



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs C Photay

**First Respondent:** KMH Communications Limited  
**Second Respondent:** Project Management Retail Services Limited

**Heard at:** Ashford on 1<sup>st</sup> and 2<sup>nd</sup> August 2017

**Before:** Employment Judge Pritchard  
Mr C Wilby  
Mr N Phillips

**Representation**  
Claimant: In person  
Respondent: Miss K Nicol, consultant

## JUDGMENT

- 1 The First Respondent is dismissed from these proceedings
- 2 The Claimant's claims of sex/maternity discrimination are dismissed.
- 3 The Claimant's claim that she was unfairly dismissed is well-founded and accordingly succeeds.

## REASONS

1. The Tribunal heard evidence from the Claimant on her own behalf and she put before the Tribunal the witness statement of Beulah Keane (former manager at Marks & Spencer); Ms Keane did not attend the hearing and since her evidence could not be challenged in cross examination, the Tribunal gave it limited weight. The Tribunal also heard evidence from the Respondent's witnesses: Peter Hiscox (Director of both the First and Second Respondents) and Christopher Irving (Director of Taxave Business Centre Limited, company accountants for the Second Respondent). The Tribunal was provided with a bundle of documents to which the parties variously referred. At the conclusion of the hearing the parties made oral submissions.

### The issues

2. The claims and issues had been identified at a Preliminary Hearing and can be described as follows:

2.1. The Claimant's claims are of direct Maternity/Sex Discrimination and Unfair Dismissal following her return from maternity leave.

2.2. The Claimant relies on the following principal factual events:

2.2.1. The ultimatum made to her on 12 May 2016 by Mr Hiscox that she should either accept a part-time post or be made redundant;

2.2.2. The failure of the Second Respondent to inform her within a reasonable time that the secondment to Marks and Spencer was anticipated to end in March 2017;

2.2.3. The re-issuing of that ultimatum on 2 June 2016 by Mr Irving;

2.2.4. The failure to offer any alternative role;

2.2.5. The failure to progress the grievance she raised on 26 May 2016;

2.2.6. The act of dismissal for redundancy, when there were alternative vacancies in roles she was capable of performing;

2.2.7. The failure of the First Respondent to re-engage her.

2.3. It is the Claimant's case that:

2.3.1. each of those events was an act of direct maternity, alternatively sex discrimination;

2.3.2. to the extent that she needs to she will rely on a hypothetical comparator;

2.3.3. the dismissal was unfair;

2.3.4. the failure to re-engage was a breach of contract (the Claimant was relying on the breach of agreement not as a head of claim itself, but in support of her claim of unfair dismissal).

3. At the commencement of the hearing, these issues were discussed with the parties. It was identified that the Claimant was bringing her unfair dismissal claim under section 99 of the Employment Rights Act 1996 read together with Regulations 10 and 20 of the Maternity and Parental Leave Regulations 1999 – in other words, she claimed she had been automatically unfairly dismissed because the Respondent had failed to offer her a suitable alternative vacancy. Alternatively, the Claimant was bringing her unfair dismissal claim under section 98 of the Employment Rights Act 1996 – in other words that she had been unfairly dismissed under what might be described as the ordinary principles of unfair dismissal. The Claimant's discrimination complaints would be considered under sections 13 and 18 of the Equality Act 2010.

4. At the outset of the hearing Ms Nicol on behalf of the Respondents submitted that an additional issue for consideration would be whether the Respondents, or either of them, actually employed the Claimant. It was submitted that Marks & Spencer ("M & S") should be the correct employer given the degree of control it had over the Claimant's work activities.

Relevant findings of fact

5. The First Respondent is a data networking company. The Second Respondent (formerly named KMH Projects Limited, having changed its name to that set out in the title to these proceedings on 20 July 16) provides individuals to work for other organisations, in particular M & S and Fujitsu. It was conceded that at material times the Respondents were associated employers.
6. The Claimant commenced employment with the First Respondent on 17 September 2007. On 1 August 2009 she transferred to the Second Respondent and thereafter provided her labour to M & S working as an Administrative Assistant in Paddington 5 days each week. The work she undertook was mainly in relation to the M & S Questa system. She took direct instructions from M & S management, latterly from Beulah Keane, and had limited contact with the Second Respondent's management. However, at all material times she worked under a written contract of employment with the Second Respondent which set out her salary, her working hours, her holiday entitlement, notice requirements and other matters relevant to her employment such as the entitlement to join the pension scheme and private medical insurance. According to her contract of employment, the Claimant was required to comply with the Second Respondent's staff handbook issued to employees. (The bundle of documents before the Tribunal also included a comprehensively drafted contract of employment dated March 2015, which, it was said, had not been issued to the Claimant. That contract contained, among other things, post termination restrictions). At all material times, the Claimant was paid by the Second Respondent and claimed expenses from them. Her annual salary at the termination of her employment was £22,400 gross.
7. A feature of the variously dated contracts of employment issued to the Claimant by the Second Respondent was that her employment would run in conjunction with the M & S contract. The contract between the Second Respondent and M & S was for services to be provided by individuals, mainly Project Managers, but also for the provision of the Claimant's services. This contract had been renewed from 1 April each year since 2002. Given its longevity, and the relationship he had built with M & S, Mr Hiscox was optimistic that the contract would continue to be renewed annually.
8. The Claimant's case is that Peter Hiscox had agreed that if and when M & S no longer required her services, she would be re-engaged by the First Respondent. However, in evidence Mr Hiscox denied that any such agreement had been reached and the Claimant was unable to provide any firm details of such an agreement and could refer to no documents evidencing it. On the balance of probabilities, the Tribunal concludes that no such agreement had been reached; had such an agreement been reached and was considered to be legally binding, it is more likely than not that it would have been put in writing or referred to by the Claimant in later correspondence.
9. In early to mid-2015, the Claimant informed Mr Hiscox that she was pregnant. At the time, the Claimant thought she would like to take 9 months maternity leave.

10. In August 2015, M & S informed Mr Hiscox that the Questa system was going through a big change and that they were looking at other systems to replace it. M & S also told Mr Hiscox that cover would not be required during the Claimant's maternity leave absence. The changes to the Questa system were no surprise to the Claimant who had been involved in those changes and was aware of tenders for new systems. At this stage, M & S's future requirement for the Claimant's services were in question; whilst it was thought that there would be no future requirement for the Claimant, M & S said they would be in a better position to know for sure by the time the Claimant was due to return from maternity leave. Mr Hiscox remained optimistic that he would be able to place the Claimant in an alternative administrative role within M & S regardless of the fact that Questa was being replaced.
11. The Claimant commenced maternity leave on 18 Sept 2015.
12. On 22 April 2016, M & S made it clear that the Claimant's previous role was no longer available but that there was another project available which would involve her working at home or at the Second Respondent's premises in Maidstone. The Second Respondent informed the Claimant of the new role which she thought would be a good opportunity for her. However, it transpired that the new role would require the Claimant for only 3 days each week (in the event, the requirement was increased to 4 days a week for 8 weeks). Mr Hiscox had a brief meeting with the Claimant on 12 May 2016; it had been anticipated that Mr Irving would also be at the meeting but did not attend due to being unwell and having had to go to hospital. At this meeting, the Claimant asked about alternative employment and told Mr Hiscox that she would be prepared to work in the First Respondent's warehouse; Mr Hiscox replied that he could not have someone working in the warehouse on the Claimant's earnings working alongside someone on about £16,000 per annum. Having heard the evidence, and considered in particular what the Claimant had to say in her written grievance, the Tribunal finds on balance of probabilities that Mr Hiscox did make it clear to the Claimant that she could have a job in the warehouse on a salary of £17,000 per annum. Mention was also made of an engineering role but there was no credible evidence before the Tribunal to suggest that such a role might be suitable for the Claimant.
13. The Tribunal heard disputed evidence as to whether or not the Claimant had been insistent that she should return to work in a position working 5 days each week on the same salary. On the balance of probabilities, the Tribunal prefers the evidence of Mr Hiscox that this is what the Claimant was demanding. The Tribunal notes that in her grievance, referred to below, the Claimant set out what she considered to be her statutory right, namely the right to return to work to her job or a similar job (if the old job is no longer available) on the "same or better conditions" and that the work options she had received so far had contravened those rights. The Tribunal pauses at this point to note that this is not an entirely accurate description of an employee's statutory rights; in a redundancy situation, the obligation on the employer is to offer suitable work where there is a suitable alternative vacancy. This is set under the heading "applicable law" below.
14. Mr Hiscox made enquiries of the First Respondent to see if there was any alternative employment for the Claimant but was told there was not. In the event, the information he received was incorrect. As the Claimant later

discovered, the First Respondent was seeking, notably, a Sales Co-ordinator and a Telesales Executive, these roles later becoming combined, work which the Claimant could have undertaken.

15. The Claimant wanted Mr Hiscox to set out her options in writing and he did so making it clear that the Claimant's existing position would become redundant, detailing the 3 day role with M & S which was on offer, and that in the meantime that he was trying to find a 5 day a week role for the Claimant. Mr Hiscox remained optimistic that this would be the case.
16. By letter dated 26 May 2016, the Claimant raised a grievance. She expressed her disappointment that she had been told by Mr Hiscox that she could have a job in the warehouse for £17,000 per annum, that she had not been offered a full-time position, and that her statutory rights had been contravened as referred to above. She also complained about the meeting that had been held on 12 May 2016 and Mr Hiscox's aggressive tone of voice. She requested an update on available options.
17. It was decided that Mr Irving should meet with the Claimant. He therefore invited the Claimant to a meeting to be held on 2 June 2016. Mr Irving informed the Claimant of her right to be accompanied by a colleague or trade union representative. At the meeting, Mr Irving dealt with matters informally – he told the Tribunal he had been trying to mediate on the Second Respondent's behalf as a friend. In the event, Mr Irving re-iterated the option of the Claimant working 3 days a week for M & S and told the Claimant that there were no vacancies within the First Respondent (as had been communicated to him by Mr Hiscox) but that Mr Hiscox was doing his utmost to find a full-time position for the Claimant at M & S. Mr Irving told the Claimant, based on his mistaken understanding at the time, that there was no obligation upon the Second Respondent to try and find alternative employment within the First Respondent. In the circumstances, the only other option was redundancy.
18. Later the same day, Mr Irving emailed the Claimant outlining the discussion that had taken place at the meeting, making it clear that there was no alternative employment within the First Respondent and that redundancy had to be considered. Mr Irving set out the payments to which the Claimant would be entitled if she wished to take the redundancy option.
19. The Claimant replied the following day to say that she would accept redundancy.
20. By email dated 10 June the Claimant asked for the points she had raised in her grievance to be addressed. Mr Irving replied that they were taking legal advice and would reply within 10 days.
21. In the event the Claimant remained on maternity leave until her employment ended on 18 June 2016.
22. After her employment had ended, the Claimant discovered the alternative employment that had been available with the Second Respondent at relevant times.

23. Mr Hiscox subsequently made efforts for mediation to take place between the Claimant and a human resources advisor in order to resolve the Claimant's grievance but in the event no such mediation took place.

## **Applicable law**

### *Employment status*

24. Section 230(1) of the Employment Rights Act 1996 defines "employee" as an individual who entered into or works under a contract of employment. Sub-section (2) defines "Contract of Employment" as a contract of service or apprenticeship, whether expressed or implied, and whether oral or in writing.

25. There is extensive case law on the question of who is an employee. As early as 1968 the case of Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance constructed what has become known as the multiple test. This has been developed over the years and the concept of an "irreducible minimum" has been introduced. This approach was endorsed by the House of Lords in the case Carmichael v National Power plc 2000 IRLR 43.

26. In the case of Montgomery v Johnson Underwood Ltd 2001 IRLR 269 the Court of Appeal held that mutuality of obligation and control are the irreducible minimum legal requirements for the existence of a contract of employment. The Court of Appeal confirmed that the guidance in Ready-Mixed Concrete, as approved in Carmichael, was the best guide to be followed by Tribunals.

27. That guidance requires three conditions to be fulfilled. Firstly, that the individual agrees that, in consideration for a wage or other remuneration, he will provide his own work and skill in the performance of some service for the employer: "mutuality of obligation". Secondly, the individual agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree, "to make that other master". Thirdly, the other provisions of the contract are to be consistent with its being a contract of service.

28. The Tribunal must consider the whole picture to see whether a contract of employment emerges, although mutuality of obligation and control must be identified to a sufficient extent in order for a contract of employment to exist.

29. As to whether an agency worker is employed by the end-user, the Court of Appeal held in the case of James v Greenwich London Borough Council [2007] ICR 577 that a Tribunal will only be entitled to imply an employment contract between an agency worker and an end-user where it is necessary to do so to give business reality to the situation.

30. Under section 83(2) of the Equality Act 2010, employment means, insofar as relevant in this case, employment under a contract of employment or a contract personally to do work.

### *Prohibited acts under the Equality Act 2010*

31. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his:

- 31.1. As to the terms of her employment;
- 31.2. In the way he affords her access, or by not affording her access, to opportunities to promotion, transfer or training or for receiving any other benefit, facility or services;
- 31.3. By dismissing her; or
- 31.4. By subjecting her to any other detriment.

32. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, the House of Lords held that in order for a disadvantage to qualify as a detriment the Tribunal must find that by reason of the act 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. An unjustified sense of grievance cannot amount to a detriment.

*Pregnancy/maternity discrimination*

33. Section 18(4) of the Equality Act 2010 provides, among other things, that a person discriminates against a woman if he treats her unfavourably because she is exercising the right to ordinary or additional maternity leave.

34. Section 18(7) provides that section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as it is for a reason mentioned in subsection (4).

*Direct sex discrimination*

35. Sex is a protected characteristic. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination: a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

*“Because of”*

36. The House of Lords has considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council’s motive, which had been benign, was beside the point. In that case the council had applied a criterion which, although on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

37. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged

discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502.

38. These principles of causation equally apply to claims under section 18 of the Equality Act 2010; see: Indigo Design Build and Management Limited v Martinez [2014] EAT 0020/14.
39. The discriminatory ground does not have to be the only factor operating on the discriminator's mind so as to lead him to act in the way complained of. It is enough if it has had a significant influence; see Onu v Akwivu [2014] ICR 571.

*“Automatic” unfair dismissal*

40. Section 99 of the Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or the principal reason is of a prescribed kind.
41. Regulation 20 of the Maternity and Parental Leave Regulations 1999 sets out some of those prescribed reasons. In particular, and insofar as relevant to this case, Regulation 20(1)(b) provides that an employee shall be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is that the employee is redundant and Regulation 10 had not been complied with.
42. Regulation 10 applies when, during an employee's ordinary or additional maternity leave, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment. Under paragraph Regulation 10(2):

*Where there is a suitable alternative 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)*

Paragraph (3) provides:

*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*

43. At first blush, it might be thought that these provisions require an employer having an alternative vacancy to take steps to ensure the terms of a vacancy are adjusted to comply with the provisions of paragraph (3) such that they are



not substantially less favourable for an employee facing redundancy when on maternity leave. However, that would not be a correct analysis of the law. In Simpson v Endsleigh Insurance Services [2011] ICR 75, the Employment Appeal Tribunal explained that Regulations 10(3)(a) and 10(3)(b) must be read together. In its view, the requirement to offer a 'suitable alternative vacancy' under Regulation 10(2) can only sensibly be tested if the offer is coupled with a new contract which complies with Regulation 10(3)(b). Thus the Employment Appeal Tribunal made it clear that if any of the terms and conditions associated with a vacancy are substantially less favourable, the employee is not entitled to be offered the position, even if the work is otherwise suitable for her. The Employment Appeal Tribunal also made it clear that a Tribunal must assess the suitability of available vacancies from the perspective of an objective employer, rather than from the employee's perspective.

*"Ordinary" unfair dismissal*

44. Under section 98(1) of the Employment Rights Act 1996 it is for the employer to show the reason for the dismissal and that it is either for a reason falling within section 98(2) or for some other substantial reason of kind such as to justify the dismissal of the employee holding the position she held. Redundancy is a potentially fair reason falling within section 98(2).
45. Section 139(1)(b)(i) of the Employment Rights Act 1996 provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.
46. In Murray v Foyle Meats Ltd [1999] ICR 827, Lord Irvine approved of the ruling in Safeway Stores plc v Burrell [1997] ICR 523 and held that section 139 of the Employment Rights Act 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.
47. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.
48. In Williams v Compair Maxam Ltd [1982] ICR 156 the Employment Appeal Tribunal laid down the matters which a reasonable employer might be expected to consider in making redundancy dismissals:
  - 48.1. Whether, if selection from a pool of employees carrying out similar work is necessary, the selection criteria were objectively chosen and fairly applied;

- 48.2. Whether the employees were given as much warning as possible and consulted about the redundancy;
- 48.3. Whether, if there was a union, the union's view was sought;
- 48.4. Whether any alternative work was available.
49. However, in determining the question of reasonableness, it is not for the Tribunal to impose its standards and decide whether the employer should have behaved differently. Instead it has to ask whether the dismissal lay within the range of conduct which a reasonable employer could have adopted. The Tribunal must also bear in mind that a failure to act in accordance with one or more of the principles set out in Williams will not necessarily lead to the conclusion that the dismissal was unfair. The Tribunal must look at the circumstances of the case in the round.
50. If the issue of alternative employment is raised, it must be for the employee to say what job, or what kind of job, he believes was available and give evidence to the effect that he would have taken such a job: that, after all, is something which is primarily within his knowledge: Virgin Media Ltd v Seddington and Eland UKEAT/0539/08/DM.
51. The Polkey principle established in the House of Lords is that if a dismissal is found to have been unfair by reason of procedural defects then the fact that the employer might or would have dismissed the employee in any event had a fair procedure been followed goes to the question of remedy and compensation reduced to reflect that fact.
52. The relevant principles of law relating to a Polkey deduction as set out in Software v 2000 Limited v Andrews & Others [2007] IRLR 568 are, insofar as they are relevant to this case:
- (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
  - (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee herself.
  - (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the Tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.
  - (4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and

reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) Having considered the evidence, the Tribunal may determine:

- (a) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself.
- (b) That employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

## **Conclusion and further findings of fact**

### *Employment status*

53. It is clear that at all material times the parties were of the view that the Claimant was employed by the Second Respondent. It was only at the commencement of the hearing that Ms Nicol raised the Claimant's employment status as an issue. It was unclear whether, by the end of the hearing, Ms Nicol was still pursuing the argument, not least because she made no submissions on it. Nevertheless, since it was an issue raised, it is one the Tribunal has considered.

54. The Tribunal has no hesitation in concluding that the Second Respondent was the Claimant's employer. The Second Respondent had issued the Claimant with a number of written contracts which were expressly said to be contracts of employment. The Claimant was working under those contracts; in particular, she was assigned to work in M & S in consideration for remuneration paid by the Second Respondent. Her work for the Second Respondent no doubt realised a margin of profit for the Second Respondent. In the Tribunal's view there was sufficient mutuality of obligation between the Claimant and the Second Respondent. There was no such mutuality between the Claimant and M & S, not least because M & S was not liable for payment of the Claimant's salary and expenses.

55. Although the Claimant's work was not carried out under the Second Respondent's direct supervision and control, the Second Respondent had ultimate contractual control over the Claimant, including the power to dismiss her which it clearly exercised in this case.

56. The arrangements between the parties represented the actual relationship between them. There would be no necessity in this case to imply an employment contract between the Claimant and M & S in order to give business reality to the situation.

57. In light of the Tribunal's factual finding that no agreement had been reached between the Claimant and Mr Hiscox that the Claimant would return to work

for the First Respondent in the event that M & S no longer required her services, the First Respondent has no liability in this case and will be dismissed from proceedings.

*Maternity and/or sex discrimination*

58. The Tribunal concludes that the provisions of section 13 of the Equality Act 2010 do not apply in this case. The alleged detrimental treatment took place during the Claimant's maternity leave period which means, under section 18(7), that section 13 insofar as it relates to sex discrimination is dis-applied.

59. The Tribunal next considers whether the Claimant was subjected to the detriments alleged.

59.1. With regard to the alleged ultimatum of 12 May 2016 and its alleged repetition on 2 June 2016, at these meetings the Claimant was being told of the options as they were understood by the parties at the time, namely that the only alternative employment available was a part-time role with M & S or a warehouse position on a modest salary which the Claimant made tolerably clear that she would not accept. The Tribunal has formed the impression that the Claimant mistakenly thought her statutory right extended to being paid the same salary regardless of the nature of the alternative employment offered to her. Being informed of these options did not amount to an ultimatum such that it can be said that the Claimant was subjected to a detriment when judged by the Shamoon standard.

59.2. With regard to the allegation that the Second Respondent failed to inform the Claimant within a reasonable time that the secondment to M & S was anticipated to end in March 2017, the Tribunal is unable to accept that the Claimant suffered a detriment or that she could have reasonably have perceived it as such. She had worked since 2009 under a contract which made it clear that her employment was in conjunction with the M & S contract which she knew was renewed on an annual basis.

59.3. The Tribunal is satisfied that the Second Respondent failed to offer or notify the Claimant of alternative roles within the First Respondent. This was because Mr Hiscox had been given incorrect information. This was clearly a detriment suffered by the Claimant.

59.4. The Second Respondent made little effort to deal with the Claimant's grievance in a meaningful way. Mr Irving approached the matter informally and his notes of the meeting suggest a mere acknowledgment of the issues and no attempt to address all the points raised. This failure amounted to a detriment.

59.5. There is no doubt that the Claimant was dismissed. Nor is there any doubt, as accepted by Mr Hiscox when giving evidence, that there was in fact alternative employment within the First Respondent that the Claimant was capable of doing.

59.6. The Tribunal has found as fact that there was no agreement that the First Respondent would re-engage her and this allegation

cannot amount to a detriment. With regard to the fact that the Claimant was not re-engaged by the First Respondent when male employees had been so re-engaged in the past, the evidence suggested that there were alternative roles known to have been available for them at the time.

60. The Tribunal accepts that the detriments established amounted to unfavourable treatment of the Claimant. However, the Tribunal must go on to determine the reason why the Claimant was subjected to the detriments which she has established, namely: whether the Respondent failed to offer her an alternative role, failed to progress her grievance, or dismissed her because she was exercising her right to maternity leave. There was no credible evidence to suggest that either Mr Hiscox or Mr Irving, consciously or unconsciously, acted as they did because the Claimant was exercising her right to maternity leave. Rather, the Claimant's maternity leave was simply the context and background against which the redundancy situation and their dealings with the Claimant arose. The Claimant was not offered alternative employment with the First Respondent because of a mistaken belief by Mr Hiscox and Mr Irving; redundancy was offered and accepted, resulting in the Claimant's dismissal, on that basis. As for the failure to progress the Claimant's grievance, there was no credible evidence adduced to suggest that the failure had anything whatsoever to do with the Claimant's maternity leave.

61. The Tribunal was concerned that but for the Claimant not having been on maternity leave, redundancy consultation might have commenced sooner. However, this was not an allegation of discrimination which had been identified at the preliminary hearing for determination by this Tribunal and was not an allegation put forward by the Claimant in evidence. In any event, the Tribunal would be wrong to conclude that any such failure was discriminatory without having regard to the reason why consultation did not begin sooner. The Tribunal accepts that it only became clear on 22 April 2016 that M & S no longer required the Claimant's services under the previous contract whereupon Mr Hiscox promptly commenced discussions with the Claimant; hitherto, Mr Hiscox was confident that an alternative role could be found for the Claimant should the M & S contract end.

62. The Tribunal concludes that the Claimant was not unlawfully discriminated against because she was exercising her right to maternity leave.

*"Automatic" unfair dismissal*

63. The Claimant clearly faced redundancy in that she was the only individual in a role which was no longer required. She was redundant within the meaning set out in section 139 of the Employment Rights Act 1996.

64. The most pertinent issue raised during the hearing concerned the fact that alternative employment was available for the Claimant within the First Respondent despite the mistaken belief of Mr Hiscox and Mr Irving that it was not. There was clearly a failure of communication between the First and Second Respondent and a failure by Mr Hiscox to take reasonable steps to ensure the information he had been given was accurate. In the Tribunal's view, it would not be right for the Second Respondent to rely on its own failure to avoid what might otherwise give rise to an unfair dismissal.

65. However, having considered the alternative employment which was in fact available as identified by the Claimant, the Tribunal finds that they were not suitable alternative vacancies such as to fall within Regulation 10(3) of the Maternity and Parental Leave Regulations 1999: they would be on substantially less favourable terms, particularly in terms of applicable salary. In accordance with Simpson, the Tribunal concludes that Regulation 10 was not triggered. Accordingly, the Claimant was not automatically unfairly dismissed.

*Ordinary unfair dismissal*

66. Although it could be said that consultation was commenced as soon as it became clear that redundancy was on the cards, the Tribunal finds that such consultation as was carried out was cursory at best and consisted of little more than informing the Claimant of the situation; there was no credible evidence that the Claimant's views were positively sought.

67. Ms Nicol submitted that Mr Hiscox had taken reasonable steps to try and find the Claimant alternative employment by seeking a full time position with M & S and by enquiring of the First Respondent, a company with which Mr Hiscox had no active role. The Tribunal is unable to accept that submission: Mr Hiscox was a director of the First Respondent. The fact is that there was alternative employment which the Claimant could have undertaken but she was not informed about it. Mr Hiscox, acting as a reasonable employer, should have taken steps to ensure that the information he was being given was correct. After all, Mr Hiscox was a director of the First Respondent. Irrespective of the fact that Regulation 10 of the 1999 Regulations was not triggered in this case, the Second Respondent had an obligation to treat the Claimant fairly and this would mean making her aware of vacancies that might exist within an associated employer for which she might be suitable together with sufficient detail so that she could make an informed choice as to whether she would be interested in applying for them. The Second Respondent's failures in this regard, and the fact that the consultation was inadequate, fell outside the band of reasonableness expected of a reasonable employer. The Tribunal concludes that the Claimant's dismissal was unfair.

*Future conduct of these proceedings*

68. This case will be set down for a remedy hearing with a time estimate of half a day.

69. However, the parties are encouraged under Rule 3 of the Employment Tribunal Rules of Procedure 2013 to use the services of ACAS to settle the claim or otherwise reach agreement. To assist the parties, the Tribunal finds the following:

69.1. The Claimant received a statutory redundancy payment and will not therefore be entitled to a basic award;

69.2. Although the Claimant maintained that she should return to work in an alternative role with the same salary, as a matter of impression and judgment based on the material and evidence before it, the Tribunal concludes that had the Claimant been informed of the

details of the vacancies and been given the opportunity to consider them, she might well have taken the sales role for which she was suitable: the salary was not a great deal lower than her salary on the M & S contract; she had some previous experience in sales; the Tribunal notes in the event she took fresh employment with a new employer at a lower salary. The Tribunal concludes that there was a 75% likelihood that the Claimant would have been offered and accepted the combined vacant position of Sales Co-ordinator/Telesales on a gross salary of £18,000 per annum had it been brought to her attention. Thus the Claimant's loss of earnings going forward will be calculated at 75% of the difference between her net salary when working for the Second Respondent and the net salary she would have received had she taken the Sales Co-ordinator/Telesales job. This calculation is without prejudice to any argument or factual findings that the Claimant failed to mitigate her losses and/or that she has now in fact done so.

69.3. The Claimant will be entitled to compensation in the sum of £300 for loss of statutory rights as set out in her schedule of loss;

69.4. Compensation will be increased by 10% by reason of the Second Respondent's failure to comply with ACAS Code of Practice in relation to her grievance, in particular in that the Second Respondent failed to comply with:

69.4.1. paragraph 33 which requires employers to hold a formal meeting; and

69.4.2. paragraph 40 in that a decision was not communicated to the Claimant, in writing, without unreasonable delay, and set out what action the Second Respondent intended to take to resolve the grievance; and

69.4.3. paragraph 41 in that the Claimant was not told that she could appeal the outcome of the grievance.

69.5. The Tribunal will award costs in the Claimant's favour in the sum of £1,200 to be paid to her by the Second Respondent by way of reimbursement of Tribunal fees.

70. It is hoped therefore that the parties are able to reach settlement without recourse to further time and expense that a remedy hearing would incur. The parties are encouraged to commence settlement negotiations promptly and are required to notify the Tribunal immediately upon any settlement being reached.

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Employment Judge Pritchard  
Date 9 August 2017