



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs S Guidi

v

Capll Limited

Heard at: Watford

On: 10-13 December 2018

Before: Employment Judge Hyams

Members: Mrs G Binks
Mrs J McGregor

Appearances:

For the Claimant: Mr S Roberts, Representative

For the Respondents: Mr D Hulse, of Counsel

UNANIMOUS JUDGMENT

The claimant was not dismissed unfairly.

The claimant was not treated less favourably because of her pregnancy or because she intended to take maternity leave.

REASONS

Introduction; the claimant's claims

- 1 The claimant was dismissed by the respondent on 6 September 2017. The reason given by the respondent for her dismissal was that she was redundant. She claims that her dismissal was both unfair and tainted by discrimination because of her pregnancy. The claim was refined and the issues were defined

at a preliminary hearing before Employment Judge Henry on 14 May 2018. We state the issues as determined at that hearing below, after stating our findings of fact.

- 2 We heard oral evidence from the claimant and, on her behalf, from Ms Debra Yardley, who was the respondent's Director of Client Services at the time of the claimant's dismissal, and Mrs Keelin Sheils, who was employed as a Senior Account Manager at that time. On behalf of the respondent we heard oral evidence from Mr Andrew Paul, Managing Director, Mr Jeremy Casey, Mr Matt Green, and Mr David Yazdi. We refer further below to the roles of the latter three witnesses.
- 3 We had before us a bundle consisting of two lever arch files. We read those documents in the bundle to which we were referred. We were given several recordings of telephone conversations, and we listened to those recordings.
- 4 Having heard that oral evidence and recordings and read those documents, we made the following findings of fact.

The facts

- 5 At the time of the claimant's dismissal, she was employed by the respondent in the office which was referred to in evidence as the respondent's London office, but which was in fact situated in Borehamwood. She did not have a formal job description, but it was agreed by the parties that she was employed as an Operations Manager.
- 6 The factual background to the claim is not straightforward, and it is necessary to state it in some detail as it is relevant to the manner in which the claimant's dismissal came about.
- 7 The claimant's continuous employment as far the respondent was concerned started on 8 May 2006. At that time the claimant started to be employed by a company called Fundraising Initiatives Limited ("FIL").
- 8 The respondent was established by Mr Paul in 2009. Before then, he was employed in a sales capacity by Npower for five years. The respondent was established to provide what were in effect sales services to (ultimately) charities. Those services of a sales nature consisted in the procuring of donations (including via regular direct debits) to the charities through individual "fund-raisers" engaging with members of the public at venues such as Crufts and county shows. Mr Green started to work for the respondent, in a self-employed capacity, working on a commission basis only and developing (as we understood it) the respondent's sales by developing the respondent's sales staff (called by the respondent "fund raisers") and their techniques. Potential donors have in recent years been encouraged to make donations by being given the chance of winning a prize in a lottery as a result of making their donations. Mr

Green's role was stated in the contract to which we refer further below (of which there was a copy at page 39, i.e. at page 39 of the hearing bundle), as being engaged to provide the services of "Field Support Manager". In reality, he was a sales manager, managing the fund-raisers, who were in effect salespeople.

- 9 FIL was established at some point before 1999. It was at that time called "Caring Together". It was established by Ms Cathy Sullivan, and it subsequently changed its name to "Fundraising Initiatives Limited". Mr Casey worked with that company from 1999 to 2004. He then spent about six years working on his "own ventures outside of charity fundraising", as he put it in paragraph 2 of his witness statement. In 2010, he was engaged by Ms Sullivan to work (as he put it in the same paragraph) "as a consultant alongside FIL to assist them in many areas of their business".
- 10 FIL entered into contracts with charities, such as Battersea Dogs Home, the Royal Society for the Prevention of Cruelty to Animals, and Alzheimer's Society. Under those contracts, FIL would (as far as we could see: we were not given direct evidence on this) agree to procure donations by using third party organisations such as the respondent to procure, via fund-raisers, donations from members of the public. Before 2015, FIL had contracts with more than 10 charities in that regard. Those contracts were fulfilled by FIL engaging with a number of contractors such as the respondent to procure the donations. Thus, FIL sat in the middle between charities and fund-raising companies such as the respondent. In fact, both FIL and the fund-raising companies such as the respondent sat between the charities and the donors. However, the functions carried out by FIL and the respondent before 2015 were different.
- 11 In early 2015, there was what Mr Paul described as a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 ("TUPE"), of the claimant's contract of employment from FIL to Global Customer Acquisitions Limited ("GCA"). At the same time, he said, the other employees of FIL and the employees of the respondent transferred to GCA, and there was, he said, a transfer of their contracts of employment to GCA under TUPE. However, the operations of both FIL and the respondent continued as going concerns, and as a result, they continued at that time to be run separately and to receive (in return for payment) the services of the employees of (nominally) GCA. The reason for the purported transfer of the contracts of employment of FIL and the respondent to GCA was that it was intended that there would be a merger of the operations of FIL and the respondent, and that GCA would be the result of that merger: it was the intended merger vehicle. In paragraph 10 of his witness statement, Mr Paul said that the reason for the creation of GCA was that during 2014, Ms Sullivan had said that FIL's financial position was not sustainable, and that he (Mr Paul) did not want to endanger the respondent's existence by taking on all of the debts of FIL. However, TUPE operates automatically, and the evidence before us (in paragraphs 8-14 of Mr Paul's witness statement) suggested that there was no transfer of the businesses of FIL and the respondent to GCA. We put that to the

parties after they had made their submissions and they agreed that we should work on the basis that there had been only one transfer of the contract of employment of the claimant under TUPE, and that that was from FIL to the respondent. That transfer took place on 2 November 2015, when there was a transfer of it to the respondent in the circumstances to which we now turn.

- 12 The financial position of FIL deteriorated seriously during 2015. That led to FIL going into administration in October 2015. The situation was helpfully and succinctly described by Mr Paul in paragraphs 12-16 of his witness statement, which we accepted as being accurate:

“12. By August 2015, I noticed that Capll was struggling in obtaining payment from FIL. I spoke with Cathy and asked about cash flow issues to which she categorically confirmed there were none. However, unbeknown to me, FIL was working with administrators. In or around September 2015 we had another meeting and it became clear that there would be a problem financially. At this time we even considered splitting and going our separate ways but decided against this due to the impact it may have in the market place.

13. In early October 2015 we were invited by the administrators to discuss a pre-pack deal. Capll was still struggling to be paid due to FIL being on a factoring facility. Deborah was involved in all of these discussions. By the end of October 2015, FIL went into administration and we believed we had a pre-pack deal. However, on Friday 31 October 2015 the administrators declined a deal. Essentially, Capll, FIL and GCA were all out of business at this moment in time.

TUPE Transfer to Capll

14. The only option we all had was to use Capll as the business going forward. GCA had Cathy on the board, as did FIL, and therefore neither of these companies could command any credibility in the market.

15. Deborah put a call in to Battersea Dogs Home charity who were the biggest campaign being provided at the time. She told them that FIL had gone under and owed them circa £250,000. We agreed with Battersea that whatever they lost with FIL, Capll would honour if they transferred their budget over. We received a letter of intent within an hour and carried on business as usual on the Monday.

16. As GCA was in administration we quickly TUPE transferred all staff from GCA to Capll in the first 2 weeks of November 2015. The FIL team now worked for Capll and remained in London albeit working from different premises which were sourced approximately 1 or 2 weeks after the transfer.”

13 Mr Paul continued:

“Legal advice received at the time of the transfer to Capll was that TUPE meant we had to wait 1 year before making any changes to staffing structures and amalgamating the 2 businesses.”

14 We could see that that legal advice failed to take account of the possibility of the respondent fairly dismissing staff immediately after the transfer for an economic, technical or organisational reason entailing changes in the workforce, and concluded that it was at least possible (if not probable) that the reason why Mr Paul decided to leave the London office staff (including the claimant and Ms Yardley) in place was that in order to survive and then prosper, the respondent needed to persuade charities that had previously been under contracts with FIL and lost money when FIL went into administration that the respondent was a viable replacement provider of the services that FIL had provided. In addition, Mr Paul and Mr Green were not familiar with the ways in which the staff of the London office worked, and they (Mr Paul and Mr Green) did not have relationships with the charities (whom FIL and the respondent called “clients”): rather, the London office staff (including the claimant, Ms Yardley and Mrs Sheils) did.

15 Mr Paul did not say precisely that in his witness statement, but we deduced it from all of the evidence before us. Mr Paul’s witness statement was otherwise accurate in so far as it described the way in which the operations of the respondent and the former operations of FIL continued after 2 November 2015. In that regard, he said this:

‘18. In any event, in the most part we had to continue exactly as things were before because Capll had no database in place of its own to manage the data flow from donors to invoicing. It has actually taken from November 2015 until very recently to get such a system in place.

19. What this meant was that FIL (hereafter referred to as “the London Team”) carried on as they were and Capll (hereafter referred to as “the Burnley Team”) did as they did. Operationally I did not have any in depth knowledge of what the London Team did. I relied on Deborah to keep me informed; she ran that team and I left her to it.

20. The London Team were concerned with clients and their priority was to secure more clients other than Battersea, which over time they did. The Burnley Team carried on delivering the operational requirements out in the field. Over the course of the next few months the business grew and I was really pleased with the work that Deborah and the London Team had put in.

21. This being said, both Deborah and I knew we were overstaffed in

certain areas and sales volumes overall were dropping within the industry as previously identified. Therefore, we started to look at how we could cut costs.'

16 While we were unable to ascertain whether paragraph 18 was accurate (since we did not hear further evidence on what was said in that paragraph), we accepted what Mr Paul said in paragraphs 19-21 of his witness statement.

17 The claimant's role was described by her in summary in paragraph 2 of her witness statement, in this way:

"As Operations Manager my role was to work across all functions of the business. I was based in the London office which we called the Client Services team and this consisted of two teams, a client facing team and an operational team. I oversaw the work of the operational team. The client facing team reported directly to Debra Yardley, the Client Services Director. However, in the event Debra was away this team would report into me."

18 We had difficulty discerning precisely what the claimant's role was. We took into account all of the evidence which we heard and read, including the email chain at pages 89-91 and the intended structure chart at page 92. We also took into account the claimant's email to Mr Yazdi (created in the circumstances we describe below) at pages 233-234, to which Mr Casey was taken in cross-examination and which he had not before then seen, and Mr Casey's clear evidence in response to what was said on those pages. What he said was in many respects that the claimant was claiming to have done things which were in fact done by others, including (by way of example) "Developing the Virtual Reality programme", which he was emphatic was done by someone else entirely.

19 Mr Green's role was, we found, predominantly field-based. Towards the end of 2016, he spent up to two days per week at the London office. He described the reasons for that in paragraph 25 of his witness statement, which (reading in the apparently missing words in the final sentence, as shown below) we accepted:

"As things progressed towards the end of 2016, I did become involved in discussions relating to the new structures [pg. 65]. Andrew had intimated that I was to become more involved with client services in London. There was a lack of knowledge as to what they did and so I was tasked with bridging the divide somewhat, which included sourcing job specifications [pg. 85-86]. Jeremy Casey had been brought in to work with the sales teams more and therefore I did not need to spend as much time with the sales teams. This created an opportunity for me to find out more about [what the] London team did on a day to day basis."

20 On 9 November 2016, Ms Yardley (in the email and its enclosures at pages 54-56) referred to Mr Green as being "Head of Field Operations". In oral evidence,

the claimant said that she later herself proposed the designation of Mr Green as Head of Field Operations, in order to differentiate her role as Head of Client Operations. (Those titles were used in the proposed structure plan at page 92, sent by Mr Green on 16 December 2016, or, as shown by the email at page 91, sent by him on 20 December 2016 to, among others, the claimant.) In fact, as noted above, Mr Green's contract for services dated 1 April 2014 at page 39 referred to him as "Field Support Manager."

- 21 On 15 November 2016, the claimant told Ms Yardley that she was pregnant. On 1 December 2016 Mr Green and the claimant had the text exchange at page 632, which was in the following terms (omitting the emojis):

Mr Green: "Morning how are you? Any great news to share"

Claimant: "I don't know what you mean?! There must be something in the water, first Emily and now me!!"

Mr Green: "I know..... I've decided I'm only employing Men in the new restructure lol
Congratulations"

Claimant: "or women over 50! Thanks!"

- 22 In paragraph 8 of her witness statement, the claimant said this:

"I thought announcing my pregnancy early on would show I was trustworthy and loyal to the business. When I informed Debra Yardley she was happy for me and asked for my permission to inform Andrew Paul which I agreed to. After Debra notified Andrew she admitted he said it was an inconvenience and messed up the plans as he wanted me to cover Matt's work while he was in America. This made me feel nervous for my job and that I would be no longer wanted in the business."

- 23 Ms Yardley did not refer to this in her witness statement. Mr Paul's evidence about the issue of pregnancy and the impact of the claimant's pregnancy on what happened was in paragraphs 53 and 54 of his witness statement. In those paragraphs he firmly denied that he had said to Ms Yardley that the claimant's pregnancy was an inconvenience. Ms Yardley was cross-examined on this issue, and was emphatic that Mr Paul said that the claimant's pregnancy was an inconvenience.

- 24 Mr Green was during 2016 considering going to work in America on a joint venture of his and Mr Paul's. In paragraph 7 of her witness statement, the claimant said that she was "due to cover Matt's work in this period". That was put to Mr Paul and he denied it, firmly. We accepted Mr Paul's evidence in that regard: Mr Paul had no plan for the claimant to take over Mr Green's work if Mr Green did in fact go to America.

- 25 We pause to mention here (out of chronological order) that Mrs Sheils was pregnant at the time of the claimant's redundancy, and that it was agreed by the parties that Mr Green had told Mrs Sheils that he thought that Mr Paul was keen to persuade her nevertheless to remain in the employment of the respondent, as it suited the respondent that she stayed.
- 26 We concluded, having considered all of the evidence to which we refer above, that Mr Paul did indeed say that the claimant's absence on maternity leave would be inconvenient.
- 27 Mr Casey's unchallenged oral evidence was that FIL had had about 12 charity clients before 2 November 2015. After then, FIL (as part of the respondent's operations) had just one. That was Battersea Dogs Home, and it remained a client only because the respondent underwrote the £250,000 liability of FIL to that charity, as described by Mr Paul in paragraph 15 of his witness statement. By the time of the claimant's dismissal, the respondent had more charity clients: four or five, said Mr Casey.
- 28 That meant that there was less work for the claimant and her colleagues to do in the months following 2 November 2015. On 2 November 2015, the Borehamwood (i.e. London) office had eight members of staff including Ms Yardley. Towards the end of 2016, the respondent, with Ms Yardley's co-operation, made two of those members of staff redundant. That diminished the financial pressure on the respondent arising from the cost of the London office staff, but in the period from January to March 2017, the income of the respondent diminished. Mr Paul's oral evidence, which we accepted, was that salaries were a big part of the respondent's total costs, and the respondent had to reduce costs very quickly.
- 29 That led to a discussion by Mr Paul with Mr Casey and Ms Yardley on 27 March 2017 about the situation. Mr Paul described the situation in this way in paragraphs 34-37 of his witness statement.

"London Office Closure

34. On 27 March 2017 I held a meeting in Burnley with Jeremy and Deborah to go through the last phase cost cutting. For me this was predominantly about looking at Deborah's team as she had made very limited adjustments. I asked for both Deborah and Jeremy to come with a plan. Unfortunately, Deborah did not have one.
35. I therefore suggested a proposed structure to Deborah which would include her role, a Client Account Manager and a Compliance Manager, all to be based in London but working from home. At the end of this meeting Deborah questioned her position and I inferred that she very much wanted me to be the personal [sic] responsible for making

any decision which impacted on the London Team.

36. I took legal advice and was advised to make all the London Team redundant as we were proposing an entire office closure. Staff at risk of redundancy should then be allowed to apply for any newly created roles. The Claimant, who formed part of the London Team had now become affected.
37. I rang Deborah and explained what was being proposed. She questioned what would happen to her and I said there would be a role there for her. Deborah took the weekend to think about things but confirmed she was going to take redundancy. I agreed with Deborah that an announcement would be made on 6 April 2017 informing the London Team about the decision. No prior communications were to be provided before then.”
- 30 We accepted that those paragraphs were accurate, except that Ms Yardley did, in her email of 7 March 2017 at page 106, make a number of suggestions for cost savings. Nevertheless, she wrote under the heading “Staff Cost London Team”:
- “I really do feel the London team is as slim as it can be. Given we are going to have to go through accreditation, have swallowed up Rob and Shelley’s role by absorbing workload into the Account Managers and Angela’s role and I have 2 senior members of the team going on Mat leave I am not sure the team can lose an experienced head.”
- 31 During March 2017, the respondent made 4 members of the Burnley office staff redundant, as communicated by Mr Paul in his email to Ms Yardley of 22 March 2017 at page 114.
- 32 Mr Paul telephoned Ms Yardley during the period before the weekend of 1-2 April 2017, telling her that he was planning to close the London office. In paragraph 9 of her witness statement, the claimant said that she was on Friday 31 March 2017 told by Ms Yardley by telephone that she (Ms Yardley) had received a telephone call from Mr Paul who had told her that he was “closing down the London office and putting all staff members in London at risk of redundancy.” We accepted that evidence of the claimant. Ms Yardley told Mr Paul at the end of that weekend that she would not remain in the respondent’s business. During that week, the staff of the London office guessed, and were able by asking Ms Yardley some pointed questions to which she was forced to give some guarded answers, to become sure, that more redundancies were being considered.
- 33 That fact was first communicated openly on behalf of the respondent when Mr Green had a meeting with the staff of the London office on 6 April 2017. It was a meeting which was plainly intended to warn the staff. The manner in which Mr

Green communicated the information was experienced by the London office staff to be provocative, in that they understood what he was saying to be undermining of their work and achievements. He experienced them to have been hostile to him.

- 34 It was the claimant's evidence that in the following week she noticed that she was not receiving telephone calls from her usual contacts and the number of emails that she was receiving reduced. In addition, what she referred to in her email of 5 April 2017 at page 388 as "our weekly Operations Conference call" did not occur. We noted that at page 347 there was an email dated 6 February 2017 in which Mr Green had started the weekly conference calls as a way to avoid the need to meet up in person with the operations team as frequently as was evidently then occurring. Mr Green referred to those conference calls in paragraph 28 of his witness statement. What he said there was this:

"During this period of change we started the operational conference calls the Claimant refers to in her claim to try and tie everything together. This involved personnel from the sales teams (Tina and Huddi), the Claimant from client services, Emma Girdlestone in terms of data and sales reports, Loretta regarding management of the Burnley office and me operationally. Angela who worked with the Claimant in London would join to take notes. I cannot recall exactly how these calls were instigated. However, I do remember that they ended due to the significant changes which were occurring within the business [pg. 119A]. It was nobody's decision to end them as such; they just phased out as the changes unfolded and people were too busy with other things."

- 35 We noted that there were emails in the bundle at page 390 onwards which showed that those conference calls were problematic for the intended attendees in early March 2017. We noted too what Ms Tina Driver, the northern sales team manager, said in the recording of her conversation with Mr Paul of which we were given a copy, which was that the conference calls stopped about 6 weeks before he spoke to her. Given those factors, and in any event having seen and heard Mr Green give evidence, we accepted what he said in paragraph 28 of his witness statement. However, we noted that the claimant was written about in the email from Ms Loretta Spencer of 3 February 2017 at page 347 to have been present at the "Op's Meeting" of the day before, and that she was one of the direct recipients of the emails on that page.

- 36 Mr Green also said this in paragraph 33 of his witness statement:

"Following my announcement on 6 April 2017, members of the London team started asking me questions about things the Claimant would ordinarily have dealt with such as mystery shopping and client requests. It felt like her attitude had changed and she had decided to 'down tools'. I had experienced this myself when I met with the Claimant before the announcement and had spoken to her about general work queries."

- 37 Mr Green was asked in cross-examination about the change of attitude to which he had referred and he described a situation on 6 April 2017, before he made the announcement to which we refer above, of the claimant responding to him when he asked her for her input in regard to a mystery shopper's report, that he (Mr Green) should ask Mr Paul, as he (i.e. Mr Paul) made decisions, not her. That was in marked contrast to the manner in which the claimant had previously dealt with mystery shoppers. In addition, Mr Green and the claimant accepted that the relationship between them was, after 6 April 2017, less cordial than before. We therefore accepted what Mr Green said in paragraph 33 of his witness statement.
- 38 We can deal much more briefly with the subsequent events. The claimant had a consultation meeting with Mr Green on 20 April 2017. She asserted to him implicitly if not explicitly that she should be given an opportunity to do the work that he did instead of being made redundant. He responded that he was not an employee, he was a contractor. She also complained about being cut out of her work.
- 39 A second redundancy meeting was intended to take place a week later, on 27 April, but on the day before then, the claimant was informed that the intended consultation meeting was not going to take place because the respondent had taken on board her concerns (see the email at page 134B). The claimant was not happy about that and insisted on her next consultation meeting taking place, to which the respondent agreed. Mr Casey then chaired that meeting, and the claimant then complained in the email of 27 April 2017 at page 134A about that. Mr Paul then responded half an hour later (page 134C).
- 40 The claimant had an informal discussion with Ms Spencer on 3 May 2017 about her concerns, and then, on 7 May 2017, the claimant raised a formal grievance (pages 146-146A). The grievance included an assertion that her and Mr Green's roles were "very similar".
- 41 That grievance was initially investigated by Mr Paul, who at the same time paused the redundancy consultation process. In the course of carrying out his investigation, Mr Paul spoke to Ms Driver and Mr Huddi Mhernaz (who was the respondent's southern regional sales manager) to find out to what extent they dealt with the claimant and to what extent they dealt with Mr Green. Those conversations were recorded, and we listened to them.
- 42 Mr Paul concluded that what the claimant did was very different from the work that Mr Green did. For that and other reasons, he rejected the claimant's grievance. The claimant appealed against that rejection, and Mr Paul engaged a third party contractor, Mr Yazdi, to carry out an investigation. Mr Yazdi is a recently-qualified solicitor who had, before becoming so qualified, worked in human resources ("HR"), starting in 2007 and completing CIPD ("Chartered Institute of Personnel Development") Level 7 in 2012. He became a chartered

member of the CIPD the following year and in 2014 he started his own HR business.

- 43 Mr Yazdi's investigation was thorough. He had a telephone meeting with the claimant in the course of it (the claimant being happy only to speak on the telephone and not meet up with him, as they lived a long way from each other), and he received from her the email at pages 233-234 to which we refer above. She also sent him many emails to support her grievance (at pages 169-234), including emails of which she was a recipient as one of persons to whom they were copied.
- 44 On 26 May 2017, the claimant's pay was not put in her bank account, despite that being the respondent's pay day. That error was remedied immediately when the claimant drew it to the respondent's attention. That matter was added to the claimant's initial grievances, and Mr Yazdi investigated that.
- 45 Mr Yazdi's conclusions were reflected in the outcome letter that he wrote, which was dated 14 June 2017, at pages 264-267. He rejected all of the claimant's grievances.
- 46 On 16 June 2017, Mr Casey held a final redundancy consultation meeting with the claimant. On 20 June 2017, Mr Paul wrote to the claimant, informing her that she was to be dismissed for redundancy with effect on 6 September 2017. She was given notice but was not required to work her notice period.
- 47 On 28 July 2017, the claimant again did not receive her pay as expected, and, again, that was remedied on the same day.

The issues

- 48 The issues were stated in the record of the preliminary (case management) hearing of 14 May 2017, in the following way:

"8. Unfair dismissal

- 8.1 What was the reason for the dismissal? The respondent asserts that it was redundancy, which is a potentially fair reason for the purposes of section 98(2) of the Employment Rights Act 1996.
- 8.2 It is not in dispute that there was a redundancy situation in law.
- 8.3 Was there a fair selection process?
- 8.4 Was there reasonable consultation?
- 8.5 Was the pool of selection reasonable?

- 8.6 Was there a reasonable search for alternative employment?
- 8.7 Was the claimant offered reasonable alternative employment?
- 8.8 In all the circumstances of the case, was dismissal reasonable?

9. Direct discrimination because of pregnancy/maternity

- 9.1 Has the respondent subjected the claimant to the following treatment falling within s.39 of the Equality Act, namely:
 - 9.1.1 Not including the claimant's colleague, Mr Green, Field Operations Manager, within the pool for selection?
 - 9.1.2 The displeasure of Mr Paul in respect of the claimant's pregnancy, underlying and predetermining the claimant's selection for redundancy?
- 9.2 If so, has the claimant proved primary facts from which the tribunal could properly and fairly conclude that the treatment was because of the protected characteristic of pregnancy and/or maternity?
- 9.3 If so, what is the respondent's explanation? Does it prove a nondiscriminatory reason for any proven treatment?

10. Remedies

- 10.1 If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.
- 10.2 There may fall to be considered compensation on a finding of unfair dismissal, made up of a basic award and a compensatory award. It is noted that the claimant received a statutory redundancy payment.
- 10.3 There may fall to be considered in respect of any proven unlawful discrimination, a declaration in respect thereof, recommendations and/or compensation, injury to feelings, and/or the award of interest."

49 We were referred to a number of authorities, one of which (*Morgan v Welsh Rugby Union* [2011] IRLR 376) we drew to the parties' attention. Our conclusions on the above issues were these.

Our conclusions

Unfair dismissal

- 50 The reason for the claimant's dismissal was redundancy. The selection process was one which it was within the range of reasonable responses of a reasonable employer to follow. In our view it was in the circumstances well within the range of reasonable responses of a reasonable employer to decline to put Mr Green in a pool of two (the other one being the claimant) from which to select one to be dismissed for redundancy. This is because Mr Green was self-employed, working for sales commission only, and doing what was in our view a very different job from that of the claimant. We regarded Mr Yazdi's conclusion to that effect, stated at pages 265-266, as accurate. Thus, the pool of selection was reasonable.
- 51 The consultation process was in our view very much within the range of reasonable responses of a reasonable employer.
- 52 The claimant was offered the opportunity to apply for both of the remaining roles to be carried out by the former London office staff, including the one role that she could reasonably have been thought to be able to fulfil, namely that of Account Manager. She declined to do so. She did so because she thought that the respondent wanted Mrs Sheils to be the Account Manager and because the respondent had (she thought) cut her out of its operations in April 2017. Partly because we concluded that the respondent did not cut the claimant out of its operations in the manner that she asserted, but also in any event, in our view in the circumstances as we found them to be, the respondent made reasonable efforts to redeploy the claimant.
- 53 For all of the above reasons, in our view the claimant's dismissal was not unfair.

Pregnancy

- 54 In our view, not including Mr Green in the selection pool had nothing to with, i.e. it was in no way connected with, the claimant's pregnancy or the fact that she was intending to take maternity leave (to which we refer below for simplicity as simply the claimant's pregnancy). Even though we concluded that Mr Paul had said that the claimant's pregnancy was inconvenient, we came to the clear conclusion, having heard all of the evidence, including his, that none of his decisions were affected negatively by the claimant's pregnancy, i.e. he did not treat her less favourably because of her pregnancy. In this regard, we took into account the fact that Mrs Sheils was pregnant but (and we now record that we concluded this) Mr Paul wanted her to remain in the respondent's employment, and we rejected the claimant's supposition that that was irrelevant because it suited Mr Paul to have Mrs Sheils remain in the respondent's employment at that time.

- 55 For the avoidance of doubt, we did not think that the fact that Mr Paul had said that the claimant's pregnancy was an inconvenience was, on its own and in the other circumstances, sufficient to cause the burden of proof to shift, but if it had done then the respondent would have satisfied us on the balance of probabilities that it did not discriminate against the claimant because of her pregnancy.
- 56 Thus, we concluded that the claimant's redundancy was in no way predetermined by reason of her pregnancy and she was not otherwise treated less favourably because of her pregnancy.

Employment Judge Hyams

Date: ...11.02.19.....

Sent to the parties on:13.02.19.....

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For the Tribunal Office