EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs B Warren-Ukadike		New Look Retailers Limited

Heard at: London Central **On**: 14, 16, 20, 21, 22 September 2022

Before: Employment Judge H Stout
Tribunal Member S Pearlman
Tribunal Member E Wiles

Representations
For the claimant: In person
For the respondent: Ms C Ibbotson (counsel)

LIABILITY AND REMEDY JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Respondent did not directly discriminate against the Claimant because of her maternity leave in contravention of ss 18 and 39 of the EA 2010;
(2) The Respondent did not directly discriminate against the Claimant because of her sex in contravention of ss 13 and 39 of the EA 2010;
(3) The Respondent did contravene ss 19 and 39 of the EA 2010 by indirectly discriminating against the Claimant because of sex when it adopted a practice *"during the redundancy process, requiring workers to be willing to work flexibly and to make themselves available for work most days of the week"*;
(4) The Claimant's complaint of unfair dismissal under Part IX of the ERA 1996 is well-founded;
(5) The Claimant's financial compensation must be reduced by 70% to reflect the chances that she would have been dismissed by reason of redundancy in any event even if the Respondent had acted lawfully;

(6) The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures when it failed to treat her complaint of 14 May 2021 as a grievance. It is just and equitable to uplift the award by 20% under s 207A(2) of TULR(C)A 1992;

(7) The Respondent must pay to the Claimant within 14 days, by way of compensatory award for unfair dismissal: **£2,998.30**, comprising £2,548.30 loss of earnings and £450 for loss of statutory rights;

(8) The Respondent must pay to the Claimant within 14 days, by way of compensation for discrimination, **£5,673.83**, comprising interest on the loss of earnings of £136.84, £5,000 for injury to feelings and £536.99 by way of interest on that.

REASONS ON LIABILITY

1. Mrs Warren-Ukadike (the Claimant) was employed by New Look Retailers Limited (the Respondent) from 3 June 2020 to 21 May 2021 as a Sales Advisor. She was dismissed by reason of redundancy following her return from maternity leave on 17 May 2021. In these proceedings, she brings claims for unfair dismissal, sex and maternity discrimination.

The type of hearing

2. This has been a remote electronic hearing under Rule 46. The public was invited to observe via a notice on Courtserve.net. No members of the public joined. There were no significant issues with connectivity.

3. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

4. The issues to be determined were agreed at the start of the hearing to be as follows:

Direct maternity discrimination (s. 18 Equality Act 2010)

1. Did the Respondent subject the Claimant to the following treatment?

    1.1. Not allowing the Claimant to make a Flexible Working Request during her maternity leave;

    1.2. Not offering the Claimant a suitable alternative role.

    1.3. Being given a contract at White City and having that taken away.

2. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the treatment was because she was on compulsory maternity leave and/or exercising her right to additional maternity leave?

3. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Direct sex discrimination (s. 13 Equality Act 2010)

4. Did the Respondent subject the Claimant to the following treatment?

    4.1. Not allowing the Claimant to make a Flexible Working Request after her maternity leave had ended.

5. Was any of that treatment "less favourable treatment", i.e., did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparator(s)? The Claimant relies upon a hypothetical comparator.

6. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that this was because of his disability.

7. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Indirect sex discrimination (s. 19 Equality Act 2010)

8. Did the Respondent apply the following provision, criterion and/or practice ("PCP") generally:

    8.1. During the redundancy process, requiring workers to be willing to work flexibly and to make themselves available for work most days of the week?

9. Did the application of the PCP put people sharing the Claimant's protected characteristic (sex, female) at a particular disadvantage when compared with persons who do not have this protected characteristic (men) in that women are more likely to undertake childcaring responsibilities than men and will therefore be more unlikely to be able to provide the required flexibility and availability.

10. Did the application of the PCP put the Claimant at that disadvantage?

11. Can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim? The Respondent relies on the following legitimate aim: operational needs of the organisation, specifically, to be able to properly operate the stores and to meet business need by providing proper staff cover.

Unfair dismissal

12. Was there a "*potentially fair*" reason for dismissal? It is agreed that the reason was "*redundancy*".

13. Did the Respondent comply with regulation 10 of the *Maternity and Parental Leave etc Regulations 1999*, i.e. did the Respondent offer the Claimant (before the end of her employment under her existing contract) alternative employment with her employer under a new contract of employment which was suitable in relation to the employee and appropriate for her to do in the circumstances and its provisions as to capacity and place in which she was to be employed (and other terms and conditions of employment) were not substantially less favourable to her

than if she had continued to be employed under the previous contract? If not, the consequence under regulation 20(1)(b) is that the dismissal was unfair.

14. Did the Respondent adopt a fair procedure?

15. If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when? (Polkey)

16. Was there an unreasonable failure to comply with the ACAS Code of Practice on Grievance procedures in relation to the Claimant's of 14 May 2021 and, if so, whether it would be appropriate to uplift the award and, if so by what amount between 0% and 25%?

The Evidence and Hearing

5. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We did so. We also admitted into evidence certain additional documents which were added to the bundle.

6. We explained our reasons for various case management decisions carefully as we went along.

7. We received a witness statement and heard oral evidence from the Claimant, and also received witness statements from her former colleagues Maria Pena and Celestine Teca. Ms Pena and Ms Teca were not cross-examined; we took their statements 'as read'. We received statements and heard oral evidence from the following witnesses for the Respondent:

    a. Lily Vashnevsky, General Manager White City Store
    b. Mica Rennison, Store Manager Stamford branch
    c. Gerard Adams, Senior People Business Partner
    d. Hema Ladwa, Business Partner (left April 2022)
    e. Rebecca Skinner, General Manager Gracechurch Street store (since July 2021 Regional People Partner).

Adjustments

8. No adjustments were required.

Amendment application

9. At the start of the hearing, the Claimant applied to amend her claim to include two additional claims of direct maternity discrimination: (i) being given a contract at White City and having that taken away; and (ii) not being informed about alternative roles available between January and May 2021. We

permitted the former, but refused the latter for reasons we gave orally at the hearing but set out as follows.

10. The Tribunal has a discretion under Rule 29 to permit amendments to a party's statement of case. In accordance with the principles in Selkent [1996] ICR 836, it is a discretion to be exercised in accordance with the over-riding objective and taking into account all the circumstances, including:

    a. the nature and extent of the amendment,
    b. its timing (including any applicable time limits and the implications of the amendment in terms of impact on the trial timetable or costs),
    c. its merits (where those are obvious, there being no point in adding an amendment to bring a hopeless claim); and
    d. the relative prejudice/hardship to the parties of either granting or refusing it.

11. In deciding whether or not to permit an amendment, the Tribunal must first consider the nature of the amendment and, in particular, whether it is the addition of factual details to existing legal claims or addition or substitution of other legal labels for facts already pleaded to or whether it amounts to making an entirely new claim. If a new claim is to be added by way of amendment, then the Tribunal must consider whether the complaint is out of time or, at least, whether there is an arguable case that it is in time. For this purpose, the new claim is deemed received at the time at which permission is given to amend (*Galilee v Comr of Police of the Metropolis* [2018] ICR 634 at para 109(a)) (or possibly the date on which the application to amend is made, but not earlier). If it is out of time, or not reasonably arguably in time, permission should be refused.

12. If the proposed amendment is simply relabelling of existing pleaded facts with new legal labels, there is no need to consider the question of time limits, although timing generally will still be a consideration, along with all the other factors.

13. Although the Respondent accepted that the proposed direct maternity discrimination claim in relation to the White City contract was a relabelling of what the Claimant had originally pleaded as a breach of contract claim, in our judgment it was a 'new claim' because a discrimination claim focuses not on the contract but on the 'reason why'. Time limits therefore needed to be considered, but the claim is subject to a just and equitable test for extension and, if meritorious, we were satisfied that there would be an arguable basis for an extension of time. The nature and extent of the amendment was in reality minimal and the Respondent already had a witness dealing with the factual issue so there was little prejudice to the Respondent. On the other hand, without the amendment the Claimant would not have a claim about this aspect of what happened to her (it being agreed that it did not work as a breach of contract claim in the Tribunal) and it was apparent that it was a point of importance to her.

14. The proposed claim about not informing the Claimant about roles that became available between January and May 2021 was a new claim. The facts were not pleaded in the claim form. It adds very little to the claim the Claimant has already brought, save that it refocuses the claim in a way that has caused surprise to the Respondent and which the Respondent has not come prepared to deal with. Although we may need to cover the question of what happened with roles during that period as part of the unfair dismissal claim, in our judgment the prejudice to the Respondent of granting this amendment outweighs the prejudice to the Claimant of refusing it.

The facts

15. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

16. The Respondent owns a national chain of clothing stores.

17. On 3 June 2000 the Claimant commenced employment at the Respondent as a Sales Advisor. She has worked at five different New Look stores, starting off in Coventry, then Holloway, then Wood Green, Marble Arch and, with effect from 21 June 2018, the Tottenham Court Road (TCR) or 'the Oxford Street store' as it is sometimes referred to (albeit that there were at that time three New Look stores on Oxford Street (52)).

18. The Claimant also had another job as a self-employed dance teacher, teaching after-school classes on Thursday and Friday afternoons.

The Claimant's contract and the Respondent's standard working arrangements

19. The Claimant's contract was the Respondent's standard part-time contract, which obliges the Respondent to offer the Claimant a minimum number of hours (8, in the Claimant's case) and provides at clause 4: *"We may ask you to work additional hours where there is a business need. We will schedule your hours over our continuous seven day trading week. … We can amend your shift pattern or the length of your shifts with a minimum of 24 hours' notice."* In other words, the Respondent's standard contract requires availability over a 7-day period.

20. Ms Skinner for the Respondent explained in her witness statement that: *"In practice of course a store manager will try and organise schedules to fit in with individual preferences and so that sales advisors are able to predict their*

shifts, however flexibility is required to cope with illness, holidays or other unexpected absences and peak period when retail is very busy. Generally, that flexibility needs to be relied upon most in the smaller stores".

21. The Respondent also has a Flexible Working Policy, under which any employee with at least 26 weeks' service may make a formal flexible working request (FWR) (not more than 1 request in any 12-month period), which may (counterintuitively) include requests for 'inflexible' working, i.e. fixed hours or days. If a FWR is granted on a permanent basis then the policy provides for an individual's contract to be amended to reflect that change. This is a permanent change and the policy provides there is then no automatic right to return to previous working arrangements.

22. What can be agreed by the Respondent by way of flexible working depends on the store. In general, larger stores (such as TCR where the Claimant worked) had more employees and opened longer hours so that work was available between 7am and 10pm and there were more employees providing more scope for fixed shifts for those who needed them. Other stores do not have such long opening hours or as many employees and thus generally require more flexibility of employees to ensure cover, including cover for holidays and sickness absence. For example, we have heard the store at which Ms Skinner works, Gracechurch Street, works 8am to 8pm, while the White City store that Ms Vashnevsky manages trades from 10am to 10pm.

<u>The Claimant's working arrangements and personal circumstances</u>

23. The Claimant had four periods of maternity leave during her time at New Look.

24. The Claimant's average working hours prior to commencing her fourth maternity leave in May 2020 were 18 hours per week, although in quiet periods the stores would reduce hours for all employees, down to their contractual minima.

25. At the TCR store rotas were mostly fixed for everyone. However, the Claimant had been working fixed days for the Respondent since 2006 for childcare reasons, and prior to that because she was at school and university. This was an 'informal' arrangement agreed with her local manager – 'informal' in the sense that it had not been agreed pursuant to a FWR and her contract had not been amended to reflect it.

26. The Claimant's colleague, Celestine Teca, explains in her witness statement that she also arranged set days and times with her manager following her maternity leave with her second child as she had a good relationship with some of her managers and they sympathized with her childcare difficulties, although prior to maternity leave she had been told by managers 'repeatedly' that this was not possible.

27. The Claimant in her witness statement states that she was unable to comply with the Respondent's flexible shift requirements because in order to do so she would have to arrange full-time childcare, which she could not afford to do for a part-time job. She argues this is indirectly discriminatory against women who are more likely than men to have primary childcare responsibility. She relies on data from the Institute for Fiscal Studies (IFS) which shows that women still are more likely to be the primary childcarers.

28. Prior to her May 2020 maternity leave, the Claimant was working on Mondays, Thursdays and Fridays. During term time she worked 7am to 1pm on each of those days so that she could finish in time to teach dance classes. During the holidays she did two 'full' days 7-4pm on Thursday and Friday as she did not teach during the holidays.

29. Having heard oral evidence from the Claimant, we find that the position at all times material to the matters which we are considering was that the Claimant's husband did not work Thursday and Friday and so could look after their youngest child on those days with no need for nursery. If the Claimant had been required to work Monday to Wednesday, she would have needed to put her youngest child in nursery, and so far as she was aware there were nursery places available, though she would have needed to check before committing to working on a Monday to Wednesday that one of the nurseries still had those days available.

30. For the dance classes, she told us during the liability part of the hearing that she was self-employed and could choose the days that she worked, so those were flexible.

31. The Claimant has three other older children who are at primary and secondary school. In evidence, she confirmed that there was no issue with dropping them off at school or collecting them as her husband could do that if need be.

32. The Claimant was not promoted during her employment, and believes that is because she was a mother of young children. She says she was told on many occasions by different managers that this was the reason. When she asked Adriano Capocci at a redundancy meeting when the Marble Arch store closed in 2018 whether she could jobshare a management position, he is noted as responding *"we'd need more availability than you're able to offer at the moment because it would need to be fair for other members of the management team as well"*. Despite this, the Claimant in these proceedings frequently referred to the 2018 redundancy exercise as having been carried out differently (and better) than the 2020/2021 exercise because although her availability was limited then too, she was still offered a role. We add that the Claimant's allegation about historic discrimination in relation to management roles does not form part of her claim in these proceedings, was not explored in oral evidence and has no bearing on the issues we have to consider, so we make no factual findings in relation to it either.

The pandemic

33. On 23 March 2020 the first 'lockdown' due to the Covid-19 pandemic began and the Respondent's stores closed from 26 March 2020.

34. On 20 April 2020 the Claimant along with other employees was placed on 'furlough', back-dated and effective as of 22 March 2020.

35. The Respondent's stores were closed until 15 June 2020, and then again between 5 November 2020 and 2 December 2020 and again between 6 January 2021 and 12 April 2021. In London and the South East (where the Claimant worked) the third period of lockdown began before Christmas on 21 December 2020. Staff were furloughed during each lockdown period.

36. Footfall in stores has been significantly impacted by the pandemic. Footfall into central London stores for the period 19 October 2020 to 8 December 2020 was down by 45.4% when compared to the same period in 2019. Footfall into central London stores for the period 1 May 2021 to 31 May 2021 was down by 48.3% when compared to the same period in 2019. For both periods it was the area of the country that saw the biggest drop in footfall. For the same periods the fall in footfall for area S02 (covering the Croydon, Greenwich and Colliers Wood stores) was down by 26.8% and 43.5% respectively. Due to the decline in footfall stores did not need as many sales advisors and in some cases (for example the Gracechurch Street store) reduced their floor space. As a result even when stores were allowed to reopen many of New Look's retail staff remained furloughed. As at 8 December 2020, 25.6% of retail staff in central London were furloughed, and 6.3% of staff in S02. As at 21 May 2021 there were still 13% of staff furloughed in central London, but only 0.2% in S02.

37. Between October 2020 and May 2021 New Look closed 6 stores in the southern region, namely Oxford Street, Holloway, Newbury, Winchester, Gravesend and Brighton. The closure of all these stores meant there were fewer vacancies as well as higher numbers of colleagues at risk looking for alternative roles. Four of these closures were due to a Company Voluntary Arrangement (CVA) that New Look entered into in September 2020 which gave New Look's landlords enhanced break options where they felt they could secure alternative tenants on improved terms. Some of those landlords exercised their break options resulting in store closures. All this also meant that most stores reduced the hours that staff worked and allocated the hours they had to existing staff.

The Claimant's maternity leave

38. On 16 May 2020 the Claimant commenced maternity leave expecting her fourth child.

Redundancy situation

39. In October 2020 the landlord of the TCR store C worked at served notice.

40. On 26 October 2020 the Claimant was notified by letter that she was at risk of redundancy and the reason for it.

41. At the same time as the TCR store was closing, the Holloway store was also closing. A separate redundancy process was followed in relation to employees at that store. We have not received evidence about employees at that store.

42. A Ms Cooper emailed the Claimant a vacancy list on 27 October 2020. The roles available were all supervisor or managerial roles and all the contracts were for at least 16 hours. The Claimant has not suggested that any of these roles were suitable for her.

First consultation meeting

43. On 29 October 2020 the Claimant attended a first consultation meeting with Lily Vashnevsky, General Manager of the White City store. Notes were taken of the meeting which the Claimant was sent during the process, and did not seek to correct, so we take them to be essentially agreed, although they are not verbatim. Like all the Claimant's consultation meetings, the meeting was conducted by telephone and the manager followed a standard script. The Claimant was informed of her right to be accompanied, but as with all subsequent meetings chose not to be.

44. Ms Vashnevsky told the Claimant the Oxford Street store was expected to close on 2 January 2021. She informed the Claimant of who her employee representatives were. She asked the Claimant about her current working hours, and noted this to be 7.00-13.00 on Monday, and from 7.00-16.00 Thursday and Friday. The notes indicate that Ms Vashnevsky then asked the Claimant about the reasons why she was not able to work at other times. The Claimant indicated that she had not thought about availability yet as it would depend on nursery arrangements. Ms Vashnevsky asked her to think about it and to speak to the nurseries. She indicated that it would be better if the Claimant could be more 'concrete' about her availability.

45. Ms Vashnevsky then went through the current Sales Advisor vacancy list with the Claimant indicating that all the vacancies would require flexibility in terms of covering additional shifts. Ms Vashnevsky was not aware whether any particular store would be able to accommodate the Claimant's desired fixed working pattern. In answer to the Claimant's question, Ms Vashnevsky told the Claimant that she could secure a role and then discuss hours with store management when she returned from maternity leave, but that it would be better to sort the hours out sooner rather than later. The notes record the Claimant as saying that Greenwich, Harrow and Wood Green would be too far for her to travel but that White City and Colliers' Wood were acceptable,

although in evidence she said that she thought that Wood Green was all right too (she had worked there previously).

46. There was also discussion about the level of the Claimant's redundancy pay.

47. Ms Vashnevsky was not aware that the Claimant as a woman on maternity leave was entitled to priority on redundancy.

48. The Claimant was sent the vacancy lists after the meeting (97). It is not the Respondent's normal practice to have vacancy lists such as this. They were drawn up because there so many people at risk of redundancy from the TCR and Holloway stores that the Respondent imposed a recruitment freeze and reserved all available posts for those being made redundant. The vacancy lists shows stores, the minimum hours of the contracts they have on offer and what availability they were looking for. All the contracts on offer were the Respondent's standard Sales Advisor contracts with the clause 4 requirement for 7 day per week flexible working, but in these vacancy lists stores set out what availability they actually were looking for in practice.

49. The Claimant's case before us has been that some of these vacancies were suitable, but at the appeal stage (186) and in her complaint of 14 May 2021 (178) the Claimant stated that the roles were not suitable because all the roles would have required her to be flexible with the hours and days that she worked. In evidence, the Claimant explained that this was because this is what she was told at the time by Ms Vashnevsky and Ms Ladwa. In these proceedings, the Claimant maintains that at least the vacancies at Wood Green for 12 hour contracts with "Mon to Fri" availability, or the vacancy at White City for an 8 hour contract "Mon to Fri" would have been suitable. Alternatively, the Claimant submits that she could have been allocated to Wood Green or Colliers Wood to work just Thursdays as those stores had identified a need for cover on those days (albeit they had specified they wanted someone to work more than just Thursday on a single contract).

50. Following this first meeting, the Claimant contacted two potential nurseries. One had full availability and one was not sure as they were completing an extension. By January 2021, the latter nursery emailed the Claimant to say that it now had full availability for all days.

<u>Second consultation meeting</u>

51. In November 2020 (the exact date is not known), the Claimant attended a second consultation meeting with Hema Ladwa. Ms Ladwa was aware that if suitable alternative employment was available the Claimant as an individual on maternity leave needed to be given priority over other employees. At this meeting, the Claimant confirmed that during term time she could only do 7.00-13.00 Monday, Thursday and Friday, but outside of term time she could do Thursday and Friday 7.00-16.00 as she was not doing her dance job during the summer holidays. She said that her availability may change in May 2021 (when she was due to return from maternity leave) due to nursery availability.

52. The Claimant indicated that she considered an 8-hour contract at Colliers Wood, White City or Wood Green would be suitable. The Claimant did not inform Ms Ladwa that she had been in contact with nurseries. Ms Ladwa does not appear to have asked this question either.

53. Following a discussion about her redundancy pay, the Claimant asked if she could defer her redundancy until she was back from maternity leave. The Claimant was aware that another colleague had already deferred the decision. In a redundancy process in 2018, Celestine Teca had also deferred her decision until she was due to return from maternity leave. Ms Ladwa said that she would look into deferring her redundancy.

54. After the second consultation meeting, Ms Ladwa liaised with colleagues and also with stores not on the vacancy list where employees had expressed an interest in vacancies further afield to see whether they had any vacancies. She did not make any enquiry as to whether any of the stores would be prepared to accept the Claimant on the basis of her availability as she had stated it to be. Nor is there any evidence that anyone else made this enquiry.

55. On a spreadsheet completed after the second consultation meetings, the Claimant is noted as having expressed preferences for the Colliers Wood 12 hour contract, White City 8 hour contract and Woodgreen 12 hour contract. These were the store locations the Claimant chose, but it is apparent from the minimum hours referred to that someone 'matched' her to those particular contracts on the vacancy list rather than simply recording the Claimant's preferences as expressed in the meeting. However, the Respondent's case is that those roles were not actually suitable for the Claimant because they all required more availability than she had. A decision therefore seems to have been taken not to offer the Claimant any of vacancies, but to defer the redundancy consultation in relation to the Claimant. We have not heard evidence from anyone who considers that they made that decision. Ms Ladwa did not believe she had done, but the Excel spreadsheet that we have been provided with effectively records this decision and it was on the basis that that decision had been made that the third consultation proceeded.

Third consultation meeting

56. On 8 December 2020 the Claimant attended a third consultation meeting with Mica Rennison. This was very brief as the notes record 'because the Claimant was on maternity leave' and nothing of substance was discussed. Ms Rennison understood from the Excel spreadsheet with which she had been provided that the Claimant had decided not to accept an alternative role or take redundancy now but to defer the decision until her return from maternity leave. This was not correct, as the Claimant had not made that decision. She had expressed an interest in vacancies at three stores and merely asked the question about deferral. Ms Rennison knew that the Claimant being on maternity leave was entitled to priority if a suitable role

was identified. She did not think it was surprising that the Claimant wished to defer the decision. Trading conditions were very difficult as a result of the pandemic so situations were limited. The Claimant for her part assumed the Respondent had decided not to offer her a role but to defer her decision. She did not ask Ms Rennison why she had not been offered a role, or say that she had chosen three stores. If she had done, Ms Rennison would have adjourned the meeting and sought advice. Ms Rennison did not know whether the roles had been taken at that point, but from the spreadsheet the evidence before us is that the other roles had already been offered to others who were successful in the selection exercises. We further understood from Ms Ladwa that the standard process was for allocation of roles to happen between the second and third consultation meetings, so on the balance of probabilities other people had been allocated roles by the time of that third consultation meeting.

57. By letter of 8 December 2020, the Respondent notified the Claimant that her redundancy consultation period would be extended to the end of her maternity leave. The Claimant accepted in cross-examination that this was beneficial to her as otherwise she would have been made redundant. She would have preferred to have been offered a role, of course, but she did not know at this time that she was supposed to be made a priority.

What happened with other employees

58. After the second consultation meetings, employees who were not on maternity leave and who wished to be redeployed were put through a desktop selection process, and interview as well in some cases.

59. This did not happen for those on maternity leave, for all of whom their decisions were deferred until they were due to return from maternity leave. It does not appear to have occurred to anyone at the time that this might be detrimental for those individuals. Deferral was a standard option for employees on maternity leave with the Respondent, the rationale being that it meant they avoided being made redundant immediately, and that decisions could be made about role at the point that they were ready to return and knew what their availability would be. We infer that, in the past, prior to the pandemic, the size of the Respondent meant that it was rare for employees (at least those who were willing to travel) not to be able to find suitable alternative employment at another store in the event of their store closing. The pandemic had, however, changed that position as we have recorded above.

60. There were 87 employees placed at risk of redundancy from the TCR store, of whom 18 were male and 69 were female. In total, 33 employees were made redundant. Of those made redundant, four female employees are recorded in the Respondent's spreadsheet as being made redundant in part due to limited availability owing to childcare. For two of them their flexibility was also limited by having another job. Childcare is not mentioned in relation to the redundancies of any male employee. As such, 6% of female employees

were made redundant because of an inability to comply with a requirement for flexibility owing at least in part to childcare, while no male employees suffered that disadvantage. 100% of those who are noted as having limited flexibility due to childcare requirements were made redundant, as were both employees whose redundancy decisions were deferred because they were on maternity leave.

Events during the remainder of the Claimant's maternity leave

61. On 12 December 2020 the redundancy process ended for other affected workers and those who had not been selected for other roles were made redundant. The TCR store closed from January 2021.

62. On 31 December 2020 (after the start of the third lockdown shop closure) the Respondent sent the Claimant a new contract assigning her to the White City Store with effect from 5 January 2021. The letter was sent in Ms Vashnevsky's name, but was produced by Employee Relations (ER) without input from Ms Vashnevsky. On the face of the letter, it is an offer of a new 8-hour contract at White City. There was nothing to suggest it was just an administrative arrangement. The letter said that if the Claimant did not respond, it would be assumed she had 'accepted the changes'. The Claimant therefore considered that inaction constituted acceptance.

63. The Claimant emailed HR the same day: *"Just wanted to confirm that my transfer is on hold until May 2021 when I will have my meetings to try and place me somewhere or be offered redundancy? By signing the new contract it looks like I'm agreeing to go to Westfield on an 8 hour contract."*

64. Rebecca Rogers replied: *"I can confirm this is the correct standard wording for our changes of contract. Jamila has advised she will give you a call to advise further."* We observe that on its face that reply suggests that the change of contract was 'standard' and therefore 'substantive' rather than merely administrative.

65. Jamila then sent the Claimant a message on WhatsApp to explain that: *"The only reason you are based in White City is that you need to be based somewhere while you're on maternity leave due to the store closing. Or you will get lost in the system"*. The Claimant replied that she 'thought it was something like that'.

66. The Claimant has at all times maintained she believed that this was an alternative role to which she would return after maternity leave if she could not find an alternative post, and this is what she said at her fourth consultation meeting, and in her complaint of 14 May 2021, as well as in her evidence in these proceedings, and we accept that this was her genuine belief. Although we had initially read her email of 31 December as indicating that she understood it was not a 'real' contract, and Jamilla's WhatsApp message as making that clear, having heard the Claimant's oral evidence, we understand how she construed this correspondence differently and accept her belief to

be genuine. However, the Respondent's intention was that this was a purely administrative arrangement to ensure that the Claimant remained on the payroll despite the closure of the Oxford Street store, and (objectively) Jamilla's WhatsApp message made that position clear.

67. On 4 May 2021, the Claimant emailed Employee Relations (ER) to say that she was due back from maternity leave this month and had tried calling White City but could not get through and *"would like to know what the process is regarding my options for transferring"*.

68. Arrangements were then made for the Claimant to meet with Ms Vashnevsky.

Fourth consultation meeting

69. On 13 May 2021 the Claimant attended fourth consultation meeting with Ms Vashnevsky. The Claimant had not been sent vacancies in advance but had herself looked at the Respondent's online jobs portal. She had found two full-time roles there which were not suitable. The notes record that Ms Vashnevsky asked the Claimant if her availability was only Thursday and Friday 7-4, *"so it is pretty set"*, and the Claimant replied *"yes"*. The Claimant said that she had been in to Croydon and Colliers Wood stores to see what they had available, but they had said that she needed to go through the formal redundancy process. Later in the meeting, Ms Vashnevsky's view was that there was 'not much' available without flexibility, and in particular that they did not need someone starting at 7am. Ms Vashnevsky explained that the earliest start at White City was 10.00. The Claimant responded that she could start later and finish later (up til 18.00). Ms Vashnevsky asked whether, if apart from Thursday to Friday, if the Claimant could change or adapt. The Claimant replied, *"Due to childcare I'm not sure if I could change"*. Later she said she could possibly work until 6pm *"within the childcare hours more"*. The Claimant says that she was there referring to any day of the week, but in context it could in our judgment reasonably be understood as a reference to Thursday and Friday, and that is how Ms Vashnevsky understood it.

70. The Claimant at the meeting asked whether there were any vacancies at White City, to which Ms Vashnevsky answered 'no'. The Claimant then said that she thought because her contract was at White City she was on contract there, but Ms Vashnevsky said 'no', to which the Claimant said 'ok' although queried the position as she said she had understood from a conversation before Christmas that she would have been able to discuss flexibility at White City on her return. We observe that the Claimant's failure to speak up in support of her own belief about this contract at this point was symptomatic of the Claimant's general reticence in these redundancy consultation meetings.

71. The Claimant asked if other locations could be explored and Ms Vashnevsky agreed to do so. She agreed to check with Kingston, Bromley, Croydon, Harrow, Greenwich and Colliers Wood, to obtain information about flexible working and get the Claimant a redundancy estimate.

72. Immediately following the meeting, Ms Vashnevsky emailed those six stores to ask them whether they could accommodate the Claimant's availability Thursday-Friday 7-6 on an 8-hour contract (220). She also phoned those that did not reply and checked the position with Woolwich and Wandsworth by telephone. Nobody was able to match the Claimant's stated availability. Ms Vashnevsky was also aware that Grace Church Street store still had colleagues furloughed, Victoria had no vacancies at all and Holborn had over recruited and so had contracted for more minimum hours than it required. Ms Vashnevsky did not ask about what roles any of those stores did have available because in her view the Claimant had been so clear about her availability that there was no point. No vacancy list was produced at this time because there was no large-scale redundancy exercise ongoing. So far as all the Respondent's witnesses' are aware, apart from White City adverts which we deal with below, the only vacancies the Respondent had at this point were the ones on its website, which the Claimant still agrees were not suitable.

73. In a WhatsApp exchange with her former manager, Jamilla, on 15 May about vacancies the Claimant was more forthcoming about her availability because she felt more comfortable talking to Jamilla and knew 'she would understand'. The Claimant in her closing submissions submits that Jamilla 'would have' shared this information with Ms Vashnevsky, but there is no evidence that she did so and we do not accept the assertion. In the WhatsApp messages, the Claimant told Jamilla that Thursdays and Fridays would be easiest because that was what she was working before, and that if she changed hours she would have to see if her husband could change his hours in order to take the kids to school. Jamilla replied that availability of *"just two days with no closes"* was difficult (i.e. a reference to the Claimant not being able to work until closing time), and that most small small stores do not usually start at 7am. In response, the Claimant wrote that she could start later but would need to get back to pick up the kids so, depending on where the store is would not be able to work much later, plus the pay would be different in stores closer to home so that would need to be factored in too.

74. In May 2021 Sales Advisor roles were advertised at White City. The Claimant's recollection was that at least one of the advertisements was for a part-time permanent role, but this information is not apparent from the screenshots we have in the bundle, save that one of them states *"Permanent / Fixed Term. Temporary"*. Ms Vashnevsky says that these were for temporary fixed term contracts requiring full availability. This was all Ms Vashnevsky was permitted to advertise for at that time because of the impact of the pandemic. We accept Ms Vashnevsky's evidence on this. Even if the Claimant did see what appeared to be a permanent role advertised, even according to her it had 'disappeared' by the time she looked again and in our judgment if the advertisement was ever online it was an error. Ms Vashnevsky did not tell the Claimant about the temporary vacancies because she did not consider they would be suitable. That was also the Claimant's view in cross-examination, but in closing submissions she suggests that she would have considered temporary roles.

Claimant's grievance

75. By email of 14 May 2021 the Claimant complained to Head Office about the redundancy process. In this she stated that all the roles offered to her had been unsuitable as they did not allow her to continue her flexible working arrangements. She complained that there were no suitable roles available at the moment. In this letter she said that she was *"confused as to why I was given a contract and now being told I can't work at that store"*, a reference to the issue with the White City contract. The Claimant did not state that the letter was a grievance, because she thought a grievance and a complaint were the same thing.

76. The Claimant's maternity leave ended on 17 May 2021.

77. On 20 May 2021, ER responded to the Claimant's complaint by email. Her complaint was not treated as a grievance and she was not invited to a meeting or offered a right of appeal against the complaint decision. The letter concluded: *"If you continue to have concerns after your final meeting has been concluded, you do have the right to appeal the outcome"*, but our understanding is that this is a reference to Ms Skinner's evidence that if the Claimant had labelled her complaint *"grievance"* it would have been dealt with in accordance with the ACAS Code of Practice and the redundancy process put on hold while it was considered.

Fifth consultation meeting

78. On 21 May 2021, the Claimant attended fifth consultation meeting with Ms Vashnevsky. Ms Vashnevsky told the Claimant she had checked for vacancies in Kingston, Bromley, Harrow, Croydon, Greenwich and Colliers Wood, Wandsworth, Surrey Quays and Woolwich, GCS, Victoria, Holborn. Ms Vashnevsky confirmed that the Claimant's availability was Thursday and Friday, 7am-6pm, and the Claimant said 'yes'. The Claimant asked about central London too and Ms Vashnevksy said that GCS had members on furlough, Victoria had no vacancies and Holborn had over-recruited. She also confirmed with the Claimant that she had checked all stores she had asked about and the Claimant said yes.

79. The Claimant said she had also been in touch with Jamilla who had not managed to find her anything suitable either. The Claimant is noted as agreeing that everything had been looked into.

80. The Claimant asked about flexible working and about taking a role and discussing availability afterwards. The notes record Ms Vashnevsky as replying that it 'did not work like that', that they had based the search on Thursday to Friday 7-6 as she knew the Claimant had to work around nursery. The Claimant sought to confirm, *"So you're saying there wouldn't be*

anywhere I could go that would set my hours", to which Ms Vashnevsky replied *"Yes, correct. Because you would have to go there and fulfil that contract … If no stores can offer you your current contract we wouldn't be able to get to the flexible working stage".* She said that there would not be anywhere the Claimant could go that would set her hours. She said that she had sent an email and *"no store could work with that".* Ms Vashnevsky made clear that she had understood the Claimant only to be available two days Thursday and Friday and that is what she had therefore checked for.

81. As the Respondent considered there was no suitable alternative employment for the Claimant, she was told that she would be made redundant. The Claimant did not raise with LV that there were vacancies at White City at the time as she had seen from the adverts. She said this was because she was waiting for Ms Vashnevsky to tell her about the vacancies and when she did not and made her redundant, the Claimant started crying and says that she could not speak.

82. Redundancy was confirmed by letter of 21 May 2021. The Claimant was paid in lieu of notice £1,496.87 and £2,245.31 by way of redundancy pay.

Appeal

83. On 26 May 2021 the Claimant appealed dismissal. In this appeal she referred to jobs she had seen advertised at White City, which she said was one full-time and one part-time role. In her appeal letter she stated that she was not asking for her job back, but was seeking compensation. She asked for the appeal to look again at her complaint of 14 May 2021.

84. On 10 June 2021 the Claimant attended an appeal hearing with Rebecca Skinner, the date having been postponed once at the Claimant's request. This was also conducted by telephone. The Claimant had been informed of her right to be accompanied, but chose not to be accompanied. The meeting lasted about 1.5 hours. At the meeting Ms Skinner explained to the Claimant that to have a formal flexible working arrangement in place she would have had to put in a written request and, if granted, her contract would have been amended. During the meeting the Claimant said that she thought it would have been better for her to have accepted a role during the initial consultation and then discussed with the manager around hours.

85. Ms Skinner understood that during the initial consultation there had been checks with all stores the Claimant was interested in to see whether they could accommodate her particular availability. In her witness statement she states: *"It wasn't practical to expect someone at risk of redundancy and returning from maternity leave to potentially file multiple flexible working requests if they were interested in more than one store".* However, when questioned in cross-examination, Ms Skinner confirmed that she had not actually investigated what had happened in October-December 2020 in terms of specifically checking the Claimant's availability with stores. Her

understanding was that this had not been done, just the vacancy lists had been referred to.

86. At the end of the meeting, Ms Skinner asked the Claimant what she wanted from this process and she said that after all that had happened she no longer wanted a job with the Respondent but only wanted compensation. She also mentioned that she felt she had been prevented from getting management experience because she had worked fixed hours.

87. The Claimant felt that at the meeting she had had an opportunity to discuss the matters she had raised in her 14 May complaint.

88. Miss Skinner investigated the Claimant's appeal points by first speaking to Ms Vashnevsky, and then to Ms Ladwa. She also checked with ER that they had never received a flexible working request from the Claimant.

89. On 25 June 2021 Ms Skinner met with the Claimant again to inform her of the outcome of the appeal. All the Claimant's complaints were dismissed, save that her complaint around the way suitable alternative employment options had been discussed was partially upheld because the Claimant had not been provided with a list of vacancies in advance of the 13 May meeting. Ms Skinner considered that this had been remedied in part by adjourning the meeting to enable vacancies to be properly looked into, but the Claimant had still not been provided with a list of what was available. Ms Skinner considered that she should have been told this.

90. On 29 June 2021 the appeal outcome was confirmed by letter.

Comparator

91. The Claimant has identified a former TCR colleague Amara Kallon as a comparator. He was placed at risk of redundancy at the same time as her, but had no restrictions on his availability and obtained a role at the Claimant's first choice store, Colliers Wood. Mr Kallon was originally employed on a 20 hour contract with flexibility (259). He was redeployed into the Colliers Wood store on a 16 hour contract with flexibility (265-271). He transferred to Colliers Wood in January 2021. Ms Pena reports that he has in fact been working full-time Monday to Friday, more than his contracted hours.

These proceedings

92. The Claimant contacted ACAS on 25 June 2021. A certificate was issued by ACAS on 6 August 2021. Her claim was presented to the Tribunal on 19 August 2021.

Conclusions

Direct maternity discrimination

The law

93. Section 39(2)(a)/(c)/(d) of the EA 2010 provides, in summary, that an employer must not discriminate against a woman in relation to any of the terms of her employment, by dismissing her or subjecting her to any other detriment.

94. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

95. Section 18 EA 2010 defines discrimination, so far as relevant to these proceedings, as follows:

> (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.

96. "Because" means that the maternity leave has to be 'the reason' for the unfavourable treatment: *South West Yorkshire Partnership NHS Foundation Trust v Jackson* [2018] 11 WLUK 729, [10]. As with other forms of direct discrimination, the Tribunal must determine *"what, consciously or unconsciously, was the reason"* for the treatment (*Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls). The protected characteristic must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]). It must be remembered that discrimination is often unconscious. The individual may not be aware of their prejudices (cf *Glasgow City Council v Zafar* [1997] 1 WLR 1695, HL at 1664) and the discrimination may not be ill-intentioned but based on an assumption (cf *King v Great Britain-China Centre* [1992] ICR 516, CA at 528).

97. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. This requires more than that there is a difference in treatment and a difference in protected characteristic (*Madarassy v Nomura International plc* [2007] EWCA Civ 33, [2007] ICR 867 at [56]). There must

be evidence from which it could be concluded that the protected characteristic was part of the reason for the treatment. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

98. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope. In all cases, it is important to consider each individual allegation of discrimination separately and not take a blanket approach (*Essex County Council v Jarrett* UKEAT/0045/15/MC at [32]), but equally the Tribunal must also stand back and consider whether any inference of discrimination should be drawn taking all the evidence in the round: *Qureshi v Victoria University of Manchester* [2001] ICR 863 per Mummery J at 874C-H and 875C-H.

Conclusions

99. There are three specific alleged detriments that the Claimant relies on in relation to direct maternity discrimination:

    a. Not allowing the Claimant to make a Flexible Working Request (FWR) during her maternity leave;

    b. Not offering the Claimant a suitable alternative role;

    c. Being given a contract at White City and having that taken away.

100. We consider first whether the Respondent did not 'allow' the Claimant to make an FWR. In our judgment, this is in substance what happened. The Respondent's position (as conveyed to the Claimant principally by Ms Vashnevsky) was that unless and until she had secured a substantive role, she could not make an FWR. The practical effect of this was to prevent the Claimant making an FWR as, on the face of it, there were no suitable substantive roles for her (a point we deal with below). This situation could in our judgment reasonably be regarded by the Claimant as a detriment, given that the Respondent's position put her in a 'Catch 22' situation where it appeared that she could not take a role because she could not work flexibly as required by clause 4 of her current contract, but also could not until she had taken a role make a request to the Respondent for variation of that contract. We add that we consider the detriment threshold is crossed even though we can see that in practice it might not have made much difference which order these things happened in because the Respondent was treating the Claimant as someone who could only work on fixed days in any event and assessing her suitability for vacancies against that assumption (again, however, this aspect we return to further below).

101. In any event, we are satisfied that the Claimant was subjected to the detriment alleged. That brings us to the question of the reason for the treatment. We find that the Respondent's reason for treating the Claimant in this way (or, specifically, Ms Vashnevsky's reason for doing so as hers was the 'operative mind' dealing with the Claimant's queries about flexible working) was not because the Claimant was on maternity leave. That was just an accident of timing. It was because the Claimant was at risk of redundancy and was therefore no longer in a substantive role and the Respondent's policy is that FWRs are assessed by individual stores against the business needs of that particular store and so the policy requires that someone be in a substantive post at that store before an FWR can be considered. Those therefore are the reasons for the treatment, not the Claimant's maternity leave. She would have been treated the same by the Respondent at any time.

Not offering the Claimant a suitable alternative role

102. We do not understand there to be any dispute between the parties that the Claimant was not offered a suitable alternative role, or that this constituted a detriment, the question for us for this maternity discrimination claim is *why* she was not offered a suitable alternative role. However, as the question of suitable alternative employment is also relevant to the unfair dismissal claim, for convenience we include some of our reasoning in relation to the unfair dismissal claim in this part of our judgment too.

103. We begin with the question of whether there was a suitable alternative role available in October – December 2020.

104. Suitability in this case is all about days, hours and location. These were the factors that were of critical importance to both parties. It was critical to the Claimant that she should be able to fix her working days, and not work more than 2 or 3 days each week, Monday to Friday only, and not beyond 6pm. The Claimant could not commit to working the whole week on a minimum hours contract because that would have involved placing her child in nursery Monday to Wednesday when her partner was working, which would have been uneconomic if the Respondent in fact reduced her shifts to the minimum hours. Further, the Claimant's position in consultation with the Respondent at this point was that she could only work Monday, Thursday and Friday 7am-1pm (and Thursday and Friday 7am-4pm during the school holidays). As such, roles that required her to work on other days were not on their face suitable for her, on the basis of the information she had given.

105. We appreciate that it was difficult for the Claimant at this point to commit to days other than Thursday and Friday because she could have no guarantee that the nurseries would still have places on appropriate days by May 2021, but on this issue, we consider that 'the ball was in the Claimant's court'. She could have said that she could work other days provided the days were fixed and hoped that the position with nurseries remained as she had been

informed it was, but equally she could reasonably not take that option as, if things did not work out, she might have ended up with a job she could not do.

106. From the Respondent's perspective, it was in our judgment entitled to work on the basis that what was 'suitable' for the Claimant was a role that required her to work only on days that she had told them she could do. In any event, as at November 2020 the Respondent did inform the Claimant of the available options. There were on the Vacancy List, for example, two roles at Wood Green that required only Monday and Tuesday working. If the Claimant had considered those roles to be suitable for her, she could have said, but she did not.

107. The Respondent organises its workforce by contracting individuals for a minimum number of hours on an in principle fully-flexible basis. The business reason for this, as we understand it, is in order that in quiet trading times, stores can reduce staff hours to the contracted minimum. A store not in the position to do that is regarded by the Respondent as 'over-contracted'. But in busier times, and in order to cover absence, employees are available to work flexibly and increase their hours. However, as a matter of practice, the Respondent recognises that many of its employees, engaged as they are on minimum hours contracts, will not be able to be fully flexible in this way over 7 days. It was for this reason that during the October-December 2020 redundancy exercise, stores had been asked to identify what they actually required by way of availability from employees on the contracts that were vacant.

108. The only roles available at that time, according to the November 2020 Sales Advisor vacancy lists, required that an individual in a role on a minimum hours contract should be available to work flexibly either for every day Monday to Friday (Wood Green) or for more days or weekend days when the Claimant was not prepared to work (White City, Colliers Wood, Greenwich, Harrow). We acknowledge that it is possible that there might have been alternative vacancies outside the London area (we note that Ms Ladwa did enquire about vacancies in Bury St Edmunds and Cambridge for example for employees who had asked about that), but the Claimant had given no indication that stores in a wider geographical spread would be of interest to her and so there is no evidence before us that there were any suitable roles elsewhere.

109. On the basis of the evidence before us, accordingly, there was no suitable alternative employment for the Claimant in October-December 2020. We note that the Claimant herself acknowledged this in her grievance and appeal letters.

110. The Claimant has made suggestions as to how the roles available might have been 'carved up' to fit her availability, for example, by permitting her to work Thursdays at Colliers Wood and then imposing different requirements on other employees. She made a similar point about how the job her comparator Mr Kallom was allocated could have been carved up so that she could do part of it. However, subject to the requirements that an employer not discriminate and act within the range of reasonable responses when

dismissing an employee (to which we come later), it is not for the Tribunal to substitute its view for that of the employer as to what roles were available. As we have already noted, there is a business rationale for dividing up roles into a certain number of minimum hours contracts in the way that the Respondent did and, from the point of view of deciding whether a suitable alternative role was available to offer the Claimant, we must take the Respondent's decision as to what those roles were as the basis for our decision.

111. So far as the direct maternity discrimination claim is concerned, however, what matters is what was the *reason* that the Claimant was not offered a suitable alternative role in October-December 2020. We have not heard evidence from any individual at the Respondent who claims to have made this decision, but so far as we can tell from the evidence we have received, the reason why the Claimant was not offered a role was because, on the basis of the information the Claimant provided to the Respondent at that point, there was no suitable alternative vacancy as at October-December 2020. We have considered whether the Claimant's maternity leave played any part in that decision, but we are satisfied it did not. Ms Ladwa, who conducted the second redundancy consultation, was aware that priority is to be given to women on maternity leave so if a suitable role was available, we would have expected her to act on that. However, it was not. The Claimant's maternity leave was the reason why the redundancy decision was deferred, rather than the Claimant being made redundant immediately, but her maternity leave played no part in the decision not to offer her an alternative role.

112. As to the situation in May 2021, the Claimant's position by that time in consultation with Ms Vashnevsky was that she could only work Thursdays and Fridays, 7am-6pm. She was questioned about that, but did not disclose to Ms Vashnevsky the whole truth about her personal circumstances and availability which was, as we have noted, that she could in fact have worked any 2 or 3 days per week as long as the days were fixed. The Claimant has suggested that Ms Vashnevsky ought to have just asked the stores she was interested in what they had available and then told her so that she could have had the option of changing her availability. This appears to have been because this was what happened when the Claimant was placed at risk of redundancy in 2018. However, we do not consider that it was reasonable for the Claimant to expect this at this stage. She knew that many colleagues were made redundant in December 2020, she knew there were no suitable advertised vacancies (save for the possible White City roles that we deal with in a moment). She knew from Ms Vashnevsky's questioning of her that Ms Vashnevsky considered that her apparently very limited availability was a real obstacle to finding her a position, yet she still maintained that her availability was only Thursday and Friday. Viewed objectively, the Claimant appears to have been playing a game of brinksmanship in order to secure work on her preferred days of Thursday and Friday when her husband was available to look after her child and so nursery costs would have been avoided. It was of course the Claimant's prerogative to take that approach, but having done so, the Respondent could only reasonably take what she said at face value. Even though Ms Skinner at the appeal stage considered that Ms Vashnevsky could

have done more to offer the Claimant alternative options, in our judgment it was within the range of reasonable responses for Ms Vashnevsky only to make enquiries of the stores the Claimant asked about and for the hours and days she said she could do. As none of them had anything available, again the reason why the Claimant was not offered a role in May 2021 was because there was, on the evidence, none available. It was not because of the Claimant's maternity leave.

113. That leaves only the issue of the temporary White City roles which were advertised around that time. So far as concerns this maternity discrimination claim, in our judgment, based on the evidence we heard, it is clear that the reason why Ms Vashnevsky did not offer those roles was because they were temporary and she did not consider a temporary contract to be appropriate alternative employment. The failure to offer those roles was not therefore maternity discrimination. It will be noted, however, that we have not said that it was reasonable for Ms Vashnevsky not to offer these roles – a point we return to in relation to the unfair dismissal claim.

Being given a contract at White City and having that taken away

114. As to the issue of the Claimant being given a contract at White City, we accept the Claimant's evidence that she genuinely believed that she had been provided with a substantive role at White City to 'fall back on' (to use her words) in the event that she did not find an alternative on her return from maternity leave in May 2021. We further find that, viewed in isolation, the combination of the letter of 31 December 2020 and Ms Rogers' email of 4 January 2021 objectively amount to an offer (and by non-response, acceptance) of a substantive contract at White City. Wholly objectively, that impression is undermined by the inconsistency between these communications and the prior letter of 8 December 2020 and Jamilla's WhatsApp message, as well as the Claimant's own email of 31 December 2020 which appears to indicate she understands it is not a 'real' job. We can, however, see how the Claimant, having received the unqualified offer of 31 December 2020 and the email of 4 January 2021, could reasonably understand Jamilla's WhatsApp as conveying that this was a real job where she would be 'based', albeit that she would have the option of choosing an alternative later. Equally, though, we accept that this is not what the Respondent (i.e. the Claimant's managers) intended, and that Jamilla's WhatsApp was intended by her to (and did objectively) convey that the White City position was just an administrative arrangement and not a substantive role. We further accept Ms Vashnevsky's evidence that there were no substantive permanent posts at White City available at this point.

115. Addressing those facts through the prism of a direct maternity discrimination claim, we find that the Claimant could reasonably regard what happened with the White City contract as a detriment, as it appeared to her (reasonably) that she had been allocated to a substantive post and had something to fall back on, and then this was taken away. However, that detriment only arose because of errors in the Respondent's communication. Had the Respondent

properly explained what it was doing, the Claimant could not reasonably have regarded it as a detriment to be maintained on the Respondent's books until the end of maternity leave. In any event, the reason for this administrative arrangement was in order to keep the Claimant on the Respondent's books given that her store had closed and she no longer had a substantive post. This happened while the Claimant was on maternity leave, and would not have happened if she were not on maternity leave, but maternity leave was the occasion for, rather than the reason for, the treatment.

Direct sex discrimination

The law

116. Under ss 13(1) and 39(2)(a)/(c)/(d) of the Equality Act 2010 (EA 2010), we must determine whether the Respondent, in relation to any of the terms of her employment, by dismissing or by subjecting her to any detriment, discriminated against the Claimant by treating her less favourably than it treats or would treat others because of her sex.

117. The law is the same as for direct maternity discrimination, save that direct sex discrimination requires that the Claimant be 'less favourably treated'. 'Less favourable treatment' means that the complainant is treated less favourably than a comparator is or would be. A person is a valid comparator if they would have been treated more favourably in materially the same circumstances (s 23(1) EA 2010). However, we may also consider how a hypothetical comparator would have been treated.

Conclusions

118. The sole detriment relied on here is: *"Not allowing the Claimant to make a Flexible Working Request after her maternity leave had ended"*. In our judgment, the same analysis applies here as applied to the direct maternity discrimination claim. The reason for the treatment was not because of the Claimant's sex but because the Claimant was at risk of redundancy and was therefore no longer in a substantive role and the Respondent's policy is that FWRs are assessed by individual stores.

119. We add that, on reflection, this issue was probably wrongly characterised as a sex discrimination claim, rather than a further incident of direct maternity discrimination under s 18(4). The essence of the claim is, as we understand it, that the Claimant was not allowed to make a FWR because she had been on maternity leave, not because she was a woman. In any event, even as a s 18(4) claim it would still fail for the same reason. Maternity leave was not the reason for the treatment.

Indirect sex discrimination

The law

120. By s 19(1) EA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.

121. The burden of proof is on the claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.

122. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EA 2010 s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

123. The Supreme Court in that case explained that the same approach is to be taken to group disadvantage and individual disadvantage. The individual must suffer the same disadvantage of the group, and it is not necessary to be able to show the reason why (ibid at [31]). However, it remains open to the respondent to show that there was no causal link between the PCP and the individual disadvantage (ibid at [32]). Ms Ibbotson has also drawn our attention to the case of *Shackletons Garden Centre Ltd v Lowe* (UKEAT/0161/10/JOJ) which, in the light of the later decision of the Supreme Court in *Essop*, we take as being an illustration of this principle that there must be a causal link between the PCP and the disadvantage suffered by the claimant. If the disadvantage is in fact the result of a personal choice by the claimant, then it will have been a 'self-inflicted detriment'. We assume for present purposes, consistent with the Supreme Court decision in *Essop*, that although this causal link must be established, there is no need for us to consider the 'reason why' the claimant suffered the disadvantage. If that is not necessary for establishing group disadvantage, we do not see why it is necessary for the individual either. The facts of the *Shackletons* case chime

closely with those we are concerned with, however, so we set out the passage here on which the Respondent relies:

> 11. The Tribunal then turned to the second issue that arises in relation to indirect discrimination cases, namely whether the provision criterion or practice puts her at that disadvantage. The Tribunal concluded that it did. They record their conclusions in the following terms:
>
> "We are equally satisfied that the claimant was put to that disadvantage. Whilst it was at one stage contended by Ms Shackleton that there were other nurseries available which the claimant could have used, the claimant's position was clear. She could have arranged her mother-in-law to look after her daughter on the Friday, but would have to place her child in a nursery or child care on the other two days of the week. The nurseries to which Ms Shackleton had alluded were more expensive and nearer the garden centre, whereas the claimant wanted the child care provision to be nearer her own home so that in the event of an emergency, her immediate family or friends could have attended that nursery and helped out.
>
> We are satisfied that that in itself places the claimant at the disadvantage as a consequence of the imposition of the provision criterion or practice."
>
> 12. The Appellant says that there are a number of things wrong with that conclusion. Their primary contention is that, by indicating that she did not wish to investigate the suggested alternative nursery arrangements described, the Claimant was exercising a personal choice rather than suffering a detriment by reason of the disparate impact of the provision criterion or practice on women. Reference is made to the unreported case of the Ministry of Defence v Mrs Adele MacMillan (EATS/0003/04), in which, at paragraph 35, it is stated to be axiomatic that the detriment cannot be self inflicted.
>
> 13. The second criticism of the Appellant is that the Tribunal has not identified, with sufficient particularity, what was said by the Claimant to constitute the disadvantage imposed by the requirement that she work particular hours, in particular, hours that fitted in with a rota system and which involved weekend working.
>
> 14. We observe that there is nothing in the ET1, nor apparently in the evidence that the Claimant gave, which identifies what was the problem with her accepting rotational work involving some weekend work, rather than fixed days, all of them during the week. There does not seem to have been any evidence from her that the place that she had booked at the particular nursery would only be available if she could guarantee to leave her child on specific fixed days of the week, or that the nursery was not available at weekends. Had that been the case, and had the choice of that nursery, for the reasons that she has given, not been simply a self inflicted detriment, then it might have given rise to the conclusion to which the Tribunal came. But the Tribunal did not make findings of fact along those lines.
>
> 15. In our judgment, the conclusion that the Tribunal reached is one which was not open to it on the evidence that it had heard and on the arguments presented. Nor were there sufficient findings of fact to enable them to come to that conclusion. Accordingly, in our judgment, this ground of attack is well aimed and the appeal succeeds in respect of this issue.

124. As to the question of justification, we have had regard to the guidance of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 (see Lord Reed at [74], with whom the other members of the Court agreed on this issue: see Lord Sumption, [20]). The Supreme Court reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive

measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EA 2010.)

125. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhau GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at [10]-[12].

Conclusions

126. The alleged PCP is *"during the redundancy process, requiring workers to be willing to work flexibly and to make themselves available for work most days of the week"*. The Respondent argues that what happened in this respect was not a PCP because all the Respondent was doing was encouraging the Claimant to be more flexible in order to make it more likely that she would secure a role. However, taking the first stage of the redundancy process first, i.e. what happened between October and December 2020, we consider that the Respondent was applying a practice as alleged by the Claimant because most of the roles on the vacancy list did require workers to work flexibly and to make themselves available for work most days of the week, and indeed that is what Ms Vashnevsky told the Claimant in the first consultation meeting. This requirement reflected clause 4 of the Respondent's standard contract which, on any view, amounts to a PCP imposing a requirement on all employees subject to that contract to make themselves available for the whole week. The fact that not all the roles required such flexibility does not in our judgment stop this being a practice of the Respondent in relation to this redundancy exercise. It is significant in this regard that the Respondent has been able to identify on the "Oxford Street data" spreadsheet those for whom limited availability was the reason that they did not get suitable alternative employment. That is also evidence of a 'practice'. It is also the Claimant's lack of flexibility that the Respondent identifies as being part of the reason why no role was found for her in May 2021. Indeed, in the 5th consultation meeting Ms Vashnevsky refers in terms to the need for the Claimant to be able to fulfil the contractual flexibility requirements before being able to take a role and make an FWR. In other words, consistent still with clause 4 of the contract, the Respondent was still operating its 'practice' as at May 2021.

127. We now turn to the question of particular disadvantage. In the light of *Essop*, we are not required to look at the reasons why an individual could not comply with the requirement to work flexibly. We must just consider who could not comply with the requirement, and then answer the question as to whether women were at a particular disadvantage in relation to men in that regard. The Respondent's analysis in Ms Ibbotson's Closing Submissions of the Oxford Street data by reference to those who put 'childcare' as the reason for

limited availability is thus not helpful as that focuses on the 'reason why' there was a disadvantage rather than just the disadvantage caused by the PCP. Nor is the Claimant's analysis as that too focuses on the reason why rather than the disadvantage.

128. Conducting our own analysis of the data, we find that 12 out of the 87 employees were unable to secure alternative employment because they were unable to comply with the requirement to work flexibly. Of those, 10 were female and 2 were male, i.e. 83% of those who could not comply with the requirement were female and 17% were male. 10 out of 69 female employees (14%) were made redundant because they could not comply with the requirement, whereas 2 out of 18 male employees (11%) could not comply with the requirement. We find that the difference between 11% and 14% is significant in this case. 14% is over 25% larger than 11%. Further, the actual number of women affected (10) as against two men is substantially higher. Moreover, we are conscious that this PCP is very closely aligned to the PCP that forms the foundation of most indirect discrimination claims involving flexible working requests, where judicial notice should even be taken that a requirement to maintain full-time working disadvantages women who still tend to have primary childcare responsibilities: see *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699. In this case we do not have to take judicial notice because the evidence produced by the Claimant from the IFS demonstrates this is still the position. Given that we know that women generally are more likely to be disadvantaged by requirements for full-time working (or something close to that), that assists us in reaching our conclusion that the difference between 14% and 11% in this case can properly be regarded as a significant one, reflecting as it does a wider issue of disadvantage to women with regard to this sort of PCP. We therefore find that the PCP placed women at a particular disadvantage in comparison to men.

129. The next question is whether the PCP put the Claimant at that disadvantage. Here, the Respondent argues that it did not because the Claimant could in fact have offered more flexibility as she had in principle two nurseries who could accommodate her child any day of the week, as well as her husband available to provide childcare on Thursdays and Fridays. However, as between October and December 2020, we find that the Claimant was limited in terms of how flexible she could be. On an 8-hour minimum hours contract we accept she could not reasonably have committed to 3 days per week of nursery; there was too much chance that she would not be allocated enough hours to make that financially worthwhile. We further accept that as at October to December 2020, 5 or 6 months before the Claimant was due to return, it was reasonable for her not to commit to days of the week other than those she had previously been working. We acknowledge that the Claimant could have offered alternative days and taken the chance (which seems likely to have been a good chance) that the nurseries would in fact have been able to accommodate those days, but looking at the roles actually available as at November 2020, it would have made no difference. The only roles available that did not require weekend working or whole-week working or evening working were the Wood Green 4-hour contracts requiring Monday/Tuesday

availability. However, we do not consider that the Claimant's failure to take these contracts mean that the detriment she suffered in October-December 2020 was 'self-inflicted'. In fact, if the Respondent's PCP had compelled her to take those roles she would just have suffered the different detriment of taking a 4-hour minimum contract role but having to commit to two full days of nursery care, which was unlikely to be financially attractive. We should add, in the light of the Respondent's reliance on *Shackletons Garden Centre*, that we do not consider the Claimant could reasonably have been expected to offer weekend or evening availability given the age of her youngest child, the fact that the nursery closes at 6pm and, we are prepared to assume, is not open at weekends in common with every other nursery we as a panel have encountered. We add that it was not contended by the Respondent that the Claimant ought to have been willing to work at weekends.

130. By May 2021, we consider that the Claimant was still disadvantaged by the PCP because even if (as we consider she could) she had offered to work any 2 or 3 days per week as long as they were fixed, there is no evidence to suggest that she would have been offered a job as Ms Vashnevsky did not ask stores what availability they had apart from the Thursday and Friday the Claimant had mentioned. It is enough in our judgment to establish that the Claimant was disadvantaged at this stage by her inability to work flexibly that Ms Vashnevsky thought she was at that disadvantage.

131. That means we must now consider justification. The Respondent argues that the PCP was a proportionate means of achieving the legitimate aim of ensuring that the stores were able to properly operate and meet business needs by providing proper staff cover. We accept that this is a legitimate aim, but we cannot find that it is justified in the circumstances of this case because the Respondent can operate properly and meet its business needs with some employees working fixed shifts only. The PCP in its absolute form is not therefore rationally connected to the objective and a less intrusive measure could have been used without compromising achievement of the objective, specifically the measure that the Respondent does in fact operate both on an 'informal' basis and under its Flexible Working Policy of considering the individual circumstances of stores against the individual needs of employees.

132. In the context of a redundancy exercise, that process of assessment needed to form part of the process of considering whether roles were suitable for individuals, rather than being something that was only considered after a substantive role had been allocated. Such an approach would have served the Respondent's legitimate aim equally well, as it did at all times outside the context of the redundancy exercise.

133. In an indirect discrimination case, the burden is on the Respondent to show justification and it is normally necessary to produce cogent evidence of justification, but in this case we have no evidence from any individual store as to whether they could in fact have accommodated the Claimant's fixed working hours. The question was never asked of Colliers Wood, Wood Green or White City (or any other store) in October-December 2020. It is not enough in our judgment for the Respondent to say that the stores had put their

required availability on the vacancy lists. Commonsense suggests that that would have been a 'wish list' and that if specifically asked about fixing hours to meet the needs of a long-serving employee returning from maternity leave, the answer may have been different. In any event, in the absence of evidence as to the particular circumstances of those stores and why they could not reasonably have accommodated the Claimant's fixed days, we cannot find that the Respondent was justified in maintaining its PCP in the context of the redundancy exercise.

134. The same goes for the position in May 2021 insofar as the requirement of flexibility was still being imposed, without the Respondent having produced evidence of justification in relation to all relevant stores. There was therefore ongoing indirect discrimination during the whole of the redundancy process.

135. However, there is an important caveat to the position as it was in May 2021: insofar as the Claimant was by May 2021 maintaining to Ms Vashnevsky that she was only available Thursday and Friday (and we find that that was her position), then it was not the PCP that disadvantaged her at that stage, but her failure to make clear that she could have made alternative arrangements to work on other days. In this respect, we find that as at May 2021, it was unreasonable of the Claimant not to have indicated to her employer that she could work other days of the week subject to checking with the nurseries. The likelihood is that one of the nurseries would have been available, but if not and could only do a different day, the Claimant could have offered that. In other words, insofar as the Claimant did not get offered a job as at May 2021 because it was thought she could only work on Thursday and Friday, that was a self-inflicted detriment and the Respondent is not required to justify that in these proceedings.

136. It follows that the Respondent's application of the PCP *"during the redundancy process, requiring workers to be willing to work flexibly and to make themselves available for work most days of the week"* constituted unlawful indirect discrimination. However, it does not follow that the application of the PCP in this case caused the Claimant financial loss. Our analysis on *Polkey* below is as applicable here as to unfair dismissal. The application of the PCP only caused the Claimant financial loss to the extent that there was a chance that if not applied or if applied only insofar as was justifiable the Claimant would have obtained a job.

<u>Unfair dismissal</u>

The law

137. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA 1996). 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 a potentially fair reason falling within subsection (2). There is no dispute

in this case that the reason for dismissal is redundancy, which is a potentially fair reason.

138. If dismissal is for a potentially fair reason, then the Tribunal must consider whether in all 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 (s 98(4)(a)). The question of fairness is to be determined in accordance with equity and the substantial merits of the case (s 98(4)(b)). At this stage, neither party bears the burden of proof, it is neutral: *Boys and Girls Welfare Society v McDonald* [1997] ICR 693. The Tribunal must not substitute its own view for that of the employer, but must consider whether the employer's actions were (in all respects, including as to procedure and the decision to dismiss) within the range of reasonable responses open to the employer: *BHS Ltd v Burchell* [1980] ICR 303 and *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

139. As this is a redundancy dismissal, the principles in *Williams v Compair Maxam* [1982] ICR 156 apply. As adjusted to dismissals where there is not union involvement, they are as follows:

    (1) The employer must give as much warning as possible of impending redundancies so as to enable alternative solutions to be considered;

    (2) The employer must consult 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;

    (3) The employer must 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 must 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 must see whether instead of dismissing an employee he could offer him alternative employment."

140. Section 99 of the ERA 1996 provides, so far as relevant:

> (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—
> …
> (b) ordinary, compulsory or additional maternity leave,
> …
> and it may also relate to redundancy or other factors.

141. Regulation 20 of the *Maternity and Parental Leave Regulations 1999* ("MPL Regs") provides:

> **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.

142. Regulation 10 of the MPL Regs provides:

> **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.

143. In *Simpson v* Endsleigh *Insurance Services Ltd* [2011] ICR 75 the EAT confirmed that when applying regulation 10:

    a. Regulation 10(3)(a) and (b) must be read together ([27]), i.e., putting our own gloss on it, a role will not be suitable if the terms and conditions on which it is offered are 'substantially less favourable' to the Claimant than her existing terms and conditions;
    b. The suitability of a vacancy should be assessed from the perspective of an objective employer, rather than from the employee's perspective; it is up to the employer, knowing what it does about the employee, to decide whether a vacancy is suitable ([31]).

Conclusions

144. We consider first whether the Claimant's dismissal was automatically unfair for failure to comply with regulation 10 of the MPL Regulations. As part of the direct maternity discrimination claim we have already concluded that in October to December 2020 there was on the face of the vacancy lists no suitable alternative employment that could be offered to the Claimant. Nor has any evidence been adduced before us that there were any stores that could have accommodated her availability. The question was not asked at the time, and the evidence has not been brought to the Tribunal. We have considered whether to draw an adverse inference against the Respondent for its failures in that respect, but we do not consider that would do justice in this case. Based on the evidence we have heard, we consider it more likely than not that the stores if asked specifically would still not have been able to accommodate the Claimant's requested hours. On the balance of probability we are not therefore satisfied that there were any suitable vacancies in October-December 2020 and therefore there was no failure to comply with regulation 10 at that point. Likewise in May 2021, save for the question of the temporary vacancies at White City, the position was the same and, based on the information provided by the Claimant, there was no suitable alternative employment to offer the Claimant.

145. The Claimant has argued that as at May 2021 Ms Vashnevsky ought to have known she could be more flexible and looked generally for anything that might be available, or that the Respondent should at any point have considering 'carving up' the roles that it did have so as to create a role. We do not consider that regulation 10 requires that. It requires any suitable alternative vacancy to be offered, but if there is no suitable alternative vacancy, the Respondent is not required to create one. Further, the Respondent is entitled under regulation 10 to assess what is suitable by reference to the information provided by the employee. Ms Vashnevsky did not therefore have to ask more generally whether the stores had alternative availability.

146. That brings us to the question of the temporary roles at White City. On the evidence before us we are unable to conclude that these were suitable. They were temporary, so both Ms Vashnevsky's view and the Claimant's instinctive reaction was that they were not suitable, although she has reconsidered this in submissions. We have as a result heard very little about them. Ms Vashnevsky told us that they required full availability, in which case on their face they were not suitable. We are not therefore satisfied that these were suitable alternative vacancies and the failure to offer them to the Claimant did not mean that the Claimant's dismissal was automatically unfair.

147. However, that brings us to the s 98(4) ordinary unfair dismissal question of whether dismissal for redundancy was fair in all the circumstances of the case, having regard to the size and administrative resources of the Respondent.

148. We take into account that this is a very large employer with multiple stores in the London area, even post pandemic. We find that it was outside the range

of reasonable responses for such an employer not to check with stores specifically whether they could accommodate the Claimant's availability. We have already found that the Respondent's approach to individual availability during the redundancy process involved unlawful indirect sex discrimination. In our judgment, it was particularly important that the Respondent should have made specific enquiries of stores, given that the Claimant was on maternity leave, because if one of those stores could accommodate the Claimant's availability, the Respondent was bound by reg 10 of the MPL Regulations to offer that employment to the Claimant and not to any other employee first. This is a case where the Respondent has possibly only escaped liability for an automatic unfair dismissal by dint of its failure to make appropriate enquiries at the time. We do not consider that such failure is within the reasonable range of responses open to an employer. In short, a reasonable employer would specifically have checked with the stores in which the Claimant was interested whether they could in fact accommodate the Claimant's requested hours, in exactly the same way as they would have done if a FWR was being considered following substantive appointment. The failure to do so in this case renders the Claimant's dismissal procedurally unfair.

149. We further find that it was outside the range of reasonable responses not to offer the Claimant the short-term vacancies at White City. We so find even though we are not satisfied on the evidence that those roles were suitable. When the Claimant asked Ms Vashnevsky whether there were any roles available at White City, Ms Vashnevsky's answer 'no' was untruthful. No reasonable employer should be untruthful. Further, even if the Claimant had not asked the question specifically, a reasonable employer ought to inform an employee who is otherwise going to be made redundant that there is an option of short-term employment as part of the duty to consult to identify ways of avoiding redundancy. A short-term job is better than no job at all, and by the time it comes to an end other alternatives may be available and redundancy thus avoided. The failure to inform the Claimant about these vacancies was outside the range of reasonable responses.

150. We do not, however, consider that it was outside the range of reasonable responses or unfair not to investigate job shares or carving up contracts (save to the extent of effectively considering an FWR in relation to the stores in which the Claimant was interested). We have already explained why we accept that the Respondent is in principle entitled to decide (subject to complying with discrimination law) how many employees it wishes to contract, and for how many hours and to require availability of those employees that enables it to meet its operational needs. This is especially reasonable for a business like the Respondent that was in financial difficulties and had entered CVAs with creditors. Over-contracting was an option that the Respondent could reasonably seek to avoid at this point, despite its size and administrative resources.

151. Finally, we do not consider that unfairness arises because of the offer and then removal of the White City contract. Although the Claimant's misunderstanding was a reasonable one, once the position had been

explained, that was sufficient. As the Respondent had no need for a substantive role at White City at that point, even if the Claimant had been properly offered a contract, there was still a redundancy situation (subject to the point about temporary roles, with which we have already dealt).

152. We therefore find that the Claimant's dismissal was procedurally unfair.

Polkey

The law

153. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place or, alternatively, what was the percentage chance of a fair dismissal taking place at that point: the *Polkey* principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46. The same principle applies in discrimination claims: the Tribunal must determine what would have happened if there had been no discrimination on a percentage chance (not balance of probabilities) basis: see *Shittu v South London and Maudsley NHS Foundation Trust* [2022] EAT 18, especially at [65]-[75] and at [80]-[102]. The burden is on the employer to satisfy the Tribunal of the chances of a future or hypothetical event happening: ibid at [55].

Conclusions

154. We have to consider what would have happened if the Respondent had acted lawfully, i.e. if it had made enquiries of stores in October – December 2020 who had stated availability 'close' to that of the Claimant as to whether they could accommodate her requirements, and if it had offered the Claimant the temporary roles at White City. We assume for this purpose that the Claimant would have behaved the same and would still not have told the Respondent her true availability.

155. This is a very speculative exercise, but the parties were agreed that we should attempt it on the evidence we have heard, and we do not consider it would be appropriate to adjourn for further evidence or submissions as it is apparent that any further evidence could only be post-hoc.

156. Looking at the November 2020 vacancy list there are 8 contracts that are 'close' to the Claimant's stated availability at this point of Monday, Thursday and Friday, i.e. Wood Green 4h Mon/Tue (x 2), Wood Green 8 hr Mon/Tue/Thur/Sat (x2), Wood Green 12 hr Mon to Fri (x2), White City 8hr Mon to Fri and 8hr Mon/Wed/Thur/Fri/Sat. We consider that with that many possibilities, there must be some chance that the Claimant's availability could

have been accommodated if the question had been asked, but we do not put the chance very high as it is clear that some thought has already gone into what each store requires and accommodating the Claimant's request would have required reorganisation for either store. In the context of a redundancy exercise, of course, with multiple vacancies available, there was the opportunity for reorganisation. For example, splitting one of the Wood Green 12hr Mon to Fri contracts into two contracts one of 8hrs Mon to Wed and one of 4 hrs Thu and Fri would on the face of it accommodated the Claimant's availability. Although that would only be if what Wood Green was seeking was someone to work full-time Mon to Fri. If Wood Green in fact wanted someone who could work any of those days, but might in fact be asked to work only some of the days one week and some the next then the Claimant's request could not have been accommodated. There also still remains the issue that, as at November 2020, the Claimant was maintaining she could only work Thursday and Friday mornings during term-time so even this potential line of creative reorganisation would not have met her stated availability at that point.

157. As to the short-term vacancies at White City, it is unclear whether the Claimant would have accepted these as her initial reaction even at the hearing was 'no' and we were struck that the Claimant's attitude at the 4th and 5th consultation meetings was not that of someone keen to secure a job at all costs. She stuck rigidly to her preferred days of Thursday and Friday and the evidence we have heard is that the temporary roles required more availability than that.

158. Putting these factors all together we think that the chances of the Claimant obtaining or accepting alternative employment even if the Respondent had acted lawfully is well below the 50% mark. We put it at 30% in this case. The *Polkey* deduction is therefore 70%.

159. We should add that, although the argument was not raised by the Respondent, we have considered of our own motion whether there should be a reduction for contributory fault for the Claimant as a result of her failure to inform the Respondent of her true availability, but we consider that the consequences of the Claimant's conduct in that regard are properly reflected in the *Polkey* decision.

<u>Failure to follow ACAS Code of Practice</u>

The law

160. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) *"it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment*

tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

161. In this case, a relevant Code of Practice, namely the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015).

162. Paragraph 1 of the Code of Practice defines grievances as *"concerns, problems or complaints that employees raise with their employers"*.

163. Paragraph 1 also provides that *"The Code does not apply to redundancy dismissals …"*.

164. Paragraph 32 of the Code provides: *"If it is not possible to resolve a grievance informally employees should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance."*

165. Paragraphs 33 to 45 provide, in summary, that where a grievance is received, an employer must invite the employee to a meeting to discuss it, offering the employee the right to be accompanied, provide an outcome in writing and then the right of appeal (with another meeting and written outcome).

166. Although we are not in this case concerned with a disciplinary process, it is relevant that guidance is provided in paragraph 46 about overlapping processes as follows: *"Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."*

167. The Court of Appeal in *Crédit Agricole Corporate and Investment Bank v Wardle* [2011] EWCA Civ 545, [2011] ICR 1290 urged caution about putting a value on the % uplift until the total value of the award is known.

Conclusions

168. We find that it was unreasonable for the Respondent not to recognise the Claimant's complaint of 14 May 2021 as a grievance. A company the size of the Respondent really has no excuse for not recognising an employee grievance, especially where it is submitted as a formal employee email complaint.

169. We then consider whether it would be just and equitable to uplift the award to the Claimant and, if so, by how much. We consider that it would be just and equitable because although the points that the Claimant raised in her grievance were in the end considered at the appeal against her dismissal, the Respondent's mishandling of her grievance meant that she did not get a grievance meeting, and appeal against that, prior to a decision being taken to dismiss her. Had she had that opportunity, we consider that there is a strong possibility that the overall outcome might have been different, because

the grievance and appeal process would have provided an opportunity for both the Claimant and Respondent to reflect on whether it was really the case that suitable alternative employment was not available, with the Claimant possibly moderating her approach having had a chance to discuss it with someone other than Ms Vashnevsky. We consider that it is appropriate to uplift the award by 20%.

Overall conclusion on liability

170. The unanimous judgment of the Tribunal is:

    a. The Respondent did not directly discriminate against the Claimant because of her maternity leave in contravention of ss 18 and 39 of the EA 2010;
    b. The Respondent did not directly discriminate against the Claimant because of her sex in contravention of ss 13 and 39 of the EA 2010;
    c. The Respondent did contravene ss 19 and 39 of the EA 2010 by indirectly discriminating against the Claimant because of sex when it adopted a practice *"during the redundancy process, requiring workers to be willing to work flexibly and to make themselves available for work most days of the week"*;
    d. The Claimant's complaint of unfair dismissal under Part IX of the ERA 1996 is well-founded;
    e. The Claimant's financial compensation must be reduced by 70% to reflect the chances that she would have been dismissed by reason of redundancy in any event even if the Respondent had acted lawfully;
    f. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures when it failed to treat her complaint of 14 May 2021 as a grievance. It is just and equitable to uplift the award by 20% under s 207A(2) of TULR(C)A 1992.

REASONS ON REMEDY

171. We gave oral judgment on liability on the morning of the last day of the hearing (22 September 2022) and then proceeded to hear evidence and submissions on remedy. We received a statement, schedule of loss and some additional documentation from the Claimant, who also gave oral evidence and was cross-examined. We gave oral judgment on remedy at the hearing. In doing so, we omitted to consider the requirements of the *1996 Regulations* in terms of awarding interest on discrimination awards. Neither party reminded us of this. We have rectified this omission in the written reasons that follow, which constitute the final decision of the Tribunal. Our findings of fact on remedy are set out as part of the reasons for our conclusion on each of the issues that arose.

Unfair dismissal

The law

172. Sections 112-124A of the ERA 1996 provide, so far as relevant, as follows:-

112.— The remedies: orders and compensation.

(1) This section applies where, on a complaint under section 111 , an employment tribunal finds that the grounds of the complaint are well-founded.

(2) The tribunal shall—
(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and
(b) ask him whether he wishes the tribunal to make such an order.

(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.

(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.

118.— General.

(1) Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of—

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 1262).

119.— Basic award.

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,
(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
(c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—
(a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
(c) half a week's pay for a year of employment not within paragraph (a) or (b).

(3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any year of employment earlier than those twenty years.

122.— Basic award: reductions.

…
(2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

123.— Compensatory award.

(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—
(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

…
(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

…

124.— Limit of compensatory award etc.

(1) The amount of—
(a) any compensation awarded to a person under section 117(1) and (2), or
(b) a compensatory award to a person calculated in accordance with section 123,
shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of—
(a) £93,878, and
(b) 52 multiplied by a week's pay of the person concerned.

…
(5) The limit imposed by this section applies to the amount which the employment tribunal would, apart from this section, award in respect of the subject matter of the complaint after taking into account—
(a) any payment made by the respondent to the complainant in respect of that matter, and
(b) any reduction in the amount of the award required by any enactment or rule of law.

> **124A Adjustments under the Employment Act 2002**
>
> Where an award of compensation for unfair dismissal falls to be—
>
> (a) reduced or increased under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 (effect of failure to comply with Code: adjustment of awards), or
> (b) increased under section 38 of that Act (failure to give statement of employment particulars),
>
> the adjustment shall be in the amount awarded under section 118(1)(b) and shall be applied immediately before any reduction under section 123(6) or (7).

173. The losses that can be compensated under s 123(1) are limited to pecuniary, economic losses; claimants cannot recover compensation for loss arising from the manner of the dismissal including humiliation, injury to feelings or distress: *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL.

174. Subject to that case-law-defined limitation, the Tribunal needs to determine what loss has been *"sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"*.

175. The claimant is under a duty to take reasonable steps to mitigate their loss, but the burden is on the respondent to show that they failed to do so. Whether the claimant has taken reasonable steps is to be judged objectively, but by reference to the particular circumstances of the claimant's case and their personal characteristics at the time of dismissal (including ill health): *Fougère v Phoenix Motor Company Limited* [1976] ICR 495. Subject to the requirements that the loss is a consequence of the dismissal and attributable to action taken by the employer, an 'eggshell skull' rule thus applies and a claimant who is old or ill or otherwise disabled is to be judged by the standards of what can reasonably be expected of them in their circumstances, not by the standards of a younger or fitter or non-disabled person.

176. Where a number of potential deductions or uplifts to a compensatory award have to be considered, the order in which they must be applied, as established by the statutory provisions set out above and the case law is as follows:-

    a. Adjustment for any payment by the employer to the employee of an *ex gratia* payment or payment in lieu of notice;
    b. Any deduction for failure to comply with the duty to mitigate;
    c. Any 'just and equitable' reduction in accordance with s.123(1) ERA 1996 (including a *Polkey* reduction to reflect the chance that dismissal would have occurred even if the proper procedure had been followed);
    d. Any uplift or decrease for failure to follow ACAS procedures;
    e. Any deduction for contributory fault under s 123(6) ERA 1996;
    f. Adjustment for any payment of an enhanced redundancy payment in excess of the amount of the basic award;

g. Any adjustment made under s.38 of the Employment Act 2002 (EA 2002) in respect of a failure to provide full and accurate written particulars of employment;
h. The statutory cap under s 124 ERA 1996.

Conclusion on unfair dismissal compensation

177. The Claimant is not entitled to a basic award as she has already received a redundancy payment.

178. As to compensatory award, the parties are agreed that the Claimant's net weekly basic pay was £160.38.

179. Since dismissal, the Claimant has continued to earn money from teaching dance classes on Thursday and Friday after school, but as she was doing this while employed by the Respondent, we do not count these earnings as mitigating her loss. She did between September and December 2021 teach some additional dance classes, from which she earned a total of £780 (based on the two invoices in the bundle, less the amount earned on the first invoice from 7 after-school classes at £30 per class).

180. As to mitigation of loss:-

a. We find that, so far as retail and admin jobs are concerned, the Claimant has made reasonable efforts to seek alternative employment. We have not counted, but there must be close to 100 applications in the bundle, and we accept the Claimant's evidence that more were made online and are not evidenced. Those are reasonable efforts to secure employment in those sectors. An employee acting reasonably is not required to make constant applications, even when they are busy with family and other work commitments.

b. The Respondent submits that the Claimant should have widened her search to include café and restaurant roles which, it is suggested, involve similar skills to retail. However, the Claimant has no experience at all of café work and, given that she has so many other skills, we do not consider that she ought reasonably to have sought employment in this sector.

c. The Claimant has a BA in Performing Arts from London Metropolitan University and has been teaching dance since 2012 for various other people and dance schools. She even ran her own dance school for a period by hiring a hall and advertising for students, although she said it was difficult to cover the cost of the hall doing that. The Claimant has made some effort to pursue additional dance teacher worker, as is demonstrated by her success in obtaining additional classes in the period September to December 2021. However, we were left unclear about precisely what efforts the Claimant has made

to secure additional dance classes since that point. The Claimant said that someone else returned to cover the additional dance classes she was doing, and that it was difficult to find other work because she generally did after-school dance classes but she could not do after-school work on Mondays to Wednesdays because she would need to put her youngest child into nursery for a whole day to do that, and it was difficult to find additional dance classes in schools during the day on Thursday and Friday as she is not qualified to teach PE generally, only dance and there was not much demand for that. However, we have only seen email evidence of communications with one dance school (EOS) in connection with possible work from September 2022. This sits uncomfortably with what the Claimant told us in the liability part of the hearing about being able to do dance classes 'when she wants to' as she is self-employed. The Claimant also has not considered alternative forms of childcare other than putting her child in nursery for a full day. In her email to EOS she stated that she would need two days of 4 hours of dance teaching (at £20 per hour) in order to justify putting her child into nursery (at a cost of £70 per day). She said that the nursery she had in mind was one she had used before and 'trusts', but in our judgment it is not reasonable for someone who is subject to a duty to mitigate their loss not to consider alternative childcare options, such as part-time nursery placements, childminders, babysitters, friends or family members. The Claimant herself mentions in her email to EOS the possibility of her older daughter looking after her youngest while she teaches, but to us she denied this was possible on the basis that her older daughter does other things after school. However, with three older children in the house it ought to be possible to arrange childcare for the youngest even from within family members for a few hours after school. The Claimant's answers to questions indicated she had not even considered this. Overall, we concluded that the Claimant has not made reasonable efforts to mitigate her loss through exploring alternative childcare options and securing additional dance teaching work.

d. The Claimant also has experience as a teaching assistant and she signed up with two teaching agencies (academics ltd, smart teachers) to provide cover if someone was sick, but she said that she was not offered work on a Thursday or Friday. We suggested to her that teaching assistant roles would have paid enough to warrant putting her youngest into nursery and/or that obtaining a permanent rather than cover teaching assistant role on Thursday or Friday would have earned a lot more than two after-school dance classes, but the Claimant said that she did not think that teaching assistant roles 'paid as much as people think' and referred again to the difficulty of meeting a whole day of nursery costs. In closing submissions, she said that she did not want to look for teaching assistant roles on Thursday or Friday because that would have meant giving up her after-school dance classes and she did not wish to risk doing that if she might not pass a probationary period as a

teaching assistant. She said that her long-term aspiration was to become a PE teacher and she therefore wished to continue with the dance classes. While recognising that the burden is on the Respondent to prove that the Claimant has not made reasonable efforts to mitigate her loss, we were not satisfied that the Claimant had made reasonable efforts to mitigate her loss through seeking teaching assistant work. She could have looked for permanent employment as a teaching assistant on Thursday and Friday mornings without having to secure further childcare or give up her dance classes. As to taking teaching assistant work at other times, again, an unreasonable lack of imagination with regard to childcare options was held up as an obstacle. Further, if the Claimant was prepared (as she told Jamilla she was) to put her child into nursery in order to work at the Respondent, we consider she ought reasonably to have been willing to do so in order to take on teaching assistant work, which we observe would provide relevant experience for her career aspiration as a PE teacher, and which we are not prepared to assume would have paid any less than retail. Indeed, it certainly would not have paid less for a day than the Claimant earned from after school dance classes (£30) as that would have meant it was paid considerably less than national living wage.

e. The Claimant also plays the violin and has in the past taught the violin. She has not made any effort to pursue work as a violin teacher, even though that could be done from home. Again, she cited childcare as the obstacle, but that would not be an obstacle to teaching on Thursday and Fridays around the dance classes, and our observations about the unreasonable failure to explore childcare options for the rest of the week apply again here.

f. Overall, we consider that while it was reasonable for the Claimant initially to limit her job search to retail work and maintaining her Thursday and Friday afternoon dance classes, we consider that once she had not got a new retail job by Christmas 2021 (which, being the busy retail period, would reasonably be regarded as providing the best opportunities for securing employment), acting reasonably to mitigate her loss, she needed to widen her search and explore other options, including by giving up the afternoon dance classes if that was what was necessary. After all, when she offered to work until 6pm on Fridays for the Respondent she was offering to give up those classes and we do not consider that a fear of failure ought reasonably to have held her back from doing so for other more gainful employment. If she had, between Christmas 2021 and Easter 2022, explored alternative childcare options, actively sought additional dance work, re-started her violin tuition and/or sought permanent employment as a teaching assistant, we consider that by Easter 2022 she ought to have been able completely to mitigate the £160.38 loss per week she was suffering consequent on her dismissal by the Respondent.

g. We add that we do not make any allowance to reflect the Claimant's argument that it was the Respondent's (allegedly discriminatory) failure to promote her during her employment which meant that she has been unable to secure retail employment since dismissal. That historic allegation was not part of her claim in these proceedings so we have made no findings in relation to it and, in any event, it had no bearing on her dismissal so is not a loss flowing from it for which the Claimant should be compensated. It is also only speculation by the Claimant that that is the reason she is not getting more interviews.

181. It follows that the Claimant's compensatory award must be limited to 49 weeks from dismissal, which is £7,858.62. From that we deduct the £780 for the additional earnings from dance. We multiply it by 0.3 to reflect the *Polkey* deduction, giving £2,123.59, and then uplift by 1.2 to give the 20% uplift to reflect the failure to follow the ACAS procedures, giving a total compensation for pecuniary loss of £2,548.30.

182. Loss of statutory rights we put at £450 because of her length of service, so the total compensatory award for unfair dismissal is **£2,998.30.**

183. The Claimant has not received additional state benefits since dismissal so the recoupment rules do not apply.

Indirect discrimination

The law

184. Section 124 of the Equality Act 2010 provides as follows:-

> **124 Remedies: general**
>
> (1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).
>
> (2) The tribunal may—
>
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
>
> (b) order the respondent to pay compensation to the complainant;
> (c) make an appropriate recommendation.
>
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate—
>
> (4) Subsection (5) applies if the tribunal—
>
> (a) finds that a contravention is established by virtue of section 19, but
> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.

> (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c).
>
> (6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119.
>
> (7) If a respondent fails, without reasonable excuse, to comply with an appropriate recommendation..., the tribunal may—
>
> (a) if an order was made under subsection (2)(b), increase the amount of compensation to be paid;
> (b) if no such order was made, make one.

185. Compensation for discrimination is to be awarded on a tortious basis (s 124(2)(b) and (6)), i.e. it should put the claimant back in the position they would have been but for the discrimination: *Ministry of Defence v Cannock and ors* [1994] ICR 918. There is no statutory cap on discrimination awards.

186. In addition to pecuniary losses, the Tribunal may make an award for injury to feelings. The guidance in *Prison Service and ors v Johnson* [1997] ICR 274 remains relevant:

    a. awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party;
    b. an award should not be inflated by feelings of indignation at the guilty party's conduct;
    c. awards should not be so low as to diminish respect for the policy of the discrimination legislation. On the other hand, awards should not be so excessive that they might be regarded as untaxed riches;
    d. awards should be broadly similar to the range of awards in personal injury cases;
    e. tribunals should bear in mind the value in everyday life of the sum they are contemplating; and tribunals should bear in mind the need for public respect for the level of the awards made.

187. The Presidential Guidance on Employment Tribunal awards for injury to feelings and psychiatric injury following *De Souza v Vinci Construction (UK) Ltd* [2017] EWCA Civ 879 for claims presented on or after 6 April 2021 is as follows:-
    a. a lower band of £900 to £9,100 (less serious cases);
    b. a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and
    c. an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

188. Pursuant to the *Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996* (the 1996 Regulations), reg 2 the Tribunal may include interest on any subms awarded in discrimination claims, and must consider whether to do so without the need for any application by a party in the proceedings. Parties may agree interest: reg 2(2). If they do not, interest is calculated as simple interest which accrues from day to day at the judgment

rate (currently 8%): reg 3(1). Interest on injury to feelings awards is to be interest beginning on the date of contravention or act of discrimination complained of and ending on the day of calculation (reg 6(1)(a)). Interest on all other sums is calculated from the mid-point date between the date of contravention and the date of calculation (reg 6(2) and 6(1)(b)).

189. Where the tribunal considers that in the circumstances serious injustice would be caused if interest were to be awarded in respect of the periods specified in paragraphs 6(1) and (2), the tribunal may calculate interest in respect of such different period as it considers appropriate (reg 6(3)). The tribunal's written statement of reasons for its decision must contain a statement of the total amount of any interest awarded and how it has been calculated (reg 7(1). If the tribunal does not award interest then it must provide reasons for doing so (reg 7(2)).

Conclusion on discrimination compensation

190. As the indirect discrimination in this case was (we find) unintentional, by virtue of s 124(4) and (5) we must first consider whether or not to make a declaration or a recommendation before awarding any financial compensation. The Claimant confirmed that she was not seeking a recommendation. We are nonetheless satisfied that it is appropriate to make a compensatory award as not doing so would not mark the seriousness of the discrimination we have found in this case.

191. The Claimant's financial loss consequent upon the unlawful discrimination that occurred prior to dismissal is in our judgment the same as the financial loss flowing from her unfair dismissal because the *Polkey* deduction reflected in substance the element of the Claimant's loss that flowed from the discriminatory failure to consider her situation in November 2020 as if she had made a FWR in relation to the roles available at that point. Having since the hearing considered our obligations under the 1996 Regulations, we are satisfied that it is appropriate in this case to make an award of interest on that sum, which we calculate as follows: there are 490 days between 21 May 2021 and 22 September 2022 (including the end date). The mid-point is therefore 245 days. Interest at the judgment rate of 8% on £2,548.30 is **£136.84**.

192. As to injury to feelings, we take into account:

    a. The injury to feelings the Claimant has suffered is the loss of friendship and support from having a job, the loss of a job she had held for 20 years. In her statement she describes suffering from stress and sleepless nights, feeling demoralised and as if she has a stigma for being an *"irresponsible mum of four children"* who does not have a job. Those are all significant injuries, but they are not the most serious end of those that we deal with. There is no medical evidence in relation to the stress for example, no other mental health issues and the Claimant was not so demoralised that she could not start looking again for employment immediately.

b. Discriminatory dismissal would normally sit in the middle band of *Vento*, but this was not a discriminatory dismissal and to the extent that the Claimant's feelings have been injured by the non-discriminatory elements of her dismissal (or how she feels she was treated by the Respondent in terms of promotion, which was not part of her claim in these proceedings) and we cannot compensate for those. The discrimination we found was in a PCP that was applied as part of the redundancy process. That PCP was applied up to and including the point at which the Claimant was dismissed, albeit that insofar as the Claimant did not get a job because she was maintaining her availability was only Thursday and Friday as at May 2021, it was self-inflicted detriment. We found that the discriminatory element effectively counted for 30% of the reason why the Claimant did not remain in employment. That must be reflected in our judgment because the *Polkey* deduction will not apply to this award.

193. Doing the best we can, we award **£5,000** by way of injury to feelings. Again, having now considered our obligations under the 1996 Regulations, we are satisfied that it is appropriate that the Claimant should receive interest on that award, and we calculate it as follows. Although the discrimination occurred prior to dismissal, we consider that the injury to feelings consequent on that occurred at dismissal, so we take 21 May 2021 as the starting point. There are 490 days between 21 May 2021 and 22 September 2022. Interest at the judgment rate of 8% on £5,000 for 490 days is **£536.99**.

Conclusion on Remedy

194. The Claimant is awarded compensation as follows:-

a. By way of compensatory award for unfair dismissal **£2,998.30**, comprising £2,548.30 loss of earnings and £450 for loss of statutory rights;
b. By way of compensation for discrimination **£5,673.83**, comprising interest on the loss of earnings of £136.84, £5,000 for injury to feelings and £536.99 by way of interest on that.

_____

Employment Judge Stout
28/09/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

28/09/2022

FOR THE TRIBUNAL OFFICE