THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS:
Ms BC Leverton
Mr M Sparham

BETWEEN:

MISS T EVANS

Claimant

AND

C & J CLARK INTERNATIONAL LIMITED

Respondent

ON: **8 – 10 May 2018**

Appearances:

For the Claimant: Mr D Robinson, Friend
For the Respondent: Ms S Barry, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 10 July 2017, the claimant complains of unfair dismissal – ordinary and automatic; pregnancy and maternity discrimination and indirect sex discrimination. The respondent admits dismissal but contends that it was by reason of redundancy and fair. It resists all claims.

2. We heard evidence from the Claimant. The Respondent gave evidence through Suzanne Wood (SW), Employee Relations Advisor; Lee Geraci (LG), Store Manager, Marble Arch; Jeff Gilson (JG) Store Manager, Regent Street and Daren Croxson (DC) Franchise Regional Manager (formerly Area Sales Manager). There was an agreed bundle of documents and references in the judgment in square brackets are to pages within that bundle.

The Issues

3. The issues in the case are set out in the case management order of Employment Judge Hall-Smith and are referred to more specifically in our conclusions. [34-35]

The Law

4. Section 99 Employment Rights Act 1996 (ERA) provides that an employee shall be regarded as unfairly dismissed if the reason or principal reason for dismissal relates to pregnancy, childbirth or maternity.

5. Regulation 10 Maternity & Parental Leave Regulations 1999 (MPLR) provides that where an employee is made redundant during maternity leave, she is entitled to be offered a suitable available vacancy. Suitability is assessed by the criteria at Regulation 10(3).

6. Section 18 Equality Act 2010 (EqA) provides that a person (A) discriminates against a woman if in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy, pregnancy related illness or maternity leave.

7. Section 19 EqA provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice (PCP) which is applied to persons who do not share the Claimant's protected characteristic (female) but which (in our case) put females at a particular disadvantage compared to men and which A cannot show to be a proportionate means of achieving a legitimate aim.

8. Section 94 of the Employment Rights Act 1996 ("ERA") provides the right not to be unfairly dismissed.

9. Section 98(2) ERA sets out the potentially fair reasons for dismissal. One of those reasons is redundancy *98(2)(c*)

10. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

11. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Findings of fact

12. The Respondent is a leading UK based international shoe manufacturer and retailer, with stores across the UK

13. The Claimant was initially employed on 16 October 2011 as a Sales Assistant in the Respondent's Wimbledon store. After being seconded to the role of Assistant Manager in November 2013, the position was made permanent in March 2014. The Claimant remained in that role until her dismissal, effective 29 March 2017.

14. Due to difficult trading conditions, increasing business costs and changing shopping habits, the Respondent instructed external consultants to carry out a review of its store staffing model and to report on efficiencies. As a result of that review, a new business model was proposed for staffing at each store, based on turnover. The proposal was that all retail stores with an annual turnover of less than £1m would no longer require an Assistant Manager and instead, their tasks would be redistributed amongst the Store Manager, Team Leaders and Sales Team members.

15. As the turnover for the Wimbledon store at the relevant time was £933,618, the Claimant fell within the category of Assistant Managers at risk of redundancy. [72]

16. From July 2016 the Claimant was absent from work on sick leave. She was pregnant at the time and did not return to work prior to commencing her maternity leave on 9 October 2016.

17. The Claimant gave birth on 23 December 2016.

18. On 5 February 2017, the Claimant attended an individual briefing with the Store Manager, Marcus Grant (MG), who informed her of the restructuring proposal by reading out a Store Brief document setting out the background and rationale for the plans and the effect on her role. [75-76]. That same day, there was a store brief to the rest of the staff which the Claimant complains she was not invited to it. Although the staff were given the same information as the Claimant, she contends that by not being invited to the meeting, she may have missed something else that was said about the company's vision. However, this was purely speculative as there was no evidence before us that anything else was said, relevant to the exercise.

19. The Claimant told us that at her meeting with MG, she asked if the process could be deferred until she returned from maternity leave in October 2017. MG subsequently made enquiries of SW, who had been engaged by the Respondent on a fixed term

contract as an Employee Advisor to assist with the redundancy process. SW advised that the Claimant could defer. The Claimant says that she was never told by MG that she could defer and that when she phoned him on 6 February 2017 with the same enquiry, he told her that Paul McRonald, the Area Manager, had said no. We did not hear from either M G or Paul McRonald, so we have no direct account to the contrary. All we have is a file note from SW, prepared on or after 31 March 2017, with an entry dated 9 February 2017 stating that "*Theresia has decided that she will continue with the consultation process.*" The Claimant was not provided with a copy of this document at the time and denies what is said in the entry.

20. The note does not say the source of that information and SW did not say or suggest in evidence that she had a direct conversation with the Claimant on that date.

21. We accept the Claimant's evidence on this and find that she was told on the 6 February by MG that she could not defer the process and was not advised to the contrary by Paul McRonald at any time thereafter. It is common ground however that she was told this in writing later (see para 30 below)

22. On 22 February 2017, the Claimant attended a consultation meeting with Jeff Gilson (JG), at the time Store Manager, Bromley. He had been allocated because he was independent from the Wimbledon store. The Claimant recorded the meeting on her phone and we have seen a copy of the agreed transcript. [91-102] The Claimant was given an at risk letter, a draft of her redundancy calculation, FAQs and information on a confidential redundancy support.

23. At the meeting, JG went through the new business model for the company and its application to the Wimbledon store, using a pre-prepared script. JG also informed the Claimant that she could apply for vacancies on the website and that she would be sent a vacancy list. [84-90 & 11]

24. The Claimant raised a number of queries about the impact of her maternity leave on the redundancy process which he took away from the meeting to raise with SW. One of the main issue, for our purposes was whether the Claimant had to apply for suitable alternative employment. The Claimant had done some research prior to the meeting and was aware of the provision in regulation 10 Maternity Leave Regulations relating to suitable alternative employment.

25. Having sought advice from SW, on 23 February 2017, JG prepared a draft email to the Claimant, incorporating SW's advice, which he asked SW to cast her eye over before it was sent to the Claimant. [107] In the event, the draft response was not sent to the Claimant. Instead, the contents were read out to her at the 2nd consultation meeting on 1 March 2017.

26. Our observation is that the draft email is very technical, contradictory and not easily understood. It tells the Claimant that as she is on maternity leave she has the right to be offered suitable alternative employment while at the same time stating that the Respondent had chosen not to utilise the provision of offering suitable alternative employment. At paragraph 10 of her statement, SW says that she advised JG that none of the vacancies constituted suitable alternative employment so the Claimant would not be automatically offered any of the roles on the vacancy list but would have to express interest by applying. That message does not come across at all in the draft email and it

is no wonder that the Claimant is confused and dissatisfied with the response she received.

27. The Respondent's position was that a suitable alternative role would have been at least an Assistant Manager position and even then, it would depend on the size and turnover of the store. The Claimant was sent the vacancy list on 23 February 2017, along with the website address for non retail opportunities. On the vacancy list were a number of Assistant Manager positions. There were 28 in total. 3 of the vacancies were in London, Colliers Wood, Elephant & Castle and Kilburn. The roles in Elephant & Castle and Kilburn were for 8 hours per week - the Claimant's contract was for 38 hours a week. The Colliers Wood role was to cover maternity leave and the Claimant had ruled this out as unsuitable. The remaining Assistant Manager vacancies were outside London, the nearest being in Staines and the furthest, Glasgow. It was common ground that these would not have been suitable for the Claimant.

28. There were a number of Team Leader roles, one of which was in the Wimbledon store. At the second consultation meeting on 1 March 2017, the Claimant had enquired about this vacancy and comments on the fact that it was not offered to her.

29. There is a dispute between the parties as to whether the Claimant expressed an interest in applying for the Team Leader position at the second consultation meeting. The Claimant contends that she did however, JG said that she did not. We prefer JG's account as it is supported by the transcript to the meeting. In the transcript, the Claimant is asked by JG whether she would like to apply for any of the vacancies on the list and she replies: "*No I haven't made a decision*". [126]

30. There then followed a telephone conversation on 1 March 2017 between the Claimant and SW the contents of which are disputed. SW says at paragraph 13 of her statement that when the Claimant enquired about the Team Leader role, she told her that there would be a trial period. However, the Claimant denied any mention of a trial period. This is important as the Claimant's explanation for not applying for any of the Team Leader positions was that if she accepted the position, she would lose her redundancy. If losing her redundancy was the reason for not applying, then it is difficult to see how she thought she would retain her right to redundancy if the role were simply offered to her, because even in that scenario, she would have had to have accepted it. This makes us think that her complaint was purely theoretical and that she did not actually want to take the Team Leader role. The Claimant knew about the entitlement to a 4 week trial period as she had read this in the Redundancy Policy. If her position was that SW did not mention the trial period, the logical conclusion to draw was that the trial period applied. If the Claimant were in any doubt about the matter she could have asked the question, as she was invited to do in SW's email of 1 March 2017. In that email, the Claimant was formally offered the Team Leader role to commence on her return from maternity leave and was sent a copy of the job description and details of the hours and hourly rate - £7.75 per hour. She was told that if she did not want it her other options were to continue with the process and take redundancy if she did not want alternative employment or to defer the process until her return from leave in September, at which point she could look at available alternative employment or take redundancy. The Claimant was asked to respond with her preferred option but did not do so. [132]

31. There were other Team Leader vacancies on the list that were within close proximity to the Claimant's home. There was a Team Leader role in Mothercare. This position was much more beneficial than the Wimbledon role. It was more hours – 24 as opposed to 8 – and it was based in Croydon where the Claimant lived. Also, it was away from an environment where relations between the Claimant, her line manager and her Area Manager were, by her account, strained.

32. All of this caused us to wonder whether the Claimant wanted a Team Leader role at all. This is further re-enforced by events at her redundancy appeal hearing where, when asked what outcome she wanted from the appeal, she does not say she wants a Team Leader role subject to a trial period, instead she says that she wants to make sure the Respondent followed the right processes. Also telling is a comment she makes at the appeal to the effect that the reason she did not apply for the positions was that it was too much for her to cope with [223]

33. We have concluded from all of this that the Claimant was not interested in taking up a Team Leader position, which would have amounted to a demotion. On 29 March 2017, the Claimant attended the third and final consultation meeting. We have seen the template invitation letter and that makes clear that it is the final meeting and could result in her redundancy if no alternative positions were identified. [192].

34. At the meeting, the Claimant was advised that as no alternative role had been identified, she was being made redundant with immediate effect. Following the meeting the Claimant was handed her termination letter [200]

35. The Claimant appealed against her redundancy. The basis of her appeal was that there were suitable alternative roles within the company that she should have been offered, though she does not specify what these were. [206-207]. In her appeal letter, she says that she does not believe the redundancy was genuine and that a number of managers wanted rid of her [210]

36. The appeal was heard on 28 April 2017 by Daren Croxton, Area Sales Manager. The Claimant contended that the notes of the appeal meeting were made up and that they did not reflect what was said. However, this was different from what she had said earlier in her evidence when she identified only one inaccuracy in the notes, which was of little consequence. Daren Coxton, (DC) who heard the appeal,told us that there was a note taker at the meeting and that the notes were typed from her handwritten ones taken at the time. We therefore accept his evidence that the notes were an accurate account of what was said.

37. On 3 May 17, DC wrote to the Claimant rejecting her appeal. [228-230]

38. The Claimant complains that on 15 June 2016, she was told by MG that Lee Garecia (LG) had asked whether she was coming back after maternity leave. LG admitted in evidence to asking the question while the Claimant was on maternity leave and that it was an innocent enquiry. We accept his evidence. LG was not in Claimant's line of management and therefore not in a position to make any decisions about her continued employment. The question could therefore only have been out of curiosity.

Submissions

39. The Respondent provided written submissions which were spoken to. The Claimant's submissions were oral. These have been taken into account.

Conclusions

Was the Claimant automatically unfairly dismissed by reason of pregnancy or MAT leave s.99 EqA

40. We are satisfied that the removal of the Claimant's Assistant Manager role at the Wimbledon store was as a result of the nationwide reorganisation of the Respondent's business and that this amounted to a redundancy within the meaning of section 139(i)(b) ERA in that the requirements for employees to carry out work of a particular kind had ceased or diminished or was expected to. The Claimant came within the category of employees affected and as the only Assistant Manager in the store, it followed that she would be at risk of redundancy. This was a nationwide process and there is nothing in our findings of fact which would lead us to conclude that pregnancy or maternity leave was a factor in the decision to dismiss the Claimant.

Did the Respondent breach Regulation 10 MPLR 1999 by not offering the Claimant suitable alternative employment

41. In order for Regulation 10 to apply, the circumstances at 10(3) alternative position must meet the criteria at Reg 10(3). So, the new role must be suitable from the Claimant's viewpoint and the role should not be substantially less favourable than her redundant role. The Assistant Manager roles on the vacancy list were not suitable alternatives for the reasons stated at paragraph 20 above. We are satisfied that the Claimant did not consider the Team Leader roles suitable but in any event, in terms of hierarchy, it was below that of Assistant Manager and attracted a lower hourly rate and would therefore have amounted to a demotion. Further, the 2 Team Leader roles referred to by the Claimant attracted fewer hours than her previous role. In those circumstances, there were no roles identified by the Claimant that fell within the terms of Regulation 10 and therefore this complaint therefore fails.

Was the Claimant discriminated on grounds of pregnancy and maternity s18 EqA

42. In light of our findings at paragraph 33, we find that the dismissal was not discrimination on grounds of pregnancy and maternity, or at all. Turning to the enquiry by LG (para 31) we find that this did not amount to unfavourable treatment because of pregnancy. The claim fails.

Was the Claimant's dismissal fair

43. For reasons already stated, we find that dismissal was on grounds of redundancy. In the context of a redundancy dismissal, the issues relevant to fairness are selection, consultation and suitable alternative employment.

44. We are satisfied that the Respondent adequately consulted with the Claimant on her position. There was an initial meeting on 5 February to advise the Claimant of the proposals, followed by 3 consultation meetings on 22 February and 1 & 29 March. On each occasion, the Claimant had an opportunity to put her view and ask question. Also,

we are satisfied that the Respondent took reasonable steps to assist the Claimant in finding suitable alternative employment by providing her with details of available vacancies and we also satisfied that none of them were suitable for the Claimant. Whilst there are some aspects of the process that could have been handled better, overall we are satisfied that it was reasonable.

Indirect discrimination

45. The PCP, though described as the selection process is probably wider to mean the redundancy process as a whole.

46. The Claimant contended that she was at a disadvantage because she was not invited to the general meeting with staff on 5 February. In fact, the Claimant received preferential treatment in that she had a one on one meeting where she was provided with the same information. As already indicated, her claim that something else might have been said at the group meeting about the company vision was purely speculative.

47. Even if the Claimant were able to establish group disadvantage (which we don't think she can) the Respondent told us that they had decided to meet with the Claimant separately in order to shield her from the embarrassment of being the only one of her colleagues affected by the news. The Claimant accepted in evidence that it would have been difficult for her if she had heard the news for the first time at the group meeting and also accepted that the Respondent had good reason to talk to her separately. We are therefore satisfied that the Respondent's actions were justified. The indirect discrimination claim fails.

Judgment

48. All claims fail and are dismissed.

Employment Judge Balogun
Date: 7 July 2018