Case No: 2303599/2017

EMPLOYMENT TRIBUNALS

Claimant: Mrs C Kanumukkala

Respondent: Atkins Limited

Heard at: London South (Croydon)

On: 25 & 26 September 2018 and 27 September 2018 in Chambers

Before: Employment Judge John Crosfill
Mrs R Bailey
Ms S Murray

Representation

Claimant: Mr Kevin Harris of Counsel

Respondent: Mr Ian McGlashan a Consultant

JUDGMENT

The Claimant's claim for unfair dismissal brought Part X of the Employment Rights Act 1996 is well founded.

Any compensatory award shall be reduced to reflect the findings set out below.

The Claimant's claims for discrimination contrary to sections 13 and 18 of the Equality Act 2010 are dismissed.

The Claimant's claims that she suffered detriments contrary to section 47C and 48 of the Employment Rights Act 1996 are dismissed.

REASONS

1. The Claimant worked for the Respondent as an Applications Packaging Engineer from 6 January 2014 until her dismissal which took effect on 20 July 2017, which the Respondent says was by reason of redundancy. In these proceedings she complains that her dismissal was unfair and says that it was

discriminatory. In essence she says she was disadvantaged in the process that was followed, and in particular the manner in which the selection criteria were applied, by the fact that she had recently availed herself of maternity leave.

2. At a Preliminary Hearing that took place before Employment Judge Spencer on 6 March 2018 the issues to be decided at the final hearing were agreed between the parties. The issues were set out in full in a schedule to EJ Spencer's Case Management Order and will not be repeated here but will be addressed below.

3. As directed, the parties had prepared a joint bundle of agreed documents relevant to the matters in dispute which ran to some 255 pages. The following people had prepared written witness statements and gave evidence before us:

   3.1. the Claimant, Mrs C Kanumukala; and

   3.2. Matthew Edward Leach the Head of Contracts and Client Architecture and the person who took the decision to dismiss the Claimant; and

   3.3. Helene Ballard a Senior HR Adviser who provided support to Matthew Leach in his dealings with the Claimant; and

   3.4. Alistair Lambert the Director of Finance Shared Services who heard the Claimant's appeal against her dismissal.

4. We followed our usual procedure and, having established that the issues were agreed and the parties were ready to proceed, we spent the morning of the first day reading the witness statements and the documents referred to within them. The parties had agreed between themselves that the Claimant would give evidence first and we proceeded on that basis.

5. At the conclusion of the evidence, the two representatives at our invitation provided written submissions reduced to bullet points in support of their client's respective cases. They both supplemented their submissions orally. We shall not set out rival submissions here but address them below in our discussions and conclusions. We were able to conclude the evidence and submissions within two days. We were not confident that we will be able to give judgment at any sensible hour on the remaining day and so we reserved our decision.

Findings of fact - liability

6. Having heard the evidence, we reached the following findings of fact.

7. The Respondent is a company offering consultancy services all over the world, principally in the field of engineering. In order to assist its consultants the Respondent supplies, or creates bespoke, packages of 'applications' for use on mobile devices and computers. The Claimant was employed as an Application Packaging Engineer. We were provided with her job description which summarised her position as being:

   "To package/sequence applications for remote deployment to workstations. To work in larger Application Services environment, supporting other work processes and offering customers a quality, efficient and effective service.

The reference to "customers" in the job description were two internal customers namely the Consultants.

8. The Claimant started work for the Respondent on 6 January 2014. Her contract of employment described her as a Software Packager. She worked in the Applications Services team which was a part of the wider Information Services section. The Claimant commenced a period of maternity leave on 16 November 2015 and returned to work on 14 December 2016.

9. By the time of the Claimant's return from maternity leave the Applications Services team was divided into two teams. The Applications Services Manager was Simon Goulder. Reporting to him was a team of 5 Application Packager Engineers headed by a Senior Application Packager Engineer and a team of Application Services Engineers again headed by a Senior Application Services Engineer. In part the Application Services Engineers reported to Jessica Pollard the 'Application Portfolio Manager'. The Claimant was in the Packagers team.

10. During 2016 the Respondent had started to relocate some of its operations to India in particular it relocated its HR Centre to Bangalore. Having completed that, a decision was taken to move the Information Services function (including the Applications Services Department) to India. That decision was taken for two reasons firstly because it would give rise to cost savings but in addition the business itself was increasingly global and centred around India. We accept that those were genuine business reasons and had nothing to do with the Claimant's personal circumstances.

11. On 9 March 2017 Matthew Leach, assisted by Helena Ballard made an announcement at a meeting attended by all of the Application Packaging Engineers either in person or, like the Claimant, by Skype, that following a review the following proposals were to be put forward:

    11.1. The roles of the Applications Services Manager and Applications Portfolio Manager would be deleted from the structure; and

    11.2. it was anticipated that the number of roles in the Application Packaging team would reduce from 5 to 1 and that it was anticipated that there might be a requirement for four redundancies within the "pool"; and

    11.3. 3 new roles would be created and would be filled through internal application and selective interview. These were an Application Delivery and Lifestyle Manager, a Delivery Services Lead and a Lifecycle Services Lead.

12. During the meeting on 9 March 2017 Matthew Leach explained the selection process that was proposed. He said that the company would use its standard selection criteria that it has used in other redundancy exercises. The employees were told that they would be informed of the identity of the managers carrying out the scoring exercise. They were told that all of the scores would be reviewed.

13. That announcement was followed up by a letter inviting the Claimant to attend an individual consultation meeting on 14 March 2017. Attached to that letter

was a copy of the presentation made by Matthew Leach containing the rational for the changes and a description of the proposed changes and process to be followed.

14. The Claimant attended the meeting on 14 March 2017. It seems to us that the approach of both the Claimant and Matthew Leach to that meeting was constructive. In response to Matthew Leach's explanation of the rationale for moving the work of her team to India the Claimant commented that she believed it would be unwise to shrink the team in the UK before the new team in India was up and running. Simon Leach agreed to consider that and in fact acted upon that suggestion. The Claimant enquired whether it would be possible for her to be given one of the jobs to be created in India and Matthew Leach told her that if she was prepared to do one of those jobs she did not need to apply for it as it was hers for the asking.

15. The Claimant was given a copy of the proposed selection criteria form that was to be used in selecting between the team members at threat of redundancy. The selection criteria were as follows:

    15.1. skills and knowledge

    15.2. work performance

    15.3. adaptability and change orientation

    15.4. customer focus

    15.5. attendance record

    15.6. disciplinary record

16. The Claimant was told that the scoring process would be conducted by Matthew Leach himself together with Simon Goulder, Jessica Pollard. The Claimant asked how the process of assessing skills and knowledge would take place and Matthew Leach told her that it was intended that the assessors would consider each Packages use knowledge of a software program called Microsoft Installer and their knowledge of scripting. He told her that assessors would look at the last available performance development review (PDR).

17. The Claimant queried whether any of the people scoring her had sufficient knowledge or technical skills to be able to accurately assess her work. In particular, she felt that neither Simon Goulder nor Jessica Pollard had adequate technical knowledge. The Claimant suggested in her witness statement that Matthew Leach was 'disinterested' and told her she had 'no option but to accept it'. We do not accept that that is a fair representation of the attitude of Matthew Leach. The notes of the meeting do record the Claimant raising her concerns and the Claimant is asked whether input should be invited from any other person. The Claimant proposed that the respondent consult a Mr Tim Hunt a Senior Configuration Engineer in preference to the scorers put forward by Matthew Leach. We find that Matthew Leach was prepared to listen to the Claimant's concerns but regarded the existing managers of the team from

which redundancies were to be made as perfectly competent to carry out a redundancy selection exercise.

18. The evidence against which the scores had been assessed was discussed and explained to the Claimant. The proposals were as follows:

    18.1. Skills and knowledge would be assessed by looking at the most recent Performance Development Review ('PDR') and any evidence of knowledge of two particular computer programming matters; and

    18.2. Work Performance would be assessed by looking at a spreadsheet which measured output by reference to the number of packages each employee had worked on.

    18.3. Adaptability and Change Orientation was to be measured by reference to a further spreadsheet an 'innovation tracker' which recorded suggestions made by each employee and any follow up action that was taken.

19. The Claimant was informed that the most recent PDR would be used which in her case predated her maternity leave.

20. The Claimant pointed out that in respect of the Work Performance she had been on maternity leave and that it would not be possible to measure her performance over the last 12 months. Matthew Leach proposed that in the Claimant's case her productivity should be measured over the full 12 months prior to her taking maternity leave. The Claimant commented that during that period she had been asked to cover for a colleague who did not do any packaging work. It was a matter of dispute as to whether the Claimant had suggested that that was from May to November or whether as Matthew Leach recalled it the period suggested was 3 months. We find that it is more likely that Matthew Leach has correctly recalled this conversation. The employee whose work the Claimant covered is shown on the Work Performance spreadsheet as leaving in August. It is unlikely that the Claimant was covering her work before that.

21. A proposal was made that the Claimant's score was weighted to take account of this. There was some dispute between the parties as to the extent to which the Claimant agreed the approach that was to be taken. We find that where the Claimant raised objection to the period over which she was to be scored it is likely that she agreed that the 12-month period prior to her taking maternity leave was appropriate or at least she did not strongly object to this. We find it likely that the suggestion that the Claimant's score would be weighted by 25% to reflect her covering the work of her colleague came from the Respondent but reflected the Claimant's suggestion that she had been covering her colleagues work only for 3 months. We find that she tacitly, if not expressly, agreed to that approach at that stage.

22. In her witness statement the Claimant has taken a number of objections to other aspects of the scoring of work performance such as suggesting there might have been a dip in performance whilst she was pregnant. We do not find that

these matters were raised at the time but have occurred to the Claimant once she saw her scores.

23. The Claimant did not object to the use of the Innovation Tracker. She did not note at the time that that tracker had been introduced in February 2016 during her maternity leave and that using it meant that other employees were able to demonstrate their innovation over a longer period than she was.

24. At the conclusion of the meeting on 14 March 2017 the Claimant was given a redeployment guide which informed her how to apply for any vacancy or position within the Respondent's organisation. On 17 March 2017 Helena Ballard wrote to the Claimant and informed her that if she wished to accept the role of Application Packager Engineer advertising India she could do so. She pointed out that the role would be subject to local terms and conditions and could not be performed from the United Kingdom. The Claimant was informed that if there was a commercial reason to delay the redundancies whilst the team in India were recruited and trained that would be considered at the time.

25. On 22 March 2017 the scoring panel comprising Matthew Leach, Simon Goulder and Jessica Pollard met and undertook a scoring exercise in relation to each of the Application Packager Engineers. The Claimant obtained the third highest score of 12 points behind Adrian Ciocalau who scored 16 points and Michael Roberts who scored 14 points. Michael Roberts got exactly the same points as the Claimant in every category with the exception of Adaptability and Change Orientation where he scored 5, the maximum mark.

26. In the course of the evidence it was explained to us by Matthew Leach that Michael Roberts had come up with an original suggestion that 'DFS' was used to assist installations. This was a significant and original idea and saved both time and therefore money. It had been investigated and acted upon. We accept the Respondent's case that this demonstrated the sort of innovation skills that the Adaptability and Change Orientation criteria was meant to assess.

27. On the same day at 17:21 Matthew Leach sent an email to Timothy Hunt asking whether he could comment upon the Claimant's packaging ability and in particular in relation to application packaging, App-V and license servers (setup/ management). Timothy Hunt not in fact respond until 23 March 2017 by which time the scoring had been completed. His response was as follows:

> *"It's a few years back now and I didn't work with Carlo that long before I moved teams. However, I was involved in some early training in my general impression of her ability coming into the team was that Kala was at a very junior level and ability and performance in the areas mentioned was not very strong.*
>
> *I'm not able to comment on any performance improvement since then however Kala has recently packaged an application I requested and communication was good, with required changes made as requested during the UHT stage and the package was delivered in required timeframe"*

28. In a change to what had been suggested to the Claimant the scoring was then moderated by Joe Withers the Director of Global Services.

29. In the days that followed from the scoring exercise matters were delayed because the Respondent had decided to make further redundancies in its Epsom offices. The numbers involved meant that the Respondent was obliged to engage in collective consultation. Representatives were consulted but by 11 April 2017 both the employees and the Management agreed that all meaningful collective consultation had taken place and agreement was reached to and the collective consultation process. It was at this stage that the individual consultation recommenced.

30. On 11 April 2017 the Claimant send an email to Helena Ballard asking for her individual scores. Helena Ballard sent the Claimant her scores on 12 April 2017. After some email communication a further consultation meeting was arranged between the Claimant and Matthew Leach. That meeting took place on 19 April 2017. In the course of that meeting the Claimant complained about her scores.

31. The Claimant had been given a score of 3 for Skills and Knowledge. Matthew Leach explained that that was consistent with her 2015 appraisal which rated her as “consistently good”. He explained that in his view it would have been necessary to have achieved “outstanding” in order to get a score of 5.

32. Matthew Leach told us and we accept that when he had been appointed he had taken a more robust approach to the appraisal system. The system remained broadly the same with 3 catagories but he was less lenient that Mr Goulder in that he would not say that an employee was meeting the required objectives unless all targets were met. His evidence was that the Claimant was advantaged by having her PDR from 2015 rather than disadvantaged. We accept that evidence. We agree with Matthew Leach that it is apparent that where employees have been scored both in 2015 and 2016 it is apparent that the 2016 scores are generally lower. The only exception was Ady Ciocalau and it was common ground before us that he was exceptionally good at his job.

33. The Claimant had also been given a score of 3 for ‘Work Performance’. As she had been informed the scorers looked at the spreadsheet that recorded the number of packages each employee had dealt with every month. In the Claimant’s case the calculations were done for the period between November 2014 and October 2015. She was treated as if she had only been undertaking this work for 75% of the full time equivalent. It was not the case, as the Claimant seemed to believe that there was a direct comparison between her output in 2014-2015 to the output of the other employees directly prior to the announcement of the redundancy scoring exercise. In fact, the Claimant productivity was measured relative to the other employees. Essentially they were ranked by reference to the average output. Assuming that the Claimant is correct and only 25% of her work was packaging whilst covering her colleagues work then a weighting of 75% over the full 12 months is marginally more generous than necessary to compensate for that if the period was, as we have found, August to 16 November. During the period during which the Claimant was assessed her output was significantly less than that of Ady Ciocalau and, when weighted, marginally less than Mike Roberts but better than the other two employees. As we indicated above Mike Roberts was given the same score for this criteria.

34. The Claimant was given a score of 3 for Adaptability and Change Management. Matthew Robberts explained that he had looked at the Innovation Tracker and noted that the Claimant had made contributions but that he did not note anything of significance which had been acted upon and delivered. He suggested that a score of 3 was good but not outstanding. She made little comment on that during the meeting of 19 April 2017. We are satisfied that neither the Claimant nor the anybody within the Respondent organisation realised that the Claimant might have been disadvantaged by the fact that the Innovation Tracker had been introduced during her maternity leave and that she had less time to contribute than the other employees in the pool.

35. The criteria of customer focus, disciplinary record and attendance proved to be of little utility in distinguishing between the candidates. The scorers decided that there was no evidence one way or another of customer focus nor was there any distinction in attendance or disciplinary records. As such each employee was awarded the same score.

36. The Claimant raised at the meeting her concerns that the spreadsheet recording Work Performance was inaccurate. Matthew Leach told us and we accept that he had printed off the spreadsheet prior to the announcement that there may be redundancies as all of the effected employees had access to it and it was capable of manipulation. He felt that it would prevent any cheating were he to take the record as it stood at the time.

37. The Claimant was informed that she remained at risk of redundancy and told that she would be permitted reasonable time off if she wanted to attend external interviews. By a letter dated 21 April 2017 the Claimant was invited to a final consultation meeting which was to take place on 27 April 2017.

38. The Claimant, and as we understand it most of the team, applied for the role of Delivery Services Lead. The Claimant was interviewed but that role was given to Ady Ciocalau. The Claimant did not suggest that there was anything unfair or unsurprising about that appointment and very fairly acknowledges that his scoring in the redundancy exercise was justified. The consequence of that promotion was that the remaining role of an Applications Packaging Engineer was given to Mike Roberts the second highest scorer from the team.

39. Jessica Pollard applied for and was appointed to the role of Application Delivery and Lifecycle Manager. The Claimant was given the opportunity to apply for that role but did not do so. The reality was that that role was some grades above the role she had been performing. Gemma Headley, who had been an Applications Services Engineer was offered the role of Lifestyle Services Lead.

40. As a part of the Respondent's drive to relocate the Applications Services Team to India Simon Goulder had been made redundant. We find that as a consequence he was unhappy. He circulated an e-mail from his private e-mail account to all of the Application Packager Engineers. He drew attention to the fact that due to Gemma Headley's promotion there was a vacancy for a Application Lifecycle Engineer which was a role expected to remain in the UK. He added his view that it was 'strange' that the redundancy selection pool had been limited to the Packagers' and had not included the 'Services' team. He expressed a view that there was a substantial overlap in the roles. Finally, he

drew attention to the fact that contract workers had been engaged to deal with a backlog of packaging work which he suggested was inconsistent with there being a need for redundancies.

41. The Claimant attended what was billed as the final consultation meeting with both Helena Ballard and Matthew Leach. The meeting took place via Skype. In the course of that meeting the Claimant was told that the proposal to make redundancies would be implemented and that she would be dismissed. She was told that there was a possibility that her notice period would be extended as, despite the plans to relocate the team to India there was a backlog of work that needed to be dealt with. In essence the Respondent was acting on the Claimant's suggestion that the Packaging team remained in place until the replacement in India was up and running. The Claimant was aware that the fact that she was given notice of her dismissal did not prevent her from pursuing any vacancies that arose. The meeting was followed by a letter from Helena Ballard giving contractual notice and offering a further 4-week period on top with the possibility of a further 4 weeks subject to review. The Claimant accepted the offer of an extended notice period. That letter clearly set out that the Claimant had a right of appeal. In the covering e-mail Helena Ballard directed the Claimant to an online resource where the appeal procedure was found. The Claimant did not appeal at that time.

42. After she was served with notice of her dismissal the Claimant corresponded with Helena Ballard by e-mail. On 4 May 2017 she complained by e-mail that she had not been given an opportunity to challenge the scoring. Helena Ballard responded on 9 May 2017 and stated that the Claimant had been given an opportunity to challenge her scores on 19 April 2017. She set out again the Respondent's rationale for the scores that had been given. That e-mail led to a conversation between the Claimant and Helena Ballard on 16 May 2017 where again the Claimant expressed her dissatisfaction. Helena Ballard sent an e-mail to the Claimant after that conversation and offered her a right of appeal provided that she submitted her appeal within 24 hours. The Claimant did not take up that offer but sent an e-mail on 18 May 2017 suggesting that she had been disadvantaged in the assessment of her work performance by changes made whilst she was on maternity leave furthermore she had done more packages than she had been given credit for (although using a different period to that used for the scoring exercise). Helena Ballard responded on 22 May 2017 disputing that the fact that there had been changes in process had any effect on the score that had been given.

43. The Claimant applied for a role as an Infrastructure Licencing Engineer. In fact, a decision was taken not to appoint to that role and the application did not progress. It would seem that the decision was not communicated to the Claimant as clearly as it could have been.

44. Manjula Reddy was a member of the same team as the Claimant. She had scored less in the selection process than the Claimant. Both she and the Claimant applied for the role of Application Lifecycle Engineer. Both employees were invited to interview. The interviews were conducted by Jessica Pollard and Gemma Headley. The interviews were conducted in accordance with a rigourous policy designed to provide a level playing field for each candidate. Each candidate was asked the same questions. The record of interview

suggests that the Claimant was negative both respect of relationships with others and in addressing problems at work. In contrast Manjula Reddy's record of interview was more positive. The outcome was that Manjula Reddy was offered the position and the Claimant was not. The Claimant says that Jessica Pollard contacted and suggested that whilst unsuccessful the Claimant had been her first choice. We find that it is quite possible that Jessica Pollard might have used comforting words but the outcome was not in dispute and the Claimant was not the first choice overall. We have no basis to find that the concerns recorded on the record of the Claimant's interview and the scores awarded were not genuine. The Claimant did not suggest that either of the interviewers had any personal issue with her. The fact that the Claimant has a higher score in the redundancy exercise does not mean that she would have performed better at interview. We note that when interviewed by Matthew Leach and another manager of the role of Delivery Services lead they too noted a tendency to be negative about the internal customers. Overall we have no reason to doubt that the interview process was a genuine attempt to select the best candidate for the role.

45. After the Claimant learned that she would not be offered the 'Lifecycle' role she continued to protest about her dismissal and both the selection process and the failure to appoint her to the Lifecycle role. The Claimant suggested, incorrectly in our view, that there had been an absence of good faith in the process. She was by that stage intimating employment tribunal proceedings. On 19 July 2017 the Claimant sent an e-mail to members of the Respondent's HR team protesting that two contractors were continuing to do packaging work whilst she was being made redundant.

46. In May 2017 there was a backlog of packaging work. At this stage no employees had been recruited in India. In order to address this backlog a decision was taken to engage 2 contractors CT and AF. They continued to work until August 2017 at which stage their contracts terminated.

47. The Respondent also recruited a contractor AL to fill a vacancy as an Application Lifecycle Engineer. This role was not advertised. It was the same or broadly the same as the role that the claimant had interviewed for but we accept the Respondent's case that it was never intended to be other than a temporary role. AL was paid a daily rate far in excess of what the Claimant earned. He proved to be unsatisfactory and the engagement was terminated in August 2017.

48. The Claimant's dismissal took effect on 20 July 2017 her notice period having been extended to 12 weeks as she had agreed. On the same day Rachel Ryland, the Head of HR Services UK & Europe e-mailed the Claimant in response to her e-mail of 19 July 2017. She pointed out correctly that the Claimant had been given a number of opportunities to appeal the decision to make her redundant and had not done so. She went on to offer a final opportunity to appeal.

49. The Claimant took up the offer of an appeal and submitted grounds of appeal. She took the following points:

49.1. She complained that she had not had an opportunity to challenge the scores she had been given; and

49.2. She complained about the identity of the scoring managers; and

49.3. She complained that the assessment of her Work Performance was wrong;

49.4. about the Respondent engaging contractors at the same time as making redundancies; and

49.5. She complained of the failure to appoint her to the 'Lifecycle role'; and

49.6. She suggested that a role of 'Applications Lifecycle Engineer' had been filled by an external candidate but not advertised.

50. Alastair Lambert was asked to deal with the appeal. The Claimant was asked whether she thought that a meeting would be beneficial. She said that she thought that Alastair Lambert had all of the information he needed. Alastair Lambert then proceeded to deal with the matter on paper. We find that he took his role seriously and made appropriate enquiries of others to investigate the Claimant's concerns. In particular, he held a meeting (via Skype) with Matthew Leach to discuss the matter.

51. Alastair Lambert wrote to the Claimant on 13 September 2017. He did not uphold any part of her appeal. He did acknowledge that contractors had been engaged to undertake work of a kind that the claimant had done but informed her that those contractors had only worked until August. He also informed the Claimant that there had been a contractor used to fill a temporary role in the Lifecycle team but that he too had left without being replaced in August.

52. On 5 December 2017 the Claimant instigated these proceedings.

53. By April 2018 there had been a further wave of redundancies, again caused by a shift in the business to India and Ms Reddy, Mr Roberts and Mr Ciocalau were all made redundant.

<u>Unfair dismissal – the law to be applied</u>

54. Section 94 of the Employment Rights Act 1996 (hereafter "the ERA 1996") sets out the right of an employee not to be unfairly dismissed by her or his employer.

55. For the Claimant to be able to establish her claim of unfair dismissal she must show that she has been dismissed. In the present case here is no dispute that the Claimant was dismissed.

56. If dismissal is established sub-section 98(1) ERA 1996 requires the employer to demonstrate that the reason, or if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in sub-section 98(2) of the ERA 1996 or for "some other substantial reason". If it cannot do so then the dismissal will be unfair. Redundancy is one of the matters listed in Sub Section 98(2). In order to amount to a potentially fair reason the employer mist

show that the circumstances meet the statutory definition of redundancy which is set out in Section 139 ERA 1996. That section provides (as far as is material):

Redundancy.

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) ……..

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

57. Section 99 of the ERA 1996 provides that it is automatically unfair to dismiss an employee for a 'proscribed reason' or in 'proscribed circumstances' set out in regulations. The material parts of the section are as follows:

Leave for family reasons.

(1) 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,

…..

and it may also relate to redundancy or other factors.

58. The relevant regulations made under that section are the **Maternity and Parental Leave etc. Regulations 1999** and the regulation relevant in the present case is regulation 20 the material parts of which are as follows:

> ***Unfair dismissal***
>
> *20.—(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—*
>
> > *(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or*
> >
> > *(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.*
>
> *(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if—*
>
> > *(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;*
> >
> > *(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and*
> >
> > *(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).*
>
> *(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—*
>
> > *(a) the pregnancy of the employee;*
> >
> > *(b) the fact that the employee has given birth to a child;*
> >
> > *(c) ……...*
> >
> > *(d) the fact that she took, sought to take or availed herself of the benefits of, ordinary maternity leave;*
> >
> > *(e)the fact that she took or sought to take—*
> >
> > > *(i) additional maternity leave;*
> > >
> > > *(ii)..*
> > >
> > > *(iii)…*
> >
> > *(f)..*

(g)...

(4) Paragraphs (1)(b) and (3)(b) only apply where the dismissal ends the employee's ordinary or additional maternity leave period.

(5) – (8)

59. As stated above the burden of proof in showing the reason for the dismissal falls upon the Respondent however where the employee contends that the reason for the dismissal is automatically unfair they bear an evidential burden. That means that the employee must show that there is a real issue as to whether the reason for the dismissal is the one she contends for ***Kuzel v. Roche Product Ltd*** **[2008] IRLR 530**.

60. If the employer is able to establish that the reason for the dismissal was for a potentially fair reason, then the employment tribunal must go on to consider whether the dismissal was actually fair applying the test set out in section 98(4) of the ERA 1996 which reads:

'*(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

61. In ***Williams v Compair Maxam*** **[1982] IRLR 83**, at 87, 19, Browne-Wilkinson J set out five principles which reasonable employers will usually observe when dismissing for redundancy employees represented by an independent trade union: warning; consultation; objective selection criteria; fair selection in accordance with those criteria; the possibility of alternative employment. He emphasised that these principles did not apply in all circumstances; each case depends on its own facts. Where a tribunal is considering any case where the dismissal is said to be by reason of redundancy it should always consider whether there has been reasonable consultation, fair selection criteria and efforts to find alternative employment.

62. The correct test is to ask whether the employer acted reasonably, not whether the tribunal would have come to the same decision or followed the same process itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: ***Iceland Frozen Foods Ltd v Jones*** **[1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions

might be reasonable.

63. Where a dismissal is found to be unfair the Tribunal must consider what compensation is 'just and equitable'. Where the employee would or might have been dismissed even if the employer had acted fairly then a tribunal should adjust any compensation to reflect that possibility ***Polkey v AE Dayton Services Ltd*** **[1987] UKHL 8**. The burden of establishing that the employee might or would have been dismissed falls on the Respondent although the Tribunal is entitled to look at all of the evidence whatever the source. A summary of the relevant principles is found in ***Software 2000 Ltd v Andrews*** **[2007] IRLR 569**

Discussion and conclusions

64. The parties were invited to prepare written submissions and in our discussions we found it useful to work through these in order to address the issues raised by each party. It is convenient for us to set out our deliberations using the headings found in Mr Harris's submissions. In this section we make some secondary findings of fact necessary to decide the issues before us.

Unfair dismissal

65. The first contentious issue for us was the reason for the dismissal. It had been suggested in the schedule to the Case Management Order of EJ Spencer that the Claimant had not accepted that there was a genuine redundancy situation. It seems that that contention was based in part on the assumption that there could not be a redundancy situation where an employer is replacing staff with contractors.

66. The definition of redundancy found in Section 139 ERA 1996 includes circumstances where the employer expects his requirements for employees to carry out work of a particular kind to diminish. That permits an employer to dismiss by reason of redundancy in advance of the point when redundancies are 'required'. In the present case we have accepted that the Respondent had genuine business reasons for wishing to relocate the majority of the Claimant's team's roles to India. The recruitment of contractors was simply to deal with a backlog of work. It was not intended to be permanent and was not inconsistent in any way with the wish to reduce the headcount in the UK in the long term and recruit in India. We are satisfied that there was a redundancy situation.

67. We are satisfied that the only reason that Matthew Leach decided that the Claimant was to be dismissed was the desire to reduce the number of Application Packager Engineers from 5 to 1 in accordance with the plan to relocate the majority of the teams work to India. Whilst the Claimant had at times suggested in correspondence that there was some plan to remove her from the business we are not satisfied that that was the case.

68. Whilst 'redundancy' is a potentially fair reason for dismissal a dismissal would be automatically unfair if the reason or if more than one the principle reason for selecting the Claimant was for a reason falling within regulation 20(3) of the **Maternity and Parental Leave etc. Regulations 1999**.

69. We find below that the Claimant was placed at a disadvantage by the use of the Innovation Tracker spreadsheet which might possibly have meant that she scored less than she could have done had she been at work when the spreadsheet was introduced in February 2016. We have concluded below that it is possible that the Claimant might have been awarded a higher score although we have assessed that possibility at just 25%.

70. The question for us is whether that finding leads to a finding that the reason or principle reason for selecting the Claimant for redundancy was 'connected with' one of the matters listed in regulation 20(3). We do not think that it does. Our reasons for this are:

    70.1. We do not think that the reasons Mathew Leach had for dismissing the Claimant had anything to do with the fact that she had been pregnant or given birth to a child. These were in the background but were not the 'reason' for any treatment.

    70.2. The reasons for selection are analogous to the reasons for a dismissal and they are the facts known and the beliefs held by the decision maker see ***Abernethy v Mott Hay and Anderson*** **[1974] IRLR 213**. Matthew Leach knew what the score the Claimant had been given for each criteria and we accept that the scores were operative on his mind. He was not aware, because he hadn't given it any thought, that the Claimant might have been disadvantaged by the fact that she had less time to demonstrate innovation. In those circumstances we do not find that he was influenced by anything 'in connection' with the fact that the Claimant took maternity leave. We think he ought to have been but he wasn't. As such this case can be contrasted with a situation where say pregnancy related absence was taken into account.

    70.3. Finally, we are reinforced in that view by the fact that we have not found that the Claimant would have avoided selection had she not been away on maternity leave when the Innovation Tracker was introduced. She might have done but we have assessed the chances overall at 12.5%. As such there is a 75% chance that the outcome would have been the same. It is hard to see how in those circumstances we could find that the reason the Claimant was selected for redundancy was connected to the fact that she took maternity leave.

71. It follows that we do not find that the dismissal was automatically unfair and so we have to go on and consider whether the dismissal was fair or unfair applying the test in Section 98(4) of the ERA 1996. We remind ourselves that we should not substitute our views for those of the employer. The headings that follow below are those points referred to by Mr Harris.

Pool

72. Mr Harris suggested that it was unfair that the 'Packagers' were not placed in a pool with the 'Services' team. We accept the point made by Mr Harris that an employer will not usually act fairly unless some thought is given to who should be included in the selection pool. That submission is supported by ***Taymech v Ryan*** **EAT 663/94**. That said, absent any custom practice or policy, an

employer who applies its mind to the question has considerable latitude providing it acts for genuine reasons ***Thomas and Betts Manufacturing Co Ltd v Harding*** **1980 IRLR 255 CA**. Whilst we accept that there was a degree of overlap of duties between the Packager team and the Services team there were also differences. It was the Packager work that was being re-located at that stage. We are satisfied that the Respondent did give the matter some consideration. In the circumstances whilst we accept that some employers might have acted differently the decision to restrict the pool to the packagers was not irrational and it is not for us to substitute our view of who should have been included in the pool.

The identity of the managers who scored the Claimant

73. The Respondent chose the two line managers and their manager as the persons to carry out the selection process. The Claimant's objection to this was a lack of knowledge of her work and a lack of technical skills. These are two separate points. We cannot accept that the managers in the department did not understand the work that they had to supervise. It was they who directed the team and they would have been well aware of what was required. The fact that the Claimant had no personal dealings with Matthew Leach or Jessica Pollard is not in our view a good point. The approach that was taken, properly in our view, was to look at objective evidence. As such the scorers looked at past appraisals, output from spreadsheets and evidence of innovation. It was not necessary for the managers to have any personal knowledge of the Claimant to undertake that exercise fairly.

74. For similar reasons we do not think that the Claimant's objections about a lack of technical knowledge were well founded. On the evidence before us her concerns were probably factually misplaced but regardless of that it was not necessary for the managers to understand the minutae of what the Claimant did to assess her against the criteria adopted given the reliance on objective evidence.

75. It is relevant to ask what else could the Respondent have done. It invited the Claimant to nominate somebody who knew the Claimant better and she did so. The reality was that Mr Hunt's response was of very little assistance because he had managed the Claimant at an early stage in her employment. We return to the failure to await his input below.

Decisions made on 'inaccurate' information

76. Mr Harris sought to persuade us that the information provided by the Claimant in support of her appeal was accurate whilst that actually used by Matthew Leach was inaccurate. Our finding above is that Matthew Leach downloaded the spreadsheet as a live document prior to the announcement of the redundancies to prevent any risk of manipulation. The Claimant relies upon the spreadsheet amended she says to reflect occasions where she says that packages have been attributed to the wrong employee.

77. We consider that the decision to 'freeze' the data was a sensible and reasonable precaution. On appeal Alastair Lambert did consider whether the 'new' data would have made any difference. He concluded that if the Claimant

was correct she would have been given a score of 4 and not 3 but that because Mike Roberts scored two points more than her he should not interfere with the outcome.

78. In making selections for redundancies an employer is required to act in good faith and reasonably. We find that it was reasonable for Matthew Leach to rely upon the data that he extracted. It was not necessary to undertake an extensive forensic analysis of whether that data was 100% accurate. It would have been very difficult to question the veracity of the Claimant's later claims. It may have opened up similar challenges by the other employees.

The Claimant's 'Skills and Knowledge' was assessed on 2015 information

79. The Claimant was assessed on her 2015 'PDR' which assessed her as consistently good and merited a score of 3. She suggests that had she been assessed in 2016 she would have obtained a higher score. There is simply no evidence that that was the case. We have accepted that scores in 2016 were generally lower than in 2016 due to a more rigorous approach by Matthew Leach. As such we see no demonstrable disadvantage to the Claimant.

80. We do not see that relying upon the most recent information has prejudiced the Claimant. Mr Harris took us to the most recent output figures in support of his contention that the score should have been higher or would have been if a later period had been considered. We do not accept that that would have been the case and, where the information actually being considered was the annual PDR whish assessed a range of matters, we are not persuaded that the Claimant's score would necessarily have been higher.

81. We would expect a reasonable employer to take reasonable steps to avoid any unfairness caused by a period of absence on maternity leave. In this regard we remind ourselves that the test to be applied is not one of perfection but whether the actions of the employer fell within a range of reasonable responses.

The reliance on the Innovation Tracker

82. This is a point which was raised only obliquely in the list of issues and really only rose to prominence in the course of the hearing. That said both parties were able to deal with this in their evidence and submissions. The Complaint made by the Claimant is that the new policy of measuring 'innovation' by holding regular 'brain storming' sessions and recording the ideas and changes on the Innovation Tracker spreadsheet started in February 2016. It was accepted by Matthew Leach that he (and we assume the other scorers) had regard to the totality of the information provided. The Claimant says that it was unfair to measure her input only from 14 December 2016 to 22 April 2017 (at the latest), a period of just over 4 months when the other team members were measured from the inception of the new policy that is around 14 months.

83. We find that the Claimant's complaints have considerable force. An employee may only have a 'bright idea' once in a while. Mike Roberts scored a maximum of 5 points for one particularly successful idea that he proposed. The longer the period over which an employee is able to get credit for any bright ideas the greater their opportunity to shine. The Claimant rightly says that she did put

forward a number of ideas in the short period when she participated under this new system. She did not come up with anything as useful as Mike Roberts idea but the possibility that she might have done cannot be excluded.

84. We have stated above that the test is not one of perfection. That said we consider that the unfairness to the Claimant in assessing her input over a far shorter period than the others is one that ought to have been obvious. This is particularly so where the Claimant was complaining about the other selection criteria on a similar basis. Matthew Leach honestly acknowledged in his evidence that this never occurred to him. We have asked ourselves whether in circumstances where the matter was not specifically raised by the Claimant the Respondent can be said to have acted outside a range of reasonable responses but unanimously conclude that it did. We consider that the potential unfairness was obvious. The Respondent could have looked at the Claimant's actual input over the shorter period and applied some weighting or it could have applied some other measure of innovation rather than relying only on the data they had.

<u>The weighing was inaccurate</u>

85. The Claimant's complaint was that when she was covering the work of her colleague she says that she was only doing 25% packaging work and 75% of other work. She complains that her output was only adjusted by 25%. She says that is unfair. We do not accept that argument for the following reasons.

86. The approach suggested by the Claimant is mathematically flawed. She only covered her colleagues work for a period we have found between August and November (at best 4 months). We have also found that at the time that the weighting to be given to the scoring was actually considered the Matthew Leach reasonably believed that the period was just 3 months. It was the annual output and not the output over 3 or even 4 months that was weighted. The Claimant was in effect treated as if she had worked as a packager for just 9 months. As she did 25% packaging work during the (on our findings) 4 months she covered for her colleague the weighting was correct. Had the period been thought to have been 3 months it was generous.

87. We have found above that the Claimant tacitly agreed to the weighting that was given. In those circumstances it is very difficult to say that the Employer acted unreasonably in proceeding on what it could reasonably have thought was an agreed basis. We do not see any unfairness in doing so.

<u>The Claimant should have scored higher in productivity, skills and knowledge and innovation</u>

88. The Claimant is essentially asking us as an Employment Tribunal to second guess the scores given by the Claimant's managers. That is not an approach we are permitted, or prepared, to take. We are entirely satisfied that the scoring exercise was carried out in good faith. We are satisfied that the issue of whether the Claimant was scored fairly against the criteria was revisited on appeal. We accept that at that stage the Claimant was questioning the accuracy of the spreadsheet that measured the output. We consider it sensible and fair to take the spreadsheet as it was prior to the announcement. There was material

available to justify the scores awarded. It is not for us to substitute our view having heard evidence from the Claimant.

No reconsideration of the scores after the meeting of 19 April 2017.

89. The Claimant suggests that when her scores were discussed with her and she raised her concerns fairness demanded that the scorers were all involved in the decision of whether they should be revised. We do not think this was essential. Matthew Leach had been one of the scorers. Managerially he was the most senior. He was in a good position to judge whether anything the Claimant said would alter her score and he declined to do so. We see no unfairness in this particular aspect of the process.

90. We are far less impressed by the fact that the Claimant was specifically asked whether some other assessor could speak up for her and she nominated Mr Hunt. She did so having expressed concern that the scorers lacked personal knowledge of her. That was not unimportant for the criteria of 'skills and knowledge'. Matthew Leach did act on the assurance that Mr Hunt would be contacted but then the exercise was conducted before his input was received. No reason was given for this and it seems that this was simply overlooked. We consider that it was unfair to assess the Claimant before awaiting the response of Mr Hunt. We have read what Mr Hunt says and are of view that had his comments been considered they would not have improved the Claimant's score. However, at this stage we are looking at the fairness of the process and to fail to take into account matters that the Claimant had specifically asked to be looked at was in our view unfair. Our conclusions as to the effect of a fair process go only to remedy.

The Respondent cannot justify the sore given to Mike Roberts

91. The Claimant's attack is directed at the score given to Mike Roberts for innovation. Matthew Leach explained to us that the score related to an exceptionally good idea recorded in the Innovation Tracker. Mr Harris valiantly tried to persuade us that the score was 'subjective'. We disagree it was evidence based and we consider it was a genuine attempt to assess Mike Roberts's abilities.

The Claimant should have been preferred over Manjula Reddy for the role of Application Lifecycle Engineer

92. The Claimant sought to persuade us that it was inconceivable that in circumstances where she scored higher than Manjula Reddy in the selection process she should not have been preferred for the role as Application Lifecycle Engineer. Mr McGlashan rightly reminded us that we must avoid substituting our view of who might be suitable for that role for that of the interview panel. He referred us in that regard to ***Samsung Electronics (UK) Limited v Mr K Monte-Cruz*** **UKEAT/0039/11/DM**. That authority acknowledges that an interview process may include a substantial level of judgment for the employer and a tribunal should not second guess that judgment unless there is some very good reason to do so.

93. The issue for us is whether the interviews for the post were conducted in good

faith and fairly. We consider that the interview process was beyond any criticism. It followed the approach of asking each candidates the same questions and scoring their answers. The Claimant comments on the fact that her record of interview contains a number of negative statements by the scorers. That is true. The Claimant is criticised for her negativity. That was true in the other interview that she had. We suspect that the Claimant's feelings towards her employer were jaded at this stage and that was reflected in her interview performance. There is no basis for us to conclude that the scores given to the Claimant were not genuine. We do not find the suggestion that Jessica Pollard said words to the effect that the Claimant had been her first choice to take the matter one way or the other. It is very possible that some attempt to be kind has been misconstrued. The interview records explain exactly why the Claimant was not successful in this application for alternative employment.

The Respondent engaged external contractors to do the work of those made redundant rather than extending the notice period of the Claimant.

94. We have made findings above that 2 contractors were engaged to cover packaging work in May and not released until August. As a general rule it would be unfair to offer work that the employee threatened with dismissal did to a contractor. The Respondent had agreed two extensions of the Claimant's employment. It seems to us that there was no good reason why a further extension could not have been granted whilst the backlog was addressed. The Claimant specifically raised this as a possibility. The Respondent did not persuade us that a further extension was difficult or gave rise to uncertainty. The Claimant would quite readily have agreed an extension as she had before. Whilst it would have been a brief respite it would have provided a respite from unemployment. Had this been the only error made by the Respondent we would not have found the dismissal unfair only on this basis but it compounds the errors we have identified above.

95. In respect of the contractor AL we take a different approach. The Claimant had been interviewed for the permanent position and had not been appointed. Some genuine concerns had been raised about her suitability for that role. In those circumstances we do not consider that the Respondent acted unfairly in not considering her for the temporary position.

Overall conclusions

96. We have found that in the respects set out above the Respondent acted unfairly. The major failings was in respect of the Innovation Tracker and the failure to recognise how unfair it was to limit the period where the Claimant was required to demonstrate her innovation skills. There are then other more minor failings in the process. Cumulatively we consider that these flaws in the process mean that the process followed fell outside the range of reasonable responses and, regardless of the fact that it might have made no difference, the dismissal was unfair.

Section 123 of the ERA 1996 – Polkey considerations

97. We had asked the parties to address us on the question of whether in the event

that we found the dismissal was unfair the Claimant could or would have been dismissed in any event.

98. It was accepted by the Claimant that, because all of the remaining members of her team were ultimately dismissed following a further relocation to India her employment would not have survived beyond April 2018.

99. Had the Respondent used the Claimant's services rather than those of external packagers her employment could, and we find should have been extended to August 2017. We do not know the exact date and that can await any remedy hearing.

100. We do not consider whether if Matthew Leach had awaited the input from Mr Hunt it would have made any difference to the Claimant's scores. Mr Hunt is in fact fairly negative about the Claimant at the outset of her employment whilst acknowledging one competent piece of work more recently. We are entitled to make our own findings at this stage and find that it is more likely than not that this would have made no difference whatsoever to the scores allocated to the Claimant.

101. The more difficult issue is whether or not had 'Innovation' been fairly assessed it would have made any difference. We do not think it likely or reasonable to expect the Respondent not to assess innovation in selecting who should be made redundant. We find that had the Respondent acted fairly it would have attempted to extrapolate from the contributions the Claimant had made in the narrow window over which she was able to contribute to the Innovation Tracker. We note that she did make some contributions although accept Matthew Leach's evidence that at least one of those suggestions went nowhere. The Respondent could, and we find should, have addressed this issue in discussions with the Claimant and given the Claimant an opportunity to explain why her score should match that of Mike Roberts given the disadvantage she faced.

102. We must ask whether the Claimant had any prospect of being retained. Mike Roberts scored the same as the Claimant on the other criteria and 5 points for his input into the Innovation Tracker. To be retained the Claimant needed a further 2 points.

103. We note that the Claimant has persuaded Alastair Lambert that there was a possibility that she should have been given a score of 4 rather than 3 for her work output although we do not think that Matthew Leach was unreasonable in relying on the earlier data. It is possible that if the Claimant had shown that she should be given a further point for adaptability and change orientation the Respondent would have accepted that there was a tie between her and Mike Roberts. Some further process or criteria would then have had to follow to give a tie break.

104. We are required to speculate but do so based on the evidence we have been presented with. We accept the evidence that there is a marked distinction between the Innovation demonstrated by the Claimant and that of Mike Roberts. The Claimant would have faced an uphill battle establishing that she should be given a score of 4.

105. Doing the best that we can with the evidence we find that the Claimant had a no more than 25% chance of equalling Mike Roberts score and thereafter only a 50% chance of being retained. That gives an overall possibility that the Claimant would have kept her job beyond the time that the contractors were dismissed to be 12.5%. She would have been dismissed by April 2018 in the second relocation.

106. We shall apply those findings to any assessment of compensation unless the parties are able to resolve the matter.

Claims under the Equality Act 2010

107. The burden of proof in claims brought under the Equality Act 2010 is governed by section 136 of that act and provides that, where a claimant establishes facts from which discrimination could be inferred (a prima facie case), then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the Respondent. The proper approach to the shifting burden of proof has been explained in ***Igen v Wong*** **[2005] ICR 9311** which approved, with some modification, the earlier decision of the EAT in ***Barton v Investec Henderson Crosthwaite Securities Ltd*** **[2003] IRLR 332**.

108. The burden of proof provisions should not be applied in a mechanistic manner ***Khan and another v Home Office*** **[2008] EWCA Civ 578**. In ***Laing v Manchester City Council*** **2006 ICR 1519** Mr Justice Elias (as he then was) said *"the focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race""*. Such an approach must assume that the burden of proof falls squarely on the Respondent to prove the reason for any treatment. It is an approach that should be used with caution and is appropriate only where we are in a position to make clear positive findings of fact as to the reason for any treatment or any other element of the claim. We shall indicate below where we consider that it is open to us to follow this approach.

Section 18 Pregnancy and Maternity

109. The agreed list of issues deals with the Claimant's claims under this section at paragraphs 10 and 11 but cross refers to the treatment listed in paragraph 12.1 to 12.3.

110. An issue appears to be taken that any treatment complained of is outside the protected period. Paragraph 11 identifies an issue as to whether the treatment was the implementation of a decision taken within the 'protected period'.

111. Section 18 of the Equality Act reads as follows:

18 Pregnancy and maternity discrimination: work cases

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

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

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it.

(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.

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

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

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

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

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

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

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

(b) it is for a reason mentioned in subsection (3) or (4).

Discussion conclusions and further relevant findings

112. None of the unfavourable treatment either occurred during or was a consequence of a decision implemented in the protected period. The decisions both to make redundancies and how to do so were all taken after the Claimant returned from maternity leave. We conclude that the Claimant cannot rely on sub section 18(2).

113. The Claimant could however rely on sub-section 18(4). That sub-section is not restricted by the 'protected period'. What the Claimant would need to show is that the unfavourable treatment she complained of was 'because' she had

availed herself of maternity leave.

114. Section 18 requires the Claimant to show that she has received 'unfavourable' treatment. Whilst no comparison with the treatment of others is required it is clear that to amount to 'unfavourable treatment' the treatment must be something about which a reasonable employee could reasonably complain.

List of Issues 12.1

115. We find as a fact that the Claimant was not disadvantaged in any way by having her work output measured in the 12 months before her maternity leave. The assessment that was made was a relative assessment and she is assessed against the average performance at the time. The weighting issue had nothing whatsoever to do with the fact she had taken maternity leave but in any event the weighting was in our view properly assessed. We do not find that there was any unfavourable treatment whatsoever.

List of Issues 12.2

116. Looking at the unfavourable treatment listed at paragraph 12.2 of the List of Issues, the Claimant did not pursue any case that the Respondent had selected particular scorers because she had been pregnant or taken maternity leave. At the highest she complained that she did not know her scorers as well as she had been away from work.

117. We do not accept that the Claimant was treated unfavourably by the selection of these managers. We have not found there was a lack of relevant knowledge. The scorers collectively were quite capable of doing the scoring exercise. The Claimant has not shown us that she suffered any disadvantage at all in this regard.

List of issues 12.3

118. The final matter said to be unfavourable treatment was using the Claimant's PDR from 2015. We do not accept that that was unfavourable at all. If anything the Claimant was mildly advantaged by the use of this PDR as she avoided the tightening up imposed by Matthew Leach. We do not accept that the Claimant would have done any better had a later assessment been undertaken.

119. It will be evident that had the Claimant included the issue of the assessment using the Innovation Tracker as a claim under this heading then she may well have succeeded. She did not and it is not for the tribunal to substitute a case not advanced by a party. For what it is worth any losses would have been the subject to the same reductions as the claim for unfair dismissal.

Sex discrimination contrary to Section 13

120. The material parts of Section 13 of the Equality Act read as follows:

13 Direct discrimination

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

121. Section 6 provides that 'pregnancy and maternity' are protected characteristics for the purposes of this section.

122. Section 39(2)(d) of the Equality Act 2010 makes it unlawful to discriminate against an employee by subjecting him to a 'detriment'. It is clear that an 'unjustified sense of grievance cannot amount to a detriment see ***Deer v University of Oxford*** **[2015] IRLR 481**. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** **[2003] IRLR 285** the House of Lords dealt with the question of what might amount to a detriment at paragraphs 34 and 35:

> *'… the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.*

123. It is necessary that the Claimant demonstrates 'less favourable treatment'. We repeat our findings above and in particular our findings that the Claimant did not suffer any discernible disadvantage by reason of the 3 matters set out at paragraph 12 of the list of issues. Those findings are sufficient to dispose of the claims.

Detriment claims under Section 47C and 48 of the Employment Rights Act 1996

124. Section 47C provided that an employee has the right not to be subjected to a detriment done for a proscribed reason. The proscribed reasons are those set out in regulation 19 of the Maternity and Parental Leave etc. Regulations 1999.

125. The Claimant relies under this heading on the same detriments as her discrimination claims and the matters set out in paragraph 12.1-12.3. In each case we have found that the Claimant suffered from no disadvantage whatsoever as a consequence of having availed herself of maternity leave. That finding is sufficient to dispose of these claims.

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Employment Judge John Crosfill
Dated 14 January 2019