EMPLOYMENT TRIBUNALS

Claimant: **Miss FB Yasin**

Respondent: **Swift Lawyers Ltd**

Heard at: Manchester Employment Tribunal (by video conference)

On: 9, 10 and 11 January 2023

Before: Employment Judge Dunlop
Mr I Taylor
Ms L Atkinson

Representation

Claimant: In person
Respondent: Miss L Halsall (Counsel)

JUDGMENT

1. The claimant's claim of 'automatic' unfair dismissal on grounds of pregnancy under s.99(3)(a) and s.105 Employment Rights Act 1996 is not well-founded and is dismissed.

2. The respondent unfairly dismissed the claimant. Her claim of 'ordinary' unfair dismissal under s.98 Employment Rights Act 1996 succeeds.

3. By dismissing the claimant for redundancy, the respondent discriminated against the claimant on grounds of her pregnancy contrary to s.18 and s.39 Equality Act 2010.

4. The compensation due to the claimant in respect of her claims of unfair dismissal and pregnancy discrimination will be determined at a Remedy Hearing. However, the elements of that compensation which compensate the claimant for financial loss will be subject to a reduction of 35% reflecting the possibility that the claimant would have been dismissed in any event.

REASONS

Introduction

1. The respondent is a law firm and the claimant, Miss Yasin, was employed by them for around three and a half years as a paralegal. During that period, she had two consecutive maternity leave periods. In January 2021, whilst on furlough, she informed the respondent of a third pregnancy. On 18 March 2021 Miss Yasin was dismissed on notice by reason of redundancy.

2. On 13 June 2021 Miss Yasin presented a claim to the Tribunal, asserting that her dismissal was both unfair and discriminatory.

The Hearing

3. The hearing took place over three days on 9, 10 and 11 January 2023. It was a fully remote hearing, which took place over the Tribunal's CVP video conferencing system. Barring the odd minor problem with connection or sound, the hearing proceeded smoothly.

4. The Tribunal were provided with a 935-page bundle of documents. Miss Yasin also referred to two supplemental bundles of documents. In fact, these had been incorporated at the end of our main bundle of documents. Miss Halsall was of assistance in identifying the equivalent page numbers when Miss Yasin wished to refer to documents in her supplemental bundles and we were grateful for that assistance. One additional document was produced at the start of the hearing, which we will refer to below. We had regard to the documents identified in the witness statements and by the parties during the course of the hearing.

5. Miss Yasin gave evidence on her own behalf. She also produced witness statements from Michelle Abbot and Joanne Cameron-Branthwaite. We were informed that Ms Abbot was unable to attend the hearing and we were invited to read her statement and give it such weight as we considered appropriate. The respondent did not object to this approach, but noted that Ms Abbot's statement was silent on key points which they would have wished to question her on had she appeared. Ms Cameron-Branthwaite was available to give evidence and joined the start of the hearing. However, Ms Halsall indicate that the respondent would have had no questions for her. On reviewing her statement midway through the hearing, the Tribunal was also satisfied that we would have no questions. By agreement, Ms Cameron-Branthwaite's statement was therefore accepted into evidence without her being called as a witness.

6. On behalf of the respondent, we heard evidence from Nizam Ahmed, the respondent's CEO, and Nazira Adam, a Director and Principal. Ms Adam is a solicitor, Mr Ahmed is not.

7. Both Miss Halsall and Miss Yasin prepared written submissions which we took time to read. Each was given the opportunity to supplement their written submissions with oral submissions, but each indicated that they considered the written submissions set out their respective positions fully and had nothing to add. We adjourned at lunchtime on the third day of the

hearing to deliberate, informing the parties that the Judgment would be reserved.

The Issues

8. The issues in the case were identified by Employment Judge Benson in a case management summary prepared following a case management preliminary hearing on 5 October 2021. The parties agreed that the List of Issues set out in that summary remained complete and accurate. It is reproduced below, (although we have omitted the sections which relate only to remedy).

9. At the outset of the hearing, the Employment Judge explained to the claimant that in some successful claims of unfair dismissal or discriminatory dismissal it is appropriate to reduce the compensation payable to reflect the possibility that if the claimant had been treated fairly/in a non-discriminatory way, there is a real possibility they would have been dismissed in any event. This is referred to as a ***Polkey*** reduction, after the case of **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**. We discussed the fact that it is usual for submissions to be heard about **Polkey** at the end of the liability hearing, whereas other remedy issues (such as whether a claimant has taken reasonable steps to mitigate their loss) will be considered at a remedy hearing. The parties agreed that it was appropriate for **Polkey** to be considered (if needed) as part of this hearing, notwithstanding the fact that it does not appear as a separate issue in the list of issues.

Unfair dismissal

1 .1 Was the reason or principal reason for dismissal:

1.1.1 Related to Miss Yasins pregnancy, childbirth or maternity; or ordinary, compulsory or additional maternity leave contrary to S.99(3)(a) or (b) of the Employment Rights Act 1996? And/or

1.1.2 Was Miss Yasin selected for redundancy because of her pregnancy and/or her intention to take maternity leave contrary to section 105 of the Employment Rights Act 1996?

1 .2 If so, Miss Yasin will be regarded as unfairly dismissed.

If not;

1.3 Has the respondent shown that the reason for Miss Yasin's dismissal was redundancy? Miss Yasin says that there was no genuine redundancy situation.

1.4 If the reason was redundancy, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss Miss Yasin. The Tribunal will usually decide, in particular, whether:

1.4.1 The respondent adequately warned and consulted Miss Yasin;

1.4.2 The respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool; Miss Yasin contends that she was not fairly selected as she should have been in a pool for selection with her colleague, Mr Scott Nolan.

1.4.3 The respondent took reasonable steps to find Miss Yasin suitable alternative employment; Miss Yasin says it did not;

1 .4.4 Dismissal was within the range of reasonable responses;

Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)

3.1 Did the respondent treat Miss Yasin unfavourably by dismissing Miss Yasin?

3.2 Was the unfavourable treatment because of the pregnancy?

3.3 Was the unfavourable treatment because Miss Yasin was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?

Findings of Fact

Background facts

10. The respondent is a law firm. The ET3 records it employs 19 people. That reflects its approximate size throughout the period of the events in this case, although the exact number of employees has fluctuated over time. It employs a mixture of solicitors, non-qualified fee-earning staff and non-fee earning staff in management and support roles.

11. Prior to 2016, the respondent derived much of its income from personal injury ("PI") work. In around 2016, the government announced an intention to reform aspects of PI litigation, which was expected to have the effect that pursuing such claims would be less commercially profitable/viable for legal representatives. The timescale of the reform was uncertain, but it was seen to represent a looming threat for businesses such as the respondent.

12. In March 2017, Ms Adam took up a role as a Principal and Director of the respondent. In effect, she headed up the litigation side of the firm (including PI) working alongside another Director heading up the non-litigation side, which mainly comprised conveyancing work. The other Director planned to leave the business, and a year-long transitional period was envisaged. Mr Ahmed was already working for the respondent as a business development manager, he was later promoted to CEO in around 2020.

13. During 2017 Mr Ahmed and Ms Adam identified a potential new area of work for the firm, namely negligence claims against installers of cavity wall insulation. It was believed that many properties had suffered damp, mould and related issues due to unsuitable or poorly-installed insulation products and that there may be valuable claims against the installation companies and their insurers. The respondent began to take on clients with potential cavity wall insulation ("CWI") claims.

14. Ms Adam identified a need for more staff to help administer these incoming clients. To be clear, these were files in a pre-litigation stage and no actual claims had been issued (or, as it transpired, ever would be issued). The respondent decided to recruit for a paralegal and an administrative assistant to work on the files.

15. Miss Yasin was recruited as a paralegal in the "CWI department" and commenced work on 4 December 2017. She had a law degree and had completed her LPC. She also had experience working on pre-litigation files at another firm and had a small amount of experience handling litigated files in her own name, although this only amounted to a couple of weeks. Her experience was predominantly in PI. She did not have specific experience of CWI claims, as this was a new area.

16. Miss Yasin reported to Ms Adam in terms of legal supervision and work allocation. For HR purposes, her line manager was Michelle Abbott, the office manager. It was expected by both parties that Miss Yasin would ultimately manage at least some of the CWI claims through commencing litigation and (as the firm hoped) settlement, although she would need to develop her experience in order to do that.

17. Miss Yasin spent the initial phase of her employment vetting the new CWI files to assess whether they were potentially suitable as claims. As this work reduced, she was asked to assist on PI files being conducted by Miss Adam and another fee earner, Joanne Cameron-Branthwaite from about March 2018. Miss Yasin did so willingly, and found herself busy with the combination of work.

Miss Yasin's maternity leave 2018-2020

18. Miss Yasin became pregnant and commenced maternity leave on in October 2018. Her proposed return date was in August 2019 but, unfortunately, her baby experienced some relatively serious health concerns and this delayed her return. Miss Yasin felt she was being pressurised to come back. We find that this was genuine feeling on her part, but the respondent's queries as to her intentions were understandable given the uncertainty of the situation and did not amount to unreasonable pressure.

19. In any event, Miss Yasin had become pregnant again and was due to give birth to her second child in January 2020. Although she initially intended to return to work, she ultimately decided to make the second maternity leave consecutive with the first one, and so she remained away from the workplace.

20. During the time that Miss Yasin was absent, little meaningful work was done on the CWI files. Instead, the respondent decided to 'hang back' in the hope that lead cases (we use that term in a non-technical sense) litigated by other firms would open the door to settlements with insurance companies. The respondent never recruited any specific maternity cover for Miss Yasin, and the PI work she had been doing was absorbed by other fee earners.

21. We note, generally, that the paperwork and administration around Miss Yasin's maternity leaves seems to be somewhat slapdash, particularly given the nature of this employer. There are, for example, emails suggesting that the firm has no record of her maternity leave start date and there is no evidence of any attempt by the respondent to inform Miss Yasin of her maternity rights and what she can expect.

22. During January 2020 Ms Adam announced her intention to reduce her working hours dramatically. In February, the respondent interviewed Scott Nolan as a possible new recruit to the firm. Mr Nolan is not a solicitor. He has been described as a 'Senior Litigation Executive' and the respondent's witnesses tell us that he was an experienced litigator. There was no documentary evidence e.g. job description, CV or job application provided.

We find this somewhat surprising given that Miss Yasin expressly compared herself to Mr Nolan in her claim and in the list of issues.

23. During this interview, Mr Nolan was given to understand that he would be progressing the CWI files. There is a dispute between the parties as to whether he would be taking over the role Miss Yasin would have been doing but for her maternity leave, or whether Miss Yasin would have been unable to litigate the files and so Mr Nolan's role, focused on litigating them, would have been a different role. In the circumstances described below, the files never progressed to litigation and we don't consider it necessary to resolve this dispute.

24. As it transpired, Mr Nolan's recruitment was not progressed at this stage due to uncertainty arising from the onset of the Covid-19 pandemic. The CWI files remained in abeyance.

25. In August 2020 Miss Adam reduced her working days down to one per week. It was decided to proceed with Mr Nolan's recruitment at this stage and he joined on 21 September 2020. We accept that Mr Nolan took responsibility for many of the matters which Miss Adam had been working on. In particular, there was one high-value multi-track PI claim which he took over on his first or second day at the firm and which subsequently absorbed his time for several days of the week. That files was referred to by the client's surname name during the hearing, for the purposes of this Judgment and to preserve the confidentiality of that client, we will rename it as the 'G' file.

26. Mr Nolan was employed on a salary of £27,000, compared to Miss Yasin's £18,000.

Miss Yasin's return to work

27. Miss Yasin returned from maternity leave in the first week of November 2020. She found herself working alongside Mr Nolan. We find that she assisted him in some of his on-going work. That was natural as she was returning after a long absence. She was not told, and did not consider, that he was senior to her and considered the terms 'litigation executive' and 'paralegal' to be effectively interchangeable in the industry. She was not aware of the salary differential. She would have become aware, if not aware initially, that Mr Nolan had greater experience of litigating claims than she did, although not specific experience of litigating CWI claims. Her understanding was that they would both be working on the CWI claims when it came to litigating them, and would be supervised by Ms Adam.

28. On her return to work Miss Yasin was asked to review the CWI files and began to do so. She was concerned about the fact that they had been left in abeyance during her absence and concerned about their viability. An issue came to light about expert reports which had been obtained, which were understood not to be compliant with the requirements of the Civil Procedure Rules. There were also uncertainties about limitation. Finally, there were concerns over whether the commercial funder which had been funding the cases would continue to do so.

29. At Miss Yasin's instigation a meeting took place on 19 November between Mr Ahmed, Mr Nolan and Miss Yasin. At this meeting Mr Ahmed expressed a positive view about the CWI files and provided reassurance to Miss Yasin that her job was not at risk (a concern she had expressed to Mrs Abbott). The fact that another firm was believed to have had some success litigating similar claims was discussed, and Mr Nolan was tasked with trying to find out more.

30. The following day, Mr Nolan reported back on his conversation with a solicitor at another firm, whom we will call HH. According to Mr Nolan, HH reported that she had run a number of CWI claims successfully, although there was an issue around full recovery of costs. HH apparently had other trials coming up, including one in January 2021 which was of particular significance as it was expected to deal with the liability of insurers as well as the contractors themselves (many of those businesses having become insolvent). Mr Nolan's proposal was that the firm delay issuing any claims until the result of the January trial was known (likely to be March 2021). In the meantime, there was work to be done in categorising the claims according to the installers involved and the limitation position. Miss Yasin took on the task of reviewing the files in accordance with this plan. At this point there were around 200 files.

31. Mr Ahmed gave evidence that he received a telephone call in relation to funding at sometime in December and was told that funding was gong to be further restricted. He says that he did not ask for confirmation in writing, nor make a file note in relation to this. When questioned, he confirmed that he would note on an individual file if (say) insurance funding was withdrawn, but did not do so on this occasion because it was a broader issue relating to many files. We found this made little sense – if it is important to record such matters for smaller claims, it is surely all the more important to record a funding decision which affected 200 files. Ultimately, we rejected Mr Ahmed's evidence on this point. Broadly, we found that his recollection of specific timings of events was not secure and that he was a witness who was prepared to give evidence in the respondent's interests without being scrupulous about the accuracy of what he was saying. We have therefore set aside the question of funding withdrawal in our consideration of what happened next.

32. At this time, Miss Yasin was effectively working three days per week and using accrued annual leave to cover Mondays and Fridays. Again, this arrangement was not well documented by the respondent and there seemed uncertainty over how much annual leave she had. We reject Mr Ahmed's suggestion in his evidence that he ever agreed to a flexible working arrangement for Miss Yasin (beyond her short-term use of annual leave as described).

Early 2021 Events

33. We do accept that an article was published in the professional press in January 2021 suggesting that the 2016 PI reforms were now expected to come into effect imminently. The respondent had already run down its PI department, initially by stopping active marketing and more latterly by

turning down work. Aside from the on-going work on the G case, there was little to be done.

34. At the start of January 2021, a new national lockdown was announced. The respondent considered that attendance at work was required in order for employees to perform their functions and notified staff accordingly. Miss Yasin was concerned about the risks of exposure to covid-19 for her daughter, who remained vulnerable, and suggested working from home. Instead, it was agreed that she would be furloughed. The respondent suggests that this was due to lack of work, Miss Yasin says it was due to her concerns about covid-19. We find that it was a proposal which suited both parties at this time. Miss Yasin had reviewed around 150 of the CWI files, so in that sense there was still work to do. The broader picture, however, was that the litigation side of the firm was much quieter than it had been prior to Miss Yasin's maternity leave, due to the changes in PI and Ms Adam's scaling back of her work. There was no urgent need for the CWI files reviews to be completed pending the outcome of the January case being run by HH's firm.

35. On 19 January 2021 Miss Yasin emailed Mrs Abbott. She was asking to move to a three-day a week working pattern permanently, but wanted to maintain her salary level. Mrs Abbott passed the request onto Mr Ahmed who rejected it, stating in an email that:

    With regards to Farzana's role predominantly being within the personal injury/CWI department up until this has not started bringing any revenue into the business we would not be able to consider any pay increases.

    Also the role is a full time role.

36. The panel can appreciate the point made about pay rise, but the comment about the role being a full-time role is more difficult to understand given Miss Yasin was on furlough due to 'lack of work'.

37. Later on the same day as she received this response, Miss Yasin informed Mrs Abbott by email that she was, again, pregnant, with a due date of 24th June. She asked Mrs Abbott to confirm "next steps" with regard to arranging maternity leave and working during pregnancy.

38. Mrs Abbott did not immediately reply, but shortly afterwards Miss Yasin received a message from Mr Nolan congratulating her on her pregnancy. She inferred (we find correctly) that her pregnancy was being discussed amongst the firm's staff before Mrs Abbott had made any acknowledgment to her. Miss Yasin was upset by this.

39. On 3 February 2021 Miss Abbott acknowledged Miss Yasin's email and informed her that the respondent intended to keep her on furlough until the end of April, following which a return to work would be discussed.

40. Later in the month, Mr Nolan picked up his communication with HH. He updated Mr Ahmed and Ms Adam in an email sent 22 February 2021. The news was not good. HH's firm had pursued four cases to trial, of which they had won only two. Damages in the two successful cases were only a fraction

of the amounts sought. We were told that the important January case had settled, although that information doesn't actually appear in Mr Nolan's email. In any event, he concluded:

The question here is where we go with these cases…we are essentially left with two options. We could take a pragmatic view and simply close these files, or alternatively, keep in close contact with [HH]…and await the outcome of any further cases she runs….

In any event I feel that the time has come where we have to update the client…They are expecting some sort of update in March.

41. We understand that this email was disclosed late to Miss Yasin, having been recovered from an archive of deleted emails. There were two versions of the email produced, the difference being a slightly different address shown as the sender, although both addresses were associated with Mr Nolan. (One of these versions was the document added late to our bundle, on the first day of the hearing.) The respondent's representative and witnesses speculated that this was because one version was the original and one was the version which had been archived and recovered. Initially, it appeared that Miss Yasin might assert that the email was not genuine. In the end, she did not assert this and we are satisfied that it was genuine. We nonetheless share Miss Yasin's surprise that such an important document, recording the respondent's thinking in relation to these files, was apparently deleted.

Dismissal

42. On 3 March 2021 Mrs Abbott rang Miss Yasin. Miss Yasin says that she was told that she was going to be made redundant, that she would receive an invitation to a meeting but that Mrs Abbott wanted to let her know, so that the letter didn't come as a shock. Miss Yasin is clear in her evidence that she was told that a decision had been taken, rather than that redundancy was a possibility or was being considered. The respondent's evidence is that Mrs Abbott "would not" have put matters in that way. We find Miss Yasin a truthful witness on this point and accept her evidence. We further consider that the email sent by Miss Yasin after the call, asking for *"the official reason for the redundancy"* supports her account.

43. Mr Ahmed's evidence in his statement was that he proposed to have a discussion with the funder about the possibility of closing the files, whereupon *"Mrs Abbott explained that she would have to follow a redundancy procedure in the meantime as the CWI claims may not be continued by the firm."* We reject the suggestion that it was Mrs Abbott's idea to make a redundancy (although it may well have been her suggestion that the business would need to follow a process). We also reject the suggestion made in both Mr Ahmed and Ms Adam's statement that Ms Adam had nothing to do with the redundancy decision. This position does not make sense, as the ultimate decision of whether to litigate the files would lie with Ms Adam. Further, under cross-examination, Miss Adam herself confirmed that she was part of the decision to make Miss Yasin redundant, contradicting the evidence given in both her own statement and Mr Ahmed's.

44. We find that on a date between 22 February and 3 March 2021, Mr Ahmed and Ms Adam jointly took the decision that the firm would not progress the CWI files pending a formal decision to close the files to be taken following discussion with the funder. They further decided, together, that Miss Yasin would be made redundant as a consequence of that decision.

45. Mr Ahmed instructed Mrs Abbott to complete whatever process was necessary into to put this decision into effect. Mrs Abbott was not a decision-maker in relation to the redundancy, she was simply the messenger.

46. On 4 March 2021 Mrs Abbott wrote to Miss Yasin to invite her to a redundancy consultation meeting on 10 March. She stated in the letter that a "*detailed review and risk assessment has been concluded*" in relation to the CWI files. Miss Yasin has repeatedly sought disclosure of the document(s) containing this review,to no avail. The respondent's witnesses gave evidence that there were some figures written on a piece of paper which was subsequently shredded. Again, the Tribunal are surprised, given the nature of this business at the failure to document the decisions taken in respect of the files and the reasoning behind that decision.

47. The statement in the letter was, we find, hyperbole, designed to make the respondent's process seem more formal and substantive than was actually the case. What actually happened, as we have said, was a simply joint decision by Mr Ahmed and Ms Adam that the files would be closed and that Miss Yasin would go.

48. A few other matters from the letter are of significance. The first is that it said Mr Nolan would attend the consultation meeting, although it did not indicate in what capacity. In the final paragraph of the letter Mr Nolan is described as Miss Yasin's "line manager" and she is invited to contact him, or Mrs Abbott, in the event of any query. Secondly, in describing the purpose of the meeting the letter noted (amongst other matters) that it would consider possible suitable alternative employment within the organisation.

49. In further email correspondence Mrs Abbott stated that the reference to Mr Nolan being Miss Yasin's line manager was an error and that Mr Nolan would attend the meeting in order to answer any technical questions about the decision to close the CWI files.

50. The bundle contains a verbatim transcript of the consultation meeting on 10 March. Key points which emerge are:

    50.1 Mrs Abbott was open about the fact that she would have to go back to "senior management" (i.e. Mr Ahmed and Ms Adam) in respect of any points or suggestions made by Miss Yasin.
    50.2 Mrs Abbott asserted that Miss Yasin was the only person working on the CWI files so a selection pool and scoring process has not been used. Miss Yasin challenged this assertion and asserted that Mr Nolan was employed "for the same reason". There was a discussion about this and Mr Nolan stated that that had been the expectation when he attended a first interview in early 2000, but it turned out following his recruitment in autumn 2000 that he had devoted most of his time to taking on Ms Adam's PI cases, and particularly the G file.

50.3 Miss Yasin raised the question of administration work around closing the files. Mrs Abbott replied that she hoped it would be possible to communicate with the clients easily by way of a mail merge letter, rather than writing to each individually.

50.4 Miss Yasin asked whether she could remain on furlough until a final decision had been taken on closing the files (which at this stage were proposed to be put into abeyance), no specific response was given to this question.

50.5 Miss Yasin also asked about whether she could work as an assistant in PI. In the context of this enquiry she acknowledged that Mr Nolan was "a senior member" and proposed that the firm still needed an assistant. Mrs Abbott's response was that she would have to take this back to Mr Ahmed. Mr Nolan expressed some doubt, highlighting that only a very small number of PI claims had been taken on in recent times and referencing the imminent PI reforms.

50.6 Finally, Miss Yasin asked if there was a position in conveyancing. Mrs Abbott's response was: "*Farzana if there was which there isn't at the moment, but if there was and if there is moving forward, then I would 100 percent just give you the role. I honestly, hand on heart, hand on heart I would do that. There is just nothing in the department. I honestly wish there was I really do."* She then talked about changes in that department and the various personnel involved and indicated a possibility that if more fee earners were recruited there may be a need for more assistance and *"then obviously I'll come directly to you first".* She went on to say "*I certainly wouldn't advertise that role until I had spoken to you."*

50.7 Towards the end of the meeting Mr Nolan speculated that he might be also be facing redundancy in a few weeks or months if the G case settled.

50.8 Miss Yasin asked directly if the redundancy had anything to do with her pregnancy, and Mrs Abbott stated that it had not.

51. Following the meeting Mrs Abbott spoke to Mr Ahmed about the points Miss Yasin had raised. Specifically, the question of whether she could remain on furlough whilst the final position with the CWI files was decided and whether there might be alternative work in either the PI department or conveyancing department.

52. In a letter dated 18 March 2021 the respondent rejected these proposals. In relation to the conveyancing work it was stated "*Whilst there is no position available at present, should the situation change and a position becomes available we will contact you.*" In relation to the CWI work, it was stated that the business had now decided that the claims would not be pursued further and a letter would be sent to each client informing them of this. Therefore there was no work for Miss Yasin to do.

53. Miss Yasin was informed that her employment would terminate on 16th April 2021 (i.e. after four weeks' notice) and the letter gave details of her statutory redundancy payment as well as informing her that she could appeal the decision by writing to Miss Adam.

54. Overall, the tone of the letter appears much cooler towards Miss Yasin than Mrs Abbott's tone in the meeting. Further, the letter fails to acknowledge

that the respondent will remain responsible for Miss Yasin's maternity pay or set out any arrangements for that. The respondent later accepted this responsibility although it took some effort on Miss Yasin's part before she received the payments she was entitled to. Although signed by Mrs Abbott, the substance of the letter was actually composed by Mr Ahmed.

Appeal

55. Miss Yasin appealed against the decision to dismiss her by letter dated 25 March 2021. She contended that it was not a genuine redundancy, that she had been unfairly selected and that she was being discriminated against on the grounds of her pregnancy. Initially, Miss Adam said the appeal would be 'passed back' to Mrs Abbott and Mr Ahmed, only when pushed by Miss Yasin did she proceed to make arrangements for a hearing which eventually took place on 20 May 2021.

56. We have a transcript of a recording of that meeting. There was very lengthy discussions about the decision to close the CWI files, about Mr Nolan's role (including both what he had been recruited for and what work he was actually doing) and about the PI reforms and what had been known at what time in relation to those. There was a shorter discussion about pregnancy, and Miss Adam repeated the assurances that Miss Yasin's pregnancy had nothing to do with redundancy. There was a very brief discussion towards the end of the meeting about the conveyancing department, including the fact that another employee called Hansa was not planning to return. We understand that Miss Yasin believed she might be able to act as an assistant to Hansa after her return. Ms Adam mentioned that there were changes in the conveyancing department but did not elaborate. There was no suggestion of any other job opportunity, nor any repetition of the promise to contact Miss Yasin if anything came up.

57. During the appeal Ms Adam responded to each of the points raised by Miss Yasin. It may be inferred from the discussion that the appeal is rejected, although that was not stated in terms. Miss Adam failed to send any outcome letter following the meeting.

58. Mr Ahmed's witness statement included some information about appointments in the conveyancing department. Specifically, he informed the Tribunal that "during the period of March, April and May" the respondent employed two conveyancing fee-earners. Michael Glover was described as an experienced conveyancer with over 40 years' experience and Charles Uff was described as a solicitor with significant experience in conveyancing. Mr Ahmed made the point that conveyancing solicitors, in particular, are difficult to recruit and valuable to the firm as having qualified solicitors is important for mortgage panel membership and indemnity insurance fees. Mr Ahemd stated that if a role had been available to assist in conveyancing it would have been offered to Miss Yasin, but there wasn't one.

59. The bundle of documents included a screen shot from the respondent's website/app of the professional profile of a woman called Sumaya Raja. The page gave Ms Raja's job role as "conveyancing assistant" and included the following text "*I qualified as a solicitor in June 2020 and was recruited by Switft Lawyers in June 2021 as a conveyancing assistant. Prior to joining*

Swift I worked in both conveyancing and personal injury." The respondent had not volunteered any documentary or witness evidence about the role Ms Raja was recruited for. The screenshot had been taken and disclosed by Miss Yasin.

60. Under cross examination, Mr Ahmed emphasised that Ms Raja was a qualified solicitor and that her description as an assistant was a "mistake". He said she was a fee earner doing work in her own name and that Miss Yasin would have been unable to do that work due to her lack of experience in conveyancing.

61. We find that there has been a distinct lack of transparency from the respondent around this role, and roles in the conveyancing department generally at this time. This was the case both during Miss Yasin's redundancy process (including the period of the appeal) and during the litigation. Although Mrs Abbott had been effusive in her comments to the effect that *she* would offer Miss Yasin a role if there as one available, we find Mr Ahmed and Ms Adam took quite a different attitude.

62. We consider it highly likely that senior and experienced conveyancers, such as Mr Glover and Mr Uff, would expect to have the support of assistants. It is not efficient, from the point of view of the respondent, to have expensive, experienced employees carrying out all of the more basic level tasks. Although Mr Ahmed was vague about the dates of recruitment for those individuals, it is not surprising that the firm found the need to recruit for an assistant shortly afterwards. We do not accept Mr Ahmed's evidence that the description of Ms Raja as an "assistant" was merely a mistake. She is a qualified solicitor, and as such may have been better placed than Miss Yasin to progress more quickly within the role, but that does not mean that the role required a solicitor (as implied in Mr Ahmed's evidence, conveyancing departments may well have significant numbers of fee-earner staff who are not solicitors). We also note that she was very recently qualified.

63. Finally, and moving away from the chronological approach we have taken so far, it is material to record that there was a volume evidence of Miss Yasin being highly regarded by those she worked with and within the firm generally. In the 10 March meeting, Michelle Abbott described her as a "model employee" and Mr Nolan said she was a "grafter" and he had "thoroughly enjoyed" working with her and would be "gutted" if no alternative employment was found. During his cross examination, Mr Ahmed volunteered a lengthy commendation of Miss Yasin as an employee, including that she would go "above and beyond" the tasks he gave her and that it was hard to recruit employees who could do that. We find that these comments went beyond the platitudes often expressed, particularly in redundancy cases. It is striking that Miss Yasin had created such a positive impression notwithstanding her significant absences from the workplace.

Relevant Legal Principles

Unfair dismissal

64. The unfair dismissal claim is brought under Part X of the Employment Rights Act 1996.

65. Section 98 ERA provides (so far as relevant) as follows:

> **"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
>
> **(a) the reason (or, if more than one, the principal reason) for the dismissal and**
>
> **(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this sub-section if it … is that the employee was redundant …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
>
> **(b) shall be determined in accordance with equity and the substantial merits of the case".**

66. The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

> **"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **(a) …**
>
> **(b) the fact that the requirements of that business –**
>
> **(i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish".**

67. Section 99 ERA provides that a dismissal will be regarded as unfair if the reason or principal reason is of a prescribed kind, or if the dismissal takes place in prescribed circumstances. For the purposes of this case, the relevant proscriptions are set out in the Maternity and Parental Leave etc Regulations 1999.

68. Regulation 20 provides that the dismissal will be unfair if the reason or principal reason for dismissal is the pregnancy of the employee, or the fact that she sought to take maternity leave. Similarly, the dismissal will be unfair if the reason for the dismissal is that the employee was redundant and

> **"it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee who have not been dismissed by the employee, and**
> **It is shown that the reason (or, if more than one kind, the principal reason) for which the employee was selected was for dismissal was [the pregnancy pf the employee or the fact that she sought to take maternity leave]"**

69. If neither of these 'automatic' reasons for dismissal is established, the Tribunal will then consider whether the dismissal is nevertheless unfair applying the general test of fairness set out in section 98(4) ERA.

70. The section 98(4) test has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

71. The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee. See **Abernethy v Mott Hay and Anderson [1974] ICR 323**.

72. A historical conflict between the 'contract' and 'function' tests for determining whether a redundancy situation was established was resolved by the EAT in **Safeway Stores plc v Burrell [1997] ICR 523**, later approved by the House of Lords in **Murray v Foyle Meats Ltd [1999] ICR 827**. Both those cases emphasise that the question of whether there is a diminution in the employer's requirement for employees to carry out work of a particular kind is distinct from the subsequent question of whether the dismissal of the claimant employee was wholly or mainly attributable to that diminution.

73. In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

74. The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

> **"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in <u>R v Gwent County Council ex parte Bryant</u> … when he said:**
> **'Fair consultation means:**
> **(a) consultation when the proposals are still at a formative stage;**
> **(b) adequate information on which to respond;**
> **(c) adequate time in which to respond;**

(d) conscientious consideration by an authority of the response to consultation".

75. The employer's duty to look for alternative employment is not to be conflated with the statutory provisions around suitable alternative employment which may, in some circumstances, disentitle an employee from a redundancy payment if they turn down an alternative role deemed to be suitable. In order to fairly dismiss, the employer has a much broader obligation to bring the employee's attention to opportunities within the organisation.

76. The assessment is to be made based on facts known to the employer at the time of dismissal and the appearance of a vacancy shortly afterwards would not make the dismissal unfair (**Octavius Atkinson & Sons Ltd v Morris 1989 ICR 431**). However, the facts known to the employer at the time of dismissal might include the fact that a position was "under review" or may become available within a short time (**Maguire v London Borough of Brent EAT 0094/13**).

Discrimination on Grounds of Pregnancy

77. Section 18 Equality Act 2010 provides as follows:

Pregnancy and maternity discrimination: work cases

> **(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.**
> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—**
> **(a) because of the pregnancy, or**
> **(b) because of illness suffered by her as a result of it.**
> **(3) …**
> **(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.**

78. S.39(2) EA provides that an employer must not discriminate against an employee by dismissing her or by subjecting her to any other detriment.

79. The effect of these provisions are that a woman can succeed in a claim of discrimination on grounds of pregnancy or maternity by demonstrating that in dismissing her or subjecting her to a detriment her employer has treated her unfavourably on the grounds of pregnancy or maternity. If she establishes this, the claim will succeed and she need not compare herself to a man (real of hypothetical) who has received (or would receive) more favourable treatment.

80. In considering the question of whether unfavourable treatment was 'because of' the claimant's pregnancy the Tribunal must examine the respondent's grounds for treating the claimant in a particular way. The pregnancy need not be the only reason, but it must have played a part. Further, it can be a conscious or unconscious motivation.

81. Section 136 EA contains the burden of proof provisions namely that if there are facts from which a Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the Tribunal must hold that the contravention occurred.

82. In **Igen Ltd V Wong 2005 ICR 931 CA** the Court of Appeal considered and amended the guidance contained in **Barton v Henderson Crosthwaite Securities Ltd 2003 IRLR 332** on how to the previous similar provisions concerning the burden of proof should be applied:

82.1 It is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful .These are referred to as " such facts"

82.2 If the claimant does not prove such facts the claim fails.

82.3 It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

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

82.5 It is important to notice the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts proved by the claimant to see what inferences of secondary fact could be drawn from them and must assume that there is no adequate explanation for those facts. These inferences can include any inferences that may be drawn from any failure to reply to a questionnaire or to comply with any relevant code of practice. It is also necessary for the tribunal at this stage to consider not simply each particular allegation but also to stand back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

82.6 Where the claimant has proved facts from which inferences could be drawn that the respondent has treated the claimant less favourably on the proscribed ground, then the burden of proof shifts to the respondent and it is for the respondent then to prove that it did not commit, or as the case may be, is not to be treated as having committed that act.

82.7 To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities that the treatment was in so sense whatsoever on the proscribed ground. This requires a tribunal to assess not merely whether the respondent has proved an explanation for such facts, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the proscribed ground was not a ground for the treatment in question.

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

83. The guidance has been approved in subsequent cases including, significantly, **Hewage v Grampian Health Board [2012] IRLR 870, SC** and **Royal Mail Group v Efobi 2021 ICR 1263, SC**. The case law makes it clear that the tribunal is not expected to split its hearing into two parts, but instead conducts the two-stage exercise during its deliberations, having heard all of the evidence. Secondly, in conducting this exercise the tribunal may take account of all relevant evidence at stage 1, without artificially excluding evidence which comes from the respondent at this stage of the decision-making process.

Submissions

84. The respondent submitted that this was a genuine redundancy coming about due to the decision to close the CWI files. That decision was forced upon the respondent by circumstances and had nothing to do with the claimant's pregnancy.

85. The claimant was employment to do the CWI work and there was no other candidate for the redundancy. Whilst there might have been discussion at

interview about Mr Nolan taking over the CWI files, that was not what had happened in reality. In any event, Mr Nolan was more senior and experienced than the claimant and she could not do the work that he was employed to do. Again, her selection for redundancy had nothing to do with pregnancy.

86. The respondent submitted that there were no alternative jobs available at the time of dismissal. The CWI work was ending – the fact that there might be one outstanding task of sending file closure letters did not mean that the claimant's job should be kept open, that work could be absorbed elsewhere. The PI work was contracting.The claimant could not have done Mrs Abbott's HR work which was absorbed by Mr Nolan. There were no support roles in the conveyancing department and, even if there were the claimant did not have the experience to do such a role. Ms Raja was appointed two months after the claimant was dismissed and was a qualified solicitor, so that would not have been a suitable role.

87. The claimant submitted that she had been reassured that the CWI work would continue and that her role was safe in November 2020. In late January 2021 she announced that she was pregnant and a few weeks later a decision was made to close the files and to make her redundant. As far as she was concerned, the problems with the files were all known about in November 2020, the only thing that had changed was her pregnancy and that must have prompted the respondent's decision to dismiss.

88. Further, when work diminished for Mr Nolan, the respondent had been able to find other work for him to do. It made no similar effort to find work for her. She felt strongly that Mr Nolan was also employed to do CWI work and should have been considered for redundancy. She also submitted that the respondent had failed to offer her alternative roles, including as a conveyancing assistant and assisting with HR matters.

Discussion and conclusions

Unfair dismissal
Reason for dismissal

89. We first considered whether the respondent had established a potentially fair reason for dismissal. The reason relied on by the respondent in this case was redundancy. We can understand why Miss Yasin doubts it that this was a genuine reason in the circumstances of this case. From her perspective, she acknowledges that there were concerns about the CWI files but considers that these were longstanding concerns which she herself had brought to the attention of senior management leading to the meeting in November 2020. We accept that in that meeting she was given assurances that she still had a job and that there was still work to be done on the files and still an intention to litigate them.

90. From Miss Yasin's perspective the only thing that had changed between the positive November meeting and the phone call on 3 March was her announcement. We are satisfied however, that that was not the only thing that had changed. In November, the CWI files were still considered to be viable, after 22 February, they were not. That change in position was not

well-documented by the respondent having regard to their obligations to their clients, nor was it discussed with Miss Yasin, a step which might have avoided some of the difficulty in this case. But, having said all that, we are satisfied that the change in position was genuine and that the decision to put the files into abeyance and then to close them was made for commercial reasons and was not, itself, related to Miss Yasin's pregnancy.

91. This decision led to a diminution (and, ultimately a cessation) of the respondent's need for employees to work on the CWI files. Although the picture is somewhat complicated by the fact that Miss Yasin had also done work on PI files and, more latterly, due to maternity leave and furlough, there had been periods where no work had been been carried out on the CEI files, we are content that the definition of redundancy set out at s.139 ERA is satisfied. It was suggested by Miss Yasin that she could not be redundant whilst there was still the outstanding task of sending closure letters on the files. A redundancy situation can arise where work is expected to cease or diminish, as well as where it already has. We do not consider that the fact that there was an outstanding administrative task in relation to closing these files changes the fact that a redundancy situation, as defined in the statute, had arisen.

92. In our view the main or principal reason for Miss Yasin's dismissal was redundancy. If the CWI cases had been proceeding then we are content that Miss Yasin would have remained in employment, as she had during previous maternity leaves and the respondent would have absorbed the work as necessary pending her return. It follows that Miss Yasin was dismissed due to her pregnancy and that the 'automatic' unfair dismissal under s.99 ERA must fail.

Selection

93. Miss Yasin also asserts, under s.105 ERA, that if she was redundant she was selected for redundancy due to pregnancy. For this claim to succeed the Regulations require that she shows that the circumstances giving rise to the redundancy applied equally to one or more other people in employment, and that the reason she was selected for redundancy was due to her pregnancy. The only other person that Miss Yasin contends should have been selected for redundancy is Mr Nolan, on the basis that he was also recruited to work on the CWI files.

94. This argument overlaps with Miss Yasin's 'ordinary' unfair dismissal case. Selection is an area which the Tribunal will consider in every claim involving a redundancy dismissal. We heard evidence about Miss Yasin and about Mr Nolan and their roles. We did not hear evidence about other paralegals or assistants employed in other parts of the firm and there was no basis to consider any argument as to whether a wider selection pool should have been considered.

95. Given that Miss Yasin has been clear from the outset that she was concerned about Mr Nolan and believed that he should have been assessed alongside her for the potential redundancy we found it surprising that the respondent offered no documentary evidence about Mr Nolan's professional background and qualifications, or about the job that he had

applied for and the conditions he was employed on. It went little beyond an assertion by Mr Ahmed and Ms Adam that Mr Nolan was 'far more' senior than Miss Yasin and really there was no comparison to be made between the two. Broadly, we found neither Mr Ahmed nor Ms Adam particularly impressive as witnesses, and would have been reluctant to determine that he had been properly excluded from the selection pool on that basis alone.

96. However, we also had evidence from Miss Yasin and information from Mr Nolan himself in terms of matters discussed in the transcript of the consultation meeting. Although that was not evidence (and was not given on oath) we consider it was reliable as a contemporaneous record of Mr Nolan's own views on his position. From that evidence, primarily, we conclude that Mr Nolan did have conduct of files which were being litigated and, in particular, that a significant part of his day to time was devoted to the G file. Although he had expected to handle the litigation of CWI files when recruited, that had not materialised. Any work that he did do on those files was minimal, as it was Miss Yasin who was engaged in the major review of the files taking place over November/December 2020 and there was no other work being done.

97. We are satisfied that the circumstances constituting the redundancy did not apply equally to Miss Yasin and Mr Nolan, and the terms of s.105 were not engaged. Miss Yasin was not selected for redundancy because of her pregnancy. She was selected because she was in a 'pool of one' as the only employee directly affected by the decision not to progress with the CWI files. Again, we consider that Miss Yasin's concerns in relation to Mr Nolan were justified given the information that she had at the time. A fuller consultation process may have addressed some of those issues, and that is a matter which we return to below.

Warning and consultation

98. In assessing the fairness of a redundancy dismissal, applying s.98 ERA, a Tribunal will consider whether adequate warning was given and whether the respondent engaged in genuine and meaningful consultation with the employee.

99. Overall, we do not consider that the timescale applied to this redundancy exercise was unduly abrupt. There was time for adequate consultation to take place and therefore Miss Yasin had sufficient warning of her dismissal.

100. Unfortunately, however, we do not consider that the respondent actually engaged in genuine and meaningful consultation during the time available. The main reasons for this conclusion are set out below.

101. Firstly, as indicated in our findings of fact, we accept the Miss Yasin's evidence that she was told by Mrs Abbott during the telephone call of 3 March that she was being made redundant, not that redundancy was being considered or that she was potentially being made redundant or any such similar caveat. The process that was put in place subsequently (likely at the behest of Mrs Abbott with her HR experience) as a 'box ticking exercise' in relation to a decision which was already final in Mr Ahmed's mind before the telephone call took place.

102. Secondly, and following on from what is said above, it is notable that Miss Yasin was not given the opportunity to consult directly with Mr Ahmed (or Ms Adam) as the decision-makers in this process. We accept that this fact alone would not necessarily make the consultation unfair. It is not unusual for direct line managers to conduct consultation meetings and then relay potential suggestions to more senior managers before reverting to the employee. It is, however, difficult to see why this was necessary in a relatively small organisation and in a redundancy exercise affecting only one individual. Further, the rather cursory nature of the responses provided by Mr Ahmed to Miss Yasin's points (as set out in the letter he composed to be sent by Mrs Abbott) are a further indication that his mind was closed to any alternatives.

103. We have said above that we were satisfied that it was appropriate for Mr Nolan not to be placed in a selection pool with Miss Yasin. We accept Miss Yasin's feeling that he should have been is genuine. This illustrates, in our view, another failure of consultation. Particularly in circumstances where an employee has been absent from the business during furlough, they cannot be assumed to have the same knowledge as the employer about conditions 'on the ground' in the business. An open dialogue about the need for redundancies, as well as the basis for selection, when the proposals are at a formative stage, rather than when they are 'a done deal' is likely to prevent the sort of suspicions and misconceptions which have arisen in this case.

104. Finally, although perhaps not technically falling under the heading of consultation, we consider that the respondent's approach to Miss Yasin's appeal against dismissal in this case was poor, and underlines that the respondent was merely going through the motions in its processes.

Suitable alternative employment

105. We have further concerns with the respondent's attempts to find suitable alternative employment which overlap with our concerns about the consultation process.

106. We find that the respondent was not open or transparent, either with Miss Yasin at the time, or with the Tribunal, about developments in the business and what the business needs were likely to be. We consider that Miss Yasin was right to note the contrast between her own position and that of Mr Nolan. When work was drying up in PI, Mr Nolan was found other opportunities within the business, notably taking over the HR responsibilities of Mrs Abbott. We do not necessarily consider that Miss Yasin could have taken over those responsibilities herself, but do consider that it demonstrates, at least potentially, a difference in approach between an employee that Mr Ahmed wanted to keep and an employee that he had decided he did not want to keep.

107. More specifically, we reject the respondent's evidence that there was no role available in the conveyancing department. With the demise of PI (and, to a lesser extent, CWI) the conveyancing department represented the future of the firm. The firm was positioning itself to attract, and carry out, as much work as possible in this area, for example by investing in new app-

based technology. We note that Mrs Abbott was aware of some planned restructuring in that department even at the time of the initial consultation meeting. We note the recruitment of two senior fee earnings in the period March to May 2021, and the respondent's vagueness in its evidence about those appointments and the timescale. We note the appointment of Ms Raja as a conveyancing assistant in June 2021. We conclude that Mr Ahmed would have formed an intention to recruit for this post well in advance of the appointment having taken place, and that it is more likely than not that he had formed that intention by the time of Miss Yasin's redundancy was confirmed by letter on 18 March 2021, and certainly by the time her notice expired a month later.

108. We find that by not offering Miss Yasin the role of conveyancing assistant – or at least exploring the possibility with her – the respondent failed in its obligation to give due consideration to whether there was suitable alternative employment for Miss Yasin.

Conclusions in relation to unfair dismissal

109. We consider that the respondent acted outside the band of reasonable responses in relation to both the way in which it conducted consultation and its obligation to consider suitable alternative employment. For those reasons, we find that the dismissal was unfair. There was the additional procedural failing in relation to the failure to send an outcome letter following the appeal. That contributes to the unfairness but is a minor point compared to the other matters.

110. The parties were asked to address the question of whether any ***Polkey*** reduction should be made to Miss Yasin's compensation (in the event that she was successful) in their questions and submissions at the liability stage of the hearing. Miss Yasin had little to offer on this point. Miss Halsall submitted that any procedural unfairness would have made no difference to the timing of the dismissal and, as such, invited us to reduce any compensation by 100%.

111. We have found procedural unfairness, but we have also found substantive unfairness. Most importantly, this concerns the respondent's failure to address the question of alternative employment. We find that if Miss Yasin had been offered an alternative role as a conveyancing assistant she would most likely have accepted it – not least due to her impending maternity period. However, we do acknowledge that we cannot be completely sure that that would have been the case. It is almost certain that taking on a new role would have required attendance in the office and the evidence is that Miss Yasin had been reluctant to do that in the past, due to (understandable) concerns around her eldest child's vulnerable health and potential exposure to covid. There is also the possibility that the role simply wouldn't have suited her or that the respondent would (acting reasonably) have concluded that she wasn't able to adapt to working in a different department.

112. Taking account of all of these possibilities, we consider that awarding Miss Yasin full compensation on an unreduced basis would amount to giving her a windfall. Trying to assess the percentage probability that she

would have remained in employment is necessarily a speculative exercise. Having regard to all of the circumstances of this case, and in particular the matters referred to above, we consider that there is a 65% chance that, acting reasonably, the respondent would have offered Miss Yasin a role as a conveyancing assistant and she would have accepted that role and successfully moved into it, subsequently taking her maternity leave as a substantive employee within that department. It follows that the compensatory award due to Miss Yasin should be reduced by 35%, reflecting the possibility that she would have been dismissed even if the respondent had acted reasonably in relation to the matters we have identified.

Discrimination on grounds of pregnancy

113. For the reasons set out above, we were satisfied that Miss Yasin's role was genuinely redundant and that the criteria for an 'automatic' dismissal on the grounds of pregnancy or seeking to exercise her right to maternity leave are not satisfied. However, that does not mean that her pregnancy played no part at all in the decision to dismiss.

114. We consider that Miss Yasin has proven facts from which it is possible to conclude, in the absence of an alternative explanation from the respondent, that both the respondent's failure to engage in genuine and meaningful consultation, and its failure to consider Miss Yasin for the role of conveyancing assistant were on the grounds of her pregnancy (and/or on the grounds that she was seeking to take maternity leave). The key facts are as follows:

114.1 Miss Yasin was a highly-regarded employee. She was praised for her initiative and ability to undertake new tasks. She had successfully worked in the CWI role despite having no previous experience in this area of work (because it was a new area) and so had demonstrated that she was able to work successfully in an area of law in which she had no prior experience.

114.2 When Miss Yasin announced her third pregnancy there was a delay in any response from the respondent. It is event, however, from the communication she received from Mr Nolan, that the fact of her pregnancy was being discussed in the office.

114.3 If the respondent had offered her a role as a conveyancing assistant, or found some other work which would have enabled her to remain employed there would have been an almost immediate need to backfill that work due to her starting her third maternity.

114.4 As described more fully above, Mr Ahmed and Miss Adam made a decision to make Miss Yasin redundant before then 'going through the motions' of a consultation exercise. They were not interested in seeking ways to avoid the redundancy.

114.5 Again, as described more fully above, there was going to be a need for further assistance in the conveyancing department. The respondent was not open and transparent with Miss Yasin about the developments in that department, about its recruitment of new fee earners, or about the need for assistants.

114.6 A new assistant was recruited in June 2021, despite assurances given to Miss Yasin that there was no need for an assistant. The

respondent was not open about that recruitment during this litigation process, Miss Yasin was only made aware due to her own research online and the respondent then argued that the description of Miss Raju as an assistant in the department was a mistake (we do not accept that argument).

114.7 The respondent's conduct in failing to pay Miss Yasin's maternity pay until Miss Yasin had 'chased' for it through extensive correspondence demonstrates that the respondent was either not fully aware of its obligations towards pregnant employees, or else was unconcerned about whether it met them.

115. We consider that those circumstances give rise to an inference that Miss Yasin would have been treated differently if she had not been pregnant. The treatment which is complained about is her dismissal. It is clear that dismissal is unfavourable treatment. The key question is whether that unfavourable treatment was on the grounds of pregnancy. Although pregnancy was not the immediate cause of Miss Yasin's dismissal, for the for reasons we have set out, if Miss Yasin can show that her pregnancy played some part in the dismissal – namely that it led to the respondent failing to consult her properly and failing to make a genuine search for alternative employment for her – then that would be sufficient for her claim to succeed.

116. The facts set out above are, in our view, sufficient for Miss Yasin to demonstrate that her pregnancy played a part in the respondent's decision to dismiss, albeit that it was not the sole or principal reason for the dismissal. The respondent has offered no alternative explanation for those facts, and on that basis the claim of discrimination on grounds of pregnancy also succeeds.

117. The financial compensation flowing from the discrimination we have identified will also fall to be reduced by 35%, in accordance with our findings at paragraphs 110-112 above.

Next steps

118. A date for a provisional remedy hearing had been agreed with the parties when we adjourned to reach our decision. The remedy hearing will now go ahead on 10 March 2023.

Employment Judge Dunlop

Date: 1 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

2 February 2023

FOR EMPLOYMENT TRIBUNALS