Neutral Citation Number: [2024] EAT 98

Case No: EA-2022-000535-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 June 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

MS KASHMIR BILGAN

MISS NATALIE SWIFT

Between :

MISS HELEN BALLERINO **Appellant**

- and -

THE RACECOURSE ASSOCIATION LTD **Respondent**

- -
- -

Robin Pickard (instructed by Free Representation Unit) for the **Appellant**
Safia Tharoo (instructed by Gateley Legal) for the **Respondent**

Hearing date: 14 May 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30 on 20 June 2024

SUMMARY

Discrimination - direct discrimination because of sex, maternity and pregnancy - sections 13 and 18 ***Equality Act 2010***

Unfair dismissal - automatically unfair dismissal - section 99 ***Employment Rights Act 1996*** *and regulation 20(1)(b)* ***Maternity and Parental Leave etc Regulations 1999***

The claimant was dismissed during her maternity leave, purportedly by reason of redundancy. It was her case that the redundancy was a sham and her dismissal was less favourable treatment because of sex and/or unfavourable treatment because of pregnancy or maternity; alternatively, if there was a redundancy, the dismissal was unfair for the purposes of section 99 **Employment Rights Act 1996** ("ERA"). Rejecting those claims, the Employment Tribunal ("ET") found that regulation 20(1)(b) of the **Maternity and Parental Leave etc Regulations 1999** ("MAPLE") did not apply as there was no suitable alternative vacancy for the purposes of regulation 10. Although finding that the burden of proof had shifted to the respondent under section 136 **Equality Act 2010** ("EqA"), the ET rejected the claimant's contention that the redundancy had been a device to get rid of her and dismissed her claims of discrimination. The claimant appealed.

Held: allowing the appeal
As both parties agreed, in the particular circumstances of this case, the ET was required to satisfy itself that there was a genuine redundancy situation for the purposes of section 139 **ERA**. That was a necessary step in determining the claimant's claim of unfair dismissal under section 99 **ERA**; although it might be possible to proceed straight to the question of suitable alternative vacancy in some instances (assuming that the dismissal was by reason of redundancy), the facts of the present case gave rise to a potential overlap between the assessment of suitability and the determination of redundancy, as defined by section 139. As for the claims under the **EqA**, having found that the burden of proof had shifted under section 136 **EqA**, the ET had to determine whether the respondent had demonstrated a non-discriminatory explanation for its treatment of the claimant. In this case, the respondent had specifically relied on what it said was a redundancy (as that term is defined under section 139 **ERA**) in respect of the claimant's post; something the claimant said was a sham. As was common ground on the appeal, in these circumstances, the ET was required to engage with the question whether there had in fact been a redundancy for the purposes of section 139 **ERA**; it had failed to do so. Given the particular issues raised in this case - involving the introduction of a new role, into which the claimant's

position was to be subsumed - the question whether there was a genuine redundancy could not be answered as a matter of impression, and the ET's failure to engage with this issue rendered its decision unsafe.

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Introduction

1. This appeal raises the question as to how an Employment Tribunal ("ET") is to address claims of direct sex discrimination, pregnancy and maternity discrimination, and of automatic unfair dismissal, in the context of what is said to be a sham redundancy.

2. We refer to the parties as the claimant and the respondent, as before the ET. This is our unanimous judgment on the claimant's appeal against the decision of the Reading ET (Employment Judge Anstis, sitting with lay members Ms Farrell and Ms Gibson, over seven days in October 2021 and March 2022, with an additional two days in chambers), sent to the parties on 27 May 2022. By that judgment, the ET dismissed the claimant's claims of unfair dismissal and of sex, pregnancy and maternity discrimination, but upheld claims for unpaid holiday and notice pay. The claimant appeals against the rejection of her claims of direct discrimination and unfair dismissal, contending that, in circumstances in which the question of redundancy had been put in issue, the ET had erred in failing to address the question whether this had been a dismissal by reason of redundancy for the purposes of section 139 **Employment Rights Act 1996** ("ERA"). The respondent accepts that the ET's reasons do not set out each element of the test for redundancy, as provided by section 139, but argues that is not fatal to its decision.

3. The claimant appeared in person below but has been represented by Mr Pickard of counsel, acting *pro bono*, on this appeal; Ms Tharoo of counsel has acted for the respondent throughout.

The facts

4. The respondent is the trade association for racecourses in the United Kingdom and represents and supports member racecourses, operating from premises at Ascot. At the relevant time, the respondent had around 12-14 employees.

5. The claimant is a qualified accountant. On 1 August 2018, she started working for the respondent in the role of Financial Accountant. She was employed to work 40 days per year, looking after the formal elements of the respondent's accounts, overseeing the day-to-day bookkeeping work, and signing off on formal management accounts and relevant statutory and regulatory accounts. The claimant largely worked from home, but would attend the respondent's premises at Ascot as necessary. As the ET noted, the claimant's

duties were different from those carried out by her predecessor, and there was an element of uncertainty as to whether 40 days would be sufficient, and as to how this revised role would work out. As she settled into the job, the claimant had expressed the view that her work in fact required two-three days a week; this was an issue that the respondent said it would review, possibly around April 2019, when it was anticipated that a new Chief Executive would be in post.

6. At the time of commencing her employment with the respondent, the claimant was pregnant. On 21 December 2018 she started her maternity leave.

7. During the claimant's maternity leave, from 1 February 2019, Mr David Armstrong took up office as the respondent's Chief Executive. During the recruitment process for his role, Mr Armstrong had prepared a presentation headed "*Vision for the RCA*", which had included a proposal for the respondent to play a more active role in supporting the commercial agenda across all racecourses, with data and measurement being "*at the heart of the strategy*". Upon taking up his post, Mr Armstrong undertook a review which led him to identify a need for the respondent to provide more effective commercial support to its members. To address that need, he determined that a new full-time role of Business and Financial Analyst should be created. That position was advertised externally and five candidates got through the initial shortlist.

8. The first interviews took place in early June 2019. At that stage, as the ET found, candidates were told that the role was "*slightly fluid*"; it was not suggested that the job would include the claimant's workload.

9. Between the first and second interviews, however, the intended role of Business and Financial Analyst was extended to include the claimant's position of Financial Accountant, under an expanded role entitled Finance Manager and Business Analyst. The new job description for this position was drawn up by 13 June 2019, when two of the candidates were invited to second interviews, and were advised of the new title and job description for the vacancy. The second interviews took place on 27 June 2019

10. Meanwhile, on 14 June 2019, contact was made with the claimant and a meeting was arranged for 18 June 2019. The ET records what took place at that meeting, as follows:

> "74. … the claimant was told that her role was at risk of redundancy as a result of the decision to amalgamate her role with the new role, … she was provided with a job description for the new role and invited to apply for it, but at the same time given a draft settlement agreement, with instructions that if she wished to accept it she should do so within five days. The claimant reacted badly to this approach, and criticises the respondent for not giving her any warning that this was what was meant by "future arrangements", …. During the course of the meeting she criticised Ms Davies for doing this to her during her maternity leave."

11. In the event, the claimant did not make an application, rather it was her position that the redundancy process was a sham and that she was the subject of maternity discrimination. There was then, as the ET found, an extended stand-off between the parties, with each setting out their positions in writing, until 31 July 2019, when the respondent notified the claimant that she was dismissed with immediate effect. In the meantime, in respect of the position of Finance Manager and Business Analyst, an offer had been made to the successful candidate on 12 July 2019, referring to "*a start date in August 2019 to be mutually agreed*".

The ET's decision and reasoning

12. Addressing the claimant's complaint of unfair dismissal, the ET reasoned as follows:

> "99. The claimant alleges that the new job (in its revised form) amounted to a suitable available vacancy that she should have been offered as an alternative to redundancy. We accept the respondent's submission in relation to Simpson that this is to be assessed by an employer on an objective basis.
> 100. It is clear that the new role encompassed the claimant's previous role, but in every other respect it was completely different. The main part of the job concerned business analysis, rather than the financial accounting that the claimant had been involved with. It was a full time role, compared with the claimant's then 40 day a year role, and was office based, rather than being home based.
> 101. In those circumstances we have no hesitation in finding that the respondent was under no obligation to offer it as a "suitable available vacancy". It was an entirely different role, on terms (as to hours and location) that were less favourable to the claimant."

13. In the circumstances, the ET concluded that the claimant had failed to demonstrate that the prescribed circumstances for section 99 **ERA** purposes applied to her dismissal and it rejected her claim in this regard.

14. The ET went on to consider the claimant's complaints of direct discrimination, which included allegations of sex discrimination and/or pregnancy and maternity discrimination in relation to the respondent's decision to make the claimant redundant. In considering these complaints, the ET made clear it shared the claimant's concern as to the lack of documentation available in relation to either version of the new role; this, the ET said, had led it to "*consider sceptically this introduction by the respondent of the new role*" (ET, paragraph 113). The ET was also satisfied that, pursuant to section 136 **Equality Act 2010**, the burden of proof had shifted to the respondent (ET, paragraph 114).

15. Looking then at the explanation provided by the respondent, the ET referred back to its earlier conclusion (under section 99 **ERA**) that the new role was not a "*suitable alternative vacancy*" such that it had to be offered to the claimant in preference to other candidates. It accepted that the new job (in its revised form)

was intended to encompass the claimant's duties and that one of the external candidates had been told that they were the "*odds on favourite*" before the role had been discussed with her. Although finding the lack of documentation surprising, the ET considered that the respondent's version of events should be accepted and that, contrary to the claimant's case, this was not a device concocted to terminate her employment because she was on maternity leave. The ET thus accepted that there had been a plan for recruiting for one role, but, after the first round of interviews, it was considered that the claimant's tasks should be subsumed within that role, which was, nevertheless, "*almost entirely different to the claimant's*" (ET decision paragraph 120 c).

The legal framework

16. The claimant pursued claims of direct sex discrimination and discrimination because of pregnancy or maternity under the **Equality Act 2010** ("EqA"). By section 13, direct discrimination is defined as follows:

> "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 of the **EqA**, separately provides that (so far as relevant):

> "(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 ...
> (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."

17. In addressing a case under the **EqA**, section 136 provides for a shifting burden of proof, as follows:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."

18. Where it is determined that the burden has shifted to person A, it is for them to establish, on the balance of probabilities, that the treatment in issue was in no sense whatsoever because of the relevant protected characteristic; **Igen Ltd and ors v Wong and ors** [2005] EWCA Civ 142.

19. As for the claimant's complaint of unfair dismissal, she did not have sufficient service to pursue a claim under 98 **ERA**, but relied on section 99, which provides that a dismissal will be regarded as unfair if the reason or principal reason is of a prescribed kind, or the dismissal takes place in prescribed circumstances. The circumstances relied on in the present case were those prescribed by regulation 20(1)(b) **Maternity and Parental Leave etc Regulations 1999** ("MAPLE"), as follows:

> (1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if— (*b*) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

20. Regulation 10 **MAPLE** provides (relevantly):

> (1) This regulation applies where it is not practicable by reason of redundancy for an employer to continue to employ an employee under her existing contract of employment during— (a) the protected period of pregnancy; (b) the statutory maternity leave period; or (c) the additional protected period.
> …
> (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.

21. As confirmed in **Sefton Borough Council v Wainwright** [2015] IRLR 90 EAT, for the purposes of regulation 10 **MAPLE**, "*redundancy*" is to be defined in the same way as provided by section 139 **ERA**, that is (relevantly):

> (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— … (*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.

22. Whether or not a dismissal is by reason of redundancy is a question of fact for the ET; **Shawkat v Nottingham City Hospital NHS Trust (No. 2)** [2002] ICR 7 CA, per Longmore LJ at paragraphs 17 and 19. That is a question that is not, however, to be answered as a matter of impression: the ET must be satisfied that the facts of the case before it meet the statutory definition; **Robinson v British Island Airways Ltd** [1978] ICR 304 EAT, at p 308E-G. More specifically, where an employee loses their role in a business reorganisation that does not necessarily mean that they have been made redundant; as Burton P observed in **Kingwell and others v Elizabeth Bradley Designs Ltd** EAT/0661/02:

> "… it is not an automatic consequence of there being a business reorganisation that there is a redundancy; nor is there a need for a business reorganisation in order that there should be a redundancy situation. The two are entirely self-standing concepts. But if a business reorganisation leads to a diminution in the requirement for employees carrying out the relevant work, then that business reorganisation leads to a redundancy

> situation and if not, not."

Equally, it is not always essential that there should have been a reduction in headcount, a reduction in a requirement for total working hours may suffice; **Campbell v Tesco Personal Finance plc** [2023] EAT 68 at paragraph 19. The statutory test remains the touchstone; thus it cannot be assumed that there is a redundancy once an employee of one skill is replaced by an employee of a different skill, as Longmore LJ observed in **Shawkat**:

> "19. … [that] is a consideration which a tribunal may take into account if they think it right to do so, but it is not a necessary conclusion from that state of affairs that the requirement for work of a particular kind has ceased or diminished. …"

23. As for whether there is a suitable available vacancy for regulation 10(2) **MAPLE** purposes, that is also a question of fact for the ET; **Community Task Force v Rimmer** [1986] IRLR 203 EAT. In addressing the question of suitability, however, the EAT has held that this is to be tested by the requirements laid down by regulation 10(3); specifically that the work to be done is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances; **Simpson v Endsleigh Insurance Services Ltd** [2011] ICR 75.

24. Finally, as for the approach we are to take to the ET's decision, we keep in mind the guidance provided in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672:

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should … be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. ..."

25. That said, where an ET has fallen into error, the EAT's role is not to strive to uphold a decision where the reasoning reveals a fundamental error of approach; as Sedley LJ observed in **Anya v University of Oxford** [2001] ICR 847 CA:

> "26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

The claimant's case on appeal

26. For the claimant, it is observed that it was a central plank of her case before the ET that the purported redundancy in this case was a sham. As such, in order to determine her claims of discrimination and of unfair dismissal under section 99 **ERA**, she says that the ET had first to decide whether there was a genuine redundancy. The ET had, however, failed to address the question whether the respondent's requirements for "*employees to carry out work of a particular kind*" had ceased or diminished, having failed even to define the particular kind of work that was said to have ceased or diminished. That, the claimant argues, was enough to render the ET's decision unsafe.

27. The claimant further contends that this is not a case where it would be appropriate for the EAT to seek to uphold the ET's decision notwithstanding its failure to address a key issue. The ET's findings of fact did not show there was a redundancy situation - something that was a primary question of fact and, therefore, for the ET, not the EAT, to determine (per **Shawkat**). To the extent it was argued that the ET had rejected the claimant's case that the redundancy was a sham, that could not be correct given the ET had failed to make the primary finding that there was a redundancy. As for the ET's reference to the new role being "*almost entirely different*" to the claimant's, that still failed to answer the question whether the respondent's need for general accounting skills (the claimant's work) had ceased or diminished (and see **Robinson**). It was the claimant's case that, on the facts, there was a one-to-one replacement of her by a new (male) employee and the ET's findings - that the roles were different and that the new role was not a suitable alternative vacancy - were not dispositive of whether there was a redundancy (by analogy with **Shawkat**).

The respondent's case

28. Accepting that, on the facts of this case, the ET had been required to satisfy itself whether there was a genuine redundancy in accordance with section 139 **ERA**, but that it had not explicitly set out, and commented upon, each element of that test for redundancy, the respondent submits that, taken as a whole, that was not fatal to the ET's decision. In respect of the claim under section 99 **ERA**, it was not an error of law for the ET to proceed straight to the question whether there had been a suitable alternative vacancy (effectively assuming there had been a redundancy). As for the claims of discrimination, although the burden had shifted, the ET

had accepted the respondent's redundancy explanation. Accepting that, given the way the parties' cases were put, the ET had been required to satisfy itself that there was a genuine redundancy for section 139 **ERA** purposes but that it had not expressly referred to that provision, it was nevertheless clear that it had carefully considered the claimant's claim that the redundancy was a sham, and had reached clear and cogent findings that her case was not made out.

29. Moreover, for the purposes of section 139, it was not the case that there could be no redundancy situation because the claimant's duties did not cease or diminish: it was not necessary that there should always be a reduction in the amount of work done by the complainant; it could be sufficient if the same amount of work was undertaken by fewer employees or within a shorter number of working hours (*per* **Campbell**). In the present case, the respondent had identified a need for a new post to be created - a Business and Financial Analyst - and had then considered that the new full-time position could subsume both the duties envisaged for the new post and the claimant's part-time Financial Accountant position; this could fall within section 139 **ERA**, as the work required could be undertaken by one person, not two.

Analysis and conclusions

30. The claims with which we are concerned for the purposes of this appeal - of direct discrimination because of sex, or because of pregnancy or maternity; and of unfair dismissal under section 99 **ERA** - were pursued by the claimant in the alternative. It was the claimant's primary case that there was no redundancy and the purported removal of her job - by its being subsumed within the new post - was a sham: in reality, her duties were not expected to (and did not) cease or diminish, and the respondent still had the same requirement for employees to carry out the same financial accounting work. In the alternative, if there was a redundancy situation, it was the claimant's case that her dismissal was rendered unfair under section 99 **ERA**, given the obligation on the respondent to offer her the new post as a suitable alternative vacancy (as required by regulation 10 **MAPLE**).

31. As was common ground before us, on either case, the ET was required to determine whether or not there was a redundancy, as that term is defined by section 139 **ERA**. Most obviously, given the claimant's reliance on regulation 20(1)(b) **MAPLE**, the ET had to be satisfied that her dismissal had been by reason of redundancy for the purpose of the claim under section 99 **ERA**. As for the discrimination claims, while not

part of the relevant definitions under the **EqA** (sections 13 and 18), once the ET had found that the burden of proof had shifted to the respondent, both parties accepted that it was then bound to consider whether it should accept the respondent's explanation for the claimant's dismissal (the less favourable, or unfavourable, treatment in issue) as being by reason of redundancy. Specifically, as Ms Tharoo acknowledged at the hearing of the appeal, that explanation was not put in general terms, as relating to a (non-discriminatory) business re-organisation, but was specifically put on the basis of there having been a redundancy as that term is defined by section 139 **ERA**. Notwithstanding the fact that the question of redundancy had thus been identified as a key issue in the claims, it was also agreed before us that the ET did not specifically address the statutory test laid down by section 139 **ERA**. The question for us is whether that renders the ET's decisions unsafe.

32. Accepting that the claimant's claim under section 99 **ERA** required (per regulation 20(1)(b) **MAPLE**) that she had been dismissed by reason of redundancy (such that this was the first issue raised by that claim), the respondent contends that the ET was nevertheless entitled to go straight to the question whether there was a suitable alternative vacancy; as it had effectively assumed redundancy for these purposes, there could be no prejudice in the ET's adoption of this course.

33. In some cases, we can accept that this may be correct: in a claim under section 99 **ERA**, where reliance is placed on regulation 20(1)(b) **MAPLE**, if an ET proceeds on the basis that a dismissal is by reason of redundancy, as that term is defined by section 139 **ERA**, it may not give rise to any error for it to move straight to the question whether there is a suitable alternative vacancy for the purposes of regulation 10 **MAPLE**. As always, however, much will depend on the particular facts of the case. In the current proceedings, it is the claimant's case that there was a degree of overlap between the question at the heart of section 139 - what was the particular kind of work for which the respondent had a diminishing requirement? - and the determination of whether the new role was a suitable alternative vacancy. Having failed to engage with the test laid down by section 139, the claimant argues that the ET could not properly assess the suitability of the new role as an alternative vacancy.

34. On the particular facts of this case, that seems to us to give rise to a valid objection. Although the ET accepted the respondent's evidence as to the business re-organisation that Mr Armstrong had brought about, it did not engage with the requirements of the test under section 139 **ERA**. In a case where the claimant's role was itself relatively new, and there was some uncertainty as to how many hours it actually required, the

question whether there was a redundancy could not simply be answered as a matter of impression; the ET needed to address the terms of the statute (*per* **Robinson**). The fact that there had been some form of re-organisation, and/or an additional requirement for different skills, did not necessarily mean there was a redundancy (see *per* **Kingwell** and **Shawkat**). Further complexity arose from the fact that a new role had been added to the organisation; taken together with the uncertainty regarding the number of hours required for the work undertaken by the claimant, this was not a case where redundancy could necessarily be assumed from an apparent reduction in headcount (see **Campbell**). Moreover, although the finding of redundancy for the purposes of the claim under section 99 **ERA** was a necessary first step, we accept the claimant's point that, in the particular circumstances of this case, it was also likely to be relevant to the ET's determination of the subsequent question, as to whether the work to be done as Finance Manager and Business Analyst would be of a kind that was both suitable and appropriate for the claimant.

35. As the claimant acknowledges, the question of the suitability of the new role was a matter for the ET to assess. For our part, we can see that it might ultimately be entitled to find that the additional duties encompassed by that position - the business analysis required, not simply the financial accounting that the claimant had undertaken - meant that it was neither suitable nor appropriate, but we do not think we can say that this would inevitably be so. We also accept the claimant's point that that decision ought to be informed by a proper assessment of the constituent elements of the role, which, in turn, might depend upon prior findings made under section 139 **ERA**.

36. Of course, it was (and remains) the claimant's primary case that the proper application of section 139 **ERA** would in fact lead the ET to conclude that there was no redundancy: her dismissal was an act of less favourable, or unfavourable, treatment because of her sex or the fact that she was on maternity leave. In those circumstances, it is contended that the need for the ET to consider whether there was a genuine redundancy for section 139 purposes ought to have been all the more apparent.

37. In this regard, we note that this was not a case where the respondent was relying, in general terms, upon a business re-organisation that had led to the removal of the claimant's role; rather, as Ms Tharoo acknowledged, its explanation was more specific, being firmly put on the basis that the claimant's position had been rendered redundant, as that term is defined by section 139 **ERA**. Pursuant to section 136 **EqA**, having found that the burden of proof had shifted to the respondent, the ET was required to determine whether it had

made good its non-discriminatory explanation for the treatment in question. The explanation in this case was that the claimant was redundant; something the claimant had, however, denied. In rejecting the claimant's case that incorporation of her position into the new role had been "*a device*", the ET had, more generally, dismissed her argument that the respondent's explanation - that her position was redundant - was a sham, without actually determining whether or not there had really been a redundancy.

38. We do not suggest that a respondent might not be able to rely on a business reorganisation as demonstrating a non-discriminatory explanation for a dismissal, but the particular reliance on there having been a redundancy is a striking feature of this case. Equally, we accept that it might have been open to the ET to have found that the requirements of section 139 **ERA** were made out, and the claimant's dismissal was indeed by reason of redundancy; that would be a question of fact for the ET to determine. The difficulty is that the ET did not address the questions posed by section 139 in order to determine the issue of redundancy that had been raised in this case; specifically, it did not ask itself whether the respondent's need for employees to carry out financial accounting work had ceased or diminished (or was expected to do so).

39. Mindful of the need to read the ET's decision holistically, and to be slow to conclude that it has failed to apply the relevant principles, we note that there is no indication that the ET reminded itself of the test for redundancy under section 139 **ERA**, albeit that it is common ground before us that it had been required to satisfy itself that there was a genuine redundancy situation as defined by that provision. In the circumstances, we consider that this is a case where the ET's reasoning fails to demonstrate that it has engaged with what is agreed to be the relevant question at the heart of the claims before it (*per* **Anya**). We therefore allow the appeal and, accepting that the question of redundancy is one of fact for the ET to determine, must remit this matter for reconsideration.

40. For the claimant it was urged that this should be to a differently constituted ET, and, having had the opportunity to consider our judgment in draft, additional written representations have been made by Mr Pickard on this issue. We have carefully considered all that has been said, but we are not persuaded that it is necessary to direct that this remission must be to a different ET. Having had regard to the guidance in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763 EAT, we consider the proportionate course is to remit this case to the same ET (to the extent that remains possible) for reconsideration of the claimant's claim of automatic unfair dismissal under section 99 **ERA** and, also in relation to her dismissal, of her claims of direct

discrimination because of sex (section 13 **EqA**) or pregnancy and maternity (section 18 **EqA**). The ET made a number of findings that have not been the subject of any challenge and that makes it more convenient for the same panel to consider the case on remission; moreover, although some time has now passed since the ET hearing, we consider that the panel members are likely to be able to remind themselves of this case and to complete their task by considering the issues we have identified in this judgment. There is no reason to doubt the professionalism of the ET and, whilst we concluded that it failed to engage with what was agreed to be the relevant question at the heart of the case, this is not a case where we have found that its conduct of the hearing, or its reasoning as a whole, was "*wholly flawed*" or that there was a "*complete mishandling*" of the case. In our judgement, to the extent it remains practicable, the same panel will be best placed to revisit this case, to make the necessary findings on the issue of redundancy, and to then proceed to determine the claims in question. This remission does not provide the ET with a "*second bite at the cherry*", but with the opportunity to complete the exercise required, by asking whether there was in fact a genuine redundancy.