EMPLOYMENT TRIBUNALS

Claimant: Ms S Harris-Stevens

Respondent: Fullbrook Ventures Limited (t/a Bernard Sims Associates)

Heard at: Cardiff **On:** 8, 9 & 10 November 2021

Before: Employment Judge S Jenkins
Mr P Bradney
Mrs M Humphries

Representation:
Claimant: Mr N Smith (Counsel)
Respondent: Mr D Soanes (Solicitor)

RESERVED JUDGMENT

1. The Claimant's claim of indirect disability discrimination is dismissed on withdrawal.

2. The Claimant's claims; of unfair dismissal, direct sex discrimination, direct disability discrimination, and discrimination arising from disability; all fail and are dismissed.

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal, pursuant to Section 94 Employment Rights Act 1996 ("ERA"); direct sex discrimination, pursuant to Section 13 Equality Act 2010 ("EqA"); direct disability discrimination, pursuant to Section 13 EqA; discrimination arising from disability, pursuant to Section 15 EqA; and indirect disability

discrimination, pursuant to Section 19 EqA. In the event, the indirect disability discrimination claim was withdrawn during the hearing.

2. We heard evidence from Mrs Jacqueline Sims, Director, and Mr Bernard Sims, Managing Director, on behalf of the Respondent, and from the Claimant on her own behalf. We considered the documents in the hearing bundle spanning 421 pages to which our attention was drawn, and we also considered the parties' representatives' written and oral submissions.

Issues and Law

3. The issues to be determined in this case were set out by Employment Judge Ryan in a Case Management Summary sent to the parties on 20 July 2021, following a preliminary hearing on 19 July 2021, and are set out in the Appendix to this Judgment.

4. It was agreed at the outset of the hearing that assessment of remedy, if required, would be left to the end of the hearing if there was time, or would be dealt with at a subsequent hearing, if not.

5. Subsequent to the preliminary hearing before Judge Ryan, the Respondent conceded that the Claimant had been disabled at the relevant times for the purposes of Section 6 EqA, so that did not remain a live issue for us to determine. Also, as we have noted, the indirect disability claim was subsequently withdrawn so we did not have to determine that.

6. In relation to the discrimination claims, as noted by Judge Ryan, they all focused on the dismissal of the Claimant, ostensibly by reason of redundancy, and therefore the initial focus for us was on the reason for dismissal. If we concluded that the reason for dismissal was redundancy, as advanced by the Respondent, then the Claimant's claims under Section 13 and 15 EqA would fail as the dismissal would not have been because of the Claimant's sex or disability, and nor would the dismissal have arisen in consequence of something arising from the Claimant's disability, in this case her sickness absences.

7. Conversely, if we concluded that redundancy was not the reason for dismissal and it was, instead, motivated by the Claimant's sex or her disability, then one or other of those claims would succeed, as would the unfair dismissal claim, as the Respondent would not have satisfied us that it had dismissed the Claimant for a fair reason.

8. If we were satisfied that the reason for dismissal was redundancy, then we would need to consider whether dismissal for that reason was fair in all the circumstances.

9. The statutory definition of redundancy is found in Section 139(1) ERA, which provides as follows

   (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -…..

   (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.

10. The test for assessing the fairness of any dismissal by reason of redundancy was encapsulated within paragraph 1.2 of the issues identified by Judge Ryan. These largely derive from the guidance provided by the Employment Appeal Tribunal ("EAT") in ***Williams -v- Compair Maxam Limited*** **[1982] ICR 156**. In that case the EAT put forward four factors that a reasonable employer might be expected to consider in such circumstances:

    (a) Whether the selection criteria were objectively chosen and fairly applied.
    (b) Whether the employees were warned and consulted about the redundancy.
    (c) If there was a union, whether the union's view was sought.
    (d) Whether any alternative work was available.

11. In this case, the Respondent had viewed the Claimant as being in a "pool of one", and therefore the application of selection criteria had no bearing.

12. With regard to the identification of the selection pool, the EAT, in ***Kvaerner Oil and Gas Limited -v- Parker*** **(UKEAT/0444/02)**, confirmed that the employer's choice of pool must be assessed by consideration of whether it fell within the range of reasonable responses open to an employer in the circumstances. The EAT have also made clear that a Tribunal should not substitute its own view for that of the employer in relation to the pool, noting in ***Taymech Limited -v- Ryan*** **(UKEAT/663/94)** that, "*There is no legal requirement that a pool should be limited to employees doing the same or similar work. 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 to the problem*".

13. The EAT has also noted that Tribunals are only concerned with whether the reason for the dismissal was redundancy, not with the economic or commercial reason for the redundancy itself, see ***James W Cook and Co (Wivenhoe) Limited -v- Tipper and others*** **[1990] ICR 716**.

14. With regard to the Claimant's discrimination claims, the burden of proof was also relevant. Section 136 EqA provided that we would first need to consider whether there were any facts from which we could conclude, in the absence of a non-discriminatory explanation from the Respondent, that acts of unlawful discrimination had taken place. If so, the burden would then shift to the Respondent to demonstrate a non-discriminatory explanation. In that regard, the appellate courts have regularly made clear, for example the Court of Appeal in ***Khan -v- The Home Office*** **[2018] EWCA Civ 578**, and the EAT in ***Chief Constable of Kent Constabulary -v- Bowler*** **(UKEAT/0214/16)**, that Tribunals should avoid a mechanistic approach to the drawing of inferences.

Findings

15. Our findings, on the balance of probabilities where there was any dispute, were as follows.

16. The Respondent is a health and safety consultancy, headquartered in Guildford. It operates throughout the United Kingdom, and has offices in Litchfield, Leeds and Manchester, with consultants also located in other parts of the country. It employs approximately 30 employees.

17. The Respondent's two directors are Mr Bernard Sims and Mrs Jacqueline Sims, who are married. Mr Sims focuses on the operational side, with Mrs Sims focusing on the human resources side.

18. The Respondent has a particular focus on construction design and management ("CDM"), employing several consultants who advise on the health and safety issues arising in relation to the design and planning phases of construction work. A lot of the Respondent's work in that area was undertaken for clients in the hospitality or food and drink sectors, involving the construction or refurbishment of hotels, pubs, restaurants and cafes.

19. The Claimant was recruited by the Respondent in October 2016, at a time when it was looking to expand its operations outside of the areas covered by its physical offices, as a Senior CDM Consultant. She had worked in that field for several years prior to that. The Claimant was based at her home in Cwmbran, and reported initially to the Guildford headquarters, but, following her return from maternity leave in September 2019, reported to a manager based in the Litchfield office.

20. Although based at home, the Claimant regularly visited client sites and that meant that her work took her across much of South Wales, as far as Swansea to the west and Brecon to the north, and regularly into the West of England around the Bristol area, but also as far north as Gloucester and Worcester, as well as further south into Somerset, Cornwall and Devon.

21. At around the same time as the Claimant started working for the Respondent, another Senior CDM Consultant, Philip Holland, was recruited. He also worked from his home, in his case Royal Wootton Bassett, and covered principally the M4 corridor between Bristol and London, but also covered areas either side, for example Oxford and Luton to the north, and Heathrow to the south. Mr Holland also covered clients in South West England, he and the Claimant being very similarly located to cover clients in that area, Mr Holland being some 10 minutes travelling time further away than the Claimant from the M4/M5 interchange.

22. The Claimant took maternity leave in March 2019 and returned to work on 23 September 2019. During her absence Mr Hutton initially covered the Claimant's work, but another CDM Consultant, Mr James Hector, based in Bristol, was recruited to assist in the coverage of the South West area. Following the Claimant's return therefore, there were three Consultants who dealt with the Respondent's clients in South West England, with the Claimant, in addition dealing, with clients in South Wales, and Mr Hutton also dealing with customers along the M4 corridor.

23. Unfortunately, the Claimant suffered from post-natal depression following the birth of her child, and she commenced a period of sickness absence on 13 February 2020. In the event, she never returned to work.

24. The COVID-19 pandemic took effect in March 2020, with lockdown being implemented towards the end of that month. That had an immediate, significant impact on the Respondent's work, bearing in mind that its clients were primarily based in the hospitality and food and drink sectors.

25. Following the implementation of the furlough scheme, most of the Respondent's employees were placed on furlough, with Mr and Mrs Sims and the Respondent's management team undertaking what work there was. Mr Holland and Mr Hector were placed on furlough, although shortly after, at some point in the Summer, Mr Hector left to take up another position.

26. At this stage, the Claimant was on sickness absence, and therefore was not placed on furlough. Email exchanges took place between the Claimant and Mrs Sims, and also with the Claimant's Line Manager, between April and July 2020, regarding the Claimant's ongoing absence and her sick pay. This included discussing the repayment of an overpayment that had been made

to the Claimant in March 2020 when she had been paid in full when she should only have received SSP.

27. The Claimant submitted monthly Fit Notes confirming her unfitness for work, although by August 2020, the wording of the Fit Notes suggested that the Claimant's condition was improving, the Fit Note dated 5 August 2020 noting that there was "*ongoing improvement*", and similar comments were made in subsequent Fit Notes. The emails from the Claimant herself, from June onwards, also suggested that she was more optimistic about her health.

28. On 8 June 2020, Mrs Sims emailed the Claimant indicating that the Respondent would like the Claimant to move onto the furlough scheme with effect from 1 June, commenting that it was permitted and made sense on both sides, on the basis that the Claimant would receive more money than if she remained in receipt of SSP, and that it would also enable the Claimant to start repaying the overpayment of around £1,500. Notwithstanding that the Claimant was, by this stage, in receipt of payments via an insurance policy arising from her sickness absence, she agreed with the proposal and she signed a furlough agreement on 10 June 2020.

29. By July 2020, following the ending of the first lockdown and the gradual opening up of businesses, the Respondent started to bring its Consultants off furlough. Mr Holland moved to a flexible situation, working two days per week from the end of July, continuing to cover clients in South West England as well as along the M4 corridor.

30. The pandemic had an understandably significant impact on the Respondent's business. It had previously had a turnover of between £3 million and £3.5 million per annum, i.e. approximately £250,000 to £300,000 per month on average, and that was forecasted to fall, and did indeed fall, to approximately £2 million per annum. By August 2020, with, at the time, the furlough scheme being anticipated to end in October, the Respondent decided to move on with redundancies.

31. Planning for redundancies had in fact been undertaken as far back as the end of April 2020. At that time, Mr and Mrs Sims, together with the Respondent's Accountant, prepared a spreadsheet which included the names of the employees that the Respondent felt might be made redundant if redundancies were to be implemented, together with their ages, lengths of service and salaries. The Claimant was included in the spreadsheet, together with two other Senior CDM Consultants and ten other employees. The spreadsheet was updated in subsequent months before the redundancies were implemented, apart from the Claimant's, at the beginning of September, with some employees included in the initial

spreadsheet not being made redundant, and with others, who were not initially included, being made redundant.

32. The Claimant's inclusion in the spreadsheet, alongside two other Senior CDM Consultants, formed a key part of her contention that she had been singled out for redundancy due to an impermissible reason, i.e. in her case her sickness absence due to post-natal depression. Minutes of the Respondent's Management Committee meetings in the bundle disclosed that concerns had been identified over the other two Senior CDM Consultants, and Mr Sims, in his evidence, confirmed that they were initially included as it was felt that they would be the most likely to be selected for redundancy due to the anticipated conclusion that they would score lower than others.

33. In the case of the Claimant, no performance concerns existed, and she contended that it was only her absence due to post-natal depression that led to her being identified.

34. The evidence of Mr and Mrs Sims however, which we accepted, was that the Claimant was included in the initial spreadsheet due to their view that, in view of the Claimant's location, it was likely that her position would be made redundant. We considered that the tone of the email exchanges between the Claimant and Mrs Sims and her Line Manager, which in our view was supportive and sympathetic, the reasonable number of female employees engaged in the Respondent's business overall, and the fact, as we note below, that the Respondent agreed to delay the implementation of the Claimant's redundancy, supported our conclusion that there was no ulterior motive on the part of the Respondent in identifying that the Claimant, at an early stage, could face redundancy.

35. By August, the Respondent had decided to move on with the potential redundancies. Selection pools were considered and, in some cases, for example headquarters staff, selection processes were undertaken to identify the individual employees to be made redundant. In the Claimant's case, as we have noted, the Respondent took the view that she was in a "pool of one" and therefore no selection exercise was undertaken.

36. Mrs Sims emailed the Claimant on 11 August 2020, seeking to arrange a call with her the following day. In that call, Mrs Sims alerted the Claimant to the fact that she was at risk of redundancy and a video meeting was arranged for 17 August 2020.

37. Prior to that, on 14 August 2020, the Claimant emailed Mrs Sims asking how many employees were at risk of redundancy and for details of the criteria being used for selection. No direct response was provided to those queries at the time, but Mrs Sims sent a formal letter to the Claimant dated

15 August 2020, sent by email on 17 August 2020, confirming that the Claimant was at risk and that the formal consultation would start at the meeting on 17 August.

38. That meeting took place as planned between the Claimant and Mr and Mrs Sims, with another employee taking notes. The background to the redundancies was explained and it was confirmed that the Respondent was looking to remove approximately eleven roles, some being individual "*due to location and the role*".

39. The Claimant was asked for her proposals or suggestions, and she confirmed that she would do anything to keep her job. She indicated that she would consider returning to work on a part-time basis, following a phased return. She also noted that if she came off furlough and went back on sick leave, as her SSP had been exhausted, that would save the Respondent money.

40. Mr and Mrs Sims noted that, with regard to CDM Consultants, they were looking to reduce the numbers in the South and the North and when the Claimant asked how that would look, she was told that they were looking to reduce two in the North, one in the Midlands, and three in the South. At that stage, the Claimant was included within the Midlands team. Mr and Mrs Sims confirmed that they were looking to try to finalise the process by the end of August or beginning of September and would make further contact with the Claimant.

41. The Claimant confirmed her suggestions in an email to Mrs Sims on 20 August 2020, and Mrs Sims responded shortly afterwards, indicating that she would get back to the Claimant shortly. Mrs Sims then sent a substantive reply on 3 September 2020.

42. In that, Mrs Sims noted that taking the Claimant off furlough and placing her on sick leave would certainly save money but that the Claimant would continue to accrue holiday. She also noted that the position over the following months was uncertain and that they did not think that there would be sufficient work available for the Claimant, even for one or two days. She noted that the big rollout programmes of the Respondent's clients were on hold until the following year. She concluded by saying that she felt that moving the Claimant from furlough to being on sick leave would only delay matters for another couple of months when the Respondent did not believe there would be any difference to the outcome based on its forecasts. She confirmed she would shortly invite the Claimant to the next meeting.

43. The Claimant replied to Mrs Sims' email later that same day. She noted that she appreciated Mrs Sims' honesty with regard to the current workload, and that she completely understood the Respondent's concern in relation to

that. She asked how many people were at risk from the Midlands team, noting that she remembered that Mr Sims had said that the team needed to be reduced by one consultant, and therefore that she was wondering how many people were in the selection pool with her.

44. The Claimant noted that her agreement to a phased return would be the best way forward once she was ready to return, and provided there was sufficient work at that time, but noted that obviously it was not known when that would be. She pointed out that she did not necessarily think that it would be a case of delaying the inevitable and suggested that the position be reviewed once she was in a position to return to work when there could be a clearer picture of future workloads. Mrs Sims replied to the Claimant later that day confirming that she would get back to her as soon as she could.

45. Mrs Sims then wrote to the Claimant on 7 September 2020 with a substantive response to her proposal. In answer to the Claimant's query over the number of people at risk, Mrs Sims confirmed that the Claimant's role was stand-alone, due to where she was based. She also confirmed that when Mr Sims had been referring to a role at risk reporting into Litchfield he had been referring to the Claimant's role.

46. Mrs Sims confirmed that the Respondent would move on with the Claimant's proposal that she be moved from furlough to sick leave in order to save costs, and that if the Claimant was fit to return in October they could discuss whether to place her back on furlough. She concluded by saying that, in view of the uncertainty over the Claimant's fitness to return, the Respondent was comfortable in reviewing the position at the end of October when they would have more of an idea about the Claimant's fitness and the Respondent's workloads and forecasts. The Claimant replied later that evening, noting that she agreed that Mrs Sims' proposals were a very sensible way forward.

47. In September 2020, Mr Hutton increased his working days to four, remaining on furlough for the other day each week. He continued to service clients in South West England as well as around the M4 corridor.

48. On 1 October 2020, although certifying her as unfit to work for a further month, the Claimant's GP noted within the Fit Note that consideration could be given to a phased return. An identical comment was made in a Fit Note dated 30 October 2020.

49. On 10 November 2020, Mrs Sims sent a letter to the Claimant. In this she noted that, having reviewed the position, the anticipated workloads remained low and the Respondent therefore continued to look at costs and the viability of the Claimant's job role. The Respondent had, by then, at the

end of August or beginning of September, implemented the other proposed redundancies which involved the departure of some ten employees, including the two Senior CDM Consultants who had been originally identified as likely to be made redundant. Mrs Sims confirmed that the Respondent was now therefore going to continue with the consultation process, and a telephone meeting was arranged for 13 November 2020.

50. That telephone meeting took place as scheduled. Again, the Claimant confirmed that she would do anything to keep her job, and suggested a phased return of one day per week for the first month and then two days per week. The Claimant also suggested that she could use up her holidays in "dribs and drabs" and noted that she was happy to consider part-time working, with three or four days per week being ideal.

51. The Claimant also noted that the Respondent's weekly movement sheets, to which she continued to have access, which noted the whereabouts of all staff, indicated that sites were being visiting in her area. She commented that she did not think that there was a full understanding of her location as she was the closest employee to Bristol and the South West.

52. Mrs Sims then sent a further email to the Claimant on 20 November 2020, noting that her suggestions had been considered carefully but unfortunately there had been very little change to the situation earlier in the year when the Claimant had been advised that her role was at risk of redundancy. She commented that there was still very little work for the Claimant in order to be able to sustain a role even on a part-time basis as suggested. She commented that given the lack of work in and immediately around where the Claimant lived, even if she were to take on projects in Bristol, the South West and the Midlands, it would mean that she would spend more time travelling further afield to areas which were already covered by others. She commented that it would in effect mean taking work from other employees based in other areas which would in turn leave them under-utilised.

53. The Claimant replied on 24 November 2020 noting her confusion with regard to Mrs Sims' comments about her area. She commented that Mrs Sims' email had made it sound as though she was solely employed to cover South Wales, which had never been the case. She also commented that as she was closest to those areas (we presumed she was referring to Bristol and the South West rather than the Midlands) she would spend less time travelling to them than others and not more. She also observed that the costs of keeping her on the furlough scheme would be less than the costs which would have to be met in relation to redundancy, notice and outstanding holiday.

54. After discussions between Mr and Mrs Sims, Mrs Sims then wrote to the Claimant on 24 November 2020, attaching a formal letter inviting the

Claimant to a further video meeting on 30 November. That meeting took place as planned, again between the Claimant and Mr and Mrs Sims, with the same employee taking notes. In the meeting the Claimant confirmed that she had no further comments.

55. Following the meeting, Mrs Sims sent a letter to the Claimant on 1 December 2020, confirming the termination of her employment with immediate effect by reason of redundancy, with a payment in lieu of notice. The letter confirmed the Claimant's ability to appeal that decision.

56. The Claimant did appeal, by letter dated 5 December 2020. She repeated her comment that there appeared to have been a misunderstanding of the geography of the area she covered, and in particular her location and proximity to projects, and that of other people who had been covering those projects in her absence. She noted that, despite being based in Wales, she was still closest to Bristol and the M5, and also therefore to the South West. She commented that sending consultants from other parts of the country to cover projects which were in fact closest to her would lead to higher travel expenses.

57. An appeal meeting was arranged for 10 December 2020 and took place on that date. The meeting was again between the Claimant and Mr and Mrs Sims, there being no-one above them within the Respondent's organisation to consider the appeal. The same employee was present to take notes. The Claimant's appeal letter was discussed and Mr and Mrs Sims confirmed that her role had been identified as a stand-alone one due to where she was based, and that the Respondent had looked at the position with regard to pools carefully, and had used pools in some cases but had proceeded on the basis that jobs were stand-alone in others.

58. With regard to the Claimant's comment about her perception that the geography of her area had been misunderstood, Mr and Mrs Sims responded that whilst the Claimant was close to Bristol and the M5 there was still not very much work in Bristol or the M5 corridor.

59. With regard to the Claimant's point about there being additional costs to send other consultants to work in the South West, Mr and Mrs Sims again replied by saying that there was hardly any work in the area being covered by the Claimant. They remained therefore of the view that there was insufficient work to retain the Claimant. The Claimant asked if there was not even enough work for her to undertake her role on a one day a week basis and Mr and Mrs Sims responded that unfortunately things still did not add up for the Respondent on that basis. The decision to make the Claimant redundant was therefore confirmed and a letter confirming that was sent to the Claimant by Mrs Sims on 14 December 2020.

Conclusions

60. Applying our findings and the applicable law to the issues on which adjudication was required, our conclusions were as follows.

61. As we have noted, the principal issue for us to consider was the reason for dismissal. Was it a desire on the part of the Respondent to remove an employee who was a problem, i.e. in the Claimant's case arising from her absence with post-natal depression, or was it genuinely the identification of her role as redundant?

62. Overall, our conclusion was that the reason for the Claimant's dismissal was not her absence due to her disability. Whilst the Claimant had been off for nearly ten months by the time her employment ended, she had only been absent for approximately ten weeks when first identified as potentially redundant. We also did not discern any hint of a lack of sympathy or patience on the part of the Respondent in relation to the Claimant's circumstances.

63. In addition, we noted that the Respondent had been prepared to delay the implementation of redundancies for a two-month period, and to revisit the position when the Claimant was ready to return. Whilst that delay did not cause any material financial outlay to be incurred by the Respondent, all other redundancies were implemented by the Respondent at the end of August or beginning of September, and we did not think that the Respondent's willingness to delay the implementation of the Claimant's redundancy indicated any antipathy on the part of the Respondent to the Claimant because of her condition or her absence.

64. Overall, we did not consider that there were any inferences to be drawn from the primary facts to suggest that discrimination had occurred. We therefore concluded that the Claimant's claims of direct sex discrimination, direct disability discrimination, and discrimination arising from disability failed and should be dismissed.

65. With regard to the Claimant's unfair dismissal claim, a corollary of our conclusion that the decision to dismiss the Claimant was not her condition or her absence, was that we concluded that the reason for dismissal was redundancy. It was clear to us that a redundancy situation existed, in that the Respondent's requirement for employees to carry out work of the particular kind in the place where the Claimant was employed had diminished.

66. Turning to the question of whether dismissal for that reason was fair in all the circumstances, our overall conclusion was that it was. We were conscious, as we have noted above, that our role was not to step into the

shoes of the Respondent and to consider whether its approach was correct, or even the better or best of alternative approaches. Rather, our role was to assess whether the Respondent's approach was a reasonable one, on the basis that an employer genuinely applying its mind to its approach is to be allowed a reasonable degree of latitude.

67. The focus of the Claimant's disagreement with her identification as redundant was on the Respondent's decision that she, based in South Wales and covering South Wales and South West England, should be made redundant in light of the Respondent's conclusion that work in that area had dropped off to such an extent that a redundancy resulted.

68. Whilst the Claimant did not raise any specific issues regarding pooling in her discussions with the Respondent prior to her redundancy being confirmed, in her witness evidence she asserted that she should have been pooled with Philip Holland, bearing in mind that they both dealt with customers in the Bristol area and the South West.

69. We accepted that the Respondent certainly could have approached matters in that way, and perhaps it would have been better overall had it done so. However, as we have noted, that was not the test for us to apply. Instead, we had to assess whether the Respondent's decision on pooling fell within the range of responses open to an employer acting reasonably in the circumstances.

70. In that regard, we considered that the Respondent's approach was not unreasonable and did not fall outside the range. It was faced with a significant drop in income, which was going to lead to a marked drop in profitability if remedial action was not taken in terms of reducing costs. Bearing in mind that staff costs were a significant element in the Respondent's costs base and, as would be common with most organisations, would be the element most easily able to be adjusted reasonably promptly, it was entirely understandable that the Respondent should look at its staffing costs and structure as an area in which costs could be reduced.

71. We also thought that it was understandable that the Respondent should approach its retrenchment in reverse order to the way it had approached its expansion, looking at its outlying areas where its workload was not as significant as it was in the South East around its headquarters and in the major conurbations of Birmingham, Leeds and Manchester.

72. That led to the Respondent to look at the area covered by the Claimant in relation to its neighbouring areas. In that regard, the workload in the area, in common with that of other areas, had reduced, to such an extent that there was insufficient work for a single employee, as evidenced by the fact that

even in December 2020, Mr Holland was only working four days per week, still spending one day per week on furlough, covering the M4 corridor and the South West.

73. Clearly work remained to be undertaken in South Wales and the South West, and the Respondent took the approach of considering that that work could be better undertaken by consultants from outside the area, principally Mr Holland, but also, in the context of Worcester, Gloucester and South Wales, by consultants based in the Midlands, than by the Claimant. Whilst the Respondent could certainly have explained its approach rather more clearly to the Claimant than it did, as the comments from Mr and Mrs Sims gave the Claimant reason to suspect that they viewed her role as being South Wales based, we considered that its overall approach was reasonable. Mr Holland, based in Royal Wootton Bassett, was obviously best placed of the two employees to pick up work in the M4 corridor, and other consultants in the Midlands were best placed to pick up work in that area, with the Claimant again obviously best placed to pick up work in South Wales. However, the Respondent took the view, in our view legitimately, that there was less work in South Wales to be covered by consultants travelling from outside that area than there was in the M4 corridor, to be picked up by Mr Holland, or in the Midlands, to be picked up by the Midlands consultants.

74. That then left the work in Bristol and the wider South West area. Whilst we noted that the Claimant was the closest Consultant to Bristol and indeed the South West, that was only by a small, and in our view immaterial, margin. It would take Mr Holland a very similar period of time to reach Bristol and the South West as it would take the Claimant.

75. In our view, it was open to the Respondent to take the view that removing the Claimant's role of looking after customers in South Wales and the South West, and maintaining Mr Holland's role in looking after the M4 corridor and the South West, with the relatively limited work in South Wales being picked by other consultants as and when required, better suited its business needs. We certainly did not consider that the Respondent's approach was outside the range of reasonable responses.

76. In terms of the other elements of the ***Compair Maxam*** test, we were satisfied that the Respondent undertook a reasonable consultation process. The Claimant was warned that she was at risk of redundancy, first informally and then formally. Formal meetings then took place, with a delay being implemented at the Claimant's request, before the consultation was restarted and the redundancy confirmed. Also, whilst the Claimant was clearly not satisfied with the answers provided, the Respondent provided responses to the Claimant's queries.

77. In the circumstances that applied, where the Respondent was implementing several redundancies to cut costs, there were no alternative roles available and therefore nothing that could potentially have been offered to the Claimant.

78. Overall therefore we were satisfied that the Respondent had acted reasonably in dismissing the Claimant by reason of redundancy and therefore considered that her claim of unfair dismissal should be dismissed.

Employment Judge S Jenkins
Dated: 1 December 2021

JUDGMENT SENT TO THE PARTIES ON 3 December 2021

………………………………………………..
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

APPENDIX

The Issues

1. Unfair dismissal

1.1 What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

1.2 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

1.2.1 The Respondent adequately warned and consulted the Claimant;
1.2.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool;
1.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;
1.2.4 Dismissal was within the range of reasonable responses.

1.3 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

2. Remedy for unfair dismissal

2.1 Does the Claimant wish to be reinstated to their previous employment?

2.2 Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.6.1 What financial losses has the dismissal caused the Claimant?

2.6.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
2.6.3 If not, for what period of loss should the Claimant be compensated?
2.6.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
2.6.5 If so, should the Claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.6.7 Did the Respondent or the Claimant unreasonably fail to comply with it?
2.6.8 If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?
2.6.9 If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of fifty-two weeks' pay apply?

2.7 What basic award is payable to the Claimant, if any?

2.8 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

3. **Disability**

3.1 Did the Claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The Tribunal will decide:

3.1.1 Did they have a mental impairment: Depression/post-natal depression?
3.1.2 Did it have a substantial adverse effect on her ability to carry out day-to-day activities?
3.1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?
3.1.4 Would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?
3.1.5 Were the effects of the impairment long-term? The Tribunal will decide:

3.1.5.1 did they last at least 12 months, or were they likely to last at least 12 months?
3.1.5.2 if not, were they likely to recur?

4. **Direct sex and/or disability discrimination (Equality Act 2010 section 13)**

Was the claimant dismissed <u>because</u> of her sex or disability?

5. **Discrimination arising from disability (Equality Act 2010 section 15)**

5.1 Dismissal was unfavourable treatment.

5.2 Did the claimant's absences from work arise in consequence of the Claimant's disability?

5.3 Was the unfavourable treatment because of that?

5.4 Was the treatment a proportionate means of achieving a legitimate aim? The respondent is to confirm this.

5.5 The Tribunal will decide in particular:

5.5.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;
5.5.2 could something less discriminatory have been done instead;
5.5.3 how should the needs of the Claimant and the Respondent be balanced?

5.6 Did the Respondent know or could it reasonably have been expected to know that the Claimant had the disability? From what date?

6. **Indirect discrimination (Equality Act 2010 section 19)**

6.1 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP: the requirement to be fit and well enough to perform the relevant duties.

6.2 Did the Respondent apply the PCP to the Claimant?

6.3 Did the Respondent apply the PCP to persons with whom the Claimant does not share the characteristic or would it have done so?

6.4 Did the PCP put persons with whom the Claimant shares the characteristic, at a particular disadvantage when compared with persons with whom the Claimant does not share the characteristic, in that the claimant was not well enough to attend work and to perform all relevant duties?

6.5 Did the PCP put the Claimant at that disadvantage?

6.6 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent say that its aims were:

AIM: the respondent is to confirm.

6.7 The Tribunal will decide in particular:

6.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;
6.7.2 could something less discriminatory have been done instead;
6.7.3 how should the needs of the Claimant and the Respondent be balanced?

7. **Remedy**

7.1 How much should the Claimant be awarded?