CASE NUMBER: 1401917/2021

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms Laura Hunter **v Carnival PLC (Trading as Carnival UK)**

Heard at: Southampton

On: 8,9 and 10 November and 3 February 2023

Before: Employment Judge Rayner
Mr R Spry-Shute
Mr Ruddick

Appearances

For the Claimant : In Person
For the Respondent: Mr Bromige of counsel

JUDGMENT

Declaration

1. The Claimant was unfairly dismissed.

2. The Claimant was automatically unfairly dismissed contrary to section 20(3) and section10 MAPLE Regulations 1999.

Discrimination

3. The Claimant's claim of discrimination contrary to section 18(2) and 18(4) Equality Act 2010 is dismissed.

Remedy

4. The Respondent will pay to the Claimant the sum of **£13,248.52 which is comprised of the following sums:**

Loss of earnings from 29 June 2020 – 31 June 2022	£11091.04
Pension loss from 29 June 2020 until 31 June 2022	£1657.48
Loss of statutory rights	£500.00

5. **The recoupment regulations will apply to this award and the following findings are made in that respect:**
    a. **The prescribed element of the award is £13,248.52.**
    b. **For recoupment the period is the effective date of termination until the date of hearing today which is 3 February 2023.**
    c. **there is no difference between the prescribed element and the total award**

Reasons

1. The Claimant brings a claim of ordinary unfair dismissal automatically unfair dismissal, contrary to the Maternity And Paternity Leave Regulations 1999 and brings claims of discrimination on grounds of pregnancy contrary to section 18(2) and 18(4)of the Equality Act 2010.

2. A telephone case management hearing took place on 22 October 2021 and a draft list of issues was agreed.

3. The claim was listed for three days but shortly before the hearing it was reduced to 2 days.

4. The Employment Tribunal heard evidence in the case over two days on the 8; and 9 November 2022 . At the start of the hearing, we were provided with an agreed bundle of 359 pages including pleadings, and with witness statements on behalf of the Claimant and the Respondent.

5. The Claimant gave evidence on her own behalf and on behalf of the Respondent we heard from Ms R Dunn, the Claimant's most recent line manager, Ms Milner, a senior employee relations consultant involved in the collective redundancy consultation process, who had also supported Ms

Elstone in relation to the Claimant's appeal, and Ms Elstone (nee Simms) who had heard the Claimant's appeal against dismissal.

6. During the course of the hearing, we were provided with some additional documents showing the scoring of individuals and some documents which were an enlarged copy of the sheets recording scoring of the various individuals.

7. At the end of the hearing of evidence and submissions the Judge explained to the parties that we would not be able to deliberate; determine matters and deliver judgement within the time available .

8. We canvassed with the parties whether they would be happy for us to give a reserved judgement or whether they would prefer to return on a future date for a verbal judgement and then decide whether or not they wanted reasons in writing . The parties both requested a further date for hearing to deliver a verbal judgement and deal with remedy if necessary .

9. A further hearing was therefore fixed, and judgment was delivered.

Findings of Fact

10. The Respondent operates cruise ships and prior to her maternity leave, the Claimant worked on the shore side part of the operation as a team leader in the Respondent's contact centre. Prior to this, she had had a number of roles within the Respondent including secondment to other parts of the business. We find that she had long experience, wide ranging abilities and skills, and that she had performed well in her job across a range of posts.

11. The Claimant worked for the Respondent from the 2 January 2008 .

12. The Claimant became pregnant, and informed the Respondent that she was pregnant, and told them both the date of her expected week of childbirth and the date she intended to start her maternity leave,

13. On the 23 March 2020, the Claimant received a letter from People Services Directorate confirming that she wanted to start her ordinary maternity leave on the 6 April 2020, with her additional maternity leave following automatically. The letter confirmed that the Claimant was, at that stage, intending to return to work on the 5 April 2021

14. The letter also set out the Claimant's entitlement to maternity leave. It told her that she was entitled to enhanced maternity pay during the 26 weeks of ordinary maternity leave and statutory maternity pay for the first 13 weeks of additional maternity leave. The remaining 13 weeks of her additional maternity leave would be unpaid.

15. There is no dispute between the parties that the Claimant was therefore within the protected period for the purposes of section 18 Equality Act at the point that the redundancy exercise was started until it was completed; throughout the consultation, and up to and including the date of the decision to dismiss the clamant and the dismissal of the Claimant's appeal.

16. Further there is no dispute that the Claimant was entitled to both ordinary and additional maternity leave and that she was covered by regulation 10 of the Maternity and Parental Leave Etc Regulations 1999 , although the Respondent disputes that the Claimant was entitled to the protection of regulation 10 in the particular factual circumstances of this case.

17. Further it is not disputed that the Claimant was an employee who was protected from detriment by reason of regulation 19 and section 47C of Employment Rights Act 1996 as it is relevant to her. This means, in this case,

that she was protected from being subject to any act or deliberate failure to act for reasons that

a. she was pregnant
b. had given birth to a child
c. took or sought to take or availed herself of the benefits of ordinary maternity leave or additional maternity leave.

18. She started her ordinary maternity leave on the 6 April 2020. However, the Claimant took annual leave from the end of February 2020, prior to starting her maternity leave, and was absent from the workplace from that date.

19. On the 29 April 2020 the Respondent notified all employees that the company would be entering a formal consultation in respect of a wide-reaching redundancy exercise, with the first formal consultation meeting taking place on the 11 May 2020.

20. We accept, as does the Claimant , that there was a genuine redundancy situation. We accept that the reason for the redundancy exercise was that the Respondent's business, which is the support and management and operation of cruise ships and cruises, had been very badly hit by the Covid 19 pandemic, meaning that the majority of the cruise ship industry had effectively shut down for the immediate future.

21. On the 11 May 2020 the Claimant and others attended at a first formal consultation meeting, following which the Claimant was formally placed at risk of redundancy, along with all the other team leaders in her work area.

22. Following a consultation process the Claimant was given notice of dismissal on grounds of redundancy, to take effect on 30 June 2020. The Claimant appealed this decision, but her appeal was dismissed.

23. The Claimant approached ACAS on the 13 September 2020 and her certificate was issued on the 13 October 2020. She filed her claim to the employment tribunal on the 13 November 2020.

24. Her claim in respect of dismissal is therefore in time, as is any event after the 14 June 2020. In this case, we all agree that it would be just and equitable to extend time in respect of any act or omission which was part of the redundancy process, and which would otherwise be out of time.

25. In their response, the Respondent set out the timeline and the process that they had followed in selecting individuals for redundancies as well as the reason and need for the redundancy exercise, and we find that this is true.

26. We also find that the Respondent did ensure that it stayed in touch with the Claimant and communicated regularly with her during the redundancy process whilst she was on maternity absence.

27. The Respondent states and we accept that selection pools and criteria were established after discussion and agreement with the elected employee representatives as part of the consultation process.

28. The Respondent states and we accept that the Claimant was included in a selection pool with the other team leaders in the contact centre. It was initially proposed to reduce from 21 team leader roles to 15, but as a result of consultation, it was established that, to ensure operational stability, there would be a continuing requirement for 16 team leader roles rather than 15.

29. The process described by the Respondent is that the affected employees were scored by their respective line managers against the agreed criteria. The scores of all the team leaders were then calibrated, through what the Respondent

described as an independent validation process. We accept that there were several stages in the scoring of individuals and that the intention was to ensure that there was a fair and objective scoring of all those within the pool.

30. It is the Respondent's case that the period of the Claimant's secondment to an unrelated role between February and June /July 2019, had not been taken into account when scoring her for the team leader role. It was asserted that both the Claimant's line manager, Richard Turner who had managed the Claimant between October 2018 and February 2019 and Miss Dunn, her line manager from July 2019 onwards, had an input into her scoring to ensure fair assessment of her. We accept that the only work, which was assessed for those in the pool, for the most part, was that carried out in the team leader role.

31. The Respondent asserted that all team leader scores were independently validated by Peter Robinson, the senior manager of the Contact Centre Operations with support from an HR business partner

32. The Claimant has raised concerns about the inclusion of a man, JG in the Team Leader pool, because she understood him to have been working elsewhere in the organisation, and only covering her position whilst she was on maternity absence. He was subsequently offered one of the team leader roles and therefore not made redundant.

33. Miss Dunn said in her evidence to the ET that he had initially been employed as a PCA (personal cruise adviser). He had applied for a team leader position in August 2019 and been unsuccessful. He had then reapplied for a post of team leader in January 2020 and been successful and had been appointed from the 1st of February 2020, initially as drydock team leader.

34. Miss Dunn said that she decided that he would be best placed to support the Claimant's team when she went on annual leave prior to starting her maternity

leave in February 2020. Her view was that he had proved to be a great team leader and consistently received good feedback. She referred in her witness statements to some feedback which was included within the bundle. We note that the feedback all seems to be from 2019, before he was made a team leader in Miss Dunn's work area.

35. All of the emails about JG were provided by Miss Dunn at some point in July 2020, and we note that the Claimant filed her appeal against the decision to dismiss her on the 3 July 2020.

36. We find one of the issues she raised was how JG was successful in securing his position as a team leader and whether or not he was scored on his PCA role. It appears that the feedback about JG all pre dates him taking on a team leader role, and that he was, therefore either scored on his earlier role, or that Miss Dunn did take it into account. She certainly provided it as a justification, or explanation of his having been successful in the selection exercise.

37. We also note that one of with the pieces of feedback from Jane Gooding, a personal cruise adviser, states at the end *I want to add Laura is still a great TL too LOL*. This was not explained to us in evidence.

38. The Respondent asserted that because his appointment preceded the Claimant's maternity leave and was unrelated to it, it was appropriate to include him in the team leader selection pool rather than score him in respect of and against his previous role as a personal cruise adviser.

39. We accept that this was the chronology of events and the reason he was included in the pool, but do not accept that his earlier role and achievements were irrelevant when it came to the selection process. We observe that Miss Dunn, who was the first person to score the team leaders in her area, started that process with a very high opinion of JG, and that was a result of her

previous experience of him in a different role. We all agree that this is likely to have influenced her scoring of him.

40. The Respondent asserts that the Claimant was one of five team leaders out of the pool of 21 who were provisionally selected for redundancy, and that the remaining team leaders, including JG, scored more than those provisionally selected for redundancy. We find that, on the basis of the scoring records provided to us, this is correct.

41. However we are surprised that JG who had only been in the team for relatively short period of time, was able to score more than the Claimant in respect of a number of areas. This is not to suggest that he may not have been good at his job but it is hard to see how he could have demonstrated any significant experience or expertise in such a short period of time.

42. We find that as early as the 11 May 2020, the Respondent was aware that they had at least 15 vacant team leader posts and that their method for filling each of these posts was to carry out the redundancy selection exercise, to decide who would get the posts.

43. It was central to the Respondent's redundancy process and the selection exercise that all of the team leaders were competing for one of 15 (later 16) generic vacant posts. On the evidence we have heard we find that none of the team leaders were applying for their own jobs.

44. A second formal consultation process meeting took place on the 20 May 2020 and there were discussions between the employer and the employee representatives at that point about the process for selecting who would be made redundant and who would be offered one of the 15 vacant posts.

45. There was a lengthy discussion about the Selection criteria and the criteria to be used were then agreed. Miss Dunn told us in her witness statement that it was agreed that there would be a discretion for different areas of the business to populate in more detail the requirements for particular roles under the criteria headings, subject to input from an HR business partner. We understand this to mean that different areas of the business could identify particular criteria which they considered to be more important, not that it was agreed that there would be a discretion in the selection itself.

The Agreed selection criteria

46. Around the 22 May 2020 managers were provided with a document entitled *Operational Organisational Review Line Managers Briefing Pack 2.*

47. Firstly, it states *during organisational restructure where the number of roles or positions might be rescoped or reduced employers need to define a fair way to select the individuals who were retained to perform those roles. For this they need to bring suitable candidates together into a selection pool.*

48. It goes on to state who should be included in the selection pool and identifies individuals in the organisations whose roles are

    a. *the same or similar even if they work on different shifts or in different sites or parts of the business*
    b. *interchangeable in terms of work*
    c. *and affected by the redundancy proposals.*

49. It is then identified that there are two types of selection pools; firstly, those where there is a reduction of total number of the same role and secondly where

there is an amalgamation of roles resulting in a newly created position that is not a vacancy.

50. We find that in this case on the evidence we have heard the type of selection pool created was one where there was a reduction of the total number of the same role.

51. The second section deals with selection criteria. It is stated that the criteria should be measurable and should be capable of being supported by evidence, for example knowledge; skills; qualifications and disciplinary records. Assessment of the criteria should not be reliant on the subjective opinion of an individual manager. The employer should ensure that the criteria are applied fairly and consistently.

52. The guidance states that Carnival UK had created selection criteria based on a selection criteria matrix and a selection criteria support template.

53. The purpose of the selection criteria matrix was to capture the output from the selection criteria support template. It included the criteria headings as follows
    a. *knowledge/skills*
    b. *versatility*
    c. *relevant qualifications/ certified training*
    d. *performance-appraisal*
    e. *performance-values and behaviours*
    f. *disciplinary record*

54. The process was then that the substantive line manager for each individual at risk in the selection pool would complete the selection criteria.

55. It states *as far as possible we need to ensure that selection criteria are objective and measurable and are not based on subjective opinion. if an individual assessed is currently on maternity; due to go on maternity; paternity;*

shared parental leave; adoption leave or long term sick leave, please contact your HR business partner who will be able to guide you.

56. We have no evidence before us that Miss Dunn did in fact approach HR prior to scoring the Claimant. This is despite her stating in her evidence that she was acutely aware that the Claimant was on maternity leave and that she, Miss Dunn, did her best to update her on developments that affected her.

57. The guidance continues*, the selection criteria support template which is available from your HR business partner should be used to identify specific criteria requirements under each heading for the relevant pools. Scores for each heading should be transferred to the selection criteria matrix document.*

58. The guidance goes on to state that the HR business partner would allocate a validation manager and that the business partner would review the selection criteria template in conjunction with that validating manager.

59. A Selection criteria matrix was included at appendix A. This sets out the 7 criteria above but indicates a weighting in respect of appraisal of 2x. It also states on the form *if no end of year rating recorded or new to role/mat leave/STL, score 3.*

60. *Performance values and behaviours* was also weighted at 2x, disciplinary record was weighted at 1x with 0 being no live sanction and -5 being a live sanction on file.

61. Guidance was set out as to how the range of 1 to 5 for employees scores should be applied. It stated *the range of one-to-five-point scores should be applied as follows*
    a. *5- consistently exceptional performance and behaviours*
    b. *4 -consistently over achieving performance and behaviours*

c. *3.5 -consistent delivery of performance and behaviours with some areas of overachievement*
d. *3- consistent delivery of performance and behaviour*
e. *2.5- consistent delivery of performance and behaviours with some areas of underachievement*
f. *2- inconsistent delivery of performance and or behaviours*
g. *1-consistent underperformance and or not demonstrating the behaviours expected.*

62. From the evidence before us we find that during May 2020 Peter Robinson corresponded with other individuals including Vicky Hart McLaren to identify ways to review the team leader pool consistently.

63. Throughout the process there continued to be discussions with the employee representation group. At a meeting on the 10 June 2020 questions were raised about maternity and how people on maternity leave would be treated. The Claimant was not at that meeting.

64. At that meeting Jo Milner stated that there had been a misunderstanding about how people on maternity leave would be treated. She noted that any one on maternity leave was entitled to return to a suitable alternative job. She was challenged by one of the Employee reps, Tom Andrews, and stated, *we are not doing any more than adhering to the statutory guidelines, which unfortunately means offering a suitable alternative rol*e.

65. We accept that the use of the word *unfortunate* was not an indication of how JM felt about the advice, but was used because of her audience. The wording was unfortunate, but at that point we find that the understanding of HR, based on the guidance received, was that the Claimant, as someone on maternity leave should be offered one of the vacant posts. JM had referred to advice and guidance which stated

What that does mean is that if a vacancy that is suitable for the employee exists they must be offered it even if this means that they are treated more favourably than their colleagues who are also at risk of redundancy. This is the case even if the other employees are better qualified for the position than they are. For example this could be where a pool exists and the employee on maternity leave scores less than other employees in the same pool. They must be treated more favourably due to the protection provided. It goes on to say, *if an employee on maternity leave is not offered a suitable alternative vacancy where one is available their dismissal will be automatically unfair*.

66. At the end of the guidance, it stated *in case where there is a selection pool the role is not redundant. However, where there is a requirement to reduce the number of individuals undertaking that role, one of those roles in the pool will be allocated to an individual on maternity leave adoption leave or shared parental leave.*

67. Ms J Milner attempted to explain this. She stated *we need to accommodate those on maternity on no less preferential terms there is a role available eg their role if there is a stand alone role and we couldn't find another suitable alternative role so long as we follow a fair process we can make them redundant*

68. Following that meeting on the 12 June 2020, J Milner sent an e-mail to the employee representative group. Within that e-mail she stated *contrary to original advice that we were given we've now been guided by these additional external advisors that, where an individual is currently on maternity leave or otherwise, whilst they are protected, meaning they have priority over any suitable alternative vacancies, they can be for selected for redundancy in the same way as anyone else via the selection criteria exercise. Where they are not selected to remain in their current roles, we will continue to explore suitable*

alternatives within the business. For those impacted they will remain at risk of redundancy and if no suitable alternative roles exist then the likely outcome of the consultation process will be a redundancy.

69. However, the Respondent HR team understood from this advice, we find that the effect of the Respondents redundancy process was to place all the team leaders at risk of redundancy and to require selection from the 21 at risk individuals into 16 vacant posts.

70. Any one of those vacant posts would have been suitable employment for the Claimant . The Respondent was very clear in all their documentation that it was not the Claimant's role that was being made redundant, but that five team leader posts which were generic were being made redundant.

71. Miss Dunn who was carrying out the scoring does not appear to have been told this. We have heard no evidence from her that she was aware of the advice from HR or of the discussion that took place at the meeting on the 10 June 2020. Nor does it appear that any of the employee representatives communicated the discussion with the Claimant, who they were presumably representing.

72. Between the 25 May and the 2 June 2020 the Respondent undertook a process of scoring those who are placed within the team leader pool . This included the Claimant .

73. On the 12 June 2020 the Respondent circulated the further information regarding employees currently on maternity leave, adoption or shared parental leave who were at the risk of redundancy as set out above.

74. On the 15 June 2020 the Claimant was invited to a further consultation meeting and on the 17 June 2020 the team leader scoring matrices were revised.

75. The Claimant then had an individual consultation meeting with Rebecca Dunn on the 19 June 2020. The Claimant was told that the selection criteria exercise had been undertaken between the 26 May and the 8 June and that following that process she was told that her role was still at risk of redundancy and the provisional outcome was likely to result in her redundancy. This was because the scoring had been carried out and the Claimant's score was in the lowest 5. There was no reference at all to the guidance from HR, or any protection the Claimant might have as a result of being on maternity leave.

76. At that meeting the Claimant asked what her score had been and was told it would be sent to her on e-mail along with the redundancy statement. The Claimant was not able to ask any questions about how she had been scored, or what assumptions, if any, had been used to reach her scores. Nor was she able to see how others had been scored.

77. At this meeting there was a discussion about a potential redundancy package. The Claimant asked whether her maternity would stay as it was and she was told that her redundancy package would be paid in July 2020. The implication being that the Respondent had decided that the Claimant's contract would be terminated in July 2020, and not at the end of her maternity leave. The Claimant was also told that at the formal redundancy meeting she would have the appeal process explained and Miss Dunn said she would respond to the Claimant in respect of maternity leave and pay.

78. Following the meeting on the 22 June 2020, the Claimant received a consultation outcome letter.

79. This letter told the Claimant that she was invited to a further formal consultation outcome meeting where it was anticipated that she would be told either that her role of team leader was remaining or that the role of team leader was redundant in which case they would discuss with her the details relating to her departure from the company.

80. The Claimant also received an e-mail from Miss Dunn telling her that she would continue to be paid her maternity leave entitlement in full. She stated that an employee who is already on maternity leave who is made redundant would be entitled to receive their pay, paid in a lump sum, when their employment ends. The Claimant was also provided with her scores from the matrix scoring for the first time at this point.

81. During the course of the hearing, we have been provided with the Matrix of scoring and the assumptions which would lead to a score of 0 -5 points . This was the matrix by which all those at risk of redundancy were considered and scored .

82. We observe that the narrow range of possible scores meant that there were fractional differences between the individuals, of very small amounts.

83. The Claimant had worked with the Respondent for a relatively long time. She had experience across the organisation, and this was reflected in the breadth of knowledge for her current role for which she scored 4.

84. However, the Claimant only scored a 2.5 in respect of ability to handle escalations; 3 for flexibility across other guest facing teams; 3 in stakeholder management; 3 in communication skills; 3 on performance; 3 on leadership skills 3 on versatility; 2.5 in respect to the development programme; 2.9 in respect of CUK behaviours and three in respect of EOY rating.

85. This gave her a total score of 23.6 and placed her in the lowest 5 scorers, meaning that she was provisionally selected for redundancy. We find, from looking at the scores, that a variation in the Claimants score of 2 points would have put her in the top 16.

86. We have been provided with three sets of scoring. The First set, (not necessarily chronologically,) are scoring of individuals, with one page and a scoring grid in respect of each named individual. These set out the score in respect of each of the criteria, and at the bottom of the page there is an overall total score. It is on this sheet the Claimant is noted as scoring an overall score of 23.6. We understand that this was the final sheet produced at the end of the scoring process.

87. The second scoring sheet, which we were told was produced around the 2 June 2020, is a score sheet in respect of the development programme. The Claimant is not on this list at all. JG and somebody called Miss Smith were scored as zero because they did not attend the programme.

88. The third set off data is a composite of 16 individuals. The score sheet shows each individuals score in respect of each of the criteria. The Claimant does appear on this score sheet and she has been allocated score of 2.5 in respect of the development programme. Mr Ganetra has been allocated a score of 3 (three). Miss Smith does not appear on the list. The Claimant's total score is 23.57.

89. The second sheet in this group contains some of the same names but in a different order with different scores, and comments next to several of the names. There are no comments next to the Claimants name. Her score on this sheet is 26.9

90. We have also been provided with an additional score sheet which is a composite list of individuals and their scores.

91. From these score sheets, we find that at one point the Claimant was scored at 26.9, with new score for the development programme. She was subsequently

allocated a score of 2.5 in respect of the development programme. This would have given her a score of 29.4.

92. We find that the only logical explanation for this variation in scores, is that there was a process of moderation which did impact on the scores of several individuals, including the Claimant, contrary to what we have been told in evidence.

93. The Claimant attended a further meeting on the 25 June 2020 with Miss Dunn.

94. At the meeting the Claimant explained that she was not due back to work, post her maternity leave until January 2021 at the earliest, and that she therefore felt that she was at a disadvantage to apply for any vacant role at that stage, in June 2020, or to make any proposals about alternatives to redundancy.

95. She said she could email her representative and Miss Dunn about what proposals she might be interested in putting forward, but that it had been suggested to her that she should not bother. Miss Dunn did not encourage the Claimant to make any suggestions, and nor did she discuss any alternatives to redundancy, such as delaying the decision or the termination of employment in the Claimant's case, until the end of her maternity leave, when she would be in a better position to make representations about her return to work.

96. There was significant period of time before the Claimant was due to return to work, and we find that there was at least a chance at the point that the discussion took place , that the cruise ship industry would have recovered to some extent by the time the Claimant was due to return from maternity leave, and that there might therefore have been more opportunities available. Miss Dunn must have realised this but there was no discussion about alternatives or delay to the redundancy decision taking effect.

97. Instead, the Claimant was told that, as all other options had been exhausted her role of team leader was redundant from the 30 June 2020.

98. We find that throughout the process, Miss Dunn did nothing to try to assist the Claimant at all. She did not ask HR for advice, she did not encourage her to apply for other roles and she did not take advice of consider whether or not the dismissal could be delayed. She was, we find wholly disinterested in taking any steps to try to avoid the Claimant's redundancy.

99. We have heard evidence about another woman who was absent on maternity leave at the time of the redundancy selection process. she did not work in the same area as the Claimant. in her case the Respondent decided to defer the implementation of the decision on redundancy until the end of her maternity leave. We find that part of the reason for doing this was so that a review could be carried out as to whether or not by that time any suitable available vacancy might be available. we were provided with no explanation at all as to why this was not suggested or considered for the Claimant. we find that it should have been.

100. At the meeting, the Claimant asked who did her scoring and was told that it was Miss Dunn and someone called Peter. She asked whether or not she had been scored over the full 12 years of her employment or just 12 months and was told she had been scored across the last 12 months. She felt that this was unfair because if she was in Cunard Marketing, Peter didn't know her, and she had been managed by Richard. Miss Dunn suggested that Richard had done the scoring with her and reminded the Claimant that she had the right to appeal.

101. On the 29 June 2020 the Claimant received a letter from the Respondent confirming that the company was terminating her employment by reason of redundancy. She was told that her effective date of termination would be the 30

June 2020 and that she had a right of appeal. She was told what her redundancy package would be.

102. The Claimant did appeal against her selection and dismissal for redundancy on the 3 July 2020 and set out her reasons.

103. Firstly, she referred to the fact that she had been on maternity leave throughout the process and had not been able to keep on top of all the information being provided via e-mail. She said it was stressful having a new born baby as well as being in lockdown with COVID-19 and suffering with depression.

104. She also referred to the redundancy hanging over her head.

105. Secondly, she referred to the selection criteria and the selection exercise carried out by her manager and Peter Robinson. She complained that she did not think that her scoring was a true representation of her performance over the last year, when she had been managed by Richard Turner.

106. She pointed out that Peter had had no direct dealing with her, and she did not understand how his input would be able therefore to contribute to her final score. She also noted that whilst he would know about the team performance, he would have no knowledge of her individual personal performance.

107. She raised an issue about Mr JG who was successful in securing a position as team leader.

108. She pointed out that he had been unsuccessful when he applied for the team leader position previously. Another woman, Adriana had been successful in securing the position. However, when the scoring was carried out for the

purposes of redundancy, JG had apparently scored higher than the Claimant , despite the fact that the Claimant had been working in the role for many years and JG had only been in post for a matter of months.

109. The Claimant noted that JG was given the opportunity to build on skills and experience within the team leader role by covering for dry dock and then taking over the Claimant's team as a maternity cover.

110. She also referred to evidence of the PCA score being manipulated. She suggested that there had been an element of handpicking by senior staff of those that they wanted to stay and those they did not want to retain. She said her desired outcome would have been *to have stayed* but she now felt she had lost trust in the company.

111. An appeal hearing took place on 22 July 2020 and we were referred to the notes of that hearing. We accept that they are not a verbatim transcript of the conversation, but we observe that they are a very full note of the meeting which lasted for over an hour.

112. The appeal was heard by Rosie Sims with Jo Milner the HR Rep in attendance.

113. The Claimant raised the issue of her scoring and drew particular attention to the fact that she had been marked down on versatility. She noted that she was at a disadvantage because once she became pregnant, she was less able to take on projects because of a risk that they would over run, and would not be completed by the time she started her maternity leave.

114. She suggested that other people who had been in post for less time than her had scored higher and pointed out that without a breakdown of the scores

she was not able to understand why the scores had been given as they were. We agree that this was not possible without further data.

115. There was a particular discussion about the score of 2.5 she had received for escalations and the comment that said *can handle escalations but does not always make herself as available as her colleagues* .

116. When looking at the scoring matrix, the score of 2.5 was described as reflecting *consistent delivery with some areas of underperformance* . The Claimant strongly disagreed with that score. She pointed out that no one was around to see who took the escalations and it was therefore just an opinion. She did not understand how the score of 2.5 had been reached . She said she had never shied away from an escalation, and that she used to come in at 7:00am even when she was eight months pregnant. She explained that she did not feel that any of the scoring was a truthful reflection of her performance .

117. In that meeting the Claimant said the scoring matrix reflects certain elements with regards to taking on additional projects; helping other departments. She said, *I have been scored low I can't do that when I'm pregnant as couldn't take on work then hand it over* .

118. The Claimant particularly identified *versatility* and *behaviours* as areas where she felt she had been marked down unfairly. The Claimant was asked on a number of occasions why she felt she was at a detriment, and it was suggested that she felt she was marked down because she was going on maternity leave and was unable to take on anything extra. The Claimant agreed with this.

119. The Claimant also referred to a series of WhatsApp messages, which we have also been referred to, about a calibration process that was taking place outside the agreed procedure.

120. We observe that it was not possible for the Claimant to challenge or debate the way that she was scored, or the assumptions that informed her scoring at this point. She did not have the information about how scores had been allocated. The scores, and the basis of them in individual circumstances was fundamental to understanding why someone was selected or not selected for redundancy.

121. We have been referred to the outcome of her appeal against redundancy dismissal. This was the letter written by Rosie Sims.

122. In this letter Miss Sims refers to the score in respect of versatility. This was a matter that the Claimant had raised in her appeal and for which she had been scored at 3. The comment made was that *some versatility demonstrated* .

123. In the outcome letter Rosie Sims states *it has been confirmed to me verbally by two people who were involved in the scoring that the definition of versatility was based on both knowledge and willingness. Although it is recognised that you were knowledgeable in your role recognised by a score of four and the other areas of the contact centre recognised by a score of three your flexibility to apply that knowledge across the contact centre was in question. I have been told that you found it difficult to accept that you would be carrying out your role in the P&O Cruises team rather than Cunard after your secondment. You mentioned yourself in your hearing that you were unhappy with that decision. This has led to those who were carrying out the scoring to believe that you would not have been flexible to work across the teams if required and I understand their rational behind that*

124. The scoring was in fact carried out by Miss Dunn. She was interviewed by Miss Simms on the 16 July and again on then the 23 July. She was asked about how versatility was scored. She said *we looked at if they could work in*

different teams across the business if needed. She was asked how she had scored Laura.

125. This is when she said *this has given me the biggest headache of all the scores. I suppose when I look at it, she should have been given a 3.5 because of her experience in Cunard marketing. That is a score that I probably would change.*

126. Later in the meeting she was asked if she had evidence of her conversations with Richard about Laura's score and she said she did not, because it was verbal.

127. Peter Robinson was spoken to about the input that Richard had had to Laura's score and asked if he had any evidence about it. He said he did not.

128. Emma Hawkins was asked about the scoring but made no comment specifically about the Claimant .

129. In her witness statement, Miss Sims makes reference to the comment made by Miss Dunn and then says, however *when I made more inquiries about this with Peter Robinson and the HRBP I was confident that had Rebecca scored Laura 3.5 in this area her score would have been moderated down to two or three, meeting expectations of her role in any event, as it was clear that other team leaders were more proactive in their willingness to help across teams.*

130. We do not understand how she drew the conclusion she did in her appeal outcome letter from the evidence she had before her. We all agree that she is simply wrong in describing what was said to her.

131. We have also been concerned that one of the matters raised with Miss Dunn by Miss Sims at the appeal meeting was the extent to which the Claimant had put herself forward for projects.

132. At that meeting Miss Dunn stated in response to a question, *was Laura selected for any projects before her maternity leave*, stating, *no it was her decision not to take things on I have an e-mail where she asked to stop doing part of her usual responsibilities before she went on maternity leave I did have a conversation about whether she wanted to stay on the rota because she was having a difficult pregnancy and she could be at called at anytime of night. I was worried for her welfare she was on an occupational health referral.*

133. There does not appear to be any further discussion about whether, therefore, the reason for the Claimant not being able to demonstrate a higher level of versatility, was directly linked to her pregnancy. If it was, then to mark her down because of it would be to subject her to a detriment because of her pregnancy or something associated with it. What Miss Sims says in her witness statement paragraph to 11 *in addition there was a forum for team leaders to put themselves forward for projects and Laura had not been proactive in relation to this and there were elements of her role but she was asking not to do such as quality monitoring.*

134. It was in respect of this aspect of versatility that Miss Sims is confident that even had the Claimant been marked at 3.5, she would have been marked down subsequently.

135. If she is right, the only reason would have been something connected with her pregnancy – she would have been marked down because her difficult pregnancy meant she could not take on other projects.

136. We find that Miss Dunn candidly accepted when she spoke to Miss Simms that she had scored the Claimant incorrectly and should have scored

her at a 3.5. There is no evidence before us and there does not appear to have been any evidence before Miss Simms to suggest that this was an incorrect assessment. We all agree that Miss Simms knew when she dismissed the appeal that there was real cause for doubt about the fairness of the Claimant's scoring. Her refusal to admit this, and her explanation, derived from a comment about how her pregnancy affected her, points to a lack of willingness to consider whether or not the Claimant had a valid argument, and a failure by Miss Simms to realise that she was taking into account factors which arose from the Claimant's pregnancy, in a negative way.

137. We have asked ourselves whether we have any evidence, or have found any facts from which we could infer that Miss Dunn or Miss Simms were prejudiced against the Claimant because she was pregnant.

138. We all agree that the findings we have made point to a failure on behalf of Miss Sims to take into account the fact of the Claimant's pregnancy and its impact on her scoring, as well as any rights that she had as a result of it. We find that the human resources support provided also failed to properly analyse or consider how somebody in the Claimant's position should be treated in the redundancy process.

139. We all agree that there was a failure to understand or acknowledge that the effect of pregnancy on the Claimant was that she was not on a level playing field with other staff.

140. This is the reason why, we infer, that the guidance told staff to speak to HR if they had to consider someone who was pregnant as part of the scoring.

141. In respect of escalations Miss Simms said she had been provided with evidence justifying a score of 2.5 for escalations. This amounted to one e-mail

in which she said Laura had indicated she didn't feel that an escalation needed to be dealt with straight away and that it was fine to deal with it within 24 hours.

142. The Claimant told the Respondent that this was one instance and that there was a good reason for her approach on that occasion. We find that the e-mail exchange demonstrates that firstly, the Claimant took on board the advice, but secondly after looking into it, Claimant identified that she had in fact been on a break when asked to do the escalation. This does not appear to have been acknowledge by anybody either at the time or when deciding to use this one example to reduce the Claimant's score. There does not appear to have been any recognition of the Claimant's positive work over the remainder of her time working there. Of course, the Claimant did not have the opportunity to impress as others did, during the redundancy consultation itself, because she was absent on maternity leave. No-one from the Respondent has ever acknowledged that the Claimant had this disadvantage.

143. We find that whilst there was a system of marking and scoring which set out the factors to be taken into account in deciding whether someone would score a 1,2,3, the factors that would then lead the manager to determine that someone demonstrated something, or did not, were not specific and depended entirely upon the managers knowledge and assessment of each individual.

144. We note that at no time were the individuals themselves invited to comment on or contribute on any of the scores or the assumptions or evidence underpinning the scoring.

145. We conclude that the scoring system, although objective in principle, relied upon a manager making an assessment of each individual employee's abilities in each category based on a subjective assessment.

146. The Claimant had joined Miss Dunn's team in July 2019 and she had started her maternity leave in April 2020. She was on leave from February

2020. She had been pregnant for the majority of her time in that team , and for the last months of her pregnancy, as she explained to her managers in the appeal, had simply not been able to take on longer terms projects because she was not going to be at work for the most part of them, because she was starting her maternity leave. She also provided information that she had in any event being an occupational health referral.

147. The Claimant also queried what contributed to JG having such a high score although new to the role and was told that he had supported Miss Dunn as a PCA and that he regularly sent her updates and shared progress.

148. It is obvious that the Claimant was not in a position to give that support in the same way, because she was absent on maternity leave, and the reason why JG was able to do so, was because he was covering her leave.

149. We find that there is no evidence before us that this factor, again an obvious and real consequence of maternity leave, was ever considered by the Respondents as a factor to be considered in the scoring. What we find did happen, was that there was an emphasis of scoring those who were available and able to impress the manager higher than the Claimant, who was about to start maternity leave. This was particularly true of JG.

150. We all agree that there was a disadvantage to the Claimant , of not being present and able to impress on a daily basis; of being absent and therefore unable to demonstrate her skills, or be seen to be achieving, and that it did not appear to us that this disadvantage to the Claimant, was recognised at all by the Respondent.

151. Peter Robinson was also interviewed and asked about how Laura had been scored. He confirmed that Miss Dunn had worked with Richard, who had

an input into the scores, but was unable to provide any evidence about how scores were reached. He stated he knew that there had been a discussion.

152. Emma Hawkins was interviewed and asked about her input to scoring . She said that they had looked at all the scores to see if they were fair and that they did it with Rebecca Dunn first and then as a group. She said it was a little bit like a calibration that they did for appraisals, but the purpose was to see whether or not they agreed with the scores. She said she didn't think that any scores were changed as a result.

153. We have observed that there are scores for some team members underperformance which go to 9 decimal points . it is not clear to us how that has been scored or why it is not a simple 1,2,3,4 or 5 as in all the other areas .

154. Miss Dunn and Richard independently scored the team leaders who reported to them.

155. Miss Dunn gave evidence but said nothing in her witness statement about how she had scored the Claimant, or the thinking behind any of the scores. She simply said that her and Richard independently scored the team leaders who reported to them and then met to discuss and calibrate the scores. She says that the Claimant was not disadvantaged by the fact she had returned to P&O direct rather than Cunard direct, following her secondment because Richard, her previous manager had input into her scoring .

156. We did not hear evidence from Richard himself about any input that he did have into the scoring process and we have no evidence other than this assertion that the Claimant's previous experience was taken into account, or if it was, how it affected her scores if at all.

157. On the basis of the evidence, we have we find that the Claimant did not gain any benefit from the process of scoring by Richard involved, and there is

no evidence that her past experiences were in fact taken into account by anyone.

158. We also find that it is more probable than not that JG, who was effectively covering the Claimant's maternity leave, benefited from being in place at work and having his previous experience positively and clearly taken into account. We find that his scores were higher because he was present in the work place, able to demonstrate his skills, and able to call on previous managers to confirm the present thinking of Miss Dunn, who clearly thought he was a desirable and competent employee. This is in contrast with the Claimant , who does not appear to have been noticed by Miss Dunn, and when she was scored appears not to have been valued in the same way.

159. The necessity of a scoring system which is free from the possibility of subconscious bias is fundamental to a fair selection process. Here, there were many opportunities for a subjective assessment of the individual to be made by Miss Dunn. Whilst we accept that she did try to carry out the process without bias, and in a fair manner, we all agree that she did not wholly succeed in the Claimants scoring, and that the subsequent appeal did not remedy the problems.

160. Once the initial scoring had been done there was then a process of calibration. We are told that it was carried out by Peter and an HR business partner who each reviewed the scores independently to validate them. Again we heard no evidence from either of the individuals who carried out the process.

161. As set out above, following the calibration, the Claimant was one of five individuals potentially placed at risk of redundancy. Nobody has suggested to us in evidence that anybody raised a concern that the Claimant, as a woman on maternity leave, had fallen into the bottom 5, despite the fact that she had many

years' experience across many areas of the business. Nobody questioned the scoring that she had been allocated.

162. We all agree that the approach of Miss Simms to the appeal and to her determination was not to assess whether or not the scoring had been unfair or discriminatory but to look for reasons to justify scoring. This suggests an element of prejudging, or confirmation bias.

163. We infer that, had HR been involved at an earlier stage in the scoring of the Claimant, it is likely that these nuances would have been pointed out, and that even if the need to offer the Claimant a vacancy had not been identified, her scoring would have been more generous, because scores would have disregarded any issues arising from her pregnancy.

164. However, whilst the explanations give for the scoring point to a lack of awareness of the impact of pregnancy, we have not found any facts from which we could infer prejudice against the Claimant because she was pregnant or on maternity leave. The reason for the failures we have identified was a lack of awareness and interest in the Claimant and inherent issues with the scoring process being completely objective, but we find that neither were any thing to do with, the fact of her maternity leave or her absence.

165. The Claimant herself suggested in her evidence , that the failures were more likely to be because she was not a particularly well liked member of staff. We find that the treatment of Mr JG and the Claimant was different, but we find that the explanation was that Miss Dunn liked and was impressed by him, and she and others were not impressed by the Claimant, and did not like her as much.

The key legal provisions

Ordinary unfair dismissal by reason of redundancy

166. Redundancy is defined by 139 Employment Rights Act 1996 which provides that:

"(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) the fact that her employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish

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

168. We remind ourselves that in an unfair dismissal claim, tribunals cannot substitute their own principles of selection for those of the employer.

169. We remind ourselves that the key authority is *Williams v Compair Maxam Ltd* [1982] I.C.R. 156, which, in conjunction with ACAS guidance (see https://www.acas.org.uk/redundancy), prescribes the following as the key features of a fair and proper procedure:

a. an appropriate pool of employees for redundancy must be chosen and fair and proper selection criteria and procedures applied to the chosen pool;
b. an offer of suitable alternative employment to the employee must be considered; and
c. consultation must take place with the employees provisionally earmarked for redundancy and trade unions about the selection process and criteria prior to the decision to dismiss. If each of these three requirements are met, the redundancy will be deemed to be procedurally fair, resulting in a finding of no unfair dismissal.

170. As the EAT made clear in *Williams v Compair Maxim* (above) , it is important that the criteria chosen for determining the selection should not depend solely upon the subjective opinion of a particular manager but should be capable of at least some objective assessment.

171. Following this test then, the first question is whether the employer has satisfied the employment tribunal that the definition of redundancy has been met.

172. The second stage is for the tribunal to test the fairness of the substance of the decision to dismiss for redundancy in terms of the familiar "range of reasonable responses" test.

173. If the employer can satisfy the ET that dismissal for redundancy was within the range of reasonable responses, we must then assess the procedural fairness of the redundancy.

174. We remind ourselves that therefore in an unfair dismissal claim a tribunal will not usually review the marks employees received through a scoring process. It will generally be sufficient for an employer to show that a reasonable system for selection was established and fairly administered. Whilst we may assess the fairness of the system, the criteria and the method of marketing, we should not embark upon a detailed analysis of the individual scores unless there has been a glaring inconsistency or bad faith is alleged.

175. We remind ourselves that in contrast, the tribunal may well be required to consider the marking and scoring in detail when considering the question of discrimination, or when considering whether there has been an automatically unfair dismissal for pregnancy or maternity reasons. In those cases, the assessment of whether any unfavourable treatment is caused by or on grounds of pregnancy, or related to pregnancy, may well require an assessment of the scoring carried out and the motivation behind and subjective scoring.

Pregnancy and Maternity discrimination contrary to section 18 Equality Act 2010.

176. A woman who is pregnant or on maternity leave is protected from discrimination by S.18 of the Equality Act 2010. Such discrimination occurs where an employer treats a woman 'unfavourably' because of the pregnancy or maternity leave - S.18(2)(a) and 18(3) and (4).

177. Section 18 EQA 2010 protects women from unfavourable treatment because of any of four reasons:

a. because of the pregnancy 18(2)a
b. because of an illness suffered by her as a result of the pregnancy (18(2)b
c. because she is on compulsory maternity leave 18(3)
d. because she is exercising or has exercised or has sought to exercise the right to ordinary or additional maternity leave (18(4))

178. The statutory protection arising from this section applies to a woman during what is called the protected period. This is defined by 18(6) and is the period which begins when the women's pregnancy begins, and continues until

a. if she has the right to ordinary and additional maternity leave either

i. at the end of the period of additional maternity leave,

ii. or if she returns to work earlier, when she returns to work after the pregnancy.

179. The protection will only apply if an employer or the person who treats a woman unfavourably knew or ought to have known or is to be treated as having known that the Claimant was pregnant at the time of the unfavourable treatment

180. The Claimant will bear burden of proving discrimination under the Equality Act 2010 subject to the burden of proof provisions contained in section 136 Equality Act 2010. This provides that where a Claimant is able to prove facts from which a court could decide that discrimination had taken place in the absence of any other explanation, that unless the employer or person accused the discrimination is able then to prove that there treatment or their actions were not discriminatory in any sense, that the court must find that discrimination has taken place.

181. In practice this means that the Claimant must prove a basic case which is more than simply showing, in pregnancy case for example, that she was pregnant and that she was treated unfavourably in the protected period, and that the employer knew that she was pregnant. Whilst in a pregnancy discrimination claim the Claimant does not have to show that she was treated less favourably than another person, but only that she has been treated unfavourably, any evidence of how others were treated may support her claim.

182. We remind ourselves that thin this case, there is no dispute that the Claimant was treated unfavourably by being selected for redundancy, and that she was selected during the protected period. The question we must consider, is the reason or cause of her treatment.

183. Where there are facts from which a tribunal or court could find that pregnancy discrimination had taken place the Respondent must prove on the balance of probabilities that the reason for any unfavourable treatment was not a protected characteristic such as pregnancy. No discrimination whatsoever must be proved.

184. It is not necessary in a discrimination claim for the protected characteristic such as pregnancy to be the only reason for the unfavourable treatment. If any part at all of the course the unfavourable treatment was the fact that the Claimant was pregnant, then unlawful discrimination will have taken place.

Automatic Unfair dismissal

185. Women who are pregnant or have recently given birth are also protected under the rules on Automatic unfair dismissal within section 99 ERA 1996. This provides that a person who is dismissed shall be regarded as automatically unfairly dismissed if *the reason or principal reason for the dismissal* is of a prescribed kind such as pregnancy or maternity leave OR the dismissal takes place in prescribes circumstances.

186. This means that the tribunal must determine the reason for the treatment complained of, which here is the selection for redundancy; and whether or not the principal reason for it is of the prescribed kind.

187. Section 99 ERA 1998 is concerned with leave for family reasons and protects employees who are dismissed for a reason relating to pregnancy; childbirth or maternity or for a reason relating to ordinary; compulsory or additional maternity leave or for exercising a right for time off for antenatal care.

188. The Maternity and Parental Leave Regulations Etc 1999, provide at section 20, that an employee who is dismissed is protected in that she is entitled to be regarded as automatically unfairly dismissed if the reason or principal reason for her dismissal is

a. that she was pregnant;
b. the fact that she has given birth;
c. the fact that she took or sought to take, or availed herself of the benefits of ordinary maternity leave or additional maternity leave.

189. Secondly that she is automatically unfairly dismissed if the reason or principal reason for the dismissal is that the employee is redundant and that regulation 10, which addresses redundancy during maternity leave, has not been complied with.

190. Regulation 10 provides that when, during the ordinary or additional maternity leave, it is not practicable by reason of redundancy for the employer to continue to employ the Claimant under her existing contract of employment , that where there is a suitable available vacancy, the employee is entitled to be offered, before the end of her existing contract, alternative employment with her employer .

191. The new contract must be such that the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do and the provisions must be not substantially less favourable .

192. These provisions have been considered by the courts in a number of key cases which support the proposition that a woman who is absent on ordinary or

additional maternity leave has a pre-emptive right to any suitable vacancy the employee may have which applies not just to vacancies at the time the employee is due to return to work but also to vacancies which may arise during the employees maternity leave, once redundancy has caused her job to be no longer available .

193. We have therefore considered at what point the right to any suitable alternative vacancy arises in the process and what types of vacancy it will apply to.

194. In *Sefton Borough Council v Wainwright [2015] IRLR 90, EAT*, the protection offered to women on maternity leave under MAPLE regulations 10 and 20 was considered. In that case, the Claimant and one other person were both facing redundancy, as both their posts were deleted.

195. In this case, the Court recorded that the right of a pregnant woman to be treated more favourably in respect of vacant posts during a redundancy exercise that occurs whilst she is on maternity leave is afforded to women on maternity leave because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain. (see paragraph 47).

196. In ***Sefton*** the Claimant complained that she had been selected for redundancy whilst a colleague had been offered the vacant post. In that case there had been a reduction in the number of posts from two posts to one post whilst the Claimant had been on maternity leave.

197. The remaining post was a new post and was judged suitable for both parties and was ring fenced so that only those two individuals could be considered for it. Following interview, the Claimant was not offered the job and her male colleague was. She was dismissed for redundancy

198. The court upheld a finding that the Claimant had been automatically unfairly dismissed contrary to regulations 10 and 20 (1)b MAPLE regulations.

199. The Claimant 's claim of automatically unfair dismissal, based on MAPLE regs 10 and 20(1)(b), succeeded both at the tribunal and on appeal. HH Judge Eady QC rejected an argument by the appellant Counsel that reg 10 was not engaged until the selection process had been concluded in favour of Mr Pierce and the Claimant had been given notice of dismissal. There was a 'vacancy' as soon as there was an unfilled post that the employer proposed to fill. In addition it had ceased to be practicable for the Claimant to return to her old job once it had been deleted, notwithstanding that she was not proposing to return until the end of her maternity leave some months in the future. She was therefore entitled, under reg 10, to be treated more favourably than Mr Pierce; this was, as Judge Eady explained, protection afforded to women on maternity leave 'because of the particular disadvantage that they suffer in engaging in a redundancy selection process and competing for whatever jobs remain' (at [47]).

200. Two further points can be taken from *Sefton*. The first is that the EAT made it clear that there was not necessarily an obligation on the Council to offer the Claimant the job awarded to Mr Pierce. Its obligation was to offer suitable alternative employment. If there was another suitable job , it would suffice for the Council to have offered the Claimant that job: there was no obligation to offer her *every* suitable and available job.

201. We have also taken notice of the second point in Sefton, which is that i the Council's appeal against a finding of sex discrimination succeeded, because it was an error for the tribunal to proceed automatically from the finding of a breach of MAPLE reg 10 to a finding of sex discrimination.

202. Whilst it was clear that the Claimant had been unfavourably treated, by being made redundant, and that this had occurred during the protected period, We remind ourselves that it is still necessary to address the reason for her treatment. In Sefton, the tribunal had not done that, and accordingly the matter was remitted for reconsideration.

203. Whilst it may well be unlawful discrimination to dismiss an employee on maternity leave for redundancy when there is a vacancy that would be suitable for her, it does not follow from those primary facts alone that that is the case. The tribunal must make findings of fact and draw conclusions separately under section 18 EqA 2010.

204. If a woman is made redundant where there were suitable alternative vacancies available , which were not offered to her, the result is that the dismissal is rendered automatically unfair. It may also amount to pregnancy discrimination contrary to the equality Act 2010, but that does not automatically follow.

205. The Respondents rely upon the dicta in the case of *Eversheds Legal Services Ltd v De Belin* [2011] IRLR 448, [2011] ICR 1137*, EAT*.

206. The Claimant was a male employee and one of two employees in a redundancy selection pool, the other being a female employee on maternity leave, Ms Reinholz. The scoring of the two by reference to the employer's chosen selection criteria produced a very close result; what tipped the balance and led to Mr De Belin being selected for redundancy was that Ms Reinholz could not be given a score for one of the criteria, the time taken from completion of work to payment by the client, because during her maternity leave she had not done any work in respect of which the time to payment could be measured. The employers instead simply awarded her the maximum points, despite

alternative suggestions for the fair measurement of her performance suggested during consultations by Mr De Belin (such as measuring her performance during the period before she commenced maternity leave, which on the facts would have given her a lower overall score). Mr de Belin therefore claimed that he had been discriminated against on grounds of his sex, because the Claimant had received more favourable treatment that he had received.

207. That case reminds us that it is important to appreciate that the right to preferential treatment in a redundancy situation conferred by MAPLE reg 10 does not extend to any right to be given preference in a conventional redundancy selection exercise, by being scored in a more advantageous way for example.

208. The Question for the ET and the EAT was not therefore whether or not the female employee absent on maternity leave should have been offered a suitable alternative vacant post. The questions being considered was whether or not, in a selection exercise, an employer could defeat a claim of sex discrimination by awarding higher marks to a woman absent on maternity leave. The answer is that they cannot. To do so is discrimination, because the more favourable treatment arises because of pregnancy or maternity.

209. We accept that an employee is not entitled to be given preferential treatment but we do not accept that the dicta of that case or any other case means that where there is a pool for redundancy the MAPLE regulations would not apply .

210. In *Sefton* (Above), the EAT determined that the case of *de Belin* was not a comparable case. de Belin was concerned with a conventional case of selection for redundancy from a pool, and the issue was the more favourable scoring of the Claimant, who was absent on maternity leave. That was found to be se more favourable treatment and sex discrimination.

211. We observe that that is not the Claimant's case . She was not in a situation where she is arguing she should have been treated more favourably than others in the scoring. What she argues is that she should have been scored according to the Respondents own scoring matrix and that she should have been scored fairly in comparison with others and that the Respondent failed to do that.

Discussion and Conclusions

212. There is no dispute between the parties that there was a genuine redundancy situation. nor is there any dispute between the parties that the genuine reason for the claimant being dismissed was redundancy and not some other reason.

213. We all agree that the Claimant was treated unfavourably both in not being scored as highly as others and in that she was scored down in at least two areas for reasons which we have found to be directly linked to the fact of her maternity absence, and secondly in that she was selected for and made redundant.

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214. The relevant decisions and actions took place during the protected period , within the meaning of the Equality Act 2010 .

215. Before us the Claimant has asserted that by being placed into a pool with other team leaders following the reduction in the number of all team leader posts , that there were, effectively a number of team leader posts available, each of which would satisfy the requirements of section 10(2) MAPLE 1999 as being suitable available vacancies. She asserts that therefore these were vacancies which she ought to have been offered.

216. The Respondent has asserted that there was no suitable available vacancy until the process of selection had been gone through and that the Respondent was entitled to use the pool in order to determine who would be selected for redundancy .

217. We conclude that the Claimant was at risk of redundancy as soon as the consultation exercise commenced, and the decision was taken by the Respondent to put each of the team leader posts at risk of redundancy, at the same time as determining that the posts were interchangeable, and that there would be a reduction of 5 posts. We have found that the Respondent put everyone at risk of redundancy and created a set number of vacancies. Any one of those vacancies would have been suitable alternative employment for the Claimant , when she returned from maternity leave. She did not need to be offered all of them, but she was entitled to be offered one of them.

218. We reject the Respondents argument that the Claimant only became at risk of redundancy once the selection process had been carried out and that at that point there were no suitable available posts because they had been allocated to others.

219. The selection process being followed by the Respondent was to determine which of the 20 individuals being made redundant would be appointed to the new available posts. The redundancy exercise this organisation carried out was predicated on an understanding that all the team leader posts were interchangeable.

220. Applying the legal principles set out above we conclude that from the point it was determined that all team leaders were at risk of redundancy, unless they secured one of the 15 or 16 vacant posts, that the Claimant was entitled to the protection of regulation 10 of MAPLE 1999.

221. The failure of the Respondent to offer her one of the suitable available posts means that her dismissal was automatically unfair.

222. We have next considered whether or not the reason or principle reason for dismissal was one specified within regulation 20 (3) MAPLE. We have reminded ourselves what those provisions say.

223. The wording is *the reason or principle reason for the dismissal is of a kind specified in paragraph 3* and paragraph 3 says *the kind of reasons referred to in paragraph 1 and 2 are reasons connected with the pregnancy of the employee or the fact that she took sought to take or availed herself of the benefits of ordinary maternity leave* , *or additional maternity leave*.

224. We all agree that the Claimant's scoring was adversely impacted by the fact that she was on maternity leave.

225. We accept that a scoring system which provides a midpoint for somebody who is absent on maternity leave is capable of being fair provided that it is applied consistently to all those who are absent, and provided that there is no part of the scoring which is subjective otherwise.

226. We conclude that the Respondents did have an objective set of criteria, and some guidance as to when each score would be awarded. However, we also find that there was a lack of objectivity when it came to scoring, and in numerous instances there was opportunity and risk of a subjective assessment by managers . We conclude that in the case of the Claimant in particular, subjectivity was a factor in a number of her scores, and was influenced by her not being in work, or by the fact that before she went on maternity leave she had been less available, because of her pregnancy, her health and her impending maternity leave.

227. In practical terms, we conclude that the Claimant , who was not and had not been in the office doing the work on a daily basis, was disadvantaged because she had not been able to build up a portfolio of positive work which her new manager could review and assess, whereas those who were in the workplace had been able to do this and more importantly were immediately and at the forefront of Ms Dunn's mind .

228. We have not made any findings that suggest that Miss Dunn or any one else consciously or unconsciously intended to disadvantage the Claimant in the scoring process. Looking at all the evidence before us we do find that she did not give any particular credit to the Claimant or investigate her own views when they were less than positive about the Claimant and overly positive about other members of staff

229. We conclude that this was not conscious or deliberate, but we do find as fact that this was what happened. Setting aside the obligation to offer her a vacant post, in this selection process, the only reason the Claimant was dismissed as redundant was because she was scored in the lowest five during a redundancy selection exercise and the principal reason for her lower scores in at least 3 factors, arose directly from the fact that she took or availed herself of ordinary and or additional maternity leave.

230. We therefore conclude that , in the alternative, her dismissal was automatically unfair contrary to section 20 (2) .

231. We then considered that Claimants claim of ordinary unfair dismissal in respect of the selection procedure. We have made findings of fact that the way the scoring was applied to her was not strictly objective and was inherently unfair to her. We have also found as fact that the Claimant was treated differently to the way another woman was treated in that no consideration was given to the possibility of deferring her redundancy dismissal date.

232. The Respondent has not provided any explanation for not deferring the decision on redundancy as they did for at least one other person. The Claimant was absent on maternity leave and there would therefore be no cost to the Respondent. The Respondents reason for redundancy was an uncertain future as a result of a pandemic .We understand that the Respondent always intended to and has subsequently restarted its operations very successfully .We accept the time that it was not foreseeable when or whether this would happen but since the referral was implemented for one other person, and taking into account the Claimant's long service and her experience across a range of different aspects of the industry, we find that it should have been offered to the Claimant. She told us she would have accepted the offer of such a deferment.

233. We have also reminded ourselves that in an unfair dismissal claim, we must not substitute our own views for those of the Respondent. We must assess the fairness of their process and should not enquire in great detail into the scoring its self. On the face of it, the Respondents operated a fair and objective process.

234. We conclude that the Respondents did have an objective set of criteria, and some guidance as to when each score would be awarded. However, we also conclude that there was a lack of objectivity when it came to scoring, and in numerous instances there was opportunity and risk of on a subjective assessment by managers. We conclude that in the case of the Claimant in particular, subjectivity was a factor in a number of her scores, and was influenced by her not being in work, or by the fact that before she went on maternity leave, she had been less available, because of her pregnancy, her health and her impending maternity leave.

235. In practical terms, we find that the Claimant was disadvantaged because she had not been able to build up a portfolio of positive work which her new manager could review and assess, whereas those who were in the workplace

had been able to do this and more importantly were immediately and at the forefront of Ms Dunn's mind .

236. We conclude that Miss Dunn did not consciously or unconsciously intend to disadvantage the Claimant in the scoring process; but looking at all the evidence before us we do find that she did not give any particular credit to the Claimant or investigate her own views when they were less than positive about the Claimant and overly positive about other members of staff .

237. We conclude that overall, the Respondent did not operate an objective redundancy selection process and that the Claimant was disadvantaged by this. We would therefore have found her dismissal to have been ordinarily unfair on this basis.

238. We have found that the Respondent did not consider alternatives to the Claimant's dismissal in May 2020. We conclude that it was not reasonable for the Respondent to have dismissed the Claimant at the date that they dismissed her. The Respondent had not taken all necessary steps to seek to avoid Redundancy. There was a step they could take, and which they took for at least one other woman, but not only was it not taken, it was not even suggested to the Claimant.

239. We conclude on this basis that the dismissal was unfair.

240. We next consider whether or not the Claimant was discriminated against contrary to section 18 Equality Act 2010.

241. We find that she was treated unfavourabley, as set out above and have therefore considered whether or not we have made findings of fact which would shift the burden of proof.

242. We have reminded ourselves that unfavourable treatment within the protected period alone will not be sufficient.

243. We remind ourselves of the wording of the Equality Act 2010 section 18(2).

244. We also remind ourselves that a finding that the Claimant has been automatically unfairly dismissed does not mean that it follows that she has also been discriminated against .

245. Section 18 provides that an employer discriminates against the woman if during the protective period, in relation to pregnancy of hers he treats her unfavourably because of the pregnancy or because she is exercising or seeking to exercise or has exercised the right to ordinary or additional maternity leave .

246. The Claimant has been treated unfavourably in that she was selected for redundancy by a process which we have found to be flawed . The Claimant was treated this way during the course of her maternity leave and was during the protected period.

247. The key question for us is causation. Why was the Claimant treated as she was and was it because she was on maternity leave.

248. We accept in our findings in respect of automatic unfair dismissal that the fact of her maternity leave was causative in that it had a negative impact on her scoring, but we all agree that there is a difference between the unintentional underscoring of somebody who is on maternity leave and therefore not able to demonstrate their skills and abilities and actions taken *because of* maternity leave.

249. We have also made findings that there was a failure to properly consider whether or not the Claimant should be offered one of the suitable available

vacancies or indeed the correct way of scoring her as a woman on maternity leave. whilst the organisation had plenty of guidance and human resources support, Miss Dunn did not access it.

250. In our findings we are critical of the way that the Respondent officers carried out the scoring and the redundancy exercise. We have detected a lack of interest in supporting the Claimant to remain within the organisation in contrasts with the way some other individuals have been treated.

251. We have therefore considered whether or not from the facts we have found we could conclude in the absence of an explanation that discrimination had taken place.

252. We all agree that we cannot do so.

253. This is not a case where the fact that the Claimant was on maternity leave itself automatically caused a lower score . The score was not because the Claimant was absent on maternity leave, in the sense that those who carried out the scoring either consciously or subconsciously scored the Claimant down because of pregnancy.

254. The low scoring was caused by something which arose from pregnancy, which was her absence. Indeed this employer had put in place steps to ensure that those on maternity leave; those absent on sick leave or perhaps absent by reason of disability were not disadvantaged in the system .

255. The problem was that there was a subjective element . There is no evidence that it was the fact of the Claimant s absence that played on the mind of those who made decisions and in particular the decision making of Miss Dunn or Peter Robinson .We have found as fact but both individuals sought to apply the criteria fairly and used evidence that they had in front of them and that the failure was to take into account the fact that the Claimant was absent on

maternity leave . Here they looked at the evidence and ignored the fact that the reasons why the Claimant may seem less impressive and less persuasive, or problematic was because of the Claimant s absence from maternity leave.

256. The test we must apply in a discrimination claim is not whether but for the Claimant's absence on maternity leave her scores would have been different, but rather whether her maternity leave was the reason why she was scored as she was.

257. We find her low scores were a consequence of her absence on maternity leave but her absence was not causative. the cause of the treatment was not that she was on maternity leave all, but a consequence of it .

258. We all conclude that the Claimant's maternity leave was not reason why the Respondent officers scored her as they did.

259. We therefore dismiss the Claimant's claim of pregnancy discrimination.

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Employment Judge Rayner
Dated: 2 June 2023

Revised copy sent to the parties on: 15 June 2023

For the Tribunal Office

CASE NUMBER: 1401917/2021

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.