EMPLOYMENT TRIBUNALS

Claimant: **Mrs L Male-Maltby**

Respondent: **G Seller & Co Limited**

Heard at: **Nottingham** **On:** **2, 3 and 4 November 2020**

Before: **Employment Judge Butler**
Members: **Mrs E Lowe**
Mr A Blomefield

Representation
Claimant: Mr T Wood, Counsel
Respondent: Mr D Bansal, Solicitor

JUDGMENT

The unanimous Judgment of the Tribunal is that the claims of discrimination on the grounds of pregnancy/maternity and automatic unfair dismissal are well-founded and succeed. She is entitled to compensation.

The case will be listed for a remedy hearing.

REASONS

The Claims

1. The Claimant submitted her claim form on 24 December 2018 after a period of early conciliation from 1 October to 1 November 2018. She claims that the Respondent was in breach of regulation 10 of the Maternity and Parental Leave Regulations 1999 (the regulations) and s.18 of the Equality Act 2010 (EQA) in that the Respondent discriminated against her by failing to offer her a suitable alternative role when the office at which she worked closed and she was automatically unfairly dismissed as a result of that failure. Further, she claims that the Respondent's discrimination and failure to follow its grievance procedure when she complained about the failure amounted to a fundamental breach of the implied term of trust and confidence which entitled her to resign and claim automatic constructive unfair dismissal.

The Issues

2. The issues were helpfully agreed by the parties before this hearing. They are as follows:

Pregnancy/maternity discrimination

(a) Did the Respondent treat the Claimant unfavourably in the protected period because of her pregnancy/maternity leave?

(b) The Claimant relies on:

(i) Being asked to apply for two roles, In Hinckley and Newbold Vernon;

(ii) In the application for the Hinckley Role, being told to outline her suitability in an email;

(iii) Not having her application properly considered and not being afforded an interview which was afforded to others;

(iv) Being provided with a final written grievance outcome without the opportunity to appeal.

Unfair dismissal

(c) The Claimant claims she was constructively unfairly dismissed as a result of the acts and/or omissions of the Respondent. The Respondent denies dismissal but in the alternative contends dismissal was on the grounds of redundancy.

(d) Did the Respondent commit breaches of the Claimant's terms of employment by:

(i) Asking the Claimant to apply for both available roles when she should have been offered the Hinckley role?

(ii) Not offering her a suitable role.

(iii) Offering her a role on substantially less favourable terms than her previous contract of employment.

(e) If the above matters are made out, are the breaches sufficiently serious or fundamental to amount to a repudiatory breach of the Claimant's terms of employment?

(f) Did the Claimant resign in response to the alleged breaches or for any other unconnected reason?

(g) Did the Claimant affirm the alleged breaches by delaying her resignation?

(h) If the Claimant was dismissed, what was the reason for her dismissal? Was that reason a potentially fair reason within the meaning of s. 98(1) or (2) of the Employment Rights Act 1996 (ERA)?

(i) If so, did the Respondent act reasonably or unreasonably in all the circumstances in treating that reason as sufficient to dismiss the Claimant both procedurally and substantively?

(j) If the dismissal was unfair, procedurally, what was the likelihood that the Claimant would have been dismissed in any event had a fair process been conducted?

Automatic Unfair Dismissal

The Law

3. Regulation 10 provides:

(1) This regulation applies where, during an employee's ordinary or additional maternity leave period, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of her employment under her existing contract) alternative employment with her employer, or his successor, or an associated employer, under a new contract of employment which complies with paragraph (3) (and takes effect immediately on the ending of her employment under the previous contract).

(3) The new contract of employment must be such that –

(a) the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances, and

(b) the provision as to the capacity and place in which she is to be employed, and as to the other terms and conditions of her employment, are not substantially less favourable to her than if she had continued to be employed under the previous contract.

4. Regulation 20 provides:

(1) An employee who is dismissed is entitled under s.99 of the (ERA) to be regarded for the purposes of Part X of that Act as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or

(b) the reason or principal reason for the dismissal is that the employee is redundant, and regulation 10 has not been complied with.

(2) An employee who is dismissed shall also be regarded for the purposes of Part X of the 1996 Act as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for redundancy was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee;

(b) the fact that the employee has given birth to a child;

(c) …..

(d) the fact that she took, or sought to take or avail herself of the benefits of, ordinary maternity leave [or additional maternity leave].

5. S.18 EQA provides:

(1) This section has effect for the purpose of the application of Part 5 (work) to the protected characteristic of pregnancy and paternity.

(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 ….

(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. S.95(1)(c) ERA provides that an employee is dismissed by his employer if –

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

7. S.98 ERA provides:

(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 section if it –

….

(c) is that the employee was redundant.

….

8. S.99 ERA provides, inter alia, that an employee who is dismissed by reason of pregnancy, childbirth or maternity.

9. We were also referred to a number of authorities which we address below.

The Evidence

10. We heard oral evidence from the Claimant and from Mr Joseph Barsby, a director of the Respondent. They both produced written witness statements and were cross-examined.

11. There was an agreed bundle of documents comprising 115 pages and references to page numbers in this judgment are to page numbers in the bundle.

The Factual Background

12. The Respondent is a funeral director and memorial masons business. The Claimant commenced employment with the Respondent on 24 August 2017. Her precise job title was stated to be Part time Administrator and Community Liaison (contract of employment page 38). She worked at the Respondent's Glen Parva office, which was a small office (with only one chapel of rest as opposed to five at the Hinckley premises). The Respondent's main office is in Hinckley and it has a further small office at Newbold Verdon. The Claimant's hours of work were from 9 to 12 or 12 to 3 on alternate weeks. This gave her time to take her elder child to school in the morning and pick him up in the afternoon. The Glen Parva Office was less than 2 miles from her home.

13. The Claimant's duties included reception work, maintaining the ambience and cleanliness of the office, referring enquiries to the Hinckley office, giving advice to clients, preparing estimates and handling money. She also did a small amount of social media work.

14. In April 2018, having discovered she was pregnant, the Claimant notified Mr Barsby (page 47) and subsequently wrote to him again notifying him that her expected date of confinement was 9 June 2018 and she would commence maternity leave on 25 May 2018 (page 48).

15. On 21 August 2018, she was contacted by the Respondent and asked to attend the Hinckley office two days later. At the meeting, which was also attended by Rhonda Astill, Funeral Operations Director, Mr Barsby told the Claimant that the Glen Parva office was to close but there were two alternative roles she could apply for: a part-time position at the Newbold Verdon office on the same terms and with the same duties as her current role and a full-time position at the Hinckley office. On 23 August 2018, Mr Barsby wrote to the Claimant to confirm what had been discussed (page 51). It confirmed her position at the Glen Parva office would be redundant and said if she wished to apply for either of the available positions she should let him know "by 5pm Friday 24th August 2018".

16. The Newbold Verdon office was 9.6 miles from her home and the Hinckley office 14 miles. The Claimant said she occasionally worked at the Hinckley office when required but her recollection was that she only attended Newbold Verdon once for training purposes.

17. Having reflected on her position, the Claimant emailed Mr Barsby at 6.25pm on 23 August 2018 saying she would like to take on the full-time role at Hinckley (page 53). He replied saying, "The next step is to have another sit down and then we can make the final decision with who will be offered which role" (page 53). They arranged to meet but the Claimant then realised her newborn son had injections booked for that day (page 57) and they agreed to have a telephone conversation on 28 August 2018 which did take place. No notes of that conversation were taken. It is the Claimant's case that, although she was expecting to be interviewed for the Hinckley role, Mr Barsby ignored her application for the role and offered her the part-time role at Newbold Verdon. She was told it was felt she was better suited to that role and would not be offered the full-time role in Hinckley. This came as a surprise to the Claimant as on 25 August she had exchanged text messages with a colleague called Janina Perry, who was covering the Claimant's maternity leave, wherein Ms Perry said she had applied for both roles at Newbold Verdon and Hinckley and said, "they interviewed me Friday …. normal interview type questions which I don't like lol" (page 55). The Claimant's recollection is that Mr Barsby gave no details of the full-time role in their conversation but was certainly not told it was a different role to the one she undertook at Glen Parva.

18. On 28 August at 7.08pm, the Claimant emailed Mr Barsby to express her disappointment and to ask him to reconsider as the Hinckley role was the most suitable for her. She explained that the part-time role would not work due to childcare issues and, in particular, the increased costs of such care due to the greater travel time involved in the Newbold Verdon role (page 58). Mr Barsby then telephoned her and said if she wanted to be considered for the full-time role, she should email him explaining why she was the best person for the position. This she did on 30 August (page 59). She says that only a couple of hours later Mr Barsby called her to tell her nothing had changed and she would be offered the part-time role. The Claimant then called Mr Barsby to explain that the part-time role would mean that with the added cost of travel and childcare she would not earn anything from her employment. She asked if she could just work the morning shift which would mean she would incur no further childcare costs. He replied that he would speak to the other employee who job shared with the Claimant to see if this was possible. He called back a while later to say the other employee could not commit to working afternoons only but he could offer the

Claimant two additional hours work to which she answered that an extra two hours would still not cover her additional childcare costs.

19. On 30 August, the Claimant emailed Mr Barsby again (page 61). She confirmed that, due to the increased childcare costs, it "would cost me money to work (in the part-time role in Newbold Verdon)" and "I would like to ask now, assuming the role in Hinckley is still vacant, what reasons you have for the full time Hinckley role not being a suitable alternative for me? I ask this because the duties of the role are basically the same in both locations…." Mr Barsby replied by email on 31 August (page 60). In it he said, inter alia, "We are obligated to make sure we offer you the same or equivalent role that you were already in, which we have" and, "The decision we have made is that there was a better candidate for the full-time role at Hinckley, regardless of the fact that you have stated in a previous email 'I understand that you want that role covered in Hinckley as soon as possible'. You have been treated fairly and were the first to find out about the closure of Glen Parva before anyone else outside of Senior Management".

20. The Claimant then contacted ACAS to understand her legal position. She then raised a grievance by email on 3 September in which she set out why the Newbold Verdon role was not suitable for her, expressing her disappointment that a better candidate had been identified for the Hinckley role, suggesting that she should have been offered the Hinckley role as it was suitable alternative employment for her on return from maternity leave, alleging maternity discrimination and asking what her status with the Respondent was (page 63).

21. In her grievance, the Claimant explained that taking the Newbold Verdon role would mean that her extra childcare costs would mean that her outgoings would exceed her wages by £1.50 per month. She said that her advice from ACAS was that a woman on maternity leave must be offered a suitable alternative role without having to apply for it. She asked what her employment status with the Respondent was.

22. Mr Barsby elected to hear the Claimant's grievance. Due to her childcare commitments and the fact that her employment situation had led to depression, she asked if the grievance could be dealt with over the telephone (page 68). Mr Barsby agreed and the call took place on 6 September 2018 with the Claimant's husband in attendance with her for support. No notes of the hearing have been produced.

23. Mr Barsby sent the grievance outcome letter to the Claimant on 7 September 2018 (pages 71-73). In it, he said, "You quite rightly stated on the phone that you have enhanced rights whilst on maternity leave and that you shouldn't have had to apply for the Hinckley position". He said that the Hinckley role was a new role "with different responsibilities and full-time Hours". It is the Claimant's case that she had been given minimal information about the Hinckley role and had assumed it was the same as she undertook in Glen Parva except for the hours. Mr Barsby went on to say, " We were given the difficult task of deciding who would be best suited for each role. Our decision was to give you the role you are entitled to and the one we feel you are best suited to". He continued, "This was a considered decision based on a number of factors,

including skills and abilities of all candidates". He offered the Claimant a right of appeal to Ms Astill.

24. The Claimant appealed (pages 76-78). Upon receipt of the appeal Ms Astill emailed the Claimant to ask if there was anything else she wished to add and to inform her by email and that, "…. I will review everything and confirm to you in due course, the outcome of your appeal in writing".

25. In her appeal, the Claimant said she was not aware that the Hinckley role had different responsibilities to the one she undertook at Glen Parva until Mr Barsby had said this in his letter. She also said that she had asked on a number of occasions why she was deemed unsuitable for the Hinckley role and that she had been disadvantaged by being on maternity leave and discriminated against.

26. Ms Astill did not offer the Claimant a meeting but sent her appeal outcome letter to her on 12 September 2018. In dismissing the Claimant's appeal, Ms Astill said, "It was purely felt that as you would be returning to work after a lengthy absence you would be better suited to a role which matched the position you held in Glen Parva, a role which you would have returned to in March, had we not taken the sad decision to reluctantly close the office".

27. By email to Mr Barsby dated 27 October 2018, the Claimant resigned (page 80). Ms Astill replied on 8 November 2018 offering a grievance hearing on 16 November 2018 which the Claimant declined.

28. Our overall impression of the Claimant's evidence was that it was honestly given. She made no attempt to put a gloss on what she considered was the unlawful treatment of her by the Respondent. She explained the delay between receiving the grievance appeal outcome by referring to her confusion and distress at not knowing what her employment status with the Respondent was or would be and the fact that she was looking after a new baby which we found to be understandable in the circumstances. We accepted her evidence that Mr Barsby did not give any detail of the Hinckley role to her despite the fact that she was told she could apply for it and did so.

29. Mr Barsby said that the Claimant's role at Glen Parva was more than a receptionist. There were administrative duties which the part-time employees were trained in when they went to the Hinckley office. He said the Respondent has an equality policy which is not referred to in her contract of employment and he did not know why it was not in the bundle. There was no formal maternity policy but they followed the relevant guidelines. They do not train employees in that policy, they "practice it".

30. After his meeting with the Claimant on 23 August 2018 to advise her that the Glen Parva office was closing, Mr Barsby said he told her about the two alternative vacancies. He said the Hinckley role was different to the part-time role the Claimant had undertaken in Glen Parva and the part-time role in Newbold Verdon. The role in Hinckley was much more pressured where administrative queries had to be dealt with rather than being referred to Hinckley as they were in Glen Parva and Newbold Verdon.

31. At page 51 is the letter sent to the Claimant after their meeting. In it, he says, "As discussed in our consultation on 23rd August, there is a vacant part-time position at the Newbold Verdon office and a full-time role at the Hinckley office. If you wish to apply for either of these positions, please let me know by email to joseph@seller.co.uk by 5pm Friday 24th August 2018". In cross-examination, Mr Barsby accepted that on the face of this letter the only distinction between the roles at Newbold Verdon and Hinckley was that one is full-time and one part-time. In hindsight he accepted it was not clear that the Claimant could have the Newbold Verdon role because she was sent the same letter as the other two part-time employees and it should have been different. With respect to him, this does not make sense, not only because the Claimant was sent the wrong letter, but because the other two employees were offered the opportunity to apply for both roles. If the intention was to offer the Claimant the part-time role, the letter contradicts this. He went on to say that the Claimant knew she could have the Newbold Verdon role because he told her so on 28 August 2018 and the Claimant knew she would have a role. There was no evidence from the other two employees to support Mr Barsby's witness statement at paragraph 7 that they were told they could apply for both roles depending on whether the Claimant chose to take the Newbold Verdon role and, again, this contradicts what he allegedly said to all three in his letter at page 51.

32. Mr Barsby said that in his conversation with the Claimant on 28 August 2018 he confirmed the details of the Hinckley role whereas the Claimant says he did not. Since there are no notes of that discussion and the details of the Hinckley role are not set out in writing at this stage or referred to in his witness statement, we treat this evidence with some circumspection. He maintained that the Claimant's email to him of 28 August 2018 shows the Hinckley role had been discussed but the Tribunal could not understand this as the Claimant's email only refers to the Hinckley role being full-time and nothing more. He then sought to justify not giving the Claimant that role by saying she had struggled on the occasions she went to the Hinckley office but this is not reflected in his witness statement nor was there any documentation in the form of an appraisal or meeting note to indicate the Claimant had ever been told about this. We considered this to be an attempt to justify not giving the Claimant the full-time position well after the event. This view is supported by the documentary evidence in the bundle showing that the Claimant asked several times why she was not considered for that role and there is no evidence she ever received an answer other than there was a more suitable candidate.

33. In considering the Claimant's personal finances and childcare costs and issues, Mr Barsby accepted the Claimant had raised these with him. His evidence was that her personal finances were not the Respondent's responsibility and her children were not his priority. He mentioned the scenario where she might have to leave the office to look after her children when a bereaved family was coming into the office and said this would not be fair to her or the business.

34. Considering the Claimant's email at page 58, Mr Barsby said the Claimant had been open about wanting to work full-time within the business before the decision was made to close the Glen Parva office.

35. In paragraph 12 of his witness statement, Mr Barsby said he interviewed the other two candidates earlier on the same day as the Claimant. It was put to him that the text from Ms Perry to the Claimant at page 55 contradicts this as she says she was interviewed four days earlier and he said he could not remember and must have been wrong. This was not the only discrepancy in his evidence. It was put to him that paragraphs 9-12 of the response differed significantly from his witness statement. His reply was that his witness statement was the true version with the exception of having interviewed the other candidates on 25 August 2018 – which is seemingly incorrect as can be seen from Ms Perry's text message at page 55.

36. Mr Barsby sought to further justify the decision not to give the Claimant the Hinckley role by criticising the attributes she had listed at page 59. He said the Claimant did not always turn up to work on time and had only made three social media posts which "didn't turn out". He accepted this was not commented on in his witness statement. However, he then made reference to what he described as a large number of telephone calls and text messages between him and the Claimant of which there was no evidence in the bundle.

37. By 30 August 2018, he said he still had doubts that the Claimant was ready to step up to a full-time role but in the next breath said she had as much chance as the others. He said Ms Perry had initially struggled with the added pressure of the full-time role and that if the Claimant had not taken in what the full-time receptionist role was about, she was not the right person for that role.

38. Mr Barsby accepted that in her email at page 61 the Claimant clearly requested reasons why she was not suitable for the full-time role. His evidence was that, in saying there was a better candidate, he was answering the question. We considered this to be an evasive answer.

39. The Hinckley office was undergoing refurbishment throughout this process and Mr Barsby's evidence was that this would be completed around January or February 2019. Asked why, therefore, in paragraph 9 of the response (page 27) the full-time role needed to be filled immediately, he said it was because he wanted all employees to know where they were going to be working and the Claimant's maternity leave was not a consideration.

40. Addressing the circumstances of the Claimant's grievance, Mr Barsby said the Respondent was a small business and he had to deal with it even though it was essentially about him. He dealt with it so as to leave Ms Astill to hear any appeal. In fact, Ms Astill attended the grievance hearing, which was by telephone, as note taker. Mr Barsby said they had HR advice throughout the process but, despite this, we note that Ms Astill attended the grievance hearing, then dealt with the appeal and denied the Claimant an appeal hearing, all contrary to the Respondent's Grievance Policy (pages 109-110).

41. Mr Barsby was asked why he did not respond to the Claimant's email of 7 September 2018 in which she asked what the position would have been if the Hinckley role was the only one available. He replied that he did not know why he did not respond or whether, in fact, he did. There was no reason why he would not respond. It was put to him that in his grievance outcome he had not said anything about the job description for Hinckley or why the Claimant's skills did not

match that role. His response was that he was not counselled to include that information by his advisers.

42. Regarding the appeal, Mr Barsby said that this was dealt with by Ms Astill who he described as less senior than him and a fiery individual who would have overturned his decision if she disagreed with it. She took the notes of the grievance hearing but they were not produced in the bundle. As regards the

Grievance Policy stating that the Claimant was entitled to an appeal hearing, he said Ms Astill would have taken advice and done everything she was told to do and, whether the Claimant was on maternity leave or not, "we would have done everything Mentor told us to do". It was also put to him that paragraph 18 of the response (page 28) stated, "The Claimant refused to attend a formal hearing". He accepted there was no evidence of this. Indeed, the Tribunal noted that Ms Astill's email to the Claimant at page 74 makes it perfectly clear that the outcome of the appeal would be in writing and the prior communications between them makes no mention of an appeal hearing or any refusal to attend. Mr Barsby stated that Ms Astill had a discussion with him about the grievance because she knew he was upset about it. He said her outcome letter explains that after a lengthy absence and with the added pressures of the Hinckley role, it would not be suitable for the Claimant as she was not qualified in terms of skills or her knowledge base. We found this to be curious evidence as the outcome letter before us makes no reference to the Claimant's qualifications in terms of skills or knowledge base.

43. The Tribunal questioned Mr Barsby about the interview process. He said the Claimant was asked how she would cope with the added pressure of the Hinckley role, the overtime required and the expansion of the role after the renovations. He said Ms Astill was with him during this process and the same questions were asked of all the candidates. Ms Perry wanted to be considered for both roles and was told if she did not get the Hinckley role she would get the Newbold Verdon role.

44. We also questioned him about pages 91-92 which is a comparison between the part-time role carried out by the Claimant and the Hinckley position. He said this was what he explained to the Claimant. The new role had significant responsibility, did not take long to be trained up and dealt with the crucial matters of stationery stock levels, records of remains and the arrangement of remembrance services. At the time of the interviews, this document was handwritten but not given to the Claimant. The red notes are the additional duties to be undertaken at Hinckley and the document was typed up for the purposes of this claim. The Tribunal wondered why the handwritten notes were not produced and formed the impression that this document was actually produced for the hearing and had not existed before in any form. We concluded it was produced in an effort to back up the Respondent's account and considered to be unreliable.

45. Our overall impression of Mr Barsby's evidence was that it was unreliable. We do not accept that he gave due consideration to the Claimant's application. He did not fully explain the duties involved in the Hinckley role to the Claimant. Much of his account is not corroborated by documentation and the application of the Grievance Policy to the Claimant's grievance was not in accordance with the Respondent's own written policy. Throughout his evidence, we considered Mr Barsby sought to justify the decision not to offer the Hinckley role to the Claimant

with comments which were not shared with the Claimant at any point and comprised evidence not referred to in the response or his witness statement.

46. We were also concerned that Ms Astill did not give evidence and there was no evidence to support Mr Barsby's account of the appointment of Ms Perry to the Hinckley role.

47. For the above reasons, where there was a dispute on the evidence, we preferred the evidence of the Claimant.

The facts

48. In relation to the issues before us, we find the following facts:

(a) Whilst the Claimant was on maternity leave, a decision to close the Respndent's office in Glen Parva was made. The Claimant was informed of this by Mr Barsby and told there were two vacancies for which she could apply, a part-time role on the same terms and conditions in the Newbold Verdon office and a full-time role in Hinckley.

(b) The Claimant calculated that the Newbold Verdon role would involve additional child care costs as she would need someone to collect her older son from school. This would mean she would have costs of £1.50 more than she would earn each month. She had previously discussed working full-time in the future with Mr Barsby.

(c) Mr Barsby did not explain the details of the Hinckley role to the Claimant or how they differed to what she had been doing in Glen Parva. He did not explain why the Claimant was not suitable for the Hinckley role despite a number of requests by the Claimant.

(d) It was always in Mr Barsby's mind that Ms Perry, who was employed as maternity cover for the Claimant, would be given the Hinckley role.

(e) Mr Barsby paid no attention to the circumstances of the Claimant in respect of childcare and the additional costs of that care if she worked in Newbold Verdon.

(f) The principal reasons for not giving the Hinckley role to the Claimant was her absence on maternity leave as evidenced by the grievance appeal outcome letter from Ms Astill.

(g) The Respondent's application of the Grievance Policy to the Claimant was in breach of its own written policy.

(h) The reasons for the Claimant's delay in resigning were related to the care of her newborn son and her confusion as to her status at the Respondent.

Submissions

49. For the Respondent, Mr Bansal presented written submissions and gave oral submissions. He said that the agreed list of issues contained the only issues

the Tribunal could address – a statement of the law with which we do not agree. He submitted that the Respondent had complied with regulation 10 by offering the Claimant a suitable role. Whether it was a suitable role was a matter for the

Respondent. The Newbold Verdon role was on favourable terms and the Claimant's contract of employment provided that she could be required to work at any of the Respondent's offices.

50. Pursuant to s.18 EQA, he submitted it was a question for the Tribunal as to whether the failure to offer the Hinckley role to the Claimant was due to her maternity leave. The fact that she was not suitable for the role meant there was no discrimination.

51. For the Claimant, Mr Wood referred us to the decision in **Sefton BC v Wainwright [2015] IRLR 90.** He submitted that the EAT decision was authority for two propositions relevant to this case: firstly, that the Claimant should have been "slotted in" to the Hinckley role as it was suitable for her; and, secondly, that there was an obligation on the employer to do what is reasonably necessary to protect women on maternity leave. In this case, Mr Barsby's mental processes must be considered and inferences drawn. He considered the Claimant's maternity leave to be linked to the failure to offer the Hinckley role.

52. He further submitted that, in relation to constructive dismissal, the breach of the implied term of trust and confidence was not only due to the failure to offer the Claimant the Hinckley role, but also a failure to take steps in accordance with regulation 10. The Claimant was deprived of significant statutory protection at a time of disadvantage. She could not be expected to continue in employment. The Newbold Verdon role was not suitable and the Claimant was entitled to be offered the Hinckley role. The offered role in Newbold Verdon was not suitable and did not comply with regulation 10.

53. As a consequence, he submitted that the focus fell on the Hinckley role. It did not need to be a perfect match. The Respondent had highlighted the pressures and extra responsibility of that role and said the Claimant would not cope; but that evidence only came out in the hearing and there was no evidence that it was a high pressure job. In essence, the Respondent merely preferred Ms Perry for that role. All the documents in the case were entirely consistent with the Claimant's account and Mr Barsby's evidence had been inconsistent.

54. Finally, he submitted that the Claimant's grievance had not been properly dealt with. Mr Barsby had input into the appeal outcome and the Claimant was deprived of an appeal hearing. Further, she was incorrectly described as having refused to attend an appeal hearing.

Conclusions

55. We first address whether the Respondent complied with its obligations under regulation 10. There is no argument between the parties that the Claimant was redundant, she was clearly told so by Mr Barsby (page 51). Neither is there any argument that she was within the protected period as she was still on maternity leave. Following the reasoning of the EAT in **Sefton**, if there was then a suitable alternative vacancy, there should have been no competition and she should simply have been slotted into it.

56. The issue, therefore, is whether the Hinckley role was a suitable alternative. The Respondent's evidence was that it was not. It substantiates this view by saying it was a full-time role, as opposed to part-time, and was a more pressured job which required greater skill levels than the Claimant possessed. The Respondent contends that the Newbold Verdon role was a suitable alternative because it was on exactly the same terms and conditions as the role she undertook before the redundancy arose.

57. We must consider who assesses whether a role is a suitable alternative and what must be taken into consideration in that assessment. In **Simpson v Endsleigh Insurance Services Ltd 2011 ICR 75 EAT**, it was held that it is up to the employer, knowing what it does about the employee's personal circumstances and work experience, to decide whether or not a vacancy is suitable and there is no requirement for the employee to engage in the process. What we find concerning, however, is that the Respondent did not immediately advise the Claimant that the Newbold Verdon job could be hers if she wanted it. Mr Barsby's assertion that she was sent the wrong letter (page 51) we found to be of dubious reliability when considered in the light of his evidence that the same letter was sent to the other employees.

58. Further, Mr Barsby invited the Claimant to explain why she was suitable for the Hinckley role. In their various communications, she set out the calculations, not challenged by the Respondent, explaining why, from a financial and childcare perspective, the position at Newbold Verdon was not suitable. The Claimant further gave evidence that she had previously indicated to Mr Barsby how she would like to work full-time for the Respondent at some stage – evidence which he confirmed.

59. We bear in mind that there was a contractual mobility clause in the Claimant's contract of employment which reads, "Your usual place of work is at (Glen Parva) or any other current or future premises of the Company". But that clause goes on to say the Claimant will be required to work one day a week in Hinckley and four in Glen Parva with the Company reserving the right to amend these "duties" depending on the needs of the business (page 38). The Claimant did spend occasional days working at the Hinckley office but not at Newbold Verdon. We accept her evidence that Mr Barsby was well aware of her childcare commitments and, in his evidence, was totally dismissive of them and the financial impact of her working at the Newbold Verdon office. He further did not consider the increased travelling time that would be involved.

60. The Claimant made several requests for details of why she was not considered suitable for the Hinckley role. She received no response. Yet in his evidence, Mr Barsby produced the document at pages 91-92 which he confirmed was never shared with the Claimant. He said it is a comparison of the duties of the part-time role and the full-time role at Hinckley. He further said this was a handwritten document drafted at the time the Respondent was creating the Hinckley role but was typed for the purposes of this hearing. We found this evidence to be unreliable. If there was a document in existence at the material time, albeit handwritten, we would have expected the original to be produced with a typed copy if there were concerns about legibility. The content of the document is also a concern. The additional duties over and above those already carried out by the Claimant are in red type. At page 91, the first entry states, "Overtime may

be required without notice". This ties in with Mr Barsby's evidence that the Claimant having to leave on time when a bereaved family came into the office would not be fair on her or the business. We considered this comparison document to be an afterthought designed to bolster the response.

61. Taking all of these matters into consideration, we find that the full-time role at the Respondent's Hinckley office was suitable alternative employment for the Claimant and in not offering that position to her the Respondent did not comply with its obligations under regulation 10. Following the decision in **Eversheds Legal Services Limited v De Belin [2011] IRLR 448**, we do not accept that the Respondent did what was reasonably necessary to afford the statutory protection to the Claimant who was on maternity leave.

62. We next consider whether the Claimant was treated less favourably because of her pregnancy and maternity leave. It does not necessarily follow that a failure to comply with the regulation 10 obligations amounts to less favourable treatment for the purposes of s.18 EQA; we must look to the cause of that treatment. In this regard, we consider that we have to look no further than the appeal outcome letter (page 79). Ms Astill states, "It was purely felt that as you would be returning to work after a lengthy absence you would be better suited to a role which matched the position you held in Glen Parva". The reason for that lengthy absence was, of course, maternity leave and Ms Astill clearly sets out that the Claimant was denied the Hinckley role because of her pregnancy and maternity leave.

63. The Claimant resigned approximately six weeks after receiving the appeal outcome letter. The Respondent argues that delay amounts to an affirmation of any breach. The Claimant argues that the delay was because she was distressed by her treatment, was unsure of her legal position and was looking after a newborn child. We accept, in these circumstances, that the delay in resigning did not amount to an affirmation of the breach. In fact, there were two breaches of the implied term of trust and confidence. The first was her treatment in relation to the redundancy situation and the failure to give her the Hinckley role without the formality of an interview and selection process and the second was the failure to afford her an appeal hearing and the hearing of the appeal by someone of inferior status to Mr Barsby who held the grievance hearing.

64. Having identified those breaches, we have no hesitation in finding that the failure to comply with the regulation 10 obligations and the manner in which the grievance appeal was handled amounted to fundamental breaches of the implied term of trust and confidence and this entitled her to resign and claim constructive dismissal. Given that, on the facts, we find that the principal reason for her resignation was her treatment whilst on maternity leave, that dismissal was automatically unfair.

65. In this case, the Respondent's account was not helped by a number of factors, all of which the Tribunal took into consideration in reaching these conclusions. Firstly, the documents produced do not support Mr Barsby's account. We have previously mentioned the letter at page 51 and his evidence that this was sent to the Claimant in error and she should have received a different, unspecified, letter. Why then did the other two applicants receive this letter advising they could apply for both roles? Mr Barsby also said that the

advice of Mentor was always followed and we wondered whether the letter sent by Ms Astill (page 79) was drafted or even checked by the Respondent's advisers. It sets out quite clearly and in no uncertain terms that the Claimant was not suitable for the Hinckley role because of her absence on maternity leave. There can be no other interpretation. Further, Ms Astill was not called to give evidence, nor was there any evidence to corroborate Mr Barsby's timeline for the

appointment of Ms Perry to the Hinckley role. Finally, the Respondent produced no written notes of any meetings or conversations with the Claimant. Regrettably, our overall conclusion is that the Respondent acted without proper reference to the law and has subsequently attempted to cover its tracks.

66. For the avoidance of doubt, as the Claimant resigned, we do not consider it appropriate to consider an uplift for failure to follow the ACAS code.

67. Since the claims of discrimination and unfair dismissal succeed, the case will be listed for a remedy hearing.

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Employment Judge Butler

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Date 2 December 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE