EMPLOYMENT TRIBUNALS

Claimant: Ms L Street
Respondent: Marks and Spencer PLC

Heard at: London Central (by CVP)

On: 14-22/5/2024

Before: Employment Judge Mr J S Burns
Members Ms S Plummer and Mr P Brione

Representation
Claimant: Ms J Franklin (Counsel)
Respondent: Mr A McPhail (Counsel)

JUDGMENT

The claims are dismissed

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Senior Nutritionist from February 2019. She took maternity leave from 30/5/21 to 30/5/22. The Claimant was dismissed in May 2023, the Respondent says on grounds of redundancy. The Claimant says that changes were made to her role and to the team structure during her absence from maternity leave and that she was marginalised following her return to work from maternity leave. The Claimant also complains about her selection for redundancy and the redundancy process.

2. Early conciliation started on 10 February 2023 and ended on 28 July 2023. The claim form was presented on 29 September 2023.

3. The Issues for trial were set out in a CMO dated 13/12/23. The Claimant subsequently provided the names of actual comparators. The victimisation claim was partly withdrawn at the start of the trial. The claims as we had to consider them are sufficiently identified in our conclusions below.

4. At trial we were referred to a bundle of 536 pages, a Claimant's chronology and written opening statement and heard evidence from the following witnesses: The Claimant, William Watts (Respondents Head of Food Technology), Grace Ricotti (Head of Health Food and

Sustainable Diets), Katie Hill (Head of People in Foods Commercial) and Lucinda Langton (Head of Technology). Both sides provided written and oral closing submissions.

Findings of fact

5. Between the start of the Claimant's employment and the Claimant's maternity leave which started on 30 May 2021, the Nutrition team consisted of the Claimant and Sophia Linn (Nutritionist). The Claimant managed Sophia and was managed firstly by Debbie Barnes and then by Dominic Darby.

6. Before her maternity leave the Claimant had met Mr Watts in the course of their employment. They had worked together on projects and conversed about twice a month.

7. Before the Claimant went on maternity leave Mr Paul Wilgoss (Technical Director and Mr Darby's then manager and above the Claimant in her management chain), had expressed the view that she *"lacked "clarity/strategy*", a matter of which the Claimant was aware and which she had recognised in a personal development form in early 2021- in which she had recorded that *"this needs to be developed as a skill ..to be considered as future potential I need to be more strategic*".

8. The Claimant was involved in recruiting Rebecca Brown as Senior Nutritionist on a fixed term contract to cover the Claimant's maternity leave.

9. The Claimant arranged that during the maternity leave Mr Darby would take over responsibility for the strategic aspects of the Claimant's work while Ms Brown would carry out the remainder of the Claimant's duties.

10. In June/July 21, Mr Watts took over from Mr Darby as Head of Food Technology which included the line management of the nutrition team. He did so firstly on an interim basis and was uncertain whether he would be confirmed in the role. There was a delay before he was confirmed in the role in January 22.

11. In the Autumn of 2021 the Respondent decided that it would recruit for two new roles: a further Senior Nutritionist and a new Head of Nutrition role. The Respondent was putting more emphasis on nutrition, particularly following a number of regulatory changes in the area, and needed more employees to do this work. The Head of Nutrition role was intended to spearhead the new strategy and lead the Nutrition team. This initiative was led by Mr P Wilgoss who instructed Mr Watts to implement it.

12. From the date of his appointment as manager in charge of the Nutrition team, to 22/10/21 there is no evidence that Mr Watts contacted the Claimant who was on maternity leave. During this period Ms Linn contacted the Claimant and told her that Mr Watts had taken over, but Mr Watts was unaware of this contact at the time.

13. On 22/10/21 Mr Watts sent the Claimant an email as follows: *"Hi Laura, I hope you are well and settling into your new role as Mummy Street . I just wanted to drop you a quick note to say hi and to update you on some activity we have going on in the Food Group. As you can imagine*

it continues to be all systems go and we are making some good progress on our Health Strategy. The food leadership team have decided that we want to go even bigger and bolder on Health and Nutrition and so have signed off some additional resource for the Health & Nutrition team , which is great news. This has not been widely shared so if you can keep it to yourself for the moment. We are just in the process of finalising what this looks like , but I wanted you to know first-hand. away next week but it would be great to catch up when I am back on a call if you are able. Hope all is well and you are all managing to get some sleep Take care and speak soon. Will'.

14. The Claimant did not receive this email because she had failed to update her password for her work email account. When she subsequently saw the email (which she did only in disclosure in the Tribunal proceedings), she suggested that the first sentence of it and particularly the use of the term "*Mummy Street*" was patronising and showed that Mr Watts when he wrote it saw the Claimant simply as a mother, rather than as a useful employee. Having heard oral evidence on the point and reading the email as a whole and in context, we find that the term was somewhat clumsy and could be seen in hindsight as unprofessional. However it can be seen also as simply a kind acknowledgement of the Claimant's maternity, while the rest of the email shows Mr Watts communicating with the Claimant in her capacity as a valued team member.

15. We were not taken to any policy or other formal requirement that managers should contact employees who are absent on maternity or other leave at particular times or at all, but find that good management practice would have been for Mr Watts to have got in touch with the Claimant earlier in order to introduce himself.

16. On 30/11/21 Mr Watts texted the Claimant to request a meeting to update her on the new roles.

17. On 3/12/21 Mr Watts spoke to the Claimant on the telephone. He explained the proposed changes including expansion of the nutrition team and that a new Head of Nutrition would be appointed. He wanted to give the Claimant an opportunity to apply for the role, and for this purpose had ensured that the role would be advertised internally. However, in recruiting for the role the Respondent would be looking also at the external market. In telling the Claimant this Mr Watts may have been aware that this would have the effect of discouraging the Claimant from applying. We reject the claim that he told her that if she applied she would not be considered. That claim is not consistent with other evidence in the documents, (such as the Claimant's accounts at the internal appeal hearing, in her POC and her witness statement).

18. Nor did Mr Watts say that working part-time would disqualify the Claimant from applying for the new role. The Claimant may have asked for the part-time working policy during that call but that issue was not further discussed at that time.

19. As Mr Wilgoss had initiated the creation of the new post and had expressed his view that the Claimant's strategic skills needed development, (a matter which the Claimant had recognised before her maternity leave), and Mr Wilgoss wished to look outside the Respondent to see if "*new thinking*" could be found to strengthen the implementation of a new strategy, it would have been unlikely that the Claimant would have obtained the role if she had applied for it. Both she and Mr Watts recognised this. As the Claimant stated at the subsequent appeal hearing, what Mr Watts

told her on 3/12/21 "*meant to her …that if she applied she would not be considered*". However Mr Watts did not tell her this.

20. Mr Watts would have had the power to stop the Claimant applying for the new role, as within the Respondent it is usual practice for employees to obtain the consent of their managers before applying for a new role. Mr Watts did not withhold his consent but made it clear that the Claimant could apply if she wished to do so. This was a reasonable and honest position for him to adopt.

21. On 7/12/21 the Claimant requested Mr Watts to provide a Keeping in Touch (KIT) Meeting to "*discuss the team structure*" and so she could explain "*how elements of her role were handed to Becky*". The next day Mr Watts replied asking what days would be suitable and whether the Claimant preferred to meet by Teams or in person. The Claimant replied immediately saying she was available on Tuesday afternoons and preferred Teams. However Mr Watts did not get back to the Claimant before 5/1/22. He explained that the reason for this was that December "*is his busiest month and the Claimant hadn't chased (him)"* but he conceded that it was a "*miss/mess*" on his part.

22. The decision to recruit a new Head Of Nutrition and recruit a new Senior Nutritionist had already been made by Mr Wilgoss before 3/12/21 and at that stage the Claimant did not object to the plan in any event. Even if the Claimant had managed to have a further discussion with Mr Watts about this before 5/1/22, the advert would still have gone out.

23. The proposed appointment was advertised internally and on 5/1/22 Mr Watts contacted the Claimant to "*let her know it had gone live*."

24. On 11/1/2022, the Claimant having considered the matter and discussed it with her husband, sent a message to Mr Watts informing him that she had made the decision not to apply for the Head of Nutrition role, because "*it wasn't the best time for her to interview and put herself across"* but that she was "*excited that the team is growing and to work with whoever you recruit for both roles".*

25. Mr Watts replied promptly that he "*understands her decision but thinks its on balance the right decision for now"*, the clear implication of which was that, despite her decision not to apply, the Respondent remained committed to her development in future within the Respondent.

26. Had the Claimant decided to apply for the role, her application t would have been considered.

27. As the Claimant must have been well aware, from then on it was inevitable that the nutrition work which previously had been shared between the Claimant and Miss Linn would be reorganised amongst the expanding team, and that as she had decided not to apply for the new Head role, that her previous leadership role would diminish and some of her old responsibilities (particularly those relating to strategy) would be re-allocated to the new Head of Nutrition, when that post was filled.

28. On 25/2/22 Mr Watts texted the Claimant to inform her that Rebecca Brown (the Claimant's maternity leave cover who was working at Senior Nutritionist level) had been recruited on a permanent basis. In evidence Mr Watts explained that after her permanent appointment Ms Brown had carried on doing the same duties (ie the Claimant's duties) that Ms Brown had done before and no other temporary resource was put in place as locum to cover the Claimant's job. Thus, in fact at that point there was there was no expansion of the team but rather simply a conversion of Ms Brown's role from temporary locum cover to permanent employee doing the Claimant's work. The reason for this appointment was to fulfil Mr Wilgoss' requirement that a new permanent Senior Nutritionist should be recruited.

29. In April 22 Mr Wilgoss retired and was replaced by Mr A Clappen as Mr Watts' manager.

30. On 7/5/22, following a phone conversation with Mr Watts, the Claimant made a formal flexible working request to reduce her contracted hours from full-time to three days per week. In that application she included the following observation : "*the team is currently being restructured, so I think this is an ideal time to accommodate this change to my working pattern*…" The Respondent was supportive of the Claimant's request, and it was agreed.

31. The Claimant ended her maternity leave and started taking accrued annual leave on 1/6/22.

32. Ms Linn was put forward to the promotion panel in July 22 and it was decided subsequently that she would be promoted to Senior Nutritionist.

33. On 12/7/22 the Respondent held a CPD training day. The Claimant did not attend. On a balance of probabilities, she had been sent an email about the training but she had not read the email because she had not updated her email password. It would have been good practice for Mr Watts to have reached out to her to invite her to the training, as he knew that she was having email problems and he had previously used other channels of communication with her. His failure to do so was due to oversight.

34. Before 22/7/22 Ms Brown and Ms Linn produced on a spreadsheet a draft plan for the distribution of work between the three team members after the Claimant's return.

35. On 22/7/22, Mr Watts sent an email to the Claimant attaching this spreadsheet as a draft proposal. He referred to this as "*a starter for 10 on what a split in responsibilities could look like – have a look and we can discuss when you are back in the office in August."*

36. Thus, while the production of the spreadsheet prior to the Claimant's return meant that she was unable to influence the first draft, it was clearly just a draft and intended as a basis for discussion after her arrival.

37. The Claimant returned to work on 1 August 2022 on an agreed working pattern of Monday, Tuesday and Friday.

38. Her job title, pay-grade and pay (on a pro-rata basis to reflect part-time working) were the same as before.

39. The whole team discussed the division of tasks, and the Claimant amended the draft. Each of the three Senior Nutritionists took on one category within the business to look after. The three categories were Fresh, Ambient and Hospitality. The Claimant took on Hospitality which, out of the three categories, was the smaller category in terms of workload, reflecting the Claimant's reduced working hours, but still an important role. She took the lead on a specific project involving the Institute of Grocery Distribution, which was important work in which the Respondent sought to utilize the Claimant's talents.

40. Many of the strategic aspects of the Claimant's role and her line management of Ms Linn were not returned to her. Strategic responsibilities (such as the development and delivery of the new health strategy) and the management of Ms Linn were covered by Mr Watts and then handed over to Grace Ricottii who took up her role as Head of Nutrition in mid-October 22 and became the Claimant's line manager.

41. On 13/9/22 Mr Watts informed the Claimant about Ms Linn's promotion to senior nutritionist. We accept his evidence that the Claimant was told about this at the same time as the rest of the business.

42. The Claimant was still unsure about her work role and objectives and discussed these with Mr Watts and thereafter Ms Ricotti.

43. Ms Ricotti continued the discussion with the Claimant about her work and objectives, and in December 2022 the Claimant confirmed that she was happy with them.

44. In February 2023 the Claimant had a discussion with Debbie Barnes (her previous line manager) in the course of which the latter asked the Claimant if she was intending to have another child. In her oral evidence the Claimant said "*it was a 121..a relatively casual meeting*" but was unable to provide any further information about the context and circumstances in which this question was asked. There is no evidence as to what, if any, answer the Claimant gave to this question and no evidence that any such answer was passed on to any other manager. Ms Barnes played no part in the Claimant's redundancy selection or dismissal. On balance this was simply an innocuous question asked in the course of a chat between friendly colleagues.

45. Towards the end of 2022, following Stuart Machin's appointment as the Respondent's CEO, below budget trading for the first half of the financial year and with the business facing "headwinds" such as the cost of living crisis and the unexpected rise in energy expenditure, a decision was taken that the Respondent needed to reduce its cost base by £400m.

46. On 23 February 2023, the Respondent announced proposed redundancies across the company and carried out collective consultation with the BIG staff forum as a result of which a document was produced, dealing with such matters as how selection pools would be chosen and which selection criteria would be used.

47. In accordance with this agreed process, the three Senior Nutritionists (the Claimant, Ms Brown and Ms Linn) were placed in a pool, with a view to selecting one for redundancy dismissal.

48. The selection criteria were “Behaviours”, “Leadership” and “Technical”. The criteria were weighted 20% for Behaviour, 30% for Leadership and 50% for Technical.

49. In advance of any individual consultation meetings, the affected individuals were invited to produce a self-evidence form setting out how they believed they had met the skills assessment criteria. The Claimant provided her self-evidence to Ms Ricotti on 13 April 2023. All three candidates produced evidence of work predating and postdating Ms Ricotti’s arrival.

50. The Claimant made a counterproposal that Ms Ricotti’s and another manager’s roles should be combined and one manager dismissed. We are satisfied that there were business reasons for the Respondent not taking up this suggestion.

51. The marking was conducted by Ms Ricotti, who by that time had 6 months’ experience of managing the three candidates. The Claimant’s scores were Behaviours:7 Leadership:7 and Technical: 8. The other two Senior Nutritionists in the pool scored 9 and 8 for Behaviours, 9 and 8 for Leadership, and 8 and 9 for Technical. As lowest scorer the Claimant was provisionally selected for redundancy dismissal.

52. We find that Ms Ricotti took her responsibilities seriously, and was unbiased and professional. She was careful in referring to both the evidence provided by the candidates themselves and to her own experience of them since mid-October 22. She provided detailed written explanations for the marks she had given to the Claimant and to the other two candidates.

53. After the scoring but before the Claimant’s individual consultation meetings, a “resource forum” was held in order to check the scores and consider whether alternative roles were available. Ms Ricotti, Mr Watts, and Katie Hill (HR People Partner for Foods) attended the resource forum in relation to the Claimant’s selection. Ms Hill having checked and asked questions was satisfied. Mr Watts agreed.

54. The Claimant attended an individual redundancy consultation meeting on 18/4/23 and was informed that she was at risk of redundancy. The Claimant who had access to the Respondent’s ‘collective consultation hub’ which listed all the available vacancies, explained that she was not interested in any other (non-nutritionist) roles.

55. The Claimant attended further individual consultation meetings with Ms Ricotti on 25 April 2023 and on 2 May 2023 during the latter of which it was confirmed that the Claimant’s role was redundant, and that her last day of work would be 23 May 2023.

56. The Claimant submitted an appeal against her redundancy on 10/5/2023.

57. Lucinda Langton (Head of Technology) was appointed to hear the Claimant’s appeal. Before the appeal hearing the Claimant queried whether Ms Langton was sufficiently independent of Mr Watts and Ms Ricotti to be suitable to act as an appeal manager. Ms Langton

felt she was suitable but told the Claimant that the Respondent would try to find some other appeal manager if the Claimant preferred this, which offer the Claimant then declined.

58. Ms Langton had not dealt with a redundancy appeal before, but her normal job role includes "*holding up a mirror*" to the business and challenging business decisions when she thinks fit. We find that she is a capable and professional person who would not have flinched from upholding the appeal if, following her investigation, she had found that it deserved to be upheld on its merits.

59. Ms Langton heard the appeal on 23 May 2023. We accept the contemporaneous notes taken on Ms Langton's behalf as accurate and prefer them to the Claimant's proposed amendments where they differ on the subject as to what the Claimant said at the appeal hearing about what Mr Watts had told her on 3/12/21.

60. Ms Langton questioned Mr Watts, Ms Ricotti and others.

61. She dealt systematically with each of the separate grounds of appeal in a careful and detailed outcome letter. We reject the claim that Ms Langton was biased or that the outcome was predetermined.

62. On 7 June 2023, Ms Langton notified the Claimant that her appeal was dismissed.

The law (as it was at the relevant time)

63. Section 4 Equality Act 2010 (EA) provides that sex pregnancy and maternity are protected characteristics

Direct sex Discrimination

64. Section 13 EA provides that a person discriminates against another if because of a protected characteristic, he treats another less favourably than he treats or would treat others.

65. The requirement is on the Claimant to show less favourable treatment by comparison with an actual or hypothetical comparator whose relevant circumstances must be the same or not materially different.

Maternity and Pregnancy discrimination

66. Section 18(4) EqA provides (in relevant part) that: *(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.*

67. Section 18(2)(a) EqA provides (in relevant part) that: (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—because of the pregnancy,

68. Section 18(5) provides that: *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).*

Causation

69. Each of section 13 and section 18 contain the requirements that the relevant alleged detrimental treatment be "because of" the relevant characteristic. This requires the consideration of the mental processes of the alleged discriminator. It is not enough that the relevant protected characteristic forms part of the background or context; and the "but for" test has no place in the relevant analysis. In Blackdown Hill v Artemev [2023] EAT 156, which dealt with such claims, the following was stated at paragraph 40; "*Both section 18 and section 13 use the word "because", and the same approach to what may be called the causation test applies in relation to both. It is an error to apply a "but for" test. Nor would it be sufficient that the fact that the complainant took maternity leave provides the context of, or background to, the impugned conduct. The conduct must be "because" she exercised that right, in the sense that this must have materially influenced the decision, by operating, whether consciously or not, on the mind of the decision-maker."*

Indirect Discrimination

70. Section 19 of the EA provides that a person discriminates against another if he applies to that other a provision, criterion or practice which he applies or would equally to persons with whom the other does not share the protected characteristic, it puts persons who do share the characteristic at a particular disadvantage when compared with persons who do not share it, and he cannot show it to be a proportionate means of achieving a legitimate aim.

71. In the absence of a provision or criterion, there has to be something that can qualify as a "practice" …. The term "practice" has something of the element of repetition about it. A one-off application of a disciplinary process cannot reasonably be regarded as a practice. If it relates to a procedure, it must be something that is applicable to others than the disabled person. If that were not the case, there would be no comparative disadvantage between the (Claimant) and the others to whom the alleged practice would also apply. (Nottingham CT v Harvey 2013 EAT).

72. A PCP connotes a '*state of affairs, indicating how similar cases are generally treated or how a similar case would be treated if it occurred again.' In relation to practice, this implies the way in which things are generally done or will be done. It is not necessary for a practice to already have been applied to another person, if there is an indication that it would be done again in future if a similar case were to arise*." (Simler LJ in Ishola v TFL EWCA Civ 112 7/2/2020.0

73. Victimisation is defined in section 27 of the EA and it occurs where the victimiser subjects another to detriment because the other has done a protected act or the victimiser believes the other has done or may do a protected act. A protected act is defined to include bringing proceedings under the EA or giving evidence in such proceedings or doing anything in relation to the Act or alleging a breach of the Act.

Onus of proof

74. Section 136 provides that it there are facts from which a court could decide, in the absence of any other explanation that a person has contravened a provision under the EA, the court must hold that the contravention occurred, unless the person shows that he did not contravene the provision.

Time in discrimination claims

75. Section 123 of the Equality Act 2010 provides that *'proceedings on a complaint within section 120 may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or b) such other period as the employment tribunal thinks just and equitable."*

76. Insofar as a Claimant seeks to place reliance on the concept of "conduct extending over a period", in *Worcestershire NHS Trust v Allen* [2024] EAT 40, the EAT stated at 24 of the Judgment: "……*It is not enough that incidents are linked and that later events would not have occurred but for the earlier events, there must be something in the conduct that involves continuing discrimination*…."

77. It is for the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule - see Robertson v Bexley Community Centre 2003 IRLR 434

78. The Tribunal may have regard to the checklist in section 33 of the Limitation Act 1980 as modified by the EAT in British Coal Corporation v Keeble and Ors 1997 IRLR 336, EAT: The length and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party has cooperated with any requests for information, the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

79. However, in the applying the just and equitable formula, the Court of Appeal held in Southwark London Borough v Alfolabi 2003 IRLR 220 that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion'.

80. This was approved by the Court of Appeal in Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050 when the Court noted that "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

81. The decision of the Court of Appeal in Apleogun-Gabriel v London Borough of Lambeth 2001 IRLR 116 makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

Detriment and automatic unfair dismissal

82. Section s47C ERA 1996 provides that an employee has a right not to be subjected to any detriment by any act or deliberate failure to act for a reason relating to (inter alia) a. Pregnancy, childbirth or maternity; and/or b. Ordinary, compulsory or additional maternity leave

83. s99 ERA 1996 provides that an employee is automatically unfairly dismissed if she is dismissed for a reason or principal reason relating to a. Her pregnancy, childbirth or maternity; and/or b. Her ordinary, compulsory or additional maternity leave.

84. Whether or not the detriment or dismissal flows from a proscribed reason is a question of causation. The detriment must be more than just related to the reason for a link to be established. It is not enough to establish that but for the reason the employers act or omission causing the act of detriment would not have happened. The Tribunal must consider the mental processes that caused the employer to act or fail to act to determine whether the reason actually caused the detriment or dismissal.

85. Section 48(2) provides that in a complaint about detrimental treatment it is for the employer to show the ground on which any act or deliberate failure to act was done.

86. In claims for unfair dismissal if the employer fails to show a legitimate potentially fair reason and fails to disprove the section 99 reason contended for by the Claimant, then it must be held that the dismissal is for the section 99 reason.

Ordinary unfair dismissal (redundancy)

87. As to whether the employee was redundant section 139(1) of the Employment Rights Act 1996 provides as follows:

> *"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 his employer has ceased or intends to cease –(i) to carry on the business for the purpose 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"*

88. Where redundancy is established by the employer as a potentially fair reason for dismissal under Section 98(1) and (2) of the Employment Rights Act 1996, then section 98(4) must be considered which provides as follows:

> *"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and shall be determined in accordance with equity and the substantial merits of the case.'*

89. Where redundancy is established, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation Polkey v. A E Dayton Services LTD [1987] IRLR 503 at para 28.

90. Proper consultation involves consultation when proposals are in a formative stage, adequate information on which to respond, adequate time in which to respond, and conscientious consideration of the response. R v British Coal Corp ex parte Price 1994 IRLR 72 at para 24.

91. Warning about redundancy and consultation about it do not have to be two separate processes. The warning can come at the beginning of the consultation Elkouil v Coney island Ltd IRLR 174 2002 13

92. Unless there is a customary arrangement or agreed procedure the employer has a good deal of flexibility in defining the pool from which he will select employees for dismissal. He need only show that he has applied his mind to the problem and acted from genuine motives. Thomas Betts Manufacturing Ltd v Harding 1980 IRLR 255 CA. However, in choosing the pool the employer must act reasonably and must have a justifiable reason for excluding a particular group of employees from the selection pool where the excluded category do the same or similar work to those who are up for selection. British Steel PLC v Robertson EAT 601/94.

93. The employer must seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service. Williams v. Compare Maxam Ltd 1982 IRLR 83 A tribunal may not substitute the selection criteria it would have chosen for those used by the employer. The Tribunal should consider if criteria fall within range of reasonable responses (Post Office v Foley, Graham v Secretary of State for Work and Pensions)

94. Tribunals should not generally get involved with the minutiae of how individual scores are arrived at, as indicated by the Court of Appeal in British Aerospace Plc v Green and others [1995] IRLR 433, and again by the Court of Appeal in Bascetta v Santander [2010] EWCA Civ 351. Instead a tribunal should focus on whether the employer has a good system in place for assessing employees against the criteria.

95. In Nicholls v Rockwell Automation Ltd UKEAT/0540/11 and UKEAT/0541/11 the EAT confirmed that it was not appropriate for the tribunal to effectively re-score an employee unless the employer's motives were in question.

96. The employer should try as far as reasonable to find alternative work within its own organisation and where appropriate within other companies in the same group

97. It is not the function of the Industrial Tribunal to decide whether it would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. Thus the tribunal should not impose its own views as to the reasonableness of selection for redundancy but should ask whether the

selection was one which an employer acting reasonably could have made. Drake International Systems Ltd v O'Hare EAT 0384/03

Conclusions

98. We have considered all the evidence and the facts as a whole and the submissions made on both sides orally and in writing.

99. We find that the Claimant has not discharged the initial onus of proof in section 136 Equality Act 2010. If we are wrong about that we are in any event satisfied with the Respondent's non-discriminatory explanations.

The section 13 and section 18 Equality Act 2010 claims

100. Contrary to the Claimant's submission, we do not find that the Respondent or its responsible managers consciously or unconsciously allowed the Claimant's protected characteristics to operate on their minds so as to materially influence their decisions/acts/ omissions referred to by the Claimant.

101. In relation to the direct discrimination claims, the Claimant in the list of issues relied on Jon Jones (Head of culinary development chef) as an actual comparator in relation to the claim that *"the strategic and management aspects of her role were taken over by her manager and not returned to her following her maternity leave*" and on William Watts as an actual comparator in relation to the claim '*encouraging the Claimant not to apply for a senior management position in the Company"*, and alternatively/otherwise on a hypothetical male comparator. She failed to develop any of these comparisons in her evidence. However, we accept that it is unnecessary in claims involving pregnancy or maternity for a Claimant to rely on any comparator in order to make good her claims.

(the claims are set out in italics and our conclusions in ordinary text below)

a. The strategic and management aspects of her role were taken over by her manager and were not returned to her following her maternity leave;

We have found that this occurred in large part. This was not because of the Claimants' gender, pregnancy or maternity leave but because the Claimant's original role no longer existed in the same form, the business and its requirements and the role of others in the expanding team had changed during her 14 months absence and a new Head of Nutrition had been appointed for the specific purpose of line-managing the team and taking responsibility for the new strategy.

b. Failing to consult with her that her original role was being changed and duties allocated to other members of the department;

This claim is not made out on the facts. The Claimant knew how her duties were being carried out during her maternity leave because she arranged it. Mr Watts gave the Claimant advance warning and an opportunity to apply for the new leadership role. The consultation with /participation by the Claimant in the distribution of work after her return from annual leave could have been started with her while she was on that leave but the fact that this did not occur was

not caused by a discriminatory mental process on the part of Mr Watts. When the Claimant returned to work Mr Watts gave the Claimant the opportunity to discuss and change draft proposals as to how work would be reorganised among the team and detailed and prolonged discussions about this continued until December 2022, with the Claimant finally indicating that she was happy with this.

c. Not allowing the Claimant to return to her original role;

We have found that this occurred in large part. This was not because of the Claimant's gender, pregnancy or maternity leave but because the Claimant's original role no longer existed in the same form, the business and its requirements and the role of others in the expanding team had changed during her 14 months absence and a new Head of Nutrition had been appointed for the specific purpose of line-managing the team and taking responsibility for the new strategy.

d. Failing to provide the Claimant with a suitable role upon her return from maternity leave. The new role had reduced management and strategic responsibility and due to changes in the team structure was in effect a role of a lower grade given the responsibilities originally provided for in her contract;

This claim is not made out on the facts. The Claimant's work was different in certain respects from before maternity leave, but was not at a lower grade, and it was suitable and appropriate for her working hours and talents.

e. Failing, whilst the Claimant was on maternity leave, to inform her of changes to the team structure

This claim is not made out on the facts - see above

or of relevant training opportunities at the Respondent;

This claim is not made out on the facts. The Claimant was not pro-active in seeking training during her absence and had failed to keep her business email account password updated so she did not receive group emails which would otherwise have been a means of informing her about events such as CPD days. While Mr Watts could have been more proactive himself in contacting the Claimant separately about this, his failure to do so was not because of the Claimant's gender, pregnancy or maternity leave but because of oversight on his part.

f. Placing the Claimant at risk of redundancy and pooling her with two other individuals who were less senior or experienced than her;

The Claimant was pooled with Ms Brown and Ms Linn. Both had less prior nutrition experience than did the Claimant but both were at the same level of seniority as her. The reason for the pooling was not because of the Claimant's gender, pregnancy or maternity leave but because the Respondent needed to make one Senior Nutritionist in the same pay band redundant, and the pool was the correct one as per the guidelines agreed with the BIG staff forum.

g. Encouraging the Claimant not to apply for a senior management position at the Company;

This claim is not made out on the facts. To the extent that the effect of Mr Watts message on 3/12/21 discouraged the Claimant from applying this was because as her manager it was proper

of him to convey the facts honestly to the Claimant, and not because of her protected characteristics. Mr Watts alerted her to the internal job advert when it was published.

h. Failing to objectively score the Claimant as part of the redundancy selection and giving the Claimant a lower score to ensure she scored less than others in the pool overall;

This claim is not made out on the facts. We accept that that Ms Ricotti acted honestly and professionally in scoring the Claimant and the other candidates.

i. Asking questions concerning if the Claimant was planning to have further children;

Ms Barnes did ask one such question but the Claimant has not shown a prima facie case either that this was unfavourable/less favourable treatment or that it was because of the Claimant's gender, pregnancy or maternity leave

j Selecting the Claimant over others for redundancy;

We accept that that Ms Ricotti acted honestly and professionally in scoring the Claimant and the other candidates on their merits and not because of the Claimant's gender, pregnancy or maternity leave

k. Failing to adequately address the Claimant's concerns in her appeal;

This claim is not made out on the facts. We accept that Ms Langton acted honestly and professionally in addressing the appeal.

l. Rejecting the Claimant's redundancy appeal;

We accept that that Ms Langton acted honestly and professionally in addressing the appeal and that she dismissed it on its merits and not because of the Claimant's gender, pregnancy or maternity leave

m. Dismissal

The Claimant was dismissed because she was the lowest scored candidate in a situation in which the Respondent had decided for business reasons that it needed to make one senior nutritionist redundant, and not because of the Claimant's gender, pregnancy or maternity leave

<u>Indirect sex discrimination (s19 EqA)</u>

102. The Claimant relied on the following claimed policies, criteria or practices ("PCPs"):

Failing to consider those who worked on a part time or flexible basis for senior positions, including the Head of Nutrition role;

103. There is no evidence that this was a PCP, and we do not find that it was applied to the Claimant in any event.

Making changes to team structures without consulting with those on a period of leave;

104. There is no evidence that this was a PCP, and we do not find that it was applied to the Claimant in any event.

Marking down during redundancy selection process those who worked on a part time or flexible basis;

105. There is no evidence that this was a PCP, and we do not find that it was applied to the Claimant in any event

Operation of the redundancy selection criteria.

106. This was a PCP applied to the Claimant and it would have been applied to men if they had been in the selection pool. However, it is not shown that the PCP would have placed women at a particular disadvantage when compared with men. We accept for present purposes that women are more likely than men to work part-time or take maternity leave but we do not accept the submission that the operation of the selection criteria would disadvantage persons in general who had been on leave or working part time in comparison with others.

Victimisation (s27 EqA)

107. The following protected act(s) was relied on: *Appealing the redundancy as set out in paragraph 20 of the Particulars of Claim. The following detriment was relied on; The rejection of her appeal.*

108. We accept that those parts of the appeal which alleged discrimination were a protected act. We accept that Ms Langton acted honestly and professionally in addressing the appeal and that her dismissing of the appeal was done on its merits and not because the Claimant had done that act.

Pregnancy and/or maternity detriment (s47C ERA / reg 19 MAPLE)

109. The Claimant relied on the same detriments as those relied on as less favourable/unfavourable treatment in the section 13/18 discrimination claims above (except (m), dismissal), claiming that the detriments were done for a prescribed reason, namely a. Pregnancy, childbirth or maternity; and/or b. Ordinary, compulsory or additional maternity leave.

110. We dismiss these claims for the same reasons, mutatis mutandis as we have given for dismissing the section 13/18 claims.

Time points/Limitation.

111. Having regard to the dates of ACAS mediation and the presentation of the claim, the events in 2021 and 2022 (“the earlier events”) would fall outside the primary limitation period.

112. We do not find that the earlier events formed a single continuing act with the redundancy process, dismissal and appeal, (because the earlier events were different in type, with different actors and we have not found a continuing act of discrimination running through the events) and as such the earlier events are prima facie out of time.

113. The only reason the Claimant put forward for the delay in presenting her claim about these earlier matters is that '*I didn't want to end up in ET, it is not the go-to. I wanted to go back to work, I wanted a positive start, I wanted to be supported and add value'.* The Claimant cannot be criticised for this but by the same token the same could be said by most employees who wait until they have been dismissed before litigating. The Claimant was aware that she could have claimed earlier, and made a decision not to do so. We do not accept the submission that no prejudice has arisen from this - as the events in 2021 and to a large part in 2022 were already stale when the claim was presented.

114. The onus of proof is on the Claimant to show that it would be just and equitable to extend time for the late discrimination claims; and that it had not been reasonably practicable for her to bring her late detriment claims in time. We would not have been so satisfied in any event.

Automatic unfair dismissal (s99 ERA and s20(1)(a) MAPLE)

115. The claim is that the Claimant's dismissal was for the following reason or principal reason a. Her pregnancy, childbirth or maternity; and/or b. Her ordinary, compulsory or additional maternity leave.

116. We find that the reason was because the Claimant, for non-discriminatory reasons, was scored lowest in a situation in which the Respondent had made a reasonable business decision that it had to dismiss one Senior Nutritionist by way of redundancy. The reason or principal reason was not as stated in section 99 ERA and MAPLE section 20(1)(a)

Unfair dismissal (s98 Employment Rights Act 1996 ("ERA"))

117. The reason for dismissal was a genuine redundancy situation. The pooling, selection criteria and scoring were fair and reasonable. The Respondent consulted fully, asked if the Claimant was interested in other roles (she was not) and provided a reasonable appeal.

118. Ms Ricotti was the obvious person to do the scoring and the period of time chosen for assessment (her 6 months of management of the candidates) was a sensible period.

119. We recognise that an unfortunate train of events lead to the redundancy situation following an expansion of the nutrition team which commenced during the Claimant's maternity leave and that the Claimant is left with a sense of unfairness about this.

120. We have some sympathy with the Claimant's submission that "*Assuming that C's team was pooled because of an excessive headcount and not a discriminatory reason, this was the fault of the R who doubled the size of the team while C was on maternity leave….throughout the process, R had no regard for this fact. The victim of its mismanagement was, unfairly, C."*

121. However, we accept the Respondent's submission that the expansion of the nutrition team in 2022 followed by the unforeseen redundancy situation/need to cut costs in 2023 were each genuine business decisions made in good faith by the Respondent at the times they were made; and that it would be wrong for us, with the benefit of hindsight, to substitute our view about the wisdom and timing of those decisions.

122. Putting the matter another way, we do not regard the history of the nutrition team as precluding the Respondent from relying on redundancy as a potentially fair reason for dismissal and showing that the dismissal was fair as a result of the application of the principles in section 98(4) ERA 1996 as they existed in 2023.

123. We have considered all the submissions about the claimed unfairness in paragraph 75 of the Claimant's written submissions. The submissions in paragraph 75(h) and (j) are really a submission that we should rescore the Claimant or change the selection criteria, which we are unwilling to do. The remainder of the submissions in paragraph 75 are contrary to our findings of fact. We have taken them all into account in concluding that the procedure adopted and decision to dismiss was within a range of reasonable responses open to the Respondent and accordingly that the Claimant was fairly dismissed.

Employment Judge J S Burns
22/05/2024
Date sent to parties.

31st May 2024

For Secretary of the Tribunals