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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs l Symons-Jones **v** **Open Energi Limited**

Heard at: London Central **On**: 6-9 November 2017

Before: Employment Judge P Stewart

Members: Ms K A Church
Mr S Ferns

Representation:

Claimants: In Person
Respondent: Mr M Keenan, Consultant

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims are dismissed.

REASONS

1. The Claimant started work for the Respondent Company on 1.February 2016, her employment ended on 31 March 2017. She was made redundant. She claims that her redundancy was discrimination brought against her on the grounds of her sex and/or pregnancy or maternity.

2. At a Preliminary Hearing (Case Management) held on 9 August 2017, Employment Judge Joanna Wade recorded that the complaint was of direct sex discrimination contrary to Section 13 of the Equality Act 2010 recording:

> *The Claimant says that she was made redundant because she was a woman. She would not have lost her job if she was:*
>
> *A man and/or*

A man who was planning to have children soon.

Her comparator is a hypothetical man in her role.

3. The Claimant also claimed in terms that it was discrimination on the grounds of marriage and also indirect discrimination. The Claimant agreed that she would confirm by 23 August whether she was pursuing those claims. She subsequently indicated that she wished to withdraw those claims and, on 4 September of 2017, the complaints of marriage discrimination and indirect sex discrimination were dismissed upon her withdrawal, the order being signed by Employment Judge Wade.

4. The Claimant is Australian, she was born in June 1985. In January 2016 she applied for and obtained Tier 2 (General – New Hires – Restricted) Visa for entry to work in the United Kingdom for the Respondent company as Policy Manager at a salary of £40,000 per year. The summary of her job description that was given in the Certificate of Sponsorship Details was "Monitor and Track Regulatory and Policy Developments related to demand side response. Represent Open Energi in all policy forms and clearly articulate the benefits of the technology. Review and provide response to consultation papers, discussions papers and policy statements. Analyse, assess and communicate high level business impacts and risks. Define strategy to maximise impact of policy work and determine messaging and positioning." The Claimant says that her recruitment with such a visa was due to the lack of applicable skills in this Country and the business needs of the Respondent in respect of energy policy.

5. The Claimant asserts that her 6 to 9 months of employment at the Respondent Company were positive: she performed well in her role, achieved her objectives and went above and beyond in creating a national and international profile for the Respondent. This was not contradicted by the Respondent. In the autumn of 2016, there was effected a round of redundancies within the company. The Claimant was, however, assured by her Line Manager, Chris Kimmett in an email dated 11 October 2016, that while there were changes going to be enacted over the coming weeks, she should be "crystal clear" that she should not be worried about her role at the Respondent. That assurance proved to be correct in that the Claimant was not included in the round of redundancies effected in or about the beginning of November of 2016.

6. However, the position of the Company in terms of finance was not good. We heard evidence from the Finance Director Mr Tom Saul, that the Company was "flat on its back". In the year ended 30 September 2015, the Company had had recorded a loss for the financial year of £7.3 million. In the following year ending 30 September 2016, the loss for that financial year had increased to £8.8 million.

7. The Claimant was ambitious: she wanted to obtain promotion to the management team within the organisation. She told the Tribunal that she was given positive encouragement, most notably from the Chief Executive Officer who told her to expect this shortly. We heard from Mr Ged Holmes,

one of three witnesses for the Respondent, who at the time was employed as the Respondent's management director (effectively, the CEO). He had implemented what was referred to as the first round of budget cuts and redundancies in November of 2016. He agreed to have a meeting with the Claimant shortly after he had outlined the restructuring process that he had carried out to the staff. At that meeting, the Claimant sought advice from him on how to develop her career ultimately and join the Respondent's management team. He told us:

> *9. … The conversation led into the subject of career development, with the Claimant stating she was ambitious and had aspirations to be on the management team. I explained the construct of the current management team and the fact that there was not currently a role or vacancy available. However, I admired her determination and I agreed to work with the Claimant on her development and provide a personal development plan template (this was sketched out and handed to the Claimant at the meeting). I recall informing the Claimant that the first thing she needed to do was to get a clearer view of what she wanted to do in terms of progression and in what particular function or functions. I would then be happy to support in terms of the relevant experience, training and personal development. It was agreed that the Claimant would go away and work on her personal development plan and come back to me when she was ready to discuss further. To be clear, the Claimant never followed up on that conversation or came back with any input to a PDP.*
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> *10. In addition, I discussed the possibility of the Claimant sitting in on some management meetings as an observer. This would help the Claimant to understand the functions of the management team and prepare her better for the future. The Claimant confirmed she would like to do that. I further advised the Claimant that before I could invite her to the management meetings I would look to seek the agreement of her then Line Manager.*

8. In so far as the Claimant's version of events at that meeting differs from that of Mr Holmes, we prefer the evidence of Mr Holmes. While Mr Holmes may have encouraged her to think about preparing for promotion he did not provide any assurance that she would shortly be promoted to join the senior management team.

9. Outside of the workplace, the Claimant's life was proceeding apace. She had formed a relationship with Mr Darren Jones, the gentleman who now is her husband. He was a solicitor working for British Telecomm. They announced their engagement at some stage during the second half of 2016 and in that period the Claimant became pregnant but, sadly, miscarried on 28 October 2016.

10. On 7 November 2016, after a short period of hospitalisation occasioned by the miscarriage, the Claimant returned to work and asked Mr Holmes if she might be permitted to relocate her job base to Bristol. The Claimant's husband made a similar request of his employer at BT. While Mr Holmes did not provide an answer for several weeks, the Claimant withdrew her application to relocate to Bristol at the end of November, because BT had rejected Mr Jones' request.

11. Although the Certificate of Sponsorship details that had been compiled for the purpose of the Tier 2 Visa specified that her salary was £40,000 per

annum, the written statement of her contract of employment, which the Claimant signed on 1 February 2016, records that her rate of pay was £50,000 gross per annum.

12. When the Claimant withdrew her application to relocate to Bristol, she asked Mr Holmes for a pay rise. It seems that the rationale for this request related to the revision of the Claimant's domestic agenda. The relocation to Bristol, had it happened, would have cost the Respondent money because it would have provided some financial assistance to her to relocate. Such money as was not being spent in assisting her relocation was therefore available to provide assistance to the Claimant because, now that she and her fiancé would be staying in London, they would occupy a flat in London by themselves and a third party who, until then had lived in the property, would move out. Previously, this third party had paid rent. So, with the Claimant being no longer in receipt of such rent and the Respondent no longer having to budget for assisting the Claimant to move to Bristol, the Claimant sought a pay increase of some £12,500 per annum.

13. The Claimant and Mr Jones determined that they should have a wedding which would be celebrated in both Bristol and in Sydney Australia. The Claimant appears to have been on cordial terms with the colleagues with whom she worked and the three witnesses from the Respondent from whom we heard, Mr David Hill, Mr Tom Saul and Mr Ged Holmes were all invited to her wedding along with one other. Two of those who were invited were unable to attend, but two did attend.

14. The Claimant was taking leave from 1 February of 2017 through to 27 February and her Line Manager, Mr Chris Kimmett, emailed her on 4 February in the morning saying: "I will be upset if I see you answer another email, there is nothing that can't wait" followed by a smiley emoticon.

15. The Claimant went off to Australia to enjoy her honeymoon. She knew the Respondent faced considerable financial straits but, having survived herself the first round of redundancies in November 2016, feeling confident of continued employment. However, the principal investor in the Respondent company was not as sanguine as she was about the Respondent's future. It appointed a Mr Richard Haddon to conduct a review of the Respondent's business and, after he had reported to the principal shareholder, he was installed in January of 2017 as the Executive Chairman with a mandate to effect a turnaround in the Company's fortune.

16. Mr Haddon conducted a meeting with the Senior Management team on 9 February 2017. According to the evidence that we received, he asked the Senior Management Team a seemingly simple question: "What was the [Respondent] company?" To this, he received various answers. No-one gave what he considered to be the right answer which was that "The Respondent company was a money-making machine … … which was broken". The role of the Senior Management team was to mend it. He arranged for the team to discuss ways in which they could redevelop the strategy for the Company that would reduce the number of personnel employed by the Company from to 31, down from 45.

17. Mr Ged Holmes, whom Mr Haddon was replacing, was, at this stage, in the process of leaving the Company. However, he attended both the start and the end of that meeting. At the end, he was prevailed upon to manage the redundancy process that would have to be conducted as a result of the decisions taken by the Senior Management team under the tuition of Mr Richard Haddon.

18. Mr Holmes produced a document entitled Redundancy Business Case February 2017, with which was accompanied several pieces of information. Firstly, a organisation chart showing the positions that various people held within the organisation. Secondly, there was a list of the personnel together with their start date, the time they had been employed and their salary and other allowances. Thirdly, there was a list of those to be made redundant and those who were in redundancy pools and therefore might be made redundant. On the organisation chart, various of the boxes giving the individual's name and title within the Company were shaded. The shading indicated positions which, on the 9 February, the Senior Management team had determined that the company could do without.

19. On the 10 February, Mr Haddon sent to all staff, including the Claimant a short email entitled update discussion on Monday saying:

> *As you know I am met with the Senior Management Team yesterday to discuss the way forward for the Company and it reconfirmed my point shared with you in the recent energiser note. Although I will not be able to provide detail until a few weeks' time, I am happy to provide an update on Monday and answer any questions that you may have. Therefore, just after 9 a.m. on Monday, all who would like to be involved can gather with me in the office. As always I am also available by email or on my mobile if that is more convenient".*

20. On the 13 February, Ms Xanthe Banham of the HR department sent to an email to all staff inviting them to a meeting to be held that morning. Those who might be out of the office but able to dial in were invited to dial in to a specified number to join the meeting through a conference call. In such manner was the Claimant, on honeymoon in Sydney, Australia, invited to join the conference all.

21. As a result, the Claimant and her husband listened in to the conference call on 13 February 2016. Both made notes of the various points that were advanced at that meeting on two sheets of paper. The Claimant recorded first that Mr Richard Haddon, the Executive Chairman, spoke. Those points Mr Haddon made were noted by her husband. The first of these was Mr Haddon mentioning that the company was although "he used that word lightly" because according to the note that Mr Jones made, the company never made any money, lost about £7 million last year (of £40 million invested). The note included Mr Haddon's observation that, at present, the more turnover there was, the less profit there was. At the bottom of the first page of these notes, Mr Jones recorded Mr Haddon saying "ultimately need less people, there was a need to strip it to the essential position quickly with dignity and discretely and professionally". Mr Jones recorded Mr Haddon saying staff were in three categories, one was ring fenced which equalled "safe". The second category was "job pool" where there would be simple

selection criteria. The third category was composed of jobs that were not clearly required and, for those job-holders, it would be a quick redundancy. On the second page of these notes, there was recorded an observation by Mr Haddon that "we have created a new organisation chart". The Claimant wrote after her husband's points that "£40 million pounds is written off, it was written off last week, we are not going to be making profit tomorrow – I think it is going to take 2 years".

22. The Claimant arrived back from Australia on 21 February; on 28 February she had a meeting with Mr Ged Holmes and Mr David Hill concerning the proposed redundancy. She was informed that the Company was entering into a consultation phase where they were continuing to look at all options to avoid redundancy and she was asked that consider any ideas as to how we may avoid them. The Claimant was provided with a letter which was dated 27 February. The letter made reference to a consultation meeting held on 27 February by conference call – this was a mistake in that the conference call to which the Claimant and her husband had listened in whilst in Sydney was on 13 February. It was agreed they would have a further meeting on the 6 March 2017. On the 2 March 2017, the Claimant wrote to Mr Hill complaining about the lack of due process, she noted that it was made clear to her at the meeting on the 28 February that her role had "ceased" and she expressed reasons as to why she had no confidence that any suggestions she would put forward would be taken seriously. She continued in her letter in the following terms:-

> *This is clearly disappointing not least because it is only a matter of a few months ago that I was told that policy was one of the six core requirements for Open Energi – crucial to the opening up of new markets needed to generate new revenue streams. I had been told that I was being considered for a place on the management committee because policy was so core to Open Energi and I offered a number of suggestions as to how to enhance my role by making it income generating (on the basis of grant applications and the work that I am currently doing in raising Open Energi's profile with the Government as part of its industrial strategy consultation).*
>
> *Yet in your letter of 28 February, you claim that the reason for redundancy is because "the Company is changing its strategic direction, has a need to reduce its cost base and focusing on development technology for new markets". My role in engaging with Government, Regulators, the Press and Industry Stakeholders is without question key to changes in strategic direction and in developing technologies for new markets – not least because of the emphasis the UK Government has placed on business such as Open Energi as part of its industrial strategy. I fail to see, therefore, how my redundancy is justified. The only remaining selection criteria for my redundancy is therefore cost cutting.*

23. At the meeting on the 6 March 2017, the Claimant was accompanied by her husband, Mr Jones. Mr Holmes was present, as was Mr Hill. Mr Holmes opened the meeting by explaining that this was a follow-on meeting from that held on 28 February. The reasons why the Company was undertaking a restructure were stated and it was said that, despite the Company's best efforts, they found no alternative to restructuring by means of redundancy. The Claimant was informed by Mr Holmes that her role was now redundant and the Company would be issuing her with redundancy notice. At this point the Claimant, who had no questions or comments to make, was informed of

her right to appeal the decision to Richard Haddon, the Executive Chairman. At this point, the note the Respondent made of this meeting records Mr Jones informing those present that he was a lawyer and he would be representing the Claimant and, if unsuccessful at appeal, they would be pursing the company via an Industrial Tribunal. When the representatives for the company asked what the basis of the claim would be, Mr Jones said that would be made clear in writing in the coming days.

24. Mr Holmes said he would speak with Mr Haddon try to facilitate an appeal meeting at the earliest opportunity. Mr Jones informed Mr Hill and Mr Holmes that the Claimant was being represented by Cherie Blair QC and that it was "maybe in our interests to avoid the negative publicity that a Tribunal could lead to and that maybe in everyone's interest to settle the matter with compensation payment." The meeting closed with the Claimant beng presented with her redundancy notice and with the statement of a commitment to get an appeal hearing set up at the earliest opportunity.

25. In fact, Mr Haddon did not conduct the hearing of the appeal. Instead, it was conducted by Ms Carmel Walberg within an organisation called "HRFace2Face". The date of the meeting was 16 March 2017 and Ms Walberg produced a report dated 28 March 2017 which comprised 7 closely typed pages and concluded that the appeal should be dismissed.

The Law

26. The Claimant's complaint is of direct discrimination in that she was made redundant because of the protected characteristics of her sex and of her pregnancy and maternity. We were referred to paragraph 13 of the Equality Act 2010 and also to paragraph 136 of the Equality Act 2010 *sub paragraphs* 1, 2 and 3. Mr Kennan, representing the Respondent, referred us to the House of Lords decision in **Murray and another v Foyle Meats Limited** [1990] UKHL30 and the Claimant referred us to the case of **Efobi v Royal Mail Group Limited** UK EAT/0203/16/DA, a decision of Mrs Justice Elizabeth Laing sitting alone, with particular reference to paragraph 78 of that decision which discusses Section 136 (2) and the burden of proof.

Discussion

27. Both the Claimant, who was representing herself, and Mr Keenan, representing the Respondents, provided their submissions in writing at the close of the case and we are very grateful to both of them.

28. The Claimant in her closing submissions asserted that the facts disclosed that the Respondent treated men differently to the way they treated women during the redundancy process. The first point that she made under this head was that a man, one Seb Blake, was on a period of "extensive" leave and therefore was "uncontactable" at the same time as the Claimant was on a period of "extensive" leave and was also "uncontactable". This related to the fact that, on the organisation chart produced by Mr Holmes and distributed to the company, two Commercial Analysts, Mr Blake and Mr Dago Cedillios, who reported to Mr Kimmet (as did the Claimant who also reported to Mr David Hill) were in a redundancy pool of two for one Commercial Analyst

post. Against that pool was the comment that selection would await Mr Blake's return from leave.

29. The Claimant sought to contrast the treatment afforded Mr Blake with the treatment afforded her. On that list, hers was one of four single post holders who were considered superfluous to the company.

30. We heard that Mr Blake was on a period of 6 months unpaid leave and he was in South America. We therefore could understand why references were made to him being on a period of extensive leave and being uncontactable. The Claimant, however, at the time that she had listened in on the conference call from Sydney was on a period of some 3 weeks leave at maximum. We do not regard such leave as being "extensive", Further, self-evidently, she was not "uncontactable", She was on email and was able to respond to the invitation issued to log in into the conference call. That would allowed her to hear the points being made by Mr Richard Haddon and others at the meeting held in London.

31. Additionally, Mr Blake was in the pool along with the other Commercial Analyst. One person from that pool was to be made redundant. There was a need for the Company to be fair and conduct a consultation with both people in the pool at the same time. That could not be achieved until the end of the period when Mr Blake was away. It therefore seems to us that there was nothing inherently unfair about delaying the decision in respect of Mr Blake until he had returned and was available for consultation. There was no similar pool in respect of the single post holder for the four single post holders. The Claimant who. by this stage, had had her post renamed "Director of Public Policy", was not in a pool with other people. The Senior Management team had considered her post to be one that was not required and could be sacrificed because of the need to save money.

32. The Claimant asserts that Mr Blake who "protected" until his return and was never made redundant. She makes the point that "I was not protected, was asked to dial in from my honeymoon and was made redundant." The use of the term "protected" is in our view unjustified. The delay in the consultation from Mr Blake until the end of his period of unpaid leave of absence when consultation could be conducted did not give protection against the possibility of redundancy: it merely allowed the Company to act fairly to both Mr Blake and the other person in the pool. For the Claimant to say that she was "not protected" suggests that in some way she was put at a disadvantage. We do not consider this to be the case. She was better informed than was Mr Blake: she was able to dial in and make notes on the presentation that Mr Haddon had provided on 13 February. She was not in competition with Mr Blake for a post, he was in a different pool and she was in no pool whatsoever. Thus we reject the comparison with Mr Blake as indicative of some preference for a male individual over the Claimant as female.

33. In addition, the Claimant cites the fact that a Mr Steve Smulovic was "allowed to decide how he was to be considered for redundancy." In the event that he was not made redundant. The Claimant notes that Mr Smulovic was not made redundant.

34. On the organisation chart that Mr Holmes had circulated, Mr Smulovic was shown as being a Portfolio Manager to whom there were two Project Managers reporting and also certain other individuals three of them being Water Designers, one being a Design Manager and the one being a Solutions Designer. In the list of redundancy pools, three Water Designers were listed in a pool and two of the Project Managers were listed as being in the pool. Against Mr Smulovic's name on the chart was this comment "Steve Smulovic should be offered the option of being pooled with the following Project Managers if he expresses an interest in a Project Manager role."

35. We regarded this as being an indication that the Company was attempting to be fair in the redundancy process to Mr Smulovic: if he were not to be permitted to drop down and be compared with two Project Managers in a pool of Project Managers, then he would be considered as a single post holder and it would have been a "quick redundancy" for him. That outcome may or may not have been preferable to him. Being offered the opportunity to be considered in the pool with Project Managers allowed him the possibility of being retained within the company but only if he was prepared to accept a lower grade post. We did not consider that this of itself indicated that Mr Smulovic, because he was a man, was being treated differently to the way in which the Claimant was treated.

36. The Claimant continued by making the following point under this heading "My protected characteristics were at the forefront of the mind of the Respondent". She then asserts that every witness for the Respondent made it clear both in their statements and in cross examination that they knew that she was engaged, then married and planned to have children. She had invited all the witnesses to her wedding. Therefore, she invites the Tribunal to conclude that the Respondent was aware of her protected characteristics at all material times.

37. We have no difficulty in accepting that the Respondent was aware of her protected characteristics at all material times. But we consider there to be a difference between the senior management of the Respondent being aware, i.e. have knowledge of those protected characteristics, and those protected characteristics being "at the forefront of the mind of the Respondent". In our view, there was no evidence to indicate that awareness of the protected characteristics of the Claimant occupied a position at the "forefront of the mind" of the Respondent.

38. The Claimant then makes a number of points under the heading "policy continues to be a vital part of the business". In the paragraphs that follow, the Claimant asserts that, at the Hearing, she established that the public policy was crucial in the old strategy due to the relationship the Respondent had with the National Grid. She goes on to assert that there was an acknowledgment from Mr Tom Saul in cross examination that 95% of the Respondent's income presently still comes from the National Grid and that the new strategy is in place for the next 4 years.

39. We accept that, under the old strategy in place at the time of the first round of redundancies, that public policy was significant as is evident from the fact

that the Claimant's position as Director of Policy was retained. However, that does not mean that the Respondent was disentitled from changing its mind. The new Executive Chairman, Mr Richard Haddon, had acted as a new broom sweeping out old ideas and ushering in new ideas and had promoted a new strategy in January / February 2017. The new strategy was to eliminate that were considered inessential to the business. The Senior Management team considered the Claimant's post to be inessential. The Claimant, in asking us to make a finding that policy continues to be a vital part of the business, is effectively inviting us to second guess the Respondent's thinking on the way in which the business should be run. We considered this to be not part of our function.

40. We observe that the new strategy that was agreed by the Senior Management Team under the guidance of Mr Richard Haddon, had determined that the old strategy was not the way forward; that there should be a new strategy and that the new strategy involved eliminating posts that those in charge of the business regarded as inessential. For that reason, the Claimant's job was at risk and, indeed. in the absence of any alternative suggestion that was viable, her post was subsequently was made redundant.

41. The Claimant under this heading went on to say that Mr David Hill acknowledged that public policy work was still being undertaken by the Respondent company, namely through the Respondent's membership of the Association of Distributed Energy (ADE) trade group. That seems to us to be incontestable. We were told this trade group employed 9 people whose expenses were paid for by somewhere in the region of 390 members. If the company decided that such work as was needed on public policy should be performed through the auspices of such a group, that is a matter for the company. The Claimant invited us, at the end of this section of her submission, to conclude that owing to the ongoing and crucial relationship with the National Grid, public policy is not a redundant function. However, whether public policy is or is not a redundant function within the company is not a question that we have to ask. The company determined that it had no need for a director of public policy and we are neither in a position, nor are required, to second guess that decision.

42. The next section on the Claimant's written submissions was to the effect that no evidence had been provided of the meeting of 9 January, which made the decision to alter the company strategy and reduce the workforce. The Claimant says that, while we heard from Mr David Hill, Mr Ged Holmes and Mr Tom Saul about the meeting where the decision was taken and as to who was on the list that was later circulated by Mr Holmes, the Respondent failed to provide what she says is "Any evidence of the analysis discussion and/or conclusions of this meeting." She also made reference to the fact that, in his evidence, Mr Saul had referred to organisational charts at the meeting which had not been disclosed. She also cites Mr Holmes who, when cross examined, indicated he had not been involved in the decisions taken that day, merely in the follow up processes associated with the redundancy. She therefore invites the Tribunal to dismiss any evidence from Mr Holmes about the decisions taken on 9 February and also to conclude that the lack of

evidence presented about the meeting on 9 February failed to show that "discrimination did not take place".

43. We take the view that the evidence from Mr Hill, Mr Saul and Mr Holmes indicates that there were discussions on the 9 February, that those discussions under the guidance of Mr Haddon resulted the Senior Management team adopting a different strategy for the future conduct of the company and that this different strategy resulted in a second round of redundancies that would reduce the number of personnel employed by the Company from 45 to 31. We do not understand how it can be said that we did not have or were not provided with evidence of such a decision being taken. It is true that we were not shown contemporaneous documentary evidence that was used at the meeting. However, at best, that would only have allowed us to see the way in which the decision was arrived at. It would not alter the fact that such a strategy change was adopted with the result that a second round of redundancies was mandated. Indeed, the fact that such a decision would be taken and the thinking behind it were all expounded during the 13 February meeting to which the Claimant and her husband were able to listen and to make extensive notes as to the thinking.

44. The next section that the Claimant provides is that "the Respondent failed to have called appropriate witnesses to give evidence". We do not agree with this point. The Claimant asserts that Richard Haddon was in the decision-making position of the Respondent Company and she invites the Tribunal to conclude that, in failing to call Richard Haddon as a witness, the Respondent has failed to provide evidence that it did not discriminate against her because of a recognition that the cost of employing her would increase should she be able to realise her maternity plans. We simply were satisfied that we had heard evidence of what happened on 9 February and that it resulted in a change of strategy and the second round of redundancy being adopted.

45. The next heading is "The redundancy process has no evidence". By this, the Claimant explains she means there is no contemporaneous evidence of "the entire redundancy process". She asserts it was raised in her cross examination of the Respondent's witnesses that the metadata showed that minutes, where they did exist, had been typed up after the Respondent had knowledge of her claim and that there was no evidence of the Respondent company considering her for other roles. On this basis, she invites the Tribunal to conclude that there was no evidence of the redundancy process and that this therefore fails to evidence the discrimination "did not take place".

46. First, we did hear evidence of the entire redundancy process. We heard evidence of the decision being taken to make the redundancies, of Mr Holmes being requested, as one of the valedictory services he could perform for the Company, to manage the redundancy process,. We received (and were able to read) the copy of the note that he had provided on the redundancy business case. We were able to see the list containing the names within the redundancy pools and holding the single posts that were being considered for redundancy. We were able to look at the chart that showed how the organisation was being culled and we were also able to see

the costs as against all the names of the personnel within the Company. In our view, there was satisfactory contemporary evidence of the entire redundancy process.

47. We should also say that the documents that were produced by the Claimant as to the metadata of minutes were so faint in their photocopy that we were unable to see that the date upon which they had been typed up. Against the fact that there was no evidence of the Company considering her for other roles, there was evidence that the Respondent invited the Claimant to consider whether there were other roles that she was capable of occupying within the organisation. However, given that there were 45 people within the organisation and it was being reduced to 31, that she had been identified as a single post holder and that she did not have extensive experience within the organisation, it is unsurprising in our view that both she and the Respondent were not able to identify a suitable alternative role for her.

48. The next heading is that "the key driver at all times was costs, and to reduce the cost of staff". This heading was followed by the Claimant first recording that the Tribunal had received evidence that, on multiple occasions, the rationale behind the decision of Mr Haddon (as she puts it) was to reduce costs. Further, that Mr Haddon and Mr Saul had put together plans to meet that outcome and that those plans were never disclosed to the Tribunal. We accept that the reason behind the decision to have the redundancies was to reduce costs. The company, as we have noted earlier, was making a running loss in excess of 8 million pounds per annum. The admission in cross examination that, as a matter of logic, the costs of covering her maternity leave and the pay rise that she was asking for to cover family life were increased costs to the business does not indicate, and does not provide material upon which we can conclude, that the decision to make the Claimant redundant was based upon that additional cost being likely to be incurred. In the context of reducing the number of personnel from 45 to 31, the additional cost that maternity leave might cause the company in the event of the Claimant becoming pregnant and choosing to have maternity leave was but a pin prick in the overall cost reduction. We note that the Respondent's witnesses accepted that it was an obligation on the part of the company to pay such additional costs as were legally required when a female member of staff required maternity leave. We were not able to discern any dissent from, or objection to, that obligation from the witnesses.

49. We observe that, within a company that is losing in excess of £8 million a year, the request by the Claimant to increase her salary by 25% not on the basis of added value but on the basis of her own domestic planning was somewhat surprising. However, on all the evidence we were not satisfied that this request for further money or indeed the costs that might be incurred were she to become pregnant in the future had any impact on the overall discussion by the Senior Management team on the strategy to be adopted for the business and the need thereafter for redundancy for the reduction of personnel from 45 to 31.

50. The Claimant then sets out that the comparator that she cites is a hypothetical man although she invites us to concentrate on the commercial

team under Chris Kimmet and, in particular, to compare her with Sebastian Blake. We have earlier dealt with the comparison that she made with Sebastian Blake. We do not consider it is a proper comparison. The circumstances that caused him to have a consultation delayed in his case were entirely different from those affecting the Claimant.

51. The Claimant sets out that there was conscious or subconscious bias which led to her redundancy. In support of that proposition, the Claimant said this in paragraph 8 of her statement:

> *Whilst I enjoyed my work at Open Energi, I was continuously dissatisfied with the male culture at the business. I reported an inappropriate sexual comment made to me in early 2016 by a male colleague while I was in the office kitchen to my manager Chris Kimmet, although this was not taken any further. In December 2016, the same male colleague hot for the "good old days" when business could be done down the pub at a pre-Christmas party session with three other employees present, a session that had been arranged to discuss the brand and purpose of Open Energi. At the subsequent Christmas party, I discussed this comment with the Communications Lead at Open Energi who called the session though at that stage, I did not feel any action would be taken, as this macho attitude was clearly tolerated by the business. Despite Open Energi having standard text on equality and the workplace in the Employer Handbook, I did not see these policies used in practice during my employment to encourage gender equality in the workplace.*

52. In her submission, the Claimant quotes Mr Saul saying, when he was being cross examined, that he thought that the Claimant was bringing this claim because of her husband. She asserts his final answer in cross examination was to try and "undermine" her by refuting the claim that she was "a female leader". She cites the fact that he said to her in cross examination, "you were merely a junior member of the team" and she cites that as being a final example of bias and trying to undermine the Claimant as a woman.

53. This ties in with something that was quoted in the ET1 by the Claimant: in her grounds of claim at paragraph 27, she made reference to the HRFace2Face report produced by the Respondent which deals with her appeal against discrimination and, specifically, to paragraph 30 of that report where:

> *it is agreed by (the Respondent) that senior managers discussed that "the postpartum world can seem very different" – suggesting that I would not return to work in the way I had planned to in order to continue my high level of work at (the Respondent). Being told by senior men that my approach and ability to return to work would be different following my pregnancy is not only patronising but discriminatory, and clearly not of consideration for other employees who are men.*

54. The quotation that "the postpartum world can seem different" was taken from paragraph 30 of the HRFace2Face report. The full content of that report was as follows:

> *LSJ explained that several other occurrences had occurred towards her feeling that she had been discriminated against, including a member of the management team making a comment that she may not choose to return to work at all following her maternity leave and her note of change in the management's*

behaviour to her individually and her career following her announcing she intended on marrying and starting a family.

The following comments are taken from various witness statements:-

"TS also assured her of the Company's support if she did move house, and that the Company would show understanding and flexibility when she started a family. Regarding maternity leave, during her pregnancy LSJ stated an intention to use all her keep in touch days and would return to work as soon as she could after the birth. However, TS assured LSJ that, as the postpartum world can seem very different, he preferred the mother to be as much in control of the date of her return to work as possible, and that as long as she communicated her intentions, she could move her return to work date and need not feel absolutely bound by whatever date she chose before starting her maternity leave.

In relation to her existing role, LSJ already practiced flexible working, working from home in the morning to avoid peak commuting hours or leaving work early for personal commitments. There are a number of other employees at Open Energi who also enjoyed this benefit. Beyond this working arrangement there are no specific additional requests from LSJ for a flexible working package other than covered in question 2 above.

Any flexible working LSJ enjoyed or any further discussions were not a factor in the redundancy.

55. The TS quoted there was Mr Tom Saul from whom we heard in evidence. In paragraph 17 of the statement Mr Saul dealt with this matter. He said:-

I also assured the Claimant of the company's support if she did move house and that the Company would show understanding and flexibility when she started a family. Regarding maternity leave, during her pregnancy the Claimant stated her intention to use all her keep-in-touch days and told me she would return to work as soon as she could after the birth. However, I assured the Claimant (from my experience when each of my four children was born and 20 years of senior management) that, as the postpartum world can seem very different, I preferred the mother to be as much in control of the date of her return to work as possible and that, as long she communicated her intentions, she could move her return to work date and need not feel absolutely bound by whatever date she chose before starting her maternity leave. I am therefore aghast at the Claimant's allegation that this comment could be possibly be misconstrued as in any way discriminatory, it being obviously intended to have the opposite effect. Indeed, when I discussed these options with the Claimant, she expressed her appreciation of this understanding and flexibility, putting the needs of a mother to be ahead of those of the company.

56. When he was cross examined, it was put to Mr Saul that the remark concerning the postpartum world appearing different was patronising. He answered by saying that if it was patronising the Claimant could have said that but, at the time, she indicated appreciation that Mr Saul was expressing understanding and flexibility and was putting the needs of the mother to be ahead of those of the Company.

57. We accept that at the time that Mr Saul made his comments, he made it in the way he has described and invoked an expression of appreciation from the Claimant of the understanding and flexibility that he was putting forward. While such a comment from a man carries with it a risk of sounding patronising, we do not consider it gives any indication of conscious or sub

conscious bias when considered in conjunction with the circumstances of the comment being made. We did not think that the comments that Mr Saul made under cross examination, and to which the Claimant directed our attention, indicated bias on the part of Mr Saul. One aspect of the Claimant's presentation of her case has been a concentration on her perception that she was an essential part of the company structure, that "Policy" was indispensible. It seemed to us that, in that context, Mr Saul was attempting to rebut the basis of that perception. We did not read into his comment as indicative of bias or an attempt to undermine the Claimant as a woman.

58. We were not able to form a conclusion on the matters advanced by the Claimant in paragraph 8 of her witness statement. We were never told what it was that she described as "an inappropriate sexual comment" made to her in the kitchen: she did not elaborate. And the nostalgia evinced by the same male colleague for doing business down at the pub does not, in our view, necessarily support the conclusion that the Claimant has chosen to draw.

59. The Claimant under the heading "Evasive or equivocal replies" asserts that the Respondent had been evasive in failing to meet certain court orders in complying with the dates for disclosure and for providing witness statements. She says that the Respondent continues to be in breach of an earlier order such as that requiring a counter schedule of loss. She criticises Mr Saul for questioning the premise of many of her questions in cross examination instead of answering them. She also criticises the fact that he made clear that her claim was entirely invalid. Because of these matters, she invited the Tribunal to conclude that the conduct of the Respondent throughout this process is evidence of their treatment of women and the culture in which she used to work. We do not derive from such procedural failings on the part of the Respondent an indication that those failings were visited in this case because the Claimant is a woman or that such failings would not have been demonstrated in dealing with the case had the Claimant been a man.

60. The Claimant asserts that under, what she terms, the old burden of proof supplied by Section 63 (a) of the Sex Discrimination Act, she has supplied sufficient evidence to establish a prima facie case. If the Tribunal disagree with that proposition, she invites us to draw the appropriate inferences from the evidence put forward and written evidence in cross examination as previously summarised and to hold that no adequate explanation has been evidenced.

61. She draws to our attention what she terms is the new burden of proof and makes reference to *Efobi v Royal Mail Group* from which she quotes Mrs Justice Elizabeth Lane as saying that it was clear that a Tribunal has to consider whether there are "facts from which a court could decide in the absence of any explanation that a person A has contravened the provision concerned". That particular quotation which she says is derived from paragraph 78 of that Judgment is in fact merely a recitation of Section 136 (2) of the Equality Act 2010.

62. We have looked at paragraph 78 of that Judgment and have noted the guidance supplied by Mrs Justice Elizabeth Laing, that it is our role to

consider all the evidence and not just the Claimant's and that, because the word "facts" are used in section 136(2) rather than "evidence", Parliament requires the Employment Tribunal to apply Section 136 at the end of the hearing when making its findings of fact. Therefore, as the Judge says:

> *It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of Section 136 2), that Parliament has required a Claimant to prove something. It does not appear to me that it has done.*

63. We have concluded that there are no facts from which this Court is able to decide in the absence of any other explanation that the Respondent has contravened Section 13 of the Equality Act. Therefore, as Mr Keenan pointed out in his submissions, if we arrive at that conclusion, then sub-section 3 of section 136 specifies that sub-section 2 does not apply if A shows that A did not contravene the provision.

64. We were satisfied on the totality of the evidence that there was a clear reason for the Claimant being selected for redundancy. That reason related to the change in the Company's strategy that was initiated by the arrival of Mr Richard Haddon. The Claimant's selection for redundancy was in redundancy round 2 completed in March 2017 was the result of the change in perception. We are not in a position to say that the Company was right or wrong in adopting this strategy that led to this round of redundancies. What we can say is that we were not satisfied that the reason for her selection for redundancy was her gender or her plans for maternity, both of these being protected characteristics.

65. The Claimant asked us to compare her position with that of a hypothetical male but we note that in the second round of redundancy some 13 males were made redundant which in our view tends to indicate that our conclusion that there was no discrimination in the selection of the Claimant for redundancy is correct. Therefore, we dismiss the claims.

Employment Judge P Stewart on 22 November 2017