EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms M Kaminska	**v**	**(1) Mr C Marchesani** **(2) Mr J R A Ribeiro** **(3) Trans-fast Remittance (London) Limited**

Heard at: London Central
(By Cloud Video Platform)

On: **24, 25 and 26 November 2021 and 29 November 2021 (in chambers)**

Before: Employment Judge Joffe
Mr A Adolphus
Ms S Went

Representation

For the Claimant: Mr K Harris, counsel

For the Respondent: Mr J Searle, counsel

RESERVED JUDGMENT

1. The third respondent was in breach of contract in failing to pay the claimant her correct notice pay on termination of her employment.

2. The third respondent made unlawful deductions from the claimant's wages in failing to pay her for her accrued but untaken holiday on termination of her employment.

3. The claim for unfair dismissal under sections 94, 99, and 98(4) Employment Rights Act 1996 is upheld.

4. The respondents discriminated against the claimant contrary to section 18 of the Equality Act 2010 by:
    a. Not allowing her to return to her role;
    b. Offering her a role with reduced pay and hours;
    c. Dismissing her.

5. The third respondent subjected the claimant to a detriment contrary to Section 47C Employment Rights Act by:
    a. Not allowing her to return to her role;
    b. Offering her a role with reduced pay and hours;
    c. Dismissing her.

6. The respondents victimised the claimant contrary to Section 27 Equality Act 2020 by:
    a. Dismissing her;
    b. Withdrawing the offer of work in Southwark.

7. The first respondent instructed and/or caused the acts of discrimination and is liable for them under Section 111 Equality Act 2010.

8. The second respondent is liable for the acts of discrimination under Section 110 Equality Act 2010.

9. There was no chance that the claimant's employment would have lawfully terminated before about June or July 2021.

10. The claimant's remaining claims are not upheld and are dismissed.

REASONS

Claims and issues

1. The parties had agreed a list of issues which is as follows. References to 'the respondent' in the Reasons are references to the third respondent. The respondents appeared in different orders in different documents but we have taken the order in the head note above from an earlier case management order. Although not included in the list it was also necessary for us to consider the liability of the unrepresented second respondent, Mr Ribeiro.

   Unfair Dismissal
   1. What was the reason for dismissal:
   a. Has the Respondent established that the Claimant was dismissed for redundancy; or
   b. Was the reason or principal reason (contrary to s.99 ERA 1996 and Reg 20(3)(a),(b) and (d))or 10 MPL Regulations 1999 and automatically unfair)
   i. The pregnancy of the employee;
   ii. The fact she had given birth to a child; or
   iii. The fact that she had…availed herself of the benefits of ordinary or additional maternity leave.

   2. If the Claimant was redundant was the dismissal unfair (contrary to s.99 ERA 1996 and Reg 20(2)):
   a. Do the circumstances constituting the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer; and
   b. The reason or principal reason the Claimant was selected for dismissal was her pregnancy, the fact she had given birth to a child or the fact she had availed herself of the benefits of ordinary or additional maternity leave.

   3. If it was not practicable by reason of redundancy for the Respondent to continue to employ the Claimant under her existing contract, was there a suitable available vacancy which she should had been offered under Reg 10, did the Respondent offer it and did the Claimant reject it.
   4. If the dismissal was not automatically unfair under s.99 ERA was it unfair under s.98 ERA, did the Respondent carry out a fair redundancy process including:
   a. Fair warning;
   b. A fair selection criteria;
   c. A search for alternative employment and offering it to the Claimant

d. A substantively fair decision to select her; and
e. An opportunity to appeal.

Maternity Discrimination

5. Was the Claimant treated unfavourably by the Respondents because of her pregnancy or because she exercised her right to ordinary or additional maternity leave contrary to s.18(2)(a) or s.18(4) EqA 2010 by the Respondent:
a. Not allowing her to return to her role;
b. Offering her a role with reduced pay and hours;
c. Dismissing her;
d. Withdrawing the offer of work in Southwark; and
e. Not dealing with the Claimant's grievances on 29 January 2020 and 17 February 2020.

MPL Regulations

6. Was the Claimant subjected to the detriments set out above at paragraph 5.

7. Was the reason the Claimant was subjected to the detriments that she was pregnant, had given birth to a child or sought to take or avail herself of the benefits of ordinary or additional maternity leave (contrary to Reg 18 and 47C ERA 1996):

Victimisation

8. Did the Claimant do a protected act under s.27(2)(d) EqA 2010 by:
a. Submitting her grievance of 29 January 2020; or
b. By submitting her grievance of 17 February 2020.

9. Did the Respondents subject the Claimant to the detriments listed at paragraph 5 because she did a protected act.

Liability of the First Respondent

10. Did the First Respondent instruct or cause another (Mr Ribeiro) to do any act which amounts to discrimination set out at paragraph 5, 8 and 9 and so is liable under s.111 EqA 2010 for the discrimination

Compensation

11. It is agreed that the issue of compensation will be dealt with at a later hearing

Findings of fact

2. The hearing was a remote hearing by video. The participants were able to see and be seen and hear and be heard satisfactorily. There were no significant issues with technology.

3. We had an electronic bundle of some 609 pages but nearly half of this consisted of documents related to remedy which we were not required to consider at this stage.

4. The claimant gave evidence for herself and called Ms Agnieszka Dyrda, former operations officer at the respondent.

5. The first respondent (hereafter called Mr Marchesani for clarity) gave evidence, as did Ms Victoria Virgolin, former employee and current director of the respondent.

6. The second respondent (hereafter called Mr Ribeiro) did not appear. Efforts made by the clerk to reach him using contact details provided did not bear fruit but a message was left for him and an email sent. It appeared that he had not been in touch with the other parties for some time. In the circumstances, we concluded it would be in accordance with the overriding objective to proceed with the hearing in his absence.

7. The respondent conceded that the claimant had not received the correct notice pay and holiday pay on termination and agreed that we should enter judgment by consent on those issues.

The respondents

8. The respondent is a company which provides a remittance service for workers working abroad who want to send currency to their home country. It has or has had branches in Spain and Italy and operates in 42 different countries.

9. Mr Marchesani is the sole shareholder of Optima FX Ltd which owns the respondent and one other business. His background is in investment banking. He told the Tribunal that his role in relation to the respondent was to set the strategy for future development and growth. He wants the respondent to move away from remittance transactions to being an online bank, investing in new technologies to remodel the business. In evidence in chief, Mr Marchesani said he had nothing to do with the day-to-day operations of the respondent and had only visited its offices a couple of times. Matters such as making decisions about employees were entrusted to the management team.

10. Mr Ribeiro was the managing director of the respondent at the time of the claimant's dismissal. He was appointed by Mr Marchesani. Mr Marchesani denied in cross examination that he could instruct Mr Ribeiro as to what he

should do. He said that the respondent was a regulated company so that was not the case. He said that Mr Ribeiro could only be dismissed by a board resolution but later said that he *was* the board of the respondent. He ultimately accepted he had the power to terminate Mr Ribeiro's employment. Mr Marchesani was a director of Optima FX Ltd but not of the respondent.

11. We noted that in his evidence Mr Marchesani tended to make very sweeping statements about matters to do with banking, financial regulation and company structures and expect the Tribunal to simply accept such statements because he purported to speak as an expert on these matters. We found it difficult at times to trust his evidence because he was deliberately opaque and seemed to think he could blind us with 'science' in relation to the matters on which he purported to be an expert. He made a very confident statement we discuss further below about currency exchange rates which turned out to be entirely wrong. We return to the issue of Mr Marchesani's reliability as a witness in our Conclusions below.

12. In his witness statement Mr Marchesani suggested that the respondent was 'in a critical position financially' and had made very limited profits but denied in cross examination that Mr Ribeiro would have had to run major expenditure past him or any budget issues, for example as to expenditure on staff salaries. In doing so, he seemed to be resiling from his account of the respondent's finances which he had provided in his witness statement.

13. On September 2007 Ms Dyrda joined the respondent as operations officer. At this stage the respondent was owned by Ms Rio and Mr de Matos and Ms Rio managed the company. The remittance work was mainly for Portuguese speakers (predominantly from Brazil) and Polish speakers.

<u>The claimant</u>

14. On 13 July 2012 the claimant joined the respondent as a customer service employee, under a contract of employment.

15. Her duties included:
- Handling of remittances to Europe and South America including making cash money;
- Transfers over the phone and online;
- Monitoring of payments;
- Dealing with complaints;
- Preparing and counting cash;
- Checking client documentation and anti-money laundering checks;
- Setting foreign exchange rate for Poland and Eastern European countries;
- Executing customer payments;
- Buying currencies online;
- Informing customers about deals and promotions.

16. Customers could place orders over the phone or online. The online orders required the monies to be transferred by an employee. Higher amounts required the employee to conduct fraud checks.
17. The claimant is a native Polish speaker and also speaks Russian. She told the Tribunal she carried out work for Spanish and Portuguese speaking customers as well as Polish speakers. When she covered weekend working she had to deal with all customers.

18. She said that some months she had the highest number of orders which she could not have had if she had just been doing the Polish work. That evidence was not challenged.

19. The claimant said 60 – 70% of customers were Brazilian.

20. Ms Virgolin's evidence (which covered only the end of the period of the claimant's employment) was that customers phoning in would go through to a native speaker of their language unless that person was busy in which case someone else would deal with the transaction in English. Ms Virgolin's evidence about how the work was carried out once she moved to the London office was that she covered Portuguese speaking work, the claimant covered Polish speaking work and an employee in Italy covered Spanish work but they all covered for each other when necessary.

21. We deduced from this evidence that the claimant would have dealt with a reasonable number of Portuguese speakers, particularly at weekends, but understandably there was a preference for customers to have the opportunity to speak to someone in their first language. The reality of the work was that a Polish speaker would cover a reasonable amount of Portuguese / Brazilian remittance work in English.

22. The claimant told the Tribunal that in her role she was dealing with Polish banks and buying currency. She said that even when she was on maternity leave staff were contacting her about matters to do with banks. We accepted that evidence. We found the claimant an exceptionally careful and straight forward witness and that evidence was not materially contradicted.

23. Ms Virgolin said that buying currency online was something she and the claimant had both done for a short period before the claimant's maternity leave. Karen Serragnoli, the previous operations officer, had previously purchased currency.

24. From 1 May 2015, the claimant became a senior customer service employee.

25. In 2017, Ms Rio and Mr de Matos moved to New York although they continued to own and manage the respondent.

26. In April 2018, the claimant was pregnant and informed Ms Rio. She and Karen Serragnoli and Ms Dyrda appear to have been the only customer service people in the London office at that point

27. From June 2018, Ms Virgolin was first employed by the respondent's Italian branch.

28. On 27 July 2018, Ms Dyrda went on maternity leave.

29. In September 2018, Ms Virgolin moved to the to London office from Italy.

30. In November 2018. Ms Serragnoli left. The claimant heard that Ms Rio was planning to sell the company.

31. That month the claimant carried out interviews for maternity cover for her role and recommended Anna Matuszewska to Ms Rio.

32. On 17 December 2018, the claimant wrote to Ms Rio to say that she wished to return to work after maternity leave.

33. On 18 December 2018, Optima FX Ltd negotiated the acquisition of the respondent

34. In December 2018 Ms Matuszewska joined the respondent. Her background in her home country of Poland was in banking.

35. Ms Virgolin said that Ms Matuszewska took on other duties such as fx conversion and managing the relationships with banks when the Polish transaction work allegedly declined during the claimant's maternity leave. Although Mr Marchesani referred to her in evidence as a relationship manager, there was no documentary evidence provided of a change to her role or title.

36. On 14 January 2019, the claimant went on maternity leave. At that point she was earning £11 per hour for up to 50 hours work a week, including two Saturdays per month.

37. In January or February 2019 Ms Virgolin was promoted to operations officer (ie Ms Dyrda's role). Amanda Faccioni joined in a customer service role. She was a Portuguese speaker and Ms Virgolin said her role was to cover the Portuguese speaking work.

38. Mr Marchesani's evidence was that he did not know about Ms Virgolin's apparent promotion into Ms Dyrda's role as he was not part of the day-to-day operations of the company. Ms Virgolin did not give evidence that she was acting into the role or covering Ms Dyrda's maternity leave and no documents were provided to the Tribunal that suggested that was the case.

39. From 25 March 2019, Mr Marchesani said he appointed Mr Ribeiro as managing director and director of the respondent although he also told the Tribunal that the acquisition of the respondent was completed on 13 April 2019

40. In April 2019 Ms Rio told the claimant that the respondent had new owners and she could contact Ms Virgolin.

41. The respondent introduced a new Customer Relationship Management ('CRM') system. This system automated the transfers and removed the need for manual inputting.

42. The pitch document we saw said that:

As well as sending money with our system, Trans-Fast will also be able to manage and track the activities of your staff and agents and generate reports on your orders.

43. The first invoice for the CRM software which we saw was dated 17 April 2019.

44. The effect of the CRM system, according to Mr Marchesani, was that more orders took place online; if people wanted to order over the phone, they would be encouraged to go to the website. The fraud checks would be done by the compliance officer. Previously fraud checks had been done by customer services employees with some oversight by the compliance officer. According to Mr Marchesani the previous practice was not lawful. This issue of the compliance officer and his role only arose in oral evidence and it was unclear to us whether we had the full picture on that role and how it changed. Mr Marchesani agreed that someone still needed to deal with customer complaints but said the operations officer or managing director could do that.

45. On 17 May 2019, there was a series of WhatsApp messages between Ms Dyrda (who was on maternity leave) and Ms Virgolin:

[15:20, 17.05.2019] Agnieszka: All is the same or different work now?

…

[15:30, 17.05.2019] Victoria Transfast: Yes.. we still in Victoria for now

[15:31, 17.05.2019] Victoria Transfast: Basically the same.. things are changing now

[15:31, 17.05.2019] Victoria Transfast: Let's see

[15:31, 17.05.2019] Victoria Transfast: About the new owner

[15:31, 17.05.2019] Victoria Transfast: His name is Caio Marchesani

[15:31, 17.05.2019] Victoria Transfast: And his email address is cm@transfastuk.com

On 31 May, Ms Dyrda again messaged Ms Virgolin

[11:33, 31.05.2019] Agnieszka: Hi Victoria good morning. I have sent e-mail to Caio cm@transfastuk.com few days ago from my personal e-mail agnieszka.dyrda@yahoo.com. Could you please ask him next time when you will talk with him if he receive it? And I'm waiting for reply please.

Thank you

46. Mr Marchesani's evidence about this email address in his witness statement was that it was not regularly monitored. In oral evidence, he said that he only had a Trans-fast address to keep separate emails relating to his different businesses and that he did monitor that email inbox but would not get involved with emails not related to his position in the company.

47. In terms of why Ms Virgolin would have provided his details as a point of contact for Ms Dyrda to make enquiries about her employment, Mr Marchesani denied in cross examination that Ms Virgolin would have known the division of responsibilities between himself and Mr Ribeiro but agreed that Mr Ribeiro would have known.

48. On 28 May 2019, Ms Dyrda had sent a detailed email to Mr Marchesani:

Congratulation for you as a new Trans-Fast owner.

I'm Agnieszka Dyrda Trans-Fast employee since September 2007 currently on maternity leave.

I have started maternity leave on 27/07/2018. I would like to stay full 12 months on maternity leave raising my daughter.

After this time I would like to use all my holidays to stay longer at home because I have nobody to stay with my child and she will be still too small for nursery.

Before my maternity leave I have 14 days not used holidays plus all days accumulated during my leave.

Could you please ask your accountant to calculate how many days in total I've got to use?

I have to know the latest day when I should back to work after paid my all holidays.

Today is hard for me to say whether I will be able to return to full-time employment. I will be more interested for part time or remote work.

Please let me know your opinion and work offer possibilities.

Before my maternity leave I had multitask duties in the company. I'm Operation Officer with main duties such as:

checking currency rates in the market and competitors daily rates and prices,

calculating and changing in the system exchange rates for customers,

checking bank deposits and card payments from customers,

validating and sending transmissions with customers orders,

checking all correspondent account balances,

buying currencies USD, EUR, PLN after early movements planning in order to minimize the exchange rate risk,

making payments for correspondents,

conciliation and reconciliation all accounts in the end of each month,

entering data into the accounting program TAS,

working with correspondents to clarify the balance difference on accounts,

helping with customer service mainly with Polish clients, answering phone calls and emails,

I look forward to receiving your reply.

49. After Ms Virgolin received Ms Dyrda's chaser message of 31 May 2019, she replied to Ms Dyrda later that day:

[15:52, 31.05.2019] Victoria Transfast: Hey Agnieska, how are you? Sorry for my late reply. Just confirmed with Caio [Marchesani] and he has received it. He will reply to you soon.

50. Mr Marchesani denied throughout his evidence that he had any involvement in Ms Dyrda's arrangements.

51. Ms Virgolin's evidence about how she came to send this message to Ms Dyrda was that this was one of the few occasions when Mr Marchesani was in the office. When Ms Dyrda texted she 'looked back' at Mr Ribeiro and Mr Marchesani and asked if they had received Ms Dydra's email and Mr Ribeiro said yes. She then said in evidence that 'both of them' said yes. It was put to her that the email had only been sent to Mr Marchesani. Ms Virgolin said she assumed they talked to each other. Her evidence on this point was confused

and confusing and it seemed to the Tribunal that she was under some pressure to attempt to square the documentary evidence with the case put forward by Mr Marchesani that he had no involvement with the respondent's employees and their arrangements. She said that she was not dealing with those types of thing at the time and assumed that Mr Marchesani would deal with the matter.

52. On 19 June 2019, Ms Dryda messaged Ms Virgolin further as she had not heard from Mr Marchesani or indeed from Mr Ribeiro:

[11:51, 19.06.2019] Agnieszka: Hi Victoria good morning

[11:52, 19.06.2019] Agnieszka: I need your help please

[11:53, 19.06.2019] Agnieszka: I have sent e-mail to Mr Caio 3 weeks ago and I haven't receive reply yet

[11:53, 19.06.2019] Victoria Transfast: Hey Agnieska, how are you doing?

[11:53, 19.06.2019] Agnieszka: I can send copy to you if you give me your mail

[11:53, 19.06.2019] Agnieszka: I'm ok thank you

[11:54, 19.06.2019] Agnieszka: How are you?

[11:54, 19.06.2019] Victoria Transfast: just reply to him asking if he has any news about it

[11:54, 19.06.2019] Victoria Transfast: I am fine. how about you?

[11:55, 19.06.2019] Victoria Transfast: He confirmed to me. so he received it

…

[11:57, 19.06.2019] Agnieszka: How is work now? I think to back for part time

[11:58, 19.06.2019] Victoria Transfast: Yes, he told me that you want to come back part time!! Nice!! Hopefully is going to work

[11:58, 19.06.2019] Agnieszka: Are you still busy?

[11:58, 19.06.2019] Victoria Transfast: Everything is fine here.. a lot of changes but it's for a good reason

[11:58, 19.06.2019] Victoria Transfast: We are not so busy as it used to be

[11:59, 19.06.2019] Victoria Transfast: But we are working on it

53. In cross examination Ms Virgolin said the 'he' who received the email was Mr Ribeiro which made no sense in the context of messages which had made no reference to Mr Ribeiro. She said the 'he' who talked about Ms Dyrda working part time was Mr Ribeiro, however when it was put to her that Mr Ribeiro had

not had a copy of Ms Dyrda's email at that point, she agreed that 'he' must have been Mr Marchesani. It was clear to the Tribunal that the references were to Mr Marchesani and that it was Mr Marchesani who to Ms Virgolin's knowledge was considering the issues raised in Ms Dyrda's email.

54. Ms Virgolin said that she was not in the management of the company so it was not her problem. It was put to Ms Virgolin that she referred the claimant and Ms Dyrda to Mr Marchesani because she knew he was in charge. She referred to the previous structure of the company where the owner made the decisions and said that she was following the same path. It was put to her that she had been operations officer for ten months by the time she referred the claimant to to Mr Marchesani. She then said she really did not know why she referred the claimant to Mr Marchesani.

55. It was the Tribunal's impression that at that point in Ms Virgolin's evidence she gave up the unequal struggle of trying to reconcile the case being put forward on behalf of Mr Marchesani that he had no involvement with decisions made about the claimant and Ms Dyrda with the contemporaneous documents.

56. On 24 June 2019 Ms Dyrdra wrote again to Mr Marchesani: (consistently with the construction of the text messages that Ms Virgolin was telling her to try again with Mr Marchesani):

Dear Caio,

I'm writing to you about my last e-mail. I haven't receive reply from you yet.

I have to know how many days of holiday I'm entitled to. As I mentioned before my maternity leave I've got 14 days plus all days accumulated during my maternity leave. As a full time worker 28 days minus bank holidays 3 in 2018 and 5 in 2019, so 20days. In total 34 days to use, so I have to back to work on 13/09/2019.

Is my calculation correct?

I would like to use all days at once after my maternity leave please.

Could you please confirm it for me?

After paid all my holidays I'm interested in part time or remote work. Perfect for me will be 2 days Friday and Saturday or Saturday and Monday.

Please let me know your opinion and work possibilities.

Could you please reply to my e-mail or address it to right person in charge of it?

I need this to plan next steps and make final decision if I will be able to come back to work.

57. On 1 July 2019, Ms Virgolin asked Ms Dyrda to copy her email to Mr Ribeiro and Ms Dyrda did so. Ms Virgolin was challenged in cross examination about how asking Mr Ribeiro to be copied in fit with her earlier account that Mr Ribeiro must have spoken about Ms Dyrda with Marchesani. She had no coherent answer to that question.

58. Mr Ribeiro replied to Ms Dyrda's email:

Dear Agnieszka,

I'll talk to Caio and I let you know as soon as possible.

Have a nice day.

59. We note that Mr Ribeiro was also acting as if the decision maker (or at least a co decision maker) about the issues raised by Ms Dyrda was Mr Marchesani.

60. 15 July 2019, Ms Dyrda emailed Mr Marchesani and Mr Ribeiro, copying in Ms Virgolin:

Dear Jose and Caio

In two weeks my maternity leave will finish. I haven't receive reply for my e-mails yet, but I believe you have accepted my holiday request 34 days all at once after my maternity leave.

Could you please contact me to discuss working conditions after my holiday?

61. In July 2019, Ms Dyrda told the Tribunal that she spoke with Mr Marchesani on the phone. She said that he was very unpleasant and said he was under no obligation to pay her for her maternity leave and holidays. He said he was in charge and that the previous company was rubbish. Mr Marchesani denied speaking with Ms Dyrda on the phone on this occasion or ever.

62. We accepted that this conversation had occurred. We found Ms Dyrda a straightforward witness whose evidence seemed to us to have been candid. She told us for example that she was ultimately happy to receive a redundancy payment. We could see no reason for her to have invented this single telephone conversation. We had the concerns about Mr Marchesani's credibility which we discuss further in our Conclusions.

63. Ms Dyrda's evidence was that at this point in the chronology, Mr Ribeiro started to reply and was 'kind' to her. He said: 'let me to talk to Mr Marchesani we will get back to you'.

64. On 20 August 2019, Mr Ribeiro sent Ms Dyrda an email:

You will be notified of your situation after the holidays as soon as possible.

I will ask our accounting to check what happened to your income tax.

65. At the point when her holiday period ended, 30 September 2019, Ms Dryrda received a letter from Mr Ribeiro:

The purpose of this letter is to confirm the outcome of a recent review by Trans-fast Remittance (London) Ltd of its financial situation and operation requirements after the recent takeover and change in the management, and what this means for you.

As a result, the management has decided to cut down on its polish operations. and eventually close this line of business. This is further enhanced due to the latest technology investment the company has carried out. Therefore, your current position is no longer needed. Regrettably this means your employment will terminate. This decision is not a reflection on your performance.

Following your emails dated 28/05/2019 and 24/06/2019 the employer has made a few attempts to find you an alternative position within the enterprise and any associated entities, however we have failed to do so at this point in time.

Your employment will end immediately. Based on your length of service, your notice period is 12 weeks. Instead of receiving that notice, you will be paid the sum of £7,032.00 plus the redundancy entitlement set out below.

Due to your employment ending because of redundancy. you will also be paid redundancy pay of £6,300.00 in accordance with contract of employment. This amount represents 12 weeks' pay which is based on your 12 years of service.

You will also be paid your accrued entitlements and any outstanding pay. including up to and including your last day of employment.

We thank you for your valuable contribution during your employment with us. Please contact me if you wish to obtain a reference in the future.

66. Ms Virgolin's evidence was that she heard from Mr Ribeiro that Ms Dyrda only wanted to work two days per week which could not be accommodated. She was offered her full time position but did not want that so she was offered redundancy as a good will gesture.

67. Ms Dyrda's evidence was that this was not a negotiated agreement of any kind. There was no discussion about redundancy. That evidence was not challenged; it was not put to her that she agreed her redundancy or negotiated the arrangements in this letter. The letter itself did not suggest that there had been negotiation. Ms Dyrda accepted and was happy with her redundancy pay. We accepted Ms Dyrda's unchallenged evidence.

68. Ms Dyrda's evidence was that she had initially been thinking to come back full time and was looking into nurseries and costs. She changed her decision as she was 'left alone' and no one contacted her. It was like 'fighting' to receive information from the respondent. At the end she would have been happy to go back two days per week because she could not find someone at that time to stay with her child. She had also thought she could perhaps work remotely. She wanted a discussion and had not agreed anything:

I had to go back to work if holiday and maternity leave were finished but where to go back to, who, in what condition? I wanted to discuss it. I was sending messages

She kept trying to get answers and became frustrated.

69. We note that the reasons given in the letter for Ms Dyrda's 'redundancy' make no sense since her role of operations officer still existed and was being filled by Ms Virgolin.

70. On 23 October 2019, the claimant exchanged WhatsApp messages with Ms Virgolin. Ms Virgolin asked if the claimant wanted to come back to work and the claimant said yes. Ms Virgolin said 'so send him an email'. The claimant replied: 'he did not take Agnieszka'. Ms Virgolin said that she had 'heard that'.

71. Ms Virgolin then gave the claimant Mr Marchesani's email address and said that she would help the claimant if 'they' asked her. She told the claimant to copy in Mr Ribeiro.

72. The claimant had a drink with Ms Virgolin at around this time. She told the Tribunal that what Ms Virgolin said suggested that Mr Marchesani was involved in running the respondent. Ms Virgolin said that he had a lot of other business interests and spent a lot of time in Dubai but came to the office a lot and spoke to everyone there. Ms Virgolin said in evidence that she did not remember saying that Mr Marchesani was involved in running the respondent as it was not true. He spent most of the time outside of the UK and when he was in the office, he was just looking at numbers, accounting, that type of thing. She said that Mr Marchesani came to the office once or twice per week when he was in the UK.

73. We preferred the claimant's account of this conversation. We felt throughout that Ms Virgolin was under pressure to present an account of Mr Marchesani's involvement with the respondent which backed up his case. The fact that at times that account broke down when it was obviously inconsistent with contemporaneous documentation made it difficult for the Tribunal to place reliance on any of her evidence touching on this issue.

74. On 13 November 2019, the claimant wrote to Marchesani:

Dear Caio,

I hope you are well.

We did not have an opportunity to meet up. My name is Monika and I am customer service advisor currently on maternity leave.

My maternity ends on 14th January 2020 and I would like to return to work soon after this date. I would greatly appreciate it if you could get back to me with your thoughts at your earliest convenience.

75. On 18 November 2019, Ms Virgolin sent messages to the claimant:

I was talking to them today

I said you were a really good employee

And they should really consider to take you back,

That's why I am insisting

And being annoying

Because I know you are really good,

76. Ms Virgolin's oral evidence in relation to these messages was that Mr Ribeiro was already saying he was not planning to take the claimant back so she was trying to talk to Mr Marchesani to see if he could 'overrule it, something like that'.

77. That day Mr Ribeiro emailed the claimant:

I hope is everything fine!

We are analysing the opportunity for you to return to our team.

We will contact you in early January.

78. On 9 January 2020, Mr Ribeiro emailed the claimant:

Dear Monika,

I wish you a Happy 2020!

We analyse your case and we come to the following conclusion.

We can offer you a job at our new shop on Southwark for Customer Service, the company shall pay an hourly rate of £9.00 per hour from Monday to Friday from 9am to 2pm or 2pm to 7pm and 2 Saturdays per month from 10am to 5pm.

I am at your disposal for any question!

79. The respondent had by this stage opened two shops where customers could attend in person to arrange remittances. One of these shops was in Southwark.

80. In early 2020 Ms Faccioni left the respondent and in due course was replaced by another employee called Gabriella, who was also a Portuguese speaker. Ms Virgolin told the Tribunal that the job was advertised and they were looking for a Portuguese speaker but no advertisement was disclosed.

81. On 10 January 2020, the claimant emailed Mr Ribeiro:

Happy New Year and thank you for your reply.-

Would you please explain what do you mean by 'analysing my case'?

As far as I am concerned, I am still an employee of TransFast and I would like to continue my work on the same basis as previously (salary: 11£ per hour, full time job Monday to Friday).

Unfortunately, I cannot agree to lower my salary by 2£ per hour. Also, before I went on my maternity leave I have officially confirmed that I was planning to return to work in January 2020.

Moreover, would you please provide me with the new shop address in Southwark so that I can check whether this is convenient for me to travel.

Please let me know your thoughts as soon as possible.

I am happy to come over to discuss everything in details.

82. These emails all copied in Mr Marchesani.

83. The claimant's oral evidence about this email is that she wanted the respondents to explain the situation. She did not reject the offer. She wanted more hours and she wanted to check the travel times. She wanted to go to the office and discuss the situation in person. She would have liked to negotiate more hours.

84. On 13 January 2020, the claimant again emailed Mr Ribeiro, copying in Mr Marchesani:

Dear Jose,

Following my email sent on Friday, as this is very time sensitive, I would appreciate it if you get back to me as soon as possible.

Kind regards,

Monika

85. She received no response to these emails and on 23 January 2020, she again emailed Mr Ribeiro copying in Mr Marchesani:

Dear Jose,

I would like to kindly remind you to reply to my e-mail sent on 10th January:

86. She had telephoned that day but was told that Mr Ribeiro did not want to talk and she should send an email.

87. She received no reply to that email.

88. Also in January 2020, the claimant exchanged WhatsApp messages with Ms Matuszewska, which included the following messages from Ms Matuszewska:

10:50 When you are coming back?

10:51 Maybe I will stay here till this time to 'secure' place for you because you never know with them...

And I'm considering looking for a new job already- please keep it for yourself, if I manage to find something, I would like to match it with your return so you can be sure that your place will be free

10:25 I will keep you up to date

And I wonder what would happen if I quit my job and vacated a place for you.

9:04 I would be looking for a new job if I were you

09:05 I thought, to be honest, if I quit my job, they would put you back in your old position and they would keep the same conditions, but there is not guaranty as I see they do not want to put up our salary, even one pound...

C: 11:49 Do you have more orders to Poland or the same as before?

Anna: 11:56 It is not bad, I think the amount is similar as before.

89. On 29 January 2020, the claimant sent a grievance letter to Mr Ribeiro copied to Mr Marchesani:

Having tried to settle our problem informally without success, and having taken legal advice, in accordance with the Employment Act 2008 and the ACAS code of Practice, I am writing to you with regard to the following matters. I wish to raise formal grievances about the following circumstances.

On the 13th November 2019 I informed you that I would be ready to return to work after my additional maternity leave on February. You replied that you were analysing the situation. I heard nothing more until the 9th January when you offered me a different job with less hours, less pay and a different location. I have taken advice and been advised that by law you are bound to offer me the same job as I had before I went on maternity leave. I should also point out that your failure to do this will amount to pregnancy/maternity discrimination under the Equality Act 2010 and also to an automatically unfair dismissal. I have already informed you that I am prepared to take the period 14th January until 24th February as holiday entitlement.

I understand you may arrange a meeting with me to discuss these matters. I may wish to be accompanied by another work colleague.

Please reply with 7 days of this letter.

Meanwhile, I reserve my rights to apply to the Employment Tribunal.

90. The claimant received no reply to her grievance letter.

91. On 5 February 2020, the claimant received a termination letter:

Termination of your employment by reason of redundancy

The purpose of this letter is to confirm the outcome of a recent review by Trans-fast Remittance (London) Ltd of its financial situation and operation requirements after the recent takeover and change in the management, and what this means for you.

As a result, the management has decided to cut down on its polish operations, and eventually close this line of business. This is further enhanced due to the latest technology investment the company has carried out. Therefore, your current position is no longer needed. Regrettably this means your employment will terminate. This decision is not a reflection on your performance.

The employer has made a few attempts to find you an alternative position within the enterprise and any associated entities, however we have failed to do so at this point in time.

Your employment will end immediately. Based on your length of service, instead of receiving that notice, you will be paid the sum of £781.20 plus the redundancy entitlement set out below.

Due to your employment ending because of redundancy, you will also be paid redundancy pay of £3,675.00 in accordance with contract of employment. This amount represents pay which is based on your years of service.

You will also be paid your accrued entitlements and any outstanding pay, including up to and including your last day of employment.

We thank you for your valuable contribution during your employment with us. Please contact me if you wish to obtain a reference in the future.

92. On 6 February 2020, Mr Ribeiro sent an email to the claimant, copied to Mr Marchesani:

I inform you that we sent you an email and letter by post on 06/02/2020 related to your professional interests.

I also inform you that the Trans-Fast Remittance London Ltd never discriminated against any employee from our new management.

93. On 10 February 2020, Ms Matuszewska sent messages to the claimant:

12:44 Amanda is leaving

12:44 And I am stay alone because Victoria no longer works in customer service

94. We note that the implication of those messages was that Ms Matuszewska was herself working in customer services.

95. On 17 February 2020, the claimant sent the respondent a further grievance and appeal against dismissal. She received no response to that document although she was sent a final redundancy payslip.

96. In June 2020 Ms Virgolin became managing director and director of the respondent. We were told that Mr Ribeiro resigned.

97. We saw various advertisements for the respondent offering Polish remittance services later in 2020.

98. We were told that Gabriella went on maternity leave in January 2021. We were told that the respondent was expecting her to return to work.

99. In June or July 2021, Ms Matuszewska left the respondent's employment. Ms Virgolin said that she was replaced by an employee called Nicola who carries out the work previously performed by Ms Matuszewska including bank relationship management and Polish customer service work.

100. On 24 August 2021, the respondent's solicitor wrote to the claimant's solicitors saying that the respondent had no documents to disclose in various categories which had been requested. It appears from the correspondence that the respondent has no documents other than those in the hearing bundle relating to the alleged redundancies of Ms Dyrda and the claimant. No documents related to Ms Dyrda's termination were disclosed by the respondent. Mr Marchesani said they could not see her redundancy letter on

their files. There were no documents relating to the claimant's purported redundancy apart from her termination letter.

101. Ms Virgolin's evidence about the files the respondent kept was that there were paper and electronic files, including staff files with contracts and personnel documents.

102. In August 2021, Ms Virgolin ceased working as managing director for the respondent; she told us that she was on sabbatical for personal reasons. She remains the respondent's sole director. Someone named James was hired to do her duties but was not the managing director.

103. The narrative set out in the respondent's response form about the claimant's dismissal was:

It is denied that Trans-Fast made the decision arbitrarily. The decision was made purely based on commercial reasons and to avoid an immediate likelihood of having to make redundancies.

The company under the new management introduced substantial investments in technology, and trimmed some of the unprofitable lines of the business, which have implicated the claimant's position. Nevertheless, the claimant was offered a different position within the company matching her qualifications & expertises in order to avoid redundancy. The position was declined by the claimant.

On the basis described above, the respondent denies allegations made by the claimant for unfair dismissal

104. The ET3 was filled in by Ms Virgolin who said that she received input from Mr Ribeiro, although he had previously ceased to assist the respondent and subsequently also declined contact. She had no legal assistance and no knowledge of UK law but received some assistance from friends as to the wording. It had not occurred to her to put in the response that the claimant's role had changed whilst she was on maternity leave.

105. There was a similar ET3 submitted on behalf of Mr Ribeiro. Mr Marchesani said they investigated with Mr Ribeiro to get information for the response forms.

<u>Effect of automation on work</u>

106. We heard some limited further evidence about the effect of the CRM system on the work to be done. The claimant believed that even in respect of online transactions, fraud checks would still have to be done by a person, as would the checking of limits and requesting documents. Ms Virgolin said that more of

the Polish work went online because a more favourable rate was offered for online transactions. The advertisements we saw provided a phone number and a web address but did not mention that there were two rates.

Need for Portuguese speaker / extent of Polish work

107. Mr Marchesani agreed in evidence that the CRM system made it easier for people to work with countries in respect of which they did not have the language but said it would still make sense to have a native speaker in the customer service role.

108. In relation to the advertisement showing that the Polish remittance service continued to be offered, Mr Marchesani initially told the Tribunal with some confidence that only the Brazilian rate was quoted in these adverts, against a backdrop of the Polish flag. When the Tribunal later pointed put to him that the rates referred to were consistent with the rates for Polish and not Brazilian currency, Mr Marchesani accepted that he was mistaken.

109. We note Ms Matuszewska's statement to the claimant in January 2020 that she thought that there was a similar number of Polish orders to what there had been previously.

110. Although the CRM system was capable of reporting on the level of particular types of work, as Mr Marchesani accepted, the respondent did not produce a report of how much Polish work there was during the relevant period. Mr Marchesani said by way of explanation that as a small company they had already spend a significant amount on proceedings. Their defence could have been more elaborate; they lacked legal expertise.

111. Mr Marchesani in cross examination said that Portuguese language work was 85% of the total, as compared with the claimant's estimate of 60 – 70%. Ms Virgolin said that she was not sure about the numbers but then said: 'I think 85% is the most accurate'. She said she knew the numbers from the period when she became managing director. We accepted that both sides were estimating the figures but concluded that the claimant's figures were likely to be more accurate for the period when she was in role because of the concerns we had about Mr Marchesani's credibility.

Rationale for the claimant's dismissal

112. Both Ms Virgolin and Mr Marchesani said that they were giving evidence about decisions made by Mr Ribeiro, both in relation to the termination of the claimant's employment and that of Ms Dyrda.

113. Mr Marchesani in cross examination repeatedly said that he could not comment on any of the detail of Ms Dyrda's or the claimant's terminations. All he knew was information gathered after the claim form was received.

114. He said that his role of setting strategic direction for the respondent did not include matters such as review of staffing requirements.

115. There is no contemporaneous documentation predating their redundancy letters explaining the rationale for the alleged redundancy of the claimant or Ms Dyrda.

Retention of Ms Matuszewska

116. Mr Marchesani said that there was no record that the claimant was buying foreign currency and setting rates and dealing with banks. He believed the new management were not aware of what her role was. He said that if she did anything beyond her job description, she was not in the office to show the new management.

117. Mr Marchesani said that he learned from management that the particular customer services role was not there and a new role of bank relationship manager was available and suitable for Ms Matuszewska to carry out as she had real banking experience in Poland.

118. Ms Virgolin said that Ms Matuszewska was an fx dealer and relationship manager in Poland and knew how to negotiate rates and deal with banks.

119. They accepted that the first assertion that the role Ms Matuszewska was performing maternity cover for had changed was in their witness statements.

120. We concluded that there was no reliable evidence that Ms Matuszewska did materially different duties from those performed by the claimant. We accepted the claimant's evidence that she had performed the duties described as banking or relationship manager duties alongside customer service duties. There was no good evidence that the balance of duties performed changed materially over the time Ms Matuszewska was covering the role. Ms Virgolin's evidence that there was such a difference seemed to us to be unreliable. There was nothing in writing to confirm a change to the role and nothing Ms Matuszewska wrote in her messages to the claimant suggested that the role had changed.

121. There was no good evidence of a significant diminution in Polish customer service work. Such evidence as was given on the point was undermined by

Mr Marchesani's at best careless evidence about the exchange rates in the advertisements and the failure to produce a report from the CRM system, which would have been the obvious way for the respondent to demonstrate a downturn and the relative proportions of Polish and Portuguese language transactions.

Law

Unfair dismissal

Reason for Dismissal

122. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal and that it is either a reason falling within subsection (2) or 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.'

Redundancy

123. Redundancy is one of the potentially fair reasons for dismissal: section 98(2)(c).

124. The definition of redundancy is found in section 139 of the Employment Rights Act 1996. It has a number of elements. The provisions which are relevant for the purposes of these claim are s 139(1)(b):
(a)
'*For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –*

……

(b) the fact that the requirements of [the employer's] business -

(i) for employees to carry out work of a particular kind …
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer

…….

have ceased or diminished.'

125. When considering redundancy dismissals, tribunals are not normally entitled to investigate the commercial reasons behind the redundancy situation. The reasonableness of the business decision which leads to a redundancy situation is not a matter on which the Tribunal can adjudicate: Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117, EAT. This does not

mean, however, that we are obliged to take the employer's stated reasons for the dismissal at face value. In order to establish that the reason for the decision was genuinely redundancy, an employer will usually have to adduce evidence that the decision to make redundancies was based on proper information and consideration of the situation: Orr v Vaughan [1981] IRLR 63, EAT, and Ladbroke Courage Holidays Ltd v Asten [1981] IRLR 59, EAT.

Reasonableness

126. Once an employer has established a potentially fair reason for dismissal, the determination of the question whether the dismissal is fair or unfair, having regard to that reason '…depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case.' (Section 98(4) of the ERA).

127. When considering reasonableness, a tribunal cannot substitute its own view. Instead it is required to consider whether the decisions and actions of the employer were within the band of reasonable responses which a reasonable employer might have adopted. The test applies to the procedure followed by the employer and to the decision to dismiss.

Reasonableness in redundancy cases

128. In cases of redundancy, an employer will not normally be deemed to have acted reasonably unless it warns and consults any employees affected, adopts objective criteria on which to select for redundancy, which criteria are fairly applied, and takes such steps as may be reasonable to consider redeployment opportunities.

129. In R -v- British Coal Corporation and Secretary of State for Trade & Industry (ex parte Price) [1994] IRLR 72, Glidewell LJ approved the following test of what amount to fair consultation: 'Fair consultation means (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.'

130. An employer will need to identify the group of employees from which those who are to be made redundant will be drawn. This is the 'pool for selection' and the choice of the pool should be a reasonable one or one which falls within the range of reasonable responses available to a reasonable employer in the circumstances. The definition of the pool is primarily one for the employer and is likely to be difficult to challenge where the employer had genuinely applied his mind to the problem. (Capita Hartshead Ltd v Byard 2012 ICR 1256 (EAT)).

131. In selecting employees for redundancy, the selection criteria must be reasonable and not merely based on the personal opinion of the selector. Provided the selection criteria are objective and applied fairly a tribunal should not seek to interfere in the way the individuals are scored or engage in a detailed critique of the scoring (British Aerospace v Green [1995] ICR 1006, CA and Nicholls v Rockwell Automation Ltd EAT/0540/11).

132. In Pinewood Repro Limited v Page UKEAT/0028 the EAT held that fair consultation during redundancy also involves giving an employee an explanation for why they have been marked down in a scoring exercise. Although this was a case primarily concerned with the now repealed statutory dismissal procedures, in Alexander v Brigend Enterprises 2006 IRLR 422, the EAT held that for an employee to understand the basis of the selection made by the employer, the employer should tell the employee the selection criteria and the scores.

133. When considering the question of the employer's reasonableness, the tribunal must take into account the process as a whole, including the appeal stage (Taylor v OCS Group Limited [2006] EWCA Civ 702).

134. The employer will have to conduct the selection process in good faith and give proper consideration to the applications of the potentially redundant employees: Darlington Memorial Hospital NHS Trust v Edwards and anor EAT 678/95.

Section 99 Employment Rights Act 1996: automatic unfairness

135. Under section 99, a dismissal will be automatically if the reason or principal reason is a prescribed reason. Those prescribed reasons include reasons relating pregnancy, childbirth, maternity and the various types of maternity leave and prescribed in regulations including the Maternity and Parental Leave etc Regulations 1999 ('MPL') which include the fact that an employee has given birth and availed herself of maternity leave.

136. Under Regulation 18(2) MPL, where it is not reasonably practicable, for a reason other than redundancy, for an employer to permit an employee who has taken additional maternity leave to return to her old job after taking AML, the employer can offer her 'another job which is both suitable for her and appropriate for her to do in the circumstances'. It is for the employer to show that it was not reasonably practicable to reinstate the employee to her old job. If it is not reasonably practicable for the employee to be reinstated, she must be offered another suitable job.

137. Under regulation 10 MPL, if it is not practicable for an employer to continue to employ an employee on maternity leave because of redundancy, and there is a suitable alternative vacancy for the redundant employee, she is entitled to be offered that vacancy.

138. If the employer does not comply with its obligations under regulation 10, the dismissal will be automatically unfair under regulation 20(1)(b).

Pregnancy discrimination

139. Under s 18 Equality Act 2010, an employer discriminates against a worker if during the protected period in relation to a pregnancy of the worker's, it treats her unfavourably because of her pregnancy, a pregnancy related illness, because she is on compulsory maternity leave or because of the exercise of the right to maternity leave. The protected period begins when the pregnancy begins, and ends if the employee has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy; if she does not have that right it ends at the end of the period of two weeks beginning with the end of the pregnancy.

140. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an 'effective cause' O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.

141. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: "(2) if there are facts from which the Court could decide, in the absence of any other explanation, that person (A) contravened the provision concerned, the Court must hold that the contravention occurred. (3) but subsection (2) does not apply if A shows that A did not contravene the provision. "

142. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on

the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

143. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: 'The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.

144. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

145. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.

146. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16,* Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

147. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.

148. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly

and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Detriment under the MPL Regulations

149. Section 47C (1) ERA 1996 provides that an employee has the right 'not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer' done for a prescribed reason. Those reasons include reasons relating to pregnancy, childbirth and maternity leave which are prescribed in the MPL Regulations.

150. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

151. Section 48(2), it is for the employer to show the ground on which any act or deliberate failure to act was done. The drawing of inferences in a detriment case was considered by the EAT in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17 (a whistleblowing case)*:*

The burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) however, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

151. The worker must show:

151.1 that he or she made a protected disclosure [had the protected status] and

151.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer

151.3 a prima facie case that the disclosure [protected status] was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou 2017 1RLR 81, CA)

152. The burden then passes to the employer to show the ground on which the act or failure to act was done.

Victimisation

153. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

154. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

155. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

156. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

Liability of non-employers under the Equality Act 2010

157. Under Section 111 EqA it is unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the Act, regardless of whether the person so instructed, etc, actually does so.

158. Sections 111(1)–(3) provide that a person (A) must not instruct, cause or induce another person (B) to do in relation to a third person (C) anything which contravenes Parts 3–7, S.108(1) or (2), or S.112(1) of the EqA. This is referred to in the legislation as 'a basic contravention' and includes all forms of discrimination, victimisation and harassment in employment.

159. Section 111(8) provides that a reference to causing or inducing includes attempting to cause or induce.

160. For Section 111 to apply, the relationship between the person giving the instruction, etc (A) and the person so instructed, etc (B) must be 'such that A

is in a position to commit a basic contravention in relation to B'
— Section111(7). This means there must be a relationship in respect of which discrimination, harassment or victimisation is itself prohibited.

161. Section 109 Equality Act provides that employers are liable for contraventions by their employees in the course of their employment and principals for the contraventions of agents done with the principal's authority. Section 110 Equality Act 2010 provides for the lability of those agents and employees who have committed the contraventions for which their employers pr principals are liable. Section 112 provides for the liability of those who knowingly help others to commit basic contraventions.

162. In Bungay v Saini UKEAT/0331/10, a case under predecessor legislation to the Equality Act 2010, members of the management board of a not-for-profit religious centre were held liable as agents for the centre, Mr Justice Silber said:
'The starting point has to be analysis of the common law rules of agency principles which were explained in Bowstead and Reynolds on Agency (18th edition-1–001) and which were approved in Yearwood v Commissioner of Police of the Metropolis [2004] IC 1660 [36] to the effect that:—
"Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so to act or so acts pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."
24. Thus the test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal (which in this case was the Centre) and not whether the principal had (namely the centre) in fact authorised the Appellants to discriminate. Indeed in *Lana v Positive Action Training Housing (London) [2001] IRLR 501* Mr Recorder Langstaff QC (as he then was) giving the judgment of this Appeal Tribunal had to consider a provision identical to that in Regulation 22(2) contained in section 14 of the Sex Discrimination Act 1975 when he said in respect of an argument that a party would only be liable for an act of discrimination which was done with the authority *"whether expressed or implied whether precedent or subsequent to commit discrimination"*

163. A case on the predecessor provisions to section 111 casts light on the necessary relationship of 'A' and 'B'. In Commission for Racial Equality v Imperial Society of Teachers of Dancing [1983] IRLR 315, [1983] ICR 473, EAT an employer rang a school careers mistress and asked her if any of her girls would be interested in a filing job, adding that they would prefer the school not to send round a 'coloured girl'. The employer had not contravened the RRA: the mistress was not accustomed to act on that employer's instructions. There had to be a relationship between the person giving and the person receiving instructions.

164. There must be a finding, based on evidence, of actual instruction causation or inducement and 'playing a material part' in a decision does not, without more, amount to instruction, causation or inducement: NHS Trust Development Authority (NHS TDA) v Saiger [2018] I.C.R. 297.

Polkey reduction

165. Section 123(1) ERA provides that

'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the 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.'

166. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

167. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:

- in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;
- if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);
- there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;
- however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

168. As Elias J said in Software 2000:

> 'The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.'

Submissions

169. We received oral submissions from both parties which we have considered with care. The respondent conceded at the outset of submissions that the dismissal had been procedurally unfair. After the conclusion of the hearing and during our deliberations, we considered that we needed to have the parties' submissions on the application of Section111(7) Equality Act 2010 to the facts of this case and we invited written submissions on the issue which we received and have also taken into account.

Conclusions

Credibility issues

170. There was a number of reasons why we found the evidence of Mr Marchesani generally lacking in credibility and reliability.

171. There were various matters in relation to which his evidence was in conflict with the contemporaneous documents and the evidence of Ms Virgolin. In

particular, his claim that he had no knowledge of who the claimant was or the circumstances surrounding her employment or its termination prior to receipt of the claim form was simply incredible in view of the contemporaneous documents we have cited above and Ms Virgolin's evidence about those documents. His evidence about his lack of involvement with and knowledge of Ms Dyrda was equally incredible for similar reasons.

172. Mr Marchesani's evidence about the exchange rates in the advertisements was at the very least reckless as to whether he misled the Tribunal. The impression he created was that he saw giving evidence as a platform to attempt to 'sell' his version of events to the Tribunal. He shaped his evidence to support his case and that meant we had to treat his evidence with great care.

173. Ms Virgolin struck the Tribunal as having been under considerable pressure to support Mr Marchesani's account of events, in particular Mr Marchesani's contention that Mr Ribeiro was responsible for employment decisions in relation to Ms Dyrda and the claimant and that Mr Marchesani had nothing to do with those decisions. This meant the Tribunal also had to be very cautious about the reliability of her evidence.

174. By contrast we found the claimant a particularly precise and careful witness and similarly Ms Dyrda was straightforward and did not appear to us to be tailoring her evidence to support the claimant's case.

Unfair Dismissal

Issue: What was the reason for dismissal:

a. Has the Respondent established that the Claimant was dismissed for redundancy?

175. We had to ask whether the respondent had a reduced need for employees to carry out work of a particular kind and whether that redundancy situation led to the claimant's dismissal.

176. We were not satisfied that there was a redundancy situation or that a redundancy situation was the reason for the claimant's dismissal. Ms Matuszewska, the claimant's maternity cover, remained in position. The evidence was that she was employed to cover the claimant's position so her employment would be expected to terminate at the end of the claimant's maternity leave.

177. We were not satisfied that Ms Matuszewska was doing a different role from that performed by the claimant and that the need for employees to do the customer services role had diminished. There were a number of reasons for this which included the failure to mention any such change up to and including the submission of the response forms, the absence of any documentary evidence to demonstrate a change, the absence of any documentary evidence of a downturn in Polish customer services work in circumstances where the respondent could have run a report from its CRM system and the evidence that the claimant had carried out the activities which were said to form part of the changed role of Ms Matuszewska.

178. The fact that Mr Marchesani either deliberately or recklessly misled the Tribunal as to the exchange rates contained in advertisements also undermined the respondent's evidence that there had been a downturn in Polish work.

Issue: Was the reason or principal reason (contrary to s.99 ERA 1996 and Reg 20(3)(a),(b) and (d))or 10 MPL Regulations 1999 and automatically unfair)

i. The pregnancy of the employee;
ii. The fact she had given birth to a child; or
iii. The fact that she had…availed herself of the benefits of ordinary or additional maternity leave.

179. We concluded that the principal reason for the claimant's dismissal was the fact that she was on maternity leave. The evidence from which we could reasonably draw that conclusion seemed to us to be overwhelming. She was replaced by her maternity cover. The respondent failed serially to engage with her properly about her return to work, failed to engage in a discussion about the alternative post offered her, failed to engage with the grievance in which she raised her concerns about her treatment. We have found that the respondent's assertion that she was redundant was untrue.

180. There was no evidence to support the proposition that it was not reasonably practicable to return the claimant to the role she had occupied prior to her maternity leave.

181. In addition, the treatment of Ms Dyrda showed the respondent's exceptionally poor treatment of women on maternity leave. Ms Dyrda was also replaced in her role when she went on maternity leave. Her efforts to engage with the respondent about her return to work were repeatedly ignored. When she did speak to Mr Marchesani, he was unpleasant to her and what he said demonstrated either a lack of understanding or a disregard for her employment rights.

182. We therefore upheld the claimant's claim that her dismissal was automatically unfair because the principal reason for her dismissal was that she had availed herself of the benefits of ordinary and additional maternity leave.

Issue: If the Claimant was redundant was the dismissal unfair (contrary to s.99 ERA 1996 and Reg 20(2)):

b. Do the circumstances constituting the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer; and
c. The reason or principal reason the Claimant was selected for dismissal was her pregnancy, the fact she had given birth to a child or the fact she had availed herself of the benefits of ordinary or additional maternity leave?

183. We did not conclude that the claimant was dismissed by reason of redundancy so this issue fell away.

Issue: If it was not practicable by reason of redundancy for the Respondent to continue to employ the Claimant under her existing contract, was there a suitable available vacancy which she should had been offered under Reg 10, did the Respondent offer it and did the Claimant reject it?

184. This issue also fell away given our findings as to the reason for the claimant's dismissal. We would not have considered the Southwark vacancy a suitable alternative within the meaning of the statute given the very significant differences in particular as to the hours and rate of pay. We accepted that the claimant would nonetheless have considered the vacancy if there had been a discussion with her. She did not reject the vacancy.

Issue: If the dismissal was not automatically unfair under s.99 ERA was it unfair under s.98 ERA, did the Respondent carry out a fair redundancy process including:

d. Fair warning;
e. A fair selection criteria;
f. A search for alternative employment and offering it to the Claimant
g. A substantively fair decision to select her; and
h. An opportunity to appeal?

185. The respondent accepted that, as a redundancy dismissal, the dismissal was procedurally unfair. On the findings of fact we have made above, that was clearly a correct concession. There was no consultation process, no fair selection procedure, no reasonable efforts to redeploy the claimant and no opportunity to appeal.

Maternity Discrimination

Issue: Was the Claimant treated unfavourably by the Respondents because of her pregnancy or because she exercised her right to ordinary or additional maternity leave contrary to s.18(2)(a) or s.18(4) EqA 2010 by the Respondent:

Not allowing her to return to her role;
Offering her a role with reduced pay and hours;
Dismissing her;

186. We considered these three matters together because they are factually intertwined. The offer of the alternative role arose from the decision not to allow the claimant to return to the existing role and the dismissal arose because she was not allowed to return to her existing role and raised questions about the alternative role proposed. There was a similar paucity of evidence in respect of the mental processes of the alleged decision maker, Mr Ribeiro in respect of all of these matters. We concluded that there was ample evidence from which we could reasonably conclude that the claimant was discriminated against in respect of these matters.

187. Those facts included:

- The fact that we found that there was no redundancy situation;
- The unreasonable lack of process and documentation;
- The unreasonable lack of contact with the claimant during the period when she was trying to resolve her work situation;
- No foreshadowing of redundancy until the dismissal letter;
- The failure to deal with the claimant's grievances;
- Ms Dyrda's similar experience; the lack of care and sense of responsibility towards women on maternity leave was striking. Ms Dyrda had to repeatedly ask for communication. Her treatment by Mr Marchesani when he finally spoke to her on the telephone was reprehensible and showed an utter disregard for her rights;
- The lack of evidence that any employee not on maternity leave was put at risk of redundancy or made redundant;
- The fact that we found Mr Marchesani was not truthful with the Tribunal in the ways we have described above. The inference we drew is that he was seeking to conceal his involvement in decision making about the claimant's employment and the lack of a non-discriminatory reason for the claimant's dismissal.

188. We considered that the burden of proof passed even if we set aside the lack of any evidence or explanation from Mr Ribeiro at the first stage.

189. Given that the burden shifted, did the respondents satisfy us that these decisions were not materially influenced by the fact that the claimant was on maternity leave? They failed to do so. We rejected Mr Marchesani's evidence that he had not played a significant role in the claimant's dismissal. As we have found above the respondent failed to satisfy us that the claimant was redundant.

190. We could only speculate as to the respondent's reason for not wanting to retain women who had been on maternity leave. In the case of both Ms Dyrda and the claimant, it may have been simply that they had replaced both women with other satisfactory employees and it was simply more convenient to retain those employees than to accommodate new mothers.

191. We upheld these complaints.

Issue: Withdrawing the offer of work in Southwark;

192. We considered that the inferences which we could reasonably draw in respect of this complaint were somewhat different. The role was offered when the claimant was on maternity leave and was withdrawn (without discussion) after she presented a grievance. In correspondence, once she had asserted her right to her old job, Mr Ribeiro ceased to engage with the claimant.

193. We did not consider those were facts from which we could reasonably conclude the offer was withdrawn for reasons relating to maternity / maternity leave. We could not ignore the obvious inference that the offer was withdrawn because the claimant asserted her rights and brought a grievance.

194. We did not uphold this complaint.

Issue: Not dealing with the Claimant's grievances on 29 January 2020 and 17 February 2020.

195. In assessing whether there were facts from which we could reasonably conclude that maternity / maternity leave played a role in the decision not to deal with the client's grievances, we had regard to the lack of process and unreasonableness which pervaded the respondent's handling of issues

relating to the claimant's and Ms Dyrda's employment. It seemed to us that there was an ignorance of and/or disregard for employment rights which was not limited to maternity-related rights. The evidence to us seemed to support an inference that any grievance or challenge would have been handled by the respondents in the same way as the claimant's were.

196. We did not uphold this complaint.

MPL Regulations

Issue: Was the Claimant subjected to the detriments set out above at paragraph 5?

Was the reason the Claimant was subjected to the detriments that she was pregnant, had given birth to a child or sought to take or avail herself of the benefits of ordinary or additional maternity leave (contrary to Reg 18 and 47C ERA 1996)?

197. Applying the different test for detriment seemed to us to lead to the same results as for direct maternity discrimination and we found that these claims were made out in respect of the complaints about not allowing the claimant to return to her role, offering her a role with reduced pay and hours and dismissing her but not in respect of the claims about withdrawing the alternative role and not dealing with the claimant's grievances.

Victimisation

Issue: Did the Claimant do a protected act under s.27(2)(d) EqA 2010 by:

i. Submitting her grievance of 29 January 2020; or
j. By submitting her grievance of 17 February 2020.

198. These were clearly protected acts. The claimant alleged that there were going to be / had been breaches of the Equality Act 2010.

Issue: Did the Respondents subject the Claimant to the detriments listed at paragraph 5 because she did a protected act.

Not allowing her to return to her role;
Offering her a role with reduced pay and hours;

199. These matters both predated the protected acts and it was not suggested that the respondents believed that the claimant was likely to do a protected act prior to her presenting a grievance.

200. We did not uphold these complaints.

Issues: Dismissing her

Withdrawing offer of work

201. These complaints seemed to us to be connected. The claimant we found would have seriously considered the Southwark role to avoid being out of work. The respondents' withdrawal of the offer of that role against a background where the respondents had refused to allow her to return to her existing role meant there was no role for the claimant.

202. We looked at the contemporaneous documentation, which was the only firm evidence we had to rely on since there was no evidence from the alleged decision maker, Mr Ribeiro, and the evidence we had from the person we concluded was at least in part the decision maker, Mr Marchesani, was unreliable. That documentation showed that the effect of the submission of the claimant's first grievance was that the respondents moved almost immediately to dismiss her and assert that there were no alternative roles for her. There was ample evidence from which we could conclude that the submission of the grievance materially caused the respondents to move from a position where they were prepared to retain the claimant in the alternative role to one where they decided to make her redundant.

203. Did the respondent provide an explanation that satisfied us that the protected act did not play that role? The only explanation was that the claimant had turned down the role in Southwark. That was a manifestly untrue explanation. The claimant raised issues about the role and sought to have a discussion. She did not reject the role.

204. We upheld these complaints.

Issue: Not dealing with grievances

205. It seemed to us that the evidence which we had was that the respondents generally failed to deal appropriately with employees in relation to their employment rights. Looking at the evidence we had as to how the respondents behaved, we drew the inference that any grievance raised by an employee would have been ignored, regardless of whether it included a protected act.

206. We did not uphold this complaint.

Liability of Mr Ribeiro

207. Mr Ribeiro as an employee of the respondent company is liable for doing the acts which we have found constituted direct discrimination by the claimant's employer, the respondent company. That liability arises under Section 110 Equality Act 2010.

Liability of the first respondent

Issue: Did the first respondent instruct or cause another (Mr Ribeiro) to do any act which amounts to discrimination set out at paragraph 5, 8 and 9 and so is liable under s.111 EqA 2010 for the discrimination.

208. We considered carefully whether the evidence led us to draw an inference that Mr Marchesani had instructed or caused Mr Ribeiro to commit the acts of unlawful discrimination we have set out above.

209. The documentary evidence around Ms Dyrda's employment showed that Mr Marchesani was involved in those decisions and that Ms Virgolin treated him as the ultimate authority for the decisions. Neither Ms Virgolin nor Mr Ribeiro ever suggested that Ms Virgolin had been in error in directing Ms Dyrda to Mr Marchesani and Ms Dyrda's telephone call with him suggested that he regarded himself as the ultimate authority. Mr Ribeiro himself said he would talk to Mr Marchesani about Ms Dyrda's situation.

210. By the time the issue of the claimant's employment was being discussed, Ms Virgolin had been in her operations officer post for some considerable time. She must we considered have known who was responsible for decision-making. She nonetheless directed the claimant to correspond with Mr Marchesani and Mr Ribeiro. In her messages to the claimant, it was 'them' ie Mr Marchesani and Mr Ribeiro whom she was going to persuade to retain the claimant, and her oral evidence is that she thought Mr Marchesani might overrule Mr Ribeiro. Mr Marchesani never objected to having the emails sent to him, asked to be removed from email chains or directed the claimant or Ms Dyrda to deal with Mr Ribeiro only. We had again to consider what inferences we should draw from our conclusion that Mr Marchesani had sought to mislead the Tribunal about the nature of his involvement in the decisions and knowledge of the claimant and Ms Dyrda. We concluded that he was untruthful with the Tribunal because he was anxious to conceal the fact that he ultimately had the power to make those decisions.

211. For all of these reasons, we concluded that Mr Marchesani had either instructed Mr Ribeiro to take the actions we have found to be discriminatory or agreed those actions jointly with Mr Ribeiro in circumstances where he had more power than Mr Ribeiro, as the person who could terminate Mr Ribeiro's employment and could 'over-rule' Mr Ribeiro. In those circumstances, it seemed to us that it was correct to characterise his involvement as *causing* the discriminatory acts.

212. As to the application of section 111(7), we considered whether the relationship between Mr Marchesani and Mr Ribeiro was such that Mr Marchesani was in a position to commit a 'basic contravention' in respect of Mr Ribeiro. The respondent company was, as we understood it, Mr Ribeiro's employer. Mr Marchesani as the sole shareholder clearly had power to cause Mr Ribeiro to be removed from his employment and, given his significant involvement in the management of the company, the opportunity to commit other discriminatory acts towards Mr Ribeiro because of the nature of his relationship with the company. It seemed to us that in appropriate circumstances, Mr Marchesani could be found to have aided the respondent company in committing any such acts of discrimination (within the meaning of of section 112) and therefore Mr Marchesani was in a position to commit a basic contravention in respect of Mr Ribeiro.

213. For those reasons we found Mr Marchesani liable for the acts of discrimination we have found made out

Polkey

214. We have found that there was no potentially fair reason to dismiss the claimant. If the respondent had allowed her to return to her existing role, as it should have done, there was no evidence to suggest she would not have remained in that role at least as long as Ms Matuszewska. There was no evidence that the respondent had had to make redundancies in the period between the claimant's dismissal and Ms Matuszewska's departure.

215. We therefore found that the claimant would have remained in the role until at least the summer of 2021 and there was no basis on which we could properly conclude that there was any realistic chance that her employment would have been lawfully terminated by the respondent or that the claimant would herself have chosen to leave her employment at a time of significant economic uncertainty and when the job market would have been impacted by the pandemic.

Conclusion and directions

216. We have upheld some of the claimant's claims for all of the reasons set out above.

217. There will be a remedy hearing on **24 January 2022**. We gave the following directions:

- The parties will exchange any further documents for the remedy hearing by **3 January 2022**;
- The claimant will provide the respondents with a copy of the bundle for the remedy hearing by **10 January 2022;**
- The parties will exchange any further witness statements by **17 January 2022.**

_____

Employment Judge Joffe
16/12/2021

JUDGMENT SENT TO THE PARTIES ON

16/12/2021.

FOR THE TRIBUNAL OFFICE