EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Dr Emma Lahert	(1) Proteome Sciences Plc	
	(2) Proteome Sciences R&D GmBh & CO KG	

Heard at: London Central Employment Tribunal

On: 22, 23, 24, 25 October 2019 (and in chambers on 26 October)

Before: Employment Judge Adkin
Mr G Bishop
Mr D Clay

Representations

For the Claimant: Ms L Bell, Counsel

For the Respondent: Ms H McLorinan, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1) The following claims are dismissed upon withdrawal by the Claimant:

i) Breach of Section 1 Employment Rights Act 1996 **(ERA)**, giving rise to compensation pursuant to Section 38 Employment Act 2002. This claim was withdrawn on the first day of the hearing and is dismissed;

ii) Indirect discrimination because of gender (which includes maternity and pregnancy) under s19(1) and 39 EQA. This claim was withdrawn during the Claimant's closing submissions and is dismissed;

2) The following claims brought against the First and Second Respondents fail and are dismissed:

i) Detriment arising out of a contravention of Section 47 (c) ERA (arising out of Regulation 19 of the Maternity & Parental Leave ETC Regulations 1999 (**MPL**));

ii) Ordinary unfair dismissal under Sections 94 and 98 ERA;

iii) Automatic unfair dismissal under Section 99 ERA (arising out of Regulation 20 of MPL);

iv) Automatic unfair dismissal under Regulation 7 of Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**);

v) Failure to elect employee representatives and/or to inform and consult pursuant to Regulations 13 and 14 of TUPE giving rise to an award under under Regulation 15 of TUPE;

vi) Direct discrimination because of gender and/or maternity and pregnancy under Sections 13(1), 18 and 39 Equality Act 2010 (**EQA**);

vii) Harassment in contravention of Section 26 EQA because of gender;

viii) Victimisation in contravention of Section 27 EQA because of gender and/or maternity and pregnancy.

REASONS

1. By a claim presented on 20 February 2019, the Claimant brought claims arising out of her employment with the First Respondent and the termination of her employment for redundancy on 20 January 2019.

2. As result of an amendment allowed by the Employment Tribunal on the first day of the final hearing, the Claimant brought a claim against the Second Respondent on the basis of an alleged transfer under The

Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

The Issues

3. The issues in this case were agreed before the hearing commenced as follows (R denotes First Respondent; C denotes Claimant):

5. TUPE

5.1. Did R propose outsourcing C's role to an associated employer based in Frankfurt within the meaning of Regulation 3 of TUPE, as set out in writing in the slide referenced at paragraph 20.1 of the particulars of claim or otherwise;

5.2. Did R act breach of Regulations 13 & 14 TUPE in respect of C?;

5.3. Was C dismissed because of said proposed relevant transfer;

5.4. If so, was C's dismissal automatically unfair in contravention of Regulation 7 TUPE.

5.5. If not, did R outsource C's role to an associated employer based in Frankfurt within the meaning of Regulation 3 of TUPE?

5.6. If so, did R act breach of Regulations 13 & 14 TUPE in respect of C?;

5.7. If so, was C's dismissal automatically unfair in contravention of Regulation 7 TUPE, or alternatively was the sole or principal reason for the dismissal an economic, technical or organisational reason entailing changes in the workforce?

6. Detriment pursuant to Section 47 (C) ERA / Reg 19 MPL

6.1. Did R have knowledge that C had had a miscarriage, had been undergoing IVF and/or was pregnant before placing her at risk of redundancy;

6.2. When did R have knowledge of C's pregnancy?

6.3. Was C subjected to an unlawful detriment(s) by any act of R done for a prescribed reason related to her pregnancy/ her seeking to take maternity leave/ her taking or seeking to take parental leave? The detriments relied on at this time are:

(1) Placing C in a selection pool of one;

(2) Failing to pool C with other staff who weren't pregnant;

(3) Placing C at risk of redundancy;

(4) Refusing to carry out any grievance process before giving C notice;

(5) Failing to adhere to R's own process and timeline as set out in the document "Redundancy Consultation – Timeline" including a failure to send letter 2 b and arrange a third meeting on receipt of C's Solicitors letter dated 18 October 2018;

(6) Failing to arrange a grievance hearing before dismissing C.

7. Unfair Dismissal – Leave for family reasons Section 99 ERA / Reg 20 MPL

7.1. Did the reason or principal reason for the C's dismissal relate to her pregnancy/ her seeking to take maternity leave/ her seeking to take parental leave? If not;

7.2. Did the reason or principal reason for C's dismissal relate to redundancy? If so, did the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by C who were not dismissed?

7.3. Was C's dismissal automatically unfair?

8. Unfair Dismissal – General

8.1. What was the reason for the C's dismissal? R asserts that the reason was redundancy.

8.2. Did R act reasonably in treating the reason (redundancy) as a sufficient reason to dismiss C?

8.3. Did R carry out a fair procedure?

9. Unfair Dismissal – Redundancy

9.1. Has R demonstrated that there was a genuine reason for redundancy, as defined in section 139 ERA.

9.2. Was C included within the correct pool of employees put at risk of redundancy?

9.3. Should other employees have been included in the pool?

9.4. Were there selection criteria applied for pooling and if so, what were they and were the selection criteria fair and objective?

9.5. Was C consulted about the selection criteria or the weightings given to these?

9.6. Was C scored fairly under the selection criteria?

9.7. Did R undertake a fair and genuine consultation?

9.8. Should R have considered "bumping" C into another role?

9.9. Was there a suitable alternative vacancy? Was that alternative vacancy offered?

9.10. Did R follow its own redundancy procedure?

9.11. Would C have been made redundant after a fair procedure in any event?

10. Direct Discrimination

10.1. Was C treated less favourably than any actual or hypothetical comparator(s) because of her gender and/or maternity and pregnancy? The less favourable treatment relied on are those matters set out at 6.3, a failure to follow a fair process and her dismissal.

10.2. The actual comparators relied on will include Emanuela Leoni and Josef Schwarz. Other comparators will be named where appropriate following disclosure.

11. Indirect Discrimination

[Not pursued]

12. Harassment

12.1. Was C subjected to unwanted conduct related to her gender (which includes pregnancy)? The unwanted conduct relied upon is set out at clause 10.1.

12.2. Did the unwanted conduct have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for her?

13. Victimisation

13.1. Did C do a protected act? The protected act that the C relies on is her enquiry as to the process for her to raise a written grievance concerning her pooling and/ or her selection for redundancy whilst pregnant immediately before she was given notice of the termination of her employment.

13.2. Alternatively, did R believe that C had done or may do a protected act?

13.3. Did R subject the Claimant to a detriment because of the protected act? The detriment relied on is denying the Claimant the opportunity

to have her grievance heard before her employment was terminated and/ or terminating her employment.

The Evidence

4. For the Claimant the Tribunal heard from the Claimant herself.

5. For the Respondent the Tribunal heard evidence from the dismissing manager Dr Jeremy Haigh, CEO of the First Respondent and Managing Director of the Second Respondent and from Dr Ursula Ney who heard the appeal against dismissal combined with a grievance.

6. We were referred to a bundle of documents of some 603 pages, including some documents added during the course of the hearing.

Procedural matters

7. In an application made by letter dated 18 October 2019 the Claimant made an urgent application to amend the claim and add the Second Respondent. This was opposed by both Respondents. Both Respondents have the same legal representatives. The Tribunal considered the Presidential Guidance on Case Management 2018 this and various authorities referred to by the parties. For full reasons which were given in an oral judgement, the application to amend was granted with the result that the Second Respondent became a party pursuant to Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, rule 34 ("the Rules"). This was a very finely balanced decision, particularly in view of the very late stage at which this application had been made and the absence of any reasonable explanation for why it was being made a couple of working days before a final hearing. Nevertheless in summary the Tribunal found it was in the interests of justice to ensure that the Second Respondent was a party to ensure that the Claimant had a remedy in the event that there was a transfer of her employment to that entity.

8. The Tribunal granted the Respondents permission to serve an amended response to stand for both Respondents. This was not opposed by the Claimant.

9. Further to the conclusion of the Claimant's successful application to amend, the Claimant intimated a further application, this time to postpone the hearing on the grounds that rules 15 and 16 of the Rules had not been complied with. In the event however, following an adjournment overnight to allow the amended response to be produced by both Respondents and for disclosure to be completed by the Second Respondent, this application was not pursued on behalf of the Claimant. The Tribunal proceeded to hear the claims, all three parties confirming by Counsel that no point would be taken further on what had been suggested was a breach of the requirements in the rules regarding responses.

10. During the course of the hearing various additional documents were added to the agreed bundle. First on the second morning of the hearing, documents in the control of the Second Respondent had been disclosed as a result of which some documents were added to the agreed bundle. Secondly as a result of answers given by one of the Respondents' witnesses, further disclosure took place and some additional documents were added.

The Law

11. ERA provides:

"47C Leave for family and domestic reasons.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—

(a) pregnancy, childbirth or maternity

48 Complaints to employment tribunals

(1) An employee may present a complaint to an employment tribunal] that he has been subjected to a detriment in contravention of section 43M, 44, 45, 46, 47, 47A, 47C(1), 47E, 47F or 47G.

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

99 Leave for family reasons.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to—

(a) pregnancy, childbirth or maternity,"

12. TUPE provides:

"A relevant transfer

3.—(1) These Regulations apply to—

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

and in which the conditions set out in paragraph (3) are satisfied.

(3) The conditions referred to in paragraph (1)(b) are that—

(a) immediately before the service provision change—

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(c) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Dismissal of employee because of relevant transfer

7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic,

technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

13. EQA contains the following provision:

> 18 Pregnancy and maternity discrimination: work cases
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably —
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her as a result of it.

14. Guidance on regulation 3 of TUPE was offered in the case of *Metropolitan Resources v Churchill Dulwich Ltd* [2009] IRLR 700 EAT HHJ Burke QC held at paragraph 30:

> "The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself <u>whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor</u>. The answer to that question will be one of *fact and degree*, to be assessed by the tribunal on the evidence in the individual case before it." (emphasis added)

15. In *Johnson Controls v UK Atomic Energy* (UKEAT/0041/12/joj) Langstaff P held that a Tribunal Judge was entitled to find that there had been no service provision change where a centralised taxi booking administration service was taken back in house by the client of the service and no longer thereafter operated as a centralised service. The element of centrality, coupled with some particular features of the job the Claimant taxi administrator had done, no longer existed after the change. The service as operated after the change by the client was held to be essentially a different activity, and the Judge held as he was entitled to find.

16. In *Department for Education v Huke* (UKEAT/0080/12/LA) – Lady Smith upheld an appeal where the Tribunal failed to consider the respondent evidence that only 25% of a role remained, holding at paragraph 21:

> "It follows that minor or trivial differences are to be ignored – we agree with HHJ Peter Clark's observation to that effect in the Enterprise Management case referred to- but, equally, it cannot be a matter of simply asking whether activities carrying the same label continue after the alleged transfer. In the factual assessment which the tribunal requires to carry out, it seems plain that they must consider not only the character and types of activities carried out but also quantity. A substantial change in the amount of the particular activity that the client requires could, we consider, show that the post transfer activity is not the same as it was pre transfer"

17. The Tribunal has considered guidance on the burden of proof in discrimination cases, in particular as referred to by the Claimant *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* 2011 ICR 352, EAT:

> "'the burden of proof provisions in discrimination cases… are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent's motivation… they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law'.

18. In a redundancy situation there may be cases in which it is reasonable of an employer to focus on a single employee without developing or even considering a wider pool for selection (*Wrexham Golf Co Ltd v Ingham* UKEAT/0190/12/RN). In that case it fell within the range of reasonable responses to place a club steward in a pool of one, notwithstanding an overlap between his responsibilities and that of the bar staff. The tribunal

in that case erred by failing to consider whether this approach fell within the range of reasonable responses.

The Facts

19. Our findings of fact fall into three sections. The first is a general chronology of events. The second deals with Dr Haigh's knowledge of the Claimant's pregnancy and IVF treatment. The third deals with the nature of the Claimant's role and what happened to her responsibilities after she was dismissed.

20. The Claimant Dr Lahert was originally sponsored by the First Respondent to complete a PhD in Neuroscience at the Institute of Psychiatry at Kings College London.

21. The Claimant commenced employment on 23 April 2007 as a Research Scientist.

22. In August 2010 she was promoted to Laboratory Operations Manager, reporting to Dr Ian Pike, the First Respondent's Chief Operations Officer.

23. On 1 January 2014 the Claimant changed role and commenced working as a Product Manager. She was still reporting to Dr Pike. For several years she also fulfilled the role of Project Manager, in which there was a vacancy.

24. In June 2016 Dr Jeremy Haigh joined the First Respondent as CEO. He also had a role as Managing Director of the Second Respondent, which was and is a wholly owned subsidiary of the First Respondent, based in Frankfurt Germany. Although these entities are legally separate, it appears that from Dr Haigh's perspective the two are essentially run as a single organisation with an integrated management structure. In our findings below we have referred to the "combined organisation" to denote the First and Second Respondents businesses collectively. In these reasons London is used synonymously with the First Respondent and Frankfurt synonymously with the Second Respondent.

25. In June 2016 Dr Lahert unfortunately suffered a miscarriage. She was signed off work from 27 June 2016 – 10 July 2016. Dr Pike rang her to offer her condolences. He informed her that he needed to tell Dr Haigh the reason for her absence as a restructure was being considered by the First Respondent's Executive team and as a result the Product Manager role and reporting lines were being reviewed. Dr Haigh accepted in his evidence to the Tribunal that if this discussion about the changes in reporting line was raised with the Claimant by telephone during her absence this would have been insensitive, however, he maintains that he did not request that Dr Pike raise this matter and was not aware that he had done.

26. Dr Haigh was aware of the miscarriage at this time. A meeting took place between the Claimant and Dr Haigh on 11 July 2016 to talk about her role. It was Dr Haigh's view that it was not sustainable for her to carry out both roles and he offered her the choice of the two roles. The Claimant says that she was emotionally vulnerable and not in the correct state of mind to make an important decision about her career. In the event, though she remained as Product Manager for the time being.

27. In early January 2017 the Claimant had an informal discussion with Dr Haigh, who indicated that the Product Manager role was likely to be placed "at risk". He encouraged her to move to the Project Manager role.

28. In the week after this conversation the closure of the First Respondent's London laboratory was announced and five employees were placed at risk of redundancy. When the Claimant mentioned to Dr Haigh that she would like to take up the Project Manager role, he told her that he could not formally announce this move until the redundancy consultations were completed.

29. The First Respondent has made a loss for 22 years. It fell within the remit of Dr Haigh to attempt to address these continued losses.

30. In April 2017 the London laboratory closed with the loss of four employees who were made redundant. The Second Respondent continued to operate a laboratory in Frankfurt, Germany. A fifth staff member from the London laboratory, Dr Emanuela Leoni, a Research Scientist, was transferred to the Frankfurt Laboratory to the position of Research Scientist in the Second Respondent's Protein Analysis Team.

31. In June 2017 the Claimant underwent a cycle of IVF (intra-vitro fertilisation) in a private clinic in an attempt to conceive.

32. The extent of Dr Haigh's knowledge of IVF treatment being undergone by the Claimant was disputed between the parties.

33. On 20 February 2018 the Claimant's reporting line changed from Dr Pike to Dr Haigh. Dr Haigh said in an email announcing this change:

> "Project Management (PM) will become a corporate function, and as a consequence Emma Lahert will report directly to me: a consistent approach to project management was introduced in July 2017 under the direction of Emma who became responsible for the cross-functional integration, management and communication of all our contract work. The intention was to reduce the confusion and miscommunication which was occurring with our customers, and allow sales staff to concentrate on generating new business. Initially this function reported into the CSO [Chief Scientific Officer], but as the role of PM developed in the second half of 2017 it became clear that managing this

capability within one division of the business might not fully reflect its value to the broader Company. Consequently, and is the case in most larger bioscience companies, PM will now report outside functional lines."

34. Dr Haigh accepted in his evidence to the Tribunal that he was thereby increasing the profile of this role, which now reported directly to him as CEO.

35. On 4 May 2018 in an email the Claimant wrote to Dr Haigh to request the following Wednesday afternoon as annual leave. In this email she apologised for the relatively short notice, but said that she had equally short notice on a medical appointment. In response Dr Haigh wrote "Emma – that's absolutely fine, and as I don't believe that medical appointments should require you to take annual leave it's a moot point anyway."

36. In early July Dr Haigh worked with the Claimant and Dr Pike on refining the Claimant's role description. An agreed role description which sets out the Claimant's key responsibilities appears at page 217 of the bundle.

37. As part of this same process a role description for "Project Leader/Analytical Project Manager (GCLP)" was being refined. Dr Haigh explained that the term "Analytical Project Manager" arose as a result of seeking accreditation to the Good Clinical Laboratory Practice standard. "Project Leader" was Dr Haigh's 'rebrand' of this role. He drew a clear distinction between the Project Leader role on the one hand and the Claimant's Project Manager role. Project Leaders were managers within particular functions who would be responsible for writing a project plan on the basis of a proposal made to the customer and for leading projects. By contrast Dr Haigh's view of the Claimant's role was a centralised coordinating role, sitting outside individual functions. The Claimant's new role description required basic training in PRINCE2, a project management methodology.

38. These changes coincided with an increasing focus on a "service" offering for clients and also with the First Respondent's plans to increase the number of client projects. The planned increase in projects appears to have been somewhat aspirational and in the event did not materialise in the way hoped for by Dr Haigh during the course of 2018.

39. The poor financial position of the First Respondent became increasingly critical during the course of 2018. Attempts to find a buyer for the business during the first half of 2018 failed. During the preparation of the First Respondent's interim financial results it became clear that an additional loan facility would be required to maintain the business as a going concern. On 2 July 2018 Vulpes Investment Management, the First Respondent's principal shareholder provided the business with a £1 million loan.

40. At the First Respondent's Board meeting on 19 July 2018 Dr Haigh was tasked with working with the Executive Team over the summer to propose actions to secure the future of the First Respondent, which could be considered at the next board meeting in September 2018.

41. The interim results were released on 24 July 2018.

42. On 2 August 2018 Dr Lahert underwent a successful IVF procedure. She received confirmation that she was pregnant on 15 August 2018.

43. In an email on 8 August 2018 Dr Haigh wrote to the team generally in an email headed Changes to Project Leadership. In this email he confirmed that Michael Bremang would be Project Leader/Analytical Project Manager for London and Emmanuela Leoni would perform the equivalent function in Frankfurt. The attached role description makes it clear that these roles are completely different in nature to the Claimant's Project Manager role. These APM roles are described as being "the lead scientist, responsible for delivery of a commercial or internal research project, accountable to the Chief Scientific Officer for project delivery, responsible for generation of the Project Report". There are points of contact between these APM with the Claimant's role. In the same email Dr Haigh wrote "As Project Manager Emma Lahert will continue to provide comprehensive support to all projects engaged by the company and work closely with our Project Leaders (APMs).

44. At some stage during the summer of 2018 Dr Haigh canvassed the question of moving the Project Manager role to Frankfurt. This happened during her regular weekly 1:1 update meetings with him. In one meeting Dr Haigh asked Dr Lahert if she thought that the Project Manager position should be based in Frankfurt. Dr Lahert stated that she said that she did not think that this was a good idea. She told him that in her view such roles can be located anywhere within an organisation and the conversation moved on.

45. In a subsequent 1:1 update meeting a number of weeks later, Dr Haigh positively suggested that the Project Manager position should operate from Frankfurt (as well as the Chief Scientific Officer role) and further that the interim Finance Director position based in Frankfurt should be relocated to London to sit at the First Respondent's Head Office. We accept that this naturally caused her some anxiety, but on this second occasion that she did not provide a comment in response. The Claimant spoke to Dr Pike, her previous line manager who reassured her that she had nothing to worry about.

46. Over the summer Dr Haigh worked with his executive team in preparation for the Board meeting on 18 September 2018. Materials were sent to the Board by email with a "pre-read" on 14 September 2018.

47. On 18 September 2018 the First Respondent's Board considered Dr Haigh's recommendation that significant cost reduction was an absolute requirement and that action needed to take place in 2018. The plan was to reduce the cost base of the business by some £870,000, including a reduction in staff costs of £470,000 per annum. The proposal in respect of staff costs included proposals to reduce the number of days being worked by Dr Haigh himself as CEO and Dr Pike as CSO and some specific changes in respect of two other roles. The first was Head of Chemical Proteomics, in respect of which the recommendation was to make Dr Andrew Thompson redundant. The second was to move the Project Management role to Frankfurt and "Make E Lahert redundant", which would represent an annual cost saving of £45,000. A consequent development was to "Appoint J Schwarz Head of Operations/Project Management". This meant that Mr Schwarz, an employee of the Second Respondent, based in Frankfurt, would take on responsibility for project management. Dr Haigh explained that these were summary recommendations and this proposal was shorthand for a more detailed proposal that fact specific responsibilities for project management would be spread among a variety of the Second Respondent's employees in Frankfurt. Dr Haigh also accepted in evidence that his plans 'evolved'. Mr Scharz would have a leading role in this project management activities which was one component of his new role as "Head of Operations and Project Management".

48. As part of these proposed changes a further two employees would be lost from the combined organisation and other employees would have their roles reduced to half a role.

49. On 1 October 2018 the Claimant attended a meeting where she was informed that she was being placed at risk of redundancy. Dr Haigh explained that there would no longer be a dedicated Project Manager role, but rather that residual project management activities would be relocated to Frankfurt to be performed by other individuals as part of their responsibilities. The Claimant says that she was given no notice of this meeting, which was unscheduled. She understood from the meeting that due to on-going cost pressures, the Project Management function was being moved to Frankfurt, so that it could be located within operations. In a letter sent on the same day, also sent by email, Dr Haigh explained the proposal as

> "to remove its dedicated Project Management position and relocate this capability to the Frankfurt laboratory so that it can be near other operational functions"

50. The Claimant's account is that she felt confused by Dr Haigh's indication that there should be consultation, since that she had the sense that the decision had already been made.

51. On 8 October 2018 the first formal redundancy consultation meeting took place. It appears that in this meeting there was some discussion about the future of project management in the combined organisation. There is no contemporaneous minute of this meeting. There is however a letter of 9 October 2018 which summarised the discussion. The Claimant appears to have, naturally in view of the changes earlier in the year, queried why the important function of project management was being treated in the way proposed. Dr Haigh suggested that the volume and complexity of the current and foreseeable work was not sufficient to require a dedicated project manager. Dr Haigh's letter suggested that the Claimant appeared to have conceded some sort of reduction in ongoing workload. The Claimant disputes that she made any such concession during any of the consultation process. Her evidence is that there was a disagreement on this point in the meeting and that she told Dr Haigh that a dedicated Project Manager role was required to run the size and scale of projects that the business was targeting as part of its services business.

52. Dr Haigh recorded in the letter that he said that any necessary activities could be picked up in Frankfurt as a small part of another role [singular].

53. On 17 October 2018 there was a further Board Meeting. At this meeting the proposal was somewhat modified to "Move any Project Management activities to Frankfurt. Make E Lahert redundant (notice given 20 Oct). Appoint J Schwarz Head of Operations." [emphasis added] Dr Haigh accepted that this was a slight change in the plan from that being discussed the previous month.

54. Also on 17 October 2018, the Claimant attended a second consultation meeting with Dr Haigh. Dr Haigh says that the Claimant was rather more confrontational in demeanour in this meeting. She raised three matters:

54.1. First, that she believed that the First Respondent knew about her miscarriage and IVF and was probably already aware, but that she was confirming nonetheless, that she was pregnant. In respect of the pregnancy, the Claimant would have been nearly 11 weeks pregnant at this stage. Dr Haigh says that this was the first time that he was aware that she was pregnant. He says he had no previous knowledge of it and said so during his meeting. He is adamant that he was unaware that she was pregnant. The Tribunal accept Dr Haigh's evidence on this point. We do not consider that there is evidence that satisfies us that he was aware of the pregnancy at this early stage. We have considered the question of Dr Haigh's knowledge further below.

54.2. Second, she did not believe that the "redundancy" was genuine and believed that the First Respondent was moving the Project Manager position to Frankfurt. Dr Haigh says that in response he reiterated that the Respondent was no longer able to justify a dedicated Project Manager.

54.3. Thirdly, she was astonished that the Respondent had no equal opportunities policy. Dr Haigh replied that this was not unusual in such a small organisation.

55. At the conclusion of this meeting Dr Haigh says that he informed the Claimant that she would be served notice to terminate her employment by reason of redundancy, effective from 20 January 2019 and that he would confirm this in writing. The Claimant says that the conclusion was somewhat more tentative and that Dr Haigh said that a final decision would be made in the next few days but it was likely that his next letter would include the decision that the Respondent would be terminating her contract at the end of the three month notice period.

56. On 18 October 2018 Dr Haigh recalculated the redundancy figures to include statutory maternity pay.

57. The Claimant instructed a firm of solicitors. By a letter of 19 October 2018, the Claimant's solicitor made a data subject access request under the General Data Protection Regulations and advised Dr Haigh that the Claimant wished to exercise her right to raise a grievance relating to her pooling and/or selection for redundancy whilst pregnant. The letter was sent by email at 15:41 on 19 October. A read receipt from Dr Haigh was received by the Claimant's solicitor at 15:48.

58. On 19 October 2018 notice of termination was provided by Dr Haigh with a termination date on 20 January 2019. This letter was sent both in the post and also by an email sent on 19 October 2018 at 17:24. That email stated "I have put the signed hard copy in the post to you this afternoon". Dr Haigh says that he had already placed a hard copy of the termination letter in the post. Dr Haigh's oral evidence to the Tribunal was that this was done "after lunch", i.e. by implication earlier in the afternoon.

59. The Tribunal has noted earlier example of the hard copy and soft copy approach by Dr Haigh on 9 October. We accept that Dr Haigh saw the email from the Claimant's solicitor the same afternoon before he sent a copy of the termination letter by email at 17:24. The Claimant has no direct evidence to contradict Dr Haigh's account about having already written the letter, and invites the Tribunal to draw an inference that he must be lying.

60. We have concluded that we do not need to determine whether or not the hard copy letter had already been sent by 15:48. We find that the content of Dr Haigh's letter was entirely unsurprising as a conclusion to a redundancy process. We find that Dr Haigh changed neither the content nor the timing of the termination letter in response to the Claimant's solicitor's letter. Even on the Claimant's case she had been told that it was likely that his next letter would be terminating her employment.

61. The Claimant appealed the decision to make her redundant and also raised a grievance regarding the redundancy process in a letter dated 31 October 2019. In this letter the Claimant wrote:

> "I consider that the Company has been aware of my pregnancy (and previously, my lengthy period of IVF and earlier miscarriage in June 2016) and that this influenced the decision to move my role/suggest I am redundant. From simply reviewing my Company diary (which is visible to everyone at the Company) from January 2016 to date, I have had time off on more than 50 occasions to attend treatments directly related to my IVF programme. Additionally I explicitly discussed my IVF treatment with Dr Ian Pike and Victoria Birse in July 2017. I firmly believe that my selection for redundancy was directly related to this and my resultant pregnancy.
>
> Although I address this in more detail below I am suspicious of the timing of your letter on Friday, 19 October 2018 giving me notice to terminate my employment. This letter was sent less than two hours of my Solicitors requesting the grievance procedure and outlining my intention to bring a grievance in relation to the proposed redundancy. I consider that the timing of my letter of dismissal was a direct reaction to me stating that I wanted to raise a grievance under two hours earlier."

62. On 21 November 2018 the Claimant attended a combined grievance and redundancy appeal hearing held by Dr Ursula Neys, who is a Non-Executive Board Director of the First Respondent since August 2017. Dr Neys had been party to the Board discussions about the First Respondent's financial difficulties and Dr Haigh's plan to reduce cost.

63. The Claimant was accompanied at this meeting by Mrs P Lahert, her mother-in-law.

64. We have the benefit of some minutes of this meeting taken by Mrs V Birse, the First Respondent's secretary. The accuracy of some parts, but not all of these minutes is disputed by the Claimant.

65. According to the minutes at this meeting Dr Neys asked the Claimant about knowledge of the IVF and also knowledge of her pregnancy. When Dr Neys asked about the Claimant's "personal situation", she replied that "it had been well known but that she did not discuss it", which we interpret to be a reference to the IVF treatment.

66. With specific regard to pregnancy Dr Neys apparently asked whether the Claimant had told anyone else before then. Mrs P Lahert said "with [her] history she hadn't wanted to mention it to anyone".

67. According to the note, the Claimant then apparently stated that it had been difficult to tell people and she had learned she was pregnant between the two meetings. We accept what the Claimant says that this second aspect cannot have been exactly what she said, given that she must have had knowledge in August that the IVF procedure to implant an embryo had apparently succeeded. Her pleaded case is that she knew she was pregnant on 15 August 2018. She says that the reference in this meeting must have been to a 12 week scan, which we accept.

68. Later on in the same meeting the minutes record the Claimant as saying:

> "she was in a situation where her colleagues were asking if she had been applying for other jobs. [She] stated that she was unable to give an answer because they were still unaware of her pregnancy."

69. This significant part of the minute was not specifically disputed by the Claimant during the Tribunal hearing.

70. By a letter dated 28 November 2018 Dr Neys confirmed the outcome of the combined grievance/redundancy appeal process.

71. In respect of the grievance it was found that there was no evidence of discriminatory behaviour given that the redundancy programme included roles held by employees of both gender and the decisions were made on the ground of cost saving. Regarding knowledge of pregnancy Dr Neys noted that the Claimant had not told anyone about this until the second consultation meeting.

72. In respect of the redundancy decision Dr Neys found that the basis for redundancy was genuinely cost saving.

73. On 12 December 2018 the Claimant obtained a MAT B1 form from a midwife and gave this to Ms Victoria Birse, the Secretary of the First Respondent.

74. On 13 December 2018 the Claimant wrote in an email to Mr Schwarz "With regard to January, I believe Jeremy [i.e. Dr Haigh] would like you to take control of all the project management from 2nd Jan and that I will provide support to you as needed until 20th January". Mr Schwarz forwarded this to Dr Haigh who then requested a telephone call with the Claimant the following day. Dr Haigh emailed Mr Schwarz on the same day as follows:

> "Such existing project-related activities as we choose to take forwards can certainly be owned by you in the first instance (making any handover simple) although they may of course be adopted by others in Frankfurt as required. Emma will retain her computer until 20 January at she says, after which it can be transferred. Whether this really requires her continuing

involvement in scheduling meetings is less clear to me although her offer to do so is appreciated – it would rather depend on whether we choose to continue using this platform in 2019."

75. On 20 January 2019 the Claimant's employment terminated.

76. In April 2019 the Claimant gave birth to a baby boy.

Knowledge of IVF and Pregnancy

77. In respect of Dr Haigh's knowledge of the Claimant's pregnancy, the Tribunal finds that he was unaware of her pregnancy until he was told by her on 17 October 2018 at the second formal consultation meeting. We accept his evidence on this point. We note that, based on a date of conception of 2 August, Dr Lahert would have been pregnant for only 11 weeks on 18 October i.e. the day after this hearing. We note the comments made by the Claimant and her mother-in-law in the appeal meeting.

78. The question of Dr Haigh's knowledge of the Claimant undergoing IVF treatment is less straightforward.

79. Dr Haigh's evidence is that he was aware of the fact that the Claimant was undergoing IVF in 2017. His evidence as to when, specifically he was aware varied between "mid 2017" and "the second half of 2017". It was put to him that this was a discrepancy, although he did not accept this. Given the time that has elapsed since these events, the Tribunal does not regard this degree of imprecision as particularly surprising. We find that Dr Haigh was aware of the IVF treatment in the period on or around June 2017 and in the months following in the remainder of 2017.

80. The central dispute is as to Dr Haigh's knowledge or awareness in mid-2018.

81. The Claimant relies upon the following:

81.1. Dr Haigh's knowledge as recently as the second half of 2017.

81.2. Her assertion that it was "common knowledge" that she was undergoing treatment.

81.3. What she characterises as frequent requests for working from home for medical appointments at short notice. For example the 4 May 2018 email set out in the chronology above. On 27 July 2018 the Claimant wrote a short email mentioning that she had a medical appointment next Tuesday that was likely to take most of the morning and asked whether it would be okay to work from home.

81.4. The fact that Dr Haigh was the Claimant's line manager from 20 February 2018.

81.5. An assumption that her old manager Dr Pike, who was aware of her IVF, would continue to share his knowledge about this with Dr Haigh.

82. By contrast the Respondents argue:

82.1. Dr Haigh is adamant that by the time of material events in mid-2018 he did not know that the Claimant was still undergoing IVF. He said he had known friends undergoing IVF and was well aware that it might prove unsuccessful with the result that the treatment might be abandoned.

82.2. His approach to "personal" matters of subordinates is to discuss such matters if they raise it, but not to pry. The Claimant never raised the matter of IVF directly with him at any time.

82.3. His preferred approach of "flexible working" meant that he would focus on employees' outputs and results rather than the amount of time they were spending in the office. The Claimant appears to have accepted in a general way that there was a flexible working approach. Paragraph 31 of the Claimant's witness statement states "The Respondent was generally relaxed in allowing me to work flexibly. As stated above, in order to mitigate any inconvenience to the Respondent, I would (wherever possible) obtain IVF appointments prior to starting work, during lunch time, or after work. If appointments at these times were not available then I would always ensure that I made up any missed hours."

82.4. The Claimant told "white lies" to deliberately obscure the reason for her absences. For example she described one absence relating to IVF on 1 August 2018 as a "stomach bug".

82.5. The Claimant did not diarise medical appointments from July 2017 onwards. In fact the Claimant, as we can see from extracts from her diary in the agreed bundle used "OOO" to denote 'out of office', which would give the reader very little clue as to where she was. Dr Haigh's evidence was to the effect that he did not spend any time poring over subordinates diaries.

83. It is plainly a credit to the Claimant that she worked hard to minimise any disruption to her work. The consequence however is that her ongoing IVF treatment was simply not visible to her new line manager.

84. Having considered this point carefully, the Tribunal accepts Dr Haigh's evidence that he did not know by the material period in mid 2018 that the Claimant was still undergoing IVF. He did not scrutinise the reason for the Claimant's absences. He had a flexible approach to working hours. We do not find his lack of curiosity as to the Claimant's absences surprising.

The reality was that at this period of time he was a CEO focussed on trying to save a business which it appears was on the verge of collapse.

Project Management Role before and after

85. *What was the role done by the Claimant?* The First Respondent exhibited two documents to the Further and Better Particulars of the Response which assist:

85.1. **Appendix 1** 'Role Description', which was apparently finalised and sent by email on 5 July 2018. This defined the key responsibilities of the role as follows:

85.1.1. Plan, monitor and report progress of all research and contract service projects.

85.1.2. Coordinate all documentation including customer proposals, project plans, interim and final reports, and post-project cost analyses.

85.1.3. Manage relationships with the sales team and customers.

85.1.4. Liaise with Chief Scientific Officer, Finance Director and Laboratory Leader as appropriate.

85.1.5. Ensure timely invoicing of clients in coordination with the Finance Director.

85.1.6. Provide regular updates on cash-flows from commercial projects to the Executive Team. Chair the Capacity Planning Review meeting.

85.1.7. Coordinate resource allocation to each project to maximise productivity.

85.1.8. Liaise with Chief Compliance Ofc to ensure adherence to appropriate guidelines and Good Clinical Laboratory Practice as required.

85.1.9. Provide quarterly reports to the Executive Committee on functional resource utilisation.

85.1.10. Control PROJECT MANAGEMENT processes within the ISO 9001:2015 Quality Management System.

85.1.11. Propose process efficiency initiatives at the portfolio level.

85.2. **Appendix 2** "Process oriented organisation project execution", a document which describes a series of processes performed by a variety of employees under various heading (e.g. Sales & Pre-Project Phase, Project Execution Phase, Invoicing, Post Project Phase).

85.3. This was marked up by the Claimant and exhibited to her witness statement, showing many discrete processes that she was involved in. Her manuscript additions to this document were not challenged by the Respondent. This document shows that activities in which she was involved is now being done by 13 different individuals (3 Analytic Project Managers, 1 in London, 2 in Frankfurt; Chief Commercial Office in London; Chief Scientific Officer in London; Company Secretary in London; 4 Group Leaders, 3 in Frankfurt, 1 in London; Head of Laboratory Science in Frankfurt; Head of Operations and Head of Finance both in Frankfurt). Dr Haigh himself suggests that he picked up elements of the Claimant's role. This would suggest 8 individuals in Frankfurt picked up elements of the role and 6 individuals in London.

86. *What happened when the Claimant left?* The Tribunal accept Dr Haigh's evidence that his plan for the Claimant's responsibilities evolved to some extent from his initial version of the plan in September 2018 to its implementation in 2019.

87. Looking at the matter very broadly, the largest proportion of the activities being carried out by the Claimant before she was made redundant are being carried out in some form in Frankfurt by a variety of different employees of the Second Respondent. Some activities have remained in the First Respondent in London. Some activities are not being done at all.

88. *Which of the Claimant's activities are no longer done?* One of the key responsibilities of the Claimant's role "propose process efficiency initiatives at the portfolio level" is now not being done at all. Another key responsibility, "Liaise with Chief Compliance Officer to ensure adherence to appropriate guidelines and Good Clinical Laboratory Practice" is not being done because of the change in the organisation chart. There is no longer a Chief Compliance Officer, but rather a Head of Chemistry & Quality Management. Beyond this, Dr Haigh struggled in his oral evidence to identify specific tasks that are not being done. We do however understand from his evidence that use of the PRINCE2 methodology is now not being used. He criticised this approach as being "ornate". The activities and approach of a dedicated project manager are not being performed in that way now.

89. *Which activities transferred and to where?* On 6 November 2018 Dr Haigh created a document headed "Task transfer" [579] which identified destinations for some of the activities listed as key responsibilities on appendix 1. This document reads [Tribunal comments in square parentheses]:

- Report progress of all contract service projects (Head of Operations). [Josef Scharz is the Second Respondent's Head of Operations and Project Management in Frankfurt.]

- Coordinate all documentation including customer proposals, project plans, interim and final reports (Project Leader), and post-project cost analyses (Head of Operations). [There are now three Project Leaders, one based in London and two based in Frankfurt].

- Manage relationships with the sales team and customers (Project Leader). [One in London; two in Frankfurt]

- Ensure timely invoicing of clients (Finance Assistant). [London]

- Chair the Capacity Planning Review meeting (Head of Operations). [Frankfurt]

- Provide quarterly reports to the Executive Committee on functional resource utilisation (Finance Director). [The Finance Director Stefan Fuhrmann is based in Frankfurt.]"

90. In a later document also entitled "Task transfer" created on 29 April 2019 Dr Haigh attempted to estimate the percentage of various employees' time that is now taken up by tasks that had been previously carried out by the Claimant. The wording of this document was incorporated into paragraph 9 of the First Respondent's further particulars document. This document reads as follows:

- Report progress of customer contract service projects – Josef Scharz – Head of Operations: Frankfurt (accounting for approximately 5% of their current working time);

- Coordinate documentation including customer proposals, project plans, interim and final reports – Michael Bremang – Project Leader; London (5%) and Emanuela Leoni and Stephan Jung – Project Leaders; Frankfurt (5% each);

- Analyse post-project costs – Josef Scharz – Head of Operations: Frankfurt (2.5%);

- Manage relationships with sales team and customers - Michael Bremang – Project Leader; London (7.5%) and Emanuela Leoni and Stephan Jung – Project Leaders; Frankfurt (7.5% each);

- Invoice clients – Victoria Birse – Financial Assistant/Exec PA; London (2.5%);

- Chair Capacity Planning meeting - Josef Scharz – Head of Operations: Frankfurt (2.5%)

- Provide quarterly reports to Executive Committee on functional resource utilisation – Stefan Fuhrmann - Finance Director; Frankfurt (2.5%).

91. We recognise that these percentages relate to the percentages of other employees' roles not percentages of the Claimant's role. Nevertheless as a very rough indicator of what percentage of the Claimant's role went where, on these figures 15% of a full-time employee remained in London and 37.5% went to Frankfurt. This makes a total of 52.5%.

92. No one individual has picked up a substantial percentage of the Claimant's responsibilities. Josef Scharz is now performing activities previously performed by the Claimant for approximately 10% of his time. For the Project Leaders the equivalent percentage is 12.5%.

93. We recognise that these figures are approximate. They are rounded. They may be slight under-estimates. We have no reason however not to accept that they are a useful, if slightly impressionistic indication of the degree of fragmentation and in an approximate way where the different activities have gone.

SUBMISSIONS

94. We had the benefit of both written submissions and oral submissions from Counsel representing each of the parties.

95. We carefully considered all of these submissions, but have only dealt with those submissions necessary for determination of the claims in the interests of brevity and proportionality and given the number of heads of claim pursued.

DISCUSSION

Issue 5.1. Did R propose outsourcing C's role to an associated employer based in Frankfurt within the meaning of Regulation 3 of TUPE, as set out in writing in the slide referenced at paragraph 20.1 of the particulars of claim or otherwise?

96. This relates to the presentation of 18 September 2018 which is referred to above. The Tribunal accepts the evidence of Dr Haigh that the content of this slide was no more than a shorthand for a broader distribution of the Claimant's responsibilities. If we are wrong on this finding, in any event we found find the plan had evolved to a wider distribution of her responsibilities by the time that consultation took place in October 2018.

97. *Was there a transfer under TUPE?* The Tribunal has considered the authorities, in particular *Churchill Dulwich, Huke* and *Johnson Controls*.

We recognise that a service provision change can relate to the employment of a single individual.

98. Our finding is that there was no service provision change under TUPE for the following reasons:

98.1. There was no dedicated Project Manager after the Claimant left.

98.2. Centralised coordination of project management was no longer done.

98.3. The PRINCE2 methodology was no longer being utilised.

98.4. Elements of the role were no longer being performed at all.

98.5. There was very significant fragmentation of the Claimant's role, not only between the First and Second Respondents, but between a significant number of employees and geographically between London and Frankfurt.

98.6. There was a substantial reduction in the volume of work being done. Even if the First Respondent's estimate of 52.5% of a role continuing is an underestimate, we consider that there has been a substantial reduction.

99. We consider that the combination of the reduction in the work done and the very significant degree of fragmentation and also the loss of the central coordination element all point to a substantial change. The activities that are still being are being done different way.

Issue 5.2. Did R act breach of Regulations 13 & 14 TUPE in respect of C?;

100. Given the finding above, we do not consider that regulations 13 and 14 are engaged.

Issue 5.3. Was C dismissed because of said proposed relevant transfer;

Issue 5.4. If so, was C's dismissal automatically unfair in contravention of Regulation 7 TUPE.

101. In respect of both of these issues, the Tribunal has found that there was no transfer and accordingly these have not been addressed.

Issue 5.5. If not, did R outsource C's role to an associated employer based in Frankfurt within the meaning of Regulation 3 of TUPE?

102. This is dealt with under Issue 5.1 above.

Issue 5.6 Was the sole or principal reason for the dismissal an economic, technical or organisational ("ETO") reason entailing changes in the workforce pursuant to regulation 7(2)?

103. Given the finding that there no transfer it is not necessary to deal with this point. Had we be required to deal with this point, we would have accepted the First Respondent's two submissions that (i) the circumstances of the urgent cost reduction leading to the need to reduce the number of employees is a paradigm ETO case and (ii) that the reason for dismissal was the First Respondent's own reason, namely the urgent necessity of cost reduction, not a requirement of the Second Respondent per *Hynd v Armstrong* [2007] CSIH 16.

6. Detriment pursuant to Section 47 (C) ERA / Reg 19 MPL

Issue 6.1. Did R have knowledge that C had had a miscarriage, had been undergoing IVF and/or was pregnant before placing her at risk of redundancy;

104. The Tribunal finds that the First Respondent did have knowledge of the Claimant's miscarriage in 2016 and that she was undergoing IVF in 2017 as above. We have found that at the time he was making decisions about the redundancy in mid 2018 Dr Haigh did not know that the Claimant was still undergoing IVF.

105. We find that no one in the First or Second Respondent making decisions or with influence on the redundancy process was aware of the Claimant's pregnancy at the point that she was placed at risk of redundancy in October 2018.

Issue 6.2. When did R have knowledge of C's pregnancy?

106. The First Respondent had knowledge of the Claimant's pregnancy when she told Dr Haigh at the second formal redundancy meeting on 17 October 2018.

Issue 6.3. Was the Claimant subjected to an unlawful detriment(s) by any act of R done for a prescribed reason related to her pregnancy/ her seeking to take maternity leave/ her taking or seeking to take parental leave? The detriments relied on at this time are:

(1) Placing C in a selection pool of one;

107. This allegation of detriment does not succeed for two reasons. First the Claimant had already been placed at risk of redundancy and the redundancy process was underway when she announced her pregnancy on 17 October. Up to this point, as we have found above, Dr Haynes was not aware of the pregnancy.

108. Second, she was the only Project Manager. We do not find that there were other colleagues with sufficiently similar roles to mean that they would naturally have been placed in a pool with the Claimant. It is clear to us on the evidence that colleagues who were being asked to take on Project Management responsibilities were doing so in addition to their substantive

roles and that these substantive roles were significantly different to the role that the Claimant was performing, as discussed elsewhere.

(2) Failing to pool C with other staff who weren't pregnant;

109. This allegation does not succeed for similar reasons to Issue 6.3 (1).

(3) Placing C at risk of redundancy;

110. This allegation does not succeed for similar reasons to Issue 6.3 (1).

(4) Refusing to carry out any grievance process before giving C notice;

111. The Tribunal has considered the Claimant's solicitor's letter of 19 October. This letter of a little over a page is principally a data subject access request under the General Data Protection Regulations. In the final three lines the following is stated:

> "In the meantime, we are advised that our client wishes to exercise her right to raise a grievance relating to her pooling and/or selection for redundancy whilst pregnant. We would be grateful if you would please forward to us a copy of your internal grievance procedure".

112. Although this letter thereby gave an indication of the topic of the grievance, the substance of grievance was sent by the Claimant herself 12 days later in a letter of 31 October 2018 which was a combined appeal against redundancy and grievance. This letter post-dated the 19 October notice of redundancy letter.

113. While it is right to state that this notice of redundancy was sent before any grievance process was followed, we do not consider that by sending his letter of 19 October Dr Haigh was refusing to carry out the grievance process. We note that the Claimant did have the benefit of a grievance being heard before and concluded by Dr Neys well inside the notice period.

114. We do not consider that the Claimant thereby suffered a detriment.

115. In any event, it is the finding of the Tribunal that Dr Haigh served the notice of redundancy letter 19 October on that date entirely because of the financial circumstances of the First Respondent.

(5) Failing to adhere to R's own process and timeline as set out in the document "Redundancy Consultation – Timeline" including a failure to send letter 2 b and arrange a third meeting on receipt of C's Solicitors letter dated 18 October 2018;

116. There does not appear to be a formal redundancy process for the First Respondent. We do not consider that this is especially surprising

considering how small this organisation is. A document headed "Redundancy consultation – Timeline" appeared at 260 of the agreed bundle. Someone has handwritten file note: 30/09/18 on it. This sets out a timeframe from 1 October – 17 October with a further period for dealing with any appeal. The significance of 'letter 2b' is that this is a letter to arrange a third meeting to dealt with any outstanding issues.

117. At the bottom of the page it says "Timeline need not be followed precisely. Key to ensure that consultation is of adequate duration (at least 14 days from initial announcement until any employee is given notice that they are being dismissed by reason of redundancy).

118. Dr Haigh did as a result of the announcement of pregnancy recalculate sums to be paid on termination to include maternity pay.

119. We did not consider that the fact of the Claimant announcing her pregnancy on 17 October changed the circumstances of the redundancy such that further consultation was required. This was not a case for example where statutory regulations would provide preference for her, since no one else was in the same pool. It did not change the underlying reasons for the redundancy exercise nor the logic in placing the Claimant's role in the pool.

(6) Failing to arrange a grievance hearing before dismissing C.

120. This allegation appears to be substantially similar to (4) which is addressed above.

7. Unfair Dismissal – Leave for family reasons Section 99 ERA / Reg 20 MPL

Issue 7.1. Did the reason or principal reason for the C's dismissal relate to her pregnancy/ her seeking to take maternity leave/ her seeking to take parental leave?

121. As should be clear from the findings above, the Claimant was placed at risk of redundancy in circumstances where this was highly likely to lead to her dismissal before Dr Haigh had any awareness of her pregnancy. Indeed her pregnancy was only mentioned at the second formal consultation meeting.

122. The fact that a male colleague Mr Thompson was placed at risk of redundancy and dismissed as part of the same exercise is one of the factors to be weighed in the balance. We acknowledge and agree with Ms Bell's submission that would simplistic to conclude that because a male colleague had been dismissed it follows that no discrimination occurred.

123. We accept the evidence of Dr Haigh and Dr Neys that the First Respondent was in a very difficult financial position. Significant cost savings were being made through a variety of measures, not simply the Claimant's

redundancy. The Tribunal is satisfied that the poor financial position and the need for cost savings was the principal reason for dismissal.

Issue 7.2. Did the reason or principal reason for C's dismissal relate to redundancy? If so, did the redundancy apply equally to one or more employees in the same undertaking who held positions similar to that held by C who were not dismissed?

124. The principal reason did relate to redundancy. We do not consider that there were employees in the same undertaking who held positions similar to that held by the Claimant. The Claimant's position of Project Manager was the only role of this nature in either the First or Second Respondent. We accept the evidence of Dr Haigh, in part based on his oral evidence but also substantiated by the documentary evidence of the role descriptions that the "Project Leader" roles were not project management roles at all in the sense that the Claimant's role was. The superficially similar nomenclature gives a potentially misleading impression that these roles are substantially similar whereas in fact they are not.

Issue 7.3. Was C's dismissal automatically unfair?

125. We do not find that the Claimant's dismissal was automatically unfair.

8. Unfair Dismissal – General

Issue 8.1. What was the reason for the C's dismissal? R asserts that the reason was redundancy.

126. The Claimant does not accept that there was a genuine redundancy situation.

127. We have considered the statutory definition of redundancy at section 139 of the Employment Rights Act 1996. We consider that both section 139(1)(b)(i) and (ii) are satisfied in the circumstances of this case. We find that there was some reduction in the project management activity required by the First Respondent.

128. Separately to the question of the reduction in workload, we consider that this is a situation where the First Respondent was entitled to reduce its headcount. The requirement for employees to carry out work of a particular kind had reduced and specifically had reduced in the London office.

Issue 8.2. Did R act reasonably in treating the reason (redundancy) as a sufficient reason to dismiss C?

129. We consider that the First Respondent did act reasonably in treating redundancy as a sufficient reason to dismiss the Claimant in view of the pressing need to make cost savings.

Issue 8.3. Did R carry out a fair procedure?

130. The test to be applied by the tribunal is whether the procedure followed fell within the range of reasonable responses (*J Sainsbury plc v Hitt* [2003] ICR 111, CA).

131. Dr Haigh at one stage in his oral evidence said that the redundancy process went "according to plan". It is contended by the Claimant that this indicated pre-judgement and a closed mind.

132. The Respondents' submissions on consultation were to the effect that no business would go in lightly to a redundancy exercise. In other words in any redundancy exercise there is a real likelihood that redundancies will be made irrespective of representations made during the consultation process.

133. It is clear that during the consultation process Dr Lahert articulated her concerns about whether it was a genuine redundancy and disagreed with Dr Haigh about his proposals to deal with project management in a very different way by removing her role. At paragraph 57 of her witness statement she concedes that she could not think of alternatives to redundancy, but makes the point that this was because she had not seen the business plan and felt that she was only provided with limited details of what was proposed.

134. We note that some information was given about the redundancy proposal by the First Respondent in a letter dated 1 October 2018. Significantly more detail was given in the consultation meeting on 8 October 2018, as evidenced by the follow-up letter sent on 9 October 2018 which sets this out. This letter plainly set out what was envisaged by way of changes and the reasons for it.

135. The Tribunal does not consider that this was a case where the Claimant was unable to articulate opposition with what was proposed or situation where an obvious alternative was not considered because the employer failed to engage with the employee. Dr Lahert and Dr Haigh discussed the matter. It was a situation where cost savings needed to be made urgently. We find that the First Respondent, appropriately, gave the Claimant the opportunity to comment on the proposal to make her role redundant. We do not consider that the nature of the consultation ultimately was unfair.

136. We do not consider that anything about the process followed in this case, which was comprised of a series of consultation meetings, took the procedure followed outside of the band of reasonable responses.

Issue 9. Unfair Dismissal – Redundancy

Issue 9.1. Has R demonstrated that there was a genuine reason for redundancy, as defined in section 139 ERA.

137. We consider that the circumstances at the time clearly fell within the definition of section 139 i.e. a redundancy.

Issue 9.2. Was C included within the correct pool of employees put at risk of redundancy?

Issue 9.3. Should other employees have been included in the pool?

138. These two issues are dealt with together. The range of reasonable responses test applies to the selection pool in a redundancy situation. The pool may be drawn by an employer in a variety of different ways and still be fair.

139. Given that there were no other Project Managers or others with roles similar to the Claimant's role, we do not consider that the decision that the claimant should be in a pool of one fell outside of the range of reasonable responses.

140. While it might be fair in some circumstances for an employer to include employees of a subsidiary company or indeed employees of an employee subsidiary based overseas, we do not consider that the failure to do this in the circumstances of this case took the selection of the pool outside of the range of reasonable responses. This was not a situation in which individuals were doing identical roles in the overseas subsidiary.

Issue 9.4. Were there selection criteria applied for pooling and if so, what were they and were the selection criteria fair and objective?

141. It appears to the Tribunal that this item on the agreed list of issues elides two distinct concepts namely the scope of the selection pool on the one hand and the selection criteria from the pool on the other.

142. We consider that we have dealt with the scope of the selection pool above.

143. Selection criteria from the pool did not apply in this case since the pool was of one person.

Issue 9.5. Was C consulted about the selection criteria or the weightings given to these?

Issue 9.6. Was C scored fairly under the selection criteria?

144. These points have not been advanced by the Claimant's counsel, and in any event we do not consider it is relevant given the pool of one.

Issue 9.7. Did R undertake a fair and genuine consultation?

Issue 9.8. Should R have considered "bumping" C into another role?

145. We do not accept the contention of the Claimant at paragraph 48.2.3 that she should have been considered for the role of an employee of the Second Respondent Emanuela Leoni on the basis that the two of them had PhD's in Neuroscience and similar scientific training.

146. We have considered the other roles we have heard evidence about and the organisation chart. *Wrexham Golf* is authority for the proposition that in some circumstances it may be fair in some circumstances for a respondent not to consider a wider pool than one employee.

147. We acknowledge the Claimant's background as a research scientist. However, in the particular circumstances of this case, in which the Claimant was in a unique role, we do not consider that it fell outside of the band of reasonable responses not to consider "bumping" or the possibility of a wider pool.

Issue 9.9. Was there a suitable alternative vacancy? Was that alternative vacancy offered?

148. There were no suitable alternative vacancies, so this does not arise.

Issue 9.10. Did R follow its own redundancy procedure?

149. There was no formal redundancy process as such. It is our assessment that the First Respondent stuck reasonably closely to the timeline set out in the document on page 260.

Issue 9.11. Would C have been made redundant after a fair procedure in any event?

150. We do not consider that the process followed was unfair.

151. Even in the event that a fair procedure was followed it seems likely that the Claimant would have been made redundant.

10. Direct Discrimination

Issue 10.1. Was C treated less favourably than any actual or hypothetical comparator(s) because of her gender and/or maternity and pregnancy? The less favourable treatment relied on are those matters set out at 6.3, a failure to follow a fair process and her dismissal.

152. To reiterate, we agree with Ms Bell's submission on behalf of the Claimant that it would be "simplistic" to conclude that simply because Andrew Thompson, a male colleague, was dismissed as part of the same redundancy exercise, this excluded the possibility of pregnancy being the reason for the Claimant's dismissal.

153. The Tribunal has weighed up all of the evidence this matter, including Mr Thompson's dismissal, the other cost saving measures being adopted by the First Respondent and the evidence of Dr Haigh who was subject to a sustained and forceful cross examination for over a day of tribunal time by Ms Bell.

154. The Tribunal is in this case in a position to make positive findings on discrimination (per *Hewage*) and does not need to consider separately the operation of the burden of proof.

155. The Tribunal finds that the sole reason for the initiation of the redundancy process, the selection of the claimant to be placed at risk of redundancy and the ultimate decision to dismiss her by virtue of redundancy is the need for the First Respondent to make costs savings urgently. All of this process was in train before Dr Haigh became aware of the Claimant's pregnancy. We do not consider that there is a link established between this pregnancy and the treatment of the Claimant

Issue 10.2. The actual comparators relied on will include Emanuela Leoni and Josef Schwarz. Other comparators will be named where appropriate following disclosure.

156. The Tribunal did not find based in the evidence that there were actual comparators whose circumstances were the same or materially similar to the Claimant.

11. Indirect Discrimination

Issue 11.1. Alleged application of a discriminatory PCP: Did R's application of a PCP (the requirement of not being pregnant and/or being available to work in Frankfurt and/or being able to relocate to Frankfurt) amount to indirect sex discrimination?

157. This claim was dismissed upon withdrawal by the Claimant.

12. Harassment

Issue 12.1. Was C subjected to unwanted conduct related to her gender (which includes pregnancy)? The unwanted conduct relied upon is set out at clause 10.1.

158. The Tribunal found that the conduct referred to was unwanted, however it did not find that it related to the Claimant's gender or pregnancy.

Issue 12.2. Did the unwanted conduct have the purpose or effect of violating C's dignity and/or creating an intimidating, hostile, degrading, humiliating and offensive environment for her?

159. It is acknowledged that the Claimant must certainly found the redundancy process unpleasant and unwelcome.

160. The Tribunal did not however find conduct which was sufficiently serious, viewed objectively to amount to that which would have the effect of violating her dignity and/or intimidating, hostile, degrading, humiliating and offensive environment. On the contrary the Tribunal found that Dr Haigh dealt with this difficult situation in an appropriate and professional way.

13. Victimisation

Issue 13.1. Did C do a protected act? The protected act that the C relies on is her enquiry as to the process for her to raise a written grievance concerning her pooling and/ or her selection for redundancy whilst pregnant immediately before she was given notice of the termination of her employment.

161. Dr Haigh conceded that he understood the Claimant's solicitor's letter of 19 October 2018 as raising an allegation of discrimination relating to her pregnancy. This was a protected act for the purposes of section 27 of the Equality Act 2010.

Issue 13.2. Alternatively, did R believe that C had done or may do a protected act?

162. It is unnecessary to address this issue given the above finding.

Issue 13.3. Did R subject the Claimant to a detriment because of the protected act? The detriment relied on is denying the Claimant the opportunity to have her grievance heard before her employment was terminated and/ or terminating her employment.

163. The Tribunal has found that Dr Haigh sent the letter of termination on 19 October 2018 that he would have sent, irrespective of whether the Claimant's solicitor's letter of 19 October had been sent. In other words we do not consider he was influenced in the timing or content of his email by the protected act.

Employment Judge Adkin

Date 14th Nov 2019

WRITTEN REASONS SENT TO THE PARTIES ON

14/11/2019

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FOR THE TRIBUNAL OFFICE

Notes

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