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EMPLOYMENT TRIBUNALS

Claimants: Mr C Constandinou
Mr T Kakkoufa

Respondents: (1) Supadance International Limited
(2) Mariola Free
(3) David Free

Heard at: East London Hearing Centre

On: 7 – 11 August 2017

Before: Employment Judge Russell

Members: Ms V Nikolaidou
Ms J Owen

Representation

Claimants: Mr N Caiden (Counsel)

Respondents: Mr C Bourne (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:-

1. The Claimants claims of direct age discrimination succeed.
2. The Claimants were unfairly dismissed.
3. The claim for holiday pay is dismissed upon withdrawal.

REASONS

1 The parties to this claim are Mr Constandinou and Mr Kakkoufa. The claim is brought against three Respondents the company which employed them Supadance International Limited, Mrs Free and Mr Free.

2 We heard evidence from the Claimants and on their behalf from Mr N Constandinou, the first Claimant's son. For the Respondents we heard evidence from Mrs Free, the Managing Director, Mr Free, the Chairman, Mr Antoniou, General Manager, Ms Dobinson, the Company Secretary, Ms A Thompson and Mr Ishmael Rifat and Mr Joe Sherret, the Accountant we were provided with an agreed bundle of documents and read those pages to which we were taken in the course of evidence.

Findings of Fact

3 The Respondents is a family established business that specialises in the production and sale for specialist ballroom dancing shoes. It has a factory in the UK, the shop in the UK and has distribution worldwide. Before April 2015 it employed 41 members of staff. The Claimants were long standing employees with 25 and 21 years service respectively. By the relevant time these proceedings Mr Constandinou was the production manager and Mr Kakkoufa was the manager in charge of the closing room. During staff absences both Claimants could cover by working the respective machines. They were also undertaking some additional tasks as well as management and cover for example Mr Constandinou was attaching heels and back moulding and Mr Kakkoufa also provided quality and production support. Each of the other one workers in the factory were highly specialist in their own specific part of the shoe making process. Over the

years leading up to April 2015 there was increasing pressure on the company financially from overseas firms competing at a cheaper prices. We will refer extensible to annual accounts and other financial figures and we found very helpful the summary provided by Mr Shearer which staff he sets out with progressive downturn in business for example in the year ending December 2011 sales were £3,911,768 these had gradually declined in the year ending December 2014 a figure of £3,293,798. Over that period of time wages and salaries had remained orderly stable but approximately £1,100,000 or thereabouts.

4 We accept therefore that there was a genuine downward trend and we also accept the Respondent's evidence that the trend of production had moved from large numbers of pairs of shoes on standard orders two lots of smaller individualised orders. As such the number of pairs of shoes being produced by the factory had significantly reduced.

5 By April 2015 the profitability of the company had to be addressed. It is anticipated that redundancies would be necessary Mr Antoniou was aware of the seriousness of the situation. There was a meeting that took place at Mr Constandinou's house, we do not consider it necessary to resolve the dispute as to who set up the meeting save to say that all who attended were content to do so. There is a dispute as to whether the meeting was for the three managers to come up with named subject to approval by Mr & Mrs Free or whether Mr & Mrs Free wanted to dismiss the Claimant and that this was the manager's attempt to come up with an alternative. The meeting was recorded albeit without the knowledge of Mr Antonio and we were referred extensively to the transcript of the recording. We took into account that the recording was clearly contemporaneous and that at the time of the discussion there was a good relationship between Mr Antonio and the two Claimants and that is reflected in the way that those present spoke openly to each other about their knowledge beliefs and fears as to what

was happening with the company. Mr Antoniou suggests now that some of his comments made within the meeting were a product of stress and attempt to protect his own position rather than an accurate reflection of what he believed and indeed had been told by Mr & Mrs Free. We do not accept that that is reflected in the content of the transcript at a very long meeting. Indeed there is recognition on both sides in that meeting that Mr Antoniou owns role repairing machines was important and that he was therefore in a rather different position. Whilst Mr Antoniou suggested in his statement that the inaccurate content in the meeting was to protect his own position and did not reflect the views of Mr & Mrs Free. In cross-examination he accepted that most of what he had said was accurate. On balance and having regard to the evidence which we have heard we think that it is an accurate reflection that the intentions of Mr & Mrs Free at that time in April 2015. We find that Mr Antoniou was speaking candidly and that he felt that he was among friends and it was an accurate reflection of what he thought was the position at the time directly taken from his conversations with Mr & Mrs Free.

6 In the meeting Mr Antoniou was not simply sending out the Claimants for voluntary redundancy as has been suggested. If so the relationship between the men was such that we consider he would have asked question explicitly and right at the outset. Indeed we considered it significant to look at the way in which the meeting in fact open which you can see from page 233 in the bundle. Right from the very outset Mr Antoniou volunteers without being prompted that they were being attacked because they were high earners when Mr Kakkoufa asked for clarification Mr Antoniou confirmed that at that point it was the Claimants although he was sure that good things had not been said about him either. Mr Antoniou was not tricked or entrapped into making such a comment. He volunteered it. we note also from the very outset of the transcript at 234 Mr Antoniou volunteers that it was the Claimants who were being discussed about or being talked by Mr & Mrs Free as

the first two names on the list for redundancy. Read overall we consider that the transcript of the conversation reads more as Mr Antoniou sharing information that the Frees were looking to dismiss the Claimants and Mr Antoniou was trying to come up with alternative to protect the Claimants whom he regarded he tells us as brothers. Inevitably in a case of this sort both counsels took us to particular passages in the transcript which they said supported their case. We considered it necessary however to regard the contents of the transcript more broadly and to place particular comments within context. Having done so we consider that the transcript of the conversation supports the Respondent's case that the production was down that costs were up and there was need to make savings. We note that that situation was not disputed by the Claimants at the time in the conversation. They have done so in the course of this hearing which we do not believe that they would have allowed comments to go unchallenged during the discussions had they not really believed as Mr Antoniou said that production was indeed down. We also considered that the transcript supports the Claimant's case that it was Mr & Mrs Free who were making these decisions. There are numerous references to Mr Free's role throughout the course of this lengthy transcript and we simply identify two specific points. One is at page 265 which made clear by Mr Antoniou that it is Mr Free who is calculating what is to be done. Indeed he has asked whether it is him i.e. Mr Free or Mrs Free and Mr Antoniou says it quite clearly that it is Mr Free albeit Mrs Free being put forward as he describes the front woman.

7 We also had regard some pages later to Mr Antoniou characterisation of the relationship between the Frees. The bottom of page on whom discussed their intentions for the business Mr Antoniou says well he sort of left it, the responsibility more to her he sought of has the final decision but he let her have all the headache. We understand that to mean and indeed we find that whilst Mrs Free was responsible for more of the day-to-

day decision making and operations it was Mr Free as the Chairman who had the ultimate say and that he was very heavily involved in the decision to make redundancies. Accordingly we find that Mr & Mrs Free were joint decision makers this was not simply a decision of Mrs Free as has been suggested.

8 There are a number of passages or comments within the transcript which relate to age. They are relatively few when looking by contrast at the references to financial difficulty and production downturn. When they are made they are relevant to Mr Antoniou's explanation as to why the Claimants are being targeted and we find that read fairly they are not simply an expression of Mr Antoniou's view but they are comments being made by him from his knowledge of Mr & Mrs Free's own reason for acting. This is made clear at page 243 when he is expressly asked what is their thinking behind identifying these two individuals. In the context of the conversation there involved we find is very clearly Mr & Mrs Free. The response is where is because your dad's already a pensioner that we find is evidence of the Free's view at the time.

9 Similarly later in the transcript at page 289 having identified a number of other workers to be put forward for the potential redundancy Mr Antoniou says "the other thing as well when we put these five people forward we think they are not going to turn around and say why aren't you sacking the older ones". He goes on to say "if they are looking at the future another five or ten years in front really is the older ones that goes". When it was put in re-examination to Mr Antoniou when he was asked who they were there was a pause whilst Mr Antoniou considered his response and he replied that it was probably Mr & Mrs Free. We find that it was indeed Mr & Mrs Free the inference of that part of the conversation again clearly a reference we find to the reaction of Mr & Mrs Free to a list of proposals which did not include the Claimant. It is an indicative of a belief or a view that

look into the future the older members of staff are those who should not be retained. In any event between the three managers in the course of the conversation alternative names were proposed and agreed to be put forward as candidates for redundancy. We were given a list at page 182 of those candidates and of their age. Mr Caiden submitted to us that we could draw an inference from the fact that of the factory workers involved they were over the age of 56. Indeed we were taken to a list of the remaining factory workers and we heard evidence as statistical impact of these redundancies on the workforce. We were asked for an inference from the statistic as to discrimination but we decline to do so on that particular point not least as these were not on our finding names advanced by Mr & Mrs Free but by Mr Antoniou and the two Claimants themselves. Therefore we consider that it provides no insight and permits no reasonable inference as to the decision making process and the reason of the Frees.

10 On 12 May 2015 there was a meeting between at the very least Mr Antoniou and Mr Shearer the Company Accountant to discuss the current account and the financial position of the company further. The Respondent's case is that the meeting was attended also by both Claimants and that they were provided with the summary of accounts which was discussed at the meeting. Mr Antoniou's evidence and that of Mr Shearer is that both Claimants were present. The Claimants case by contrast is that they attended no such meeting and had not seen the financial summary until the morning of this hearing when it was produced. In resolving the dispute we had regard to a letter written by the Respondent's solicitors in December 2015 a date file closer in time to the disputed meeting. The explanation in that letter is that financial information was discussed with Mr Antoniou with the instruction to inform the Claimants of the details that these discussions took place at the accountants officers and these include a meeting on or around 15 May 2015. It does not suggest that there was any meeting attended by the Claimant

themselves with the accountant. We accept and find that this was not put to the witnesses it was a matter that arose in the course of submissions and both counsel sought to deal with it. Nevertheless we consider that it is evidence which tends to support that account given by the Claimants and we prefer and finds that they were not present. We are not for the avoidance of doubt finding that either Mr Shearer or Mr Antoniou were lying. We find that the meeting was a long time ago and it is possible that the memories of those involved have become confused and have quite simply mixed up another meeting which took place in 2014 at the Supadance shop concerning sales of shoes. We do however find that the Claimants were not present at the meeting with Mr Shearer.

11 In 2015 due to the pile of the state of the company's finances three monthly account figures were provided to Mrs Free. The Respondent we found had made significant attempts to make other savings, for example with Mr Free foregoing his salary and cashing in his pension in part to pay the earlier redundancy payments. Further savings however were desired by Mr & Mrs Free to secure the company's financial situation. Indeed Mr Antoniou had predicted in the April 2015 discussion with the Claimants that it is likely that further redundancies would be required. We find that this was in part due to the continuing financial difficulties and in part due to an ongoing belief of both Mr & Mrs Free that the Claimants were very expensive employees.

12 On 25 May 2015 Mr Neo Constandinou was in the car with Mr Antoniou and provided evidence of a discussion which he says took place between the two. In the course of that Mr Constandinou's evidence was that Mr Antoniou compared the factory's workforce to a football team and said old workers like old football players need to leave so that it could bring in new blood otherwise the team would not be efficient. He also said that the Claimant's earned too much money.

13 We find Mr Constandinou on this point to be a credible and reliable witness. When questioned further about this discussion he gave additional detail which we considered was given spontaneously and supported the reliability of his evidence. We also take into account that the comments are consistent with the views voiced by Mr Antoniou in the April 2015 discussions with regard to looking into the future and we find that it shows an ongoing thought process on the part of Mr & Mrs Free and the Respondent generally as to the possibility of the Claimants' redundancies. We take into account that this conversation took place only a month after the initial redundancy where any benefit of those savings had not necessarily yet been seen in the accounts if anything there had been an additional financial burden of redundancy. There was a meeting with Mr Shearer attended by Mrs Free and quite possibly Mrs Donaldson and Mr Antoniou with a view to arranging a meeting with the bank the aim of turning an overdraft facility into a loan. It is worth noting that the extent of the Respondent's financial difficulties was that the overdraft facility was for £100,000. To that date the actual overdraft stood at £200,000. The date of the meeting with Mr Shearer is not clear but on balance we find that it was well before the actual meeting with the bank manager on 19 August and possibly looking at Ms Donaldson's evidence as early as late July.

14 We find that in part that on 3 August 2015 Mr Free sent an email to Ms Donaldson asking about the possible redundancy package which would be payable to Mr Constandinou were he to be made redundant. There was some evidence given by Mr Free in regard to this email when put to him that it was inconsistent with his case that he had no involvement in the decision. He suggested that he was merely there to obtain details of a voluntary redundancy package which Mrs Free had said was unaffordable. We did not find that explanation at all credible. He does not ask the details for a voluntary redundancy package and indeed the package which was calculated is statutory

redundancy only. We find that the manner in which Mr Free gave his evidence on that point was not credible, was not reliable and was designed to minimise the extent of his involvement in the decision making process.

15 It is consistent with our findings that the Claimants' redundancies was still a matter in the mind of the Frees even after April 2015 and was not a matter which had arisen urgently in the middle of August 2015. It was clear from Mrs Free's evidence that the Respondent made the decision to go to the bank. It was not a question of the bank requiring them to act for example by calling in the overdraft facility nor is there any credible evidence that the bank required the Respondent to take certain steps before it would meet in order to discuss alone. Rather we find that Mr & Mrs Free thought themselves it was more likely that they would get the loan and indeed it will be financially prudent to address the issue of costs and savings. To take that initiative before meeting with the bank manager. This is in our view sensible but it is not a case where urgent action was required by the bank. Mrs Free's evidence that there was no redundancy procedure because the bank did not or would not agree to meet with them unless the business plan was produced is neither credible nor reliable. We find that the decision to reduce costs came from the Respondent and was not demanded by the bank. There is no evidence that Mr & Mrs Free took advice from their external support and advisers with regard to proper process and we find that the decision was taken by Mr & Mrs Free to dismiss the Claimant principally as they were on the highest salary and therefore would generate greater saving and following that primary decision that they were as managers no longer required or at least their absence could be tolerated. They did not consider asking around their workforce whether others would volunteer for redundancy. They did not consider the position of Mr Antoniou. They did not consider the reduction of pay or hours for the Claimants which both say that they would have been prepared to accept.

There had been some attempts to cut overtime and we find that the overtime which was still being performed was necessary and not relevant to the Claimants work for example cleaning. There was also reference to the continued payment of bonuses which we consider and find that these were in reality payments for piece work and again were not valid to the Claimant's case. There was no consideration of the pool selection or scoring as there had been in previous redundancies some years earlier.

16 Mr Caiden on behalf of the Claimants drew our attention to a comment by Mrs Free in her witness statement at paragraph 24. With regard to this earlier redundancy exercise in which she referred to seeking volunteers for redundancy in the following terms.

17 Having devised the point system she says I followed all the advisory redundancy procedures and we jointly identified several workers who were willing to retire from Supadance. We accept Mr Caiden submission that it is possible to draw an inference from the use of the word retire in that paragraph to indicate even if subconsciously the view of Mrs Free and we find by extension Mr Free in identifying in redundancy situations those workers perhaps was shorter futures at the company. There was no consideration of alternatives from the Claimants dismissal for example with regard to other administrative costs which could be saved. The Claimants were invited to a meeting on 18 August 2015 in which they were informed that they were being made redundant. Again that meeting was recorded and there is a transcript. There was not prior warning to the Claimants that they were at risk of redundancy for less that they were to be dismissed by reason of it at that meeting. The transcript makes clear that both Mr Free and Mrs Free are actively involved in the decision making process and that is consistent with our earlier findings. The dismissal letters had already been prepared and indeed were dated the day before on 17 August 2015 were contained in seal envelope and handed to the Claimant at

the meeting. At the meeting there was a lengthy explanation by the Frees as to the financial reasons for dismissal which supports our finding that the Respondent was seeking proactively to address the financial situation and not responding to an urgent requirement from the bank. The Claimant's dismissal was the quickest way to get money down.

18 On the seventh page of a sixteen page transcript Mr Free makes a reference to pension and again we heard much evidence and submission on that point. Not least Mr Bourne tempting to persuade it but the comment should be seen in context and the genuine response to a question by Mr Kokkoufa. We did therefore look at the transcript as a whole and it is a matter of note that the Claimant's input in the meeting was very small indeed put pages on end we have the Frees explaining the financial situation of the business. The relevant pension comment therefore is in response to some of the few points being made by the Claimant expressing their desire to know on what they should live and what money they will now receive. It is in that context that Mr Free said can you get a pension now. Whilst Mr Bourne as I said tends to explain that this was only a response to a general question we prefer Mr Caiden's submission that it was indicative that Mr Free's consideration that as older workers there were other means of income at the Claimant's disposal. Given what we have found about the April 2015 discussion and the fact that Mr Antoniou's comments reflected the Frees views supports our conclusion that the ability of the Claimants to access pension was a factor in the minds of Mr & Mrs Free this is a matter that is because of their age. It is a minor point and alone we would not have found it particularly weighty. Nevertheless it is part of the overall factual matrix. During the course of the redundancy meeting there was some discussion of possible alternative employment elsewhere this was clear that this was simply a possibility. It is as I say there was remarkably little involvement of the Claimants in the meeting with no real

consideration of their circumstances or possible alternatives could costs savings. It was clear to put this in the binocular that it was a done deal that the Frees spending the majority of the meeting justifying themselves and the problems in their business.

19 The meeting took place at the bank on 19 August 2015. There was no business plan in writing. In fact we find that there was no business plan at all beyond Mrs Free orally informing the bank manager that they had dismissed two employees in order to save salary of £100,000 per annum. A loan was intended repayable over a five year period. The Claimants worked out their 12 weeks period leaving in November 2015. Throughout this time there was no consultation or consideration of alternatives. There was some talk of a possible return on a day rate basis but that did not happen and was not explored. Whilst this will be a matter for remedy it appears to be linked to the souring of the relationship between the Claimants and the Respondents.

20 We heard submissions as to the credibility and the reliability of the evidence we heard from both the Claimant and the Respondent. We take into account that this was a relatively small firm working together over a long period of time in a manner which was akin to a family business. Delegations by the Claimants are very historic indeed decades ago and we find that they are borne out of a sense that being ill treated and disloyally by Mr & Mrs Free given their previous lengthy service. It is not surprising perhaps in the circumstances it is supported by the readiness of Mr Antoniou to indulge in similar criticisms and comments in the April 2015 meeting and we find that it does not adversely affect the credibility or reliability. However nor do we think that it is cogent or reliable evidence that bad character by Mr Free and we can draw no inference from allegations which are relatively few in number and are clearly very stale indeed. We also note the Respondent's readiness to criticise the Claimants performance. For example Mrs Free in

her paragraph 30 and Mr Free in his oral evidence. Again that is perhaps indicative of the emotion and the sense of betrayal on both sides of the room and we draw no adverse inference against the Respondent's evidence purely on the basis of those allegations. Similarly the time that Mrs Free expressed herself perhaps in a slightly exaggerated way for example the Ukraine losses we find were a genuine attempt to convey to us the serious nature of the financial problems facing the Respondent which are borne out broadly speaking by the financial evidence even if rather exaggerated by Mrs Free and we did not attach any great weight to those points either.

21 We were directed by both counsel to relevant legal authorities to be considered in the course of reaching our conclusions I am not going to set them out now orally because you have done it already in writing both of you but there was no real dispute between counsels as to legal principles to be applied and this was broadly agreed as is often the case in discrimination cases that this conclusion and the application of legal principles would largely depend upon the findings of fact which we have made.

22 We deal first of all therefore with the unfair dismissal case and we find and conclude that there was a redundancy situation. This is primarily a costs saving exercise but it caused the Respondent to conclude that it no longer required employees to do work of a particular kind namely the Claimant's managerial jobs. That was the principle reason for dismissal albeit not the sole reason which we shall return to in due course.

23 We considered Section 98(4) and whether the dismissal was fair in all of the circumstances of the case. No procedure was followed in this case, the Claimants were not put at risk formally there was no consultation, no consideration of alternatives as we have said and we have not accepted the urgency point relied upon by the Respondents. Nor do we accept that either Mr or Mrs Free turn their minds in any sense to alternatives

at the time. Some alternatives may have been possible for example seeking voluntary redundancies or alternative costs cutting measures and we do not consider that it was for any reasonable employer in those circumstances could have concluded that consultation was futile as such the *Polkey* liability exception we find is not made out the dismissal was unfair.

24 We were asked to consider *Polkey* in relation to remedy. In particular how long it would have taken to follow a fair procedure and whether the Claimants could and would have been dismissed at the end of it. We find that the period for the at risk warning and consultation would not have taken very long given the size of the employer. We also took into account the limited number of realistic alternative options. The biggest delay we find would have been a reasonable time for other workers in the factory to consider whether they wished to volunteer for redundancy and we do not consider that it would have been reasonable or within the range of reasonable requirements for there to be mandatory or compulsory bumping given the circumstances of play here. Overall we consider that it would have taken no more than two weeks to canvass the other workers to see whether they would volunteer for redundancy and the decision to be made by Mr & Mrs Free within a week thereafter. In other words we consider that the fair procedure could have been completed within a three week period. As to the possible outcome and the effect of a proper fair procedure we took into account the extent of a financial problems that the Respondent the genuine need that they had to save money and the specialist nature of the work undertaken by the remaining workforce. The lack of need for that level of management the possibility that if others had been asked to volunteer for redundancy or possibly for the Claimants to consider job sharing lower wages or different work whether or not the Claimants would have remained.

25 We take into account also the fact that in the 12 weeks notice period neither Respondent nor Claimants alike considered any such alternatives largely as this was seen as a foregone conclusion. For all of those reasons we do not consider this is a case in which a 100% *Polkey* reduction would be appropriate because there is a chance the consultation would have made a difference but realistically the Tribunal considers that the likelihood of continued employment was low even without the factors of age to which I now turn.

26 We have found that the decision makers were both Mr & Mrs Free that shared input and as such this was not a Reynold's case. We applied the Talbot guidance and we looked at the overall picture and we drew the inferences from the primary fact namely the comments by Mr Antoniou in April 2015 and May 2015 Mr Free pension remark in August 2015 and Mrs Free's evidenced suggesting that she regarded previous redundancies as retirements the fact that previous redundancies had offered the possibility of voluntary redundancy to the workforce and also the manner of the dismissal. This is not simply a case where the manner of dismissal was unreasonable but it was also contrary to the earlier exercise where a fair procedure had been followed and therefore we did consider that it permitted us safely to draw the inference that age was a consideration in the Claimants' selection. Whether on the reason why approach or alternatively looking at the Claimant's younger selves as their hypothetical comparators. We conclude that if the Claimants had been younger there would have been more consideration of ways in which they could have been returned. Whilst age is not the principle reason or even a secondary substantial primary reason it was a significant reason while alternatives which may displace other members of staff were not considered. In other words even if age did not make the difference as Mr Bourne put it in submission it made a significant difference. It is possible or even likely that even without the factors or considerations with regard to

age the Claimants would still have been dismissed and that is a matter to be considered in remedy rather than liability but we find and conclude overall that in this case the Claimants age was a material and significant factor they were not to be retained within the company. As such the claim of age discrimination succeeds also. The holiday pay claims were dismissed upon withdrawal at the outset and I should say for the avoidance of doubt the claim succeeds against all three Respondents in respect of discrimination and against the First Respondent only in respect of unfair dismissal.

Employment Judge Russell

21 November 2017