EMPLOYMENT TRIBUNALS

Claimant: Miss M Darko

Respondent: Ladbroke Betting & Gaming Ltd

Heard at: London South Croydon

On: **12 – 15 April 2021 & 29 April 2021 (in chambers)**

Before: Employment Judge Tsamados
Mr C Mardner
Dr N Westwood

Representation

Claimant: In person
Respondent: Ms T Hand, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

RESERVED JUDGMENT

The **unanimous** judgment of the Employment Tribunal is as follows:

1) The Claimant was not unfairly dismissed;
2) The Claimant was not discriminated against because she exercised her right to maternity leave;
3) Her complaints are unfounded, and the claim is dismissed.

REASONS

Claims and issues

1. The Claimant, Miss Darko, presented a claim to the Tribunal on 18 February 2020. This followed a period of early conciliation between 14 and 18 February 2020. Her claim raises complaints of unfair dismissal and pregnancy/maternity discrimination against the Respondent, Ladbroke Betting & Gaming Ltd. She had been employed by the Respondent from 1 December 2016 until 20 November 2019 as a Customer Services Advisor.

2. In its response received by the Tribunal on 19 March 2020, the Respondent denied the claim in its entirety.

3. A preliminary hearing on case management was conducted by Employment Judge (EJ) Harrington on 15 May 2020 at which the Claimant appeared in person and the Respondent was represented by a solicitor. EJ Harrington recorded that following a detailed discussion, she identified the issues in respect of both complaints. She set a number of standard case management orders and listed the case for hearing for four days from 12 to 15 April 2021.

4. The issues identified at that hearing, and which we indicated we would be considering at our hearing, are reproduced below:

*"**Unfair Dismissal***

5 What was the reason for the dismissal?

5.1 The Respondent asserts that the Claimant was made redundant.

6 Was the dismissal fair or unfair in all of the circumstances?

The Claimant's case is summarised as follows:

6.1 The Claimant began her maternity leave in June 2019 and her daughter was born on 21 July 2019. At the end of October 2019 the Claimant received a telephone call from the Respondent telling her that she needed to consult about her job role and that there was a potential for redundancies;

6.2 The Claimant alerted the Respondent, on 1 November 2019 to the fact that she had some health issues that prevented her from fully participating in a process and making decisions about her role with the company;

6.3 The Claimant asked for a longer period of time to make her decision about whether to take an alternative role or to be made redundant;

6.4 At the meeting on 4 November 2019 the Claimant was given 24 hours to give the Respondent a date during that calendar week for a second consultation meeting;

6.5 The Claimant's son's birthday was on 15 November and therefore she was unable to attend the meeting on that day;

6.6 The Claimant will say that she was not given sufficient time to make her decision. In the event. the Respondent gave the Claimant a deadline of 30 November 2019;

6.7 The Respondent ignored the content of the Claimant's email dated 20 November 2019 in which the Claimant expressed her uncertainty as to what to do with her job;

6.8 The Respondent did not respond to the email dated 20 November 2019 until 26 November 2019. This followed a further email from the Claimant in which she chased for a response;

6.9 The Claimant was not provided with any support over the issues she raised including health issues until after 26 November 2019;

6.10 The Claimant will say that in the grievance and appeal meetings the Respondent failed to properly consider the issues she was raising including matters relating to her health which she evidenced by producing her prescriptions and a referral letter for counselling.

Section18: Pregnancy and Maternity Discrimination

7 The Claimant relies upon the following factual matters:

7.1 The Claimant repeats the issues set out above at paragraphs 6.1 - 6.10. particularly concerning the time limits given to her;

7.2 The Claimant was unable to attend the Respondent's premises for meetings because of her newborn baby;

7.3 The Claimant was having sleepless nights with her baby and had raised these issues with the Respondent;

7.4 The Claimant will say the Respondent made no changes to take account of her particular situation;

7.5 The Respondent arranged a grievance meeting to start at 9 am. on 18 December 2019 at its premises. This timing was difficult for the Claimant. After the Claimant had arrived, the meeting was then cancelled and rescheduled for a few days later. These arrangements put pressure upon the Claimant in her situation and. for example, the need to arrange care for her new-born baby and son. The Claimant had to make herself available when the Respondent had not been able to for this first meeting.

8 Has the Claimant established the factual matters set out in paragraphs 7.1 — 7.5 above?

9 Are there facts from which the Tribunal could decide. in the absence of another explanation. that the unfavourable treatment described above (if proved) was because the Claimant was exercising her right to maternity leave?

10 If so, has the Respondent proved that their treatment of the Claimant was not unfavourable because she was exercising her right to maternity leave?"

5. At the start of our hearing, it emerged that there was some delay in exchange of witness statements. In short, the Claimant had sent her witness statement to the Respondent's solicitors but had not received its witness statements in return. The Respondent was not ready to exchange and having received the Claimant's witness statement, the solicitors deleted it without reading it, so as not to have an unfair advantage over the Claimant. Exchange subsequently took place and the Claimant acknowledged that she had had a chance to read those documents and was content to proceed with the hearing.

6. I explained the Employment Tribunal process to the Claimant and went through the issues in respect of each of her complaints, as set out in the Case Management Summary from EJ Harrington.

Documents and evidence

7. Ms Hand provided the Claimant and the Tribunal with an Opening Note which set out a proposed reading list, a proposed timetable, a chronology and a cast list.

8. We were also provided with an electronic bundle running to 237 pages, which included an index of four pages with the result that the page numbers in the electronic bundle did not match those in the index.

9. We heard evidence from the Claimant by way of a written statement and in oral testimony. We heard evidence on behalf of the Respondent from Andrew Neves, Femi Adesanya, Colin Hughes, Hugh Westlake and Dan Shepperd, by way of written statements and in oral testimony.

Proceedings

10. The case was originally unallocated. Our previous hearing finished early, and we were allocated the case and were able to commence at 11 am on 12 April 2021. We read the documents and witness statements and started hearing evidence at 2 pm that afternoon. We heard further evidence and then submissions from both parties over 13 and 14 April 2021. We met in Chambers to reach our decision on 15 April 2021 but had insufficient time and so we reconvened on 29 April 2021, having advised the parties that we would now be giving a reserved judgment. I would apologise to the parties for the length of time it has taken to perfect the Judgment and Reasons and to send them out.

Findings of Fact

11. We set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues we were required to decide. We do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. We have, however, considered all the evidence provided and has borne it all in mind.

12. The Claimant commenced employment with the Respondent on 1 December 2016 and was employed as a Customer Services Advisor ("CSA") until the termination of her employment by reason of redundancy on 20 November 2019. She was employed to work at the Respondent's shop in Peckham, London.

13. The Respondent is a betting and gaming company. The Respondent's main business concerns are the provision of betting and gaming platforms over the counter, in retail shops, online and through Fixed Odds Betting Terminals.

14. We were not provided with a copy of the Claimant's contract of employment or a written statement of particulars of employment, any redundancy policy, grievance procedure or even a staff handbook.

15. The background to the matters giving rise to the redundancy situation is as follows. In light of stricter controls announced by the Government in approximately November 2018, including a reduction in the stakes of Fixed Odds Betting Terminals from £100 to £2, the Respondent carried out a review of the productivity of its retail estate. The Respondent anticipated that approximately one third of its retail outlets (circa 1000) would need to close over the next 18 to 24 months which could lead to around 5000 shop-based jobs being made redundant.

16. As part of this review, referred to as the Core People Programme, it was proposed that the role of CSA be removed from the Respondent's structure. The reason for this was that the role of CSA did not fulfil all of the tasks and duties related to the running of a shop. It was believed the role of CSA could be absorbed within the role of Customer Services Manager ("CSM") and that this would be more commercially viable. The Respondent therefore undertook a process of consultation with all of its CSAs as to redundancy but also to offer them the opportunity to step up into the role of CSM if they wished to do so.

17. Given the numbers of affected employees, it appears that the Respondent undertook collective consultation with employee representatives in accordance with the requirements of the Trade Union & Employment Rights (Consolidation) Act 1992. Consultation meetings were held with employee representatives, collective consultation commenced on 31 January 2019, individual consultation commenced in October 2019. So it seems clear that it was more than 90 days before the first of the redundancies took place.

18. The Claimant was aware that the collective consultation began in January 2019, as she put it, the proposal being "to get rid" of the CSA role.

19. We were referred to a collective consultation meeting which took place on 11 October 2019, the notes of which are at B37-40. The Claimant had not seen these notes until they were produced for these proceedings. From the notes, we can see that a national forum meeting was held two weeks before, at which the employee representatives were talked through the proposals regarding the future of the CSA role. At the October meeting the proposals for individual consultation with each CSA were discussed including the option to retrain as a CSM.

20. There then followed a question and answer session, during which one of the employee representatives asked about the position of CSAs on maternity leave. Mr Westlake, an Employee Relations Business Partner, explained that the Respondent would contact them, they would be offered the same choice to step up or not. If they chose to, they would be made a CSM for the remainder of their maternity leave and, on their return, they would be provided with training. If they were made redundant, they would receive any remaining maternity pay in a lump-sum and they would not lose out.

21. The Claimant said in evidence that she was generally aware of the proposal to remove the CSA role although she was unaware of a specific timeframe. She had undertaken 30 training modules to become a CSM and only had 2 further modules to complete in order to qualify for that role.

22. On 3 June 2019, the Claimant went on maternity leave. She was entitled to both ordinary and additional maternity leave. Her intended date of return was in February 2020. Her daughter was born on 21 July 2019. She already had a son who was almost two years old.

23. The Respondent had an intranet that could be accessed by its employees either at work or remotely. This included a "Huddle" space which allowed shared access to documents, including those relating to the consultation process and the Respondent's proposals regarding the CSA/CSM roles. The Respondent referred to this as "CORE" - Changing Our Retail Estate. The Claimant said in evidence that she did not access the intranet or the Huddle whilst she was on maternity leave.

24. On 16 October 2019, a member of the Respondent's staff created a blog post on the Huddle space. We were referred to the blog document at B41 which appears to say that it was created on 16 October 2019, but this date is somewhat difficult to read. The document explains that collective consultation on the CSA role was closed in early 2019 and that the decision to remove the CSA role was confirmed. There were, at that point in time, approximately 400 CSAs left in the business, and it was proposed that CSAs would be consulted individually about accepting the CSM role and for those CSAs who were unwilling to accept a CSM role they would face redundancy (unless other redeployment opportunities could be identified). The proposal was that this would be done over a 6 to 8 week period such that the programme would close by the end of 2019. The Claimant said in evidence that she had not seen this document until these proceedings.

25. We were referred to the CORE document at B43-44 and a document entitled CSA to CSM Stepping Up Handbook at B45-52. The CORE document contains an overview of the redundancy/stepping up process. In evidence it became apparent that there was no exact timeline across the country for implementation, but the overall aim was to undertake the process of consultation to determine who wished to step up to the role of CSM or take redundancy, and to undertake CSM training for those roles, all by the end of 2019. So the general scheme was: to begin individual consultation in October 2019; hold an at risk meeting; hold a first consultation meeting to set out the options; and then a second consultation meeting at which the employee would make the decision as to whether to accept redundancy, other redeployment, or a CSM role. The CSM Stepping Up Handbook sets out more details of the process of becoming a CSM.

26. We were referred to email correspondence between Michael Bevington, the Respondent's HR Regional Coordinator South West and Femi Adesanya, the Respondent's Area Manager and between Mr Bevington and Angela Ravie, the Respondent's Regional HR Business Partner – London between 26 and 29 October

2019 at B53.

27. This correspondence indicates the following. The Claimant had received an at risk call certainly by 26 October 2019 (although the Claimant did not recall this). Mr Bevington was attempting to arrange a date for the Claimant's first consultation meeting via Mr Adesanya. Mr Adesanya spoke to the Claimant on 29 October. His email to Mr Bevington explains that the Claimant could not find the time to come in for a meeting, she was exclusively breastfeeding and could not find anyone to look after her young baby. She told him that it had to wait until the end of her maternity leave. Mr Bevington then contacted Ms Ravie forwarding Mr Adesanya's email. Ms Ravie advises the following:

"We do need to consult with her during this time frame and not when she comes back.

We need to do whatever we can to accommodate her needs, that means a home visit or skype call at a push.

Can you go back to her ASAP and ask what suits best."

28. We were also referred to a number of text messages between Mr Adesanya and the Claimant during the period from 29 October to 5 November 2019 at B54-55, as to his attempts to arrange a meeting with her. It would appear from these texts that the meeting was provisionally set up for 1 pm on the Friday following 30 October, which would mean 1 November and then changed to Tuesday, which would mean 5 November 2019. However, the penultimate text makes reference to *"waiting for a return email from Angela"* (Ms Ravie).

29. The Claimant had sent an email to Ms Ravie on 30 October 2019. This is at B61, and states as follows:

"Subject: Decision about role change and my maternity

Dear Ms Ravie,

I am Mame Darko employee number 5461952 and I'm currently on maternity leave. I have recently had a call from my area manager Femi who said he wants to have a meeting with me concerning my position as a CSA.

I have had a long struggle with some of my managers in the past Kushil and David about getting me started with my CSM training. Not to get into much details, I managed to get my test done on the portal just before I went on my maternity June of 2019. I then had my manager leave without finishing his part and signing me off.

As I am currently on maternity leave looking after a baby of three months and my eldest being almost 2 years of age, I would please ask for some considering (sic) for me to rest and enjoy my baby. I am very busy and tired always and would not have the time to even be on the phone for a meeting.

I am not in the right frame of mind after giving birth to make decision which if I am not mistaken, will not be in effect until I returned from my maternity and until then, my priorities to is (sic) be fully dedicated to my family.

I respect that you have to fulfil your duties so if it is information that needs to be given to me in person, may I please request for this to be given to me in writing.

I hope to hear from you soon.

Yours sincerely

Mame Darko"

30. It would appear that the Claimant received no response to this email although Mr Westlake stated in evidence that it had been superseded by events. This would appear to be indicated by email correspondence between Mr Westlake and Ms

Ravie at B56. In these emails dated 1 November 2019, Ms Ravie refers to Mr Adesanya's attempts to arrange a telephone discussion with the Claimant, her further receipt of the Claimant's email and her proposal to Mr Westlake as to how to respond. The final email from Mr Westlake appears to suggest that he will deal with the matter.

31. On 1 November 2019, the Respondent sent the Claimant an at risk letter. This was drafted by Mr Westlake and is at B64-65. This letter advised the Claimant that her role was now formally at risk of redundancy, set out the reasons why and the terms of the redundancy. The letter notified the Claimant of a telephone consultation meeting with Mr Adesanya which would take place on Tuesday 4 November 2019 at 1 pm. Unfortunately the reference to 4 November was in error, the meeting having been arranged for 5 November 2019.

32. The Claimant said in evidence that she had told Mr Adesanya all about her "predicament". She refers to this and to her "condition" and what she was going through on a number of occasions in correspondence and in meetings. In answer to a question as to what exactly she meant by this, the Claimant responded, *"having a newborn, comes with a lot of new challenges, the sleepless nights, another child under two, stressed, not coping well".* When asked how the pregnancy had gone, she said it was not the best pregnancy and she had experienced pregnancy related sickness with her back, problems with her chair, leading to her having to take some weeks off work. When asked about her partner, who she had referred to in evidence, she explained that at the time of these events they were not living together but he was involved in looking after the children. She also stated that she was able to get some support and guidance on what to do from her partner and family and was advised not to worry unduly about the position at work, it will be sorted and to focus on her baby.

33. Mr Adesanya stated in oral evidence that the Claimant told her that she felt pressurised and stressed and spoke of the pressures of having a young baby and problems sleeping. He further stated that he passed this information onto Ms Ravie when he told her that the Claimant had not provided a date for their second consultation meeting. He expressed his difficulties in dealing with this latter point and that he felt it was outside his experience as a manager and he asked Ms Ravie to deal with the Claimant. Mr Adesanya was clear that the Claimant said nothing to him about any medical conditions or Post Natal Depression or anything like that.

34. Mr Adesanya was asked in cross examination by the Claimant if he understood why she felt pressurised into making a decision. He responded that he was still a bit confused by this, because at the time she had been told categorically that she could agree to step up into the CSM role, that this would literally have paused the process, no one would have contacted her any further, and if she got to the end of her maternity leave, even if after one day, and she had a trial period of two weeks, if she decided the role was not for her, she still had the power to take redundancy.

35. The Claimant said in evidence that a further consideration in her mind was that because of the laws as to the licensing of betting shops, she could not attend a meeting on the Respondent's premises with a child. In evidence, Mr Adesanya explained that whilst this is correct, some premises that he uses have an entrance via a back door without going through the shop. As we understood it, the Respondent also had offices where meeting could be held, including its head office on Stratford Broadway in London. However, this was not an issue that the Claimant raised with the Respondent at the time of the events in question.

36. In evidence Mr Adesanya said that all of the points that were set out on the Respondent's intranet would be covered at that first meeting.

37. The first consultation meeting did indeed take place between Mr Adesanya and the Claimant by telephone on 5 November 2019. We were referred to the notes at B66-72 which were taken by Ms Ravie. The notes are in the form of a template wording, with yes and no boxes indicating each section which was covered during the meeting. From the notes we can see that the following sections were covered: the introduction; the rationale for the removal of the CSA role; the colleague's (that is, the Claimant's) response; stepping up to a CSM role and in particular the provisions for those on maternity leave; the colleague's response to stepping up; the training and trial period; the colleague's response to the training and trial period; individual circumstances that the Respondent should be aware of; redeployment; the colleague's response to redeployment; the Employment Assistance Programme (EAP); any other questions; closing remarks and next steps; and then a section entitled "matters not to be covered with the colleague".

38. We note the following from this template document:

    a. The Claimant was advised that because she was currently on maternity leave, if she chose to accept the CSM role, her contract would reflect the move from the end of the consultation process and that she would physically start to carry out the role (and any training initially) upon her return;

    b. The Claimant was given projected amounts of redundancy pay and pay in lieu of notice on a proposed termination date of 15 November 2019. If she decided not to step up into a CSM role and the proposal went ahead, she would receive any remaining maternity pay as a lump-sum;

    c. The Claimant asked the position regarding any outstanding holiday pay and was told this would be paid to her;

    d. The Claimant stated that she needed time to think about stepping up into the CSM role or taking redundancy given the predicament that she was in at the moment;

    e. Mr Adesanya attempted to schedule a second consultation meeting. However the Claimant indicated that she would need to speak to her partner first because he would have to look after the children for her to attend a further meeting;

    f. The Claimant explained that before she went on maternity leave, she had started to train as a CSM and was frustrated because she had been trying to be signed off. She asked if she would have to do the training again. Mr Adesanya responded that this would be considered during her training then and if she had already been trained on modules, etc, the Respondent will have this on file and include it;

    g. The Claimant was advised that if the proposal does go ahead, she may wish to explore other internal vacancies by visiting the internal careers website on Huddle.

    h. Arrangements were made for the Claimant to speak to her partner and then contact Mr Adesanya the following day as to a date for the second consultation meeting;

    i. Under the heading Not To Be Covered With Colleague, the notes state:

    "The colleague was caring for children at the time so there was some background noise however Femi did go over points and check that Mame had heard everything and gave opportunity for

Mame to break to deal with kids."

39. The notes indicate that the Claimant was to be emailed a copy of the CSM Stepping Up Handbook after the meeting. Mr Adesanya confirmed in evidence that he did email this. The Claimant confirmed that she received this but did not read it.

40. The Claimant did not receive a copy of the notes of this meeting at the time and did not see them until they were provided as part of these proceedings.

41. In her written evidence, the Claimant indicates that it was a short meeting, her concern and attention was towards her daughter who cried on several occasions and her attempts to calm her, and that all she can recall is that she was given 24 hours within which to make a decision. She further said in evidence that alternative employment was not discussed.

42. Mr Adesanya said in oral evidence that the meeting was by telephone at the Claimant's request. He agreed that at times there was background noise and yes, they could hear the baby crying on occasions. Each time there was such an interruption, they stopped the meeting, gave the Claimant time to attend to the child and then continued. He believed that they got through everything that they intended during the meeting. He added that ideally, he would have preferred to conduct the meeting face to face or by video, but the Claimant did not want to do that. Mr Adesanya also stated that they would have spoken about alternative employment. He explained that Ms Ravie took the notes and that was why the Respondent uses scripts (that is, the template document), with tick boxes, and which are strictly adhered to.

43. On balance of probability we find that given Mr Adesanya's evidence and the written document that allowance was made for the Claimant attending to her child, that alternative employment was discussed and that the Claimant was required to provide a date for the second consultation meeting within 24 hours, not to reach a decision as to redundancy/stepping up as she puts it, although by implication at that meeting she would have had to indicate her preference.

44. Mr Adesanya also stated in oral evidence that the purpose of the second consultation meeting would have been to sit down with the employee to discuss the position as to stepping up, redeployment opportunities they had identified, and, if all else failed, to provide final figures of the redundancy package.

45. The Claimant texted Mr Adesanya at 8 pm that evening and again at 2.35 am the following day. These texts are reproduced in an email from Mr Westlake to Ms Ravie dated 6 November 2019 at B58 and the original of the second text can also be seen at B75-76.

46. The first of these texts says as follows:

"Hi Femi,

Just need some clarification.

You said that £1134 was the lump-sum that would be given for my redundancy alone (sic) with a 2 week payment of £567 making a total of £1701.

This however excludes the additional (sic) of my maternity pay and also any holiday pay I am entitled to.
Also would the money be payed together, can I get the total and when would I receive the money if I am to decide to me made redundant (sic)".

47. The second text states as follows:

Hi Femi,

Sorry to message you at such late hours but I feel so pressure (sic) by the company to make a decision about my role during my maternity so fast! It's making me stressed and honestly I have given birth three months ago so this additional pressure is not healthy for me at all.

I need to speak to HR so time could be given to me time to think this through properly because my mind is still recovering from given birth and I am feeling mentally drained (sic).

Even if you give me a week, I feel like I'm being rushed and pressured. This it's interfering with my maternity leave (sic). The company has a right to contact me on my leave to tell me about the redundancy but being made to make a decision so fast, I feel is unfair and my vulnerability is being capitalised on.

What if I make the wrong decision, I don't want to rush and make the wrong choice, I'm worried and this is not healthy for me or my baby."

48. In response to these texts, Mr Adesanya texted the Claimant on 7 November 2019 stating that he had spoken to the Respondent's HR department, and they had given her until 25 November 2019 to make a decision (ie at a meeting to take place on that date) and that Mr Westlake would provide her with details of the payments directly (at B76). The Claimant replied stating that her son's birthday would be on 15 November, that they were planning to go away the following week and she asked if the time could be extended to 2 December 2019 (at B77). In a further text (at B78), the Claimant asked Mr Adesanya what would happen if she took on the new role but did not pass her training and would there be specific trainers or just anyone who had been told to train. Mr Adesanya replied stating that he had passed all of her questions onto HR, who would write to her at the beginning of the following week.

49. As far as we can unravel this, the sequence of events is as follows: the Claimant enquires about the payments to be made to her; she asks for more time to make a decision; she asks further questions about training; Mr Adesanya passes her queries to HR to answer and comes back with a deadline of 25 November; the Claimant states that she is going on holiday the week following 15 November and suggests 2 December.

50. We could not find any response to that suggested date within the text messages contained within the bundle. Mr Adesanya's evidence was that HR did not agree to this date.

51. We note Mr Westlake's email to Ms Ravie dated 6 November 2019 in which he expresses concern about some of the language used by the Claimant in her texts to Mr Adesanya (at B57). The email continues:

"I think we could extend the deadline for a decision until the end of the month. This wouldn't impact the cost to the business - maternity would still be owing -I'm not privy to her calculations, but what I do know is that she started at the beginning of December so if we can get a decision before then, say commitment for meeting week commencing 25/11, then it will not increase the potential redundancy payment.

Before that, we can send a breakdown of what she could get from a money point of view.

Thoughts?"

52. Ms Ravie's response was that his proposed action sounded sensible, that she will arrange for the maternity and holiday calculations to be sent to the Claimant and let Mr Adesanya know that the meeting deadline would be extended.

53. We were referred to B90-93 which sets out a series of questions all dated 10

November 2019 raised by the employee representatives about the CSA role and the Respondent's answers. Mr Westlake said that this would have been published on the Respondent's intranet.

54. By a letter dated 11 November 2019, the Respondent wrote to the Claimant (at B95-96). This letter set out the discussion which took place at the consultation meeting, responded to the Claimant's queries about the training and confirmed that the next meeting would take place on 25 November 2019 between 10 am and 2 pm at a location to be arranged or by telephone.

55. In particular we note the following:

> *"1.* ***What happens if you do not pass your training?*** *Upon your return from maternity leave you will start a period of training for six weeks. These six weeks will also be a trial period for the role. So if you are not performing during your training or you feel that the role is not in fact suitable for you, you may still be made redundant on the terms set out above. With the exception of point 3 (this is a reference to payment of outstanding maternity pay)."*

56. In evidence, the Claimant accepted that the letter stated that she could opt for the CSM role, complete her maternity leave and then if she changed her mind, she would have the option of taking the redundancy route. However, she stated that this had to be looked at through the view of a person with "mental health" issues. Whilst the claimant said this in evidence, it is fair to say that if she had any mental health issues at this time, it was not something that she revealed to the Respondent. In a subsequent answer to the same point, the Claimant referred to being *"too stressed"* to see this as an option which, as the question put it, would have *"taken the lid off the pressure cooker"*.

57. As we have referred to above, the Claimant had already sent a text to Mr Adesanya on 7 November 2019 (at B77) stating that she had spoken to HR outlining her concerns, that her son's birthday is on 15 November, and they are planning to take him away the following week and asks if the meeting could be held on 2 December 2019.

58. On 18 November 2019, Mr Adesanya responded by text to the Claimant asking for an update as to whether the meeting can take place that week or the next week (at B79). The Claimant responded by text stating *"just give me until tomorrow as I am awaiting response from HR. I emailed them on Friday aften..."* The text appears to continue *"Dec 2nd? What is that?"*

59. The text is clearly incomplete, and we do not know whether the final line is from the same or another text or even what it means.

60. The text is followed by a voice message. In his written evidence, Mr Adesanya refers to two voice messages which the Claimant sent him on 18 November 2019. In the first one she said that she had told him she would be on holiday the week of 25 November and that she would not be back from abroad until 1 December 2019. She asked him to look back at her WhatsApp messages. Mr Adesanya said in evidence that he did and from this he understood that she was planning a holiday for the week commencing 18 November 2019 and not that she would be away until 1 December. We were not referred to any WhatsApp messages supporting what the Claimant said in her voice message. Mr Adesanya's witness statement also refers to a second voice message, which is reproduced in an email at the top of B97:

> *"I have actually never came across such a case where someone that is on maternity and there is too much interference, this is called interference and it's unfair (sic)".*

61. This sequence of events was very difficult to unravel. Do the best we could, we

could only discern the following from the evidence before us: the Claimant was offered 15 November as a date for the second consultation meeting; she states that this is her son's birthday and a special day (at her witness statement at paragraphs 8 and 9); the Respondent then rearranges the meeting for 25 November; at B77 the Claimant texts Mr Adesanya ambiguously referring to the date she is going to be on holiday (she refers to the week following 15 November) and asks for the meeting to be held on 2 December; in fact the Claimant was away from 17 November to 1 December 2019; in an email from Ms O'Brien, an Employee Relations Advisor to Mr Adesanya dated 15 November, she asks him to schedule the meeting before the end of November (at B97); on 18 November Mr Adesanya chases the Claimant as to a date for the meeting and receives texts and two voice messages as referred to at B75 and B97; at this stage Mr Adesanya hands the matter over to HR.

62. In essence, there was clearly some confusion as to setting a further date for the meeting, the evidence we were provided with was incomplete, but the Claimant wanted 2 December on return from holiday but without having made clear the dates she was planning to be away and the Respondent wanted to conclude the process by the end of November 2019. Ultimately, the Respondent set a deadline for the Claimant to reach a decision as to redundancy or stepping up to the CSM role by 30 November 2019, seemingly having given up on trying to hold a second consultation meeting at which to discuss this (the email from Mr Westlake to the Claimant sent at 3.11 pm on 20 November 2019 at B103).

63. The Claimant therefore had 10 days until 30 November 2019 to reach a decision as to whether to take the role of CSM or to accept redundancy.

64. In oral evidence, Mr Westlake explained that this date was influenced by the need to complete the national programme by a certain date. However, he stressed that the Claimant was in effect given an additional 10 days within which to reach a decision. He explained that whilst he had identified the issue of the increase in the Claimant's redundancy payment if she remained in employment for another complete year, this was purely a supplementary consideration and it was part of his role "to consider all the moving parts", as he put it, and one of them was time. But he added that the driving force was to complete the project in good time and providing the Claimant with an additional 10 days was entirely reasonable in the circumstances. In re-examination, Mr Westlake accepted that he was aware that had the Claimant chosen to step up to the CSM role and it did not work out, she would then have the opportunity to take redundancy at that stage and further this would inadvertently have increased her redundancy payment in any event.

65. In response to a question as to why the process could not simply be held in abeyance whilst the Claimant was on maternity leave, Mr Westlake replied that there were all sorts of contingencies around individual decisions: training; how many were opting to step up; would the Respondent have enough staff at the right grades and at the right shops; and would it have cover for colleagues on maternity leave. As a result he said it was vital to end the consultation as best they could.

66. The Claimant posed that question to Mr Westlake that as she intended to return from her maternity leave in February 2020, the Respondent would not have been affected. Mr Westlake reiterated that there were a number of considerations, and one was the appropriate level of cover in the shops and so it would be a question of did we need someone in that shop to cover your maternity leave or did we need someone in that shop to permanently replace you?

67. Mr Westlake added that the Respondent made it very clear to colleagues as to the trial period and to the Claimant in particular. So in effect, he stated there would have been a period of abeyance as such, as the Claimant could have stepped up, tried

out the role in the trial period and if it did not work out then she could have taken redundancy. He added that this did happen to other colleagues in that situation. Whilst it was not a given, Mr Westlake explained that in the situation with a person on maternity leave who thought it would be okay to step up, but it did not work out with their childcare, then redundancy would be back on the table. He further explained that the Respondent was lenient and would have given lots of latitude in those situations.

68. The next email we were referred to is from the Claimant to Mr Westlake timed at 5.33 pm on 20 November 2019. Mr Westlake said in evidence that this was the response to his email and we have no reason to doubt this.

69. The Claimant's email is at B98-102 and we content between the pages of the screenshots:

"After reflecting on this whole situation during my maternity leave and what has been going on, I am left wit no option but to accept redundancy. This decision comes from the disappointing and inconsiderate treatment and pressure I have received whereby I have felt that I was being pressure (sic) during my vulnerable state as I am a new mother and I clearly stated that I was not in the right frame of mind to make such rushed decisions.

I am very disappointed in Ladbrokes Coral for the treatment I have had during my maternity leave and although I understand it is law to inform anyone of (sic) maternity leave about redundancy, there was a breach in that by the constant pressure to make a decision when I had made clear my predicament. The company not only refused initially to extend my time, but I went through a long process before the extension was given.

I would believe that, if I could be treatment (sic) in such manner whilst in a vulnerable state, then there is no hope that the company values their employees or are willing to understand their situation.

I have had the worse (sic) maternity leave and sleepless nights because of this pressure which I made clear to my area manager, I am in disgust and I am shocked about this hence making decisions which is only being made because of how I have been made to feel.

For a company to not care about the wellbeing of a staff on maternity leave, I have no expression to that (sic). It is highly likely that there will be no care given to this email as I have come to the conclusion that Ladbrokes Coral only cares about deadlines and money and not about the wellbeing of their staff. I am truly bitter about this but I am left with no choice but to be made redundant as I have to put my children first. This pressure had effected (sic) them and it is not fair.

If I am unable to find work later on, I will blame the company because I made it clear that I am not in the right frame of mind right now but confession was that was dismissed (sic).

Thank you for finally getting back to me since chasing up on this case. Although some of the queries were dismissed, I will just take the as it is (sic). I don't want to stress out anymore. Please let me know when I should be expecting my payment."

70. By letter dated 21 November 2019, the Respondent wrote to the Claimant giving her notice of termination of her employment (at B104-106). Whilst the letter states that the Claimant's employment ended on 15 November, the Respondent accepted in evidence that in fact it ended on 20 November 2019. The letter confirms that the Claimant has been made redundant following her refusal of the role of CSM and inability to secure any other alternative role within the business. The letter continues by setting out general details of payments that the Claimant will receive and where to find the specific details of these and giving her details of the Respondent's Opening New Doors outplacement support package and the Employee Assistance Programme ("EAP"). The letter ends by advising the Claimant of her right of appeal.

71. In oral evidence, Mr Hughes, who later dealt with the Claimant's grievance appeal, told us that EAP is available generally to all employees. It provides free confidential 24 hour support from trained counsellors to employees to discuss anything and everything, including health and finance matters. The Claimant confirmed that she

did not contact EAP.

72. Mr Westlake said in evidence that this letter was sent in response to the Claimant's email of 20 November 2019.

73. In answer to a question, Mr Westlake did not accept that the email from the Claimant was "a cry for help". He explained that he saw the email as stating that the Claimant had reflected on the decision, she asked when she was going to get her redundancy payments, and that yes there was a lot about lack of support, but it was sent 2 hours into the 10 days she had been given in which to respond, and he felt it was appropriate to get the redundancy processed, to provide her with the information she required and get an extension to the EAP.

74. The Claimant did not receive the Respondent's letter of 21 November 2019. Her position is that she was shocked that the Respondent had not replied to her explicit email of 20 November and had to contact HR on 26 November requesting details of her redundancy. The Claimant's evidence was that this arrived on 28 November 2019 by which time the deadline in which to appeal had passed. However, we were referred to an email dated 26 November 2019 at B107 in which the Claimant was sent a copy of the letter of notice of termination.

75. The Claimant's evidence is that she then decided to make a formal complaint about the handling of her situation. We were referred to her written complaint about the handling of her redundancy during her maternity leave dated 26 November 2019 (at B119-120 and attached screenshots of WhatsApp messages between the Claimant, Mr Adesanya, Ms Ravie and Mr Westlake at B113b-t).

76. These dates would seem to suggest that the Claimant received the letter of termination on 26 November 2019.

77. The complaint was dealt with by Mr Dan Sheppard, the Regional Operations Director, as a grievance. Mr Sheppard was employed by the Respondent from February 2019 onwards. He has received HR training from the Respondent and in previous employments and has conducted grievance hearings for 10-12 years.

78. The grievance meeting was originally scheduled for 9 am on 18 December 2019 at the Respondent's premises in Stratford Broadway. The Claimant attended this meeting, but it did not take place. Whilst the Claimant said in evidence that this was held in a Coral shop not taking into account that she had a young baby and was breastfeeding, she did not raise this with the Respondent at the time. As she states in her written evidence *"I kept quiet and did not complain, I just had to arrange support with the children since I was sick and tired of this ongoing issue"*. The Claimant's position is that the meeting did not take place due to Mr Sheppard having issues with transportation. However, Mr Sheppard did not accept that this was the reason.

79. The grievance meeting was rescheduled and took place on 20 December 2019 at the Respondent's premises in Stratford Broadway. In evidence, the Claimant stated that she had to sacrifice nurturing a newborn breast fed baby to attend. She also stated that by this time she had been diagnosed with Post Natal Depression ("PND") although as we come to later on, this is not supported by the medical evidence she has provided with the bundle.

80. The notes of the grievance meeting are at B121-124 and are signed by the Claimant and Mr Sheppard at the foot of each page.

81. Mr Sheppard identified the Claimant's complaint as centred around two points.

Firstly, that she was not given sufficient time to consider whether to step up into the role of CSM. Secondly, that she had been made redundant without her permission.

82. He further identified from the supporting texts and emails that Mr Adesanya had given the Claimant some time to consider her position and that whilst she had requested to be given until 2 December to reach a decision, she was given until 30 November in which to do so. He also noted that ultimately, the Claimant confirmed her decision on 20 November 2019.

83. Mr Sheppard could not find any evidence that the Claimant was being placed under pressure to make a decision. What he could see was that Mr Adesanya was attempting to arrange a second meeting with the Claimant and she did not want this to take place until a particular date. The Respondent had to progress the process and requested a decision by the end of November and in response to this the Claimant had said she would have to take redundancy.

84. At the grievance meeting, Mr Sheppard explored with the Claimant why she felt she needed longer than the time provided to her. She explained that she did not want to think about the redundancy process whilst she was on holiday although she then indicated that in fact she did not go on holiday. Mr Sheppard pointed out to the Claimant that she had taken issue with not being given two extra days from 30 November to 2 December 2019 in which to make a decision and had not gone on holiday in any event so it may not have been an issue. The Claimant responded that she was just stressed. Mr Sheppard noted from the Claimant's file that she had prior to going on maternity leave completed all but two of the CSM training modules out of 32. He asked her why she would not want to accept the CSM role whilst she was on maternity leave but instead take redundancy. The Claimant responded that she did not know if she wanted the CSM role at that stage. The Claimant repeatedly stated that she only needed two more days to make up her mind, but this was refused. Mr Sheppard noted that this would have given the Claimant an additional year's service. However, in oral evidence he did state that this was not something he said to the Claimant in the meeting and was a bit of an assumption on his part and was not a driving factor in his decision. In evidence the Claimant denied that this was the reason why she wanted the time limit extended to 2 December 2019.

85. Mr Sheppard's written and oral evidence was that the Claimant did not give any indication at the meeting that being given a longer period of time would have resulted in her reaching a different decision and at no time did she state she had made a wrong decision or ask the Respondent to reconsider her redundancy and reopen the CSM role. In oral evidence, Mr Sheppard stated that the Claimant was quite clear and passionate about not wanting to work for the Respondent.

86. Mr Sheppard also said in oral evidence that at the hearing, the Claimant did not provide him with a copy of a prescription for anti-depressants as she claims. She provided generic information about discrimination from the internet. However, he accepted that she told him that she was on anti-depressants at the time, and it would not have made any difference had he seen a prescription because he accepted what she said in any event.

87. Mr Sheppard felt that the process had been fair and reasonable, and that the Claimant had been given sufficient time to consider her position. He made enquiries as to how long other members of staff on maternity leave had taken to make a decision during the same process. There were 8 staff on maternity leave and the average time taken between being offered the chance to step up to the CSM role and redundancy was 11 days, the shortest being 5 days. The Claimant was given an additional 19 days which took it outside the timeframe envisaged by the

Respondent.

88. Mr Sheppard stated in evidence that the role of CSA was being removed and redundancies were already being effected. The Respondent had to draw a line for a decision to be reached at some point. Mr Sheppard did not believe that the Claimant had insufficient time in which to do this. She had enough information on what would have happened if she had decided not to have taken the CSM role after a period following her return from maternity leave. She would have received her redundancy pay and would have been paid at a higher rate of pay during that time. As she had completed most of the CSM training already, Mr Sheppard did not believe that she was faced with such a difficult decision requiring further time to consider.

89. In oral evidence, Mr Sheppard explained why he looked at comparative information about other staff. He explained that the Claimant was complaining of pregnancy discrimination, so he was looking at whether the Respondent had treated her fair and reasonably and had not short-changed her in the process. So he looked at all colleagues and pregnant colleagues. When asked about the pressure the Claimant was under, Mr Sheppard replied that he did not believe that the Claimant was placed under any more pressure than anyone else going through the process.

90. By letter dated 16 January 2020, Mr Sheppard wrote to the Claimant advising her of the outcome of her grievance. This is at B127-130 and very much confirms what we have set out above from Mr Sheppard's evidence.

91. In addition, his letter deals with a "freedom of information" request that the Claimant subsequently made of the Respondent on 16 December 2019. Mr Sheppard responded that there was a 50/50 split between those stepping up to CSM and those taking redundancy and that as part of the CORE programme, the collective consultation commenced on 31 January 2019.

92. The letter concluded that there was no evidence to support the Claimant's grievance and offered the right of appeal within 7 calendar days of the date of the letter.

93. In answer to questions, Mr Sheppard explained that it was not possible to simply allow the Claimant to make a decision at a later date or nearer to the time she intended to return from maternity leave. He said he might not be the best person to ask, but that every individual decision affects others and this was a national issue, would have led to national inconsistencies and thrown out the whole process.

94. The Claimant appealed against the outcome of the grievance in an email dated 17 January 2020, at B139-140.

95. The appeal was conducted by Mr Colin Hughes, the Respondent's Regional Operations Manager. Mr Hughes has been employed by the Respondent since October 2017.

96. An appeal hearing took place at 11 am on 28 January 2020 at the Respondent's premises in Stratford Broadway. In advance of the meeting, the Claimant sent Mr Hughes an email including screen shots of documents she wanted to be considered in evidence (at B155-173). Handwritten notes of the meeting are at B174-177. These are signed by the Claimant and Mr Hughes at the foot of each page.

97. At the meeting, Mr Hughes listened to the Claimant's concerns and reviewed the documentation.

98. The Claimant expressed her disappointment on the whole outcome of her dismissal

and that she felt that her wellbeing was not really considered or recognised by the Respondent.

99. The Claimant raised her concerns that she had been pressurised into making a decision on whether to accept redundancy or the CSM role. Mr Hughes noted that the Claimant had been given 19 days to consider whereas most colleagues had been given a few days. He felt that the Claimant had been afforded flexibility and sufficient time to consider her position and to reach an informed decision. In addition, he felt that it had been made clear to the Claimant that she would be given all necessary training for the role should she accept it and that a period of grace would be given, particularly as she would be returning from maternity leave.

100. The Claimant's mental health was discussed at the meeting. Mr Hughes had copies of messages from Mr Adesanya in which the Claimant said she had not been given any support but thanked him for his support, at B165-172 at 171. When Mr Hughes asked the Claimant about this message, she said she could not recall it. In oral evidence, Mr Hughes further explained that at the meeting they discussed the assistance that the Claimant had received from Mr Adesanya about the problems with her work chair and he checked with Mr Adesanya as to the actions he had taken and was provided copies of messages passing between Mr Adesanya and the Claimant at that time. He formed the few that the Claimant had been supported by Mr Adesanya.

101. We note that during the meeting the Claimant explained that she did not go on her planned holiday because she was depressed and that was when she wrote the letter saying she wanted to be made redundant. As she says "*I gave up. The statement saying it would be processed if I didn't respond, made me given up (sic). I thought that statement was unfair (at B176)"*.

102. The Claimant also expressed her disappointment that she was required to travel to the grievance meeting and that it had been arranged for early morning when she had a relatively young baby to look after. Mr Hughes said in his witness statement that the Respondent had paid for the Claimant's taxi to ensure that she did not have to travel by public transport and that he recalled that she was about 40 minutes late for the meeting and he spent a good deal of time at the outset making sure she was comfortable and happy to continue, which she was. In oral evidence, put as a question to Mr Hughes, the Claimant said that she had to ask for reimbursement of her taxi fares for this and the two previous meetings she attended. Mr Hughes responded that he had not been aware that the Claimant had not been reimbursed until she raised the matter at the appeal meeting.

103. At the meeting, Mr Hughes asked the Claimant what she wanted by way of a solution to the grievance appeal. The Claimant asked if the Respondent could pay her salary until her child was a certain age and she made it clear that she did not want to take on the role that was originally offered. Mr Hughes stated that this was not something the Respondent could have agreed to.

104. Having considered all of the facts, Mr Hughes concluded that the Claimant had been afforded every opportunity to consider her position and was not placed at a disadvantage due to her maternity leave or otherwise. She had been given more time than anyone else and was fully aware that if she accepted the role as CSM, she would have remained on maternity leave as planned, would have had all the necessary training and a period of grace before she started the new role on her return.

105. Mr Hughes said in evidence that if the Claimant believed that she had acted hastily in taking redundancy or that she wanted to reverse her decision, she did not give

that impression to him at the meeting.

106. In answer to questions, Mr Hughes said that he did not believe that by allowing the Claimant an additional two days in which to reach a decision it would have made any difference. As he understood it, the Claimant had originally asked for an extension of time because she was going on holiday for two weeks and did not want to deal with the matter whilst on holiday. However, she did not go on holiday and so this would have given her the time to think about her decision. Mr Hughes also reiterated that at the appeal meeting the extension that the Claimant was looking for was until her child reached a certain age.

107. We would add, for the sake of completeness, that the Claimant said in oral evidence, in a question to Mr Hughes, that she did not go on holiday because she was depressed and when I rephrased this as a question, Mr Hughes accepted this could be the case.

108. By letter dated 14 February 2020, Mr Hughes wrote to the Claimant advising her of the outcome of her appeal, at B181-184a. The reasons for his decision are very much captured in our above findings.

109. At a number of points in her claim form and in evidence, the Claimant referred to suffering from Post Natal Depression ("PND"). However, it became apparent that the Claimant was not diagnosed with PND during her employment with the Respondent, although of course she was prescribed anti-depressants by the time of the grievance meeting with Mr Sheppard. We were referred to a letter from the South London and Maudsley NHS Foundation Trust to the Claimant dated 13 May 2020 as to a referral for a telephone triage assessment on 23 January 2020 at which she was assessed to be experiencing depression and anxiety, at B192. We were also referred to the Claimant's GP summary notes at B193-195, in which the first mention of PND in the GP notes is dated 8 January 2020 at B193. However, there is no mention of PND during October and December 2019.

110. In answer to oral questions, the Claimant accepted that there was a time at which she certainly considered taking the role of CSM given that she had almost completed the necessary training. She further accepted that at some point she decided not to but could not pinpoint the exact time. She explained that she was hurt and upset that she was raising issues about the process and was told to make a decision or would be made redundant. She further explained that this was why she sent her email of 20 November 2020, out of hurt. She added that she would not accept any other alternative because her major concern was being treated in the manner that she was. As she put it "*how could I work for that company in that light*".

111. We heard closing submissions from the Claimant and from Ms Egan. We do not propose to set the submissions out in our judgment, but we have considered them and taken them fully into account.

Relevant Law

112. Section 18 Equality Act 2010:

> *"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.*
> *(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—*
> *(a) because of the pregnancy, or*
> *(b) because of illness suffered by her as a result of it.*
> *(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.*

(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
(5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy…"

113. Section 98 Employment Rights Act 1996:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment…

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

Conclusions

Unfair dismissal

114. In a complaint of unfair dismissal, the Tribunal has essentially to consider three things. Was the Claimant dismissed within the meaning set out within section 94 of the Employment Rights Act 1996 ("ERA")? There seems no doubt that the Claimant was dismissed by the Respondent as evidenced by the notice of termination letter following her acceptance of redundancy. Has the Respondent shown a potentially fair reason for dismissal and, if so, whether in terms of how the Respondent has gone about dismissing the Claimant (the process) and why the Claimant was dismissed (the substantial reason), does the Respondent satisfy the test of reasonableness? Both elements are contained within section 98 ERA and we will come to later on.

115. Redundancy is one of the potentially fair reasons for dismissal within section 98(2) ERA. The Respondent avers that the Claimant was dismissed by reason of redundancy. In such a case the Tribunal must specifically consider the meaning of

redundancy contained within section 139 ERA. In broad terms, there are three main redundancy situations: closure of the business as a whole; closure of the particular workplace where the employee was employed; and a reduction in the size of the workforce. The case before us potentially falls within the latter of these under section 139(1)(b) ERA.

116. A dismissal is by reason of redundancy if it is *"wholly or mainly attributable"* to a number of factors. This includes, at section 139(1)(b), where the fact that the requirements of that business for employees to carry out work of a particular kind or 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. The latter of these situations is the one that the Respondent asserts occurred in the case before us. We will come to our conclusions later on.

117. If the Respondent shows a potentially fair reason for the Claimant's dismissal, the Tribunal must then turn to consider the reasonableness of the decision under section 98(4) ERA as it applies to the Claimant's dismissal for the reason shown, that being redundancy.

118. In particular we are directed to consider those matters which might render a dismissal for redundancy unfair as identified by the Employment Appeal Tribunal in ***Williams v Compair Maxam Ltd*** [1982] IRLR 83, EAT, as approved by ***Robinson v Carrickfergus Borough Council*** [1983] IRLR 122, NICA. These can be summarised as follows:

    a. That there was no genuine redundancy situation;
    b. That the employer failed to consult;
    c. The employee was unfairly selected; or
    d. That the employer failed to offer alternative employment.

119. These are not principles of law but rather standards of behaviour which may alter over time in accordance with the prevailing understanding of what constitutes good industrial relations practice (one obvious point being that they now often have to be applied to establishments with no trade union recognition).

120. Before turning to the law and principles, we are required to make a number of findings in respect to the Claimant's case as set out at paragraph 6 of the list of issues. We deal with these each below:

    a. We accept paragraph 6.1;

    b. As to paragraph 6.2. Whilst the Claimant was clearly diagnosed with depression in at least December 2019 and PND in January 2020, the health issues that she referred to in discussions with the Respondent, were not health issues as such. The Claimant raised issues as to her having sleepless nights as a result of being the mother of a newly born child and breast feeding which she said prevented her from participating fully in the redundancy process and making decisions about her role within the company;

    c. We accept paragraph 6.3;

    d. We accept paragraph 6.4, although the meeting actually took place on 5 November 2019;

    e. We accept paragraph 6.5;

    f. As to paragraph 6.6, we find that the Claimant was given sufficient time to

make a decision as is clear from our above findings. She was provided with plenty of notice as to the decision to delete the CSA role and the option to step up into the CSM role or to take redundancy. She was not ambushed by the decision, so to speak. She was acquainted with the role of CSM, she had undertaken much of the necessary training already, she did not need much time to acquaint herself with the factual matrix, she was simply faced with a binary decision, either to step up into the role or accept redundancy. This was, with respect, not a difficult decision to make, even with a newborn child, and she had at least a month within which to reach her decision. As we could onto to, we believe that the Respondent acted reasonably in its actions and response;

g. As to paragraph 6.7. We do not find that the Claimant's email dated 20 November 2019 expressed her uncertainty as to what to do with her job. It is quite unequivocal. Whilst one of the panel viewed it as almost a "cry for help", the Respondent did not interpret it this way and was working to time constraints. We do not believe that this interpretation was unreasonable in the circumstances. Nevertheless, we would make an observation that ideally the Respondent should have replied to the Claimant addressing the issues and concerns that she raised and perhaps even asking that she think again, given there was still some leeway within their timeframe. However, the Respondent's lack of response in this manner does not render its actions and response unreasonable;

h. As to paragraph 6.8. We accept this, but there is a reasonable explanation for this. The sent letter was simply not received. There is no suggestion or evidence of anything untoward in this. The Respondent immediately sent the Claimant a copy when chased for a response;

i. As to paragraph 6.9. The Claimant had told Mr Adesanya that she had a newborn baby, she was breastfeeding, having sleepless nights, felt pressurised and not in the right frame of mind to make a decision. It was only during the grievance process that the Claimant stated that she was taking anti-depressants. The Claimant did not tell the Respondent during the events in question that she was suffering from depression or from PND. Whilst in the email at B57, Mr Westlake refers to concerns about the language being used by the Claimant in her communications, this was not explored in evidence and in any event, he recommended extending the timeframe. We went through the notes of the grievance hearing as best we could (as they were handwritten, and the copy provided was not clear) and the only reference to health issues we could find was at B124. This only mentions being on anti-depressants and clearly at this stage the Claimant expressed the view that she did not want to come back to work but wanted compensation. Whilst the Claimant stated in an email to Mr Neves, an Employee Relations Business Partner, at B129, in the context of chasing the Respondent for a date for her grievance appeal hearing, that it is affecting her "mentally", this is after her employment has ended, being sent on 10 December 2019. So in conclusion, we do not accept paragraph 6.9 and find that the Claimant was provided with reasonable support over the issues she raised at that time, and we do not accept these were health issues in any event. Further, the Claimant had access to EAP and could have made use of it, having been told that they were trained counsellors.

j. As to paragraph 6.10. We were not sure how relevant this was to a complaint of unfair dismissal, given that these events occurred after the Claimant's employment had ended and she did not appeal against her dismissal. The Claimant's position was that she received the notice of termination letter late

and the appeal time limit had by then passed. However, she did raise a grievance and of course we recognised that the grievance process could be taken to be analogous to exercising the right of appeal against dismissal. Nevertheless, we do not accept paragraph 6.10. The Respondent properly considered the issues and whilst the Claimant had produced some further evidence as to her health, this was not available at the point at which the decision to dismiss was made and was somewhat lacking in any event. Indeed, the Claimant did not want her job back and was seeking either financial settlement or another job at a future date which the Respondent did not agree to. So we could not see within the test of reasonableness or indeed otherwise in what sense the Respondent improperly considered the issues that the Claimant raised or how the Respondent could have provided the usual resolution that an appeal would be expected to provide to dismissal. We would add that we mean no criticism of the Claimant for her stance here.

69. Going back to consider the reason for dismissal which is raised under paragraph 5 of the list of issues. Has the Respondent shown a potentially fair reason within section 98(1) and (2) ERA 1996? The Respondent alleges that it was a redundancy.

70. We considered whether the dismissal fell within the statutory definition of redundancy under section 139 ERA. We find that it does, it falls within section 139(1)(b)(i). The work of the particular kind was the work carried out by CSAs which was to cease. The Respondent was removing this role from its structure for financial and operational reasons. We therefore find that the Respondent has shown that the potentially fair reason for dismissal is redundancy.

71. We then turned to consider the sufficiency of the reason for dismissal within the test of reasonableness contained within section 98(4) ERA 1996, which is in effect what paragraph 6 of the list of issues asks us to do.

72. We have no reason to suppose that this was anything other than a genuine redundancy and that the Respondent had sound business reasons for it. Indeed, the Claimant did not challenge the redundancy in this way.

73. We have no reason to suppose that the Claimant was unfairly selected for redundancy given that all of the CSA roles were being made redundant with the offer of stepping up into the role of CSM and the Claimant did not challenge the redundancy in this way. We would add that the Claimant elected to take redundancy.

74. There was collective consultation with the affected employees from 31 January 2019 onwards and then individual consultation with those employees from October 2019 onwards and with the Claimant specifically from November 2019 onwards.

75. The Claimant was provided with information which she could have accessed through the Respondent's intranet, she had an at risk call and a first consultation meeting. The Respondent made reasonable attempts to hold a second consultation meeting but was not able to do so and so moved to presenting the Claimant with a deadline of 30 November 2019 in which to reach a decision as to whether she wished to accept an offer to step up into the role of CSM or to accept redundancy from her role as CSA.

76. There was no formal redundancy procedure as such or certainly none that we were pointed to. There was the CORE document at B43-44 and the CSA to CSM Stepping Up Handbook at B45-52 which set out the process. We find that the redundancy process followed was reasonable. The proposals were clearly set out.

77. The issue arose in January 2019 and the CORE document and Handbook set out the overall process. There was consultation with employee representatives prior to and during individual consultation and answers to questions were provided and placed on the Respondent's Intranet. Although the timeline generally was vague, it was more bespoke to each individual, and the overall timeline was to complete the process of closing off the stepping up to CSM role or redundancy from the CSA roles or redeployment by December 2019. The Respondent clearly explained the business reasons and why there had to be a deadline of the end of November 2019. It had to know who was staying and who was going, and it needed to arrange training for those staying and to maintain adequate staffing levels in each shop.

78. The Claimant was reasonably accommodated in terms of how the consultation was held. She expressed concerns about attending shop premises because of her newborn baby and the Respondent offered other options of telephone and video meetings. The initial meeting was held by telephone. Attempts were made to arrange a convenient date for the second meeting, the exact time and manner of meeting to be agreed. The Claimant was given an extension of time until 30 November 2019, initially to provide a date for the second and final consultation meeting, and then in the absence of agreement, by which to notify her decision as to stepping up or redundancy. Whilst the Claimant stated that it was her son's birthday and they were going away the following week, it was not clear at that point when exactly she would be away and why she wanted the deadline extended to 2 December 2019. The Respondent acted reasonably in moving away from holding a second meeting to requiring a decision by 30 November 2019 given the absence of communication from the Claimant and its impending deadline and the reasons for it. The Claimant was provided with a 10 day extension and two hours into it she sent an email in which she accepted redundancy. Whilst this sets out her concerns and the pressure she felt under, the email is unequivocal in terms of the acceptance of redundancy and seeking information as to final payments. The Claimant had sought a further 2 days in which to reach her decisions, but it is hard to see how those two days would have made any difference, a matter borne out by her position as to resolution she sought as raised at the subsequent grievance and grievance appeal hearings. In any event, it became apparent at the grievance hearing that she did not in fact go away for her son's birthday. Whilst she stated that this was because of her mental state, this was not something that she told the Respondent at that time. We find that the Respondent acted reasonably in extending the time in which to make a decision to 30 November and not extending it to 2 December 2019.

79. We also considered what is called the band of reasonable responses test. The real question for the Tribunal is not whether we would have chosen to dismiss the Claimant in these circumstances, but whether the decision to dismiss fell within "the band of reasonable responses" open to a reasonable employer. A Tribunal must not substitute its own opinion for that of the employer. Perhaps a Tribunal might conclude that dismissal was harsh, but the real the issue is nevertheless whether it fell within the band of reasonable responses. Within such a band, one employer might reasonably retain the employee whereas another employer might reasonably dismiss him/her. If so, then it is not an unfair dismissal, even if the Tribunal would not itself have chosen to dismiss. Having considered the circumstances of the case before us, we find that dismissal did fall within the band of reasonable responses given particularly the Claimant's acceptance of redundancy and the need for the Respondent to conclude the process within its time constraints.

80. We took the view that the grievance process including the grievance appeal was analogous to an appeal against dismissal and we formed the view that the decisions taken at both stages were reasonable as was the procedure followed. The Claimant was not able to reasonably satisfy the Respondent why she needed a further two days within which to make a decision and that she had been pressurised in the way

that she claimed. In any event, the Claimant was seeking a resolution which either did not involve returning to work and compensation or payment of her wages to a future date when her child was of a certain age and re-employment.

81. In conclusion, we find that the Claimant was not unfairly dismissed. Her complaint is unfounded and is dismissed.

82. We would add that almost all of the Respondent's witnesses attested to the fact that the Claimant could have stepped up into the CSM role, finished her maternity leave, and then if she did not want to continue in employment as a CSM to have the option of redundancy. The Claimant acknowledged this, but pointed to her mental health issues, in effect clouding her judgment. We were particularly concerned by this because it presented a way out of the pressure she felt under, although we do accept that at the time the Claimant might not have seen it in this way. In effect by accepting the CSM job she could have put the decision to accept redundancy on hold until her return to work if she then decided the job was not suitable or manageable. Sadly, she did not take advantage of this.

Pregnancy and maternity discrimination

83. Under section 18 of the Equality Act 2010 ("EQA"), it is unlawful to treat a woman unfavourably because of her pregnancy/maternity or because of an illness suffered by her as a result of her pregnancy. This applies where the unfavourable treatment, or the decision to carry out the unfavourable treatment, is made during the woman's "protected period". The protected period begins with her pregnancy and ends at the end of her statutory maternity leave period. Where a woman has the right to ordinary maternity leave and additional maternity leave ("AML"), this means at the end of the AML period or when she returns to work if sooner. It is well-established in the case-law that no comparison is required either with how a man would be treated in an equivalent situation or with how a non-pregnant woman would be treated. It need only be shown that the discrimination is because of the woman's pregnancy/maternity.

84. The Claimant's case is narrowly pleaded under section 18(4) EQA which states that a person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave. This is what was identified by EJ Harrington at the preliminary hearing. More specifically at paragraph 9 of the list of issues, where we are asked to determine whether the Claimant was discriminated against because she was exercising her right to maternity leave. This is the basis on which the Respondent has prepared for this hearing. Whilst we appreciate that the Claimant was/is unrepresented, it is clear that EJ Harrington took much care and trouble to identify her case at the preliminary hearing.

85. Under section 136 EQA, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

86. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a

reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

87. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

88. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

89. We firstly considered the matters set out at paragraph 7 of the list of issues.

    a. We have already dealt with those matters referred to in paragraph 7.1 above and revisit them in this context below;

    b. Paragraph 7.2 is correct in that the Claimant could not take a newborn baby onto licensed premises. However, this was not a reason that the Claimant put forward at the time of the events in question. The reason put forward was that she had a newborn baby (was breastfeeding and having sleepless nights). But the Respondent offered alternatives: home visit; telephone call; video call; and later the grievance meetings were held on what we understand (although it was not clear) to be office premises for which the Respondent did pay her taxi fares albeit in arrears and only after she had to raise it at the third meeting. The Claimant did raise issues to do with sleepless nights and breast feeding but this comes more into paragraph 7.3;

    c. We accept paragraph 7.3 is correct;

    d. We find that paragraph 7.4 is incorrect. The Respondent offered the Claimant telephone call, video call, home visit, extended time limits and changed the times of the telephone consultation in November 2019 (at B55);

    e. We find that paragraph 7.5 is partially correct. The meeting was set for 9 am on 18 December 2019 and then rescheduled and took place on 20 December 2019 and whilst we can appreciate that this caused the Claimant difficulties, she did not raise these with the Respondent at the time and nevertheless attended. Whilst it was not absolutely clear to us whether Stratford Broadway was shop or office premises, the Claimant did not raise the issue of not being able to bring a child onto licensed premises with the Respondent at the time of the events in question.

90. Paragraph 8 of the list of issues is dealt with above.

91. Turning then to paragraph 9 of the list of issues. We found that this paragraph was very narrowly worded, and we were only able to deal with it as it had been set out and agreed.

92. When considering unfavourable treatment, we had regard the definition with Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285, HL, in which the then House of Lords found that in order for a disadvantage to qualify as

a "detriment", it must arise in the employment field in that the court or tribunal 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, contrary to the view expressed by the EAT in Lord Chancellor v Coker, on which the Court of Appeal relied in the present case, it is not necessary to demonstrate some physical or economic consequence.

93. We also drew benefit from the test observed in discussion by Lord Canwath, in the Supreme Court in Williams v Trustees of Swansea University Pension and Assurance Scheme & Anor [2019] IRLR 306, SC (with the headnote) and from paragraph 5.7 of the Equality & Human Rights Commission's (EHRC) Employment Code (considering unfavourable treatment in the context of disability discrimination).

94. Dealing then with paragraph 9.

95. We do not find that those matters set out in paragraph 7.1 of the list of issues, as we have found them to be, amount to unfavourable treatment. Dealing with each element of paragraph 6:

    a. Paragraph 6.1. The need to consult with the Claimant cannot amount to unfavourable treatment because she was exercising her right to maternity leave;

    b. Paragraph 6.2. The Claimant's inability to fully participate in a process and make decisions about her role with the company was to do with having a newborn baby and breastfeeding and having sleepless nights and whilst it did amount to unfavourable treatment it was not because she was exercising her right to maternity leave;

    c. Paragraph 6.3. The Claimant asked for a longer period of time to make her decision as to taking an alternative role or redundancy and the failure to allow her to have until 2 December 2019 was unfavourable treatment but she wanted more time for a number of reasons, because she had a new born baby, was breastfeeding, was having sleepless nights, it was her son's birth and she was going on holiday, not because she was exercising her right to maternity leave;

    d. Paragraph 6.4. The meeting took place on 5 November 2019 and whilst the Claimant was given 24 hours to give a date for the second consultation meeting, this was not because she was exercising her right to maternity leave but because the Respondent needed to move the matter forward. In any event, the Claimant was allowed further time;

    e. Paragraph 6.5. The Claimant's son's birthday was on 15 November and her consequent inability to attend the meeting on that day was not because she was exercising her right to maternity leave. This was not unfavourable treatment. In any event, the meeting did not take place that day;

    f. Paragraph 6.6. We have found that the Claimant was given sufficient time to make her decision. Whilst the Respondent gave the Claimant a deadline of 30 November 2019, this was not because she was exercising her right to maternity leave;

    g. Paragraph 6.7. The Respondent's position is that it did not ignore the content of the email of 20 November 2019 but processed her request to take redundancy. We have found within the context of unfair dismissal that this

response was reasonable. We have expressed a view as to what we thought the Respondent should have done, although this is just an observation. However, there is nothing to suggest that the Respondent outrightly ignored the content of the email and to the extent it did if at all there is nothing to indicate that this was because the Claimant was exercising her right to maternity leave;

h. Paragraph 6.8. As we have found, the Respondent did respond to the Claimant's email, but the Claimant did not receive the letter of notification of termination. Once the Respondent was alerted to the lack of receipt, a copy was immediately emailed to her. In any event, there is nothing to indicate that this was because the Claimant was exercising her right to maternity leave;

i. Paragraph 6.9. As we have found, the Respondent did provide the Claimant with support over the issues that she raised. In any event, in as far as the issues were identified, these are not matters that it could be said, even if the Respondent did not provide any support, that any alleged lack of support was because the Claimant was exercising her right to maternity leave;

j. Paragraph 6.10. We have made findings as to the issues that the Claimant raised, and we have concluded that the Respondent did not improperly consider those issues. In any event the issues identified, even if the respondent failed to properly consider them, who amount to failure to do so because the Claimant was exercising her right to maternity leave.

96. Paragraph 7.2 of the list if issues as worded does not amount to unfavourable treatment. It is just a statement of fact. In any event, even if it did, the Claimant only attended the grievance meetings in person, and whilst it caused her difficulties, she was able to arrange childcare and attend and did not raise any complaint at the time.

97. Paragraph 7.3 of the list of issues as worded is not unfavourable treatment but just a statement of fact.

98. Paragraph 7.4 of the list of issues as we have found is not factually correct.

99. Paragraph 7.5 of the list of issues as far as we can determine matters, we find that childcare was not the issue for the Claimant. The 9 am start was only material to her having sleepless nights and being tired, but she did not raise this as a reason as to why 9 am was not convenient. Whilst it amounts to unfavourable treatment, she did not raise it and the Respondent was unaware of the issue at the time.

100. In any event, we could not find that the matters raised in paragraphs 7.2 to 7.5 of the list if issues, even if they did amount to unfavourable treatment were because the Claimant was exercising her right to maternity leave. Paragraph 7.3 was to do with sleepless nights from having a newborn baby. Paragraph 7.4 we found factually incorrect. Paragraph 7.5 was to do with the time of the meeting and the Respondent did not set that time either by act or omission because the Claimant was exercising her right to maternity leave.

101. The Respondent was going through financial difficulties which included a national exercise of deleting the CSA role and offering affected employees the chance to step up into the CSM role or to seek redeployment or to take redundancy. It had an overall time frame it had to follow so as to reorganise its business accordingly.

102. The Claimant was on maternity leave at the time and had concerns as to a) whether she should have to take part in the process at all at that time, b) how she could

engage in the process and c) that she felt pressurised to make a decision because she had a newborn baby, was breast feeding and had sleepless nights. We can understand these concerns.

103. However, the Claimant's overriding concern was that in effect she did not want to have to consider her position at all at that time because she had a young baby and was breast feeding, suffering from sleepless nights and had another young child and was no doubt experiencing the obvious pressures that go with all of that. These were concerns that came from having a young baby and a small child. But these are not things that necessarily prevent a person from attending to their affairs completely.

104. The Respondent in turn acknowledged the Claimant's position and took reasonable steps to accommodate her concerns as much as it was aware of them. However, the Respondent could not simply let the Claimant opt out of the process until her return from maternity leave, as she wished, and could not give her an unlimited amount of time to reach a decision given its own time constraints in implementing the deletion of the CSA role and reorganisation of its business.

105. We therefore conclude that the Claimant was not discriminated against because she was exercising her right to maternity leave. Her complaint is unfounded and is dismissed.

106. As a result the Claimant's claim is dismissed in its entirety.

Employment Judge Tsamados
23 September 2021