EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105395/2023

Held in Glasgow on 19, 20, 21 and 22 August 2024

Employment Judge P O'Donnell
Members Mr P O'Hagan & Ms N Bakshi

Ms C Daly	**Claimant** **Represented by:** **Mr M Daly - Husband**
Bridging the Gap (Glasgow)	**Respondent** **Represented by:** **Mr N McDougall - Counsel [Instructed by Jackson Boyd – Solicitors]**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that the claimant's complaints under the Employment Rights Act 1996, the Maternity and Parental Leave Regulations 1999 and the Equality Act 2010 are not well-founded and are hereby dismissed.

REASONS

Introduction

1. The claimant has brought the following complaints:

    a. Unfair dismissal under s94 of the Employment Rights Act 1996 alleging that her dismissal was unfair either under s98 or s99 (pregnancy and maternity).

    b. Detriment contrary to Regulation 19 of the Maternity & Parental Leave Regulations 1999 that she was not provided with alternative employment as required by Regulation 10.

c. A complaint that her dismissal amounts to unlawful discrimination under the Equality Act 2010 relying on the protected characteristic of pregnancy and maternity. The claimant relies on ss13, 18 and 39(2)(c) of the Act. She also alleges that her dismissal amounts to harassment contrary to ss26 and 40 of the Act.

d. A complaint of harassment under ss26 and 40 of the Equality Act relating to a comment made during the redundancy consultation process that her post could not be covered during her maternity due to the fact that she had an enhanced maternity package.

2. The respondent resists all the complaints.

Evidence

3. The Tribunal heard evidence from the following witnesses:

a. The claimant.

b. Diane Bate (DB), the chief executive officer of the respondent.

c. Susan Clark (SC), the claimant's line manager.

4. There was an agreed bundle of documents prepared by the parties running to 583 pages. A reference to a page number below is a reference to a page in that bundle.

5. This was not a case where there was any real dispute of fact. The evidence given by all the witnesses was consistent with each other and with the contemporaneous documents. The Tribunal did not, therefore, have to resolve any conflict in the evidence but it does consider that all the witnesses gave evidence in an honest and credible manner.

Findings in fact

6. The Tribunal made the following relevant findings in fact.

7. The respondent is a charity originally based in the Gorbals in Glasgow which engages in work with different communities to break down barriers between multicultural groups. There are two separate strands to this work.

8. First, there was what was described as "community work" where the respondent organises events or activities intended to provide social interaction between different communities such as mother and toddler groups and sports events. This work can involve people from a range of ages and backgrounds. At the relevant time, there were three employees employed to do this work.

9. Second, there was work with young people in what was known as the "schools transition programme" (STP). This was a programme intended to help young people move from primary school to high school. It involved visits to high schools to introduce the young people to the new school as well as training and development provided to older high school pupils in order that they could mentor those young people moving from primary school. The STP also involved anti-sectarianism work to educate the young people about these issues which included a residential trip to Belfast in the past. There were four employees (including the claimant) engaged in this work.

10. The respondent also employed Diane Bate (DB) as chief executive. She joined the respondent on 1 March 2022. Prior to that, the day-to-day management of the charity was done by a role described as "director". In November 2022, Susan Clark (SC) joined the respondent in the role of community and development manager. This role assumed responsibility for day-to-day management of the work of the respondent with DB's role becoming more of a strategic role.

11. The ultimate authority for the respondent is its board which is made of various people appointed from the community to direct the work of the organisation.

12. At the time of the hearing, only DB and SC remained as employees of the respondent. The four employees employed to work on the STP had been made redundant in April 2023. The three employees working on the

community side had also left the respondent's employment but the Tribunal heard no evidence about how this came about.

13. The claimant was employed as a project worker on the STP from 26 October 2009. The claimant's role evolved over the years and would include making funding applications for the STP work as well as delivering that work. She had, for a short-time, acted up in the role of director when this was vacant before DB was appointed to the post of chief executive. The claimant had considered applying for the role of chief executive but did not feel that she could focus her energies on that role as she had recently become a new mother.

14. The claimant was due to go on maternity leave for a second time in June 2022. Prior to this, DB gave her a new contract for a role described as "young people coordinator" (pp43-48). The reason for this is set out in a proposal submitted to, and approved by, the board (p42). In summary, DB considered that this new job title and job description better reflected how the claimant's job had evolved as well as justifying a pay increase which the claimant had been given.

15. The claimant went on maternity leave on 10 June 2022.

16. The work of the respondent is funded by securing grants from various bodies. The Tribunal was taken to financial statements from the respondent which show the amount of funding secured from different bodies (pp416-442, 443-469 and 470-494). These showed funding secured from bodies such as Glasgow City Council, BBC Children in Need, National Lottery, Scottish Government as well as smaller charitable trusts.

17. The majority of the funding for the STP came from the Glasgow Community Fund (GCF) administered by Glasgow City Council. There were other funders but the amounts involved were much smaller than the sums provided by GCF.

18. Funding grants are not open ended and funding will come to an end after a period of time. In 2022, the funding from GCF was coming to an end and so

the respondent applied for a new grant for three years to keep operating the STP. The respondent was seeking total funding over three years of over £455,000 (p69). There was other funding for the STP in the financial year 2023/24 amounting to approximately £76,000 but that funding was also coming to an end in that financial year. Additional sources of funding for later years had not been secured at the time.

19. The board had discussions with DB in late 2022 about what options were available if the GCF funding was not secured. There was concern about the funding landscape. From sector discussions the organisation had concluded, by December 2022, that there were fewer sources and less funding for the work done by the respondents and the respondent was unable to identify any other source of funding which could replace GCF funding if that was not awarded by the council. If that funding was not secured then the respondent was concerned that the STP could not continue.

20. The respondent did have reserves but operated a reserves policy that this would be retained to provide operating costs and potentially redundancy costs in the event that there was a loss of funding.

21. There were also the smaller sums secured from other funders but the respondent could not use this money freely; it had been awarded to them to run the STP programme and if they could not do so then they may need to return the money. Further, the sums involved would not allow the STP to continue for very long.

22. In the event, the board decided that if the GCF funding was not secured then the STP could not continue and the employees working on the project would go into a redundancy consultation. They had considered using reserves or the other funding to keep the project running for a period to explore other sources of funding. However, the view of the board was that the funding landscape was such that there was very little likelihood of sufficient sums being secured from other sources that would replace the GCF funding. They did not consider that using the organisation's reserves to keep the project going for a limited period in these circumstances was a proper and

appropriate use of those reserves. Similarly, and for the same reasons, they did not consider that they could use the monies from other funders for this purpose.

23. In August 2022, a collective grievance had been submitted by the staff expressing concerns about the strategic direction of the respondent and how it was being run since DB had become chief executive. Although she was on maternity leave at the time, the claimant agreed to her name being put on the grievance.

24. In the event, the application to GCF was unsuccessful. The respondent was able to find out the outcome by going online to the GCF website and finding their application. This was done in early January 2023. The decision was confirmed by email dated 27 January 2023 (p80). There was a further email on 28 February 2023 (p201) in which feedback was provided. It was stated that the respondent had made a good quality application but was one of many such applications with successful applications being higher strategic priorities for the Council.

25. In light of this decision, and given the earlier decision by the board as to what was to happen if funding was not secured, the four employees employed to deliver the STP were put into a redundancy consultation process. It was decided that the consultation would be conducted by SC (assisted by someone from the respondent's external HR adviser) as the line manager of the employees.

26. It was decided that DB would not be involved in this process as it was envisaged that she would hear any appeals lodged by the employees. This position subsequently changed when it became clear that much of the criticism about the redundancy situation was directed at DB. It was considered inappropriate for her to hear appeals about her actions and decisions. In the event, the claimant did not lodge an appeal of her dismissal.

27. All four employees were absent from work at the time; the claimant was on maternity leave and the others were on long-term sick. SC, therefore, held a remote meeting by Zoom on 23 January 2023 to explain that the GCF funding

application had been unsuccessful and so the STP could not continue. It was explained that all four employees involved in the STP were at risk of redundancy and that a consultation process would begin with the first meeting to be held on 27 January 2023. The text of the announcement was emailed to staff the same day (p73).

28. As noted above, all of the employees who delivered the STP were absent from work at this time. This fact combined with the loss of GCF funding meant that the respondent could not deliver any element of the STP and so it emailed partner schools to say that the project was not going to continue. An example of the email appears at p571.

29. On or around 13 January 2023, the claimant had made a request for flexible working. SC offered to meet with her on 25 January 2023 to discuss this but the claimant could not make this date and suggested 24 January. SC was not free on this date and offered alternative dates which were not suitable to the claimant. Email correspondence regarding the flexible working request continued after the announcement on 23 January about the redundancy consultation process with SC suggesting that the request for flexible working could be discussed as part of the consultation. The email correspondence appears at pp195-200.

30. The respondent held four consultation meetings with the claimant on 27 January 2023, 2 February 2023, 23 February 2023 and 5 April 2023. Minutes of the first three meetings are at pp85-86, 97-110 and 153-193 respectively. All of the meetings were held remotely and the claimant was accompanied by a trade union representative.

31. Between these meetings, the claimant raised various questions in writing and the respondent provided written replies to these (pp91-96 and 141-152).

32. The Tribunal does not propose to set out the detail of everything discussed at these meetings; there was considerable discussion of matters which are not relevant to the issues to be determined in this case. The Tribunal notes that the second and third meetings were lengthy (particularly the third meeting) and that the issues being raised by the claimant were discussed in detail.

33. The Tribunal sets out below, the matters discussed at the consultation meetings (and in the written correspondence) which are relevant to the issues in dispute.

34. First, much of the issues raised by the claimant during the consultation related to the events giving rise to the loss of funding. In particular, the claimant was of the view, which she maintained at the Tribunal hearing, that a number of mistakes had been made by DB, both in the application itself and in only making an application to GCF rather than a range of funders. However, the claimant did not, at any point in the consultation (or at the Tribunal hearing), identify what other funding she considered was available that had any prospect of replacing the GCF funding.

35. Second, the claimant did not identify any alternative employment which she could be offered by the respondent. It was common ground that there were no vacancies at the relevant time.

36. The only suggestion of an alternative by the claimant was to keep staff employed by using reserves or the other pots of funding to pay them whilst those employees (in particular, the claimant) could seek alternative sources of funding. However, the claimant did not give any indication of what sources of funding were available. SC explained to the claimant in her response to written questions and in the meetings that the board had decided that reserves would only be used for these purposes if there was a clear need to continue to provide service and a likelihood of securing alternative funding. If these criteria were not met then the board had decided it would not use its reserves.

37. Third, the claimant raised an issue about the fact that no-one had been recruited to cover her maternity leave. This is related to the claimant's issues about how DB had dealt with the funding application and the claimant expressed the view that had someone been covering her post then a better job of securing funding would have been done.

38. In response to the claimant's written questions about this, SC set out an explanation why the post had not been covered (p144). She explained that

there had been an intention to cover the role on a temporary basis but that because the claimant was on an enhanced maternity package there was no money available to pay for someone to cover the post. She went on to state that two of the other employees had had their hours increased during the claimant's first maternity leave to cover her absence and that these increased hours remained in place. It was considered by the respondent that the same staffing levels were, therefore, available during the claimant's second maternity leave.

39. The claimant took offence to this reply, in particular the comment that her enhanced maternity package meant there was no money to pay for maternity cover. It was her view that she was being blamed for the redundancy situation. This is linked to her view that someone covering her role would have done a better job of securing funding than DB.

40. The claimant set out her position on this at the third consultation meeting (pp179-180). She set out her view that because she was on maternity leave with an enhanced package this has resulted in her colleagues going off sick and now going through a redundancy consultation. This arose, in her view, because the funding situation may not have arisen if her post had been covered. She stated that she was being told that because she was off work to have a child this had resulted in the redundancy situation.

41. SC replied that this was not what was being said but the claimant and her union representative insisted that this was what had been said in writing.

42. The consultation process concluded with a final meeting on 5 April 2023 at which the claimant was informed that she was being dismissed by reason of redundancy. The delay between the third and fourth meetings arose from a number of issues affecting the respondent at this time; there had been a number of people who had left the board and it was not quorate for a period; the respondent had had to move offices at short notice.

43. All four employees who worked on the STP were made redundant at the same time as the claimant.

44. The claimant's dismissal was confirmed by letter dated 6 April 2023 (p219). She was offered the right of appeal but did not take this up.

Submissions

45. Both sides produced written submissions and supplemented these orally. For the sake of brevity, the Tribunal does not intend to set out the submissions in details. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

46. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA).

47. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is redundancy.

48. Redundancy is defined in s139 ERA and, for the purposes of this claim, the relevant definition would that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished, or were expected to cease or diminish.

49. Section 99 ERA provides that a dismissal is "automatically" unfair in certain circumstances relating to family leave in the following terms:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section 'prescribed' means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,

…

(b) ordinary, compulsory or additional maternity leave,

50. The relevant Regulations are the Maternity and Parental Leave Regulations 1999, specifically Regulation 20. Regulation 19 of the Regulations made it unlawful for an employer to subject an employee to a detriment for the same reasons.

51. The reason for a dismissal was described by Cairns, LJ in *Abernethy v Mott Hay and Anderson* [1974] IRLR 213 (approved by the House of Lords in subsequent decisions such as *W Devis & Sons Ltd v Atkins* [1977] AC 931 and *West Midlands Co-operative Society v Tipton* [1986] IRLR 112) as follows:-

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

52. It is a matter of law as to whether any such set of facts or beliefs falls into one of the categories of potentially fair reasons for dismissal and, if so, which one(s).

53. It was held in *Maund v Penwith District Council* [1984] IRLR 24 that the burden of proof regarding the reason for dismissal lies with the employer unless the employee does not have the requisite length of service to pursue a claim of "ordinary" unfair dismissal. If that is the case then the onus is on the employee.

54. The question of how the Tribunal should approach the burden of proof in relation to the reason for dismissal in cases involving claims of both "ordinary" and automatically unfair dismissal (in particular, whether the Tribunal should find the automatically unfair reason proven if the employer does not discharge

the burden of showing a potentially fair reason) was addressed in *Kuzel v Roche Products Ltd* [2008] IRLR 530 by Mummery, LJ:

"The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced led by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

55. If the respondent discharges the burden of showing that there was a potentially fair reason, the test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

56. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. The Tribunal also needs to consider whether the dismissal was a fair sanction by applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

57. In assessing the fairness of a dismissal on the grounds of redundancy, the first question is whether there has been a proper pool of employees from which selection for redundancy is made.

58. The principles to be applied by the Tribunal in assessing whether a proper pool for selection has been used are set out by Silber J at para 31 of *Capita Hartshead Ltd v Byard* [2012] IRLR 814:

"Pulling the threads together, the applicable principles where the issue in an unfair dismissal claim is whether an employer has selected a correct pool of candidates who are candidates for redundancy are that:

(a) *"It is not the function of the [Employment] Tribunal to decide whether they 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"* (per *Browne-Wilkinson J* in Williams v Compair Maxam Limited [1982] IRLR 83);

(b) *"…the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn"* (per *Judge Reid QC* in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);

(c) *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem" (per Mummery J* in Taymech v Ryan EAT/663/94*);*

(d) *the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has* "genuinely applied" *his mind to the issue of who should be in the pool for consideration for redundancy; and that*

(e) if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

59. The Tribunal would then, normally, go on to consider the fairness of the selection criteria applied to the pool. The Tribunal are not entitled to substitute their own criteria for those of the employer and are simply to assess the fairness of the criteria used.

60. In cases where everyone at risk of redundancy is being dismissed for this then issue of selection criteria is, effectively, academic as there is no selection being made.

61. In relation to the obligation to consult, the law was summarised by the EAT in *Mugford v Midland Bank* [1997] IRLR 208 at paragraph 41:

Having considered the authorities we would summarise the position as follows:

(1) Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

(2) Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

(3) It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

62. There is a requirement on an employer to make efforts to find alternative employment for a redundant employee (*Vokes Ltd v Bear* [1973] IRLR 363). However, this duty is only to take reasonable steps and not every conceivable step to find alternative employment (*Quinton Hazell Ltd v Earl* [1976] IRLR 296).

63. The duty does not, in particular, require an employer to "bump" another employee out of their job in order to create a vacancy for a redundant employee (*Byrne v Arvin Meritor LUS (UK) Ltd* UKEAT/0239/02). As Burton P put it in that case:

"The obligation on an employer to act reasonably is not one which imposes absolute obligations, and certainly no absolute obligation to "bump", or even consider "bumping". The issue is what a reasonable employer would do in the circumstances, and, in particular, by way of consideration by the Tribunal, whether what the employer did do was within the reasonable band of responses of a reasonable employer?"

64. There are provisions relating to redundancy when a woman is on maternity leave in the 1999 Regulations and the requirement to find alternative employment, specifically Regulation 10 which states:

(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) …

65. The Equality Act 2010 protects individuals from discrimination on the grounds of various protected characteristics. These include, for the purposes of this case, pregnancy & maternity.

66. The definition of direct discrimination in the 2010 Act is as follows:

13 Direct discrimination

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.

67. Direct discrimination under s13 has the requirement for a comparison with how others have been treated. This has long been an issue for claims involving women who alleged they have been treated unfavourably because they were pregnant because there is no comparator in the same or similar circumstances.

68. As a result, it has long been recognised from EU law (for example, *Webb v EMO Air Cargo* [1993] IRLR 27) that no comparator was required in such cases and this was eventually written into the relevant UK legislation. The current provision is s18 of the Equality Act which provides as follows:

(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 [or after] 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 [in that protected period as a result of the pregnancy].

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave [or on equivalent 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 [or a right to equivalent maternity leave].

(5) …

(6) …

(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 [or after] 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).

69. The provisions which described types of discrimination do not stand on their own and any discrimination must be in the context of the provisions of the Act which makes it unlawful to discriminate in particular circumstances. The relevant provision in this case is:

39 Employees and applicants

An employer (A) must not discriminate against an employee of A's (B)— by dismissing B

70. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong* [2005] ICR 931 (as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

71. It is important to remember that unreasonable or unfair behaviour is not enough on its own to allow for an inference of direct discrimination (*Bahl v The Law Society* [2004] IRLR 799). The case law requires there to be

"something more" than a less favourable or unfavourable treatment and the fact of a protected characteristic (*Madarassy v Nomura International* [2007] IRLR 246).

72. Harassment is defined in s26 of the Equality Act 2010:

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

73. In *Hartley v Foreign and Commonwealth Office* UKEAT/0033/15 (27 May 2016, unreported) it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

Decision – unfair dismissal

74. The Tribunal will deal with the claims of unfair dismissal first; a number of the issues to be determined in these claims will inform the Tribunal's decision on some of the issues to be determined in the discrimination claims.

75. The first question for the Tribunal is whether the respondent has discharged the burden of showing that there is a potentially fair reason for dismissal. For the reasons set out below, the Tribunal is satisfied that the claimant's dismissal was by reason of redundancy which is a potentially fair reason.

76. It goes without saying that a small charity which loses the majority of the funding for a particular area of work would either have or expect to have its

requirement for employees to do that work cease or diminish. This is exactly the situation in this case and the definition of redundancy in s139 is clearly met on the facts of the case; the respondent had not secured the majority funding from Glasgow City Council for the schools transition programme; as a result, they would not be able to continue with that work and so there would not be a need for employees to do that work.

77. The claimant challenges the reason for her dismissal on a number of grounds.

78. First, she sought to suggest that there was work done with young people beyond the schools transition programme and, in particular, on the community side of the organisation. However, there was no evidence that any of the work done on the community side was specific to young people and, rather, the community work involved a range of service users which could include young people.

79. In any event, the Tribunal considers that this was an argument more about the pool of employees who were at risk of redundancy and whether the claimant should have been part of it. This is an issue about the reasonableness of the dismissal under s98(4) rather than whether redundancy was the reason for dismissal. The Tribunal will address the issue of the pool further below.

80. Second, and related to the first reason, the claimant argued that the role of young person coordinator was involved in more than just the schools transition programme. Again, this is more an issue related to the pool of employees at risk rather than the reason for dismissal. However, the Tribunal does note that it heard no evidence of work done by this role beyond that of the schools transition programme. In particular, the coordinator role was created shortly before the claimant went on maternity leave and there was no evidence that this role involved any significant work beyond that of the schools transition programme.

81. Third, a central pillar of the claimant's case was that the redundancy situation was, in effect, manufactured in order to get rid of staff who had put their names to a collective grievance. However, the Tribunal heard very little evidence

from which it could draw any inference to support the claimant's case theory of a manufactured redundancy situation.

82. It was not in dispute that there was a collective grievance to which all 7 employees put their name. It was also not in dispute that all these employees now no longer work for the respondent but the Tribunal heard no evidence about how the three employees who were not made redundant at the same time as the claimant came to leave the respondent. They may have been dismissed but they may also have left for a whole range of other reasons such as finding a new job or retirement. The Tribunal simply does not know and so can draw no inferences either way in respect of this.

83. The claimant's argument is that Ms Bate, either consciously or unconsciously, made a deficient application to Glasgow City Council that would mean that funding was not secured in order to allow her to make staff redundant because they raised a grievance about her. The Tribunal would need very clear and cogent evidence from which it could draw any inference that the chief executive of a charity had sought to sabotage its funding in order to enact some form of retribution on its staff and there was no such evidence to support what is no more than speculation on the part of the claimant.

84. Fourth, the claimant argued that there was no redundancy because there were some remaining funds available for the schools transition programme and that this money along with the respondent's reserves could have been used to keep her and others in post for a period whilst they sought alternative funding.

85. Again, this is a matter which is more about the reasonableness of the dismissal and, in particular, the issue of whether there were alternatives to dismissal which the Tribunal will address further below.

86. However, insofar as the claimant is suggesting that, at the relevant time, there was no cessation or reduction in the requirement for employees to do the work of the schools transition programme, the Tribunal does not consider that this has any merit.

87. It would, to a certain extent, involve the Tribunal looking behind the redundancy and exploring why the redundancy came about. The claimant sought to argue that the respondent had made the wrong decisions about funding (for example, only applying to Glasgow City Council or making errors in its application) which would involve an exploration of the circumstances which led to the redundancy situation. The Tribunal agrees with the submissions made on behalf of the respondent that it is not permitted to do so *(Moon and ors v Homeworthy Furniture (Northern) Ltd* 1977 ICR 117, EAT, *Hollister v National Farmers' Union* 1979 ICR 542, CA, and *James W Cook and Co (Wivenhoe) Ltd v Tipper and ors* 1990 ICR 716, CA).

88. Further, the funding suggested by the claimant could not continue indefinitely and there was no evidence before the Tribunal that there was any prospect of sufficient funding being secured in the near future that would allow the work to continue. There was no evidence that, at the relevant time, there was any alternative funding available or likely to be available, either from a single source or multiple funders, that would provide the sums required to keep the work going.

89. In these circumstances, even if the limited funds available and reserves had been used to keep staff employed for a short period, it was still the case that the requirement for the work to be done was expected to cease or diminish in the future. There was still, therefore, a redundancy situation as defined in s139 ERA.

90. Fifth, and finally, the claimant brings a claim of automatically unfair dismissal under s99 ERA. In order to succeed in such a case, the claimant needs to show that the sole or main reason for her dismissal was that she was pregnant or had taken maternity leave.

91. The Tribunal has determined that the reason for the claimant's dismissal was redundancy and, in doing so, it considers that there was no evidence that her pregnancy or maternity leave was the sole or main reason for dismissal. The sole reason for dismissal was redundancy for the reasons set out above.

92. Indeed, the Tribunal considers that there was no evidence that the claimant's pregnancy or maternity leave had any bearing at all on her dismissal. The Tribunal considers that had the same circumstances (that is, a failure to secure majority funding for the schools transition programme) arisen when the claimant was not pregnant or on maternity leave then the same outcome would have occurred.

93. The claimant's argument in this respect is that had she been at work she would have done a better job of securing funding and there would have been no redundancy situation. However, this is no more than speculation on her part and is too remote from the circumstances giving rise to her dismissal for pregnancy or maternity leave to be the sole or main reason for dismissal.

94. Having concluded that redundancy was the reason for the claimant's dismissal, the Tribunal now turns to the question of whether the dismissal was reasonable in terms of s98(4) ERA.

95. The first issue is the pool of employees at risk of redundancy. This is one of the issues for determination where the Tribunal has to apply the "band of reasonable responses" test. This test requires the Tribunal to consider not whether there was anything else the respondent could have done (there is almost inevitably always some alternative actions) but, rather, whether what the respondent actually did was within the range of options reasonably open to them.

96. The Tribunal considers that putting at risk of redundancy those employees who did the work that was no longer continuing or expected to continue is clearly something that was within the band of reasonable responses open to the Tribunal. The Tribunal cannot see any basis on which it would not be within the band.

97. The claimant's case was that there were other options in respect of the pool; either that she should not be included because there was work with young people beyond the schools transition programme or that others such as Ms Clark should be included because some of the funding that was not secured was to cover management costs. However, the fact that these alternatives

existed does not mean that the pool which was used was not within the band of reasonable responses.

98. If the Tribunal were to decide that the claimant's dismissal was unfair because the respondent should have taken one of these other options then it would be falling into the error of substituting its own decision for that of the respondent rather than applying the band of reasonable responses test.

99. The issue of selection criteria does not apply in this case as all the employees in the pool were made redundant and so no selection criteria were required.

100. In terms of the issue of consultation, the respondent held four meetings with the claimant and provided answers to written questions between those meetings. Given the size of the respondent and the circumstances of the case (that is, a situation where the work was ceasing and there was no issue of selection of only some employees in the pool), the Tribunal considers that the respondent did more than enough to properly consult with the claimant.

101. The claimant may have felt that she did not get the answers she wanted from those meetings or that there was no great purpose to the consultation but that does not mean that the respondent failed to give her the opportunity to discuss the situation. The obligation to consult does not mean that an employer must agree with an employee's position to satisfy that obligation.

102. There is an assertion by the claimant that there was no real purpose to the consultation. There may be some force in this; given the circumstances where all employees were to be made redundant and there was little prospect of any alternative being found then it may be that little could be achieved by consulting with the employees. However, this does not absolve the respondent of the need to consult, it simply lowers the bar in terms of what needs to be discussed. The respondent still needed to give the claimant the opportunity to make her case and suggest options that may avoid redundancies.

103. As set out above, the Tribunal is of the view that the respondent did more than enough to give the claimant such an opportunity.

104. The claimant made a specific criticism of the consultation that Ms Bate as chief executive was not involved in the meetings. She makes the argument that this extended the process because Ms Clark (being less familiar with the organisation because she had only been in post for a short time) could not provide immediate answers to questions being raised by the claimant or her union representative.

105. The Tribunal accepts as genuine the respondent's explanation that Ms Bate was not involved in the consultation because, initially, it was the intention that she hear any appeals. The Tribunal considers that this makes sense given the very small size of the respondent with Ms Bate being the most senior employee. The fact that this plan changed when it became apparent that the claimant's criticisms of the redundancy related to Ms Bate and what the claimant say as a deficient approach to securing funding does not mean that Ms Bate not being involved rendered the consultation process unfair.

106. In particular, there was no evidence from which the Tribunal could conclude that Ms Bate's absence from consultation meetings meant that there was not proper consultation with the claimant. It may be that answers were not given to questions raised by the claimant straight-away but those answers were provided over the course of the consultation process.

107. The final issue is the question of alternative employment or other alternatives to dismissal. Again, this an issue to which the band of reasonable response test applies.

108. There were no vacancies within the respondent at the time of the claimant's dismissal and so there was nothing to offer the claimant. As set out above, there is no requirement to "bump" another employee to offer their job to someone at risk of redundancy and so the claimant's suggestion that Ms Clark could have been dismissed to allow the respondent to offer her job to the claimant is not one which has any merit. The fact that the respondent did not do so is clearly within the band of reasonable responses.

109. Similarly, there is no obligation on the respondent to create an alternative job for the claimant.

110. The only other alternative suggested at the hearing has already been touched on above which was to use the remaining funding and reserves to keep the claimant employed for a while to try to secure funding for the project. There is no doubt this could have been done but that is not the question for the Tribunal. The question is whether the decision to dismiss was within the band of reasonable responses and it clearly was; the respondent had turned its mind to the question of what it would do in the event that the council funding was not secured and concluded that, given the funding landscape, there was little prospect of securing alternative funding that would justify using their reserves to keep staff on for this purpose.

111. There were a number of points raised by the claimant which she says render her dismissal unfair but do not fall neatly within the scope of the issues to be determined as set above. For the sake of completeness, the Tribunal will address these below.

112. First, there was an issue raised during the consultation process and at the hearing that the board were not informed of the redundancy consultation process until after it had started. The Tribunal does not consider that this is relevant to the question of whether the claimant's dismissal was unfair.

113. This would only be relevant if the Tribunal was dealing with a claim that the claimant's dismissal was not effective because the person who made the decision to dismiss (that is, SC) did not have the authority (or ostensible authority) to make that decision. This is a breach of contract claim and not one of unfair dismissal.

114. In any event, the respondent (that is, the legal entity and not SC) accepts that it dismissed the claimant and there was no evidence of any lack of authority to dismiss.

115. Part of the claimant's argument relates to a response from one board member to an email of 1 February 2023 from the board confirming that they are fully aware of the consultation process (p305) and making various comments about this. At p304, there is an email from one board member stating that the email is not agreed by him. However, it does not say what is not agreed

and the Tribunal does not consider that it could draw any inference from this that the board were not aware of the consultation process or any other inference given the lack of clarity.

116. Second, the claimant raised issues about delays in replying to her flexible working request. The claimant's argument is that all the dates offered to discuss her request were after the date on which the redundancy consultation process was announced and that this was deliberate because the respondent knew they were entering a redundancy consultation process.

117. The Tribunal was not dealing with any claim about flexible working and so this did not give rise to any cause of action in itself.

118. In terms of unfair dismissal, the Tribunal can see no basis on which this would render the dismissal unfair. There was no evidence from which the Tribunal could infer that the respondent was deliberately delaying a meeting with the claimant. However, even if they were, the Tribunal can see why the respondent would not want to deal with the flexible working request before the redundancy consultation started. The fact that the claimant may be made redundant in the near future is highly relevant to her request; if the claimant is dismissed then the request is rendered academic.

119. Further, assuming there was an intentional delay, the criticism of the respondent was, at most, that it should have been more transparent about the reason for this. However, once the claimant was told then the redundancy situation would be out in the open and the Tribunal can see why any employer would want to tell all staff about the situation at the same time; they would undoubtedly be criticised if they told some employees before others.

120. Third, the claimant complains that her individual grievance lodged during the consultation process was not dealt with until after she was dismissed. In effect, she argues that her dismissal should have been paused until the grievance was resolved.

121. There is no legal principle that requires this. It may be that some employers will want to do so but there is no obligation to do this. This is another matter

which is a question of what was within the band of reasonable responses and the Tribunal sees no basis on which it could be said that it was not.

122. For all these reasons, the Tribunal considers that the claimant's dismissal was fair. The claim for unfair dismissal is, therefore, not well-founded and is hereby dismissed.

Decision – Pregnancy & maternity detriment

123. The claim for detriment under Regulation 19 of the Maternity & Parental Leave Regulations 1999 relates to the issue of alternative employment and, specifically, an alleged failure to comply with the provisions of Regulation 10.

124. Regulation 10 applies where it is not practicable for an employer to continue to employ a pregnant woman or woman on maternity leave due to redundancy. It does not, therefore, apply in this case to any period prior to the claimant's risk of redundancy materialising such as when the community and engagement manager post was recruited in 2022.

125. The requirement of Regulation 10 is for the employer to provide the relevant employee with any suitable alternative vacancy (emphasis added). As has been set out above, there were no vacancies at the time at which the claimant was being dismissed.

126. Further, Regulation 10 does not require an employer to create a role that can be offer nor to dismiss another employee to create a vacancy.

127. In these circumstances, there was no failure to comply with Regulation 10 as there was no vacancy to offer to the claimant at the point she was being made redundant.

128. Further, to the extent that the claimant's case goes beyond Regulation 10 and she seeks to argue that she was not provided with alternative employment was because she had been pregnant or on maternity leave, the Tribunal has concluded that the reason why the claimant was not provided with alternative employment was because there was none at the point she was being dismissed rather than because she had been pregnant or had taken maternity

leave. She was not, therefore, subject to any detriment for a reason prohibited by Regulation 19 of the 1999 Regulations.

129. For all these reasons, the claim for detriment under Regulation 19 of the Maternity & Parental Leave Regulations 1999 is not well-founded and is hereby dismissed.

Decision - discrimination

130. The claimant argues that her dismissal amounts to discrimination contrary to ss13 or 18 of the Equality Act (read in conjunction with s39(2)(c)) relying on the protected characteristic of pregnancy and maternity.

131. In the Tribunal's view, the correct provision of the Act to deal with discrimination on the grounds of pregnancy and maternity is s18 with s13 being excluded by s18(7). However, this is no more than a technical point and does not affect the substantive issues to be determined. The Tribunal's decision below would be the same regardless of which section of the Equality Act was used.

132. As set out above, there was no evidence before the Tribunal from which it could conclude that the claimant's pregnancy or her maternity leave had any influence on her dismissal at the time she was made redundant.

133. The Tribunal does bear in mind that the test under the Equality Act is different than for unfair dismissal; pregnancy or maternity leave needs to be the sole or main reason for dismissal in the context of unfair dismissal but only needs to be an operative cause in discrimination cases. However, even applying this lower hurdle there was simply no evidence that supported any argument that the claimant's pregnancy or maternity in any way caused the claimant's dismissal.

134. In her written submissions, the claimant makes reference to matters which are described as "instances of discriminatory treatment". Many of these are not pled as acts of discrimination in the ET1 claim form and so the Tribunal has treated these as matters from which the claimant is asking it to draw an

inference that her dismissal was discrimination rather than being relied on as causes of action in themselves.

135. The Tribunal has taken account of these matters but does not consider that either individually or taken as a whole these provide any basis on which the Tribunal could draw any inference of unlawful discrimination. In particular, where there is a clear redundancy situation leading to the claimant's dismissal then there is a particularly steep evidential hill for the claimant to get over to persuade the Tribunal to conclude that her dismissal was caused by her pregnancy or maternity. There is simply no such evidence.

136. For example, as the Tribunal has touched on already, some of the claimant's complaints relate to the failure to recruit someone to cover her job whilst she was on maternity leave. It is her position is that if the respondent had recruited a suitable person then they would potentially have secured funding to continue the schools transition programme. This is wholly speculative and there is no evidence to support this.

137. In particular, this argument involves a long chain of events from the claimant being off on maternity leave to her dismissal (for example, recruiting a suitable person, that person being able to find suitable funding, any such funding being secured in sufficient amounts to continue the project etc). In these circumstances, the claimant's maternity leave is too remote from her dismissal for the Tribunal to be able to say that it was an operative cause of that dismissal.

138. Similarly, the claimant complains about being "required" to attend the consultation meetings and that this is contrary to what is said in the employee handbook that the respondent cannot require her to attend work during maternity leave. Whilst the respondent could have used a different word, such as "invited", the Tribunal considers that this is an unfair criticism of the respondent; if they had not given the claimant the opportunity to attend these meetings because she was on maternity leave then they would have been acting unlawfully.

139. In all these circumstances, the Tribunal does not consider that there is any basis to conclude that the fact that the claimant had been pregnant or taken maternity leave had, in any way, caused her dismissal.

140. The claimant also alleges that her dismissal amounts to harassment under s26 of the Equality Act. She also brings another claim of harassment based on a comment made during her consultation meetings about her enhanced maternity pay.

141. The difficulty for the claimant is that pregnancy & maternity is not one of the protected characteristics to which s26 applies. There is an exhaustive list at s26(5) and pregnancy & maternity does not appear on that list. The claimant cannot, as a matter of law, bring a claim under s26 relying on this protected characteristic. Unfortunately, this was not identified by anyone at an earlier stage of proceedings.

142. In any event, even if the claimant could have brought this claim then the Tribunal would not have found in her favour. In respect of her dismissal, this would be for the same reasons why it has not upheld the claims of discrimination under either ss13 or 18.

143. In respect of the comment, the Tribunal would have held that this did not have the purpose or effect prohibited by s26(1)(b). There was certainly no evidence that the respondent had the prohibited purpose and this was clearly said by Ms Clark during the consultation meetings.

144. In terms of the prohibited effect, the claimant was clearly offended by the comment about her enhanced maternity pay meaning there was no money to pay for maternity cover. However, the Tribunal considers that it was not reasonable for the comment to have the prohibited effect; the claimant's offence arose from various assumptions she made about what was meant by the comment.

145. It was the claimant's position that she was, in effect, being blamed for the redundancy situation affecting her and her colleagues because her enhanced maternity pay meant that a replacement could not be recruited which meant

that there was not someone in post to make competent funding applications, which meant that the respondent only made one application (which was not a good application), which meant that funding was not secured, all of which resulted in the redundancy situation and that is was, therefore, her fault for going on maternity leave. The Tribunal considers that there were too many leaps in reasoning and logic in that sequence for it to be reasonable for that one comment to lead to the conclusion that the claimant was being blamed for the redundancy situation. The claimant has extrapolated something far beyond the comment that was made to her and it was not reasonable for that comment to have had the effect which the claimant says it has.

146. For all the reasons set out above, the Tribunal considers that the claims of harassment and discrimination under the Equality Act 2010 are not well-founded and are hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **03 September 2024**
Entered in register: **04 September 2024**
and copied to parties