



# EMPLOYMENT TRIBUNALS

**Claimant:** Christine Oliver

**Respondent:** Walsall MBC

**Heard at:** West Midlands **On:** 25<sup>th</sup>-27<sup>th</sup> September 2023

**Before:** Employment Judge Steward  
Mrs Ahmad  
Ms Malatesta

**Representation**

Claimant: In Person

Respondent: Mr Abdullah (Solicitor)

## JUDGMENT

The decision of the Tribunal is:

1. The claim of Maternity Discrimination fails
2. The Claimant was automatically unfairly dismissed due to a breach of Regulation 10 of the Paternity and Maternity Leave Regulations 1999.

## REASONS

### Introduction

3. The claimant was employed by the respondent, as a Care Manager, from 5 September 2005 until 24 December 2021. Early conciliation started on 28 February 2022 and ended on 1 April 2022. The claim form was presented on 11 May 2022.
4. The claim is about the treatment of the claimant by the respondent in relation to a redundancy process whilst the claimant was exercising her right to maternity leave and in the period immediately following the exercise of her maternity leave. The claimant has confirmed that she has

received all payments due to her on termination of her employment. The respondent's defence is that the claimant was fully consulted on the restructure and redundancy process during her maternity leave and that they did not treat her unfavourably because she was exercising maternity leave or had exercised maternity leave. It is the respondent's case that they did all that a reasonable employer could have possibly done in the circumstances.

5. The respondent's business case was set out at page 58 in the bundle. The claimant's role as a Care Manager (G8) was removed and in its place in each home was one post of Assistant Manager (G9) and a team of residential care workers (G6). The Assistant Managers posts were to be ring fenced to the Care Managers. The selection for the post was to be by interview and written test. Any Care Manager who did not secure an Assistant Managers post had the post of Residential Childcare Worker ring fenced. They would be assimilated into these posts.
6. The claimant received a telephone call from Mr Grainger on the 6<sup>th</sup> May 2021 setting out what the respondent's plans were. There is some dispute over how much information was provided and the duration of the call and this will be discussed later. However, the claimant was invited to a consultation meeting which took place on the 14<sup>th</sup> May 2021. Support and eLearning was discussed at this meeting. The claimant indicated she would be applying for the jobs that were on offer.
7. A further consultation meeting took place on the 15<sup>th</sup> June 2021. At this meeting the claimant indicated that she was not going to apply for the Assistant Manager role and that she may not even consider the RCCW role (Page 68) An expression of interest form dated the 28<sup>th</sup> June 2021 was completed by the claimant on the 5<sup>th</sup> July 2021. On this form the claimant said she did not want to be considered for any of the vacancies. The redundancy notice meeting took place on the 22<sup>nd</sup> September 2021 which also included the right to appeal. The claimant received her redundancy pay in March 2022.
8. The claimant ticked the box for maternity discrimination in her ET1. She did not in her particulars deal with any possible claims pursuant to Regulation 10 of the Maternity and Paternal Leave Regulations 1999. At the preliminary hearing on the 13<sup>th</sup> December 2022 the complaint is recorded as maternity discrimination. However at paragraph 33 dealing with the issues and in particular 1.1.7 the following issue is listed to be determined **'the claimant was not informed of her right to be offered employment preferentially due to her maternity leave status'** This would appear to be a direct reference to these regulations and the principle that failure to offer the claimant the alternative post (of Assistant Manager when she was on maternity leave) could result in her dismissal being automatically unfair.
9. The respondents deal with this at paragraph 8 of the amended grounds of resistance at page 36 in the bundle stating that the claimant did not want the role of Assistant Manager but was offered the role of RCCW which she declined and therefore denied she was not offered a role preferentially.

However, the RCCW role was not a preferential role in any event as her job would be assimilated into that role, without any application, if she was either unsuccessful for the Assistant Managers role or did not apply for it.

10. The final hearing consisted of hearing evidence from the claimant, Mr Grainger and Ms Bridgewater for the respondents. Submissions were also considered including written submissions from the respondents. During the cross examination of the respondents Ms Bridgewater confirmed that there had been an internal discussion about offering the claimant the Assistant Managers role, but this had been discounted. The role was considered too challenging and a grade above the role the claimant had done. The claimant was never involved in this discussion. Prior to submissions the respondents representative Mr Abdullah was asked how he wanted to deal with the issue Reg.10 of the Maternity and Paternity Leave Regulations 1999 and why the claimant was not offered the Assistant Managers role given her status? Why this was not a suitable alternative employment. The respondents sought leave to recall Mr Grainger to deal with the issue of why the claimant was not offered the role of Assistant Manager and specifically why she was not suitable for the role (this will be discussed in due course) and in his written submissions Mr Abdullah at paragraph 14 stated that if the claimant was prepared to accept the job of Assistant Manager she would have been appointed on a preferential basis? However, this was later qualified as a mistake in the written submissions.
11. In our unanimous view the issue of whether the claimant should have been offered the role as Assistant Manager pursuant to Reg.10 of the Maternity and Paternity Leave Regulations 1999 was a live issue to be determined. It had been raised by the claimant in the issues to be determined in the preliminary hearing order at paragraph 33 1.1.7. The issue was raised in cross examination of the respondents witnesses and was addressed by the tribunal prior to submissions. This led to the respondents being afforded the opportunity to recall a witness to deal with the issue of suitable alternative employment. Therefore, the tribunal will determine the issue of Maternity Discrimination and Regulation 10 of the Maternity and Paternity Regulations 1999.

## The Law

### 12. The Equality Act 2010 (EqA)

#### Section 4: The protected characteristics

The following characteristics are protected characteristics— age  
disability  
gender reassignment.

marriage and civil partnership pregnancy and maternity race  
religion or belief

sex  
sexual orientation

**Section 13: Direct discrimination**

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

**Section 18: Pregnancy and Maternity Discrimination: Work Cases**

(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—

- (a) because of the pregnancy, or
- (b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably

because she is on compulsory maternity leave.

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).

(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—

(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy.

(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.

(7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—

- (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
- (b) it is for a reason mentioned in subsection (3) or (4).

**Maternity and Parental Leave Etc Regulations 1999 (MPLR)**

**Regulation 10: Redundancy during maternity leave**

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that—

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

(b) its provisions as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not

substantially less favourable to her than if she had continued to be employed under the previous contract.

13. Regulation 10 provides that during the relevant period a woman is entitled to special protection and (by virtue of regulation 20) will be treated as unfairly dismissed if this is denied.

So if a woman is dismissed because she is pregnant the dismissal as well as being unfair dismissal will amount to pregnancy and maternity discrimination because of course it is unfavourable treatment. In addition, in the case of what otherwise would be a fair redundancy she is not offered a job that is both suitable and available (the Regulation 10 right) her dismissal will be automatically unfair but not necessarily discriminatory. This is because it is not absolutely the case that such a dismissal will automatically amount to unfavourable treatment discrimination under Section 18 of the Equality Act 2010. As a case from the EAT (Sefton Borough Council V Mrs M Wainwright Appeal No. UKEAT/0168/14/LA)

14. Decided Cases: **Pregnancy/Maternity Discrimination**

**O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1997] ICR 33, EAT.**

The protected characteristic only has to be an effective cause of the treatment. It does not have to be the main or only reason The EAT found that there were always 'surrounding circumstances' to a pregnancy. For example, the fact that an employer's reason for dismissing a pregnant

woman was that she would become unavailable for work did not make it any the less a dismissal on the ground of pregnancy.

**Nagarajan v London Regional Transport [1999] IRLR 572 (HL)**  
**Shamoon -v- Chief Constable of the RUC [2003] IRLR 285 (HL)**  
**Villalba v Merrill Lynch & Co [2006] IRLR 437 (EAT)**

Employment tribunals can usefully commence their enquiry by asking why the claimant was treated in a particular way: was it for a prescribed reason? Or was it for some other reason?

If a protected characteristic or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

**Amnesty International -v- Ahmed [2009] IRLR 884 (EAT)**

The fact that [a protected characteristic] is part of the circumstances in which the treatment complained of occurred, or the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.

**R (on the application of E) -v- Governing Body of JFS [2009] UKSC 15 (SC)**

The “but for” test should not be used to determine whether discrimination has been proved, unless the factual criteria applied by the respondent are inherently discriminatory.

**Interserve Limited -v- Tuleikyte [2017] IRLR 615 (EAT)**

When considering allegations of unfavourable treatment because of absence on maternity leave under Section 18(4) EqA, the correct legal test is the “reasons why” approach; it is not a “criterion” test.

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**Johal -v- Commission for Equality and Human Rights [2010] All ER (D) 23 (Sep) (EAT)**

Where an employee on maternity leave was deprived of the opportunity to apply for promotion due to an administrative error, it was the administrative error and not the fact of the maternity leave which was the reason for the treatment. Maternity leave was the occasion for the treatment complained of; it was not the reason for the treatment.

**Ladele –v- London Borough of Islington [2010] IRLR 211 (CA)**

There can be no question of direct discrimination where everyone is treated the same.

**Igen Limited –v- Wong [2005] IRLR 258 (CA)**

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from

which the tribunal could that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

**Madarassy v Nomura International Plc [2007] IRLR 245 (CA)**

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis, it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant’s evidence of discrimination.

**The Law Society -v- Bahl [2003] IRLR 640**

A tribunal is not entitled to draw an inference of discrimination from the mere fact that an employer has treated an employee unreasonably. It is a wholly unacceptable leap to conclude that whenever the victim of unreasonable conduct has a protected characteristic then it is legitimate to infer that the unreasonable treatment was because of it. All unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory. To establish unlawful discrimination, it is necessary to show that the employer’s reason for acting was one of the proscribed grounds. Discrimination may be inferred if there is no explanation for the unreasonable behaviour, it is not then the mere fact of unreasonable behaviour which entitles the tribunal to infer discrimination, but rather the fact that there is no reason advanced for it.

**Decided Cases: Maternity and Paternity Leave Regulations 1999**

**The Secretary of State for Justice -v- Slee UKEAT/0349/06/JOJ (EAT)**

The question of whether it is not practicable to continue to employ a woman under her existing contract of employment “by reason of redundancy”, is to be answered by reference to the standard definition of redundancy in Section 139 ERA. It was held that Regulation 10 was engaged even though, under the employee’s contract, the employer was entitled to move her to an alternative role which it intended to do. The redundancy situation did not therefore bring an end to the contract, but she was nevertheless redundant for the purposes of the Regulation. An employee on maternity leave is not just entitled to vacancies available at the time that she is due to return to work, but also to vacancies which may arise during the employee's maternity leave, once redundancy has caused her job to be no longer available for her:

**Sefton Borough Council -v- Wainwright [2015] IRLR 90 (EAT)**

The respondent decided to abolish two roles including that of the claimant who was on maternity leave and replace them with one new job. The claimant was not offered the new job and succeeded in a claim of automatically unfair dismissal on the basis that the new role was a suitable vacancy. On appeal to the EAT, the respondent argued that Regulation 10 was not engaged until the decision had been taken as to who was the best candidate for the new role - in effect, the claimant was not "redundant" until the respondent had determined who would be slotted into that role and only at that point would the respondent become obliged to offer a suitable vacancy. It was held that this interpretation would undermine the protection offered by Regulation 10. Applying the Section 139 ERA definition, the tribunal was entitled to conclude that the claimant was redundant when the respondent decided that two positions would be replaced by one.

Unfavourable treatment of a claimant whilst on maternity leave does not of itself amount to unfavourable treatment "because of" pregnancy or maternity leave as Section 18 EqA requires.

#### **Philip Hodges & Co v Kell [1994] IRLR 568 (EAT) 17**

The EAT found that it is not necessary that the employee is dismissed because of the redundancy situation in order for her thereafter to be protected by Regulation 10, once it is clear that it will not be practicable for her to return to her old job because of the redundancy situation affecting it.

#### **Simpson -v- Endsleigh Insurance Services Limited [2011] ICR 75 (EAT)**

Regulation 10(3)(a) and (b) must be read together in determining whether an available vacancy is "suitable". It is for the employer to decide whether a vacancy is suitable knowing what it does about the employee in terms of the employee's work experience and personal circumstances. If a suitable vacancy exists, the employer must offer it. There is no obligation on the employee to engage with the process. The EAT expressed doubt as to whether an employer would choose to test suitability by assessment and interview.

### **Finding of Fact**

15. At the preliminary hearing on the 13<sup>th</sup> December 2022 the following were the issues in the case

- 1.1.1 ***When the respondent made the announcement on 6 May 2021 the claimant says that she was unable to attend a meeting because of breastfeeding and childcare, and therefore was informed by telephone, but the call that she received was a short telephone call, which was "rushed" and the claimant did not receive the same quality of information.***

The claimant says she only had a very short call from Mr Grainger that was rushed. The respondents did not have a recollection of



the length of the call. In our view the claimant did get the information that was required and did not suffer any detriment because of this.

1.1.2 ***The claimant was not informed that she would be able to access supervision and support from her Line Manager during the consultation period.***

1.1.3 ***The claimant was not provided with any supervision support from her Line Manager during the consultation period,***

These two issues we have taken together. At the consultation meeting on the 14.5.21 (Page 64) It's clear that support was discussed including Registered Managers who would therefore not be part of the recruitment process. The claimant received the letter on the 14<sup>th</sup> of May 2021 informing her of a potential redundancy (page 67) which also set out the opportunity to raise concerns etc and request any specific support she needed. The claimant also had the opportunity to speak to Mr Grainger. We do not find that the claimant suffered any detriment in the circumstances.

1.1.4 ***The claimant was not able to participate in training via a Teams call because it was scheduled at 10am and the claimant was unable to join the meeting due to breastfeeding and childcare in general.***

The claimant was booked onto this training event and so was aware of the time and the date etc. In our view she had sufficient time to make the necessary arrangements. In her statement at paragraph 8 she accepts that she could not attend due to demands of looking after her daughter. The time of the event was at 10am in the morning. In the circumstances we do not feel that the claimant has suffered a detriment.

1.1.5 ***The claimant was not able to apply for the role of Assistant Manager because she was unable to participate in a panel interview or complete a written assessment due to breastfeeding and childcare in general, and she was not informed by the respondent that the process could have been conducted remotely or offered any other extra support options.***

The claimant was not informed that she could apply remotely but if she had asked then it's clear that the respondents would have accommodated her. This was during the COVID-19 lockdown period and business was being conducted remotely. It was not insurmountable for this to take place. The evidence would suggest that the claimant was not going to apply in any event. The expression of interest form (page 70) is dated the 5<sup>th</sup> of July 2021 and the claimant states that she does not want to be considered for any of the above vacancies. During the consultation meeting on

the 15<sup>th</sup> of June 2021 the claimant stated that the manager role was not for her and that she may not consider the RCCW role either due to her personal situation. We do not accept that the claimant has suffered a detriment.

**1.1.6 *The claimant was unable to apply for jobs on “redeployment” with the respondent because she was unable to attend face to face interviews and the respondent did not offer her the opportunity of participating in the interviews remotely.***

The claimant’s evidence was that there was nothing suitable regarding redeployment. We do not find that the claimant suffered any detriment.

**1.1.7 *The claimant was not informed of her right to be offered employment preferentially due to her maternity leave status.***

The claimant was not offered the role of Assistant Manager. When questioned about this Ms Bridgewater stated that she vaguely remembered some discussion about the most senior role but that it was felt it would be too challenging for the claimant. The claimant was not consulted about this. Mr Grainger was recalled giving evidence on this issue by Mr Abdullah. The claimant agreed to Mr Grainger being recalled. His evidence was that 4 applied for the senior role and 2 were successful. 10 years’ experience was requested, and the claimant only had 2 years’ experience. In answer to the claimant, Mr Grainger accepted that one of the roles eventually was offered to a member of staff who the claimant had supervised and who had less experience than the claimant. The claimant said she could have been offered the role. She wasn’t given the chance to show she had the requisite skills.

**1.1.8 *At a meeting on 21 September 2021 the claimant was informed that her leaving date was 30 September 2021 and that she would be paid in lieu of notice, which the claimant had to challenge in order to reverse because otherwise she would have been deprived of the opportunity to seek redeployment during her notice period.***

The claimant requested the figures for redundancy and annual leave for two dates the 30<sup>th</sup> of September and the 23<sup>rd</sup> December (Page 88A) and the respondents accepted the last date of employment was the 23.12.21 (Page 88C) The claimant accrued 3 months leave/8 days. Whether the claimant had to ‘challenge’ is perhaps not the issue. The claimant was not at any loss and therefore did not suffer a detriment.

**1.1.9 *The claimant was not provided with an estimate of her redundancy pay prior to the termination date.***

The respondents informed the claimant about the Gov.website and the redundancy ready reckoner. There was no detriment to the claimant.

**1.1.10 *The claimant was not provided with information relating to her payments on termination.***

This is correct and therefore the claimant has suffered a detriment in this regard. The issue is whether this was because of her maternity leave.

**1.1.11 *The payment of redundancy pay was delayed following termination and was the incorrect amount.***

The claimants' unsocial hours were missed. As a result, the claimant suffered a detriment. However, this was a genuine administrative error. The claimant's position was ultimately rectified.

**1.1.12 *When the claimant complained about the lack of information, the incorrect payment and delays on or about 4 February 2022, the respondent did not reply.***

The respondents have set out at paragraph 18 of the written submissions the support the claimant had. The respondents did reply as set out at page 95B. The claimant was subject to incorrect payments and delays which was a detriment.

**1.1.13 *The claimant did not receive her correct redundancy payment and final pay for annual leave accrued until the end of March 2022.***

This is correct and as above at 1.1.12 this is a detriment but is it one because of the maternity leave?

## Conclusions

16. Was the unfavourable treatment because the claimant was exercising or seeking to exercise, or had exercised or sought to exercise, the right to ordinary or additional maternity leave?
17. 1.1.10-1.1.13 above were occasions when the claimant was treated unfavourably and suffered a detriment. However, these detriments were regarding a lack of information, missed payments and delays. In our view the unfavourable treatment does not appear to be linked to the fact the claimant was on maternity leave. The claimant was not singled out due to her maternity status.
18. We therefore do not accept that the claimant has suffered discrimination and her claim for maternity discrimination pursuant to S.18 Equality Act 2010 fails.

19. However, we find that Regulation 10 of the Maternity and Paternity Leave Regulations 1999 are engaged in this case and that the claimant was suitable to be offered the role of Assistant Manager. She wasn't offered the role and pursuant to these Regulations the failure to do so makes her dismissal automatically unfair. In that regard her claim succeeds.
20. In the final written submissions that were submitted by the respondents they state elements of the claim were out of time. The discrimination element of the claim has not succeeded in any event but the issue of time limits was never raised at the preliminary hearing and was never raised in the final hearing. The issue only received a brief mention in the written submissions and as a result and given there was never any application regarding time limits we were not prepared to consider this issue any further.

**Employment Judge Steward**

Date: 6.10.23