact of the pandemic upon the respondent's operations. In paragraph 8 he says, *"As operations director I have responsibility for the respondent's sourcing and garment production which happens in Asia (China, Vietnam and Thailand). The impact of Covid-19 had already started to affect the respondent in January 2020. As Covid-19 started to spread in China, at first, our factories and fabric suppliers had gone into shutdown and travel suspended. This lasted for a period of around four to six weeks. At this stage the respondent was more concerned about the impact that these shutdowns would have in our ability to satisfy our customer's orders. By the time things in Asia were starting*

to improve, with factories being allowed to re-open, the full effects of Covid-19 were beginning to be felt in Europe and to a lesser degree the US. By the time of the first UK lockdown, at the end of March 2020, our concerns had totally shifted from having disrupted supply to having no customers for the stock we were making. The respondent moved very quickly, from trying to expedite orders, to trying to push back or cancel orders while we waited to see how things developed in our main markets and with our key customers. The end of March/early April period was spent assessing financial liabilities from our planned cancellations from our Autumn/Winter 2020 (AW20) fashion launches, postponing core production and reassuring our factories that the respondent was working to establish revised customer demands and hoped to restart production as soon as possible. During April 2020 the respondent established with customers a revised AW20 plan, which had been reduced from 40 ranges to five."

36. He goes on in paragraph 9 to say that, *"By the end of April 2020 the respondent had started to look ahead to Spring/Summer 2021 (SS21). Even though sales, at that point, were running at only 20% of pre-Covid-19 levels, our lead times within our supply chain means the respondent have to work six months ahead. The respondent had to plan on the basis that by January 2021 it would still be here albeit at a much-reduced level. The respondent put together a draft SS21 fashion range plan which had 36 ranges planned for. This compared to 60 ranges we have produced for SS20. May and June 2020 were spent finalising plans with key customers for the SS21 range plan while continuing to rephrase our factory production plans for the rest of 2020. During July and August 2020, the respondent started to plan the workload for the next 12 months. The reduction in planned workload in the operations area, which is working on product between six and 12 months before its launch, made it inevitable that we would have to look at reducing our headcount. We were planning to have only 55% of the normal volume of purchased orders and a reduction of almost 70 styles in our SS21 collection compared to SS20. This would have an immediate and direct impact of the workload of our sales, technical and supply chain teams. The upshot of these discussions was decisions on retaining the flexible furlough scheme, including bringing more people back into the business from being 100% furloughed, but also unfortunately identifying that a number of roles within the business were no longer viable given the outlook at that point."*

37. In evidence given to cross-examination, the claimant accepted that when the pandemic hit the UK in the spring of 2020, a great deal of work was needed from sales support because of cancellation and order deferrals. The claimant maintained that some orders were still being placed. For example, an order was placed by a customer on 22 April 2020 (page 286). There is a large volume of material within the bundle pertaining to customer dealings: (the relevant page numbers are set out in paragraph 18 of Miss Kilato's witness statement). The Tribunal will not conduct a minute analysis of this material. From this and the evidence that we heard it is, we think, safe to conclude that:

37.1. A large amount of time was being spent by the claimant and Denise Shepherd dealing with deferrals and cancellations of orders.

37.2. Some sales activity was being generated.

37.3. The claimant did have an involvement in some sales activity but predominantly this was being dealt with by Denise Shepherd.

37.4. The claimant deferred making some decisions until she had had the opportunity of speaking with Mrs Shepherd (particularly around cancellations and discounts).

38. The respondent anticipated a significant downturn in sales activity (as evidenced by Mr Montague and Mr Laing in the passages from their witness statements which we have cited above). In recognition of this, the respondent placed Lee Newsome and Mandy Dixon upon furlough.

39. We think that Mr Montague put matters rather well when he gave evidence before the Tribunal. He said that he had come to view the period from March 2020 over three phases. The first phase up to June 2020 was *"panic"* (as he put it). This was then followed by a period of *'stability'* between July and September 2020 when stores began to re-open and sales started to pick up. At around this time, Mandy Dixon and Lee Newsome were unfurloughed. (Miss Dixon returned to work on 22 June 2020. Mr Newsome returned to work on 6 July 2020. He started a little later due to planned annual leave). Then, from October 2020, Mr Montague described as being *"back in a negative position"* and trying to plan a viable structure for the medium term encompassing the next 18 months.

40. There was little difference in the picture being presented by each party. In the final analysis, it could not be disputed by the claimant (and she did not seek to put the matter in issue) that there was a significant impact upon the respondent's business brought upon by the pandemic resulting in a significant loss of sales as described by the respondent's witnesses. Sales support was crucial over this period as plainly the pandemic had a significant impact upon the respondent's customers. Once matters became more stable towards the middle of 2020, the respondent's mind turned to generating sales which plainly was crucial for the future viability of the business. However, it was not anticipated that sales would recover to the pre-pandemic level hence the respondent's management turned their attention to business planning over the medium turn from around the autumn of last year.

41. On 20 April 2020 the claimant sent an email to Beth Kilato and Denise Shepherd (pages 148 and 149). The background to her sending this email is set out in paragraph 74 of her witness statement. She says that *"It was a very busy time end of March into April, the sales were not at a level of prior years or prior months but naturally customers were trying to defer, return or cancel orders due to the uncertain markets particularly amongst UK key accounts. International key accounts were slightly different because each government was handling the pandemic in a different way. For example, we had no sales from Italy for some time, but*

countries such as Australia, Russia, France, Israel and China were still placing orders or requesting shipments to be released."

42. She goes on to say in paragraph 87 of her witness statement that, *"It was a very difficult time for everyone. I had the pressure of re-engaging with work-related tasks that I possibly had not done in nearly a year, nor was I fully up to date with the day to day of each accounts. The teams did handovers, but I was freshly back into the business with the responsibility of running the department, supporting Denise, looking after the daily function the sales support team would normally do. All of this whilst also trying to care for a 14 months' old toddler. It was a very stressful time and at times overwhelming, the workload exceeded my working hours. I was committed and dedicated to supporting Panache. I continued to work overtime to ensure all orders were captured as this could be converted into a sale for the business."*

43. In paragraph 91 she says that, *"My husband could see that I was exhausted and being pulled in all directions constantly on the phone with customers, or the warehouse or checking several inboxes of my team. I was working all hours of the day trying my best to ensure that all customers' requests that came through, mine and my team's inbox were actioned. We thought it best to tell Panache about how I was feeling in hope that they would furlough me and bring Natalie Kamara back in the business as she covered my position whilst I was on maternity leave".* Hence, the claimant sent the email at pages148 and 149.

44. A corroborative account of how the claimant felt in April of 2020 was provided by Mr Taylor. None of the respondent's witnesses disputed that the claimant had worked very hard after the decision to place the majority of the respondent's workforce on furlough. The claimant is and was very highly thought of by all of those from whom the Tribunal received evidence on behalf of the respondent. In the circumstances, we have little hesitation in accepting the claimant's account that she was finding matters difficult to manage during April 2020.

45. The suggestion of Natalie Kamara replacing the claimant was not in fact mentioned in an email at pages 148 and 149. The claimant could not explain why this was omitted but she said that she had discussed the idea with Mrs Shepherd over the telephone. The Tribunal did not have the benefit of hearing evidence from Mrs Shepherd. We found the claimant to be a very honest witness. We therefore accept her account that she proposed the idea of Miss Kamara working instead of her. This was a practical and credible suggestion given that Miss Kamara had covered for the claimant during her (the claimant's) maternity leave when the claimant was absent in following the birth of her first child. It is therefore credible that the idea of Miss Kamara stepping in would have occurred to the claimant.

46. It was suggested to the claimant by Mr Feeny that she had rather downplayed the idea of going on furlough given that, within the email of 20 April 2020, it featured only as the fourth bullet point. The claimant explained that she relegated the idea of furlough within the hierarchy of bullet points for fear of otherwise seeming unwilling or uncommitted. In any case, the Tribunal finds it difficult to ascribe any kind of significance to

the order in which the claimant placed matters. In the final analysis, she came up with several ideas, one of which was for the respondent to put her on furlough.

47. There was a dispute of fact which arose between the claimant and Miss Kilato upon the latter's follow up action upon receipt of the email at page 148. It was put to the claimant by Mr Feeny that Miss Kilato had discussed the email with her over a Zoom call. This the claimant denied. However, the claimant said that she had had a discussion with Denise Shepherd.

48. At the outset of the hearing, the claimant made an application to introduce a supplemental bundle of documents. This consisted only of six pages. The Tribunal acceded to the claimant's application.

49. On page C1 of the supplemental bundle there are screenshots of several WhatsApp messages from the evening of 20 April 2020. The claimant complained to her correspondent that Miss Kilato had not acknowledged her email sent that day. On 1 May 2020, she sent a message to her correspondent to the effect that Miss Kilato had called her that day but "*did not mention my letter once."*

50. We find the evidence in the form of the contemporaneous WhatsApp messages persuasive. As we have said, we found the claimant to be a very honest witness. Although not in any way impugning her honesty, the Tribunal found Miss Kilato to be a less satisfactory witness (particularly around the issue of Ms Amin's flexible working request to which we shall come to in due course). On balance therefore we prefer the claimant's account and find that no Zoom call took place following the claimant's email at pages 148 and 149.

51. The claimant acknowledges in paragraph 93 of her witness statement that following her email of 20 April 2020, Denise Shepherd came up with suggestions in order to reduce the claimant's workload. The claimant says that Mrs Shepherd *"suggested she would take me out of calls and video calls with customers where she felt appropriate. I would no longer be required to attend general calls with customers because this was taking away from my operational time in creating, inputting/importing orders. This was not the outcome that I wanted but decided I would try and work with this as I did want to continue supporting the business. Denise did not want to furlough me and bring Natalie in my place."* We accept that the claimant's workload remained high albeit that some relief was generated for her by Denise Shepherd.

52. On 20 July 2020 the claimant notified the respondent that she was pregnant with her second child. She told Miss Kilato and Mrs Shepherd of her news on 20 July 2020 (page 457). She said that a *"planned C-section date is booked as 22 December."* Miss Kilato emailed the same day to congratulate the claimant. It is not in dispute that all of the witnesses from whom we heard evidence on behalf of the respondent were aware of the claimant's pregnancy in or around July 2020.

53. On 28 July 2020 Ms Amin submitted a flexible working request. This was discussed between the claimant (who was Ms Amin's line manager), Miss Kilato and Ms Amin herself over Zoom on 17 August 2020. (It appears

that Ms Amin's flexible working request is not in the bundle. At any rate, we were not taken to it).

54. It is not to be in dispute however that Ms Amin made her request on 28 July 2020 to work three full days a week with Tuesday off: (see Beth Kilato's witness statement at paragraph 19). In the same passage, Miss Kilato says that following the Zoom meeting held on 17 August 2020, *"the claimant advised me that she was going to propose that Ms Amin return on a four day week for an initial trial period of six months. I advised the claimant that I would put forward the claimant's recommendation at the next board meeting on 24 August 2020 (page 479). Ordinarily this would have been the decision taken by the line manager [the claimant] with input from myself but at this point in time we were not in ordinary times as a result of the impact and effects of the Coronavirus. As such, decisions were being overseen by the board who would be able to view the request alongside what was happening across the whole business."*

55. Page 479 to which Miss Kilato referred is an email from her to the claimant of 2 October 2020. This is part of a chain which appears to commence on 16 September 2020 with an email from the claimant to Miss Kilato. The claimant opened the chain by saying (on 16 September 2020) that, *"I'm conscious that October is creeping upon us and I haven't had any further conversations regarding Oriane's [flexible working request]."* On 17 September 2020 Miss Kilato replied to say that the claimant had *"not missed any communication, I will be in touch with you (and Oriane) to update on the situation soon as still currently considering the proposal. I will of course keep you included as her line manager."*

56. It appears that there was then a discussion between them on 29 September 2020, as on 30 September 2020 the claimant emailed Miss Kilato to thank her for the update on Ms Amin's flexible working request. Miss Kilato informed her of the decision that had been reached upon it. She then goes on to say that*, "As her manager I do feel that the decision to bring Oriane back full time was made without any input from myself as her manager. I must let you know that I feel I have been excluded from any decision-making process due to me being pregnant/soon to go on maternity leave."*

57. This generated an email from Miss Kilato to the claimant on 2 October 2020. She said that the claimant's contention that she had been excluded from the decision-making process was *"highly incorrect".* She said that following the discussion on 17 August 2020 over Zoom, the recommended new pattern for Ms Amin was to be reviewed at the next board meeting but that the board had rejected the request. She said that, *"Due to the current situation, we have had to take a different decision-making process with a decision being made at a higher level. The decision rests with the board because of the situation, as well as the proposed restructure and redundancies that need to be made to secure the company's viability."* It appears that the board's decision to reject her request had not been communicated to Ms Amin, as Miss Kilato suggested convening a further meeting with her and the claimant on 8 October 2020 for that purpose. In the event, this meeting took place on 9 October 2020.

58. The reference in the email of 2 October 2020 at page 479 to *'the proposed restructure and redundancies'* was not news to the claimant. This is because on 28 September 2020 Mr Power had issued what he described as a *"company-wide email"* setting out the ongoing effects of the pandemic and a need for redundancies. This email is at pages 474 and 475. It was issued following a review of the business structure undertaken by Mr Power, Mr Montague and Mr Laing on 11 September 2020.

59. About this meeting, Mr Power says (in paragraph 5 of his witness statement) that, *"We all took account of those areas of the business that we oversaw and we collectively discussed the sales function due to the proposed redundancy of the sales director, Denise Shepherd. With each department we factored what was and wasn't required within them and how little we felt we could survive with."*

60. He goes on to say in paragraph 6 that, "*In respect of the sales function, the role of global sales director (performed by Denise Shepherd) was removed from the structure. It was decided that some managerial positions could be removed, namely the claimant's role of UK and international sales support manager and the customer services role which was performed by Michelle Hammond (pages 544-545). I myself come from a sales background and believed the sales function could survive on a streamlined basis with the two sales managers [Mandy Dixon and Lee Newsome] reporting directly to me. The claimant's day to day role heavily focused on supporting Mrs Shepherd and with Mrs Shepherd's role being removed, this resulted in a diminished requirement for the claimant's role. It was also decided that other aspects of her role such as line management of the sales support team could be absorbed by the sales managers [Mr Lee Newsome and Miss Mandy Dixon …] going forward. Furthermore, the existing sales support team would continue to manage order processing, conflict resolution and merchandising support. A number of KPI reporting duties previously undertaken by the claimant became obsolete due to more efficient working processes being implemented and with some reporting being absorbed by the finance department."*

61. Mr Montague gives a very similar account to that of Mr Power in paragraph 9 of his witness statement. Mr Laing also gives a corroborative account in paragraph 10 of his witness statement.

62. It is somewhat surprising to note that there are no minutes of the meeting of 11 September 2020 (or at any rate none were produced for the benefit of the Tribunal). That having been said, there could realistically be no challenge by the claimant to the account given by these three members of the board about the decisions taken on 11 September 2020. In the company wide email of 28 September 2020, Mr Power said that sales to a value of £4.5m had been lost and there was a need to reduce overhead in line with revised turnover. Plainly, the respondent was looking at significantly reduced sales into the future, which effectively compelled the board's decision to restructure and consider redundancies with effect from October 2020.

63. On 17 September 2020, Miss Kilato wrote to the claimant to confirm her maternity leave dates. Her maternity leave was to run from 11 December 2020 until 10 December 2021. She would also of course accrue holiday

leave during her maternity leave. Her anticipated return to work was therefore 27 January 2022.

64. On 28 September 2020, the claimant received a letter to say that she was at risk of redundancy. The letter is at page 476. It was signed by Mr Power. He said that the respondent would enter into a period of consultation with her and that it was envisaged that the respondent would confirm her employment position during week commencing 26 October 2020. He said that, "*Over this period, we will meet and formally consult with you to discuss any alternatives whereby your employment could be protected. I would ask you to consider and put forward any alternative proposals and suggestions at our consultation meetings with the aim of avoiding redundancy. Alternative employment within the company will also be considered as part of the process. Please give some thought to any alternative employment you deem to be appropriate."*

65. As we saw in paragraph 56, on 29 September 2020 Oriane Amin's flexible working request was rejected by the board. We saw from Beth Kilato's email of 2 October 2020 that Ms Amin had not yet been notified of the decision. The claimant put it to Miss Kilato during cross examination, with some justification, that she would not have been chasing Miss Kilato upon the issue of Ms Amin's flexible working request had she known that she (the claimant) was not to be the decision maker as line manager. There was no evidence from the respondent that the claimant had been told in unequivocal terms that the decision making upon this matter lay not with her as line manager (as would be usual) but rather with the board.

66. On 1 October 2020 the claimant was invited to her first consultation meeting. This was to be chaired by Mr Montague with Miss Kilato in attendance.

67. When confirming, on 2 October 2020, that the meeting with Ms Amin was re-scheduled for 9 October 2020, Miss Kilato also told the claimant that Ms Amin had submitted an application for voluntary redundancy. The relevant email is at page 478.

68. The first consultation meeting involving the claimant took place on 7 October 2020. Mr Montague explained the rationale for the decision to make redundancies. In essence, this was down to reduced turnover and income. Mr Montague said that the board had decided to make 19 people redundant with their workload to then be absorbed across the departments.

69. Mr Montague made a brief reference to the fact that pooling of roles had been considered in order to select those to be made redundant. The issue then turned to the question of alternative roles. Mr Montague said that *"the only active role is Ireland sales."*

70. Mr Montague then mentioned to the claimant that Ms Amin had made *"an application."* The claimant replied that Miss Kilato had made her aware of this. Mr Montague said there was also the issue of her flexible working application. It is plain from these exchanges that when mentioning Ms Amin's *'applicati*on' he was in fact referring to Ms Amin's voluntary redundancy application. He said that "*if Oriane does choose to leave, that position may be available but [that remains] to be seen"* but otherwise

there were no open positions. The claimant asked if there was an enhanced voluntary redundancy scheme. Mr Montague confirmed that any redundancy payment would be at statutory rates only.

71. Within the *proforma* consultation document upon which the meeting was recorded (at pages 489 to 496) was a section about alternative employment. Pre-prepared questions were posed: '*are you prepared to travel?'* and '*would you consider positions with a lesser degree of responsibility/status?'* In both instances, the claimant replied that it would depend upon the package and the role.

72. On 9 October 2020, the scheduled meeting between Miss Kilato, the claimant and Ms Amin took place in order to discuss the latter's flexible working application. She was told that this had been rejected. The claimant says in paragraph 156 of her witness statement that Ms Amin *"was not happy with the proposal".* There are no notes of the meeting. It is not clear to what proposal the claimant is referring. Presumably, it was the proposal for Ms Amin simply to carry on working her normal hours.

73. On 14 October 2020 the claimant was invited to attend a second consultation meeting (page 499). This took place on 19 October 2020. (The notes are at pages 506 and 513). The same people were in attendance as at the first consultation meeting 12 days earlier.

74. On 15 October 2020 the respondent issued a *"Panache restructure questions"* sheet. This is at page 500. It was explained that the object of the re-organisation was to reduce the overhead base of the business and leave a viable structure in place to handle the day to day operations. Upon the issue of voluntary redundancy and flexible working, the respondent said that*, "wherever possible such requests will be considered and accepted as long as it leaves a viable structure in place for the business to meet its day to day operational needs."*

75. On 16 October 2020 Ms Amin's application to take voluntary redundancy was refused. The letter addressed to her is at page 588. Miss Kilato explained that the respondent had, "*considered your application in line with the current and future requirements of the business. With this is in mind, your application was declined because we wished to retain your skills and knowledge."*

76. At the second consultation with the claimant, Mr Montague said that he was *"aware of Oriane in your function which we'll discuss."* In fact, neither Mr Montague nor the claimant reverted to the issue of Ms Amin's position. For whatever reason, the matter, having been flagged up by Mr Montague, it was not revisited during the course of the meeting. Mr Montague did not suggest that Ms Amin may take voluntary redundancy and have the claimant take her place. The claimant made no such suggestion either.

77. On 19 October 2020 the claimant commenced a period of sickness absence. She self-certified as unfit for a period of two days until 21 October 2020.

78. On 20 October 2020, Miss Kilato informed Ms Amin that the respondent would after all support her flexible working request. The claimant found out about this because Ms Amin sent her a WhatsApp message (at page C3 of the supplemental bundle). Ms Amin said that Miss Kilato had called

her that day (20 October). She said that the flexible working request had been agreed after all and that she was very happy about it.

79. On 21 October 2020 the claimant was certified as unfit for work due to stress for the period between 21 October and 30 October 2020 (page 516).

80. Her employment in fact ended the following day. On 23 October 2020 Mr Montague wrote to the claimant (pages 518 and 519) to confirm that she was redundant with effect from 31 October 2020. She was paid a statutory redundancy payment of £6456. She was also paid a sum in lieu of the notice to which she was entitled.

81. The Tribunal was troubled by the lack of transparency on the part of the respondent around the issues of Oriane Amin's flexible working request and application to take voluntary redundancy. The Employment Judge asked Miss Kilato whether she had discussed Ms Amin's circumstances with Mr Power at any stage. Miss Kilato said that she could not recall. She then said that she had gone to the board during week commencing 12 October 2020 to discuss Ms Amin's position. There was no reference to this in her witness statement.

82. Similarly, there is no satisfactory explanation from any of the respondent's witnesses about the basis upon which it had been decided to reject Ms Amin's voluntary redundancy application and then revisit and grant her flexible working request after it had been rejected in the early part of October 2020. Mr Power said that it had been decided to retain Ms Amin because she is a French national. This was a factor not mentioned by any of the other respondent's witnesses nor was it advanced by Mr Power in his printed witness statement as a reason for wishing to retain Ms Amin's services.

83. No contemporaneous documents were produced by the respondent to demonstrate or record the decision making over Ms Amin's applications. Their absence was surprising.

84. On 12 November 2020 the claimant appealed against her redundancy dismissal. Her appeal letter is at pages 523 to 525.

85. It is, we think, worth setting out in full the first page of the letter. The claimant said:

"I consider that my selection for redundancy was an unfair dismissal, automatic unfair dismissal and pregnancy/maternity discrimination.

1 Panache did not select individuals for redundancy in a fair and objective way as:

(a) No selection criteria were used and, if there had been a selection criteria, I consider that in view of my seniority in the team I would have scored highly avoiding selection for redundancy.

(b) Other staff whose roles I have covered during the first lockdown were not put at risk of redundancy.

(c) Selection pools were used in other teams leading me to conclude that my dismissal was unfair and I've been selected because of my pregnancy and forthcoming maternity leave.

2 This was an unfair dismissal as my role is not genuinely redundant as I was the only one in my team who was not furloughed and who carried out the work of the team during this time and those staff are now doing my job.

3 Panache states there has been a restructure of the business in order to reduce costs in the current climate. As stated, I do not consider that this has been done in a fair and objective way and removing my role does not achieve this objective as I would be one of the lowest cost employees for Panache over the next 12 months as I will be on maternity leave from 14 December 2020 to 14 December 2021 receiving only statutory maternity pay for which Panache claims 92% reimbursement. I consider that removing my role in this new structure is an unfair dismissal, automatic unfair dismissal and pregnancy/maternity discrimination."

86. In paragraph 159 of her witness statement, the claimant refers to her grounds of appeal. Paragraph 159 contains four numbered sub-paragraphs. The first three, while not word for word, are very similar to the three numbered paragraphs upon page 523 which we have just cited. The claimant, in paragraph 159 of her printed witness statement, adds a fourth paragraph which reads as follows:

"Panache's behaviour around Oriane Amin's flexible working request application and rejection of Oriane's voluntary redundancy application suggests that Panache did not follow a genuine and meaningful consultation process. I was dismissed from the decision-making process in Oriane's request for flexible working contrary to Panache's flexible working policy. Panache had the opportunity to offer me an alternative position within sales support because they received a voluntary redundancy application. This option was not genuinely explored because I was due to go on maternity leave, thus this would not meet Panache's requirement of a viable structure that deals with the day-to-day operations of the business."

87. The fourth sub-paragraph is paragraph 159 is conspicuous by its absence from the claimant's letter of appeal at pages 523 to 525.

88. The claimant told Mr Laing (who was dealing with her appeal) that she would prefer for the appeal to be dealt with in writing with a follow up call or hearing if required afterwards. She said, with justification, that at that stage she was 34 weeks into her pregnancy and wished *"to keep my stress levels around this topic to a minimum as possible".* Mr Laing agreed to the claimant's proposal.

89. He did not uphold her appeal. The appeal outcome letter is at pages 528 and 529. In essence, Mr Laing concluded that:

- The claimant was effectively in a pool of one. He said that her role *"was a singular role at risk of redundancy [and] there was no requirement to use selection criteria".*
- The claimant's role was redundant. He explained the business rationale for not putting the claimant on furlough and then the decision to make the claimant's role redundant as part of the respondent's recovery strategy.

- The claimant's contention that she ought to have been kept on as she would be "*low cost"* should be rejected. Mr Laing pointed out that there had been four requests from employees to be brought back and placed upon furlough. Those applications had been rejected upon the basis that *"low cost is still a cost".* He said that *"this demonstrates that the company has been consistent when looking to reduce costs and [the claimant] has not been disadvantaged by virtue of being pregnant and/or soon to commence a period of maternity leave."* He rejected the contention that the decision was in any way influenced by the claimant's pregnancy or maternity leave.
- The respondent had addressed alternative employment and she had not pursued any interest in the available sale executive role in Ireland.

90. On 21 December 2020 the claimant raised a grievance (pages 532 to 540). In the event, the respondent declined to deal with the matter given that she was no longer an employee. Mr Montague wrote to the claimant to this effect on 23 December 2020 (page 532).

91. The grievance consisted of the claimant taking issue with Mr Laing upon his findings related to her appeal. Amongst other things, the claimant said that the respondent had failed to offer *"bumping"* as an option based on interchangeable work/skills. She referred to the case of **North v Lionel Leventhal Ltd** [2005] All ER (D) 82. She said that she believed that she would score higher in a selection exercise than would the sales managers because of her experience working for the respondent. She prayed in aid that the respondent had asked her to work in order to cope with the immediate onset of the pandemic. She then asked, *"Did any of the sales managers or sales support merchandisers put themselves forward for voluntary redundancy? Was this rejected and if so could this not have been used to retain my role? Or was this voluntary redundancy not accepted because they knew I would be unable to work from December because I was due to go on maternity leave?"* Although she does not expressly say so, it appears that the claimant here is referring to the situation with Oriane Amin. The claimant also mentions her omission from the decision-making around Ms Amin's flexible working request.

92. It was part of the respondent's case that Mr Power has a dislike of pregnant women. The basis of this contention arises from an exchange of messages between the claimant and a former employee on 13 June 2021. As this judgment will appear upon the relevant government website and be readily available to the public and given that this issue concerns private matters pertaining to her family life, the Tribunal will refer to the former employee as 'X.' These messages are in the bundle at pages 576 to 580. In a message timed at 7:40pm that day X told the claimant that Mr Power *"hates pregnant women except for his own wife".*

93. It is plain from the evidence which he gave to the Tribunal that Mr Power found this allegation to be very hurtful. He explained in his printed witness statement that X was appointed as a temporary head of marketing to cover the maternity leave of another employee between 8 November 2016 and 16 June 2017. X at the time lived in Switzerland; (indeed, she appears to do so now). Unfortunately, there were some child custody issues which led to X being required to commute weekly from Switzerland in order to

have continued access with her child. This became unsustainable and X resigned on 15 March 2017. Mr Power explains that he and X then entered into a consultancy arrangement in order that the respondent could retain her services. In short, Mr Power says that he was supportive of X. There is no suggestion to the contrary. We therefore accept Mr Power's evidence.

94. Mr Power also says that he has three children and has witnessed his wife facing difficulties in her career as a result of having been pregnant and having had children. He says he would *"never imagine treating any employee of mine differently by virtue of them being pregnant or taking maternity leave".* He also points out that the business is "*typically female orientated and the business with my leadership would not have lasted as long or have been as successful as we have been over the years if I held the view that was suggested by [X]."*

95. The Tribunal did not have the benefit of hearing evidence from X. There was not even a written statement from her. The allegation against Mr Power appears to have little (if not no) basis in circumstances where he supported X during difficult family circumstances, has children of his own, saw his wife treated unfavourably because of pregnancy and is in a female orientated business. The Tribunal therefore attaches no credence to the contention that Mr Power has a dislike of pregnant women.

96. The claimant also sought to place reliance upon some statistics advanced by the respondent. Mr Power told us that the respondent has had 26 pregnant employees over the last six years. Twenty-three of these were in employment at the point they commenced maternity leave. The other three were those (including the claimant) made redundant in October 2020. Those three had ceased being employed prior to the commencement of their maternity leave. Of the 23, 13 returned to their role after their maternity leave ended. Eight resigned and two are on maternity leave at the present time.

97. The claimant made a fair point when she said that to lose 10 out of 23 employees represents something of a high turnover. However, such a bare statistic avails the claimant little. Firstly, this is a very small sample. Secondly, the Tribunal would need to know much more about the circumstances of the 10 employees who did not return to the respondent after their maternity leave in order to draw any adverse inferences against the respondent. It may be that some or all of the 10 chose to stay off work to be with their babies. The claimant also pointed out that four employees were in fact pregnant at the time that the redundancy exercise took place. Three of the four were made redundant. One of the four was not. It was accepted by the respondent that that individual's pregnancy was not in fact known to the respondent when the redundancies were announced. Again, it is difficult to draw adverse inferences against the respondent simply from the fact that her pregnancy was unknown, and she was retained in the redundancy exercise.

98. Finally, upon our fact finding, we need to mention the issue raised in paragraph 25 of the claimant's witness statement. Generally, the claimant said that they found meetings with Mr Montague to be uncomfortable. One of the instances to which she refers *"occurred in 2017. I was asked to stay*

behind after I finished work and taken into a room with the HR manager who at the time was Beth Kilato's predecessor. I was asked if I had been exposed to any form of race discrimination in the workplace. I was reluctant to answer the question honestly because of Bill's comments to me as stated in the above paragraph." This was (obviously) a reference to paragraph 24 which contained an allegation that when she was introduced to Mr Montague, he had said to her that she should not get into his *"bad books".*

99. The claimant goes on to say in paragraph 25 that she *"didn't feel comfortable in disclosing examples of what I felt was discrimination based on the colour of my skin to Bill or HR."* However, says that the "*racial prejudices"* claimed by the previous employee (and which was the subject of the investigation in 2017) were genuine. The Tribunal is in no position to make factual findings as to whether a former employee of the respondent was subjected to discrimination upon the grounds of race. The claimant goes on to say in paragraph 26 of her witness statement that she has regrets about not speaking up about her own experiences as a black woman working for the respondent.

100. The evidence in this part of the claimant's witness statement was advanced (it seems) in support of her case that there was a culture of discrimination. However, there was simply no evidence to support the claimant's case that the other employee suffered from discrimination related to race. The claimant gave no evidence that she herself had suffered such discrimination. She made no complaint about it at the time. It is against the probabilities that the claimant would suffer any form of race discrimination and not complain about it in circumstances where she raised articulate and well-drafted complaints and appeals about her treatment connected both of her pregnancies and her flexible working request. We therefore conclude as a fact that she was not subjected to race discrimination and there was no culture of discrimination within the respondent.

The issues in the case

101. We now turn to a consideration of the issues in the case. This is a matter which benefited from a private preliminary hearing which came before Employment Judge Parkin on 16 June 2021. The hearing was attended by the claimant and the respondent's solicitor.

102. In paragraph 31 of his minute of the case management discussion, Employment Judge Parkin set out a summary of the claimant's case. It is worth reciting paragraph 31 in full:

"The claim is of unfair dismissal and pregnancy discrimination. The claimant had recently returned to work full time, after a short phase of 4.5 days following her return from maternity leave in January 2020; her request for flexible working part time had been turned down. Just after lockdown, whilst 80% of the respondent's staff were placed on furlough, the claimant and other senior members continued to work remotely. Two of the three members of her team were put on furlough, returning partly in July and September 2020 respectively and the third was herself on maternity leave; the claimant later herself sought to be put on furlough but the respondent did not agree to this and she contends that she was

put under great pressure covering for her team members and other colleagues. The claimant notified the respondent of her pregnancy in late July 2020 and she was notified that she was at risk of being made redundant on 9 October 2020 shortly after the redundancy of the Global Sales Director, Ms Denise Shepherd, who she reported to, in late September. There were consultation meetings in October and her redundancy was confirmed on 23 October 2020, taking effect on 31 October 2020. The claimant especially criticises the lack of a selection pool and of objective selection criteria, and her exclusion from decision-making for instance on members of her team. She believes the decision not to include her in a selection pool alongside other manager colleagues whose work she had covered was driven by her pregnancy and intention to take further maternity leave, such that the dismissal itself was unfavourable treatment for this reason."

The Tribunal notes that no mention was made here of the failure by the respondent to consider her for alternative employment (in particular, taking the merchandiser role occupied by Ms Amin).

103. Employment Judge Parkin then recorded the complaints being made by the claimant and he set out the issues. The relevant parts of the case management summary are at paragraphs 33 to 35.8.

104. The issues were summarised by him as follows:

35.1 What was the reason for the claimant's dismissal? The burden of proof is on the respondent to prove a potentially fair reason for dismissal within section 98(1) and (2) Employment Rights Act 1996 and the respondent relies upon the claimant's redundancy (or some other substantial reason, business reorganisation).

35.2 If the respondent proves the claimant's redundancy was the reason or principal reason, the section 99 inadmissible reason unfair dismissal claim will not succeed but, with no burden of proof either way, the Tribunal will determine whether the dismissal is fair or unfair, having regard to that reason and depending on whether in the circumstances (including its size and administrative resources) the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant and in accordance with equity and the substantial merits of the case (section 98(4)).

35.3 If the respondent does not prove redundancy as the reason or principal reason for dismissing the claimant, the Tribunal will determine whether the reason or principal reason for her dismissal related to the claimant's pregnancy or her intention to take maternity leave in December 2020 (section 99).

35.4 Did the respond discriminate against the claimant during the protected period by treating her unfavourably in dismissing her because of her pregnancy or because she was seeking to exercise the right to ordinary or additional maternity leave?

35.5 If the claimant proves facts from which the Tribunal could infer unlawful discrimination, the burden will shift to the respondent to show that it did not discriminate unlawfully against her.

105. Employment Judge Parkin then dealt (in paragraphs 35.6 to 35.8) with the remedy issues that may arise in the case. By consent, it was agreed that the Tribunal would defer any remedy issues arising with one exception. This is a consideration upon the unfair dismissal complaints of the issue of what would have happened had a fair procedure been followed and/or the likely career trajectory and longevity of employment of the claimant with the respondent. These issues arise from the application to the case of principles in **Polkey v A E Dayton Services Limited** [1988] ICR 142, HL.

The relevant law

106. We now turn to a consideration of the relevant law. We shall start with the complaint of ordinary unfair dismissal brought under sections 94 to 98 of the 1996 Act

107. The claimant worked for the respondent for more than two years. She therefore has a right to complain that she was unfairly dismissed. In such a circumstance it is for the employer to establish the reason for dismissal. The reason for dismissal must be one of those permitted by section 98. One of the permitted reasons is that the employee was redundant. Another is that there was a substantial reason of a kind such as to justify the dismissal of the employee holding the position which the employee held. As we have decided that there was a redundancy situation, the Tribunal need not be concerned with the issue whether the respondent has established (in the alternative to redundancy) a substantial reason for the claimant's dismissal.

108. Redundancy is defined in section 139(1) of the 1996 Act. That definition applies both to claims for redundancy payments and to unfair dismissal claims. The definition in section 139 covers three situations:

- *Closure of the business.*
- *Closure of the employee's workplace.*
- *A diminished need for or a cessation of the need for employees to do the available work.*

It is the latter situation upon which the respondent relies in this case. Plainly, the respondent was not closing the business nor the workplace at which the claimant worked.

109. As summarised in Employment Judge Parkin's case management summary, the respondent's case (as set out in paragraph 32) is that the claimant, "*was made redundant from a unique position, at a time of major loss of sales and need for savings causing 19 roles to be placed at risk of redundancy … the claimant had reported to and worked closely with and supported the global sales director, Mrs Shepherd, such that when Mrs Shepherd left, the claimant's role was diminished with some elements obsolete because of more efficient processes having been introduced and the rest of the role capable of being assimilated by colleagues."*

110. Once the employer has established a permitted reason for dismissal, then the Tribunal will consider whether the employer acted fairly and reasonably in treating that as a sufficient reason for the dismissal of the employee. There is no burden upon the employer upon the question of reasonableness. It is for the Tribunal to determine whether the employer acted reasonably in treating redundancy as a sufficient reason for the dismissal of the employee taking into account in particular the factors to be found in section 98(4) of the 1996 Act. The issue is whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably in treating redundancy as a sufficient reason for dismissing the employee in accordance with the equity and substantial merits of the case.

111. The focus of the Tribunal's enquiry is upon the reasonableness of the employer's conduct. The Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there is a band or range of reasonable responses to the situation in which the employer finds itself within which one employer might reasonably take one view and another quite reasonably take a different view. The function of the Employment Tribunal is to decide whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band then the dismissal is fair. If the dismissal falls outside the band it is unfair.

112. In **Williams and others v Compare Maxam Limited** [1982] IRLR 83 EAT it was held that reasonable employers facing a redundancy situation will seek to act in accordance with the principles set out in that case. Those pertinent in this case are:

- That the employer will seek to give as much warning as possible of pending redundancies to employees so as to enable the employees to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and if necessary find alternative employment in the undertaking or elsewhere.
- The employer will consult the affected employees as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. This may include in an appropriate case the devising of fair selection criteria which as far as possible do not depend solely upon the opinion of the person making the decision but is capable of objective measurement.
- The employer will seek to ensure that selection is made fairly in accordance with those criteria and will consider any representations made as to such selection.
- The employer will seek to see whether instead of dismissing an employee, the employee could be offered alternative employment.

113. In **Williams,** it was held that where dismissal is for redundancy, the Tribunal must be satisfied that it was reasonable to dismiss the employee upon these grounds. It is not enough to show that it was reasonable to dismiss an employee. It must be shown that the employer acted

reasonably in treating redundancy as a sufficient reason for dismissing the employee in question. Therefore, if the circumstances of the employer make it inevitable that an employee must be dismissed, it is still necessary to consider the means whereby the claimant was selected to be the employee dismissed and the reasonableness of the steps taken by the employer to choose the claimant, rather than some other employee, for dismissal.

114. In carrying out a redundancy exercise, an employer should begin by identifying the group of employees from which those who are to be made redundant will be drawn. This is known as the pool for selection. It is to those employees within the pool that an employer will apply the chosen selection criteria to determine who will be made redundant.

115. In considering the employer's decision over the choice of a pool for selection, the Tribunal will consider:

- Whether other employees are doing similar work to those from which the selection for the redundancy was made.
- Whether the employees' jobs are interchangeable.

116. As a result, the pool is usually composed of employees doing the same or similar work, and an employee risks a finding of unfair dismissal if they include in the pool a range of different job functions or exclude employees who should properly be in the pool. The employer's conduct must be judged against a standard of the reasonable employer and there should be a justifiable reason for excluding a particular group of employees from the selection pool where those in the excluded category do the same or similar work to those who are liable for selection.

117. In this case, of course, the respondent devised a pool of one applicable to the claimant. They decided that only the claimant was liable to be selected for redundancy from those who sat beneath the global sales director in the old structure (pre-October 2020). (The claimant appeared to accept that the sales consultant for France was in a stand-alone category anyway as they were not based in the UK in any event). The claimant was therefore contending for a pool of five employees at that level from whom the respondent should select one.

118. The question for the Tribunal therefore is whether it was fair or unfair for the respondent to use a pool of one in all the circumstances of the case. It is open to the Tribunal to determine that it is outside the range of reasonable responses to define the pool in a particular way in order to ensure the dismissal of a particular individual. The Tribunal must of course be careful not to substitute its view as to what was the right course for that of the employer.

119. Job losses confined to one department or team can result in the dismissal of skilled and experienced staff and may result in the employer being faced with the situation that other individuals whose posts are not directly affected may be retained. It may therefore be within the range of reasonable responses for an employer to consider a bumping dismissal. This arises where an employee whose job is redundant is re-deployed to another job and the employee in that job is the one who is actually dismissed. Although the dismissed employee's role may not be redundant

the individual's dismissal will be attributed to redundancy in that it has been brought about the diminution need for work of the kind done by the retained employee.

120. We mentioned the claimant referred in her grievance letter to the **Lionel Leventhal v North** case. This case was in fact also referred to by Mr Feeny during the course of his closing submissions. In the **Lionel Leventhal** case, a senior editor was selected for redundancy because he was the company's most expensive employee. An Employment Tribunal found his dismissal to be unfair, partly on the basis that the employer should have considered making a more junior employee redundant instead and offering their job to Mr North, rather than merely assuming that he would be unwilling to accept the resulting drop in salary.

121. In the course of argument before the Employment Appeal Tribunal in **Lionel Leventhal**, reference was made to the decision of the Court of Appeal in **Thomas and Betts Manufacturing Co v Harding** [1980] IRLR 255 CA which is authority of the proposition that it can be unfair for an employer to fail to consider offering alternative employment to a potentially redundant employee, even in the absence of a vacancy. The view of the EAT in **Lionel Leventhal** was that is assessing whether or not failure so to do is unfair is a question of fact for the Tribunal, which should consider matters such as:

- Whether or not there is in fact a vacancy.
- How different the two jobs are.
- The difference in remuneration between them.
- The relative length of service of the two employees.
- The qualifications of the employee in danger of redundancy.

122. In **Lionel Leventhal**, the Employment Appeal Tribunal was also referred to the case of **Barratt Construction Limited v Dalrymple** [1984] IRLR 385. In paragraph 8 of the case report in **Lionel Leventhal**, the Employment Appeal Tribunal cited from paragraph 5 of **Dalrymple** in which the Employment Appeal Tribunal said:

"The Tribunal must decide the question of reasonableness on the evidence before them in accordance with equity and the substantial merits of the case. The evidence before them disclosed that efforts were made to see if alternative employment was available within the appellant's company and that no suggestion was ever made by the respondent that he would be interested in a more junior appointment until he gave evidence before the Tribunal. Without laying down any hard and fast rule we are inclined to think that where an employee at senior management level who is being made redundant is prepared to accept a subordinate position he ought, in fairness, to make this clear at an early stage so as to give his employer an opportunity to see if this is a feasible solution. It is well accepted that a reasonable employer will not make an employee redundant if he can be employed elsewhere, even in another capacity." [Emphasis added by us].

123. The presiding judge in **Lionel Leventhal**, HHJ Bean, went on to emphasise that in **Dalrymple**, the Employment Appeal Tribunal said it was not laying down a hard and fast rule that it is always open to an employee

willing to accept a subordinate position to take the initiative in discussions with management.

124. HHJ Bean in **Leventhal** then referred to another case which had earlier come before the Employment Appeal Tribunal. This is **Dial-a-Phone and Another v Butt** [UKEAT] 0286/03. **Butt** (like the current claim with which we are concerned) involved an employee who was pregnant. She was seeking to make an argument that a post occupied by another employee should be deleted instead of her own post. She had not indicated a willingness to accept a subordinate position. The Employment Appeal Tribunal in **Butt** (HHJ Keith presiding) said that it was unsurprising that Mrs Butt did not indicate such willingness, given that it would have undermined her stance that the other post should be deleted rather than her post. In paragraph 19 of **Butt**, it was emphasised that in **Dalrymple** the EAT was not laying down any hard and fast rule that the onus is upon the employee to indicate that they would take a subordinate inferior post. The EAT went on to say (also in paragraph 19 of **Butt**) that, *"Even if a senior employee should inform his employers (if it be the case) that he is prepared to accept a subordinate post, that does not necessarily mean that the employers will act fairly in not considering the employee for that post simply because the employee did not say he would be willing to accept it."*

125. In **Lionel Leventhal**, the Employment Appeal Tribunal noted that the Employment Tribunal had found as a fact that the employee (Mr North) was not given the opportunity to say whether he would have accepted the other employee's position and that the other employee was not approached to see whether he was interested in voluntary redundancy. The Tribunal found that to be unfair. The Employment Appeal Tribunal held that this was a finding open to the Employment Tribunal with which the Employment Appeal Tribunal could not interfere.

126. In conclusion, therefore, the legal position is that it will not necessarily be unreasonable for an employer to assume that an employee would not wish to accept an inferior position. However, there are circumstances where it is open to an Employment Tribunal to find that the employer's conduct in making such an assumption and not discussing alternative employment with an employee would fall outside the range of reasonable responses in the circumstances.

127. We now turn to the complaint of automatic unfair dismissal. As is the case here, it is usually the employee who argues that the real reason for dismissal was an automatically unfair reason. In this case, the automatically unfair reason is one which relates to the claimant's pregnancy or anticipated maternity leave. In these circumstances, as the claimant has more than two years of service, she acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation, and which is capable of establishing the automatically unfair reason advanced. Once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer, who must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal. It is for the Tribunal to determine as a matter of fact whether there is a causal connection between the fact of the employee's pregnancy or that she is seeking to

take maternity leave on the one hand and the fact of her dismissal on the other.

128. For the claimant to succeed upon the complaint brought under section 99 of the 1996 Act, the inadmissible reason (pregnancy or maternity) must be (at least) the principal reason for the dismissal if it is not the only reason. Therefore, the Tribunal must be satisfied that if pregnancy or maternity was not the only reason then it was effectively the main reason (even if there were other reasons running alongside the inadmissible reason).

129. The position may be contrasted with the claim brought by the claimant under the 2010 Act. The inadmissible reason (again, pregnancy or seeking to take maternity leave) need only be an effective cause as opposed to the only or principal cause of the proscribed treatment.

130. The protection afforded to a woman who is pregnant under the provisions of the 2010 Act is confined to the *'protected period.'* This is defined as the start of the woman's pregnancy ending on the expiry of the additional maternity leave period or when she returns to work after the pregnancy if that is later. No question arises in this case that the claimant was within the protected period and can therefore avail herself of the protection of section 18 of the 2010 Act.

131. A claim of pregnancy and maternity discrimination does not require a comparator. A woman who alleges she has been discriminated against on the ground of pregnancy or maternity need not compare her treatment with a man in similar circumstances.

132. The 2010 Act does not define what it means by *"unfavourable"* treatment for the purposes of section 18. The Equality and Human Rights' Commission has produced guidance upon the 2010 Act in the form of a statutory *"Code of Practice on Employment".* This does not in fact tackle the concept of "*unfavourable"* treatment within the meaning of section 18 but does examine what the term means with regard to unfavourable treatment connected with disability in section 15 of the 2010 Act. The Code notes that this means that the disabled person "*must have been put at a disadvantage."* A similar concept applies in the case of unfavourable treatment related to pregnancy.

133. Section 18 requires the unfavourable treatment to be because of pregnancy and/or seeking to take maternity leave which entails a consideration of the grounds for the treatment of the complainant.

134. This entails a consideration of the reason why the employee was treated as she was, in particular of the conscious or unconscious mental process which lays behind the respondent's actions to discover what facts operated in the minds of the decision makers. The Tribunal's considerations may also entail the drawing of favourable or adverse inferences for or against the employer given the circumstances. Motive or intention behind the treatment is irrelevant. A benign reason for discriminating will be no defence. The key question is why the employer treated the employee unfavourably. This requires a consideration of whether the act complained of is rendered discriminatory by the mental processes (whether conscious or unconscious) which led the putative discriminator to do the impugned act.

135. Acts of unfavourable treatment because of pregnancy or maternity leave constitutes discrimination and are rendered unlawful in the workplace pursuant to the provisions of Part 5 of the 2010 Act. The relevant section within Part 5 which we are concerned is section 39(2)(c) which provides that an employer must not discriminate against an employee (in this case by treating her unfavourably because of pregnancy or maternity) by dismissing her.

136. There is a burden upon the claimant to show facts from which the Tribunal could conclude, in the absence of any other explanation, that the employer contravened the provisions concerned. If the employee succeeds in so doing, then the Tribunal must hold that the contravention in question occurred unless the employer can show that they did not contravene the provision. The shifting burden of proof rule is intended to assist claimants to establish discrimination and to help Employment Tribunals to establish whether or not discrimination has actually taken place. The policy reason behind it is that discrimination can often be covert and therefore notoriously difficult to substantiate. The burden remains upon the claimant to prove that the alleged discriminatory treatment actually happened, and that the respondent was responsible. It is not enough for a complainant simply to make an assertion that it did. A *prima facie* case of discrimination must be established on the facts in order to shift the burden of proof on to the respondent.

Conclusions

137. We now turn to our conclusions upon the merits of the claimant's complaint. We shall start with the complaint of ordinary unfair dismissal.

138. The Tribunal has little difficulty in concluding that the respondent has established a potentially fair reason and that there was a redundancy situation. Indeed, the claimant was asked in cross-examination whether she accepted that there was a need for redundancies to which she replied, *"based upon loss of sales and the information that Bill [Montague] shared with me, yes."*

139. It is not for the Tribunal to second guess the respondent's business decisions. The merits of reorganisation are not a matter for consultation (other than in the context of a collective consultation exercise). What an employee is entitled to be consulted about is how the employer's commercial decision making affects him or her.

140. The Tribunal is satisfied (upon the evidence that we heard from the respondent's witnesses) that as a fact they had decided upon a restructure which effectively led to the deletion of the support functions at the claimant's managerial level. Michelle Hammond was also made redundant. She too was in a support role (as customer services manager).

141. The respondent decided that the sales support function could be managed by the sales team alongside their other duties because the respondent was then operating and was in the future intending to operate a significantly smaller business with a smaller turnover. On any view, therefore, there was a diminution in the need for sales support. That is the situation which pertained, and which led to the respondent's decision to

dismiss the claimant. Good evidence was adduced by the respondent that there was a redundancy situation. The respondent has therefore satisfied the burden upon them to demonstrate there to be a fair reason for the claimant's dismissal.

142. The key issue in the case is whether the respondent acted fairly and reasonably in treating redundancy as a fair reason for the dismissal of the claimant. The claimant raises two criticisms: upon the pool for selection; and alternative employment.

143. Upon the first of these, she criticises the respondent's decision not to pool her for selection alongside the sales managers at her level of the organisation (Mr Newsome and Miss Dixon).

144. It is not for us to substitute our decision as to what was the right course to adopt for that of the employer. It may well be that some employers would have put the claimant within a selection pool of three (the claimant, Mr Newsome and Miss Dixon). However, that does not mean to say that the respondent's decision not to do so was one that fell outside the range of reasonable responses. The employer's conduct must be judged against the standards of the reasonable employer. The Tribunal needs to be satisfied that it was within the range of reasonable responses to exclude a particular group of employees from the selection pool and/or for devising a pool of one given the prevailing circumstances.

145. Here, in our judgment, there was a justifiable reason (and it was within the range of reasonable responses) not to pool the claimant with Lee Newsome and Mandy Dixon. Firstly, the need to achieve sales was critical with effect from the summer of 2020. That was why the respondent recalled Mr Newsome and Miss Dixon from furlough leave. The respondent was dependent upon experienced sales executives to seek to recover at least some of the business which had been lost. We do accept that the claimant had some sales experience but on any view this was not commensurate with those whose speciality was sales. Indeed, the claimant appeared to accept in evidence that by and large her role was a supportive one rather being than sales driven. That is why the claimant was not put on furlough when the pandemic struck. This was because sales support was crucial in the initial stages to manage commercial customers whose business were likewise affected by the pandemic.

146. Even if the Tribunal is wrong upon this, and it fell outside the range of managerial prerogative not to pool the claimant, Mr Newsome and Miss Dixon within a pool of three, we are satisfied that on any reasonable and objective scoring system the claimant would have fared less well than would Mr Newsome and Miss Dixon. The claimant accepted that she had little if any experience of international sales. Effectively therefore the contest would be between Mandy Dixon on the one hand and the claimant on the other. It is difficult to see how any objective and fair redundancy scoring selection system would find in favour of the claimant in preference to an experienced sales manager in circumstances where going forward the respondent needed to generate sales as quickly and as sustainably as possible.

147. The Tribunal therefore determines that it was fair and within the range of reasonable responses for the respondent to devise a pool of one. Michelle Hammond was dismissed. The claimant was in the only other UK based sales support role. Hers was therefore a singular role and it was entirely within the range of managerial prerogative to put her into a pool of one. Her role had no place, regrettably, in the reorganised business. Therefore, but for the issue of alternative employment we find that the respondent acted fairly in treating redundancy as a fair reason for the dismissal of the claimant. It is understandable why the claimant feels aggrieved given that she was one of a minority of employees kept on in order to undertake work and steer the respondent through a very difficult period. The respondent's focus in the autumn of 2020 had to be forward-looking, focussing upon their business needs at the time. Unfortunately, this was a future without the claimant's substantive role.

148. However, the Tribunal finds that the respondent acted outside the range of reasonable responses in its approach to the question of alternative work. The jurisprudence from the Employment Appeal Tribunal which we cited above is not authority for the proposition that there is a hard and fast rule that the onus is upon a senior employee to make known to the employer that they will accept a subordinate role. There is no such hard and fast rule. The employer's conduct must be judged against the factual background which presented in order to determine whether they acted within the range of reasonable managerial prerogative in the circumstances.

149. There is some merit in the respondent's argument that the claimant could have but did not express an interest in the merchandiser role which Oriane Amin was prepared to vacate voluntarily. That said, the claimant had not said at any stage that she was positively not interested. At the first consultation meeting she said that her interest would depend upon the package which may be offered. Further, Mr Power said that alternative employment would be considered by the employer: see paragraph 64 above. Accordingly, the respondent failed to give any active consideration to the question of alternative employment contrary to the procedure they said they would adopt.

150. The respondent was not furtive about the fact that Oriane Amin had volunteered to take redundancy. On the contrary, Mr Montague mentioned it at both of the consultation meetings, and Beth Kilato drew it to the claimant's attention on 2 October 2020. Therefore, it may be considered surprising that the respondent did not consider the question. Equally, it may be thought surprising that an individual as capable as the claimant was not more forthcoming about a potential interest in the role. The claimant said that was leaving it to the respondent to approach her.

151. That said, the claimant's case bears some similarity to the **Butt** case which we looked at earlier. It would have undermined the claimant's argument that there was a position for her at managerial level had she simply "*waved a white flag"* and said that she would accept Ms Amin's post. The circumstances which presented to the respondent, however, were that they had a disgruntled employee (in Ms Amin). The disgruntlement arose out of the respondent's rejection of her flexible working request. Ms Amin was prepared to volunteer for redundancy. The respondent had made it

clear that there was no role for the claimant at managerial level. The only viable vacancy at that level was a sales executive role in Ireland in which the claimant showed no real interest. An obvious solution presented itself which was to give Ms Amin her voluntary redundancy and allow the claimant to step into Ms Amin's role which was one that she was capable of undertaking and of which she had recent experience.

152. The respondent appeared to assume that the claimant would not have been interested in Ms Amin's role because it would have resulted in a significant salary reduction of around one third, a diminution in status and having to report in to Mandy Dixon who hitherto had been a peer of the claimant. However, it is not in our judgment for the respondent to make assumptions about what an employee facing redundancy would or would not accept.

153. In our judgment, for the reasons in paragraphs 148 to 152, it fell outside the range of reasonable responses given the circumstances not to at least broach with the claimant the question of whether she would have any interest in taking the sales merchandiser role. Upon this basis, therefore, we find the dismissal of the claimant to be unfair.

154. We now turn to the complaint raised by the claimant of automatic unfair dismissal under section 99 of the 1996 Act. We find that the claimant has done enough to show that there is an issue which warrants investigation as to whether the reason or the principal reason for her dismissal was the fact of her pregnancy and maternity.

155. The claimant's case does get off the ground upon the basis that an obvious solution which presented itself was ignored by the respondent. This was to allow Ms Amin to take voluntary redundancy, and then for the claimant to step into her shoes. Coupled with this, it would then be the case the respondent would be faced with the claimant herself going on maternity leave a few weeks later leaving the sales merchandiser position vacant.

156. We are however satisfied that the claimant's pregnancy and her anticipated maternity leave were not factors which drove the decision made by the respondent to dismiss her. We find what predominantly operated upon the minds of the decision makers within the respondent was the desire to ensure the respondent's future business viability. Indeed, such was their pre-occupation with doing so that they did not *"join the dots"* and apply their minds to the possibility of the claimant taking the role hitherto held by Oriane Amin. That the claimant herself did not push for such a solution demonstrates in our judgment how everyone's focus was upon the redundancy issue following the calamity of the pandemic. It is significant that the claimant did not raise the issue of alternative employment in her letter of appeal and the question only really featured later within her grievance and her witness statement.

157. Neither party seriously considered the claimant undertaking Ms Amin's job. It follows therefore that apprehension upon the part of the respondent that the claimant would herself be going on maternity leave soon afterwards did not feature as a concern, nor did the claimant's flexible working issue at the turn of 2019/2020. Again, the claimant did not raise the latter as an issue at the time.

158. Neither issue featured in her letter of appeal (pages 523 to 525). The issue of alternative work and voluntary redundancy did feature in her grievance letter at pages 533 to 540 (but not the flexible working issue). If the flexible working issue was not operating upon the claimant's mind at the time at all, it is unsurprising for it not to operate upon the minds of the respondent's decision makers. The issue of alternative work only featured as an afterthought. We are satisfied therefore that the principal reason if not the only reason why the claimant was dismissed was because of the redundancy situation in which the parties found themselves.

159. We now turn to the complaint brought under the 2010 Act. We do not consider that the claimant has established facts from which adverse inferences should be drawn against the respondent arising out of some of the background matters.

160. Firstly, we do not find it credible that Mr Power was motivated by a dislike of pregnant women for the reasons we gave earlier. Secondly, we are inclined to agree with Mr Feeny that the claimant was engaging in *"reverse engineering"* when she sought to convey a picture of a discriminatory environment by reference to unspecified and unevidenced instances of race discrimination from around 2017. The claimant is a very impressive individual who is well able to stand up for herself (as she demonstrated when pursuing her flexible working request following the birth of her first child and in the way in which she presented herself before the Employment Tribunal). We do not accept that had there been matters as serious as race discrimination the claimant would have kept quiet. We draw a favourable inference in favour of the respondent in connection with the issue around X and the support given to her and make no adverse findings against the respondent arising out of the cohort of female employees involved in the relevant redundancy exercise.

161. It follows therefore that if the claimant is to succeed upon her complaint brought under section 18 of the 2010 Act, she must do so (and the burden of proof is upon her) in the absence of any adverse inferences against the respondent arising from background matters. The focus must solely be upon what happened at the time. The question that arises is whether those who dismissed the claimant and dismissed her appeal did so consciously or subconsciously because she was pregnant and that it was anticipated that she would take maternity leave. What influenced the respondent to act as they did?

162. It is significant that at the time the claimant's focus was mainly upon the respondent's decision not to pool her with others. Only when the case came before the Employment Tribunal did the claimant raise (in sub-paragraph 4 of paragraph 159 of her printed witness statement) that the respondent had closed its mind to the possibility of her taking the sales merchandiser role because of her pregnancy and anticipated maternity leave. Such was not at the forefront of the claimant's mind at the material time.

163. The Tribunal's findings may have been different had the claimant said unequivocally at the time that she was aware that Ms Amin had volunteered for redundancy and she would take her role notwithstanding the diminution in status and salary. Had she done that, and the respondent

had closed its mind to that possibility then the claimant may well have succeeded in at least establishing a *prima facie* case. However, she did not do so. She appears not to have applied her mind (or at any rate she had not told the respondent that she was doing so) to that possibility. This tells against the respondent being influenced against her by reason of pregnancy or anticipated maternity leave. From the respondent's point of view, time was critical. It was crucial to establish the new structure to maintain the financial viability of the business. That was the motivation of the key members of the respondent's board from whom we heard evidence. It was for the survival of the business that respondent acted as they did.

164. Further, the claimant complained that she was being excluded from the decision making around Ms Amin's flexible working request. There is justification for the claimant's complaint about this. As we have said, there was a lack of transparency upon the part of the respondent about the decisions taken around Oriane Amin. However, it is only a short leap from that to the solution of the claimant occupying Ms Amin's role. As we say, the claimant never suggested such. It not being in the claimant's mind, it is unsurprising that it was not in the minds of the decision makers within the respondent either.

165. We are satisfied that the claimant was treated unfavourably. She plainly was so treated. She was dismissed from her employment. The key question is the causal link between pregnancy and anticipated maternity leave on the one hand and the unfavourable treatment upon the other. We are satisfied that the reason why she was treated as she was is because of the redundancy situation and the critical state of the business in the autumn of last year.

166. That the respondent was not consciously or subconsciously motivated to act as they did because of the claimant's pregnancy and anticipated maternity leave does not of course avail the respondent upon the consideration of the unfair dismissal claim. Upon the latter, it is the respondent's conduct which is under scrutiny and objectively that conduct fell below the standards of the reasonable employer in the circumstances in not approaching the claimant upon the question of alternative employment. However, unfair conduct is not necessarily the same as discriminatory conduct. Different considerations apply.

167. The only remaining issue therefore is a consideration upon the successful unfair dismissal claim of what would have happened had the employer acted reasonably and fairly by approaching the claimant with an offer of alternative employment. Would the claimant have taken the role?

168. Before us, the claimant sought to argue with some justification that she would be unlikely to obtain alternative employment after the end of October 2020 given that she was by that stage heavily pregnant. Such is, regrettably, a reality. She said that she would have been prepared to accept a subordinate role notwithstanding that it represented a diminution in status from that previously enjoyed by her. She said that her salary of around £14000 per annum less than that which she was paid in her substantive role would nonetheless be attractive to her when considering the alternative of being without an income. There was of course little

prospect of the claimant improving upon the package hitherto enjoyed by Ms Amin. The whole object of the exercise from the respondent's point of view was to save money. The claimant had been told that there was no question of an enhanced redundancy package for that reason.

169. The Tribunal cannot say that it is a certainty that the claimant would have accepted the sales merchandiser role has it been offered. We think the respondent is right to say that the claimant expressed no great enthusiasm for it at the time albeit that she did not go so far as to turn it down flat. She said that she would listen to the package on offer when the issue was raised in the first consultation meeting. As we have said, the claimant did not emphasise the possibility of stepping into Ms Amin's role at any point in the contemporaneous correspondence. This puts some doubt in the Tribunal's mind as to whether, if offered it, the claimant would have taken it. Even before the Tribunal, the claimant only said that she may have taken it.

170. Against that, the claimant would certainly have been acting against her own interests not to take it had it been offered given that realistically there was unlikely to be a suitable alternative in the short time available to her before her second baby was born. On balance, therefore, doing the best we can, we consider there to be a 75% chance that the claimant would have taken the role had it been offered to her.

171. When the matter returns to the Tribunal for a consideration of remedy, there will be no basic award. This is recognised by the claimant in her schedule of loss. The respondent has paid a statutory redundancy payment. The respondent dismissed the claimant by reason of redundancy. It follows therefore that pursuant to section 122(4) no basic award will be payable in these circumstances.

172. That simply leaves the compensatory award. Pursuant to section 123(1) of the 1996 Act, this shall be in such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. The Tribunal shall make no findings here upon the amount of the loss sustained by the claimant or upon any issues of mitigation. That is for the remedy hearing. There shall however be a **Polkey** reduction of 25% from whatever loss is calculated attributable to the actions of the employer for the reasons which we have given.

173. The matter shall now be listed for a remedy hearing. The remedy hearing shall be listed with the time allocation of one day. Within 28 days of the date of the promulgation of this Judgment, the parties shall write to the Employment Tribunal with dates to avoid over the next six month in order

to facilitate the listing of the remedy hearing. When the parties write with their dates to avoid, they shall also indicate whether they feel that a case management hearing before the Employment Judge would be beneficial in order to facilitate the remedy hearing.

Employment Judge Brain

Date: 1 December 2021