EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms A Janiec	AND	Nutrisure Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 4 to 6 May 2022

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr D Curwen (counsel)
For the Respondent: Mr M Stephens (counsel

JUDGMENT

The judgment of the tribunal is that:

1. The claims of unfair dismissal and automatically unfair dismissal are dismissed.

2. The claims of discrimination on the grounds of pregnancy and maternity are dismissed.

REASONS

1. In this case the Claimant, Ms Janiec, claims that she has been unfairly dismissed or automatically unfairly dismissed due to pregnancy or taking maternity leave and that she was discriminated against. The Respondent contended that the reason for the dismissal was redundancy, and that the dismissal was fair.

Procedural matters

2. At the start of the hearing both Counsel confirmed that written consent had been given in writing to a Judge sitting alone at the final hearing, in accordance with s. 4(3)(e) of the Employment Tribunals Act 1996.

3. It was also explained that the Judge was unable to sit on 6 May 2022. It was agreed with the parties after hearing submissions, that an oral Judgment on liability would be given by video at 10am on 6 May 2022.

4. The issues to be determined had been discussed at a case management preliminary hearing, before Employment Judge Goraj, on 8 September 2021. At the start of the final hearing the issues were further discussed. The parties agreed that there was not a relevant time limit point in the claim. The Claimant accepted that there was a genuine redundancy situation. It was confirmed by the Claimant that it was not considered that reg 20(2) the Maternity and Parental Leave etc Regulations 1999 (“MAPL”) was applicable to the claim. It was said that the significant issue was whether reg 10 MAPL applied. At the point of closing submissions the Claimant confirmed that she was not pursing the failure to appoint her to the National Account Manager role was an act of discrimination.

The evidence

5. I heard from the claimant, and I have heard from Ms Moore for the Respondent. I was also provided with a bundle of documents, a reference in square brackets, within these reasons, is a reference to a page in that bundle.

The facts

6. I heard the witnesses give their evidence I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

7. The Respondent is a wholesale supplier of superfoods.

8. On 4 January 2016 the Claimant commenced employment as a Stock and Purchasing Administrator. In mid-2017 the Claimant became the National Account executive.

9. The Claimant’s job description was written by the Claimant in about July 2019. Claimant’s role involved:

(a) Manage Bulk accounts (existing and new business): It was suggested by the Claimant that this involved looking for new business and persuading people to give new business. The Claimant's witness statement did not give examples of such new business and no examples were given during her oral evidence and Ms Moore was unaware of evidence of such new business being generated by the Claimant. I did not accept that the Claimant's role involved obtaining new bulk account customers. It was most likely that she was involved in the administration of those accounts when the customer had been brought on board.

(b) Admin support of national accounts: I accepted that this involved uploading pricing information and it was an intensive administration activity.

(c) Office management (managing and maintaining printers, cleaning rota, stationery, franking machine, and other related issues).

(d) First point of call for customers regarding technical/quality queries and following up as required internally: I accepted that the Claimant would be a first point of contact for customer queries. She had access to the technical team to take advice from so that it could be relayed to the customer.

(e) "Supporting marketing on account specific activity, co-ordinating digital requirements to create images/banners and adverts", and under other duties "to assist the Sales and Marketing team function as and when required with administration or other work-related duties.": It was suggested to Ms Moore that this involved new customers , however there was not such a suggestion in the job description and Ms Moore was unaware that this had occurred. The Claimant suggested in her evidence that her role was a sales role, however no such specific mention was made in the job description she wrote. It was notable that the Job Description included, "Support the sales managers with meeting preparation, reporting, samples, sales and marketing materials etc. then follow up meeting action points with the customer to ensure agreed outcomes are achieved." The Claimant's witness statement said that she had suggested Marks and Spencer as a business development opportunity and it was later added to the portfolio. In oral evidence the Claimant said that before Mr Kemp joined in 2018 the Respondent had a plan to deal with M&S, however she could not remember whose idea it was although she mentioned it to him when he started. I accepted Ms Moore's evidence that Mr Kemp had initiated the new business because he had a good relationship with M&S's buyer, Bookers. Mr Kemp brought in Mr Roberts to assist with the M&S contract and the Claimant provided administrative support. The e-mails regarding the relationship with M&S did not include the Claimant until 29 May 2019 when the

Claimant was copied into an e-mail about scanning [p106E]. In a later e-mail tasks were given to staff [p106A], and the tasks given to the Claimant were administrative in nature. In her oral evidence the Claimant said that she had obtained Harrods as a client, but clarified that she had attended the meetings with Stuart, National Account Manager. The Harrods contract was not mentioned to Mr Sharma when the Claimant was interviewed for the Business Development Associate role, when she was specifically asked about new business. I did not accept that the Claimant was responsible for gaining the contract. The Claimant was not given sales targets and she did not receive any commission or sales related pay.

(f) The Claimant was involved in some sales, but this was on an ad hoc basis, it was not something she was regularly doing and it was not the primary focus of her role

(g) Working with the Ops team on any delivery issues, incoming charges etc.

(h) Operating on Sage e.g. checking orders, stock levels.

(i) Manage all administration with customers in terms of day to day operations, answering queries via e-mail or telephone following up on projects and managing important customer documentation on every account assigned.

(j) Launching new products with retailers: The Claimant suggested that this was product development. I accepted Ms Moore's evidence that product development is very different to launching a new product and was the process followed when developing a new product and involved looking at competitors, nutritional value, claims that could be made on the packaging with trading standards and that the Respondent had highly qualified developers who did this. The job description listed administrative activities and did not refer to the Claimant being responsible for such launches.

10. I considered that the Claimant was overstating the extent of her role. There was a lack of examples within her witness statement and when she was interviewed for the Business Development Associate ("BDA") role she only provided a few examples of how she said she could demonstrate that she met the criteria. Her oral evidence was similarly vague. The Claimant was seeking to assert that she had a significant sales role and had been instrumental in obtaining new business. I did not accept the Claimant's evidence that she had essentially been undertaking a sales role for two years. Ms Moore was not told about such sales activity shortly before the Claimant's maternity leave and there was a lack of examples of what said

to have been done. I accepted that the Claimant made some sales, however that was not the main focus of her role and her role was predominately administrative and providing support to the sales and marketing teams. I did not accept that the claimant approached potential new customers in order to sell products.

11. In summer 2019, the Claimant discovered that she was pregnant and informed the Respondent. She commenced maternity leave on about 28 October 2019.

12. Before the Claimant went on maternity leave, she had a discussion with Ms Moore as to what her role involved and gave her a copy of the job description so that her duties could be covered.

13. When the Claimant started maternity leave, her duties were covered by existing staff, mainly by Ms Moore and Claudio Stein, International Sales Manager.

14. The Respondent had approval to keep its office open during the Covid-19 pandemic lockdown, which started in March 2020, because it was a food production and distribution business. However, many staff worked from home.

15. The Claimant sought to suggest that the financial health of the Respondent was good and relied upon two accounts with which she had involvement: Tree of Life and Essential. No other client accounts were provided in the bundle. I accepted Ms Moore's evidence that due to panic buying by members of the public, retailers had sought to purchase more of those products. In the consultation meeting on 22 May 2020, the Claimant said that she had looked at the Respondent's accounts online and noted turnover had been going down for a while, this was inconsistent with the Claimant's assertion of good financial health. I accepted Ms Moore's evidence that customers were not seeing the Respondent's products as a priority and due to Brexit and the Covid-19 pandemic it had lost a quarter of its customers and the expected revenue was down at least £500,000. The two accounts referred to by the Claimant accounted for less than 5% of the Respondent's business.

16. On 6 May 2020, the Claimant wrote to the Respondent, acknowledging the challenging times and said she wanted to return to work on 3 August 2020 and asked if she could start on 2 days a week.

17. Ms Moore, Business Manager, spoke to Mr Kemp, Chief Executive Officer, and discussed whether they needed a National Accounts Executive going forward, due to a downturn in business. I accepted Ms Moore's oral evidence that she was aware that she and Mr Stein had been undertaking

the Claimant's duties and that since the start of the pandemic staff had been working from home and there was no management of the office. The other duties the Claimant had been performing, and were being covered by Ms Moore and Mr Stein, had decreased and were minimal and involved less than 2 days' work. Ms Moore had hoped for growth in the first financial quarter; however grocers would not take on new listings and therefore the hoped increase in work did not materialise. I accepted that very few of the Claimant's tasks, before she went on maternity leave, were required to be covered at the point that she sought to return and that this was due to the pandemic and the effect of Brexit on the business. I did not accept that the concern about the amount of work the Claimant could do was because the tasks had been allocated to other staff members.

18. On 19 May 2020, Ms Moore telephoned the Claimant and said that her role might be redundant and explained the situation and that a meeting would be held to discuss it. She was sent a letter inviting her to the consultation meeting.

19. The Claimant attended a consultation meeting on 22 May 2020. In the meeting the Claimant was told that her role was a standalone role and she was the only one at risk of redundancy. The Claimant asked what had made the Respondent realise that her role was not required and was told that on receipt of the return to work e-mail, it was realised that if she returned to work on 2 days a week there still would not be work for her to do. It was confirmed that customers were pausing on new listings. The Claimant suggested that the decision was unreasonable because she was on maternity leave and Ms Moore said that her maternity leave was not related to the decision and unfortunately there was not work available for her to carry out. The Claimant was asked if she thought there was an alternative to redundancy and she suggested furlough. The Claimant said that she had developed good knowledge of the customers and products and asked for it to be taken into account. The Claimant asked whether her notice could be increased to two months and if it could she would leave. The Claimant in cross-examination accepted that her role was a standalone role.

20. On 22 May 2020, the Claimant sent a letter saying she wanted to extend her maternity leave to 26 October 2020 and asked to be informed of any vacancies.

21. On 29 May 2020, Ms Moore wrote to the Claimant, in which she said that the Claimant had agreed that in the light of the downturn in work and economic climate that redundancy was the only feasible option. The Claimant was invited to a second consultation meeting.

22. On 31 May 2020, the Claimant wrote to Ms Moore disputing that she had agreed that redundancy appeared to be the only feasible option.

23. On 2 June 2020, Ms Moore wrote to the Claimant. She said that the Claimant had not disagreed with the responses to her questions and she had understood the Claimant had agreed. It was confirmed that no decision had bene taken. A further consultation meeting was proposed. The Claimant responded by saying there had been a misunderstanding because she had not agreed to redundancy. I accepted that there had been a misunderstanding by Ms Moore.

24. On 15 June 2020, investor approval was given to the Respondent to advertise for 2 new roles: Social Media Executive and Business Development Associate and to replace Mr Anderton, National Account Manager, who was the Claimant's manager and had left at the end of 2019.

25. On 22 June 2020, Ms Moore spoke to the Claimant about the social media role and sent the job description by e-mail the following day. On 24 June 2020, the Claimant e-mailed asking to be considered for the social media role. She also asked to speak to Mr Kemp.

26. The Claimant spoke to Mr Kemp. Ms Moore was with Mr Kemp when he called the Claimant. The Claimant said that she discussed a new range of products and that it would be important to introduce them as soon as possible and it was vital for the Respondent to focus on new business development. Ms Moore did not recall this being said. The Claimant asked about the state of the business and was informed about the situation. She asked if Mr Kemp knew what would happen about her job and was told that he could not say anything because nothing had been decided. I accepted the Claimant's evidence that a few days later the Respondent advertised the BDA role.

27. On 25 June 2020, the Claimant was informed that she would have to follow the usual application process for the social media role. The Claimant did not apply for the role because she did not consider that she was suitable for it. Ms Moore did not consider the role was suitable for the Claimant either, because it required proven experience of growing social media following across various platforms, experience in maintaining and running paid social media campaigns and proficiency in photograph and Videography, which the Claimant did not have.

28. On 29 June 2020 Ms Moore e-mailed the Claimant links advertising vacancies for the BDA role and another role. She also said, regarding the social media role, that they had interviews that week. Ms Moore did not think that they were suitable roles for the Claimant but had promised to keep her informed of any vacancies.

29. The requirements for the BDA role were set out in a job description [p124]. It was a requirement that the applicant had a 2:1 degree and a minimum of 2 years' experience in a full time Business Development or Sales role. I accepted that it was a standalone role and that the Respondent wanted someone who could 'hit the ground running'.

30. The Claimant e-mailed her CV and expressed interest in the BDA role. Ms Moore decided, that despite the Claimant having a 2:2 degree or the right experience she should be interviewed.

31. Ms Moore did not consider that the BDA role was suitable for the Claimant. The job description stated that, "the primary focus will be to drive new growth through new business channels, developing and managing new customer opportunities. There will also be a requirement to maintain existing customer relationships at all levels, with the right intensity to maximise business." The Claimant said that the role was a support role and relied upon the responsibility of "Supporting and learning from the Commercial Director, working with them directly to achieve the company's commercial objectives." Ms Moore disagreed and referred to the primary focus. I accepted Ms Moore's evidence, that the thrust of the role was to generate new business for the Respondent. It was a role in which the incumbent was expected to obtain new business, which is different to supporting others in their roles.

32. The key responsibilities in the job description included:

    (a) Prospecting for clients and converting them into increased business opportunities.

        The Claimant suggested that her previous work with bulk accounts showed that she had this experience, however I rejected the Claimant's evidence as to the extent of her involvement in obtaining new bulk accounts.

    (b) Providing insights by researching the e-commerce and retail landscape for superfoods that will shape business decisions.

        It was accepted by Ms Moore that part of the Claimant's role had been visiting stores and that all staff had to check the competition. The Claimant said in her witness statement that she provided reporting and analysis across the retail and e-commerce portfolio. I accepted Ms Moore's evidence that this involved downloading EPOS data, which had since been automated and that she had never seen a report produced by the Claimant. However I accepted the Claimant's oral evidence that she would obtain sales data for accounts and cross-reference it with how the products were sold, for the sales directors and managers.

(c) Engaging with potential customers by email or phone with a view of building long term relationships that may result in significant business opportunities for the company.

It was suggested to Ms Moore that the Claimant's bulk account role involved engaging with potential customers. Ms Moore was not aware of any evidence which tended to suggest that the Claimant had generated new bulk order customers and nothing was suggested in the Claimant's witness statement to that effect. Ms Moore had a handover with the Claimant prior to starting maternity leave and no mention of this was made. I did not accept the Claimant's evidence as to the extent of her involvement in obtaining bulk order customers.

(d) As you develop your skills and experience with business development, there will be opportunities for Account Management with retailers and wholesale customers.

The Claimant asserted that she undertook account management, but did not provide any examples, although she said she managed one project for Tesco. It was suggested to Ms Moore that account management was part of the Claimant's existing role. Apart from managing bulk accounts the Claimant's job description made no reference to managing wholesale accounts. I accepted Ms Moore's evidence that an account manager was comparable to the Claimant's line manager's role and although she had worked alongside an account manager, she was not actively doing it herself.

(e) In the about you section, it was stated that the person worked well to targets and likes smashing goals.

33. It was put to Ms Moore that the Claimant had made a potential contact with Pepsi-co, this was not referred to in her witness statement. I accepted Ms Moore's evidence that it was highly likely that there would be a conflict of interest with Pepsi-co due to the Respondent's earth based ethos and that Pepsi-Co used artificial elements to their products.

34. The Claimant suggested that she worked closely with the Business Development Manager and Sales and Marketing, developing strategies in the retail and e-commerce channels. No examples were given. Ms Moore's unchallenged evidence, which I accepted, was that the Claimant did not do this and it was undertaken by others.

35. I accepted Ms Moore's evidence that she considered the Claimant's experience had been managing existing customers on an administrative

and sales support level and she did not have the experience for the BDA role and therefore the role was not suitable for her.

36. On 8 July 2020, the Claimant was told that her BDA application had been progressed to a stage 1 competency based interview [p126].

37. On 16 July 2020, the Claimant was interviewed for the BDA role by Mr Sharma, an intern who was between his graduate and post graduate studies.

(a) In question 1, the Claimant was asked to provide an example of when she took on new customers and the process of engaging, negotiating and closing the agreement. The Claimant had referred to two customers, however they had become customers before the Claimant's employment and she said she took over accounts from a previous account manager. It was noted that the question was not answered directly. It was notable that there was not a reference to bulk accounts won either. The Claimant had also not referred to Harrods and could not provide an explanation as to why, other than she had been out of the business for a while.

(b) In question 2, the Claimant was asked if she was aware a client was going through a tough time, how would she balance perseverance and sensitivity. The Claimant did not provide a specific example, but made suggestions including offering an extension for payment/credit. This was not considered beneficial to the Respondent. The Claimant did not give examples of how she would persist in a sensitive way.

(c) In question 3, the Claimant was asked about the value of accounts she had managed previously and the proportion of new and existing business. The Claimant gave a total value but did not say what the proportion of new business was. It was concluded that this was because she had no experience of that aspect of the role.

(d) Question 6 related to losing an opportunity to do business with an important partner, the reason why and what was leant. The Claimant used M&S as an example, but was not directly involved.

(e) Question 7 related to learning about a new product. The Claimant said that she knew about superfoods and she would liaise with New Product Development. Ms Moore considered that a good answer would have included requesting samples to test in order to understand the taste, flavour, and effects after consuming the product.

38. After the interview Ms Moore had a discussion about the Claimant's answers with Mr Sharma and was told that the Claimant did not have the experience, knowledge or skills required to perform the BDA role and win

new business and her answers had focussed on account management and customer support which was part of the role she had been doing. He considered her answers were not focussed and the Claimant did not understand the nature of the role applied for.

39. On 28 July 2020, the Claimant was informed that her application for the BDA role would not be progressed. None of the candidates were suitable and no one was appointed to the post.

40. On 3 August 2020, Ms Moore said that they would revisit the possibility of redundancy in September or October 2020 and would look again for suitable vacancies.

41. On 6 October 2020, Ms Moore informed the Claimant about a potential administration role [p133].

42. On 7 October 2020, Ms Moore informed the Claimant that they were recruiting for a National Account Manager and sent the job specification.

43. On 13 October 2020, the Claimant replied that “none of these roles are an appropriate alternative to redundancy at this point.” She accepted during evidence that these roles were not suitable.

44. On 13 October 2020, Ms Moore e-mailed the Claimant and advised that the consultation process would restart.

45. On 22 October 2020, the Claimant attended a consultation meeting with Ms Moore. At the meeting it was confirmed that the Respondent was still struggling to get new listings. It was confirmed that the Claimant had been told she had a right to be accompanied and that she had not brought a companion. When asked if there was an alternative to redundancy the Claimant replied, “not at this time.” It was confirmed that there were no active vacancies but there was a part time administration role still required and the Claimant said that she would not be interested in it.

46. On 23 October 2020, the Claimant was invited to attend a further meeting and that the outcome could be a notice of redundancy. She was informed of her right to be accompanied.

47. At a meeting on 26 October 2020, Ms Moore discussed that all available roles had been sent to the Claimant. Discussion took place about the outstanding administration role and it was confirmed that there were no vacancies. The Claimant did not have any other alternatives to discuss. After a break it was concluded that the Claimant’s role was redundant and no suitable alternative employment had been identified.

48. On 26 October 2020, the Claimant was sent a letter confirming that she was being made redundant. She was paid a month in lieu of notice and her statutory redundancy payment. She was informed of her right to appeal.

49. The Claimant did not appeal the decision to dismiss her.

50. During 2020, three employee's, including the Claimant, were dismissed for redundancy. Other employees also left the business and were not replaced.

The Law

51. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("ERA").

52. I have considered section 98 (4) ERA which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) 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 – (b) shall be determined in accordance with equity and the substantial merits of the case".

7. **Section 99 ERA (Leave for family reasons) provides:**

[(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

[(aa) …

(b) ordinary, compulsory or additional maternity leave,

[(ba) …

and it may also relate to redundancy or other factors.

(4) A reason or set of circumstances prescribed under subsection (1) satisfies subsection (3)(c) or (d) if it relates to action which an employee—

(a) takes,

(b) agrees to take, or

(c) refuses to take,

under or in respect of a collective or workforce agreement which deals with parental leave.

(5) Regulations under this section may—
(a) make different provision for different cases or circumstances
(b) apply any enactment, in such circumstances as may be specified and subject to any conditions specified, in relation to persons regarded as unfairly dismissed by reason of this section.]

53. Regs 10 and 20 of the Maternity and Parental Leave etc Regulations 1999 ("MAPL") provide:

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

20 Unfair dismissal
(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.
(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—
(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

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

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

(a) the pregnancy of the employee;

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

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

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

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

(i) . . .

(ii) parental leave, or

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

[(ee) the fact that she failed to return after a period of ordinary or additional maternity leave in a case where—

(i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or

(ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;]

[(eee) the fact that she undertook, considered undertaking or refused to undertake work in accordance with regulation 12A;]

(f) the fact that she declined to sign a workforce agreement for the purposes of these Regulations, or

(g) the fact that the employee, being—

(i) a representative of members of the workforce for the purposes of Schedule 1, or

(ii) a candidate in an election in which any person elected will, on being elected, become such a representative,

performed (or proposed to perform) any functions or activities as such a representative or candidate.

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

[(5) Paragraphs (3) and (3A) of regulation 19 apply for the purposes of paragraph (3)(d) as they apply for the purposes of paragraph (2)(d) of that regulation.]

(6) . . .

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

(a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances;

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

(c) she accepts or unreasonably refuses that offer.
(8) Where on a complaint of unfair dismissal any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph . . . (7), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

54. S. 18 of the Equality Act 2010 provides:

18 Pregnancy and maternity discrimination: work cases
(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
(a) because of the pregnancy, or
(b) because of illness suffered by her as a result of it.
(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
(7) …

Outline of Relevant Law

S. 18 Equality Act 2010 ("EqA")

55. I approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

"*(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

56. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant unfavourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. 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 the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

57. Under s.18 there is not a requirement for there to be a comparator.

58. The EqA does not define what it means by 'unfavourable' treatment for the purpose of S.18. The Equality and Human Rights Commission code does not address what unfavourable treatment is in relation to pregnancy or maternity, but assistance can be found in what is said about discrimination arising from disability where it notes (para 5.7) that "This means that the disabled person 'must have been put at a disadvantage' Often the disadvantage will be obvious, and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that it is acting in the best interests of a disabled person, it may still treat that person unfavourably."

59. Para 8.22 of the code notes that the following would all be unlawful under S.18:

    a. failure to consult a woman on maternity leave about changes to her work or about possible redundancy
    b. disciplining a woman for refusing to carry out tasks due to pregnancy-related risks

c. assuming that a woman's work will become less important to her after childbirth and giving her less responsible or less interesting work as a result
d. depriving a woman of her right to an annual assessment of her performance because she was on maternity leave, and
e. excluding a pregnant woman from business trips.

60. The Tribunal needs to consider whether there has been something adverse rather than beneficial.

61. For a claim to succeed the unfavourable treatment must be 'because of the pregnancy or maternity leave. In every case the tribunal has to determine the reason why the Claimant was treated as she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminator has treated the claimant unfavourably and did so on the grounds of the protected characteristic. The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

62. I was referred to paragraphs 53 and 54 in Chief Constable of Hampshire Constabulary v Haque UKEAT/0482/10CEA:

"[53] The critical question as we see it therefore arises directly from the words of the statute. It is to answer only half the case to show that because a woman is on maternity leave and is a nursing mother she may have a disadvantage, which others would not have, in being called to disciplinary proceedings. The second limb of the question has also to be addressed: why is it that the disciplinary proceedings are to be progressed? Is it on the ground of her sex? Is it because the woman concerned is on maternity leave? Is it because she is a nursing mother? Is it because she is a woman?

[54] The tribunal here, in para 53, appeared there to have accepted the proposition that it was sufficient to answer the "reason why" question to show that there had been unnecessary interference with the Claimant's rights whilst on maternity leave. It uses the word "therefore" in reaching the conclusion that that amounted to direct discrimination on the ground of sex. There was no actual examination by the tribunal of the motivation, conscious or unconscious, as Lord Nicholls described it."

63. I was also referred to Charlesworth v Dransfield Engineering Services Ltd UKEAT0197/16/JOJ, a decision in relation to discrimination arising from disability in which the Tribunal had held the Claimant's absence was not an effective or operative cause of the dismissal. At paragraph 18, in upholding the decision of the Tribunal it was said "…No doubt there will be many cases where an absence is the cause of a conclusion that the employer is able to manage without a particular employee and in those circumstances is likely to be an effective cause of a decision to dismiss even if not the main cause. But that does not detract from the possibility in a particular case or on particular facts, that absence is merely part of the context and not an effective cause. Every case will depend on its own particular facts."

MAPL and S. 99ERA

64. The circumstances in which there will be an unfair dismissal are not confined to when the employee is dismissed because of pregnancy or took leave, but also applies to when the dismissal is connected with such a reason. The EAT in Atkins v Coyle Personnel plc [2008] IRLR 420 considered the causation question in relation to the similarly worded reg 29 in the Paternity and Adoption Leave Regulations 2002.

"39. The Tribunal has to ascertain on the facts what the reason or principal reason for dismissal was and then ascertain whether such reason was connected with the fact that the employee took or sought to take paternity leave. As was rightly conceded before us a time connection alone cannot suffice as otherwise nobody could be fairly dismissed even if gross misconduct occurred during paternity leave or was discovered during such leave.

40. The fact that the words 'connected with' might on the dictionary definition be taken to mean 'associated with' does not mean that a causal connection is not necessary between the dismissal and the paternity leave. 'Associated with', without more, is a very vague concept, so wide and vague that it could on its face include a simple time connection, in other words it would be enough merely because the employee was on paternity leave at the time he was dismissed. Such an interpretation cannot have been intended and for the same reasons nor can a 'but for' test or a causa sine qua *non test.*

41. We are satisfied that 'connected with' in Regulation 29 means causally connected with rather than some vaguer, less stringent connection, though in a sense the debate is both sterile and semantic as the task of considering the facts and determining whether the reason or principal reason found is such that it is connected with the fact that the employee took or sought to take paternity leave is a fact finding task which like, any finding on causation or otherwise, has to be performed. The legislation must, in our view, be

given a wide purposive interpretation and the application of the test must, as on any causation issue, be approached in a pragmatic commonsense fashion on the facts of the individual case."

65. Reg. 10 deals with the situation in which an employee's existing job becomes redundant while she is absent on maternity leave. Where there is a suitable available vacancy, the employee is entitled to be offered alternative employment before the existing contract ends, *in preference to employees who are not absent on such leave.* The new employment must take effect immediately on the ending of the employee's employment under the previous contract. To comply the new contract of employment must be such that the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and its provisions as to the capacity and place in which the employee is to be employed, and as to the other terms and conditions of employment, are not substantially less favourable to the employee than if he or she had continued to be employed under the previous contract.

66. If a suitable alternative vacancy exists (i.e. a vacancy that is suitable, appropriate and not substantially less favourable than the employee's previous job) and the employer fails to offer it to the employee, the dismissal will be automatically unfair under S.99 ERA if the reason or principal reason for the dismissal is redundancy. If, however, such a vacancy genuinely does not exist, there is nothing to prevent the employee being made redundant.

67. 'Suitable' is to be judged from the perspective of an objective employer and not the employee's perspective. In Simpson v Endsleigh Insurances Services Ltd UKEAT/0544/09/DA, the EAT held at paragraph 31:

" …under the Regulations there is no requirement on the claimant to actually engage in this process, although clearly the employers would have to consider what they knew about the claimant's personal circumstances and work experience. It seems to us that at the end of the day it is up to the employers, knowing what they do about the claimant, to decide whether or not a vacancy is suitable. Ms Palmer suggested this places a very difficult task on employers when deciding, for example, whether or not to offer a more senior post to an employee who is on maternity leave. The tribunal, at the end of para 10(7), suggested that there was no reason why the employers could not choose to test suitability by assessment and interview. The IDS handbook on redundancy, at p 106, sets out the position thus:

"To a large extent, this puts an employee away on maternity or adoption leave in a far more advantageous position than if she were at work, since it may be that, had she been at work, she would not have been offered one of the available alternative jobs in preference to other more highly qualified candidates."

We are by no means satisfied that an employer could choose to test suitability by assessment and interview."

68. In Sefton Borough Council v Wainwright UKEAT/0168/14/LA, it was stated that the Tribunal must ask whether a suitable vacancy is available. If it is available, the consequences, however unpleasant, of the employer giving the job to the employee are not relevant. The test was not one of reasonableness and employees should not be required to undertake some form of competition in order to exercise their right.

69. The requirement of suitability can only sensibly be tested by the requirement that it is coupled with a new contract complying with reg. 10(3), i.e. not substantially less favourable (see Simpson).

70. When considering reg 20(1)(b) it is necessary to consider the three questions in sub-paragraph (2). This does not require the Claimant to show that she was dismissed because of pregnancy or maternity, but that it was connected to the fact she had taken maternity leave. In S Petch Ltd v English-Stewart UKEAT/0213/12/JOJ, the Claimant went on maternity leave and the employer did not engage a temporary replacement. The Tribunal found that the work was carried out by three people rather than four and this was done by modernisation, introduction of IT and sharing the Claimant's work out among the three other members of staff. The EAT said at paragraph 27, in relation to reg 20(2), "The sub-section is satisfied if she can show that the reason or reason for the dismissal was or were connected to the fact that she had taken maternity leave, and it is plain that on the findings of fact by the Tribunal – indeed the inevitable findings on the evidence it recites -the dismissal for redundancy in this case took place because the employer had appreciated the redundancy situation and the need for cutting back from four to three, as a result of the fact that the Claimant was away on maternity leave." However the Tribunal did not go on to consider whether reg 20(2)(b) applied or whether she was bound to be dismissed in any event.

71. Consideration was given to the test in Kuzel-v-Roche [2008] IRLR 530;
    (a) whether the Claimant and had showed that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;
    (b) if so, had the employer showed its reason for dismissal;
    (c) if not, it is open to the tribunal to find that the reason was as asserted by the employee, but that reason does not have to be accepted. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side.

Redundancy

72. In Williams v Compair Maxam Ltd [1982] IRLR 83, the EAT set out the standards which should guide tribunals in determining whether a dismissal for redundancy is fair under s 98(4). Browne-Wilkinson J, giving judgment for the tribunal, expressed the position as follows: '... there is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:

    1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

    2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

    3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

    4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

    5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

73. It has been stressed that not all these factors are present in every case since circumstances may prevent one or more of them being given effect to. However, if they are to be departed from one would expect a good reason for doing so. The basic approach is that, in the unfortunate circumstances that necessarily attend redundancies, as much as is reasonably possible should be done to mitigate the impact on the work force and to satisfy them that the selection has been made fairly and not on the basis of personal whim.

74. In Langston v Cranfield University [1998] IRLR 172, the EAT held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case. Accordingly, even if not raised specifically by the claimant, the employment tribunal will be expected to consider them. Moreover, the employer will be expected to lead evidence on each of these issues.

75. Pool: The case law has rendered it difficult for an employee to challenge the manner in which an employer draws a selection pool. If an employer has genuinely applied his mind to the question, a tribunal is not obliged to consider the reasoning of the employer in greater detail. The question for the tribunal is whether the pool was one which a reasonable employer could have chosen (Taymech-v-Ryan [1994] UKEAT/663/94 and Hartshead-v-Byard [2012] ICR 1256).

76. Selection: It is now well established that tribunals cannot substitute their own principles of selection for those of the employer. They can interfere only if the criteria adopted are such that no reasonable employer could have adopted them or applied them in the way in which the employer did. However, as the EAT made clear in the Williams v Compair Maxam case, it is important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment.

77. Consultation: Consultation is one of the basic tenets of good industrial relations practice. Where unions are recognised, consultation will generally be with the trade unions, although this does not normally eliminate the obligation to consult in addition with individual employees. Usually the former will be over ways of avoiding redundancy and (if the union is willing to discuss the issue) over redundancy selection criteria. Consultation with individuals will generally arise once they have been at least provisionally selected, and will be for the purpose of explaining their own personal situations, or to give them an opportunity to comment on their assessments. As the EAT commented in Mugford v Midland Bank plc [1997] IRLR 208, unions will generally want to consult over selection criteria, but rarely if ever wish to be involved in the invidious process of selecting individuals by the application of those criteria. It is in that context that individual consultation takes on a special importance.

78. The EAT in Mugford v Midland Bank [1997] IRLR 208 summarised the state of the law as follows:

    (1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the [employment] tribunal finds that a reasonable employer

would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the [employment] tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

79. Search for alternative employment: In order to act fairly in a redundancy situation an employer is obliged to look for alternative work and satisfy himself that it is not available before dismissing for redundancy (with the same employer or elsewhere in a group of associated employers, if appropriate). It has been emphasised by the case law that the duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment.

Polkey

80. The decision in Polkey-v-AE Dayton Services [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (Singh-v-Glass Express Midlands Ltd UKEAT/0071/18/DM).

81. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (Software 2000 Ltd.-v-Andrews [2007] ICR 825 and Contract Bottling Ltd-v-Cave [2014] UKEAT/0100/14).

Conclusions

82. Due to the various tests to be applied, the factual reason for dismissal was considered first and then the tests under the EqA and ERA applied afterwards.

83. It was not in dispute that there was a genuine redundancy situation. After the Claimant started her maternity leave, the Respondent was faced with the effects of Brexit and the Covid-19 pandemic. This resulted in a reductions of customers by 25% and grocers were delaying placing listings. This resulted in a significant decrease in turnover. Further the effect of the pandemic meant that staff were not working in the office and therefore those aspects of the Claimant's role were no longer required. Further the Claimant's remaining duties had significantly reduced and constituted less than 2 days' work. In the circumstances there had been a reduction of work of a particular kind and there was a redundancy situation.

What was the reason for the dismissal?

84. When the Claimant went on maternity leave her duties were covered by Ms Moore and Mr Stein. The combined effect of Brexit and the Covid-19 pandemic resulted in a loss of 25% of the Respondent's customers and those remaining customers were delaying placing new listings and this caused a significant reduction in turnover. Staff were working from home and therefore the Claimant's office management functions were not required. Further the type of work the Claimant was doing had significantly reduced. I accepted that Ms Moore was hopeful that there would be an increase of growth and business, however that did not come to fruition. When the Claimant said that she wanted to return to work, Ms Moore looked at the work the Claimant had been doing, which was being covered by her and Mr Stein. It was realised that there had been a significant decrease in that work and that even if the Claimant returned for 2 days a week those remaining duties would not be sufficient for 2 days work. This was the reason for the dismissal.

Dismissal under s. 99 ERA

What was the sole or principal reason for dismissal and was it connected with the Claimant's maternity leave?

85. The Claimant relied upon the EAT decision in Petch and submitted that it would undermine the protection under MAPL if her role could be divided up and when she sought to return was told that she was redundant. This was not a situation in which the Claimant's duties had been allocated to other staff members and it was then realised that they could do without the

Claimant. The Claimant's duties were covered by Ms Moore and Mr Stein when she went on maternity leave, however this was a situation in which the work the Claimant had done was no longer needed or had significantly reduced. Ms Moore, on receiving the Claimant's notice of intention to return had looked at the work she and Mr Stein were covering and considered whether the work the Claimant had been doing before her leave was still required. The Respondent was faced by the dual effects of Brexit and Covid-19 restrictions and it was for those reasons the work the Claimant had been required to do had significantly diminished. The Claimant sought to rely on there being no evidence of wholesale redundancies, however what is relevant to consider is whether work of a particular kind had ceased or diminished. It was significant that there had been a recruitment freeze and other employees who had left were not replaced. The downturn and knock-on effects would have happened to the Respondent in any event and it was coincidental that the Claimant was on maternity leave at the time. I was satisfied that the Respondent had shown that the reason for the Claimant's dismissal was redundancy and there was no causal link or connection between her pregnancy or maternity leave for the decision. The Claimant having taken maternity leave was not an effective cause of her dismissal for redundancy. Further I was satisfied that the Respondent had proved that the sole reason for the Claimant's dismissal was because her role was redundant and the fact that she had been on maternity leave had no influence in the decision. The claim under reg. 20(1)(a) and the associated part of s. 99 ERA was therefore dismissed.

Was reg. 10 MAPL complied with?

86. The Claimant was dismissed by reason of redundancy and therefore she was entitled to be offered alternative employment where there was a suitable vacancy.

87. The Claimant submitted that she should have been offered the BDA position and that it was suitable. Whether a vacancy is suitable is to be judged from the perspective of an objective employer.

88. Much of the evidence during the hearing related to whether or not the Claimant's National Account Executive ("NAE") role was similar to the Business Development Associate ("BDA") role. There was a dispute between the parties as to what the Claimant did as NAE. I found that the Claimant had tried to oversell the extent of her role as NAE. The Claimant attempted to suggest, which I rejected, that a significant part of her role was sales and obtaining new business and developing products. I accepted that in order to determine whether a role was suitable, requiring an employee to undertake a competitive assessment process is not appropriate in the context of the reg. 10 obligations. However, the interview the Claimant attended was evidence which could be used in order to assist with

determining what the Claimant's role had been before her maternity leave. It was noted by Mr Sharma that the Claimant failed to provide examples of why she was suitable for the role during the interview and this was something which was also apparent in the Claimant's witness statement and oral evidence. I did not accept that the Claimant was involved in obtaining new bulk account customers, although she was involved in the administration. The Claimant wrote her job description, but did not include any reference to being a salesperson. The Claimant had a tendency to suggest involvement in work, for example the M&S contract, but on closer scrutiny had a lesser involvement than suggested. I was not satisfied that the Claimant had won the Respondent new customers. The Claimant was providing predominantly an administrative support role rather than acting as a salesperson developing new business. She made some sales, but that was not the major focus of her role.

89. The Claimant submitted that the BDA role was a support role and therefore she was suitable to carry it out, however the main thrust of the role was to develop new growth. This was a role in which the incumbent would be responsible for their own success and was not supporting someone else to obtain new business.

90. The Claimant submitted that a key failing was that Ms Moore did not consult with the Claimant about the nature of the role before deciding that it was not suitable. Although it might have been desirable for Ms Moore to speak to the Claimant, she also had the benefit of having a discussion with the Claimant before the start of maternity leave as to the nature of the role and had been given the job description written by the Claimant that made no specific reference to conducting sales or seeking new business. Ms Moore was unaware of new business that the Claimant says she had brought to the Respondent. Ms Moore and Mr Stein had also been carrying out the Claimant's duties whilst she was on maternity leave.

91. The BDA role was one which required the incumbent to develop new business and generate sales. It was a demanding role, which required qualifications and sufficient full time experience, which the Claimant did not have. The Claimant had some sales involvement, but was not acting as a full time salesperson and undertook a predominantly administrative role.

92. Although I was not provided with details of the contractual terms for the role and therefore assuming that they were more favourable or the same as the Claimant's, I was satisfied that the Respondent had shown an objective and reasonable employer could and would conclude that the role was not suitable for the Claimant.

93. Accordingly there was not a breach of reg. 10 and no breach of reg 20(1)(b) as a consequence.

94. The Claimant was therefore not dismissed contrary to s. 99 ERA and the claim of automatically unfair dismissal was dismissed.

S. 18 Discrimination

95. The Claimant relied upon two allegations of unfavourable treatment, the decision to place her at risk of redundancy and the decision not to offer her the BDA role. Being placed at risk of redundancy is to an employee's disadvantage as is not being offered an alternative role. Both instances were unfavourable and therefore it is necessary to consider whether it occurred because the Claimant had been pregnant or had taken maternity leave.

Placing the Claimant at risk of redundancy.

96. The Claimant relied upon her being dismissed for redundancy whilst on maternity leave and that she was not offered the BDA role as primary facts to shift the burden of proof to the Respondent. The Claimant was dismissed whilst on maternity leave in circumstances in which there was a genuine redundancy situation. There was no evidence of Ms Moore having made any improper or derogatory comments about pregnancy or maternity leave. Ms Moore paused the process when the Claimant applied for the BDA role and when she asked to extend her maternity leave and she informed the Claimant of all job vacancies, irrespective of whether she thought they were suitable. Employees on maternity leave have enhanced protection and there was sufficient evidence to call for an explanation by the Respondent. I accepted Ms Moore's evidence about the redundancy situation. The Respondent had lost business and had a significantly reduced turnover. Customers were not placing new listings and the work the Claimant had been carrying out before her maternity leave had significantly reduced, to the extent that it would not even provide 2 days of work a week. It was significant that Ms Moore informed the Claimant of all vacancies and paused the process for her. The reason why the Claimant was put at risk of redundancy was because the work she had done had significantly decreased. The Claimant was in a standalone role. I was satisfied that the fact the Claimant was on maternity leave played no part whatsoever in the decision making of Ms Moore. The reason for placing the Claimant at risk of redundancy was due to the amount of work the Claimant could do and lack of business being done by the Respondent. This allegation was therefore dismissed.

Not offering the Claimant the BDA role

97. The Claimant relied upon the same facts in order to discharge the primary burden of proof and for the same reasons there was sufficient evidence to

call upon the Respondent for an explanation. For the reasons set out above, I concluded that the Respondent was not in breach of its reg. 10 obligations. Ms Moore had discussed with the Claimant the nature of her role before the Claimant went on maternity leave and the Claimant had provided her with a copy of the job description she had written. In that job description there was not a specific reference to the Claimant acting in a sales capacity or a requirement to obtain new customers. The role was a sales and business development role, whereas the Claimant's role had been predominantly administration based. On the basis of Ms Moore's knowledge she decided that the BDA role was not suitable for the Claimant. There was no evidence of derogatory or improper remarks about pregnancy or maternity leave. Ms Moore assessed what she knew about the Claimant, what the Claimant had told her about the role and what she knew about it. Ms Moore considered that the Claimant's role was mainly administrative and that the BDA role was a different sales role for which the Claimant did not have the experience. I was satisfied that the fact the Claimant had been on maternity leave played no part in the decision making process and that the reason was Ms Moore believed that the Claimant's role was very different to the BDA role and she did not have the experience to do it. This claim was therefore dismissed.

Dismissal under s. 98 ERA

98. For the reasons stated above the Claimant was dismissed by reason of redundancy.

99. The Claimant was the only National Account Executive and it was work undertaken by that role which had significantly decreased. The Claimant was placed in a pool of one and she accepted that she was in a standalone role. There were not any other employees affected by the reduction of that type of work and I was satisfied that the Respondent had genuinely applied its mind as to who was at risk.

100. There was not a selection criteria applied on the basis that the Claimant was the only person at risk of redundancy. In the circumstances a scoring exercise would not assist the decision making process and a reasonable employer could have adopted the same approach as the Respondent, in that it consulted with the Claimant as to ways the redundancy could be avoided and looked at all possible job vacancies it had.

101. The Respondent undertook a consultation meeting on 22 May 2020 with the Claimant at which the situation facing the Respondent was discussed and that even if the Claimant returned 2 days a week there was insufficient work for her to do. At that stage there were not any vacancies for alternative roles. The Claimant had an opportunity to make alternative

suggestions to redundancy. The Claimant then said that she wanted to extend her maternity leave.

102. Investor approval was given to undertake recruitment on 15 June 2020 and the Claimant was informed of the social media role and the BDA vacancies. The consultation process was paused at that stage. After the Claimant had been informed that she was unsuccessful in her application for the BDA role she was advised that the possibility of redundancy would be looked at in September or October and they would look again for suitable vacancies. The Claimant was on maternity leave at this time and the Respondent paused the process.

103. On 22 October 2020 the Claimant attended a further consultation meeting at which the redundancy situation was discussed again. She did not consider that there was an alternative to redundancy. She was informed that there were not any vacancies apart from an administration role and the Claimant said she was not interested in it. A further consultation meeting took place on 26 October 2020, the situation had not changed.

104. The Respondent held 3 consultation meetings with the Claimant, at which she was able to make alternative proposals and discuss job vacancies. I was satisfied that a reasonable employer could conduct the consultation process in that way.

105. I rejected the Claimant's assertion that the decision to dismiss her was a foregone conclusion. Ms Moore paused the process whilst the Claimant applied for the BDA role. She also agreed to wait until September/October before reviewing the situation, in other words it enabled the Respondent to wait and see if the redundancy situation had changed. Ms Moore also informed the Claimant of all vacancies within the Respondent.

106. The Respondent searched for alternative employment for the Claimant and gave her the opportunity to apply for vacancies. The only available role which the Claimant considered was suitable was the BDA role. The Claimant attended a competency based interview in order to determine whether she was suitable for it. This was despite the Claimant not meeting the degree qualification requirement and not having been employed full time in a sales role for at least 2 years. The Claimant was unable to provide examples of gaining new customers and gave examples of business in which she was not directly involved. The Claimant faced the difficulty of lacking the relevant experience and skills. It was notable that nobody was appointed to the role on the basis that none of the candidates were suitable. The Claimant submitted that the Respondent should have provided training to the Claimant. Although training could be provided, the Respondent required someone who had experience in the role. Training

does not give experience and the Respondent wanted someone who could 'hit the ground running'. In the circumstances a reasonable employer could have concluded that the Claimant was not suitable for the position.

107. The procedure used by the Respondent was one which a reasonable employer could have adopted. Taking into account the size and administrative resources of the Respondent, the circumstances of the redundancy situation, that the consultation process had been paused a reasonable employer could have concluded that there was a sufficient reason to dismiss the Claimant and the Claimant was fairly dismissed.

108. The claims were therefore dismissed.

Employment Judge J Bax
Dated 9 June 2022

Written Reasons sent to Parties: 15 June 2022

FOR THE TRIBUNAL OFFICE