EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102389/17

Held at Glasgow on 18 and 19 December 2017

Employment Judge: W A Meiklejohn
Members: Mr G Noble
Mr P Kelman

Mrs Lorraine Jackson — **Claimant**
Represented by:
Mr R Bradley - Advocate

Advance Building Contracts Limited — **Respondents**
Represented by:
Mr P Santoni – Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows:–

(a) the Claimant was dismissed by the Respondents by reason of redundancy;

(b) that dismissal was unfair;

(c) the Respondents are ordered to pay to the Claimant the sum of FIVE HUNDRED POUNDS (£500.00) by way of compensatory award;

(d) the Claimant's claim under section 18 of the Equality Act 2010 fails and is dismissed; and

(e) regulation 10 of the Maternity & Parental Leave etc Regulations 1999 does not apply in this case.

REASONS

1. The Claimant pursued the following claims:-

- Was her dismissal automatically unfair because it was by reason of her pregnancy having regard to the terms of Section 99 of the Employment Rights Act 1996 ("ERA") and Regulation 20 of the Maternity and Parental Leave etc Regulations 1999 (the "Regulations")?

- In the alternative, was her dismissal unfair in terms of section 98 ERA?

- Did her dismissal constitute unfavourable treatment in terms of Section 18 of the Equality Act 2010 ("EqA")?

- Had the Respondents acted in breach of regulation 10 of the Regulations by failing to offer the Claimant a suitable available vacancy at an associated employer, namely Advance Construction (Scotland) Limited ("ACS") in circumstances where, but for her summary unfair dismissal, such vacancy would have occurred after the commencement of her ordinary maternity leave?

2. The Respondents admitted dismissal but otherwise resisted these claims. They argued that the Regulations had not been engaged because the Respondents had dismissed the Claimant before the commencement of her ordinary maternity leave.

3. For the Respondents we heard evidence from Mr G Talbot, Managing Director, and Ms G Biddle who undertook purchasing/administration duties. We also heard evidence from the Claimant. We had a joint bundle of productions to which we refer by page number.

Findings in Fact

4. The Claimant held a BSc degree in civil engineering from the University of Glasgow. Between 2007 and 2010 she worked as a site engineer for Land Engineering. Having been made redundant by Site Engineering in November 2010, the Claimant undertook agency work as a site engineer between May 2011 and February 2013. This included a period with Donaghy Ltd which involved setting out groundworks at a new school in Ayrshire. She commenced employment with the Respondents as a trainee estimator on 13 April 2015.

5. Between her periods of work as a site engineer, the Claimant worked outwith civil engineering. From February 2013 until she commenced employment with the Respondents, the Claimant worked as a kitchen designer for Digital Kitchens.

6. The Respondents were incorporated on 18 June 2014. Initially Mr Talbot was the sole director and shareholder. On 11 September 2014, Mr S Shields and Mr T Dignall were appointed as directors. Shares were allotted to Mr Shields resulting in his holding 60% of the Respondents' issued share capital and Mr Talbot holding the remaining 40%. That remained the position until 1 July 2017 when, according to Companies House records (page 60A-D) the shares in the Respondents held by Mr Shields and Mr Talbot were transferred to ACS so that the Respondents became a wholly owned subsidiary of ACS from that date.

7. Mr Shields and Mr Dignall were also directors of ACS and its parent company Advance Construction Group Limited ("ACG"). ACS was a wholly owned

subsidiary of ACG. The shares in ACG were held to the extent of 50% by Mr Shields and the remaining 50% by his wife Mrs D Shields.

8. ACG's promotional material (pages 69-72) gave the impression that the Respondents, along with ACS, Advance Flooring Solutions Limited and Structureseal Services Limited, formed part of the same group of companies. In terms of share ownership, that was the position as from 1 July 2017 but not prior to that date in the case of the Respondents.

9. When the Claimant's employment started in April 2015 the Respondents were based at Broad Street, Glasgow. At that time the Respondents' full time office based staff comprised Mr Talbot, Mr W Glavin (the Claimant's line manager), Ms Biddle, Ms F Boyle (financial controller), Mr A Mullan (trainee estimator), a draughtsman and the Claimant.

10. In June 2015 the Respondents relocated to the premises in Bellshill which we understood to be the ACS main offices. Page 68 was a drawing of these premises, prepared by the Claimant, showing the areas on the ground floor occupied by the Respondents in June 2015. Page 67 was a drawing of these premises, prepared by the Claimant, showing the areas on the upper floor occupied by the Respondents in June 2017 (the Respondents having moved within the building in or around December 2015). Parts of the premises such as toilets and kitchen areas were shared by ACS and the Respondents. The Respondents were invoiced monthly by ACS for the use of their part of the Bellshill premises (pages 146-150).

11. The Respondents operated as commercial roofing and cladding contractors. This was the area of business in which Mr Talbot had been involved since coming to the UK from South Africa in 1996. Mr Talbot had established a number of companies operating in this field, none of which appeared to have prospered. Through involvement in projects in which ACS were engaged Mr Talbot had met Mr Shields and this had led to the establishment of the Respondents.

12. The nature of the Claimant's work was to review tender documents for projects which the Respondents might want to pursue, obtain quotes from suppliers for roofing and cladding materials and put these together with plant and labour costs to enable the Respondents to submit a price for the relevant works. Tender opportunities were shared by ACS with the Respondents and on some projects the Respondents would act as a subcontractor to ACS.

13. In September 2015 the Claimant started a day release course in quantity surveying at Glasgow Caledonian University for which the Respondents paid the tuition fees. By the time her employment ended in June 2017 the Claimant had completed this course to HND level. She hoped to resume her studies after her maternity leave to complete her degree.

14. On 2 October 2015 the Claimant was issued with an offer of employment for the position of Estimator which she accepted on 15 October 2015 (pages 73-74). This incorporated the terms of the Respondents' Employee Handbook (pages 75-123). Paragraph 21 of the Employee Handbook covered Redundancy in the following terms:-

> "It is the policy of the Company by careful forward planning to ensure as far as possible security of employment for its employees. However, it is recognised that there may be changes in competitive conditions, organisational requirements and technological developments which may affect staffing needs. It is the agreed aim of the Board of Directors to maintain and enhance the efficiency and profitability of the Company in order to safeguard the current and future employment of the Company's employees. Where compulsory redundancy is inevitable the Company will handle the redundancy in the most fair, consistent and sympathetic manner possible and minimise as far as possible any hardship that may be suffered by the employees concerned. The Company will select individuals from the pool of employees affected for redundancy on the basis of performance, skills and the needs and

requirements of the business. The Company will consult with the employees concerned and consider alternative positions which may be available within the Company."

15. The Respondents' business incurred substantial losses. The abbreviated unaudited accounts for the period from 1 July 2015 to 30 September 2016 (pages 41-47) disclosed a loss of £2,286,549 and creditors of £5,388,806. The notes to these accounts stated that the Respondents had continued to trade with the support of their major creditor, ACS, and as such the accounts had been prepared on a going concern basis.

16. The Claimant became pregnant in October 2016. She told the Respondents of her pregnancy in January 2017. Ms Boyle wrote to the Claimant on 5 April 2017 (pages 124-125) recording that her expected week of childbirth was the week commencing 19 July 2017 and that the Claimant had indicated that she wanted 23 June 2017 to be her last working day. Allowing for holiday entitlement this meant that Claimant's period of maternity leave would commence on 19 July 2017.

17. In early 2017 the Respondents decided to impose a cap of £500,000 on new projects. This reflected the fact that there had been problems with larger contracts including inaccurate pricing, whereas smaller projects carried less risk. There were regular staff meetings to review current projects. Mr Talbot provided input into these including reference to the financial support of the Respondents by ACS and his hope that things would improve.

18. From late 2016 onwards there was a pattern of employees leaving the Respondents and not being replaced. This was reflected in page 144 which was a list of the Respondents' office and site staff. Amongst those described as "left – did not replace" were Mr Bauld, Senior Contracts Manager, Mr Glavin and Ms Boyle. There were examples of employees leaving the Respondents and taking up employment with ACS – Mr Mullan, Ms A Concalves and Ms E Hutchison (although her name did not appear on said

list). The departure of Ms Boyle in early May 2017 resulted in her financial controller duties being taken over by ACS staff. The facilities management side of the Respondents' business was closed resulting in the departure on 26 May 2017 of Mr B Campbell and Mr R Campbell.

19. On 26 May 2017 there was a meeting between Mr Talbot and Mr Shields. The outcome was a decision that Ms Biddle, the Claimant and Ms R McGurn, who also worked in the Respondents' office, should be made redundant. As well as being an employee of the Respondents, Ms Biddle was Mr Talbot's partner and he told her of this decision on 26 May 2017. 29 May 2017 was a public holiday and the Claimant was unwell and unable to attend work on 30 and 31 May 2017. She was due to return on 1 June 2017 which was her birthday. On 31 May 2017 Ms Biddle spoke by telephone with the Claimant and told her that she and Ms McGurn were to be made redundant.

20. When the Claimant reported for work on 1 June 2017 Mr Talbot asked her to meet with him at around 8.45am. Their meeting lasted some 10/15 minutes. The Claimant made a note immediately after the meeting (page 127) in these terms:-

> "George had meeting on Friday with Seamus, GT was told that since Frances had left and ACS accounts had taken over her duties it was clear that the same could be done in other departments to reduce outgoings. Buying, Estimating and Admin would all be taken on by ACS and Gaynor, myself and Robyn would be let go.
>
> I would get a months wage and with immediate effect could go.
>
> GT said that the plan was to tie up current project to completion and get payments, then assess the overall profit/loss and decide from there if they should build it up again slowly.

> I asked if there was anything he wanted done before I left, he just asked that I file away and tidy desk/drawers and discuss with him any outstanding issues."

21. Mr Talbot wrote to the Claimant on 1 June 2017 confirming the outcome of their meeting (page 128). His letter referred to the need to restructure and to reduce the number of estimators by one and advised the Claimant:-

> "After much consideration and seeking alternate solutions to redundancy, it is with regret that I have to confirm that we have made the difficult decision that your position will be made redundant. Please be assured that this is in no way a reflection of the quality of your work."

Mr Talbot's letter stated that the Claimant's employment "shall end" on 1 June 2017 and that she would be paid four weeks' salary in lieu of notice. This was duly paid. The Claimant was also paid a statutory redundancy payment and her statutory maternity pay (in a lump sum). The Claimant was not offered a right of appeal against her dismissal.

22. On 4 July 2017 ACS placed an advertisement for "Experienced Civils Estimators". The advertisement stated "Knowledge of Groundworks essential". The Claimant became aware of this advertisement when a friend contacted her having seen it. The Claimant's evidence was that she believed she could have performed the role of an experienced civils estimator and that she had not been offered this because she was pregnant. However in answer to questions from the Tribunal she said she "was not experienced in civils engineering" but that she could "turn my hand to it". She had "more than a basic understanding" and could have developed her career but would not "hit the ground running".

23. The Claimant gave birth to her daughter on 23 July 2017. She had not worked nor received state benefit since her employment ended.

24. Following the Claimant's dismissal on 1 June 2017 Mr Talbot spent little time on estimating work. He found that ACS were not able to deal with the Respondents' finance functions as expected and as a consequence Ms Biddle was brought back, but was to be leaving the Respondents' employment as at 22 December 2017. Thereafter Mr Talbot would be the Respondents' only remaining employee, and he was due to leave as at 31 January 2018. The Respondents effectively ceased trading as at that date.

Submissions

25. There was not sufficient time at the end of the evidence to hear oral submissions and according written submissions were provided by both parties. We do not summarise these as they are available in full within the case file, but we thank both representatives for the time and care taken in the preparation of these submissions.

Applicable Law

26. We have already referred at paragraph 1 above to the sections of the ERA and EqA and the provisions within the Regulations which are engaged, or potentially engaged, in this case:-

- In terms of Section 99 ERA and Regulation 20 of the Regulations the Respondents' dismissal of the Claimant would be automatically unfair if the reason or principal reason for that dismissal was the Claimant's pregnancy.

- In terms of section 98 ERA it was for the Respondents to show a potentially fair reason for dismissing the Claimant. Redundancy was such a reason in terms of Section 98(2)(c) ERA. If a potentially fair reason was shown, we had to decide if the Respondents had acted reasonably or unreasonably in treating it as a sufficient reason for

dismissing the Claimant, having regard to equity and the substantial merits of the case, in terms of Section 98(4) ERA.

- In terms of Section 18 EqA we had to decide if the Respondents, by dismissing the Claimant, had treated her unfavourably because of her pregnancy.

- Regulation 10 of the Regulations applies where, during an employee's ordinary or additional maternity leave, it is not practicable by reason of redundancy for her employer to continue to employ her under her existing contract of employment. Under Regulation 10(2), where there is a suitable alternative vacancy the employee is entitled to be offered, before the end of her employment under her existing contract, alternative employment with her employer or an associated employer under a new contract of employment which complies with Regulation 10(3) (which refers to the work being suitable and appropriate and the provisions of the new contract being not substantially less favourable).

Discussion and Disposal

27. It will be apparent to the parties that we have not referred in our Findings in Fact to some parts of the evidence presented to us. This includes details of where employees of the Respondents were located within the Bellshill premises and the circumstances in which certain of those employees came to become employees of ACS. While this evidence was helpful in providing context for the matters in dispute in this case, it was not in our view material to the issues we had to decide.

28. We found the Claimant to be a credible and reliable witness. She had a clear recollection of events and her recording of the matters discussed at her meeting with Mr Talbot on 1 June 2017 was persuasive as to the accuracy of her account of that meeting.

29. We found that Mr Talbot and Ms Biddle did their best to provide an accurate record of events but their evidence, particularly that of Mr Talbot, was not as clear as that of the Claimant. Mr Talbot frequently answered questions with an apology for his actions which indicated to us that he had been unfamiliar with the legal issues arising in relation to his dismissal of the Claimant and out of his depth in dealing with that dismissal.

30. Having said that, we were satisfied that the Respondents had shown that the reason or principal reason for the Claimant's dismissal was redundancy and was not related to her pregnancy. Accordingly they had shown a potentially fair reason for dismissal under section 98 ERA.

31. It was clear from the evidence that the Respondents' business was in a parlous financial state at the time of the Claimant's dismissal. It was being kept afloat only because of support from ACS. In these circumstances the Respondents had in effect no choice but to implement the outcome of the meeting between Mr Talbot and Mr Shields on 26 May 2017 by dismissing Ms Biddle, Ms McGurn and the Claimant.

32. The Respondents' requirement for these employees had ceased which brought matters within the definition of redundancy in section 139(1) ERA, subject always to the caveat that section 139(2) might apply if the business of associated employers of the Respondents fell to be treated as one with the Respondents. Mr Bradley referred us to **Vokes Ltd v Bear [1974] ICR 1** as authority for the proposition that it was not reasonable for the Respondents to dismiss the Claimant as redundant without first trying to find her alternative employment within the group of companies of which the Respondents were a member.

33. The outcome of the meeting between Mr Talbot and Mr Shields on 26 May 2017 was that the functions performed by Ms Biddle, Ms McGurn and the Claimant would no longer be performed by employees of the Respondents. That outcome applied irrespective of the fact that the Claimant was pregnant.

There was no evidence before us to indicate that alternative employment within ACG, by which we mean the companies referred to at paragraph 8 above, existed at the time of the Claimant's dismissal. Accordingly we decided that the claim under Section 99 ERA and regulation 20 of the Regulations had to fail.

34. We next considered whether the Respondents had acted reasonably or unreasonably in treating the Claimant's redundancy as a sufficient reason to dismiss her. We reminded ourselves of the redundancy clause within the Respondents Employee Handbook quoted at paragraph 14 above. The Respondents had failed comprehensively to deal with the Claimant's dismissal in a way that was compliant with their own redundancy clause which formed part of the Claimant's terms and conditions of employment.

35. We believed that there had been no pool of selection in this case – it would not have been practicable to place the Claimant and Mr Talbot in such a pool on the basis that they both undertook estimating. Mr Talbot was the Respondents' Managing Director and in no sense could his role and that of the Claimant be regarded as equivalent for the purposes of redundancy selection.

36. However, the Respondents made no attempt to consult with the Claimant before dismissing her as redundant. Individual consultation is an important element of the process by which an employee is made redundant. It gives the employee an opportunity to raise matters which the employer might not have considered. In the present case it would have given the Claimant the chance to remind the Respondents of the arrangements for her maternity leave (as detailed in paragraph 16 above), and to point out that the combined effect of her intended last working day and holiday entitlement meant that her employment might have continued until 19 July 2017. She might also have been able to argue that there was no financial benefit to the Respondents in making her redundant on 1 June 2017 in view of her arrangements for maternity leave.

37. In these circumstances we found that the Respondents had acted unreasonably in treating the Claimant's redundancy as a sufficient reason for dismissing her on 1 June 2017 and accordingly her dismissal by reason of redundancy was unfair.

38. We next considered whether the Claimant's dismissal on 1 June 2017 was unfavourable treatment in terms of Section 18 EqA. This claim could only succeed if the Claimant had been dismissed or otherwise treated unfavourably because of her pregnancy. The Claimant's case was that the unfavourable treatment had been her dismissal. However, we were satisfied that the outcome of the meeting between Mr Talbot and Mr Shields which resulted in the dismissals of Ms Biddle, Ms McGurn and the Claimant took no account of the Claimant's pregnancy. The Respondents' treatment of these employees had been by reason of the cessation (or at least expected cessation in the case of Ms Biddle) of their requirement for employees to carry out work of the particular kind undertaken by Ms Biddle, Ms McGurn and the Claimant. The intention was that this work would be performed within ACS. Their treatment of the Claimant was not because of her pregnancy. The other two employees dismissed at the same time as the Claimant were not pregnant and all three had been dismissed for the same reason (ie redundancy). The Claimant's claim under Section 18 EqA had to fail.

39. We finally considered the claim under Regulation 10 of the Regulations. There were two aspects to this. Firstly, we agreed with Mr Santoni that Regulation 10 only applies where the employee's redundancy occurs during the employee's ordinary or additional maternity leave. The Claimant had been dismissed as redundant on 1 June 2017. Her ordinary maternity leave was, per the Respondents' letter of 5 April 2017, due to commence on 19 July 2017. The Claimant's ordinary maternity leave had not commenced on 1 June 2017 and her redundancy did not therefore occur during her ordinary maternity leave.

40. The other aspect was whether regulation 10 would have been engaged had the Claimant not been unfairly dismissed on 1 June 2017. If so, should we find that the failure to comply with regulation 10 ought to be reflected in the award of compensation for unfair dismissal? We decided that the answer to this lay in our assessment of whether the vacancies for Experienced Civils Estimators advertised by ACS on 4 July 2017 constituted suitable alternative employment for the Claimant under regulation 10(2). We decided that these vacancies were not suitable for the Claimant. Our reason for so deciding is found in our recording of the Claimant's evidence at paragraph 22 above.

41. Turning to remedy, we noted that the Claimant had received a statutory redundancy payment from the Respondents and accordingly she was not entitled to a basic award having regard to the terms of Section 122(4)(b) ERA.

42. We then considered what the Claimant should be awarded by way of a compensatory award, and we reminded ourselves of the terms of Section 123 ERA. We took account particularly of the terms of Section 123(1) – "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

43. In this case the Claimant had been unfairly dismissed on 1 June 2017. Had she not been unfairly dismissed on that date her last working day before commencement of maternity leave would have been 23 June 2017. She had been paid in lieu of a notice period extending beyond that date and had also received holiday pay and so had suffered no loss before the anticipated start of her maternity leave. The Claimant had also suffered no loss during what would have been her period of maternity leave as she had received her statutory maternity pay and would not have received any other remuneration from the Respondents during this period.

44. In her schedule of loss (pages 142-143) the Claimant sought £500 for loss of statutory rights and 26 weeks' loss of future earnings from 23 April 2018. Unfortunately for the Claimant it was clear from the evidence that, had she not been dismissed on 1 June 2017, her employment with the Respondents would not, on the balance of probabilities, have continued beyond 22 December 2017 when Ms Biddle left or, at the very latest, 31 January 2018 when Mr Talbot left.

45. It followed that the only element for which the Claimant was entitled to be compensated for her unfair dismissal was the loss of statutory employment protection rights. We saw no reason to disagree with the figure of £500 proposed by the Claimant.

46. Mr Santoni submitted that any award to the Claimant of compensation for unfair dismissal should be reduced under reference to the case of **Polkey v A E Dayton Services Ltd [1988] ICR 142**. He argued that we should regard this as a case where there were exceptional circumstances so that "the procedural steps normally appropriate would have been futile and could not have altered the decision to dismiss and therefore dispensed with".

47. We did not agree. Consultation by the Respondents with the Claimant prior to her dismissal would have afforded the Claimant an opportunity to raise the points referred to in paragraph 36 above. It could not in our view be said that consultation would in this case have been futile and could not have altered the decision to dismiss. If the Claimant had been given an opportunity to remind the Respondents of the terms of the Employee Handbook dealing with redundancy the outcome might have been different, particularly as the cost to the Respondents of paying a statutory redundancy payment to the Claimant in June 2017 would have been avoided.

48. We did not believe that it was appropriate or indeed possible in this case to assess as a percentage the likelihood that the Claimant would still have been dismissed had the Respondents followed a fair procedure. It was in our view

consistent with the terms of Section 123(1) (see paragraph 42 above) that the Respondents should pay the Claimant the sum of £500 by way of a compensatory award.

Employment Judge: WA Meiklejohn
Date of Judgment: 12 March 2018
Entered in register: 20 March 2018
and copied to parties