EMPLOYMENT TRIBUNALS

Claimant: **Mr J Reeves**

Respondent: **Goldman Sachs International**

Heard at: **London Central (remotely by CVP)**

On: **9 – 11, 14 –15 October 2024, 16 – 17 October 2024 (In Chambers)**

Before: **Employment Judge Brown**

Members: **Ms S Dengate**
Mr S Hearn

Appearances

For the Claimant: **Ms R Tuck, King's Counsel**
For the Respondent: **Mr T Cordrey, Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is:

1. **The Respondent unfairly dismissed the Claimant.**
2. **The Respondent subjected the Claimant to sex discrimination when it alleged that he had performed worse than his peers, reduced his remuneration and dismissed the Claimant.**
3. **It was 50% likely that the Respondent would have dismissed the Claimant fairly, and for non-discriminatory reasons, and for the principal reason of redundancy, following a fair process.**

REASONS

The Issues and this Hearing

1. By an ET1 presented on 24 November 2022, the Claimant brought complaints of direct sex discrimination and unfair dismissal against the Respondent, his former employer. The Respondent resists these complaints.

2. The liability issues had been agreed between the parties as follows:

DIRECT SEX DISCRIMINATION

1. Did the Respondent subject the Claimant to direct sex discrimination, contrary to sections 13 and 39 of the Equality Act 2010 ("the EqA")? In particular:

1.1 Did the Respondent subject the Claimant to less favourable treatment? The Claimant relies upon a hypothetical comparator whose circumstances were not materially different to his, namely [§38 POC]:

1.1.1. A female employee taking extended leave for any reason related to the birth of a child and/or childcare under any of the Respondent's policies; and/or

1.1.2 Further, or in the alternative, a female employee taking extended leave under the Respondent's parenting leave policy.

1.2 The Claimant alleges that the Respondent treated him less favourably than it would have treated his hypothetical comparator in materially the same circumstances by:

1.2.1. Alleging in December 2021 that the Claimant had performed worse than his peers. [§21.5 & 37.1 POC]

1.2.2. Reducing the Claimant's remuneration in January 2022 as compared to previous years. [§21.5 & 37.2 POC]

1.2.3. Placing the Claimant at risk of redundancy on 5 May 2022. [§35 & 37.3 POC]

1.2.4. Not pooling the Claimant with and/or scoring him against Amy Grady and/or Godwin Tse. [§35 & 37.4 POC]

1.2.5. Selecting the Claimant for redundancy instead of Ms Grady and/or Mr Tse. [§35 & 37.4 POC]

1.2.6. Not appointing the Claimant as a Deputy Global Co-Head of Control Room. [§35 & 37.4 POC]

1.2.7. Failing to appoint the Claimant to another suitable alternative role to avoid his dismissal. [§35 & 37.5 POC]

1.2.8. Dismissing the Claimant on 5 September 2022. [§35 & 37.6 POC]

1.3 If so, did the Respondent treat the Claimant less favourably because of his sex? Prior to disclosure, the facts and matters upon which the Claimant relies as the basis for alleging that he was treated less favourably because of his sex include those set out at §21 and 23-35 POC.

2. Does the Tribunal have jurisdiction to hear the Claimant's discrimination claims against the Respondent pursuant to section 123 (read with section 140B) of the EqA? In particular:

2.1 Are any of the complaints prima facie out of time pursuant to section 123 (read with section 140B) of the EqA?

2.2 In relation to any complaints that are prima facie out of time, can the Claimant show that they amounted to conduct extending over a period which is to be treated as done at the end of that period pursuant to section 123(3) of the EqA, and that the end of that period was in time?

2.3 In respect of any complaints that are prima facie out of time and do not amount to conduct extending over a period ending in time, does the Tribunal nevertheless have jurisdiction to determine them on the basis that they were presented within such other period as the tribunal considers to be just and equitable, pursuant to section 123(1)(b) of the EqA?

UNFAIR DISMISSAL

3. Did the Respondent dismiss the Claimant unfairly, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("the ERA")? In particular:

3.1.1. Can the Respondent establish a potentially fair reason for the Claimant's dismissal? The Respondent relies upon redundancy within the meaning of sections 98(2)(c) and 139 of the ERA, and contends thereby that the Claimant's dismissal was wholly or mainly attributable to its requirement for employees to carry out work of a particular kind ceasing or diminishing.

3.1.2. If so, did the Respondent act reasonably in dismissing the Claimant for that reason in all the circumstances, within the meaning of section 98(4) of the ERA?

3. It had been agreed that this hearing was to decide liability only. At the start of the hearing, the Tribunal raised with the parties that Polkey issues might also be decided at the liability stage. The Respondent then contended that all 'Polkey' issues should be determined at the liability stage; the Claimant, that issues of Polkey relating to dismissal for the same reason as the Respondent's alleged reason for dismissal, only, should be decided at the liability stage.

4. For reasons it gave orally at the time, the Tribunal decided that it would determine Polkey issues relating to dismissal for the same reason as the Respondent's alleged reason for dismissal, and not for other reasons (including the Claimant's alleged later-discovered misconduct) at the liability stage. The additional issue was therefore:

Is there a chance that the Claimant would have been fairly and lawfully dismissed anyway if a fair procedure had been followed, for the same reason?

5. The hearing was conducted by CVP video hearing. There were no connection difficulties.

6. There was a bundle of documents and a Claimant's supplemental bundle of documents. The Tribunal heard evidence from the Claimant. For the Respondent, it heard evidence from Omar Beer, Ada Liu and Cathy Shore. The Tribunal read the following documents: the Claimant's Opening Note (and chronology); the Respondent's Opening Note; the Claimant's witness statement and Grounds of Complaint (on which he relied as part of his evidence in chief); the Respondent's three witness statements; and the bundle pages referred to in all those documents.

7. Both parties made written and oral submissions. The Tribunal reserved its decision.

8. It should be noted that, while the parties and the documents referred to 'paternity leave' in this case, the leave which the Claimant took was the Respondent's 6 month contractual 'parental leave', not the limited statutory paternity leave. However, paternity and parental leave have been used interchangeably in this case to refer to the Respondent's contractual 6 month parental leave.

Evidence and Findings of Primary Fact

9. The Tribunal was referred to a considerable amount of detailed evidence in the Hearing Bundles, in the parties' witness statements and in written submissions. These findings necessarily focus on the evidence which was most relevant to the issues in the claim.

10. The Claimant started employment with the Respondent in 2007, in Salt Lake City. He worked there and then in Sydney, Australia, and finally transferred location to London in 2013.

11. The Respondent is a global financial institution.

12. The Respondent has an "Equal Employment Opportunity" Policy, which applies in the United Kingdom, p91. It provides that, "Managers are evaluated in part on the basis of their success in carrying out our equal employment opportunity policies." Managers are evaluated on achieving more diverse teams. The Respondent is attempting to achieve more female representation in all its worldwide workforces.

13. The Respondent introduced a firm-wide Paid Leave policy from 8 April 2020, p105. It provides that, "All employees may take up to twenty-six weeks of paid leave within twelve months of the birth or legal adoption of their child in order to welcome, bond with and care for their child as long as the adoption or birth occurred during your employment at the firm." As the Respondent pointed out to the Tribunal, the Respondent's parental leave policy significantly exceeds its legal obligations.

14. The Respondent also has a Toolkit for Managers, which sets out Frequently Asked Questions and Answers in relation to dismissal of employees, p716. These include, "**Q: I just returned from medical/maternity/parenting/parental leave and thought I had a guarantee to return to my job. How can you terminate my employment?**

The firm's policy generally is to return the employee to his/her job after a period of leave, subject to necessary business decisions. If we eliminate roles or reduce headcount, you can be impacted just as other employees are impacted." P719.

15. The Claimant was promoted to the level of "Vice President" in 2013, and "Senior Vice President" in 2020.

16. From 2016, the Claimant was Deputy Global Head of the Respondent's "Control Room", working in London. Omar Beer had recently taken on responsibility for the Global Control Room and was the Claimant's line manager. Mr Beer worked in New York.

17. The Control Room is part of the Respondent's Compliance Division. It is responsible for maintaining the firm's information barriers, by monitoring and controlling the flow of confidential information between the firm's private or advisory side businesses, and its public side businesses. It therefore manages the flow of sensitive corporate information, to ensure that there are no breaches of confidentiality and/ or of regulatory rules.

18. In his role as Deputy Global Head of the Control Room, the Claimant was responsible for day-to-day management of its 40-person global team.

19. Mr Beer became Global co-head of IB Compliance in early 2019. Tin Hsien Tan was the other Global co-head of IB Compliance and Control Room, with Mr Beer, from January 2019. In mid-2020 Ada Liu took over direct responsibility for the Control Room and became the Claimant's line manager. Robert Charnley and Oonagh Bradley were the Claimant's local managers in the EMEA region.

20. A summary of the Claimant's performance assessments from 2010, p929, shows that he was placed in the top quartile of his peers in each of the years 2012 – 2019.

21. It was not in dispute in the case that, at all times, the Claimant was seen by managers as having strong technical expertise.

22. The Claimant was identified as a candidate for the Respondent's Vice President Leadership Advancement Initiative, as a future Managing Director in 2018, p360. He was to be "cross-ruffed" for promotion in 2021 – a process whereby he would be assessed for suitability for promotion to Managing Director, p356, 358.

23. In the Claimant's 2019 Annual Feedback Summary, p387, the Summary Metrics from solicited feedback showed that, overall, 87% of the Feedback received on the Claimant was 'outstanding' and 13% was 'good'.

24. In the Respondent's Annual Feedback Summaries, employees' "top strengths" are recorded, as well as things that they should "do differently". All employees are therefore given both areas of strength and areas for development.

25. The Claimant and his wife had their first child in 2019.

26. On 11 February 2020, the Claimant's managers had an email discussion, arising out of the Claimant's planned work travel. Robert Charnley said, "… I've been talking to Tin Hsien about Jon quite a bit. No transparency ahead of time about his travel plans, no visibly leading the team here, not driving things forward. Omar is also now of a similar view, having been very positive previously", p409. Oonagh Bradley responded "… think there needs to be a significant feedback session with him or he is outliving his capabilities." Mr Charnley replied, "Yes, that feedback started to be delivered… over the New Year, but not seeing signs of a turnaround yet…" p409.

27. The Claimant had visited the Respondent's New York Office at New Year 2020 when Mr Beer had spoken to him about some aspects of his performance. Mr Beer had told the Claimant that he should improve his visibility and "driving things forward".

28. On 21 February 2020, the Claimant was identified as one of 14 Senior Compliance officers who would be discussed as "talent" – that is, as having potential for promotion to "Managing Director" in 2021, p410. However, in March 2020, Mr Beer and Ms Tan were part of an email discussion chain which indicated that the Claimant was not certain to be "cross-ruffed" for promotion in 2021, as this would depend on his 'trajectory' during 2021, p412.

29. As is common knowledge, the UK government introduced covid lockdown measures on 23 March 2020. Thereafter, the Claimant worked from home – a flat which he shared with his wife and baby.

30. The Claimant told the Tribunal that, during a call with Omar Beer and Tin Hsien Tan in March or April 2020, he mentioned balancing his childcare responsibilities with work and that Mr Beer repeatedly shouted "figure it out" at him. Mr Beer denied shouting. Ms Tan told the grievance investigation that she did not recall Mr Beer shouting in that way. She said, "I can only imagine it was typical JR [Jon Reeves – the Claimant] I am sure it would have been more like "you're a grown man you can sort this out."

31. In evidence, the Tribunal considered that Mr Beer appeared to be unwilling to acknowledge to the particular hardships or difficulties that some people, including those with very young children, might have experienced during covid lockdowns. When asked in cross examination about particular challenges faced by particular groups of people, he said, "covid was a hard time" and " …it was hard for everyone." In answer to direct questions, he agreed that it was difficult for people with babies.

32. On the evidence, the Tribunal found that Mr Beer was dismissive of the Claimant when the Claimant raised his difficulty balancing childcare with work during covid lockdown. The Tribunal noted that Ms Tan's report of the tenor of Mr Beer's reaction to the Claimant was likely to have been, "you're a grown man". Ms Tan did not give evidence to the Tribunal, so could not be asked about her understanding. However, her answer to the grievance investigation appeared to indicate that both she and Mr Beer were dismissive of the Claimant, as a man, having these issues.

33. The Claimant told the Tribunal that, by contrast, management were more empathic towards female employees in relation to childcare. The Tribunal accepted his evidence insofar as it accepted that he had not witnessed management being similarly

dismissive of female employees relating to childcare. There was no evidence that they had ever been similarly dismissive of women.

34. Over the August Bank Holiday weekend 2020, the Claimant drove to Cornwall with his wife and young child, for a holiday. A very urgent Control Room issue arose and Michael Richman, Head of the Compliance Division, required it to be resolved urgently. Senior individuals were called upon to assist, including the COO, the Head of Engineering, and the Heads of each of the major Compliance Divisions. On Saturday 29 August 2020 Mr Beer sent the Claimant a blank email with the title simply saying, "Need to talk -are you available." P467. Mr Beer did not telephone the Claimant. The Claimant was not regularly checking his emails when he was driving. He saw work calls scheduled, but also that one of his direct reports, Seth Johnson, was attending to the calls. Mr Beer emailed the Claimant again on 30 August 2020 at 12.57, saying the Claimant needed to call him. Ms Liu telephoned the Claimant later that day, and the Claimant then worked over his holiday to assist in resolving the issue. When he later pointed out to Mr Beer that Mr Beer had not telephoned him, to alert him to the urgency of the matter, Mr Beer accepted that he had not telephoned.

35. The Tribunal considered that Mr Beer was unreasonable in expecting an urgent response when he had sent a vague email saying, 'Need to talk -are you available'. The Tribunal considered that the Claimant would not reasonably have understood that an immediate response was required.

36. Mr Beer accepted in cross examination that he had not telephoned the Claimant that weekend. It was put to Mr Beer that, despite the Claimant having worked for the Respondent for 13 years and, despite this being the Claimant's first holiday with his young baby, Mr Beer had done nothing to correct any negative impression which other senior managers might have got of the Claimant, arising out of this weekend. Mr Beer accepted that he had not tried to correct that impression.

37. The Claimant later complained in his grievance that his failure to respond to Mr Beer's emails for 24 hours, while he was on holiday at a weekend with his wife and young child, was "repeatedly raised with me as a missed opportunity", p797. The Tribunal found that this incident did indeed assume a great deal of importance for the Claimant's managers, in the way they viewed the Claimant. The Tribunal noted, as set out below, that, on 10 December 2021, Ms Liu told the Claimant that his failure to respond immediately at the weekend, "became a really negative sound bite" p959. Ms Liu said this some 18 months after the weekend in question. When giving evidence to the Tribunal, Mr Beer emphasised the weight which the Respondent attached to the Claimant's failure to respond promptly that weekend.

38. On 5 November 2020, the Claimant delivered a presentation to Kathryn Ruemmler, who had been newly appointed as the Respondent's Chief Legal Officer and General Counsel. The presentation was intended to provide an overview of the Control Room. Mr Beer and Ms Tan both congratulated the Claimant afterwards, saying that the presentation had been, "great", p477. However, Mr Beer secretly emailed Ms Liu and Ms Tan saying, " … on multiple occasions he started in the detail when he should have started a level higher to give context. --he described things in ways that didn't make strategic sense… I stepped in a lot because I felt like I needed to … I don't think she would have otherwise known what we were talking about." p477.

39. The Tribunal noted that the Claimant's managers were giving him a misleading impression of how they perceived his performance.

40. The Respondent changed the descriptors it used for employee performance ranking in 2020. The Claimant was given a rating of 'meets expectations' p 499-512 in his December 2020 Performance review. The Manager Summary was: "Fully Meets Expectations. We have incredibly high expectations and you are fully meeting them. You have made significant contributions and are a valued member of our team. We are proud of your accomplishments." P501.

41. The review document gave feedback on both strengths and areas for development, p501-503. In the areas for development, it was noted that the Claimant needed to drive proposed changes to completion in a timely manner, and that he needed to strike the right balance between supervising effectively and appropriately delegating, recognising that, on certain issues, he needed to be fully briefed. It was noted that some members of the team outside EMEA felt that they did not have enough connectivity with the Claimant.

42. The Claimant received a very small number of "partially meets expectations" 360 feedback scores, from one contributor. 50% of his feedback scores were "exceeds expectations", and the rest of his scores were "fully meets expectations." P510.

43. Mr Beer emailed Ms Liu and Mr Charnley about the feedback on 6 November 2020, saying, p479, "This one in particular struck me—it's worth discussing with Jon. He needs to drive more change, more often, more quickly: 'While Jonathan is receptive and respectful of proposals, he is also comfortable with inefficient or legacy processes, and does not challenge his existing operation. …'.

44. Mr Beer delivered the Claimant's performance review to him in December 2020. He prepared draft talking points for the review meeting, "We wanted to address a topic that we imagine is on your mind, that's important to you and to us — your path to promotion. We wanted to begin a discussion with you that will probably extend past today.... 2023 [MD promotion cycle] is a long way off, but the honest truth is that when we look out that far, it's not clear that you'll be on that list, at least not from your current seat as Deputy Global Head of the Control Room sitting in London. … it's also not clear that even if you did a great job from now until then that you'd be on the 2023 list… We should probably start scouting around for new roles for you. Any new role would need to be of the right seniority — you have a big and important job and we'd need to find you another important job… This isn't urgent, like it needs to happen tomorrow. We just wanted to be direct and transparent with you regarding your current promotion prospects. You're a subject matter expert, a good people manager, we rely on you." p490.

45. Mr Charnley replied, p489, " Agree with all of that. Fundamentally I think the message for Jon is that he needs to try something new in order to move his career forward. No urgency, but staying in his seat and hoping for a shot in 2023 will mean he is just marking time."

46. Mr Charnley also spoke with the Claimant about his performance and promotion prospects. Afterwards, Mr Charnley commented to Mr Beer and Ms Tan that, if the Claimant were to, " perform really strongly over the next couple of years and address these specific points of feedback I think we'd be pushing to get him an MD opportunity." Mr Charnley reported to them that he had advised the Claimant, "… there's no particular urgency to finding another role, that he should focus on addressing the feedback in the interim, and that he should remain open to changing roles as a way to catalyse change." P496.

47. Ada Liu had a conversation with the Claimant on 14 December 2020. The next day, she emailed Tin Hsien Tan, Omar Beer and Robert Charnley, saying, amongst other things, ". … if he doesn't manage to action feedback, we may need to have a more pointed conversation moving him onto something else so those beneath can progress." P495. When Ms Liu spoke to the Claimant, he told her that he wanted to stay in London and would be happy staying at "Vice President" level in order to do so.

48. Jon Gudmandsen, an advisor in the Respondent's Global Investment Research ("GIRC") EMEA department, was due to take parental leave in 2021. On 13 January 2021 Ms Liu suggested that the Claimant be lent to GIRC to provide cover for Mr Gudmandsen, p543. Mr Beer, Ms Tan and she agreed that this would test the Claimant in a divisional role and that they would see how the Control Room operated without him.

49. When told of the proposal, Michael Richman, Chief Compliance Officer, asked what was the plan for the Claimant when Jon Gudmandsen returned. Ms Liu replied on 15 January 2021, "If he hasn't found anything, then he would be back in the CR [Control Room] with idea that he moves on after that but the message would be a lot more pointed." P544

50. GIR Compliance is a team comprised of around 15 employees globally, in 7 offices. It advises the research analysts in the Respondent's Global Investment Research Division. The EMEA team in the UK was small, with one Senior Compliance Officer, Mr Gudmandsen, and 2 junior employees - or "associates".

51. When the GIRC covering role was put to him, the Claimant agreed to and embraced the suggestion, saying that he was, "Looking forward to the new challenge and feeling energized" p560. The Claimant agreed with Ms Liu that his direct reports, Amy Grady and Godwin Tse, would be best to undertake his role in the Control Room, p555.

52. Immediately before his move to GIRC, the Claimant had 4 direct reports: Seth Johnson, Americas Control Room Head; Sally Hotchkin, Global Materiality; Amy Grady, EMEA Control Room Head; and Godwin Tse, Asia Pacific and Hong Kong Control Room Head, p964. They were all Senior Compliance Officers ("SCO"), so that there were 5 SCOs in the Control Room, including the Claimant, before he moved to GIRC.

53. On 4 February 2021, Michael Richman emailed other people in Compliance saying that, "Reeves is basically done in control room as we want amy grady to grow." He said that Mr Beer and Mr Richman were considering a position for the Claimant covering conflicts globally, p 556.

54. On all the evidence, the Tribunal found that the Claimant's managers suggested that he move out of the Control Room for his career development, so that he could progress towards Managing Director-level performance. They also wanted to promote Amy Grady to Deputy Head of the Control Room. They intended that, if the Claimant was not successful in finding a new role in GIRC, or related research/compliance, during his temporary move, that he would return to the Control Room, but with a view to moving to another role. There was no suggestion, however, that he would be dismissed.

55. The Claimant undertook the role in Research Compliance from late February 2021, but remained on the Control Room headcount, p 588.

56. On 12 April 201 Mr Beer emailed Ms Liu and Ms Tan saying, "… we'll need to have a view on [the Claimant's] performance / fit as we figure out what his next opportunity is after Gudmandsen returns," p 967.

57. In May 2021, whilst in the GIRC advisory role, the Claimant informed Ms Liu that his wife was expecting a baby and that he planned to take six months' parental leave from November 2021 to May 2022. His managers expressed happiness at this news, p955.

58. In late July 2021, managers were emailed by the Respondent's Human Capital Management ("HCM") team regarding compensation recommendations for Vice Presidents in the Control Room and GIR. HCM provided their own recommendations based on an algorithm. The algorithm recommended that the Claimant should receive an increase in total pay. Ms Liu, who was the Claimant's compensation manager in 2021, suggested keeping him 'flat' - that is, that he would receive no increase in total pay, p625-626.

59. The Tribunal inferred from the algorithm's output that the Claimant was seen at this point, on the Respondent's metrics, as at least "meeting expectations" in terms of his performance. The Tribunal considered that it was very unlikely that an algorithm would suggest a pay increase for an employee who was underperforming. The Tribunal noted Ms Liu did not say, at the time, why she had suggested that the Claimant's pay should not increase, when the company algorithm recommended the opposite. The Tribunal considered that, if a manager proposed to override a company-wide algorithm, the manager ought to have some substantial justification for doing so. The Tribunal would have expected Ms Liu to have stated that justification clearly at the time, if she had one.

60. When the Claimant's GIRC role was ending in September 2021, he was asked to remain in that team until his own parental leave commenced in November 2021, to help cover the long term absence of two other team members, p 642.

61. The Respondent gathered "Year-End Feedback 2021" on the Claimant's performance in the GIRC role, p629. Ms Liu and Mr Charnley assessed him as "performing" in all culture and conduct categories – which were the categories that were measured. The Claimant's Year-End 2021 360 degree feedback gave him 16 "outperforming", 10 "performing" and no "underperforming" scores . "Outperforming" was the equivalent of "exceeds expectations".

62. An HR handover note shared on 12 December 2021 recorded that the Claimant was, at that point, considered to be a "meets" in terms of performance – that is, that he had been assessed as meeting expectations for performance at the end of 2021, p669.

63. On 14 October 2021, Mr Beer emailed Ms Liu and Ms Tan, to suggest that the Claimant run Materiality globally, moving Sally Hotchkin to a COO role. Ms Liu replied, saying that, "When Jon returns from parental leave, if he is still with the firm…", Amy Grady thought the Claimant would do well in the Materiality space. Ms Liu suggested an honest and frank discussion with the Claimant about his role in the Control Room - covering Materiality and reporting to Amy Grady and Godwin Tse p644-645. She said, "…and if he isn't happy with that then he may explore externally". p 644.

64. Ms Liu told the Tribunal that, in the event, she decided not to have an "honest and frank" discussion with the Claimant before he went on parental leave.

65. The Tribunal noted that, at this point, the Respondent was proposing that the Claimant would return to the Control Room, perhaps taking on a Global Materiality role.

66. The Claimant told the Tribunal that, in around September/October 2021, Oonagh Bradley told him that she "planned to fill all the open MD roles with women". When the grievance officer later put this to Oonagh Bradley, she said that she did not recall saying this. She said that, in the previous year, only one of the five Managing Director promotions had been a woman, p847.

67. Ms Bradley did not give evidence to the Tribunal, so the Tribunal only heard live evidence from the Claimant on this issue. The Tribunal did not disbelieve the Claimant's evidence, but he gave very little context to it. The Tribunal noted that the Respondent is attempting to achieve more female representation in its workforce. However, given that, in fact, only one of 5 promotions to Managing Director in 2021 was female, there was no evidence that the Respondent actually favoured women over men when deciding on these promotions to senior management roles.

68. In October or November 2021, during a telephone call before the Claimant commenced his parental leave, Mr Beer said that he was "jealous" of the Claimant that he should "take advantage" of the leave.

69. Mr Beer told the Tribunal that he may have joked that it would have been nice if he had been given 6 months; not because it was a 'holiday', but because it was an opportunity, as a new parent, to spend time with family - which Mr Beer had historically not been able to do.

70. On balance, the Tribunal found that Mr Beer did say that he was jealous of the Claimant taking parental leave, but that he did so because he thought that it was a good thing for the Claimant that he was able to spend time with his new baby.

71. On 9 November 2021, just before the Claimant went on Parental Leave, Ms Liu also commented on an update to the control room structure, which recorded that "Amy & Godwin are the Co-Deputy Global Heads", by deleting words "acting as co global heads while Jon Reeves fills in for Jon Gudmanson…". In cross examination, Ms Liu

said she had deleted the sentence “acting as co global head” to simplify the message, although she said that, in live discussions, she would have said that Amy Grady and Godwin Tse were “acting”.

72. The Claimant’s last working day before his parental leave was Friday 12 November 2021. On Monday 15 November 2021, Ms Liu emailed Robert Charnley and Oonagh Bradley, asking that the Claimant be removed from meeting invitations relating to the Control Room. She said, “He will be on parental leave so I don't think he is likely to dial in, but I also don't want to give him the option.” P650. She asked if the Claimant was “officially now no longer CR [Control Room]” and asked whether the organisational charts should be updated. Ms Bradley replied, “We can update the other charts but not make a big announcement” p650.

73. Ms Liu was asked about this email chain in cross examination. She said that she had asked to remove the Claimant from meeting and calendar invites because, “He should be fully enjoying parental leave without having to worry about meetings. … We don’t expect people to work during parental leave.” That answer appeared to be disingenuous because Ms Liu had actually said, at the time, ‘I don’t want to give him the option’ and had suggested that the Claimant was ‘officially now no longer control room’. The Tribunal considered that the proper interpretation of that email chain was that his managers viewed the Claimant as having been removed from the Control Room when he went on parental leave - and not on a temporary basis.

74. Ms Liu and Mr Charnley conducted the Claimant’s 2021 performance review in December 2021, p629-638.

75. Ms Liu spoke with him on 9 December 2021, p654. She told him that he was not performing effectively as an SCO and that, compared to his peers, he was underperforming.

76. The next day the Claimant had another phone call with Ms Liu, which he recorded on his telephone, without telling Ms Liu, p 956. There was a dispute about whether secret recording by employees of meetings was in contravention of the Respondent’s policies. The Claimant had recorded another larger meeting on matters which did not relate to him personally, when he had been at home with his child, and when he had not been in a position to take notes, p589. He also told the Tribunal that he wanted to have an accurate note of meetings. The Tribunal accepted his evidence that he made the recordings so that he had an accurate note of what was said. From the face of the recordings, it appeared that he did not attempt to manipulate or entrap the person he was recording. From the content of the 10 December 2021 recording, the Claimant simply appeared to be seeking clarity from Ms Liu. The Tribunal did not, therefore, consider that the fact that he had made these recordings detrimentally affected his credibility in this case.

77. During the Claimant’s 10 December 2021 telephone conversation with Ms Liu, he acknowledged that Mr Beer had previously talked to him about his “responsiveness or pushing things through to completion”. Later in the conversation, he acknowledged that he was “falling short at times”, but also said that he felt that the negative feedback correlated to times when he had family commitments, for example during his Cornwall trip in 2020, p958.

78. Ms Liu commented, “The Control Room role requires many more weekend calls then the Research job does. But I’m thinking about that one time which unfortunately made not a great impression when we first had the trading system issue blow up. This was pre-last year. And you were driving, right? And we couldn’t get you, and everyone was trying call you we couldn’t get you, we couldn’t get you. And I must say unfortunately that just became a really negative sound bite, like, where was Jon in all this?” p959.

79. The Claimant told Ms Liu that he felt that he had had tremendous support from everybody as far as looking for opportunities in the last year, p956.

80. He asked Ms Liu whether his performance feedback meant simply that he would not be promoted to Managing Director in 2023, or whether it meant that he would not be given another SCO role at the Respondent. Ms Liu did not answer that question. She repeatedly said that the feedback was just feedback on his performance in the previous year.

81. Given that the Claimant’s 2021 Annual Feedback indicated that he was “performing” in his GIRC role and that a HR handover on 12 December 2021 indicated that the Claimant’s performance was “meets” expectations, it was not clear to the Tribunal when, and on what objective basis, the Claimant’s managers decided that he was “underperforming”. It was clear, however, that Ms Liu told him that he was underperforming on 9 December 2021, when he was on parental leave.

82. The Tribunal found that this was the first time when the Claimant had been told that he was underperforming in any way. He had previously been given feedback on his performance by Mr Beer at New Year 2020, but that was at a time when he had just been assessed as being in the top Vice President quartile. Given that he was in the top quartile of performers and that all employees are given both strengths and areas for development, the ET did not find that the Claimant would reasonably have understood that his performance was in any way inadequate at New Year 2020. Even when, in 2021, he was told that he should look for opportunities outside the Control Room, this was put to him as his means of achieving promotion to Managing Director - and not because of any underperformance.

83. The Claimant was told in January 2022 that his pay would be reduced by 5%, p679. The Claimant was not given a reasoned explanation for this.

84. On 16 February 2022 Mr Beer told the Claimant that the Control Room was functioning well without him, and he would not return to his previous role following parental leave.

85. There was an absence of evidence that, after around November 2021, when the Claimant went on parental leave, senior managers were considering the Claimant for any future roles at the Respondent.

86. In March 2022 the Respondent commenced a “Strategic Resource Assessment” (‘SRA’) process to review headcount. The Human Capital Management team instructed Mr Beer, Ms Tan and Ms Lui, as managers of the Control Room and GIRC, to “identify the bottom 2.5% “of your eligible population in order to manage those individuals out of the firm.” The HCM team advised that the SRA was intended to

identify true bottom performers – particularly year-on-year bottom performers – as well as "operating efficiencies" p710.

87. On 7 March 2022 Ms Liu replied, giving the Claimant's name, p 710. No other names were provided. There was no evidence that Mr Beer, Ms Tan and Ms Liu considered any other names.

88. Mr Beer and Ms Liu told the Tribunal that they identified the Claimant as an "operating efficiency". They both told the Tribunal that the "bottom 2.5%" metric was not applicable to the Control Room. Mr Beer said, "He was the most highly paid in control room and he moved out and it performed. … We had 2 people and not 3 – that sounds like operational efficiency." Mr Beer was questioned about whether he would tell a woman on maternity leave that things were going well without her. He answered, ".. if the circumstances had been exactly the same I would have put a woman's name forward, we take into account a number of factors. I would not be in a position of assessing legal risk. They may be factors which are discussed."

89. Mr Beer confirmed, however, that he had never put a woman's name forward for redundancy when she was on maternity leave.

90. On 27 April 2021, Employee Relations emailed to say that Melissa Barrett, Chief Operations Officer Legal, Compliance and Conflicts and Global Head of Core Compliance, was "asking for an update on Jon Reeves' termination." p721.

91. The Tribunal noted that that terminology suggested that a decision had already been made that the Claimant would be dismissed.

92. The Respondent contends that, while the Claimant had been away from the Control Room covering the GIRC advisory role, the Control Room's performance had gone from strength to strength and that it had become evident that the business functioned more effectively without the Claimant in his Control Room post, than with him in it.

93. Mr Beer told the later grievance investigation that, "Amy – deputy – knocked the ball out of the park. Everyone said that. When the assignment was done, he hadn't performed well. She had." P841. "… Simultaneously amy grady was crushing it. Stepped up. Star performer. Doing a much better job than what Jon was doing," p844.

94. Ms Liu told the Tribunal that the Claimant "performed adequately, but not as well as we all hoped he would to knock it out of the ballpark. Research Management thought he did a satisfactory job but my general sense of the feedback was that they were not "wowed"."

95. It was not clear from the evidence in what way Ms Grady was performing better than the Claimant, as the Tribunal was not given specific descriptions, or examples, as opposed to cliched generalisations.

96. As the Tribunal has noted, the Claimant's 2021 feedback document indicated that, not only did Ms Liu and Mr Charnley consider that he was "performing" against all the assessment criteria, but the majority of his 360 degree feedback was that he was outperforming (16 "outperforming" to 10 "performing", with no "underperforming"

scores). Ms Liu's description of Research Management being "not wowed" did not appear to be supported by the Respondent's formal 360 degree assessment feedback.

97. Mr Beer, Ms Liu and Ms Tan did not undertake any structured assessment exercise of the Claimant, Ms Grady, or Mr Tse, for the Deputy Head of Control Room Posts. When asked in cross examination, against what criteria Godwin Tse would have scored higher than the Claimant, Mr Beer said, "I don't know how it would have shaken out. … Godwin was and is an excellent manager of the Asia control room."

98. In Ms Shore's witness statement at paragraph [35], Ms Shore told the Tribunal that the Claimant's role was identified as being potentially redundant in March 2022, and that "the final decision to formally eliminate Jon's role" was made in April 2022.

99. On 5 May 2022 Mr Beer told the Claimant that he had been placed at risk of redundancy, p729. He told the Claimant that his IT access and access to the building would be terminated.

100. Mr Beer told the Claimant that, "Until 31 May, while you are at risk of redundancy, you may take the opportunity to ask questions you may have about being at risk and, if you wish, look for a suitable alternative role within the firm. We have not been able to identify a suitable alternative role for you at this point but HCM will follow up with you to offer to assist with your internal job search." P714.

101. After that conversation, Mr Beer reported to Employee Relations that, "Notably, he [JR] also said thank you to me multiple times for having this conversation; he told me about the message "it's fine" and he also said "I think you prepped me." p729

102. In evidence, when this was put to the Claimant, the Claimant said, "He [Mr Beer] led the call. He said, 'and I hope we have prepped you for this.' I did thank him for someone finally telling me where I stood. I always say thank you – probably too often."

103. The Tribunal preferred the Claimant's evidence – Mr Beer told the Claimant that he believed that he had "prepped" the Claimant for dismissal, but that, instead, the Claimant responded that someone had now finally told him where he stood.

104. The Respondent does not have a redundancy policy.

105. No formal consultation meetings were offered to the Claimant, nor was a structured process conducted in writing, in the course of which he was invited to comment on the proposal to dismiss him, or to suggest alternatives.

106. Emma Spilsbury of HR took over responsibility for communicating with the Claimant after 5 May 2022.

107. On 10 May 2022, Ms Liu emailed Mr Beer and Emma Spilsbury of HR asking, "Now that comm to Jon has been completed, are there any concerns for the CR to make and announce our management changes, e.g., Amy/Godwin officially as co-Deputy Global Head and elevation of a number of individuals to region heads?" Mr Beer confirmed that he agreed with the proposal.

108. The Tribunal concluded that, by 10 May 2021, and during the Claimant's purported consultation period, the Respondent had made a final decision as to the structure of the control room, to appoint Amy Grady and Godwin Tse as Co-Deputy Global Heads and to promote others to Ms Grady and Mr Tse's previous positions.

109. In the event, the new structure for the Global Control Room was not announced until 14 June 2022, p747. The new structure for the Control Room, after the Claimant's removal as Global Deputy Head, p971, was: Amy Grady and Godwin Tse as Co-Deputy Global Heads of the Control Room; Cindy Wright, Head of Core Compliance (a new role); Dana Berschler as Head of Americas Control Room (instead of Seth Johnson); Kieran Birt, Head of EMEA Control Room (instead of Amy Grady); Sally Hotchkin, Materiality lead (as before); Todman Lau and Fen Cutri, Co-Heads of AsiaPacific Control room (both instead of Godwin Tse), p971. The Senior Compliance Officers were Ms Grady, Mr Tse, Ms Wright, Ms Hotchkin and Mr Cutri. There were therefore 5 SCOs. Ms Berschler became an SCO later.

110. The new structure also increased Godwin Tse's allocation to the Control Room to 100% of his working time, whereas previously he had been spending 50% of his time on GIRC work.

111. The Claimant was not invited to comment in any way on the new proposed structure of the Control Room, nor was he offered the opportunity to apply for any of the roles in it.

112. On 26 May 2022 the Claimant emailed Emma Spilsbury in HR saying, "You have still not answered my questions. I would be grateful if you would do so that we can have meaningful discussion before I am served with my notice next week:

    1. Is my role being eliminated?
    2. When was that decision taken?
    3. Why was it taken at that particular time?
    4. What is happening to my duties and responsibilities?
    5. Have I alone been selected for redundancy in my team? If so, on what basis?

    To be clear, it is incorrect to say that my managers have been speaking with me on a regular basis and trying to find me an alternative role. The only one of my managers who has spoken to me about my redundancy and alternative employment is Omar who has merely told me that I cannot return to my role, it is my responsibility to look for other roles, and that I should look for work outside of GS. Furthermore, he has only told me this since I have been on paternity leave and unable to spend time looking for alternative employment."

113. The Claimant did not find an alternative role by 31 May 2022.

114. The Claimant's Parental Leave ended on 1 June 2022. He was not permitted to return from his leave, but was placed on garden leave.

115. On 6 June 2022 the Respondent wrote formally to him, confirming that the consultation period had concluded on 5 June 2022, that his employment would end on 4 September 2022, and that he would be on garden leave until then, p743.

116. On 9 June 2022 Emma Spilsbury responded to the Claimant's 26 May 2022 email, saying, amongst other things, p750, " …. you are the only person impacted in your team which is a reflection of a business need to reduced resource at your level and seniority. You have been selected given your relative performance in the context of what is a very strong peer group. Any responsibilities you held will be reallocated to others. I have spoken to Omar who told me that during the communication meeting you thanked him for the multiple conversations to prepare you for this possibility and so it seems to me that any conversation about the likelihood of redundancy was discussed with you as soon as possible."

117. Between February and September 2022, the Respondent had a number of vacancies for Vice President Compliance roles in London.

118. Cindy Wright's new Head of Core Compliance for Control Room role was based in Salt Lake City. Mr Beer told the grievance that the Claimant would not have been a good fit owing to the particular skills that the role required, including driving forward projects relating to the Control Room's infrastructure. The Claimant did not indicate to any of his managers that he wanted to relocate to Salt Lake City.

119. The Claimant set out, in his grievance appeal document, what steps he had undertaken to find alternative work. These did not appear to be disputed. The Claimant emailed Robert Charnley on 16 June 2022 and called him on 24 June 2022, when Mr Charnley told him that a possible Commitments Committee Secretariat role would not be available and that Mr Charnley had other candidates in mind for the open Senior Compliance Officer roles in London.

120. The Claimant also contacted all the members of the Respondent's Experience Hire Recruitment on 24 June 2022 and told them that he was interested in other open Vice President roles based in London. The majority of those individuals did not respond at all, or replied simply saying that they would keep him in mind.

121. 16 roles were available in London during the Claimant's notice period: Compliance, Anti-Money Laundering; Compliance, Sanctions; Compliance, Financial Crime Compliance; Consumer and Wealth Management, Senior Project Manager/Business Analyst; Corporate Treasury, EMEA Regulatory Engagement; Operations, Derivatives Regulatory Reporting; Controllers Division, Regulatory Capital Controller; Global Markets Supervision, Global Co-Lead; Global Markets, Counterparty Risk Management; Global Markets, Change Management; Risk, Enterprise Risk; Risk, Operational Risk; Tech Risk, Governance, Regulatory, and Controls; Engineering, Technical Program Manager; Engineering, Digital Risk Office, Program Manager / Governance and Engagement Lead; Asset Management Division, Request for Proposal, p907.

122. There was no evidence that the Respondent identified possible roles for the Claimant during the consultation period, or his notice period. There was no evidence that the Claimant, or other people at risk of redundancy, were allowed to interview for available posts, whether as a matter of priority, or at all. Indeed, the Tribunal noted that Mr Charnley simply told the Claimant that Mr Charnley preferred other candidates for the

available roles, without offering the Claimant any chance to participate in an objective selection exercise.

123. On 14 June 2022 “leadership changes” in the Control Room and Research Compliance team were announced, including the promotion of two Deputy Global Co-Heads of Control Room and that a new role had been created for Head of Core Compliance Control Room, based in Salt Lake City, p 747.

124. A possible Commitments Committee Secretariat post, in which the Claimant expressed interest, did not receive headcount approval, p889.

125. The Claimant remained on gardening leave during his notice period. He was dismissed on 5 September 2022. Shortly before the termination of his employment, on 2 September 2022, the Claimant raised a grievance. Cathy Shore, Vice President, Employee Relations, investigated his grievance. She interviewed Mr Beer, Ms Liu, Ms Tan, Ms Bradley and Mr Charnley. Ms Shore rejected the Claimant’s grievance by letter of 10 December 2022, p883-892.

126. Chris Hultman was appointed Head of GIR Compliance in London and New York and also took parental leave (for 2-3 weeks after May 2020, and from July to August 2020). Jon Gudmandsen, who was the person for whom the Claimant covered in GIR, took on a more senior job in Salt Lake City as Head of Global E-Communications Compliance after his parental leave, which he had taken for 2 weeks after 7 October 2020, and from 1 March 2021 to 19 September 2021.

127. Ms Liu and Mr Beer both have children. Ms Liu gave birth to some of her children during her employment with the Respondent.

128. In the Claimant’s claim form, on which he relied as part of his witness evidence, he said that Ms Liu and other managers made comments to the Claimant such as, “we all have families” or “many of us have kids”, when he expressed difficulties in balancing childcare and work. He had also raised this in his grievance, p767.

129. In evidence, Ms Liu told the Tribunal that the Claimant had not asked her for advice on balancing childcare and work. In cross examination, Ms Liu said, “… we spoke about balancing work and family. I had 2 out of my 3 children at Goldman. I took maternity leave and retuned after maternity leave … we have a lot of working parents on my team.” The Tribunal accepted her evidence.

130. The Claimant told the Tribunal that Nirav Shah, a global manager over Control Room Engineering, was displaced and demoted when he took extended parental leave. In his grievance the Claimant said that Mr Shah, “was told by his MD, Konstantinos Rizakos, when he notified GS of his intention to take 6 months of paternity leave that this would make it difficult to judge his performance that year. He had been told his performance for 2019 "exceeded expectations". But shortly before he went on leave, Konstantinos replaced him with a Global Head of Control Room Engineering, effectively demoting him to head the Americas only. Konstantinos and Omar both report into Michael Richman, the Global Head of Compliance.”

131. Mr Rizakos was not a decision maker in relation to the Claimant. However, the Tribunal accepted the Claimant's evidence that Mr Shah was in the Compliance Division. Accordingly, Michael Richman was the grandparent manager of both Ms Rizakos and Mr Beer.

132. During the grievance process Mr Beer was asked about when the Claimant's role was put at risk. Mr Beer answered, "I think it was the SRA process. We had to make a choice. It was around May. If it had not been for SRA would we have made him redundant? I don't know. We gave him so much rope and so many indications. He was kind of lazy – he didn't do what we said he should to look for other roles." P841.

133. The SRA process was during the Claimant's parental leave. Part of the period when the Respondent considered that the Claimant should be looking for other roles was also during his parental leave, and leading up to his parental leave. Mr Beer's description of the Claimant as 'lazy' therefore related, partly, to him during a period when he was on parental leave, or leading up to him going on parental leave.

The Conduct of the Claimant's Case

134. The Respondent contended that the Claimant had brought his sex discrimination complaint vexatiously. It contended that this was illustrated by the Claimant's answer in cross examination to the question "Is your case that men taking parental leave are treated disadvantageously compared to women taking maternity leave?". The Claimant had responded: "No – I think women are treated terribly including in the world and at Goldman Sachs. I think it's necessary for women to have advantages over man, especially as a protected characteristic. And Goldman Sachs did well to help women not feel the pressure to come back to work, but I think women are more targeted than men. I think in my situation, I'm like a white man that tried to walk into a restaurant and got told that I can't sit down. So, I was discriminated against. What happened to me would not happen to a woman at Goldman Sachs, 100%. I have experience in the SRA exercise, and we would never risk doing something like this as we would not risk discrimination. We would not do to a woman what was done to me. But women are treated worse than men, but with what happened to me, it will have a knock-on effect on women".

135. The Tribunal agreed with Ms Tuck's submission on this matter. The Claimant's answer addressed, first, the proposition that men, generally, are treated disadvantageously compared to women, when they take parental leave. The Claimant acknowledged that women taking maternity leave face disadvantages in the workplace, generally, and (he said) in Goldman Sachs. However, the Claimant was clear that his own case is that he was treated less favourably than a woman would have been. His evidence was that, having had experience of other SRA exercises, Goldman Sachs would not risk a discrimination claim by dismissing a woman on parental leave as the result of an SRA exercise.

136. The Respondent also contended that the Claimant's allegations of sex discrimination were not put to witnesses during cross examination and therefore had not been pursued.

137. The Tribunal disagreed. The allegations were dealt with in cross-examination and the Respondent's evidence on them was tested.

138. The Claimant's case, that Respondent's treatment of him was linked to him taking time off for childcare, as a man, was put in a number of ways.

139. For example, regarding the Claimant being told that he was underperforming in December 2021, Ms Liu was asked in cross examination to explain how the Claimant's grading had changed from 'meets expectations' to 'underperforming' when he was on paternity leave. Ms Liu and Mr Beer were both asked whether it was correct the first time the Claimant was given feedback about underperformance was when he was on paternity leave.

140. It was put to Mr Beer that Ms Tan had described Mr Beer as saying to the Claimant, in relation to childcare, "– you're a man you have to figure it out – or you're a grown man you can sort this out." Further, it was put to Mr Beer that he had described the Claimant as lazy when the Claimant had taken parental leave. Mr Beer was also asked why Ms Liu had said there was a doubt as to whether the Claimant would still be with the firm when he returned from paternity leave.

141. The process of removing the Claimant from the control room was addressed in cross examination, and Mr Liu and Mr Beer were questioned about the link between this and the Claimant taking parental leave.

142. Ms Liu was asked whether women were removed from organisational charts and expected to take action to find alternative roles while on maternity leave. She was asked about removing the Claimant from organisational charts when he went on parental leave, and removing the description of Ms Grady and Mr Tse as "acting" when the Claimant went on parental leave. The Respondent's Toolkit for Managers, which sets out Frequently Asked Questions and Answers in relation to dismissal of employees, p716, was put to Mr Beer and he was asked whether he had terminated a woman returning from such leave. He was asked whether women on maternity leave would be told that things were going well without them.

143. The Claimant's allegation that Nirav Shah was demoted when he took parental leave was put to Ms Liu.

144. It was accurate for the Respondent to say, however, that the separate acts of detriment relied on in relation to the Claimant's dismissal were not individually put to the Respondent's witnesses. However, the Tribunal considered that those alleged detriments were, in reality, elements of the alleged detriment of dismissal - and that it was artificial, in this case, to treat them as individual detriments. The Tribunal has not considered them as individual alleged detriments, but as part of the act of dismissal. The Claimant's case on discriminatory dismissal was put to the Respondent's witnesses, as set out in the preceding paragraphs.

Relevant Law

Discrimination

145. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Sex Discrimination.

146. Direct discrimination is defined in *s13(1) EqA 2010:*

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

147. Sex is a protected characteristic, *s4 EqA 2010.*

148. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Causation

149. The ET must decide whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

150. However, if the Tribunal is satisfied that the protected characteristic is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

151. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Burden of Proof

152. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

153. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

154. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865 and confirmed that the burden of proof does not simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para 56 – 58 Mummery LJ.

155. Unreasonable or unfair conduct is not, by itself, enough to trigger the transfer of the burden of proof— *Bahl v Law Society* [2003] IRLR 640, EAT per Elias J at [100], approved by the Court of Appeal at [2004] IRLR 799.

156. The warning that unreasonable treatment in itself cannot give rise to an inference of discriminatory conduct was repeated by the EAT in *Eagle Place Services Ltd v Rudd* [2010] IRLR 486. However, in that case, the EAT also said at [86], "A decision to dismiss the comparator on [the grounds found by the ET] would have been wholly unreasonable. It is simply not open to the respondent to say that it has not discriminated against the claimant because it would have behaved unreasonably in dismissing the comparator. It is unreasonable to suppose that it would in fact have dismissed the comparator for what amounts to an irrational reason. It is one thing to find, as in Bahl that a named individual has behaved unreasonably to both the claimant and named comparators; it is quite another to find that a corporate entity such as Nabarro or its service company would behave unreasonably to a hypothetical comparator when it had no good reason to do so."

157. Unreasonable treatment, therefore, can be a factor which can be taken into account in deciding whether the burden of proof shifts to an employer. A Tribunal should not simply assume, without evidence, that an employer would have behaved equally unreasonably towards a comparator.

158. If the burden of proof does shift, it is then for the Respondent to prove that the treatment of C was "*in no sense whatsoever*" because of the Claimant's sex (*Igen v Wong* [2005] IRLR 258, para 76(11), as approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] IRLR 870).

Comparison with Maternity

159. A woman's privileged treatment on account of pregnancy, maternity or childbirth is not discrimination as defined: *Equality Act 2010 s 13(6)(b)*, as amended with effect from 1 January 2024. For example, a policy enhancing maternity pay for women but not enhancing shared parental leave pay for men falls within this exception (*Ali v Capita Customer Management Ltd [2019] EWCA Civ 900*, *[2019] IRLR 695*).

160. The Court of Appeal held in *Ali* that a woman on maternity leave was not an appropriate comparator for a man on shared parental leave in a direct discrimination claim, because the purpose of the two kinds of leave was different: shared parental leave was for childcare whereas maternity leave was for the EU law-sanctioned purposes of protecting the biological position of a woman who has given birth and protecting the special relationship between a woman and her child. This was so even where it was now possible for a woman to end her maternity leave and give it to her partner as shared parental leave. There are material differences between a woman taking

maternity leave and a parent taking shared parental leave: the court identified the following: (1) SML is in part compulsory, whereas SPL is entirely optional; (2) SML can begin before birth, whereas SPL cannot; (3) SML is an immediate entitlement, whereas SPL is not; (4) SPL can only be taken with a partner's agreement, whereas SML can be taken regardless of whether the woman has a partner or of that partner's views; (5) SML is acquired through pregnancy and maternity, whereas SPL is acquired by a mother choosing to give up SML and effectively to donate it as SPL; (6) a birth mother is entitled to SML even if there is no child to look after, whereas, for a father or partner to take SPL, there must be a child to look after. SPL does not alter the predominant purpose of SML. The correct comparator would have been a woman seeking to take shared parental leave, and she of course would have received the same pay as the male claimant received.

161. In *Syndicat CFTC du personnel de la Caisse primaire d'assurance maladie de la Moselle v Caisse primaire d'assurance maladie de la Moselle* C-463/19, [2021] IRLR 152, the ECJ held that more favourable treatment for mothers than for fathers in a collective agreement, in the form of rights to leave after the end of the statutory maternity leave period, would not be sex discrimination if it was granted not because the woman was a parent but rather was directly linked to the protection of the woman's biological and psychological condition and the special relationship between the woman and her child during the period following childbirth. This a composite aim since the court expressly said that 'the aim of protecting the special relationship between a woman and her child is not, however, sufficient in itself [emphasis supplied] to exclude fathers from the benefit of a period of additional leave.' In assessing whether this composite aim was the reason for any extra leave, the court determining the matter should, the ECJ said, look to see that the duration of and conditions applicable to the leave were not linked to length of service, since that would suggest that the leave was not directly linked to this aim. Moreover, the duration of and the manner in which the supplementary maternity leave was exercised had to be appropriate to ensure the biological and psychological protection of the woman and of the special relationship between the woman and her child during the period after childbirth, without exceeding the period which appeared necessary for that protection.

Unfair Dismissal

162. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

163. s98 Employment Rights Act 1996 provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*, ”or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.” Redundancy and “some other substantial reason” are both potentially fair reasons for dismissal.

Redundancy

164. Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, “ ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—… (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."

165. According to *Safeway Stores plc v Burrell* [1997] IRLR 200, [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] 3 All ER 769, [1999] IRLR 562. There is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

166. In *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 Cairns LJ said that "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

167. There may be an overlap between redundancy dismissals and business reorganisations. In *McFarlane v Relate Avon Ltd* [2010] ICR 507, at [40], Underhill J said, "In the end, a point of categorisation of this kind is not fundamental: if the tribunal's basic reasoning is sound the dismissal was fair, whichever box the case falls into" .

Fairness

168. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof and applies a broad band of reasonable responses *Iceland Frozen Foods v Jones* [1982] IRLR 439, (confirmed by the Court of Appeal in *Foley v Post Office* [2000] IRLR 827.

169. *Williams v Compair Maxam Ltd* [1982] IRLR 83, set out the standards which guide tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

170. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

171. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response*, R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

172. In *Samels v University of Creative Arts* [2012] EWCA Civ 1152 at [4], the Court of Appeal stated that "The courts have emphasised that tribunals must not substitute their own view [on what pool is appropriate]. The tribunal has to consider whether the pool chosen by the employer falls within the range of reasonable responses from the employer". At [5] of *Samels* the Court of Appeal cited with approval the judgment of Mummery J in the EAT in *Taymech v Ryan* [1994] EAT/663/94), "… The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

173. It is not for the Tribunal to substitute its view for the employer's assessment of criteria, or to subject the Respondent's assessment of criteria to minute examination, *British Aerospace plc v Green* [1995] IRLR 433, [1995] ICR 1006.

174. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

175. The Tribunal should, however, look at the whole process in deciding whether a redundancy dismissal is fair. In *Haycocks v ADP ROP UK Ltd* [2024] IRLR 178 the EAT set out the following guiding principles at [22]:

" (a) The employer will normally warn and consult either the employees affected or their representative; *Polkey*.
(b) A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response; *British Coal*.
(c) Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; *Freud*.
(d) A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; *Lloyd v Taylor Woodrow*.
(e) The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; *Taylor v OCS*.
(f) It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; *Mugford*.
(g) Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; *Camelot*.
(h) The use of a scoring system does not make a process fair automatically; *British Aerospace*.
(i) The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; *British Aerospace***.**

Polkey – Unfair and Discriminatory Dismissals

176. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

177. The Polkey principle applies in discrimination cases. The EAT confirmed in *Abbey National plc and Hopkins v Chagger* [2009] IRLR 86 (upheld on this point by the CA, [2009] EWCA Civ 1202) that the general rule in assessing compensation is that damages are to place the Claimant into the position they would have been in if the wrong had not been sustained. In the context of discriminatory dismissals, if there was a chance of a non-discriminatory dismissal this must be taken into account. Underhill J said, 'the claimant [ought not to make a] 'windfall' 100% recovery in circumstances where he was likely to be dismissed in any event, simply because his employer had – it may be subconsciously and only to a small extent – allowed himself to be influenced by discriminatory considerations. There is nothing in the statute to suggest that discrimination is to be treated as a specially heinous wrong to which special rules of compensation should apply'.

Decision

178. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. For clarity, it has stated its conclusion on individual allegations separately.

179. The Claimant relied on the following matters in contending that the burden of proof shifts to the Respondent in the sex discrimination claim:
" a. The lack of any fair reason for dismissal
b. The abject failure to follow any fair process before dismissing the Claimant.
c. The fact that performance concerns were not raised with the Claimant until he was on parental leave, and his appraisals showed he was "fully meeting expectations".
d. The principal example given to the Claimant about him not being sufficiently visible was from September 2020 when he was driving to Cornwall (pg 911; Claimant's w/s paras 13, 14, 24).
e. The Claimant having raised to his managers on a number of occasions the challenges he was facing balancing work and family, particularly during Covid lockdown (Claimant's w/s para 12, 13).
f. The Respondent's approach to males taking extended parental leave – and their refusal to answer questions about this.
g. Oonagh Bradley telling the Claimant shortly before his extended leave that she "intended to fill all the open MD roles with women" (pg 767).
h. Miss Bradley removing the Claimant from the Control Room organisational chart the day his leave began, saying: "We can update the other charts but not make a big announcement" (pg 650).
i. The Respondent promising the Claimant's role to the individuals supposedly covering for him and without his knowledge (pg 542).
j. Omar Beer telling the claimant he was "jealous" and to "take advantage" of his parental leave (pg 766), and when raising the balance of work and childcare, shouting "figure it out" (pg 767).
k. Ada Liu and other managers telling the Claimant "we all have families" or "many of us have kids" when he expressed difficulties in balancing childcare and work (pg 767; Claimant's w/s para 19).
l. The timing of the decision to terminate the Claimant's employment, and failure to permit him to return at the end of his parental leave – and indeed terminating his IT access whilst on parental leave."

180. As the Claimant relied on alleged unfairness in the dismissal as a matter from which the Tribunal should draw inferences, the Tribunal addressed the unfair dismissal complaint, before addressing the sex discrimination complaint.

Unfair Dismissal Complaint

181. The Tribunal considered, first, whether the Respondent had shown the reason for dismissal and that it was a potentially fair one.

The Reason for Dismissal

182. The Respondent contended that, whether characterised as a redundancy or business reorganisation (SOSR) termination, where an employer can perform the same functions better, with fewer people and at lower cost, that is both a redundancy and a substantial reason for termination of the employee who is no longer needed.

183. The Tribunal addressed the question of what was the reason, in the Respondent's mind, for dismissing the Claimant?

184. On the facts, the Tribunal decided that Mr Beer, Ms Tan and Ms Liu wanted Amy Grady, in particular, to be Deputy Head of the Control Room - and not the Claimant. They wanted to replace the Claimant with Amy Grady and Godwin Tse.

185. Both Ms Liu and Mr Beer told the Tribunal that they identified the Claimant as an "operating efficiency". Mr Beer said, "He was the most highly paid in control room and he moved out and it performed. …". Mr Beer told the grievance that Ms Grady, in particular, was "… crushing it. Stepped up. Star performer. Doing a much better job than what Jon was doing." Mr Beer had already told the Claimant on 16 February 2022 that the Control Room was functioning well without him, and he would not return to his previous role following parental leave.

186. Replacing the Claimant with Amy Grady and Godwin Tse, as Deputy Head of the Control Room was the reason that the Respondent identified the Claimant as someone who, as Human Capital Management put it, was to be "manage[d] … out of the firm." P710.

187. The Tribunal considered whether that was that a potentially fair reason – either redundancy or SOSR?

188. Regarding redundancy, the Tribunal considered whether the Claimant's dismissal was therefore wholly or mainly attributable to its requirement for employees to carry out work of a particular kind ceasing or diminishing.

189. The Respondent contended that, when the Claimant was out of the control room covering the GIRC role and on paternity leave, Amy Grady and Godwin Tse, "stepped up to absorb C's duties as Co-Global Heads of the Control Room", so that essentially there were 3 SCOs at that level in the Control Room. The Respondent contended that 3 were not needed, and only 2 were needed, so that Claimant's redundancy

represented a diminution in the requirement for employees to carry out work of a particular kind.

190. However, the Tribunal decided that, in reality, when the Claimant was covering the GIRC role and when he was on parental leave, his substantive role remained Deputy Global Head of the Control Room. As Ms Liu told the Tribunal in evidence, Ms Grady and Mr Tse were "acting up" into the Claimant's role.

191. The new structure for the Control Room, with Amy Grady and Godwin Tse as Deputy Global Co-Heads of the Control Room, was not announced until 14 June 2022, after the Claimant had been given notice of dismissal.

192. In fact, the Respondent replaced the Claimant as sole Deputy Global Head with 2 Deputy Global Co-Heads. Its requirement for employees to carry out work of that kind (Deputy Global Head of the Control Room) increased, rather than diminished.

193. Equally, while the Respondent contended that its requirement for SCOs had diminished, and that was why the Claimant was dismissed, the Tribunal found that the Respondent's requirement for SCOs in the Control Room remained at 5 SCOs. There were 5 SCOs before the Claimant went to cover GIRC/on parental leave - the Claimant and his 4 direct reports: Seth Johnson, Americas Control Room Head; Sally Hotchkin, Global Materiality; Amy Grady, EMEA Control Room Head; and Godwin Tse, Asia Pacific and Hong Kong Control Room Head, p964. There were also 5 SCOs amongst the Deputy Heads and their direct reports when the new structure, minus the Claimant, was implemented: Ms Grady, Mr Tse, Ms Wright, Ms Hotchkin and Mr Cutri.

194. Looking at the Deputy Global Head and its direct reports cohort, the Structure Chart after the Claimant's removal from Deputy Head, p971, was: Amy Grady and Godwin Tse as Co-Deputy Global Heads of the Control Room; Cindy Wright, Head of Core Compliance (a new role); Dana Berschler as Head of Americas Control Room (instead of Seth Johnson); Kieran Birt, Head of EMEA Control Room (instead of Amy Grady); Sally Hotchkin, Materiality lead (as before); Todman Lau and Fen Cutri, Co-Heads of AsiaPacific Control room (both instead of Godwin Tse), p971.

195. There were therefore more employees at the level of Deputy Global Head of the Control Room and their direct report. There were now 2 Deputy Global heads, instead of one, 2 Heads of the AsiaPacific Control Room, instead of one, and a new Head of Core Compliance Role. The Head of Americas Control Room and Head of EMEA Control Room posts remained. No posts had been deleted.

196. The Tribunal did not hear evidence about any reorganisation below that level in the Control Room.

197. On any analysis, therefore, whether looking at the role of Deputy Head of the Control Room, or at SCOs, or at Deputy Head and their direct reports, there were more, or the same number of, employees undertaking those roles, before and after the Claimant was dismissed.

198. This was not a redundancy dismissal - the Respondent replaced one particular person (the Claimant) with 2 other particular individuals (Ms Grady and Mr Tse), in an identical role.

199. The Tribunal then considered whether this was a "Some other Substantial Reason" dismissal. That was not the Respondent's pleaded case. It was not clear to the Tribunal in what way this might be a potentially fair "SOSR" dismissal. There was no reorganisation whereby some of the Claimant's duties were allocated to different roles. Indeed, the roles remained the same after the reorganisation, with more people carrying them out. Furthermore, contrary to the Respondent's contention, it was not clear that the new structure represented any efficiency, or cost saving, given that the number of employees actually increased. The dismissal involved directly replacing the Claimant, personally. That was not a potentially fair SOSR reason. It was more akin to a "capability" dismissal, if anything, in that the Respondent contended that Ms Grady (in particular) was better than the Claimant at the same job. The Respondent did not argue that this was a capability dismissal, however.

200. The Tribunal therefore concluded that the Respondent had not shown that its reason for dismissal was a potentially fair one.

201. The dismissal was unfair.

S98(4) ERA Fairness

202. If the Tribunal was wrong and the Respondent did dismiss the Claimant for the potentially fair reason of redundancy, or an SOSR reason, the Tribunal went on to consider whether the Respondent acted reasonably in dismissing the Claimant for that reason, under *s98(4) ERA.*

203. The Tribunal reminded itself that it must not substitute its own view for that of the Respondent and that the Respondent has a wide range of reasonable responses. The Tribunal should also look at the process as a whole.

204. However, the Tribunal concluded that there was no attempt by the Respondent to carry out any fair process before dismissing the Claimant.

205. On the facts, the Tribunal decided that the Respondent had made a final decision to dismiss the Claimant, even before he was told that he was at risk of redundancy. By 27 April 2022, Melissa Barrett, Chief Operations Officer Legal, Compliance and Conflicts and Global Head of Core Compliance, was "asking for an update on Jon Reeves' termination." p721. Asking about his "termination" indicated that a decision had already been made that the Claimant would be dismissed. Ms Shore confirmed, in her witness statement, that a decision had been made to delete the Claimant's post in April 2022. Given that the post of Deputy Global Head of the Control Room was not deleted at all, the Tribunal concluded that that meant that a decision had been made to "delete" the Claimant himself in April 2022– before he was even told that he was at risk. HCM's email of 1 March 2022, asking for names of individuals "in order to manage those individuals out of the firm" p710, also indicated that the Respondent's intention was always to dismiss those people, not to undertake a fair process for deciding whether they might be dismissed.

206. The absence of a written redundancy policy did not in itself mean that the Claimant's dismissal was unfair, but the Tribunal considered that it might have led to the Respondent acting unfairly.

207. The Tribunal decided that there was no consultation whatsoever at any formative stage of the proposals. The Respondent's new proposed structure for the Control Room was not shared with the Claimant. Even before he was told that he was at risk, he had been told that he wasn't going back to the Control Room, with no consultation on this.

208. The Claimant was not offered consultation meetings. The most he was told by Mr Beer was that, "Until 31 May, while you are at risk of redundancy, you may take the opportunity to ask questions you may have about being at risk." In other words, that the Claimant himself might want to initiate some communication about his dismissal – not that the Respondent was going to put in place a mechanism for consultation. The Claimant did write to Ms Spilsbury on 22 May 2022, asking for answers before the end of the consultation period, but she did not reply until 9 June 2022, after the notional consultation had ended. The Tribunal considered that that was illustrative of the Respondent's lack of engagement in meaningful consultation.

209. The Tribunal found that the Respondent did not genuinely apply its mind to the issue of a pool at all. In submissions to the Tribunal, the Respondent contended that the Control Room was the pool, because HCM had asked Ms Liu, Mr Beer and Ms Tan to identify individuals from the Control Room. The Respondent then acknowledged that, according to the subject line of the email, those managers had been asked to identify individuals from both the Control Room and the GIRC. That appeared to indicate that, even by the end of the case at the Tribunal, the Respondent did not know what its own pool was. Neither Ms Lui nor Mr Beer gave evidence about their identification of a pool.

210. The Tribunal concluded that there was no reasonable consideration of a pool for selection in this case.

211. The Respondent contended that the Respondent applied the SRA criteria of operational efficiency and bottom performers in selecting the Claimant for redundancy.

212. Ms Liu and Mr Beer told the Tribunal that they did <u>not</u> select the Claimant as a bottom performer, but as an operational efficiency.

213. As the Respondent equated "operational efficiency" with "redundancy" in this case, the argument that "operational efficiency" was a selection criterion appeared to be circular. In effect, the Respondent argued that the Claimant was selected for redundancy on the basis that he was redundant. The Tribunal did not find that identifying the Claimant as an "operational efficiency" involved the application of any objective criterion for selecting him for redundancy (rather than selecting any of the other Control Room/GIRC employees).

214. In reality, on the facts, the Respondent dismissed the Claimant because Ms Grady, in particular, was perceived to have performed better at the job than the Claimant had done. This was not, however, on the basis that the Claimant was a "bottom performer".

215. Even if (contrary to the Respondent's case) some broad "performance" criterion was applied, the Respondent's application of it was outside the band of reasonable responses. There was no attempt at any objective application of the selection criterion. Mr Beer did not know how the Claimant would have "shaken out" compared to Mr Tse, if he had applied selection criteria. There was no attempt at a selection exercise for any of the SCO / COO/ Deputy Global Head of Control Room/ Materiality/ Regional Head of Control Room roles and no attempt at any objective assessment of those other employees for the remaining roles.

216. Lastly, there was no reasonable effort to seek to find the Claimant suitable alternative work. There was a large number of vacancies within the Respondent in 2022; for example, the 16 roles identified by the Claimant on p 907. Mr Charnley did not allow the Claimant to apply for any of the open SCO roles. The Claimant was simply discounted as a candidate.

217. The Respondent argued that the Claimant's managers had been looking for suitable alternative roles for him during 2021 and had told the Claimant that he should look for alternative roles outside the Control Room from early 2021, but that none had ever been identified, so that this indicated that there were no suitable roles for the Claimant.

218. However, the Tribunal did not accept that the Respondent's managers did act reasonably, even during this previous period. The Respondent's managers did not ensure that their assessments of the Claimant were reasonable and evidence based. They relied on cliched generalisations and they changed their assessment of him from 'meets' to underperforming in 2021 – a change which was never properly explained (see further below in the sex discrimination findings). The Tribunal did not find that the Claimant's managers ever made any objective assessment of him and his suitability for available roles.

219. Furthermore, as the Claimant argued, he was on parental leave from November 2021, and knew that he would be taking parental leave from at least May 2021, so it was necessarily difficult for him to take on a new role in that period. During his parental leave he was supposed to be spending time with his child, not looking for jobs. The Claimant's failure to identify a new role between May 2021 and June 2022 did not indicate that there were no roles which were suitable for him.

220. Accordingly, the Tribunal concluded that, if the Respondent had dismissed the Claimant for the potentially fair reason of redundancy, the Respondent acted unfairly in doing so. Its failure to adopt any semblance of a fair process was so thoroughgoing that its process was unfair in every respect, and as a whole, even allowing a wide range of reasonable responses to a reasonable employer.

221. The Tribunal will address the issue of Polkey further below, after its decisions on the Claimant's sex discrimination complaints.

Sex Discrimination

Alleged Detrimental Acts

222. On the Tribunal's findings of fact, the Respondent did do all of the following:

1.2.1. Alleging in December 2021 that the Claimant had performed worse than his peers. [§21.5 & 37.1 POC]

1.2.2. Reducing the Claimant's remuneration in January 2022 as compared to previous years. [§21.5 & 37.2 POC]

1.2.3. Placing the Claimant at risk of redundancy on 5 May 2022. [§35 & 37.3 POC]

1.2.4. Not pooling the Claimant with and/or scoring him against Amy Grady and/or Godwin Tse. [§35 & 37.4 POC]

1.2.5. Selecting the Claimant for redundancy instead of Ms Grady and/or Mr Tse. [§35 & 37.4 POC]

1.2.6. Not appointing the Claimant as a Deputy Global Co-Head of Control Room. [§35 & 37.4 POC]

1.2.7. Failing to appoint the Claimant to another suitable alternative role to avoid his dismissal. [§35 & 37.5 POC]

1.2.8. Dismissing the Claimant on 5 September 2022. [§35 & 37.6 POC].

Comparator

223. The Claimant relies upon a hypothetical comparator whose circumstances were not materially different to his, namely [§38 POC]:

1.1.1. A female employee taking extended leave for any reason related to the birth of a child and/or childcare under any of the Respondent's policies; and/or

1.1.2 Further, or in the alternative, a female employee taking extended leave under the Respondent's parenting leave policy.

224. The Claimant's stated comparator is therefore not a woman who has taken ordinary maternity leave.

225. Neither party addressed the Tribunal on the law relating to the comparison between men taking paternity / parental leave and women taking extended maternity leave. However, UK and European law indicates that more favourable treatment for mothers than for fathers, in the form of rights to extended leave, even after the end of the statutory maternity leave period, is not sex discrimination, if it is granted, not because the woman is a parent, but linked to the protection of the woman's biological and psychological condition and the special relationship between the woman and her child during the period following childbirth. The comparator cannot therefore be a woman who has taken extended maternity leave, either.

226. The correct comparator is therefore the Claimant's alternative hypothetical - a woman who has taken extended leave for childcare reasons under the parenting policy, like the Claimant, and not a woman who has taken maternity leave.

Detriment

227. The Tribunal concluded that all the alleged detrimental acts were, indeed, detrimental in law. A reasonable employee would consider themselves disadvantaged in the workplace if they were considered to be underperforming and as a result had their pay reduced. They would also consider themselves disadvantaged by an unfair process which put them at risk of dismissal. The Tribunal considered, however, that the Claimant's alleged detriments fell into 2 categories:

a. Alleging the Claimant had underperformed and reducing his pay;
b. Dismissal.

228. This was because the reduction in pay appeared to be consequent on the "underperformance", so was part of the same decision making. The reduction in pay and underperformance could still amount to 2 separate detriments, however.

229. The alleged separate detriments relating to dismissal - putting the Claimant at risk, not putting him in a pool or scoring him, not appointing him to a role – were all elements of the same dismissal. The Tribunal considered that it was artificial to separate dismissal into more elements because they were not really separate detriments, but part of the same act, given that the Claimant was ultimately dismissed.

Burden of Proof

230. The Tribunal needed to consider whether there was evidence from which it could conclude that the Respondent treated the Claimant less favourably than it would have treated a hypothetical woman in the same circumstances, who had taken extended leave for childcare reasons (but not for maternity leave), by alleging the Claimant had performed worse than his peers, by reducing his pay and by dismissing him.

231. The Tribunal decided that there was such evidence, because:

a. All the alleged detrimental acts were done while the Claimant was on parental leave, which is for the purpose of bonding with and caring for children. There was a striking coincidence between the detrimental acts and the Claimant's parental leave;

b. The Tribunal accepted the Claimant's evidence that Mr Beer had been dismissive of him in relation to childcare during covid lockdown in 2020. Ms Tan described Mr Beer's likely attitude to the Claimant in relation to childcare as, "you're a grown man you can sort this out". Ms Tan's description appeared to indicate that both she and Mr Beer were dismissive of the Claimant, as a man, having any issues in relation to childcare;

c. The Tribunal accepted the Claimant's evidence that he had not witnessed managers being similarly dismissive of female employees in relation to childcare;

d. Mr Beer did not take steps to correct any negative impression which other managers had gained of the Claimant, when the Claimant was on holiday at a weekend with his young baby, when Mr Beer had not communicated to the Claimant the urgency of the need to contact work. As a result, Mr Beer allowed the Claimant's failure to contact work that weekend to assume an unwarranted level of importance for his managers, so that they were still raising the matter 18 months later;

e. Mr Beer telling the grievance process that the Claimant, "… was kind of lazy – he didn't do what we said he should to look for other roles," when the Claimant had been on parental leave, or was about to go on parental leave, for much of the period Mr Beer was referring to;

f. The Claimant's performance grading was changed from "Meets" or "Performing" to, essentially, "underperforming" when Ms Liu spoke to him on 9 December 2021, when he was on parental leave, when his 2021 objective feedback showed that he was performing or outperforming. The Respondent appeared to have acted contrary to its own objective assessment process;

g. The Claimant was dismissed wholly unfairly. A final decision was made to dismiss him during his parental leave, before he was even told that he was at risk;

h. The Respondent's Questions and Answers in relation to dismissal of employees, p716, include, "***Q: I just returned from medical/maternity/parenting/parental leave and thought I had a guarantee to return to my job. How can you terminate my employment?*** *The firm's policy generally is to return the employee to his/her job after a period of leave, subject to necessary business decisions. If we eliminate roles or reduce headcount, you can be impacted just as other employees are impacted*." P719. However, in this case, the Tribunal has decided that the Respondent did not "eliminate roles or reduce headcount" in dismissing the Claimant. It replaced him in the same role with other employees. Accordingly, the stated justification for departing from the expectation that someone on parental leave could return to their job, p716, did not apply in this case. There was therefore evidence that the Claimant was not treated in the same way as other employees returning from parenting or parental leave would have been treated.

232. The Tribunal considered that the Respondent's unreasonable conduct, including, by deciding to dismiss the Claimant when he was on parental leave and in failing to follow

any fair process for dismissal, was something which contributed to the burden of proof shifting. While unreasonable conduct in itself does not shift the burden of proof, the Respondent apparently acted contrary to its own practices in doing so – as shown by the Questions and Answers, p716. The Respondent did not eliminate roles or reduce headcount in dismissing the Claimant. The Tribunal did not accept that there was evidence that the Respondent would have acted similarly unreasonably towards a woman returning from parental / parenting leave for childcare.

233. As set out at [230], there was also evidence that Mr Beer and Ms Tan were dismissive of the Claimant in relation to childcare.

234. For the sake of clarity, the Tribunal did not find that the Claimant asked Ms Liu for advice on managing childcare, nor that the Respondent (or Ms Bradley) promoted women rather than men, nor that Mr Beer viewed the Claimant's parental leave as the Claimant simply taking time off work.

235. However, there was sufficient other evidence for the Tribunal to conclude that the burden of proof shifted to the Respondent in respect of all the detrimental acts.

Whether the Respondent has Shown that Sex was not Part of the Reason

236. It is for the Respondent to prove that its treatment of the Claimant was "*in no sense whatsoever*" because of his sex, *Igen v Wong,* CA and *Hewage v Grampian Health Board* , SC.

237. The Tribunal noted that Chris Hultman and Jon Gudmandsen, other male employees, both took childcare leave and were not dismissed. They were both, in fact, promoted. Mr Beer also has children. That was evidence that the Respondent does not, in general, treat men who take childcare leave detrimentally.

238. However, the Tribunal did not find that that the Respondent had proven that its treatment of the Claimant was not because of sex.

239. In the history of all the detriments there remained a striking coincidence between them and the Claimant's absence from work on parental leave, for childcare. Against that backdrop, it was significant that the Claimant's managers, Ms Tan and Mr Beer were dismissive of the Claimant, as a man, having any issues in relation to childcare.

240. In relation to alleging the Claimant had underperformed, the Claimant's 2021 Annual Feedback indicated that he was "performing" in his GIRC role and an HR handover on 12 December 2021 indicated that the Claimant's performance was "meets" expectations. As the Tribunal has already indicated, it was not clear to the Tribunal when, and on what objective basis, the Claimant's managers decided that he was "underperforming". It was clear, however, that Ms Liu told him that he was underperforming on 9 December 2021, when he was on parental leave. The Respondent did not show that the allegation of underperformance was not because of sex.

241. Second, the Respondent did not provide cogent evidence as to the reason for the Claimant's pay being reduced. The pay reduction appeared to be consequent on the inadequately explained allegation that he was underperforming.

242. The burden of proof shifted and the Respondent did not discharge the burden on it in respect of either of these allegations. The Tribunal found that the Respondent subjected the Claimant to sex discrimination when it alleged he was underperforming and when it reduced his pay.

243. Regarding dismissal, the reasons given for identifying the Claimant as an "operating efficiency", included that "He was the most highly paid in control room and he moved out and it performed. …". And that Ms Grady was "… crushing it. Stepped up. Star performer. Doing a much better job than what Jon was doing."

244. The reasons the Respondent relied on were not cogent, but impressionistic. There was never any objective assessment of the Claimant against Ms Grady or Mr Tse. The Respondent did not give examples of the way in which Ms Grady was "crushing it", while the Claimant supposedly was not. Mr Beer even admitted in evidence that he did not know how the Claimant would have scored against Mr Tse in an objective redundancy selection exercise.

245. The subsequent unfairness of the dismissal process compounded the lack of cogency and objectivity in the Respondent's dismissal decision-making.

246. The Tribunal did not accept that there was evidence that the Respondent would have treated a hypothetical comparator in the same circumstances in the same unreasonable way as it treated the Claimant. As the Tribunal has noted, the Respondent's Question and Answer document, p716, suggested otherwise.

247. The Tribunal found that the Respondent discriminated against the Claimant because of sex when it dismissed him.

Time – Continuing Act

248. The Tribunal found that there was a continuing discriminatory state of affairs covering the sex discrimination detriments. They all occurred in a relatively short space of time, under the same managers, during the Claimant's parental leave, for childcare. All were linked to him, as a man, having taken parental leave. The Claimant was told he was underperforming on 9 December 2021 and was named by Ms Liu as an operational efficiency within 3 months, on 7 March 2022. As there was a discriminatory state of affairs, all sex discrimination complaints were brought in time.

Polkey

249. The Tribunal then considered what was the likelihood that this employer would have dismissed the Claimant fairly, and for non-discriminatory reasons, in any event, for redundancy.

250. It might seem counterintuitive to envisage a fair redundancy procedure in circumstances where the Tribunal found that there was not, in fact, a redundancy situation at the time the Claimant was selected for dismissal.

251. Nevertheless, the Tribunal noted that, from February 2020, the Claimant was no longer being proposed for cross ruffing for promotion the following year. His managers were expressing irritation with his "visibility" and there was a comment that he would be "outliving his capabilities" unless there was a change. In December 2020, Mr Beer had told the Claimant that he was unlikely to achieve promotion from his post as Deputy Global Head of the Control room. He encouraged the Claimant to look for other roles. As Mr Charnley said at the time, the Respondent's managers considered that the Claimant would need to move roles in order to advance his career.

252. Ms Liu told Mr Richman on 15 January 2021 that, following the Claimant's move to GIRC, "If he hasn't found anything, then he would be back in the CR [Control Room] with idea that he moves on after that but the message would be a lot more pointed." P544.

253. On 4 February 2021, Michael Richman emailed senior colleagues in Compliance Department saying that, "Reeves is basically done in control room as we want amy grady to grow". P556.

254. That provided strong evidence, long before he went on parental leave, that when the Claimant returned to his post in the Control Room at the end of his GIRC posting, the Respondent did not envisage him remaining there.

255. Further, there was evidence that Ms Grady was both tipped for promotion and was considered to be performing well at the level of Deputy Global Head of the Control Room. The Claimant did not dispute this. It was therefore very likely that the Respondent would have envisaged permanently promoting her and, probably, Mr Tse, to Co-Head level (given that they had both been acting up into the role).

256. The Tribunal accepted that the "Deputy Global Head" level at the Control Room would then have been very congested, after the Claimant's return from parental leave. The Tribunal considered that it was therefore very likely that the Respondent would have undertaken a redundancy exercise, to assess Claimant against Ms Grady and Mr Tse, for retention in the Control Room, soon after he returned from parental leave.

257. Doing its best, the Tribunal had to consider what was likely to be the outcome of such a process, assuming it was a fair and non-discriminatory selection process. The Tribunal reminded itself that it had to consider what this Respondent, acting fairly, would have decided – it was not for the Tribunal to make its own assessment.

258. The following factors were relevant:

a. Long before he went on parental leave, the Respondent's managers had indicated some dissatisfaction with the Claimant's performance;
b. Before he went on parental leave, the Claimant was no longer identified as someone who was likely to achieve promotion. The

Respondent's assessment of his performance had changed from 'top quartile' to 'meeting expectations' in 2020;

c. The Claimant's managers considered that he would need to move to another role in order to achieve promotion;
d. The Claimant's managers had tried to find him another role. They arranged a secondment to GIRC in early 2021 to help him, which the Claimant welcomed enthusiastically. In February 2021, Mr Richman and Mr Beer considered "a position for the Claimant covering conflicts globally", p 556. All that indicated that his managers' opinions, that the Claimant needed to move from the Control Room, were genuinely held before he went on parental leave, and that these managers were not being unfair to the Claimant in this;
e. The Claimant did not dispute that Ms Grady was a strong performer;
f. Mr Beer did not know how the Claimant and Mr Tse would have compared on an objective assessment;
g. However, Mr Beer considered that Mr Tse "… was and is an excellent manager of the Asia control room."
h. The Respondent, in fact, appointed both Ms Grady and Mr Tse to be Deputy Co-Heads, indicating that there would have been 2 Co-Head positions available, during the redundancy selection exercise, rather than just one.

259. There was considerable evidence that the Claimant's managers did not want the Claimant to remain in the Control Room. His career trajectory had stalled. The Tribunal found that it was highly likely that Ms Grady would have been selected as one of the Deputy Global Heads of the Control Room. However, when Mr Beer gave his honest opinion in evidence, he was not able to say what an objective assessment between the Claimant and Mr Tse would have decided.

260. Given that Mr Beer could not say either way, the Tribunal concluded that there was a 50/50 likelihood that Ms Tse would have been selected to be retained as a Co-Deputy Global Head of the Control Room, rather than the Claimant.

261. It was therefore 50% likely that the Claimant would have been displaced from the Control Room, following a fair process, very soon after he returned from parental leave.

262. The Tribunal accepted there were 16 London vacancies during the Claimant's notice period. A fair procedure would have involved allowing the Claimant to apply and be interviewed for suitable posts. However, the Tribunal was not given evidence which suggested that the Claimant was likely to have been appointed to any of them, even if Mr Charnley had allowed him to apply. The Tribunal did not have any details of these jobs, or of the Claimant's relevant experience and skills in relation to them.

263. The Claimant told his managers that he wanted to stay in London – and was prepared to take a pay cut in order to do so, p495. He never told them otherwise. The Tribunal considered that he would not have accepted a role overseas, even if the Respondent had offered him one.

264. The Claimant had not himself secured an alternative post at any time after December 2020, when he was told that he should look for one.

265. The Tribunal therefore did not find, on the evidence before it, that there was any appreciable likelihood that the Claimant would have secured an alternative role, once he was displaced from the Control Room, following a fair selection process.

266. It therefore concluded that there was a 50% likelihood that the Claimant would have been dismissed, in any event, soon after he returned from parental leave.

Remedy

267. A remedy hearing will take place **on 17 January 2025.**

8 November 2024

_____

Employment Judge Brown

Sent to the parties on:

14 November 2024

……..

For the Tribunal:

……..