Neutral Citation Number: [2024] EAT 193

Case No: EA-2023-001400-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 December 2024
(corrections made to paragraph numbering: 24 December 2024)

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

Between :

WALSALL METROPOLITAN BOROUGH COUNCIL

Appellant

- and -

CHRISTINE OLIVER

Respondent

- -
- -

Shabbir Lakha (instructed by the Head of Law (Contentious) Walsall Borough Council) for the **Appellant**
Christine Oliver the **Respondent** in person

Hearing date: 27 November 2024

- -

JUDGMENT

SUMMARY

Unfair dismissal - automatic unfair dismissal - section 99 ***Employment Rights Act 1996*** *– maternity rights - regulations 10 and 20(1)(b)* ***Maternity and Parental Leave etc Regulations 1999***

Practice and procedure – *schedule 1 of the* ***Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013*** *– the Employment Tribunal claim – the list of issues - amendments*

Having been made redundant from her employment while on maternity leave, the claimant made a claim of maternity discrimination under section 18 **Equality Act 2010**. At the liability hearing, in cross-examining the respondent's witnesses, the Employment Tribunal ("ET") considered the claimant to be putting a case of a breach of regulation 10 of the **Maternity and Parental Leave etc Regulations 1999** ("the 1999 Regulations") and went on to find that a claim of automatic unfair dismissal under section 99 **Employment Rights Act 1996** ("ERA") had been made out on this basis. The respondent appealed.

Held: allowing the appeal

The ET was wrong to proceed to determine a complaint that, on its own understanding of the procedural history, had not been part of the claimant's original claim and had not been identified as a separate cause of action at any earlier stage. The appropriate course would have been to treat this as an application to amend (**Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06 applied), considering the matters identified in **Selkent Bus Co Ltd t/a Stagecoach v Moore** [1996] IRLR 661. Had it done so, the ET would have had to consider the applicability of the relevant time limit, and it had been wrong to refuse to address this issue.

Even if the ET had been entitled to determine a complaint of automatic unfair dismissal in these circumstances, it had failed to make the necessary findings of fact required under regulation 10 of the 1999 Regulations, although it could not be said that a finding in favour of the claimant in this respect would necessarily have been perverse.

The Honourable Mrs Justice Eady DBE, President

Introduction

1. The appeal in this case raises the question whether the Employment Tribunal ("ET") proceeded to determine a claim of automatic unfair dismissal, pursuant to section 99 **Employment Rights Act 1996** ("ERA 1996") that was not properly before it; relatedly, it gives rise to questions as to whether the ET ought to have approached this as a case involving an application to amend to pursue such a claim out of time. Further points of challenge are made in relation to the ET's approach to the substantive issues arising under regulation 10 of **Maternity and Parental Leave etc Regulations 1999** ("the 1999 Regulations").

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is my ruling on the respondent's appeal against the reserved judgment of the West Midlands ET (Employment Judge Steward, sitting with Mrs Ahmad and Ms Malatesta from 25-27 September 2023), sent to the parties on 25 October 2023.

3. Before the ET, the claimant appeared in person, as she does on this appeal; the respondent was previously represented by its solicitor but today appears by Mr Lakha, of counsel.

The background

The claimant's employment and dismissal

4. The claimant was employed by the respondent as a care manager from 5 September 2005 until 24 December 2021, when her dismissal on the ground of redundancy took effect. The re-structuring and redundancy process that led to the termination of the claimant's employment had commenced while she was on maternity leave. As part of the respondent's restructuring of children's residential services, each home was to have an assistant manager and a team of residential care workers; the care manager role was removed.

5. As the ET recorded:

> "5. The Assistant Managers posts were to be ring fenced to the Care Managers. The selection for the post was to be by interview and written test. Any Care Manager who did not secure an Assistant Managers post had the post of Residential Childcare Worker ring fenced. They would be assimilated into these posts."

6. In the initial consultation meeting with the claimant, she had stated her intention to apply for the jobs that were on offer. At a subsequent meeting on 15 June 2021, however, the claimant indicated that she was not going to apply for the assistant manager role and might not even consider the residential childcare worker

position; and, completing an expression of interest form on 5 July 2021, the claimant said she did not wish to be considered for any of the vacancies (ET, paragraph 7). A redundancy notice meeting took place on 22 September 2021; the claimant's dismissal took effect on 24 December 2021; she received her redundancy pay in March 2022.

The ET proceedings

7. Subsequent to her dismissal, on 28 February 2022, the claimant entered Acas early conciliation; this ended on 11 April 2022 (at paragraph 3 of its decision, the ET wrongly records this date as 1 April 2022, but it is agreed that early conciliation finished on 11 April 2022). On 11 May 2022, the claimant presented a claim to the ET. At section 8.1 of the form ET1, the claimant ticked the boxes to say that she was claiming "*pregnancy or maternity*" and "*sex*" discrimination and that she was also making other money claims. In then providing details of her claim, at section 8.2, the claimant stated as follows:

> "Whilst on maternity leave, I was informed that my post was being deleted and I was at risk of redundancy. During the consultation process I was discriminated against because I was at a disadvantage as I had not been in the workplace since April 2020 due to being pregnant and having to shield. I did not have access to supervisions or support from my line manager. I was unable to attend meetings in person due to childcare. I was unable to attend training as I was breastfeeding on demand. I was unable to apply for jobs or attend interviews as I was too busy with looking after a Newborn. ... None of these disadvantages were taken into consideration and I received no extra support. I was given no information on my rights during maternity leave and my job being at risk. ..."

8. A preliminary hearing was listed for 13 December 2022. Prior to that hearing, the claimant completed the ET's template "*Agenda for Case Management at Preliminary Hearing*" in which she (relevantly) raised the following matters (the claimant's responses being shown in italics for ease of reference):

> "2. The claim and response
> 2.1 What are the complaints (claims) ... brought? *Discrimination.*
> 2.2 Is there any application to amend the claim or response? *Yes*
> If yes, write out what you want it to say. *Unfair Dismissal*
> Any amendment should be resolved at the PH, not later.
> ...
> 4. The issues
> 4.1 What are the issues or questions for the Tribunal to decide?
> It is usually sensible to set this out under the title of the complaints.
> *Was the Claimant discriminated against due to her pregnancy/maternity?*
> *Was the Claimant dismissed?*
> *Was the dismissal for a potentially fair reason?*
> *Was the dismissal fair in the circumstances?*"

The claimant has told me that in fact the version of the agenda template that she submitted (which was in

manuscript) had identified the complaints to be determined as: "*Discrimination and unfair dismissal*".

9. As well as sending in the completed template, the claimant also submitted a witness statement (dated 26 November 2022), in which she stated (at paragraph 23) that she had been "*discriminated against during the consultation*", saying she was:

> "at a disadvantage due to:
> ...
> J. I wasn't informed of my rights during the process e.g. Women on Maternity Leave should have preference over other workers. A woman made redundant on Maternity Leave must be offered any suitable vacancy if you have one. She doesn't need to apply for it."

10. The preliminary hearing duly took place before the ET (EJ Britton presiding) on 13 December 2022. It took place by telephone and there seems to be some question as to whether the ET had the documents sent in by the claimant; certainly there is no record of the ET addressing the claimant's application to amend her claim to include a complaint of unfair dismissal. A judgment was, however, issued following the hearing (sent to the parties, along with the case summary and hearing orders, on 15 December 2022), which recorded that the claimant's unpaid money claims and her claim of sex discrimination had been dismissed on withdrawal, and that:

> "The claimant's remaining claim of maternity discrimination will proceed to a hearing on 25-27 September 2023."

11. In the summary which accompanied the ET's case management orders, it was again recorded that the complaint made by the claimant was of "*maternity discrimination*". In then drawing up the list of issues to be determined, the ET provided the following (relevant) particulars:

> "1. Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)
> 1.1 Did the respondent treat the claimant unfavourably by doing the following things:
> ...
> 1.1.7 The claimant was not informed of her right to be offered employment preferentially due to her maternity leave status.
> ..."

12. Acknowledging that the claimant's claim had been "*clarified during today's hearing*", the case management orders made at the 13 December 2022 hearing included a direction permitting the respondent to file and serve amended grounds of resistance, which it did on 13 January 2023. In respect of the allegation recorded at sub-paragraph 1.1.7 of the ET's case summary, the respondent stated:

> "8. ... The Claimant did want the role of Assistant Manager but she was offered the role of Residential Care Worker which she declined and hence it is denied that she was not offered a role preferentially. The Claimant did not need to undergo any

> interviews or assessments for this role. Furthermore her pay would have been protected ..."

13. Towards the end of its amended grounds of resistance, the respondent further stated:

> "18. The Respondent seeks a preliminary hearing to determine if any of the Claimants claims are in time and if so whether the Claimant has reasonable prospects of success."

For completeness I note that the respondent had specifically pleaded that the allegations identified at sub-paragraphs 1.1.1-1.1.6 and 1.1.8 of the list of issues (as identified by the ET on 13 December 2021) were out of time, but did not make that point in relation to sub-paragraph 1.1.7. In any event, no further preliminary hearing took place.

The ET hearing and decisions

*Identifying the claim under the **1999 Regulations***

14. At the full merits hearing in September 2023, the ET re-visited the question of the claims it was required to determine. In so doing, it recorded that:

> "8. The claimant ticked the box for maternity discrimination in her ET1. She did not in her particulars deal with any possible claims pursuant to Regulation 10 of the Maternity and Paternal *[sic]* Leave Regulations."

and that:

> "At the preliminary hearing on the 13th December 2022 the complaint is recorded as maternity discrimination."

Referring, however, to the issue identified at sub-paragraph 1.1.7 of the list of issues that had been drawn up at the preliminary hearing, (whether the claimant "*was not informed of her right to be offered employment preferentially due to her maternity leave status*"), the ET considered that this:

> "... would appear to be a direct reference to [the **Maternity and Parental Leave etc Regulations 1999**] and the principle that failure to offer the claimant the alternative post (of Assistant Manager when she was on maternity leave) could result in her dismissal being automatically unfair."

15. Considering the respondent's amended grounds of resistance relevant to this point, the ET understood that this had set out the respondent's case on this issue, as follows:

> "9. ... the claimant did not want the role of Assistant Manager but was offered the role of RCCW [residential childcare worker] which she declined and therefore it denied she was not offered a role preferentially. ...
> "

The ET, however, rejected that case, reasoning:

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

16. I do not understand the ET to have sought to clarify the claim and issues before it at the outset of the full merits hearing; this appears, however, to have been something that was addressed during the course of the evidence. As the ET recorded:

> "10. The final hearing consisted of hearing evidence from the claimant, Mr Grainger and Ms Bridgewater for the respondents. Submissions were also considered including written submissions from the respondents. During the cross examination of the respondents Ms Bridgewater confirmed that there had been an internal discussion about offering the claimant the Assistant Managers role, but this had been discounted. The role was considered too challenging and a grade above the role the claimant had done. The claimant was never involved in this discussion. Prior to submissions the respondents representative Mr Abdullah was asked how he wanted to deal with the issue Reg.10 of the Maternity and Paternity Leave Regulations 1999 and why the claimant was not offered the Assistant Managers role given her status? Why this was not a suitable alternative employment. The respondents sought leave to recall Mr Grainger to deal with the issue of why the claimant was not offered the role of Assistant Manager and specifically why she was not suitable for the role (this will be discussed in due course) and in his written submissions Mr Abdullah at paragraph 14 stated that if the claimant was prepared to accept the job of Assistant Manager she would have been appointed on a preferential basis? However, this was later qualified as a mistake in the written submissions."

17. Against that background, the ET explained its conclusion on the question whether there was a claim before it under the **1999 Regulations**:

> "11. In our unanimous view the issue of whether the claimant should have been offered the role as Assistant Manager pursuant to Reg.10 of the Maternity and Paternity *[sic]* Leave Regulations 1999 was a live issue to be determined. It had been raised by the claimant in the issues to be determined in the preliminary hearing order at paragraph ... 1.1.7. The issue was raised in cross examination of the respondents' witnesses and was addressed by the tribunal prior to submissions. This led to the respondents being afforded the opportunity to recall a witness to deal with the issue of suitable alternative employment. Therefore, the tribunal will determine the issue of Maternity Discrimination and Regulation 10 of the Maternity and Paternity *[sic]* Regulations 1999."

The decision on liability

18. Considering the various matters relied on by the claimant as acts of maternity discrimination, the ET rejected her complaints of not having received relevant information, and/or of having been subjected to a detriment in respect of the consultation meetings or in relation to the application process for the role of assistant manager. In respect of the latter issue, addressing the question whether the fact that the claimant was on maternity leave (and thus still breastfeeding and looking after her baby) meant that she was unable to apply

for the role of assistant manager, and had thus suffered a detriment, the ET concluded as follows:

> "15. ...
> 1.1.5 The evidence would suggest that the claimant was not going to apply in any event. The expression of interest form ... is dated the 5th of July 2021 and the claimant states that she does not want to be considered for any of the above vacancies. During the consultation meeting on the 15th of June 2021 the claimant stated that the manager role was not for her and that she may not consider the RCCW role either due to her personal situation. We do not accept that the claimant has suffered a detriment."

19. As for the more general complaint, that the claimant was unable to apply for jobs on "*redeployment*" because she was unable to attend interviews, the ET concluded:

> "15. ...
> 1.1.6 The claimant's evidence was that there was nothing suitable regarding redeployment. We do not find that the claimant suffered any detriment."

20. As for the specific complaint identified at paragraph 1.1.7 of the list of issues from the preliminary hearing of 13 December 2022, the ET set out its findings as follows:

> "1.1.17 ...
> The claimant was not offered the role of Assistant Manager. When questioned about this Ms Bridgewater stated that she vaguely remembered some discussion about the most senior role but that it was felt it would be too challenging for the claimant. The claimant was not consulted about this. Mr Grainger was recalled giving evidence on this issue by [the solicitor for the respondent]. The claimant agreed to Mr Grainger being recalled. His evidence was that 4 applied for the senior role and 2 were successful. 10 years' experience was requested, and the claimant only had 2 years' experience. In answer to the claimant, Mr Grainger accepted that one of the roles eventually was offered to a member of staff who the claimant had supervised and who had less experience than the claimant. The claimant said she could have been offered the role. She wasn't given the chance to show she had the requisite skills."

21. The ET concluded that the claimant had not suffered discrimination and that her claim for maternity discrimination pursuant to section 18 **EqA** must fail. It went on, however, to set out its findings under the **1999 Regulations** as follows:

> "19. However, we find that Regulation 10 of the Maternity and Paternity Leave Regulations 1999 are engaged in this case and that the claimant was suitable to be offered the role of Assistant Manager. She wasn't offered the role and pursuant to these Regulations the failure to do so makes her dismissal automatically unfair. In that regard her claim succeeds."

22. The ET recorded that, in the respondent's final written submissions, it had been stated that "*elements of the claim were out of time*"; the ET declined, however, to consider this question, reasoning:

> "20. ... The discrimination element of the claim has not succeeded in any event but the issue of time limits was never raised at the preliminary hearing and was never raised in the final hearing. The issue only received a brief mention in the written submissions and as a result and given there was never any application regarding time limits we were not prepared to consider this issue any further."

The legal framework

23. The claimant's claim of maternity discrimination, had been brought under section 18 of the **Equality Act 2010** ("the EqA"); although she failed in that claim, the ET upheld a separate complaint of automatic unfair dismissal pursuant to section 99 of the **Employment Rights Act 1996** ("ERA"). Section 99 **ERA** provides that a dismissal will be regarded as unfair if it takes place in prescribed circumstances; in the present case, the circumstances were those prescribed by regulation 20(1)(b) of the **1999 Regulations**, 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.

Regulation 10 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.

24. The protection afforded to ensure the right thus provided under regulation 10 of the **1999 Regulations** is separate and distinct from that provided by section 18 **EqA**, which prohibits maternity discrimination; as explained in **Sefton Borough Council v Wainwright** [2015] ICR 652:

> "50. ... section 18 of the Equality Act 2010 ... provides that, if possessing the protected characteristic, a woman does not have to show less favourable treatment; merely unfavourable treatment because of pregnancy or maternity leave. Regulation 10, on the other hand, provides that, during the relevant period, a woman is entitled to special protection and will be treated as unfairly dismissed if this is denied to her."

25. In the present case, it is common ground that the claimant was on maternity leave and fell within the ambit of regulation 10 at the relevant time; it is equally accepted that this was a case where, given the respondent's re-structuring exercise, by reason of redundancy, it was no longer practicable for the claimant to

continue to be employed under her existing contract of employment as a care manager. In those circumstances, if there was a suitable alternative vacancy, the claimant was entitled to be offered that employment.

26. Whether there is a suitable available vacancy for the purposes of regulation 10(2) is a question of fact for the ET: **Community Task Force v Rimmer** [1986] IRLR 203 EAT. Whether a vacancy is "suitable", however, 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 EAT at paragraph 27. In **Rimmer**, the EAT emphasised that the protection provided by regulation 10 was not subject to a test of reasonableness:

> "The test of availability ... is not expressed to be qualified by considerations of what is economic or reasonable. The tribunal must simply ask themselves whether a suitable vacancy is available. If it is available, the consequences, however, unpleasant, of the employer giving the job to the employee are not relevant." (see p 498)

Similarly, in **Wainwright**, it was held that:

> "25. The question of suitability requires an assessment on the part of the employer. If, however, there is a suitable alternative position which is available, then the entitlement is not subject to a test of reasonableness. That being so, the alternative position would need to be offered under regulation 10 notwithstanding the fact that there might be another employee also facing redundancy, but not pregnant or on maternity leave, who might be better suited to it. Employees who would otherwise gain the protection of regulation 10 should not be required to undertake some form of competition in order to exercise their right."

27. The protection under regulation 10 seeks to compensate pregnant employees or those on maternity leave for the disadvantages occasioned by their condition; it requires that an employer must offer a suitable available vacancy, appropriate for the employee in question, to an employee who is otherwise facing redundancy when she is pregnant or on maternity leave. Where there is more than one alternative position available, provided the post offered is suitable and appropriate for the employee concerned, the employer is not required to offer what might be considered to be the better position (indeed, doing more than that which is reasonably necessary in these circumstances would be disproportionate and would put the employer at risk of unlawfully discriminating against others; see the observations made by Underhill P (as he then was) in **Eversheds Legal Services v De Belin** [2011] ICR 1137 EAT); if, therefore, there is more than one suitable alternative vacancy, it will be open to the employer to decide which should be offered so as to meet the obligation upon it under regulation 10 (see the discussion in **Wainwright** at paragraphs 45-48).

28. Before addressing the issues thus potentially raised under regulation 10 of the **1999 Regulations**, however, in the present case a prior question arose as to whether this was part of the claim before the ET.

29. Proceedings before the ET are governed (so far as relevant) by the rules contained within schedule 1 of the **Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"). By rule 8, it is provided that a claim to the ET is to be started by presenting a completed claim form, using the prescribed form (the ET1). At section 8.1 of the ET1, boxes are provided for claimants to tick to indicate the type of claim they are bringing. At section 8.2, the claimant is asked to:

> "set out the background and details of your claim"

further stating that the details provided:

> "should include the date(s) when the event(s) you are complaining about happened"

30. The **ET Rules** are, however, not prescriptive of the details of claim that must be provided and, consistent with the overriding objective (rule 2 **ET Rules**) – in particular, the need to avoid unnecessary formality and to seek flexibility – a claimant has considerable latitude in deciding how to set out their case. In **Parekh v London Borough of Brent** [2012] EWCA Civ 1630, Mummery LJ described the formal requirements for an ET claim as "*minimal*".

31. That said, the claim must be in a form such that it can "*sensibly be responded to*", failing which, it will be rejected (rule 12 **ET Rules**). Moreover, as Langstaff P observed in **Chandhok v Tirkey** [2015] ICR 527 EAT:

> "16. ... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made—meaning, under the Employment Tribunals Rules of Procedure 2013 ..., the claim as set out in the ET1."

32. This is an important point. Notwithstanding the need for flexibility in ET proceedings, and the need to focus on substance rather than form (see, for example, the observations made by the Court of Appeal at paragraphs 9 and 32 of **Sougrin v Haringey Health Authority** [1992] IRLR 416), the ET only has jurisdiction to consider and rule upon the matter of which complaint is made to it (per Mummery P (as he then was) in **Qureshi v Victoria University of Manchester** [2001] ICR 873 at p 874; cited with approval by Sedley LJ at paragraph 9 **Anya v University of Oxford** [2001] EWCA Civ 405, [2001] ICR 847). This is made clear by

the statutory provisions that allow for the enforcement of employment rights before the ET: thus, relevant to the present case, section 111(2) **ERA** provides that:

> "... an employment tribunal shall not consider a complaint [of unfair dismissal] unless it is presented to the tribunal"

(and see, albeit in respect of a claim made under the (legacy) **Race Relations Act 1976**, the observations made in **Chapman v Simon** [1994] IRLR 124 CA)

33. As for what is to be understood to have been included in an ET claim, that is to be determined by what may be discerned from a fair reading of the pleaded case: per His Honour Judge Auerbach at paragraph 98 **McLeary v One Housing Group Ltd** UKEAT/0124/18. Once the claims to be determined have thus been ascertained, it will generally be helpful to draw up a list of the issues that need to be addressed in order to decide those claims. As Mummery LJ noted in **Parekh**:

> "31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: …"

albeit that he went on to make clear:

> "31. … As the employment tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence …"

34. The use of a list of issues in ET proceedings does not, therefore, displace the primary role of the claim and response; as Langstaff P observed in **Chandhok**, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. A list of issues is not a pleading (see the observation of Her Honour Judge Tucker at paragraph 33 **Moustache v Chelsea & Westminster NHS Foundation Trust** [2022] EAT 204), and where such a list, drawn up as part of an earlier case management order, fails to properly encapsulate the claim (or response), the ET may be required to revisit that earlier case management decision.

35. The ET's broad case management powers are made clear by rule 29 of the **ET Rules**, which allows that an earlier case management order may be varied, suspended, or set aside "*where that is necessary in the interests of justice*". In the context of any variation to a list of issues, in **Mervyn v BW Controls Ltd** [2020] ICR 1363 CA Bean LJ provided guidance as to the approach the ET should

take, as follows:

> "38. … what is 'necessary in the interests of justice' in the context of the tribunal's powers under rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."

And further advised:

> "43. It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."

36. In allowing the claimant's appeal in **Mervyn**, it was ruled that, even where the claimant had expressly stated (during case management discussions) that she had not resigned but had been dismissed, the ET should have considered the claim as encompassing an allegation of constructive dismissal: that, it was held, was the claim that "*shouted out*" from the pleadings (the Court of Appeal in **Mervyn** adopting the phrase that had been used in **McLeary** in this regard). Indeed, as Laing J (as she then was) stated in **Mervyn** when that case was before her at the EAT ([2019] UKEAT/0140/18):

> "84. … the ET … [has] a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently."

37. Where the problem is not that the litigant would seem to have withdrawn a potential claim but, rather, that they are seeking to pursue a new, additional cause of action, then that should properly take the form of an amendment; as the EAT made clear in **Ladbrokes Racing Ltd v Traynor** UKEATS/0067/06:

> "31. Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross examination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.
> 32. Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such

> circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.
> 33. Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend .... Further, unless it does so, the fair notice obligations ... will not be complied with.
> 34. Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.
> 35. Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.
> 36. Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.
> 37. Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.
> 38. Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."

38. In referring to the "*principles that apply when considering an application to amend*" (paragraph 33 **Ladbrokes v Traynor**), the EAT had in mind the guidance provided in **Selkent Bus Co Ltd t/a Stagecoach v Moore** [1996] IRLR 661 EAT, which made clear that relevant considerations would include the nature of the amendment (whether it was a minor matter, or a substantial alteration, pleading a new cause of action); the applicability of time limits, and whether the time limit should be extended under the applicable statutory provisions; and the timing and manner of the application.

39. In relation to a claim of unfair dismissal, section 111 **ERA** provides that the ET "*shall not consider a complaint*" unless it was presented (a) before the end of the period of three months beginning with the effective date of termination, or (b) within such further period as the ET considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that three month period (albeit that primary time limit will be subject to the extension allowed to facilitate conciliation before the institution of proceedings, provided by section 207B **ERA**). As the language of section 111 makes clear, the time limit provided goes to the ET's jurisdiction to hear the complaint; as Elias LJ observed in **Radakovits v Abbey National plc** [2010] IRLR 307:

> "16. ... time limits in the context of unfair dismissal claims go to jurisdiction, and that jurisdiction cannot be conferred on a tribunal by agreement or waiver: .... The reason is that the language of section 111(2) of the Employment Rights Act ... provides in

> terms that a tribunal "shall not consider" a claim of unfair dismissal unless it is lodged in time. That is what makes these issues jurisdictional rather than mere limitation issues.
> 17. It follows that the fact that the employers initially accepted that the tribunal had jurisdiction is not sufficient to confer jurisdiction on the tribunal. ..."

40. As for the approach I am to take to the ET's decision, I 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. ..."

41. That said, 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."

42. As for a challenge made to a decision of the ET on the ground that it was perverse, that must meet a high threshold (see the guidance provided by Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 CA). More specifically, when an appeal is pursued against the ET's exercise of discretion relating to a case management order, the decision under challenge would need to:

> "Exceed the generous ambit within which reasonable disagreement is possible"

see the observation of the Court of Appeal at paragraph 23 **CIBC v Beck** [2009] EWCA Civ 619, [2009] IRLR 740, citing the guidance provided by Asquith LJ in **Bellenden v Satterthwaite** [1948] 1 All ER 343 at p 345. As stated by Waite LJ in **X v Z Ltd** [1998] ICR 43, at p 54:

> *"*the tribunals themselves are the best judges of the case management decisions which crop up every day as they perform the function … of trying to do justice with the maximum of flexibility and the minimum of formality"

The grounds of appeal and the parties' submissions

43. The respondent's appeal is pursued on five grounds: (1) the ET erred in law in refusing to consider whether it had jurisdiction to determine a complaint of a breach of regulation 10 of the **1999 Regulations**, and it did not have jurisdiction to proceed to decide such a complaint; (2) the ET erred in law in formulating an allegation of a breach of regulation 10, wrongly making it a live issue in the proceedings; (3) the ET's finding under regulation 10 was perverse; (4) the ET failed to make findings of fact as to whether the post of assistant manager was a suitable available vacancy; and (5) (relatedly) in reaching its decision in respect of regulation 10, the ET erred in relying on the findings it had made in relation to the separate claim of maternity discrimination.

44. In addressing those grounds of appeal at the hearing, Mr Lakha first dealt with the points raised by the second and (relatedly) the first grounds of appeal.

45. By ground (2), the respondent contends the ET erred in law when, at the final hearing, it unilaterally formulated an allegation of a breach of regulation 10 of the **1999 Regulations**, wrongly making it a live issue. In this regard, the respondent points to the fact that, in her claim and at the case management preliminary hearing on 13 December 2022, the claimant had articulated her complaint as one of maternity discrimination, pursuant to section 18 **EqA**. Absent any application to amend, at the final hearing, the ET had itself identified a claim of a breach of regulation 10, arising from an allegation of maternity discrimination within the case summary from the earlier preliminary hearing. The respondent makes the point that the jurisdiction of the ET was, however, limited to complaints which have been made to it (see section 111 **ERA** and **Chapman v Simon**). Had the claimant sought to pursue a claim of automatic unfair dismissal arising from a breach of regulation 10, she would have needed to apply to amend (per **Ladbrokes v Traynor**).

46. Considering the matters relevant to any application to amend, the respondent says the ET would have had to engage with the question whether the claim of unfair dismissal was being made out of time; thus, by ground (1), it contends the ET was wrong to refuse (see paragraph 20 of the decision) to consider this issue. Time limits had been raised in the amended grounds of resistance, and the respondent says jurisdiction was, therefore, very much a live issue; but, in any event, this was a point that could be taken at any time, regardless whether a formal application had been made (per **Radakovits**). The respondent says that allowing this claim to be pursued at the final hearing meant it was out of time by over 16 months; even if an earlier date was used

(when the claimant sent her witness statement to the ET in November 2022, or when the list of issues was drawn up at the preliminary hearing stage), the claim was still some six to seven months late.

47. For her part, the claimant points out that she had included within her original claim that she had not been informed of her rights during the redundancy process, which included what she had described (at paragraph 23 of the witness statement she submitted for the 13 December 2021 case management preliminary hearing) as the right that: "*Women on Maternity Leave should have preference over other workers. A woman made redundant on Maternity Leave must be offered any suitable vacancy if you have one. She doesn't need to apply for it.*" The claimant says that was a direct reference to regulation 10 of the **1999 Regulations** and that she understood sub-paragraph 1.1.7 of the list of issues had made clear this was a matter to be determined at the liability hearing. She contends that her case had always been that she should have been offered suitable alternative employment, but, in any event, the ET at the final hearing was clear that this was an issue before it, and the respondent was permitted to re-call a witness to deal with the issue of suitable employment. Having regard to the overriding objective, and the need to ensure that the parties are on an equal footing, it could not be said that the ET had erred in its approach.

48. Mr Lakha separately addressed the remaining grounds of appeal, albeit acknowledging there was a degree of overlap between these. By ground (3), the respondent contends that the ET's conclusion under regulation 10 of the **1999 Regulations** was perverse: having found that the claimant had made clear she did not want to be considered for the post of assistant manager (or any other post), and would not apply for it (and did not do so) as it was not for her, the respondent says it was perverse to conclude that she ought to have been offered the assistant manager role. By ground (4), the respondent argues that the ET failed to make any findings of fact as to why the role of assistant manager fell within regulation 10; specifically, it made no findings about the requirements of the post, and whether the work was suitable or appropriate for the claimant, or whether the terms were not substantially less favourable. Similarly, it is said that the ET had needed to engage with these questions in respect of the RCCW post; had it done so, it would have been bound to find that this was a suitable vacancy which – in compliance with regulation 10 (per **Wainwright**) – the respondent had offered the claimant; instead, the ET had erroneously dismissed the RCCW role as "*not a preferential role*", which was not the relevant test. Relatedly, by ground (5), the respondent contends that the ET had erroneously relied on the findings of fact it had made in relation to the claim of maternity discrimination, which

was a separate and distinct cause of action (again, see **Wainwright**).

49. For her part, the claimant argues that the respondent's case under ground (3) is fundamentally flawed: the respondent had never offered her the assistant manager post pursuant to the requirements of regulation 10; selection for this post was to be by interview and written test; she had expressed interest in this role at the first consultation meeting but it was never stated that she could be offered the post without interview or written assessment; it was only because it became impossible to go through the application process (due to the claimant's personal circumstances at the time) that she did not pursue an application.

50. As for grounds (4) and (5), it is the claimant's case that the ET had made a finding to the effect that the assistant manager role was a suitable and appropriate position for her; after all, it found as a fact that such a post was offered to a member of staff who the claimant had supervised and who had less experience than her. The respondent was given the opportunity to adduce evidence to demonstrate why the claimant was not suitable for the assistant manager role and the two relevant decision-takers were present at the hearing as witnesses (one being recalled to address the regulation 10 point). It was the respondent that had failed to provide any evidence that it had carried out an assessment as to the suitability or appropriateness of the assistant manager role; the only evidence available was that it was a vacancy that fell within regulation 10. If the case were remitted to the ET, the outcome would inevitably be the same. As for the RCCW role, which was two grades below the care manager position, there were not enough such posts for the care managers facing redundancy and only one was full-time, it was also more likely to involve unsocial hours; it was not a suitable position.

Analysis and conclusions

51. The first question I have to resolve on this appeal should be straightforward: what claim, or claims, did the ET have to determine? There is no dispute that the claimant had initially signified that she was pursuing claims of maternity and of sex discrimination and had also indicated that she was bringing some additional claims for monies she claimed to be due. It is also clear that the sex discrimination claim and the unpaid money claims were dismissed on withdrawal at the preliminary hearing on 13 December 2022, leaving the complaint under section 18 **EqA** of maternity discrimination. The question is whether the claimant's claim also included a complaint of automatic unfair dismissal under section 99 **ERA** on the basis that there had been a failure to

offer the claimant a suitable and appropriate alternative vacancy in breach of regulation 10 of the **1999 Regulations**.

52. On the face of the ET's liability judgment, the answer to that question must be no. A claim of maternity discrimination under the **EqA** is separate and distinct from the right afforded by regulation 10 of the **1999 Regulations** (per **Wainwright**). As for the ET's understanding of the position, it was clear: at paragraph 8, it stated that the claimant's particulars of claim did not "*deal with any possible claims pursuant to Regulation 10*", and that, at the preliminary hearing on 13 December 2022, "*the complaint is recorded as maternity discrimination*". From the reasons provided by the ET, as the case before it stood at the outset of the liability hearing, the only claim it was to determine was of maternity discrimination under the **EqA**.

53. That is not, however, how the ET then approached its task in this case. Rather, it seems to have allowed a claim of a breach of regulation 10 of the **1999 Regulations** to have been developed in cross-examination of the respondent's witnesses, and to have only sought to clarify the issues arising on such a claim at the close of evidence (albeit then allowing the respondent to recall a witness to address the point). It does not seem that the respondent's representative at the hearing raised a particular objection to this course (and there does not seem to have been an application for an adjournment, or any protestation that the respondent might have wanted to call further evidence), although it does not appear to have been something the respondent had anticipated. More fundamentally, however, there is a lack of clarity as to how the ET considered a claim of automatic unfair dismissal was before it.

54. In its reasoning, the ET says it took the view that such a claim had been identified in the list of issues at the 13 December 2022 preliminary hearing (ET, paragraph 11); that, however, contrasts with its earlier statement that the only complaint recorded at the preliminary hearing was one of maternity discrimination (ET, paragraph 8). It is possible that the ET considered that a claim of automatic unfair dismissal by reason of a breach of regulation 10 "*shouted out*" from the list of issues (per **Mervyn** and **McLeary**); but, first, that ought to have been something clarified at the outset of the hearing (per Bean LJ, paragraph 43 **Mervyn**), and second (and more fundamentally), given that the list of issues is not a pleading (per **Moustache**), the question it needed to answer was whether that was a case that shouted out from the claim itself.

55. In this respect, the claimant urges that this was, indeed, always part of her case. She points to her complaint (as particularised at section 8.2 of her form ET1) that, given caring responsibilities, she had been

unable to apply for jobs or attend interviews and specifically pleaded that she had been "*given no information on my rights during maternity leave and my job being at risk*". The claimant also relies on her application to amend, to include a claim of unfair dismissal, made on the template agenda form for the preliminary hearing, and her inclusion of "*unfair dismissal*" as one of the claims to be determined on the manuscript version of the agenda; and she points to the reference in her witness statement (prepared for that hearing) to the fact that she had not been informed of her rights, specifically: that "*A woman made redundant on Maternity Leave must be offered any suitable vacancy if you have one*". Acknowledging that the record from the preliminary hearing did not include any complaint of automatic unfair dismissal because of a failure to comply with regulation 10 of the **1999 Regulations**, the claimant says that she felt that the Employment Judge at that hearing had not properly listened to her and had failed to engage with what she was saying ("*I did not feel heard*").

56. I do not consider that a complaint of automatic unfair dismissal arising from a breach of regulation 10 can be said to have shouted out from the claimant's original claim. In putting her case of maternity discrimination, one of the particular allegations she was making was that, because of her circumstances (being on maternity leave and caring for a newborn child), she was treated unfavourably by being required to apply for jobs or attend interviews, and by not being given information about her rights. Allowing that the claimant was acting in person and might not have been aware of the specific statutory provision potentially in play, what she did not say was that she was made redundant when there was a suitable vacant role that she could, and should, have been offered. Accepting that the formal requirements for an ET claim are minimal (**Parekh**) and that the focus should be on the substance not the form (**Sougrin**), this was not a case where the facts necessary for the claim in issue were set out; without requiring any particular degree of formality to the claimant's statement of case, the substantive elements required to demonstrate a breach of regulation 10 were simply not present.

57. The position might be said to be more nuanced if regard is had to the claimant's witness statement, produced for the preliminary hearing on 13 December 2022. At that stage, the claimant was certainly articulating the gist of the protection provided by regulation 10, although she had still not identified a suitable alternative vacancy that she could, and should, have been offered. By analogy with the guidance provided by Laing J in **Mervyn** in the EAT, it might be said that the ET ought to have enquired further into the claimant's understanding of the protection to which she seemed to be referring, and to have asked whether that was

actually a claim she was seeking to articulate. That, however, does not appear to have been done, although the ET seems to have gained the understanding that the claimant was complaining of maternity discrimination arising from (relevantly) the failure to inform her "*of her right to be offered employment preferentially due to her maternity leave status*" (sub-paragraph 1.1.7 of the list of issues).

58. The materials available at this stage provide some support for the claimant's complaint that there was a failure to properly engage with her case at the preliminary hearing. There is, for instance, no record of any decision being made on her application to amend her claim, although that does not assist the claimant as the proposed amendment was plainly referring to a complaint of unfair dismissal under section 98 **ERA**, not section 99 (and, for completeness, I do not think anything would turn on the question whether the claimant had included a reference to "*unfair dismissal*" as a claim to be determined on the manuscript version of the preliminary hearing agenda: again, the only particulars provided of any proposed complaint of unfair dismissal made it clear that was a claim to be brought under section 98 **ERA**). Moreover, while the ET had understood that the claimant was complaining about not being informed of her rights under regulation 10, it does not seem to have enquired whether she was seeking to claim that there had indeed been a suitable vacancy that ought properly to have been offered to her. These are, however, criticisms made without a full record of the discussion that took place on 13 December 2022, and, although I can point to what is *not* included within the ET's written summary from that hearing, it is equally apparent that the only claim identified was one of maternity discrimination under the **EqA**, and that there was no application for reconsideration following that hearing, still less was there any appeal.

59. At the outset of the liability hearing, therefore, the only claim before the ET was one of maternity discrimination under the **EqA**. To the extent that the claimant was merely seeking to challenge the earlier articulation of the issues, the ET would have needed to be satisfied that it was necessary in the interests of justice to re-visit the previous case management order (rule 29 **ET Rules**), and if that was something that arose only during the course of the evidence, that would have been a relevant factor that it would have needed to take into account (per Bean LJ in **Mervyn**). From the ET's own record of the position, however, it is apparent that the claimant was seeking to articulate a new claim: contrary to the original statement of her case and to the record from the preliminary hearing, she was not just saying that she had been placed at a disadvantage because she was not informed of her rights but was arguing that there was a position – the role of assistant

manager – that had been available and which was suitable and appropriate for her, that, pursuant to regulation 10 of the **1999 Regulations**, ought to have been offered to her. That was not a claim that had previously been presented to the ET (per section 111(2) **ERA**) and, absent allowing it to be introduced by way of amendment, it was not open to the ET to determine such a claim (see **Qureshi** and **Chapman v Simon**). The circumstances that arose were not dissimilar to those in **Ladbrokes v Traynor**, and the appropriate course would have been for the ET to have approached this as an application to amend.

60. Thus approaching the claimant's apparent reliance on regulation 10 of the **1999 Regulations** as an application to amend her claim, to introduce a new cause of action, the ET would have needed to be clear as to the terms of that amendment, allowing time for those to be recorded in writing; it would then have needed to allow the respondent the opportunity to set out its case in response, before considering whether – applying the **Selkent** guidance – that amendment should be allowed. In saying this, I do not ignore the difficulties that can arise for a litigant in person when seeking to articulate their complaint, and I appreciate that the ET will wish to avoid an overly formalised approach, proportionately seeking to ensure a level playing field and to do justice in the case before it. It does not, however, do justice to either party to simply proceed by allowing a new claim to emerge during the course of the evidence; as is clear from the ET's reasoning in this case, by short-cutting this process (as laid down in **Ladbrokes v Traynor**), there was no clarity as to what the claimant was saying on the crucial questions of suitability and appropriateness in respect of the assistant manager post, still less as to the respondent's case on these issues, and on whether some other (also suitable and appropriate) alternative might have been offered. Rather more fundamentally, however, there was no appreciation of the jurisdictional question as to whether a claim of automatic unfair dismissal was in time.

61. This latter point brings me to the respondent's second ground of appeal, and the ET's refusal to engage with the respondent's submission that "*elements of the claim were out of time*" (see paragraph 20 of the ET's decision). Accepting that the respondent's amended grounds of resistance had not raised any question regarding the application of time limits in respect of the issue set out at sub-paragraph 1.1.7 of the 13 December 2021 case summary (although it had expressly questioned whether a number of the allegations of discrimination were out of time): (1) that could not be determinative of this jurisdictional issue (per **Radakovits**), and (2) when making its decision at the liability hearing in September 2023, the ET was not simply considering the case to which the respondent had pleaded, but had allowed an additional claim to be

added to that case and needed to be satisfied that it had jurisdiction to determine that claim.

62. Had the ET undertaken that exercise, its starting point would have been to consider the primary time limit imposed in respect of complaints of unfair dismissal under section 111 **ERA**. As the effective date of termination of the claimant's employment was 24 December 2021, the three month limit would thus have expired on 23 March 2022, albeit that would then have been subject to the extension allowed to facilitate conciliation before the institution of proceedings, as provided by section 207B **ERA**, which would have extended time to 11 May 2022 (one month after the expiration of the early conciliation period). Accepting that any claim thus presented on 11 May 2022 would have been in time, the ET would then have needed to grapple with the problem that, on its own finding (paragraph 8 of its decision), that had not included any case of automatic unfair dismissal by reason of a breach of regulation 10 of the **1999 Regulations**. If it had taken the view that the claimant had in fact presented this additional claim in her submissions for the 13 December 2022 preliminary hearing, the ET would have been bound to find that this was more than six months out of time. If, however, the record from the preliminary hearing was accepted (which did not include a claim of automatic unfair dismissal), then the claim would only have been presented during the course of the liability hearing in September 2023, over 16 months out of time.

63. Thus considering the position before the ET at the September 2023 hearing, I must uphold the first and second grounds of appeal: the ET both erred in law in formulating a claim of automatic unfair dismissal that was not before it (ground (2)) and in refusing to consider whether it had jurisdiction to determine such a claim, when, on its own understanding of the position, it had been presented out of time (ground 1).

64. Should I be wrong on these points, however, I have gone on to consider the remaining grounds, which go to the ET's substantive reasoning on the claim of automatic unfair dismissal by reason of a breach of regulation 10 of the **1999 Regulations**. The respondent's grounds of appeal in this regard can essentially be summarised as falling under two headings: the ET erred in its approach (grounds (4) and (5)), and the ET reached a perverse conclusion (ground (3)). In her submissions in response, the claimant is careful to focus on the wording of regulation 10, and forcefully makes her case as to the suitability and appropriateness of the assistant manager position. The question for me, however, is not whether I would accept that case, but whether the ET correctly approached its task, and whether it then went on to reach a conclusion that is properly to be characterised as perverse.

65. Having decided that a claim of automatic unfair dismissal due to a breach of regulation 10 of the **1999 Regulations** was before it, the ET was required to make a finding of fact (see **Rimmer**) as to whether there was a suitable available vacancy, under a contract of employment involving work of a kind that was both suitable in relation to the claimant and appropriate for her to do in the circumstances, and which would not have been substantially less favourable to her than her previous contract (regulation 10(3), and see **Simpson v Endsleigh**). The right under regulation 10 did not require that the available vacancy must be "*a preferential role*", as the ET apparently understood (see ET, paragraph 9), merely that it was thus suitable and appropriate, having regard to the claimant's own circumstances, and that it would not have been on terms that were substantially less favourable.

66. On this question, the ET understood the claimant's case to be that the assistant manager role was a suitable alternative vacancy that she should have been offered. As it recorded, however, the respondent had taken the view that this was not a role that was suitable or appropriate for the claimant: it was a grade above her previous position and was considered "*too challenging*"; in argument before me, it has also been suggested that the role would have involved anti-social hours that would not have been appropriate given the claimant's circumstances at that time. The claimant resists that suggestion, arguing that in fact the residential childcare worker ("RCCW") position would have involved more antisocial working; she further points out that an assistant manager's post was ultimately offered to another, less experienced, care manager, who she had supervised (and see the ET's record of this fact, under issue 1.1.7). It was, however, also the respondent's case that it had, in any event, offered the claimant a suitable alternative vacancy, as a RCCW, and, as such, it had met the obligation upon it under regulation 10 (see **Wainwright**). The claimant disagrees with this proposition, pointing out that the RCCW role not only involved antisocial working that would not have been appropriate for her, but was also at a lower grade and was most likely to be part-time; as such, she would contend that it was on substantially less favourable terms.

67. In order to determine the case it had decided was before it, the ET needed to engage with these points. Applying the test set out under regulation 10(3) of the 1999 **Regulations**, it needed to make findings of fact as to the suitability and appropriateness of the assistant manager and RCCW roles, and it was required to make findings as to whether, in either case, the contractual position would have been substantially less favourable. There is, however, nothing within the ET's reasons to demonstrate that it undertook this task. It dismissed the

RCCW position as not being "*a preferential role*" (not the relevant test), making no findings as to whether it would have been on substantially less favourable terms. As for the assistant manager post, it merely recorded the parties' competing submissions in respect of this role (see its findings under issue 1.1.7), without resolving the dispute between them by making its own findings of fact on the matters identified under regulation 10(3). Moreover, by recording its findings that the claimant had not been consulted in relation to the respondent's view on suitability and had not been given the chance to show she had the requisite skills, the ET appears to have imported a test of reasonableness into its determination, but that was, again, not the relevant test (**Rimmer**; **Wainwright**). Whether or not the ET's error arose because it had made findings focused on the claim of maternity discrimination (the respondent's fifth ground of appeal), it is clear that (per the fourth ground of appeal) it fundamentally failed to carry out the task required of it for the purposes of determining whether there had been a breach of regulation 10 of the **1999 Regulations**.

68. By its third ground of appeal, the respondent goes further, arguing that, given its other findings, it was perverse for the ET to find a breach of regulation 10 in this case. Specifically, the respondent relies on the ET's findings (relevant to particular allegations of maternity discrimination) that the claimant had made clear that she did not want to be considered for the post of assistant manager (or any other position) and would not apply for it (and did not do so) as it was not for her (see the ET at paragraph 7 and under issue 1.1.5). As the claimant points out, however, the obligation under regulation 10 was to offer her any suitable, and appropriate, available vacancy; that was not an entitlement that was met by requiring her to make an application and enter into a competitive interview process for the role. The claimant's reasons for not pursuing an application for an alternative position (which included the difficulties she faced trying to do this while she was on maternity leave, caring for (and still breastfeeding) a very young child) can be seen to have identified the very disadvantage that regulation 10 seeks to address. The ET needed to make findings as to whether the role of assistant manager was in fact suitable and appropriate; the fact that it found that the claimant had not pursued an application to be considered for the role did not answer that question for the purposes of regulation 10 of the **1999 Regulations**.

Disposal

69. For the reasons provided, I uphold this appeal on grounds (1), (2), (4) and (5). To the extent that it

arises, I would dismiss the perversity challenge under ground (3).

70. Having provided the parties with my decision on the appeal, the question arises as to whether, given my conclusions on grounds (1) and (2), there can only be one result, such that any claim of automatic unfair dismissal under section 99 **ERA** must be dismissed as (i) not having been before the ET, alternatively (ii) having been presented out of time. To provide the parties with the opportunity to address this question in the light of my reasoning, I direct that any further submissions that they would wish to make in this regard, and/or on any other matter they consider arises from my judgment, should be filed with the EAT and served on the other party within 14 days of the date this judgment is handed down. I will then consider any such submissions on the papers before making my final order in this matter.