EMPLOYMENT TRIBUNALS

Claimant: **Ms Izabela Szachta**

Respondent: **Argyll London Limited**

Heard at: **East London Hearing Centre**

On: **9, 10, 11 September 2020; 1 and 2 October 2020**
27 November 2020 (Remedy)
(by Cloud Video Platform)

Before: **Employment Judge Russell**
Members: **Mr P Quinn**
Mrs A Berry

Representation
Claimant: **Mr M Collins (Counsel)**
Respondent: **Mr G Turner (Solicitor)**

JUDGMENT

The judgment of the Tribunal is as follows:-

1. **The complaint of discrimination because of pregnancy and/or maternity leave succeeds in respect of issues number 2 C, D and I.**

2. **The claim of sex discrimination succeeds in respect of issue 2E.**

3. **The unfair dismissal claim brought contrary s.98 of Employment Rights Act 1996 succeeds. All other claims fail and are dismissed.**

4. **There is a 100% chance that the Claimant would have been fairly dismissed had a fair procedure been followed. The award for unfair dismissal is: £652.50 loss of statutory rights and £35 expenses.**

5. **The Claimant is awarded £11,000 for injury to feelings.**

REASONS

1 The Respondent is a building and refurbishment company extensively reliant on the use of subcontractors on its projects. Its previous iteration was as Argyll Building

Services Limited which went into liquidation in or around 2017, at which point the Respondent was incorporated doing much the same work. It is a small company, with one director, Mr MacMillan and at the material time 8 employees, although now there are only four employees including Mr MacMillan.

2 The Claimant commenced employment on 2 November 2015. She was broadly speaking an office manager with a very wide job description, including accounting, personnel and subcontractor procurement, pricing, projects, marketing and administration. It is common ground that not all of the duties on the job description were performed by the Claimant in practice. For example, the Respondent used external accountants for filing statutory and annual accounts. On balance, the Tribunal finds that approximately two thirds of the Claimant's actual role was book-keeping and other related financial activity with the remaining third comprising general administrative and office duties.

3 The Claimant had no previous experience in book-keeping and financial functions. Mr MacMillan was aware of this when he recruited her and was happy for the Claimant to learn on the job with limited support and oversight provided by Ms Hull, a qualified accountant who had previously worked with the Respondent. The Claimant was diligent and hardworking. During her employment and with the support of Mr MacMillan, she completed several book-keeping courses and gained a level 3 Association of Accounting Technicians qualification in December 2019 based upon study completed in part during her employment with the Respondent.

4 The decision to run the financial aspect of the Respondent thus led to what were described as systemic flaws. These were not the fault of the Claimant nor was there any question of her underperforming; rather it was a product of Mr MacMillan's decision to use an inexperienced employee to handle the financial functions of the company. To be fair to Mr MacMillan, he accepted this point in cross-examination. We find that throughout the working relationship, Mr MacMillan made no significant criticisms of the Claimant or her performance. We would describe their working relationship as being good and underpinned by a degree of mutual cooperation and desire to see the company succeed.

5 On 9 July 2018, the Claimant told Mr MacMillan that she was pregnant. There is a dispute as to his reaction. The Claimant's case is that Mr MacMillan told her that he had not previously employed a woman who had been pregnant or was of childbearing age and that he could only accept her taking the absolute minimum time off for maternity leave. The Claimant said she found this upsetting and extremely offensive but agreed to take only 12 weeks. By contrast, Mr MacMillan's evidence is that no such comment was made; it was factually inaccurate as he has previously employed women who went on maternity leave, for example Ms Buckland. Mr MacMillan said that he had no difficulty with maternity leave and his concern was only to make arrangements for adequate cover and handover. Mr MacMillan maintained that it was the Claimant who said that she only wanted three months of maternity leave due to her domestic and financial circumstances.

6 Ms Buckland confirmed in evidence, which we accepted as reliable, that she did take maternity leave when employed by Mr MacMillan. Although her maternity leave was of a particularly short duration, this was not at the instigation of Mr MacMillan and there is no evidence to suggest that he regarded maternity leave negatively nor that he placed any pressure upon her to return to work swiftly after the birth of her child.

7 The Tribunal also had regard to the emails and WhatsApp messages between the

Claimant and Mr MacMillan between November 2018 and the start of her maternity leave in early January 2020. These disclose no pressure from Mr MacMillan or any negative view of the Claimant's forthcoming maternity leave. To the contrary, the Tribunal finds on balance that it was the Claimant who was keen to be at work to help and support the business, even during her periods of annual leave or maternity leave. This is particularly evident in an exchange of WhatsApp messages in early January 2020 in which the Claimant deals with work related matters in a way which expresses no concern and Mr MacMillan offers her future leave in return for the work she was then doing whilst on leave. In her WhatsApp message on 13 December 2018, the Claimant expressly states that the fact of her annual leave and maternity leave did not mean that she would not be reachable. This is consistent with our finding that the Claimant has a strong work ethic and was keen to continue to be involved in the business even whilst on leave.

8 The Claimant's email sent on 1 January 2019 refers to financial difficulty and is consistent with Mr MacMillan's evidence that the Claimant was concerned about her financial position. Finally, the allegation that Mr MacMillan said that he wanted the Claimant to have only the absolute minimum time off is not plausible given that the actual maternity leave agreed was for three months. On balance we find that in hindsight and with the relationship ending acrimoniously, the Claimant has mis-remembered or mis-interpreted what was said on 9 July 2018. This was an ordinary and amicable discussion and we do not accept that Mr MacMillan made the comments alleged by the Claimant.

9 Following the announcement of the Claimant's pregnancy, all went well and there was no change in the positive working relationship between the Claimant and Mr MacMillan, who both sought to achieve an orderly handover. Mr MacMillan began to consider how to cover the Claimant's maternity leave and decided that the office management aspects of her role could be outsourced to a company in Manila. Whether or not this was to save money and whether or not it was a commercially prudent decision is not for this Tribunal to decide. It was a decision taken for genuine business reasons.

10 Mr MacMillan was initially looking for a local book-keeper to deal with financial matters during the Claimant's absence. This is consistent with an email sent by Mr MacMillan to Insight on 2 November 2018 in which he asked if they could recommend two or three book-keepers in the area. The Tribunal finds that Mr MacMillan was not considering replacing the Claimant, simply how best to cover her work during maternity leave. There is no evidence to support the Claimant's case that Mr MacMillan viewed her impending maternity leave as a cause for concern, far less as a reason to dismiss her. It was only later, after Insight made their proposal to provide financial services, that Mr MacMillan's plans changed significantly.

11 Insight are a company providing outsourced financial management services to small and medium sized businesses. They offer a pyramid of services: from basic book-keeping to management accounts to outsourced financial director. Following Mr MacMillan's initial enquiry about book-keeping cover, Insight made a proposal about the benefits which their services would provide to the Respondent which Mr MacMillan found highly persuasive. Whilst Insight said that they were prepared to provide the book-keeping services, they made clear that this was with a view to also being awarded the Respondent's accountancy and financial management work, the "two phased approach".

12 The Tribunal carefully considered the emails between Mr MacMillan and Insight in November 2018 as they discussed the services to be provided.

13 On 18 November 2018 Mr MacMillan told Mr Mumford that:

> **"I need to avoid having both two management accountants and two book keepers salaries (fees) running in tandem. The latter is to some extent inevitable the former is avoidable. As discussed I have no desire to take step one without the destination of step two being locked in. However, I do clearly need to get the timing right to avoid running up excessive costs and/or rocking the boat at a delicate moment. We're under considerable time pressure with Izabela's imminent departure. She is currently in the process of handing over reports to our new friends in Manila that may become redundant if we move forward with Insight. It was our intention to hand over to a book keeper next week (week starting 19/11) and this has been lined up."**

14 On 21 November 2018, Mr Mumford told Mr MacMillan that he envisaged a two-step process: initially picking up the Claimant's book-keeping tasks using the Respondent's existing Clear Books accounting software with a view to providing a full financial service on the Insight Exchequer software package at a later date. A letter of engagement dated 22 November 2018 is unsigned but, as Mr Hammond accepted, set out the basis of the working relationship between Insight and the Respondent and the anticipated scope of the services to be provided. Stage 1 would last for a maximum period of three months, followed by stage 2. An appendix sets out the work in stage 1 and stage 2. Stage 1 is book-keeping only and comprises mostly the work undertaken by the Claimant. Stage 2 is a full outsource, including broader accountancy work such as statutory and annual returns previously done by the external accountants. Paragraph 1.10 of the letter of engagement says that Insight will endeavour to train and develop where possible the Respondent's financial and accounting staff if appropriate to allow them to make the most effective and efficient use of their time and to properly utilise Insight's systems and processes.

15 A central dispute between the parties is at what date did Mr MacMillan decide to use Insight to provide the Claimant's book-keeping work beyond her maternity leave and thereby potentially render her redundant. The Tribunal considers that there are two relevant dates. The first is the date that Mr MacMillan took the business decision to outsource to Insight both the book-keeping and the broader financial work. The second is the date that Mr MacMillan decided that the Claimant was at risk of redundancy because Insight would directly perform the book-keeping without the need for any input from an internal book-keeper as a permanent part of their engagement.

16 The Claimant's case is that the decision to outsource the work to Insight and remove her role, putting her at risk of redundancy, was taken in November 2018 before she went on maternity leave. The Respondent's case is that the decision to use Insight for book-keeping beyond maternity cover and put the Claimant at risk of redundancy was only taken by the end of January with the decision to move fully to the Exchequer software package as operated by Insight staff. The Tribunal were mindful that there may be a distinction between the date that the Respondent decided to outsource the book-keeping work permanently to Insight and the date that the Respondent decided that it no longer required the Claimant to do book-keeping work. In other words, the possibility that the Claimant could have continued to work on book-keeping alongside the Insight team and using their Exchequer software.

17 Having regard to the oral evidence and contemporaneous documents, the Tribunal finds on balance that Mr MacMillan was very impressed by Insight and the

services that they could offer to his business, in particular the attraction of real time financial reporting. We find that the 22 November 2018 letter of engagement represents a definite business decision to outsource the financial work on a permanent basis to Insight both in terms of book-keeping and broader financial services. The ongoing discussions in December 2018 and January 2019 were concerned principally with the timing of each phase, fine tuning the transfer of the work to Insight and the overall cost. The appendix to the letter of engagement clearly envisages that responsibility for book-keeping would remain with Insight even in stage 2, in other words after the Claimant's return from maternity leave. There is no suggestion in any of the contemporaneous documents that book-keeping would return in-house at the end of the maternity leave period. Mr Hammond's evidence was that there was discussion about training on Exchequer for external, non-Insight employees, such as the Claimant. The Tribunal found Mr Hammond to be a credible and reliable witness and his evidence is consistent with Mr MacMillan's reference in the 18 November 2018 email to the possibility of two book-keeping fees being to some extent inevitable (in other words paying both Insight and the Claimant).

18 Overall, the Tribunal finds that no decision was taken in November 2018 that the Claimant's role was at risk of redundancy. Mr MacMillan had not turned his mind properly to what would happen upon the Claimant's return from maternity leave but was working on the assumption that she would return in some capacity to work on book-keeping in liaison with the Insight team and using Exchequer. The Tribunal finds that training on Exchequer and working with Insight remained a possibility until January 2019, even if the very likely effect of the decision to outsource responsibility for book-keeping to Insight was to create an eventual risk of redundancy for the Claimant.

19 Mr MacMillan did not discuss the anticipated role of Insight with the Claimant before she went on maternity leave. The Claimant's case is that this was because she was pregnant and due to go on maternity leave. Mr MacMillan denies that either played any part in his failure to discuss Insight with her. In deciding this issue, the Tribunal had regard to a meeting which took place on 29 April 2019 once the Claimant's redundancy had been raised. In that meeting, the Claimant asked why she was not told that her job was at risk in November 2018 and says that Mr MacMillan replied: "**What would you do tell a pregnant woman she is losing her job or tell a woman on maternity leave?**". Mr MacMillan denies that he made any such comment. On balance, the Tribunal finds that the comment was made. There are handwritten notes in the Claimant's diary which were written immediately after the meeting which record the comment. The Claimant's evidence was credible and reliable. Further, where disputed comments were made at later meetings at which Mr Atkins was present, we preferred the Claimant's case to that of the Respondent. Overall, we considered her evidence as to the content of the meetings was more credible than that of Mr MacMillan.

20 We infer from Mr MacMillan's comment that he did not discuss the extent of Insight's services with the Claimant, partly because he had not yet turned his mind to how it might affect her job upon returning from maternity leave and partly because she was pregnant and he did not want to unsettle her. The Tribunal does not find that the failure was deliberate or malicious on the part of Mr MacMillan, but nevertheless the Claimant's pregnancy and impending maternity leave were material, subconscious causes of the lack of discussion in November 2018.

21 From late November 2018 until she went on leave, the Claimant worked with Mr MacMillan and representatives of Insight as part of a handover period. During the

handover period serious problems came to light with pro forma invoices being included in VAT returns and the recording of expenses on the Hoe Street Project. This is consistent with the "Ninja Warriors" email sent by the Claimant on 20 November 2018 and a WhatsApp message from the Claimant on 8 January 2019 where she accepts finding £83,000 in missing invoices. On balance, we find that the latter was the final straw which led to Mr MacMillan finally to decide to use Insight alone for all of the Respondent's financial service requirements. The Tribunal accepts that these were significant and genuine weaknesses in the Respondent's financial reporting and for which the Claimant was responsible but they arose from the systemic flaws caused by the inadequacies of Clear Books and the Claimant's lack of experience and qualification, not from under-performance on her part.

22 Having regard to the contemporaneous emails between Mr MacMillan and Insight, the Tribunal finds that by 12 January 2019 there was a concluded decision to move all of the book-keeping work permanently to Insight and to use its Exchequer software without any ongoing input from the Claimant. The decision that the Respondent no longer required the Claimant to perform book-keeping work was taken on or around 12 January 2019 and, from this date, she was at risk of redundancy.

23 By this date, the Claimant was on maternity leave. The Tribunal acknowledges that it would be unusual to expect an employer to notify an employee that she was at risk of redundancy at a time when she was on maternity leave. Indeed, as Mr Turner submitted, one can imagine circumstances in which a Claimant would rely upon that itself as an act of detriment. However, on 28 January 2019 the Claimant voluntarily contacted Mr MacMillan by WhatsApp message and asked about the business. Essentially, the Claimant was asking for an update on what was happening in her absence. Mr MacMillan did not reply.

24 On 19 February 2019, the Claimant again contacted Mr MacMillan suggesting a chat before her return to work. The following day, Mr MacMillan told the Claimant for the first time about the decision to outsource the book-keeping to Insight.

25 The formal letter placing the Claimant at risk of redundancy was sent on 7 March 2019. The letter includes a reasonably detailed explanation of the reasons for the restructure and the management decision to transfer the book-keeping role to Insight on a permanent basis. It identified the issues that arose during the handover about VAT and project expenses as factors that made the use of Insight attractive, explained the potential impact on the Claimant's role and by way of alternative to redundancy, included an offer of a part-time role, 12 hours per week, with a pro-rata salary slightly rounded up. Having regard to the content of this letter and having heard the evidence of Mr MacMillan, we find on balance that he genuinely expected and wanted the Claimant to return to work at the end of her maternity leave. He optimistically believed that the part-time role would be attractive to the Claimant and, for reasons set out below in relation to comments made at meetings on 20 March 2019 and 15 May 2019, we find that he thought that she would accept it because she had a new baby.

26 A consultation meeting took place on 20 March 2019. During the meeting, Mr MacMillan proposed a new part-time role for the Claimant. The Claimant's evidence is that whilst discussing this, Mr MacMillan made comments to the effect that, as she was a new mother and had just given birth, he was hoping that she would just accept the reduced hours offer. The comment is recorded in a typed note of the meeting produced

by the Claimant the following week, it is also recorded in a handwritten note in the Claimant's diary which was written on the day of the meeting. Mr MacMillan denies making any such comment. At the outset of the meeting, Mr MacMillan candidly accepted that there were problems in the previous financial system that he had chosen to implement which were not the Claimant's fault. This is consistent with the way in which he set out his case during the course of this hearing. However, we find that his position changed over the course of the subsequent meetings as the Claimant challenged him and did not accept the part-time offer which he proposed. The Tribunal finds that Mr MacMillan was not open to substantial discussion about the Claimant's counter proposals.

27 After he encountered resistance from the Claimant, Mr MacMillan's attitude towards her changed and he started to blame her for the book-keeping problems which had been uncovered in the handover period. Whereas the letter dated 7 March 2019 expressly relied upon redundancy because of the outsourcing decision, the dismissal letter dated 16 May 2019 expressly states that dismissal was not because of redundancy. At the point of dismissal, it appeared to the Tribunal that the Respondent did not understand that redundancy is still a dismissal and that the genuine concerns which led to the decision to outsource the entire finance function were not performance issues, in the sense that they did not arise from the competency of the Claimant but from the flaws in the system adopted which could be remedied by using Insight instead of a largely unqualified and relatively inexperienced book-keeper. To his credit, Mr MacMillan did make the distinction in evidence at this hearing however during the consultation process the meetings between the Claimant and Mr MacMillan became increasingly hostile and the relationship continued to deteriorate until it effectively broke down on both sides.

28 On 16 April 2019 the Claimant submitted a grievance but stated that she still wanted to return. In response, Mr MacMillan suggested some alternative health and safety work to increase the proposed part-time role. The Claimant did not agree on grounds that when it had previously been proposed, she and Mr MacMillan had agreed that it would reduce the time available for her primary book-keeping work. The Tribunal notes, however, that by April 2019 the book-keeping work had been outsourced. The Claimant's rejection of the proposal is consistent with the Tribunal's finding that both the Claimant and Mr MacMillan had become entrenched in their respective positions: she wanted her book-keeping job back, he maintained that there were performance issues.

29 The Tribunal does not accept that the Claimant's credibility was generally undermined by her failure to raise the specific discriminatory comments in her grievance. The contemporaneous documents and her oral evidence, supported by that of Mr Atkins, have led us to find for reasons given that the comments were made. The focus of the Claimant's grievance was to secure a return to work and an alternative to redundancy. The Tribunal did not consider it unusual for an employee in such circumstances not to want to rock the boat further by making allegations of discrimination.

30 At a further meeting on 29 April 2019 there was some discussion about alternative ways of resolving the parties' dispute but the way in which that meeting was conducted was consistent with the Tribunal's finding that the Claimant and Mr MacMillan remained entrenched in their respective positions such that a mutually agreed resolution was highly unlikely. The meeting was entirely unproductive. As set out above, the Tribunal finds that during this meeting, Mr MacMillan made the comment: "**What would you do tell a pregnant woman she is losing her job or tell a woman on maternity leave?**"

31 There was a further meeting on 15 May 2019 at which the Claimant was accompanied by Mr Atkins, a friend of the Claimant's partner who regarded his role as that of impartial observer to ensure that a fair process was being followed. The Claimant and Mr Atkins' evidence is that at this meeting, Mr MacMillan repeated his comment that he thought that the Claimant would have accepted the part-time job as she was a new mum. Again, Mr MacMillan denies making any such comment. The Respondent's case is that Mr Atkins' oral evidence is not reliable as he did not include the alleged comment in his contemporaneous typed note of what was discussed at the meeting.

32 Having heard Mr Atkins give evidence, the Tribunal finds that he was a straightforward, credible and reliable witness. It was an impressive feature of his evidence that he maintained a consistent degree of objectivity, not seeking simply to support the Claimant but even-handedly accepting that both she and Mr MacMillan became emotional and agitated, such that he had eventually called an end to the meeting. Mr Atkins did not attempt to overplay the alleged comment but said that: "**it felt like Mr MacMillan was trying to find a solution, it was a throw away comment like 'look I'm trying to help you out here'**". The Tribunal found this plausible and consistent with Mr MacMillan's evident frustration at the time; it had the ring of truth – although the comment was inappropriate, Mr MacMillan was not acting maliciously but to try and find a solution. On balance, and despite the comment not being included in Mr Atkins' contemporaneous notes, the Tribunal finds that the comment was made by Mr MacMillan in the meeting on 15 May 2019 and, by inference, was also made in the earlier meeting on 20 March 2019.

33 The Claimant was given notice of dismissal by letter dated 16 May 2019, purportedly not by reason of redundancy but for "some other substantial reason" namely the need to make changes to manage the business to a necessary standard. In cross-examination and submission, Mr Turner sought to impugn the creditability of the Claimant by reason of what he termed differences in the way she advanced her case in letters from her solicitor and the case advanced at Tribunal. The Tribunal finds that those criticisms could equally be applied to the Respondent: the initial letter referred to redundancy, the dismissal letter said that it was not a redundancy, the Response denied redundancy but the Respondent subsequently applied for leave to amend to rely on redundancy as the potentially fair reason for dismissal. In the circumstances, the Tribunal declines to draw any adverse inference about the credibility of either the Claimant or Mr MacMillan for any changes in their stated case given what was frankly a confusing and ill-tempered process.

34 The Claimant appealed against her dismissal on 20 May 2019 and asked that it be heard by an independent manager. In fact, Mr MacMillan chaired the appeal hearing on 10 June 2019. There was no separate hearing of the Claimant's grievance, although the Tribunal accepts that its substance overlapped significantly with the matters raised by the Claimant in her appeal against dismissal. By his own admission, Mr MacMillan was impatient and upset at this meeting and the Tribunal finds that this showed itself as hostility to the Claimant. The Tribunal accepts Mr Atkins description of Mr MacMillan's behaviour as being agitated and the meeting as being an uncomfortable experience. Ultimately the Claimant's appeal was not successful and her employment was terminated with effect from 15 June 2019.

Law

35 It is for the employer to show the reason for dismissal and to satisfy the tribunal that it is a potentially fair reason, section 98(1) Employment Rights Act 1996 ('ERA').

Redundancy is a potentially fair reason for dismissal, section 98(2)(c) ERA.

36 Section 139 ERA states that:

> **"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:**
>
> **(a)The fact that his employer has ceased or intends to cease-**
> **(i) to carry on the business for the purposes of which the employee was employed by him, or**
> **(ii) to carry on that business in the place where the employee was so employed or,**
>
> **(b)The fact that the requirements of that business-**
> **(i) for employees to carry out work of a particular kind, or**
> **(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,**
> **have ceased or diminished or are expected to cease or diminish."**

37 In considering whether the Respondent has established that there was a redundancy situation, we must direct our minds to whether there was (i) cessation of the business; and/or (ii) cessation or diminution in the respondent's requirement for an employee to do the work previously undertaken by the Claimant. A need to save cost, alone, will not amount to a redundancy within s.139 ERA.

38 In **Williams –v- Compair Maxam Ltd** [1982] IRLR 83, the EAT set out guidelines for considering the fairness of a dismissal by reason of redundancy. We remind ourselves that these are guidelines only and are not principles of law. The guidelines provide *inter alia* that there should be: (i) as much warning as possible and (ii) consultation about ways of avoiding redundancy, such as the possibility of alternative employment.

39 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Sex is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that sex had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

40 Section 18 Equality Act 2010 ("EA") refers to pregnancy and maternity as a protected characteristic. It provides that a person discriminates against a woman if it treats her unfavourably either because of pregnancy (during the protected period) or because she is exercising, seeking to exercise or has exercised her right to ordinary or additional maternity leave.

41 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the

employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

42 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason why the Claimant received any less favourable treatment.

Conclusions

43 In reaching our conclusions, the Tribunal addressed the matters identified in the agreed list of issues (page 40 of the bundle), having regard to our findings of fact and the law as set out above.

Discrimination – Pregnancy/Maternity and/or Sex

44 As a matter of fact, the Tribunal have found that the comment alleged in issue 2A was not made at the meeting on 9 July 2018. The Tribunal also found that the transfer of the Claimant's role and responsibilities to Insight was not in any way as a result of the Claimant taking maternity leave but was entirely for the genuine business reasons. Whilst the timing may have coincided with the Claimant's maternity leave, in the sense that problems were identified during the handover period, the maternity leave itself was not in any way a material cause. As the Tribunal has found, Mr MacMillan wanted and expected the Claimant to return to work. As a result, issue 2B is not made out.

45 The Tribunal regards issues 2C and 2D as part of the same complaint that the Claimant was given no prior warning of redundancy or consultation about the move to Insight because of the fact that she was pregnant and that Mr MacMillan regarded it as easier to tell a woman on maternity leave than a woman who is pregnant. The Tribunal has found as a fact that the latter comment was made by Mr MacMillan at the meeting on 29 April 2019. It may well be that Mr MacMillan thought that it was kinder not to worry the Claimant, although the Tribunal suspects that it was more likely based upon our finding that he had not turned his mind to the effect upon the Claimant, but nevertheless the Claimant's impending maternity leave was a material part of the reason why the Claimant was not fully informed in November 2018. The Claimant was subjected to the detriment described in these issues because of maternity leave.

46 The comment alleged at issue 2E was made on two occasions, 20 March 2019 and 15 May 2019. The Tribunal infers that it reflects Mr MacMillan's assumption that the Claimant would accept the part-time job offered because she had just had a baby. In other words, that she would not want to return to work full-time due to her childcare commitments and status as a mother. As such, the comment was not materially because she was (or had been) pregnant or on maternity leave but was an inappropriate stereotypical assumption based upon sex, namely that a woman with a baby would want to work part-time. For those reasons we have accepted that the detriment occurred and that it was by reason of sex rather than maternity or pregnancy.

47 Issue 2F was very poorly expressed. It seemed to raise two related issues: the first being the transfer of the Claimant's work to Insight and the second being the alternative part-time role. The Tribunal has concluded that the transfer of the book-keeping work to Insight on a permanent basis was made for genuine business reasons untainted by discrimination. As a result of that decision, there was no full-time role available for the Claimant to undertake and hence Mr Macmillan offered a part-time role. Whilst Mr MacMillan's assumption that the Claimant would welcome the offer was tainted by sex discrimination because it was based upon a gender-related stereotype, the offer itself was not so tainted by discrimination but was entirely a consequence of the business decision to outsource the work. This issue is not well founded.

48 As for issue 2G, Mr MacMillan reached the decision to put the Claimant at risk without any criticism of the Claimant's work albeit because he was convinced that Insight would be able to provide a more comprehensive and professional financial function. As we have found, Mr MacMillan began criticising the Claimant's performance only after she objected to the offer of a part-time job and challenged the decision to make her redundant. The fact that at this hearing Mr MacMillan again accepted that the problems with the book-keeping function were not the fault of the Claimant so much as systemic flaws leads the Tribunal to conclude that the criticism of her performance was unreasonable and was resorted to as a means to justify the decision to move to Insight. This, we consider, was borne of a degree of irritation and even petulance on the part of Mr MacMillan when the Claimant simply did not accept the offer which he thought she would be grateful for as she had a new child. It is not sufficient that but for the offer of part time work and but for Mr MacMillan's discriminatory assumption that the Claimant would accept it, it would not have been rejected and Mr MacMillan would not have been irritated and criticised the Claimant. This is too remote; the protected characteristic must be a material and effective cause of the treatment. We conclude that neither sex nor pregnancy/maternity were effective or material causes for the unreasonable criticism of the Claimant's performance.

49 As for dismissal, issue 2H, the Tribunal concludes that the sole reason was redundancy. Her role had ceased to exist as the Respondent had a diminished requirement for an employee to perform the book-keeper tasks as it had outsourced her job. The only other job available was the part-time role, potentially increased with health and safety work. The Claimant refused the part-time job as she did not consider it suitable alternative employment. Mr Collins suggested that the move to Insight was because of Mr MacMillan's desire to avoid any future periods of maternity leave and even suggested that Insight had marketed their services in part on the basis that their team approach would avoid "inconvenient absences whether for maternity, disability or whatever else". This was steadfastly denied by Mr Hammond and Mr MacMillan. The Tribunal has found that the Insight were engaged for purely business reasons and not due to any concern about maternity leave (past, current or future). Mr MacMillan was focused upon improving the financial control aspects of his business, not least as he had previously suffered the indignity and pain of a liquidation. He handled it badly in terms of communication and consultation and he made assumptions which were inappropriate and discriminatory; nevertheless the Tribunal accepts that the decision and ultimate dismissal were for entirely business reasons and not in any way because of maternity, pregnancy or sex.

50 For the reasons set out above, the Tribunal has accepted that the comment alleged at 2I was made by Mr MacMillan. It was a detriment and pregnancy and maternity leave were evidently a material and effective cause.

51 The final issue is the handling of the grievance and appeal, issue 2J. The Tribunal accepts that it was unreasonable for Mr MacMillan to ignore the Claimant's reasonable request for an independent person to hear her appeal. In essence, Mr MacMillan made the decision to outsource, conducted the redundancy process, became irritated by the Claimant's challenges, dismissed her citing unfounded criticism of her performance and then proceeded to hear the appeal. The appeal hearing was hostile and was not fair. However, the Tribunal relies upon its conclusions in respect of the performance criticisms and finds that Mr MacMillan's conduct was caused by his rather intemperate reaction to the Claimant's challenge rather than because of sex, pregnancy or maternity leave. As for the grievance, the extent of the overlap with the appeal against dismissal rendered it not unreasonable for such a small employer in the circumstances to deal with the issues in a single appeal hearing.

Unfair Dismissal

52 The claim that the dismissal was in breach of the Maternity and Parental Leave Regulations 1999 was not withdrawn by Mr Collins but nor was it expressly addressed in his submissions. The Tribunal accepted Mr Turner's submissions that regulations 10 and 20 had not been breached on the facts of the case as the Tribunal has found them.

53 The Claimant also relies upon unfair dismissal under section 98 of the Employment Rights Act 1996. Based upon our findings of fact, the Tribunal concludes that the Respondent has established that the sole reason for dismissal was redundancy, one of the potentially fair reasons. Applying section 98(4) to the circumstances of the case, however, the Tribunal concludes that dismissal was not fair.

54 The Respondent is a small company and Mr MacMillan and the Claimant worked very closely together. There was ongoing contact about work-related matters during the Claimant's absence on leave and maternity leave which the Tribunal has found was mutually acceptable and initiated by the Claimant on more than one occasion, for example the Claimant's messages on 9 January 2019 and 28 January 2019. The Claimant was due to return to work on 1 April 2019 and expressed a desire to know what was happening at work in her absence. By the date of her WhatsApp message on 29 January 2019, Mr MacMillan had decided to move to Exchequer and permanent Insight book-keeping without the Claimant with effect from early February 2019. A response to the Claimant's WhatsApp message would have been the right time to tell her about the decision to outsource the finance function to Insight and the effect that it may have on her job. Consultation at that date would have been meaningful as it would have given the Claimant an opportunity to set out any alternative proposals which may have avoided her redundancy before it became a fait accompli. For example, whether she could be trained on the Exchequer system or whether she could do some of the work internally in-house alongside the Insight team. For all of these reasons, the Tribunal concludes that it would have been reasonable and fair for Mr MacMillan to have informed the Claimant that she was at risk of redundancy in a response to her 29 January 2019 WhatsApp message.

55 There was an unreasonable failure to consult with the Claimant in a meaningful way at an early enough stage in the proceedings. Having delayed matters until March 2019, there was very little that the Claimant could meaningfully add by way of consultation when the work had already gone to Insight and the decision had long since been implemented. Whilst a fair procedure in redundancy is not an exercise in perfection, we find that the failure to consult was sufficiently material to render the dismissal unfair having

regard to the **Compair Maxam** guidelines and s.98(4). For the avoidance of doubt, the Tribunal does not find that there was a legal obligation to start consultation in November 2018 as, at that date, Mr MacMillan did not have in mind the possibility that the Respondent may not need the Claimant upon her return to work from maternity leave. Nevertheless, it would have been good industrial practice and basic courtesy to have discussed the possible longer-term role of Insight with the Claimant before she went on maternity leave.

56 The Respondent is a small employer with no dedicated HR department however it is a company with what seems to be a high turnover and there was no evidence of financial inability reasonably to appoint an external person to hear the appeal. The Respondent had access to professional legal advice and could reasonably be expected to be aware of the need for a fair appeal, particularly given the friction which had developed between the Claimant and Mr MacMillan in the meetings prior to dismissal. For these reasons, the Tribunal concludes that it is reasonable to have expected the Respondent to have paid for an independent person to hear the Claimant's appeal and grievance. As it did not do so, there was no independent and impartial appeal.

Time Limits

57 Based upon the Tribunal's findings of fact and conclusions, there were discriminatory comments in meetings on 20 March 2019, 29 April 2019 and 15 May 2019 made as part of a continuing course of conduct. The claim was not presented out of time.

Remedy

58 Judgment on liability with oral reasons was given on 2 October 2020. The Tribunal anticipated that there would be **Polkey** and **Vento** arguments on remedy and listed a separate hearing which eventually took place on 27 November 2020. At the outset of the hearing, the Tribunal confirmed the key findings of fact and conclusions which formed the basis of calculating remedy.

59 Section 123 ERA provides that the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. The award should compensate the employee for loss and is not intended to penalise the employer.

60 Guidance for the assessment of loss following dismissal and the correct approach to **Polkey** reductions was given in **Software 2000 Limited v Andrews** [2007] ICR 825, EAT as follows:

- in assessing compensation for unfair dismissal, the Tribunal must assess loss flowing from dismissal; this will normally involve assessing how long the employee would have been employed but for the dismissal;

- in deciding whether the employee would or might have ceased to be employed in any event had fair procedures been adopted, the Tribunal must have regard to all relevant evidence, including any evidence from the employee;

- there will be circumstances where the nature of the evidence is so unreliable that the Tribunal may reasonably decide that the exercise is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. However, the Tribunal should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation. A degree of uncertainty is an inevitable feature of the exercise and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

- a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary, that employment might have terminated sooner, is so scant that it can effectively be ignored.

61 An award for injury to feelings is compensatory. It should be just to both parties: fully compensating the Claimant without punishing the Respondent. Awards for injury to feelings must compensate only for those unlawful acts for which the Respondent has been found liable. An award should not be so low as to diminish respect for the legislation; on the other hand, it should not be excessive. An award should bear some broad similarity to the level of awards in personal injury cases. In deciding upon a sum, we should have regard to the value in everyday life of that money, being careful not to lose perspective.

62 We take as a starting point the guidance given in **Vento v Chief Constable of West Yorkshire Police (No.2)** [2003] IRLR 102, in which the Court of Appeal identified three bands for awards: the top being for the most serious conduct, such as a lengthy campaign of harassment; the middle band for those acts which are serious, but not within the top band; and the bottom band for those acts which are less serious, one-off or isolated. Recent Presidential Guidance takes into account the combined effect of inflation uprating and the **Castle v Simmons** uplift. The Guidance for a claim presented on 5 July 2019 gives a lower band of £900 to £8,800 and a middle band of £8,800 - £26,300.

Chance of a Fair Dismissal following a Fair Procedure

63 For the reasons set out above, the Tribunal found that the possibility of the Claimant's return with some training and working alongside Insight was possible until January 2019. The discovery by Mr MacMillan of the misreporting of expenses on the Hoe Street Project and the earlier errors in VAT invoicing, both being genuine and serious problems, were the final straw which caused Mr MacMillan to decide to use Insight for all financial services requirements henceforth. A redundancy situation had arisen by 12 January 2019 and the Respondent should have put the Claimant at risk following her WhatsApp message on 29 January 2019 to allow for meaningful consultation before the change to Insight and the Exchequer system was irrevocably implemented. The Tribunal has also concluded that it would have been reasonable to expect the Respondent to have paid for an independent person to hear the Claimant's appeal.

64 The Tribunal asked itself first: if the Claimant had been warned of redundancy on 29 January 2019 and consultation commenced at that stage and/or had there been a fair and impartial appeal, what is the chance (if any) that the Claimant would not have been dismissed? Our answer is none. There were compelling business reasons to outsource the finance function in its entirety to Insight. This is not a case where the work remained in-house being done by another employee. As for the alternatives suggested by the

Claimant, the Tribunal finds that the attraction of Insight's offering was such that even if she had suggested training on Exchequer and working in-house along with Insight, Mr MacMillan would have declined. Mr MacMillan was clearly very impressed by the service which Insight could offer and was concerned about the existing arrangements for good reason. It is not clear how much work would have remained in-house even if the Claimant had worked alongside Insight and it would not have fitted with the "one stop shop" service offered by Insight which had so appealed to Mr MacMillan. Even with earlier consultation, there is no realistic chance that Mr MacMillan would have changed his mind.

65 It is not enough to find that the Claimant would have been dismissed anyway, so the Tribunal asked itself the second question: would such dismissal be fair? The Tribunal accepts that the Claimant may well have been able to perform the work adequately, could have learned on the job and could have been trained by Insight. However, we remind ourselves that this is a redundancy dismissal, not a capability dismissal. It is not for the Tribunal to substitute our decision for that of Mr MacMillan as to how he should run his business, as long as we are satisfied that the decision to outsource was for genuine reasons. Having regard to the nature of the business, the systemic flaws in the finance function, the nature of the Insight service and the benefit to the business of keeping the whole finance operation within one team, the Tribunal finds that it was reasonably open to the Respondent fairly to decide not to pursue the hybrid option of the Claimant working in-house alongside Insight. The Tribunal accepts Mr Turner's submission that to require the Respondent to train the Claimant and dilute its outsourcing decision oversteps what is required for a fair dismissal in a redundancy situation.

66 On the facts of this case, the Tribunal concludes that even if consultation had started two weeks sooner, the Claimant would have been fairly given notice of dismissal on 16 May 2019 in any event. For the same reasons, we are satisfied that even had there been an independent and impartial appeal, there is no realistic prospect of the decision changing. For those reasons, the Claimant is not entitled to loss of earnings but it was agreed that the Claimant was entitled to an award of £652.50 for loss of statutory protection and £35 expenses in finding alternative employment.

Injury to Feelings

67 In calculating the appropriate award, the Tribunal bore in mind that the claims had succeeded only in respect of issues 2C, 2D, 2E and 2I. In broad terms, these were the delay in consultation because of the pregnancy and maternity leave and the discriminatory comments which the Tribunal found were made on 20 March 2019, 29 April 2019 and 16 May 2019. There was some overlap between the detriments, not least as the comment on 29 April 2019 related directly to the delayed consultation.

68 In considering the appropriate **Vento** band, the Tribunal reminded itself of the finding that Mr MacMillan's discriminatory conduct was not deliberate or malicious. Even with regard to the comments about the part-time job, Mr Atkins accepted that Mr MacMillan was trying to find a solution. Nevertheless, the Tribunal regards the comments made by Mr MacMillan as particularly serious. Whilst Mr Turner sought to play down their effect in his submissions on remedy, the Tribunal recalled that in cross-examination of Mr Atkins he described them as "a big no no" and that if said it would be a very serious act of discrimination. The Tribunal agrees and regards the comment about the part-time job as a serious act of discrimination even if Mr MacMillan thought that he was trying to help. It was insulting and it was particularly hurtful to the Claimant as it brought her child and

caring commitments into a difficult redundancy situation. The discrimination was not a single act: the part time work comment was repeated, there was the comment about not telling a pregnant woman that her job might be at risk and there was the consequent delay in consultation. Overall, the Tribunal rejects Mr Turner's submission that this is a lower band case and finds that the middle band is appropriate.

69 The Tribunal accepts as truthful the Claimant's evidence about the injury to feelings which she has suffered. The Claimant has a history of post-natal depression which had previously taken her five years to recover from. She describes her anxiety increasing during March 2019 and that she became increasingly teary. As a result of that, she was seen by her GP, again diagnosed with post-natal depression and prescribed CBT. Her first appointment for the CBT was on 7 June 2019 and fortunately the effects of the CBT and her ability to find new employment significantly improved the Claimant's mood. However, whilst waiting for her first appointment, although she stopped crying, she became more withdrawn from her family, especially her child. She was very often absent minded and did not hear if her partner or children were talking to her. She struggled to maintain her usual household duties such as cleaning and cooking. Her anxiety and distress were worst when interacting with Mr MacMillan. We find that that is a reference to the meetings at which the comments were made by Mr MacMillan. The Tribunal accepts Mr Collins' submission that the part-time work comments led to guilt on the Claimant's part and is particularly significant with a claimant with a history of post-natal depression.

70 It was clear from her cross-examination, that the Claimant was upset about the decision to put her at risk of redundancy and ultimate dismissal but she gave no evidence to suggest that the injury to her feelings was increased by the delay in starting consultation. The Tribunal considers this material as the dismissal itself was not found to be an act of discrimination and therefore the Claimant is not entitled to compensation for any injury to feelings caused by the dismissal itself.

71 Mr Collins did not contend for an award at the upper end of the middle bracket but suggested a figure of £13,500, somewhere below the middle point. The Tribunal carefully considered Mr Turner's submissions that such an award would be excessive given the nature of the discrimination which we have found but found that it contradicted his own position at the liability hearing, as referred to above. Bearing all that in mind, we are satisfied that this is a case that falls at the lower end of the middle bracket and that the appropriate award having regard to all of the discrimination that we have found and disregarding any hurt caused by matters which were not found to be discriminatory is £11,000.

Employment Judge Russell
Date: 13 January 2021