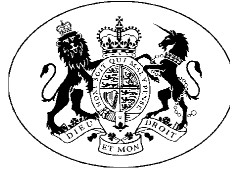
Case No: 2405507/2019



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Cavanaugh

**Respondent:** Folsana Pressed Sections Limited

**Heard at:** Manchester Employment Tribunal (sitting at Manchester Crown Court)

**On:** 8th-9th October 2019, 11th November 2019 (in chambers)

**Before:** Employment Judge Dunlop (sitting alone)

**Representation**

**Claimant:** Mr B Frew (Counsel)
**Respondent:** Ms L Gould (Counsel)

# RESERVED JUDGMENT

1. The claimant was unfairly dismissed and her claim succeeds.

2. Any compensatory award shall be reduced by 40% to reflect the possibility that, absent the unfair dismissal, the claimant would have resigned or been fairly dismissed within a limited period of time, or would have accepted alternative employment with the respondent at a reduced salary.

3. No adjustment shall be made to any compensatory award under s207A Trade Union and Labour Relations (Consolidation) Act 1992 (failure to follow ACAS Code of Practice).

4. The further hearing shall take place to determine remedy at 10.00am **on 9th March 2020** with a time estimate of three hours. Directions as follows:

   4.1 By 4.00pm on **20th January 2020** the claimant shall serve on the respondent an updated schedule of loss, a short witness statement outlining her efforts to mitigate her loss and any other relevant matters, and copies of any mitigation documents relied upon;

   4.2 By 4.00pm on **3rd February 2020** the respondent shall serve on the claimant any witness statement or documents that it wishes to rely on for the purposes of the remedy hearing or confirm (as may be the case) that it does not wish to rely on any further evidence or documents;

4.3 The parties shall co-operate to agree an index for a joint bundle of documents relevant to remedy and the respondent shall supply one copy of the joint bundle to the claimant by 4.00pm on **17th February** 2020.

4.4 The parties shall bring their own copies of statements and the bundle to the remedy hearing. Additionally, the claimant shall bring to the tribunal three copies of her statement for the use of the tribunal. The respondent shall bring to the tribunal three copies of any statement it wishes to rely on and three copies of the bundle of documents for the use of the tribunal. If the parties wish to refer to documents from the trial bundle these will need to be included in the remedy bundle or, alternatively, two additional copies of the trial bundle will also need to be brought for the use of the tribunal.

# REASONS

## Introduction

(1) The claimant, Mrs Cavanaugh, was employed in an administrative support role by the respondent ('Folsana') from 1st April 2010 to 30th January 2019 when her employment terminated following a dismissal. Folsana asserts that the reason for dismissal was redundancy. This is disputed by Mrs Cavanaugh who says that there was no fair reason for dismissal. Her claim as pursued before the tribunal was for unfair dismissal only.

## The Hearing

(2) I heard this case over two days on 8th – 9th October 2019. Mr Cavanaugh was on record as representing his wife and the couple had completed the preparatory work for the hearing themselves, but at the hearing Mrs Cavanaugh had the benefit of representation by counsel, namely Mr Frew. The hearing took place at Manchester Crown Court due to flooding in the Employment Tribunal building. I am grateful to both parties, representatives and witnesses for their cooperation in achieving a smooth hearing in a court room which was not ideally suited for an employment tribunal hearing.

(3) A brief agreed List of Issues was handed up at the start of the hearing.

(4) On behalf of Folsana, I heard evidence from:

Karen Pilkington, an external HR consultant who was engaged to conduct the redundancy consultation process in respect of Mrs Cavanaugh.

Emma Fay, an external HR consultant who was engaged to conduct the dismissal appeal process in respect of Mrs Cavanaugh.

Natalie Young, an administrative employee of Folsana.

Susan Haworth, a director of the accountancy firm used by Folsana.

(5) Mrs Cavanaugh gave evidence on her own behalf and I also heard evidence from her husband, Darren Cavanaugh.

(6) At the conclusion of the evidence, I heard oral submissions from counsel on behalf of each of the parties.

## Findings of Fact

(7) Mrs Cavanaugh is a qualified nurse and at all material times she has held substantive part-time employment within the NHS. Her role is as a Practice Education Facilitator, which involves supporting pre-reg nursing students in education and training.

(8) Mr Cavanaugh, the claimant's husband, worked at Folsana for nearly 33 years and was a Director responsible for the operations of the company for around 23 years. The business commenced as a family business involving members of the Haslam family, particularly Stephen and Robert Haslam. Mr Cavanaugh and a Mr Darren Marsden were the two non-family directors at the material times. The business is a manufacturing business employing around 45 employees at one site.

(9) Mrs Cavanaugh joined the business on 1st April 2010. The Cavanaughs' evidence was that this appointment was a reaction to decreasing sales figures during the 2008/9 recession and it was envisaged that Mrs Cavanugh would provide administrative support to the directors which would enable them to focus on the strategic running of the business.

(10) The thrust of Ms Haworth's evidence for Folsana was that Mrs Cavanaugh's appointment had been prompted by changes to personal tax allowance rules coming into force in 2010 which would have a negative effect on Mr Cavanaugh, with the result that he wished to 'divert' some of his salary to his wife. Ms Haworth further stated that she had explained to Mr Cavanaugh that such an arrangement would be possible only if Mrs Cavanaugh was being paid at a commercial rate for work actually done. At that time, it was envisaged that Mrs Cavanaugh would primarily assist Mr Cavanaugh in developing and maintaining a company database. I was also shown some material from the company accounts which demonstrated that both Mr Cavanaugh and Mr Marsden were entitled to remuneration packages equating to 12.5% of the adjusted gross profit of the business. One of the relevant adjustments was that the cost of Mrs Cavanaugh's employment was taken out of Mr Cavanaugh's remuneration package within these calculations. Similarly (although not on quite the same basis) the calculations were adjusted to take account of a salary for Elizabeth Morgan, who I am told by the respondent was a personal assistant to Mr Stephen Haslam.

(11) In both evidence and submissions, Folsana's representatives wished to emphasise the circumstances of Mrs Cavanaugh's appointment and seemed, by implication, to be attempting to cast doubt on whether she was doing a real job for the business at all. However, they expressly disavowed the suggestion that this was what they were seeking to argue, and robustly maintained their position that this was not a scenario of unlawful tax evasion. In those circumstances, the questions of how Mrs Cavanaugh

came to be employed some nine years prior to her dismissal, and of where the cost of her employment was carried within the financial structures of the business, are of very little to relevance to my decision.

(12) Mrs Cavanaugh gave evidence, which I accept, that she signed a contract at the commencement of her employment but did not retain a copy. She repeatedly requested her contract during the redundancy consultation process but this was not produced. Nor was it produced for the Tribunal.

(13) Mrs Cavanaugh gave some limited evidence in her witness statement as to the role she was performing within the business. She states that she reviewed documents and contracts and did "anything requested by the directors" including dealing with legal issues and designing and sending marketing information. She expanded on this evidence somewhat in response to questions.

(14) In summary, Mrs Cavanaugh worked almost exclusively from home and had no fixed hours. Mr Cavanaugh had two work laptops, one of which was used by her. She did not have a business email address but would access Mr Cavanaugh's email account. Mr Cavanaugh also brought relevant documents home which she would work on. Some of the work might be described as project-based, for example, on one occasion Mrs Cavanaugh was engaged in a project to identify the most cost-effective way of meeting the business's energy supply needs (which were considerable – and worth around £10,000 per month), on another occasion she assisted Robert Haslam with some litigation the business had become involved in, and on another occasion she had been involved in recruitment interviews. Alongside these specific projects she provided administrative support to Mr Cavanaugh on an *ad hoc*, as required, basis. She fitted this work around her NHS role and I find that the amount of work fluctuated significantly over the period of her employment. Mrs Cavanugh was paid £1,600 per month. It was suggested in cross examination that she worked an average of, perhaps, eight hours per week giving an effective hourly rate of £46.15 per hour. The Claimant's evidence was that she often worked for one day a week but regularly worked for a longer period. Accepting that eight hours was a minimum and using an average of around 10 or 12 hours would still give an hourly rate of approximately £30.00-£37.00 per hour.

(15) On 17th September 2018 Mr Cavanaugh was suspended from work and was ultimately dismissed on 21st November 2018 on grounds of misconduct. Essentially, the nature of the alleged misconduct was bullying members of the respondent's staff. He strongly disputes the allegations.

(16) At the point of Mr Cavanaugh's suspension both work laptops were removed from the Cavanaughs' home. Without the laptop, and without Mr Cavanaugh as a conduit for the work, there was no means of Mrs Cavanaugh continuing to perform her role. Mr and Mrs Cavanaugh gave evidence that at the point of suspension Mrs Cavanaugh had been tasked by Mr Cavanaugh with reviewing risk assessments and standard operating procedure documents in relation to the various pieces of machinery operated at the business, these being overdue for review. Mrs Cavanaugh's evidence was that she had begun to review the existing documentation to identify areas which were out-dated, and had begun to collate

manufacturer's documentation for the pieces of machinery to support this exercise. Mrs Cavanaugh did not take any steps to advance this work following Mr Cavanaugh's suspension.

(17) Following Mr Cavanaugh's suspension, nobody from the business (particularly Mr Marsden who appears to have been in day-to-day control) took any steps to contact Mrs Cavanaugh to set up alternative working arrangements, or to place her on any sort of formal leave, or simply to communicate with her as regards her own employment. Nor did Mrs Cavanaugh contact Mr Marsden or anyone else. She was later questioned on this repeatedly at both the dismissal and appeal stages of the redundancy process, as well as in tribunal. She explained that Mr Cavanaugh's mental health had been severely affected by his suspension and that she was supporting him. She also stated that it seemed 'pointless' asking for access to company IT as it was emphasised in continued letters confirming Mr Cavanaugh's suspension that he was to be restricted from such access. She took the view – reasonably in my opinion – that it was not realistic that the business would facilitate her working from home with remote access in those circumstances.

(18) Ms Pilkington's evidence was that she was initially contacted by Mr Marsden in November 2018 as Mr Marsden "wanted to place [Mrs Cavanaugh's] role at risk of redundancy". Ms Pilkington advised Mr Marsden that the consultation process should be "placed on hold" (it would have been more accurate to say not commenced at all) until the outcome of Mr Cavanaugh's disciplinary hearing.

(19) The first communication Mrs Cavanaugh received, therefore, was a letter dated 7th January 2019 from Ms Pilkington inviting her to an initial consultation meeting on 15th January 2019. The letter stated:

> *"As you are aware Mr Darren Cavanaugh, your husband is no longer employed by Folsana. The Company understands your role to be one of supporting him in an administrative capacity. In the absence of Mr Cavanaugh, the work you carry out is no longer required and you are at risk of redundancy. This is only a provisional decision and we will consult with you to try to identify ways in which the redundancy of your role can be avoided."*

(20) The first meeting took place on a rearranged date of 21st January. The notes record Mrs Cavanaugh explaining that she worked mainly, although not solely, via Mr Cavanaugh and giving the example of the energy supplier work mentioned above. She also raised the point that she had not been invited to the company's Christmas party nor given a Christmas bonus (in the form of a bottle of spirits, as was customary at the business). Ms Pilkington asked whether Mrs Cavanaugh was doing any on-going work and Mrs Cavanaugh explained that she was not (in the circumstances already outlined) but mentioned the work on risk assessments and standard operating procedures that she had been beginning. She stated that she felt as if she had been suspended and felt ostracized.

(21) Following the meeting Ms Pilkington arranged a call with Mr Marsden. According to Ms Pilkington, Mr Marsden stated to her that Mrs Cavanaugh

did not do any work for the business other than that she did for Mr Cavanaugh, and that he was not aware that she had been tasked with the risk assessments/standard operating procedure work, that these were already in place, and she would not have appropriate expertise for this work in any event. Ms Pilkington specifically asked Mr Marsden if there were any alternative roles for Mrs Cavanaugh and was told there were not. Finally, Ms Pilkington raised the issue of the Christmas celebrations and was informed that it had been an oversight not to provide Mrs Cavanaugh with a bottle of spirits which would be rectified (and in due course it was). Mr Marsden further stated that the decision had been taken not to invite Mrs Cavanaugh to the function due to nature of the allegations against Mr Cavanaugh and to avoid exposing her to potential ill-feeling from other employees. It is notable that Mrs Cavanaugh gave unchallenged evidence that Mr Cavanaugh's brother, Wayne Cavanaugh, was also an employee and was invited to the Christmas function. In a follow-up email Mr Marsden expanded on some of these responses and also indicated that himself and Ms Young were now going to conduct the review of risk assessments/standard operating procedures (despite previously asserting that these were in place and so no work was required).

(22) A further consultation meeting was arranged for 30th January 2019. Prior to this, Mrs Cavanaugh emailed Ms Pilkington on 25th January 2019 raising several points (69). Amongst other matters, Mrs Cavanaugh stated in this email that she had asked in the first meeting whether Folsana had employed anyone else since 17th September 2019 and asks that that information is now provided. By response dated 28th January 2019 (70) Ms Pilkington stated "*Nobody else had been employed by Folsana*". Mrs Cavanaugh in turn responded on 29th January stating she believed Ms Pilkington's response to be incorrect.

(23) The various iterations of that email formed the basis for the discussion on 30th January. In relation to the point about new employees, the notes state that Ms Pilkington asked Mrs Cavanaugh what she meant by this and Mrs Cavanaugh "*didn't want to discuss this further*". Nonetheless, it is clear that Ms Pilkington took no steps prior to the meeting, or before reaching a decision, to approach Mr Marsden (or anyone else) to ask whether any other employees had been taken on. Given the size of the business (45 employees) it would have been a matter of moments to do so. It also became apparent in evidence that she had simply asked Mr Marsden if there was a contract for Mrs Cavanaugh and taken his negative response at face value. She did not follow up when Mrs Cavanaugh provided detailed information as to where she believed the contract to be stored.

(24) At the conclusion of the meeting Ms Pilkington stated that the allegation that someone new had been employed was the only point which she may have had to look into further, but as no more information had been put forward by Mrs Cavanaugh, she had made the decision to go ahead with the redundancy. She explained to Mrs Cavanaugh that her employment would be terminated on notice, that she had a right to appeal and that she would receive a letter confirming the outcome in writing. This letter, dated 1st February 2019, was duly produced (81-82). The letter stated that "*you asked whether the Company had hired anyone to carry out your duties, to which the Company confirmed it had not*" and noted that Ms Pilkington had

been unable to identify any ways in which redundancy could be avoided, nor any suitable alternative employment. The dismissal was effective immediately with a payment in lieu of notice being made alongside a statutory redundancy payment and payment for accrued but untaken holiday pay.

(25) Mrs Cavanaugh appealed against her dismissal by letter dated 6th February 2019 (99). In her appeal letter Mrs Cavanaugh drew attention to the fact that she has asked whether anyone had been employed by Folsana since Mr Cavanaugh's suspension and been told nobody else had been employed, but that the dismissal letter mischaracterised this exchange as being about whether anyone had been employed to carry out her duties. Mrs Cavanaugh described this as the company being "liberal with the truth".

(26) The appeal was heard by Emma Fay. Ms Fay is a professional associate of Ms Pilkington's (they operate separate franchises of an HR consultancy, branded as The HR Department, and have each previously undertaken appeals in cases where the other had conducted proceedings ending in a dismissal) and took place on 12th February 2019.

(27) In many respects, the appeal hearing covered similar ground to the previous meetings regarding the work that Mrs Cavanaugh was doing and who she received this work from, the whereabouts of her contract, and her belief that she was being discriminated against (as it was put then) due to her status as Mr Cavanaugh's wife. However, a new matter arose when Ms Fay confirmed that Folsana had recruited a new employee to a part-time role in the accounts department in January 2019. Ms Fay stated that this role hadn't been offered to Mrs Cavanaugh as Folsana did not consider it to be a suitable alternative. The notes record that Mrs Cavanaugh indicated she could potentially have fitted the hours for the accounts role around her NHS work. She confirmed that she had no accounts experience but was familiar with database and spreadsheet work which she thought would be relevant. She also confirmed she was open to training and asked about the rules around trial periods. It is also clear from the notes that Mrs Cavanaugh (perhaps drawing on her NHS experience) believed that pay protection would apply if she had been offered an alternative role, but Ms Fay confirmed this would not have been the case.

(28) There was some further correspondence on this point after the meeting where Ms Fay asked Mrs Cavanaugh to confirm the hours she would have been able to work. Mrs Cavanaugh replied that it was difficult to be 100% sure but she was sure that something could have been worked out that was agreeable to all if the role had been offered. In support of this she pointed to another employee in accounts who worked flexibly around childcare. Mrs Cavanaugh's optimism is supported by a later letter dated 9th August 2019 from her NHS employer confirming her employment is for 18 hours a week on a flexible basis and stating that her manager would have sought to support Mrs Cavanaugh during a trial period in the proposed second employment had this been offered (330).

(29) Ms Fay's witness statement asserts that Mrs Cavanaugh was being "intentionally evasive" surrounding her NHS commitments as, in reality, she did not want to take up the accounts role. I find that although Mrs

Cavanaugh's responses might have been considered a little non-committal if Folsana had been her only employer, they make perfect sense in the context of juggling two part-time roles. Further, it does not sit well for the respondent to accuse Mrs Cavanaugh of being "intentionally evasive" on this issue given the demonstrably incorrect response it had given when she raised the very relevant question of whether anyone else had been employed during the period where her redundancy was being considered. At best, this was an example of very poor communication caused by the respondent's decision to manage the process using external HR consultants. At worst, it may have been a deliberate attempt on the part of Mr Marsden to conceal the full circumstances surrounding the redundancy from those he had charged with effecting it.

(30) By letter dated 14th February 2019 (122-123) Mrs Cavanaugh's appeal against her dismissal was not upheld.

(31) Detailed evidence was given to the Tribunal about the accounts appointment (mainly in the evidence of Natalie Young) which went well beyond that explored with Mrs Cavanaugh during the redundancy appeal. It transpires that an accounts role had become available following a resignation on 6 December 2018 and that urgent cover was required. A former employee named Zillah Gray agreed to return on an interim basis. Ms Gray had been a former office manager and was well-placed to assist in this difficult situation. The business then sought to identify a permanent replacement. I did not hear details as to the advertising of this role, but the person identified was another former employee, Clare Neary. Ms Neary's contract appears in the bundle (294-298) and gives her job title as 'Trainee Accounts' and her normal hours of work as being 10.00am-2.00pm Monday to Thursday and 9.30am to 1.30pm on Friday. Unfortunately, the salary information was redacted and the Respondent led no evidence on the salary for the role. Ms Gould suggested in submissions that, in terms of an hourly rate, it would be 'significantly lower' than Mrs Cavanaugh was receiving. This seems to me, as a matter of common sense, to be likely, although I cannot make specific findings about the pay rate for this role. Ms Young's evidence was that Ms Neary had experience of other accounting software and would require training in the specific SAGE software used by Folsana. In the event, this turned out to amount to five hours' training from Ms Gray.

(32) Ms Young's evidence was that it was "an absolute requirement" that the appointee had accounts experience, and for this reason it would not have been possible or appropriate to offer the role to Mrs Cavanaugh. I do not fully accept that evidence having regard to the junior level of the role, and the support potentially available from Zillah Gray. In response to a question from the tribunal, Ms Young confirmed that Ms Gray had not been canvassed as to her willingness to continue her temporary role and provide more extensive training if required, and that Ms Young had no reason to suspect that she would not have been amenable to doing so if asked. Ms Young made a separate point that it would not have been appropriate to offer the role to Mrs Cavanaugh as the other accounts employee she would be working alongside was one of the employees who had complained about Mr Cavanaugh. On questioning, she confirmed that nobody had broached with this employee the possibility of working with Mrs Cavanaugh nor sought to ascertain how she would feel about it. Whilst I do accept that there would

potentially have been difficulties in having Mrs Cavanaugh commence an office-based role following Mr Cavanaugh's departure there was no evidence, aside from speculation by Ms Young, that this would have been unworkable. Again, I take account of the fact that Mr Cavanaugh's brother apparently remains employed without difficulty.

(33) Finally, there was some evidence around the position of Elizabeth Morgan. As noted above, her employment costs appear in the accounts on the basis that she is an assistant to one of the Haslam directors and there was some suggestion that her work may include support related to other companies that he has interests in. Mrs Cavanaugh pointed to the fact that Ms Morgan's contract (331 onwards) appears to show her being employed as a CAD/CAM Programmer. Ms Young's evidence was that Ms Morgan had no such skills and Mr Cavanaugh gave evidence that her engagement on this basis had been directed towards securing some sort of grant or funding then available within the sector.

## Relevant Legal Principles

(34) The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

(35) The primary provision is section 98 which, so far as relevant, provides as follows:

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

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

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

**(2) A reason falls within this sub-section if it … is that the employee was redundant …**

**(3) …**

**(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**

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

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

(36) The definition of redundancy for the purposes of section 98(2) is found in section 139 of the Employment Rights Act 1996 and so far as material it reads as follows:

**"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**

**(a) …**

**(b) the fact that the requirements of that business –**

(i) **for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish".**

(37) The proper application of the general test of fairness in section 98(4) has been considered by the Appeal Tribunal and higher courts on many occasions. The Employment Tribunal must not substitute its own decision for that of the employer: the question is rather whether the employer's conduct fell within the "band of reasonable responses": **Iceland Frozen Foods Limited v Jones [1982] IRLR 439 (EAT)** as approved by the Court of Appeal in **Post Office v Foley**; **HSBC Bank PLC v Madden [2000] IRLR 827**.

(38) The reason for the dismissal is the set of facts known to, or beliefs held by, the employer, which cause it to dismiss the employee (per Cairns LJ in **Abernethy v Mott Hay and Anderson [1974] ICR 323**.

(39) A historical conflict between the 'contract' and 'function' tests for determining whether a redundancy situation was established was resolved by the EAT in **Safeway Stores plc v Burrell [1997] ICR 523**, later approved by the House of Lords in **Murray v Foyle Meats Ltd [1999] ICR 827**. Both those cases recognise that the question of whether there is a diminution in the employer's requirement for employees to carry out work of a particular kind is distinct from the subsequent question of whether the dismissal of the claimant employee was wholly or mainly attributable to that diminution.

(40) In cases where the respondent has shown that the dismissal was a redundancy dismissal, guidance was given by the Employment Appeal Tribunal in **Williams & Others v Compair Maxam Limited [1982] IRLR 83**. In general terms, employers acting reasonably will seek to act by giving as much warning as possible of impending redundancies to employees so they can take early steps to inform themselves of the relevant facts, consider positive alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere. The employer will consult about the best means by which the desired management result can be achieved fairly, and the employer will seek to see whether, instead of dismissing an employee, he could offer him alternative employment. A reasonable employer will depart from these principles only where there is good reason to do so.

(41) The importance of consultation is evident from the decision of the House of Lords in **Polkey v A E Dayton Services Limited [1987] IRLR 503**. The definition of consultation which has been applied in employment cases (see, for example, **John Brown Engineering Limited v Brown & Others [1997] IRLR 90**) is taken from the Judgment of Glidewell LJ in **R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price [1994] IRLR 72** at paragraph 24:

**"It is axiomatic that the process of consultation is not one in which the consultor is obliged to adopt any or all of the views expressed by the person or body with whom he is consulting. I would respectively adopt the test proposed by Hodgson J in R v Gwent County Council ex parte Bryant … when he said:**

**'Fair consultation means:**

**(a) consultation when the proposals are still at a formative stage;**

**(b) adequate information on which to respond;**

**(c) adequate time in which to respond;**

**(d) conscientious consideration by an authority of the response to consultation".**

(42) Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides for the potential adjustment of tribunal awards where a relevant Code of Practice applies and its provisions have not been complied with. The relevant Code for these purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Code itself states that it does not apply in cases of redundancy.

(43) There has been something of a grey area as to whether the Code applies in "some other substantial reason" cases. In **Phoenix House Ltd v Stockman [2017] ICR 84** the EAT concluded that in cases concerning the breakdown of working relationships elements of the Code were capable of being applied, and should be applied, but that the Code did not apply in terms to such dismissals and the adjustment provisions in s207A therefore could not bite. The EAT in the earlier case of **Lund v St Edmund's School, Canterbury [2013) ICR D26** held that the Code did apply to an SOSR dismissal in circumstances where the respondent school had initiated a disciplinary procedure in relation to the claimant's conduct before deciding to dismiss on related SOSR grounds. Following **Stockman** there may still be scope for s207A to apply to SOSR dismissals, but this category of cases is likely to be small, and restricted to those where the dismissal is closely akin to a misconduct dismissal and where the full provisions of the Code could have been applied without artificiality.

## Submissions

(44) Mr Frew, for Mrs Cavanaugh, submitted that the redundancy was a sham. He pointed to the lack of evidence from the respondent about the work that Mrs Cavanaugh had been doing (including the work that Mr Cavanaugh was doing that she was supporting him with) and how that work had been absorbed into the business and re-distributed.

(45) Procedurally, he said that the process was deeply flawed. Mr Marsden had taken a decision to dismiss and used the external HR consultants as a vehicle to put that decision into effect without giving proper consideration to whether a redundancy could be avoided or to whether it was right to have a selection pool of only one, and without giving them the information required for them to give proper consideration to those matters. The consultation was not genuine in that it did not take place when the proposals were at a formative stage and there was no proper consideration given to points raised by Mrs Cavanaugh.

(46) Mr Frew focused particularly on the question of whether the employer had taken reasonable steps to identify potential alternative employment. He said "not a scintilla" of effort was put in to this and that, if it had been, there was every possibility that the accounts role would have been identified and that Mrs Cavanaugh would have been offered it.

(47) Mr Frew submitted that if redundancy was not the real reason for dismissal then the tribunal should award an uplift for failure to follow the ACAS Code of Practice.

(48) Ms Gould, for the Respondent, said that it was "blindingly obvious" that a redundancy situation had arisen. She relied on the fact that nobody remaining at the respondent could identify the work Mrs Cavanaugh had been doing and that there was no on-going work to handover or "balls dropped" when Mrs Cavanaugh stopped working in September 2018 or following the redundancy itself. She further relied on the fact that there had been no new administrative appointments and that Mr Cavanaugh's own work had been taken on by the other directors and senior staff, rather than a new appointee, so the need for administrative support for that work had necessarily fallen away.

(49) In relation to procedure, she asserted that the procedure was brief because the situation was simple. She submitted that the respondent would have been vulnerable to criticism if Mr Marsden had carried out the process himself, and that, as a relatively small employer, it had done its best by engaging outside expertise.

(50) She defended the company's stance that the accounts role was not relevant to the proceedings as it would not have been a suitable alternative role for Mrs Cavanaugh and emphasised the specialist nature of the work. She sought to cast doubt on whether Mrs Cavanaugh would have taken the role if offered, given the need to work in the office and the (likely) much lower hourly rate.

(51) Finally, Ms Gould submitted that the provisions allowing for an ACAS uplift would not apply in any event. If the dismissal was found to be unfair then a very large reduction should be made to the compensatory award to reflect what she said was the improbability of Mrs Cavanaugh realistically being prepared to continue working for the respondent following the termination of her husband's employment, and also having regard to the significant changes this would entail to her own working arrangements – whether that involved a move to the accounts role or continuing in some sort of administrative position.

## Discussion and conclusions

(52) As will be appreciated, the circumstances of this case are relatively unusual, and it is vital to go back to the words of the statute. Therefore, the first question I ask myself is what is the "work of a particular kind" which the claimant was carrying out. I conclude, summarising my findings of fact above, that prior to Mr Cavanaugh's suspension she was doing various administrative projects and tasks on an *ad hoc* basis.

(53) To use the jargon, a redundancy situation arises when the employer's need for employees to carry out work of a particular kind ceases or diminishes. That happened, in this case, following Mr Cavanaugh's suspension. If there had been evidence of a newly appointed director, requiring similar support, or of additional support being required by Mr

Marsden as he took charge of Mr Cavanaugh's previous fiefdom then it might have been arguable that the work did not diminish. But the clear evidence was that Mrs Cavanaugh was not replaced. Ms Young, with her portfolio of responsibilities, may well have absorbed work which in the past would have been done by Mrs Cavanaugh. Equally, it may be that some of that work was not deemed to be required by Mr Marsden. In any event, I accept that the business's need for employees to do that work had diminished.

(54) However, s.139 raises a question of causation which is not, in this unusual case, answered simply by identifying the 'redundancy situation'. The dismissal is only a redundancy dismissal if it is "wholly or mainly attributable" to that diminution in requirements. When I step back and ask the basic question 'what was the reason for the claimant's dismissal' my conclusion is that the factual reason for the dismissal was the recent removal of the claimant's husband, Mr Cavanaugh, from the business.

(55) I find it is inconceivable that if Mr Cavanaugh had been supported by another employee who was not his spouse and who did not share his address, the business would have made no contact with that employee and given her no direction as to what work she should be undertaking (and how she should undertake it) in Mr Cavanaugh's absence. Similarly, I find it inconceivable that she would have been left, as a home-worker, without means of accessing business information and of completing any work. Finally, I find that she would not have been excluded from the company's festive celebrations as outlined above.

(56) All of these examples show that Mr Marsden regarded Mrs Cavanaugh's employment as an administrative 'loose end' which had to be tied up as a result of the departure of her husband from the business. I am fortified in this conclusion by Ms Pilkington's evidence as to the early date on which Mr Marsden had originally approached her with a view to making Mrs Cavanaugh redundant, and their joint decision to postpone the process until the outcome of the process relating to Mr Cavanaugh. Later, the lack of transparency around the role in accounts also lends support to the idea that Mrs Cavanaugh's dismissal was predetermined. Overall, Mrs Cavanaugh was viewed and treated as an adjunct to her husband, rather than as an employee in her own right. It may well be said that this was how she operated as an employee – demonstrated, for example, by the fact that she had no email address of her own – but the business had allowed this situation to arise and persist and Mrs Cavanaugh's unusual circumstances as an employee do not excuse her employer from affording her the same fairness of treatment as any other employee would be entitled to.

(57) Given the business's actions (and, perhaps more pertinently, inaction) towards Mrs Cavanaugh following her husband's suspension, the diminution in her work was inevitable. Where an employee's job involves responding to requests or instructions and those requests or instructions are no longer being given, their work will diminish or cease. Therefore, there is some strength in Ms Gould's submissions that there was an "obvious redundancy situation" but that situation was not the reason for Mrs Cavanaugh's dismissal, it was a symptom of the fact that the business had decided to dismiss her.

(58) In its ET3, the respondent alternatively contended that this was a dismissal for some other substantial reasons ('SOSR') although no specific reason was formulated. This alternative remained at large in the list of issues and the respondent's submissions, again without any specific SOSR reason being formulated. It is not too difficult to imagine that the relationship between Mr and Mrs Cavanaugh and the circumstances of his removal from the business may have given rise to a fair SOSR dismissal. However, there is no evidence of Mr Marsden, or of anyone else in the business, addressing themselves, with an open mind, to the question of the practicability of Mrs Cavanaugh continuing her employment with the business. It seems that there was a great readiness to assume that individuals would be unhappy to work with Mrs Cavanaugh (such as the colleague in the accounts department) with very little willingness to investigate or test that position. In these circumstances, the respondent is very far from showing a SOSR reason for dismissal.

(59) I therefore conclude that the Respondent has failed to establish a potentially fair reason for dismissal and the claim must succeed. However, for completeness I have also considered the fairness of the dismissal on the basis of accepting the respondent's case that the reason for dismissal was redundancy.

(60) I do have sympathy with the respondent's position that, as a relatively small employer, they would be open to criticism if senior 'conflicted' individuals had taken decisions in the redundancy process and, on the other hand, are open to criticism by sub-contracting that process to external HR consultants. However, the problem in this case was that the HR consultants were entirely reliant on information from Mr Marsden. As outlined above, he had taken the view at a very early stage that Mrs Cavanaugh's redundancy naturally followed from her husband's removal and the information and instructions received by the HR consultants were in line with that view. They were, for example, not provided with any information about others performing administrative roles with the business (who included, at least, Ms Morgan and Ms Young) to determine the appropriate selection pool. Nor, as we know, were they provided with information about the vacancy in accounts until after it had been filled and Mrs Cavanaugh had been dismissed. There also appeared to be a limited willingness on the part of Ms Pilkington and Ms Fay to push Mr Marsden for relevant information – for example by making firmer attempts to try to locate the claimant's contract. Therefore, whilst I do not criticise the number or timing of the consultation meetings, that consultation was not effective as it did not give Mrs Cavanaugh any real opportunity to influence the decision-making process. That failure also makes the dismissal unfair.

(61) In relation to alternative employment, it is far from obvious that Mrs Cavanaugh would have been able to perform the accounts role adequately, nor that she would have wanted to. However, the respondent's failure to notify her of the role and continued evasiveness around it throughout the redundancy process give rise to suspicion. Ultimately, it was a training role and Ms Gray was fortuitously available to provide the training. I find that any reasonable employer would, as a minimum, have taken steps to offer the claimant a trial period in the role if she wanted to undertake it and I find that

this employer would have done so with another potentially redundant administrative employee who was not also married to Mr Cavanaugh. That failure also makes the dismissal unfair.

**Matters relating to remedy**

(62) With the agreement of parties, I indicated that I would deal in this judgment with the question of any '*Polkey*' reduction – both in relation to any purely procedural unfairness found and any wider just and equitable reduction to compensation on the basis that Mrs Cavanaugh may not have remained in the respondent's employment on a long-term basis.

(63) Although I have found the dismissal to be substantively unfair in the circumstances set out above, I nevertheless find that that is a case where it is appropriate to make such a reduction. If Mrs Cavanaugh had not been dismissed at the time she was, alternative arrangements would have had to be made for her to be provided with work and facilities to do that work. That would most likely have involved significant engagement with Mr Marsden, whom she holds responsible for what she perceives to be unfair treatment of her husband which has had a detrimental affect on his mental health as well as the family finances. It may well have involved attending work in the office on a regular basis, which may not have suited her so much as her previous arrangements. It may ultimately have involved a reduction in pay and/or a fair redundancy process if there was insufficient work generated for her to do under the new structures within the business.

(64) Equally, if Mrs Cavanaugh had been offered a trial period in the accounts role, she may have found that the technical aspect of the work was more difficult than she had anticipated; she may have found that the hours were long when combined with her NHS commitments; she may have found that the pay was lower than she was prepared to accept. She gave evidence that she was desperate to supplement her income following Mr Cavanaugh's dismissal, and this role may have provided an obvious means to do so in the short term. However, there are many reasons why she may not have wished to continue in that role in the medium-long term. In either a continued administrative role or the accounts role it is possible that other employees of the respondent could have raised concerns about working alongside Mrs Cavanaugh given their previous complaints about Mr Cavanaugh and those concerns could have been found to be justifiable.

(65) All these matters are necessarily speculative. However, in my view the obstacles to Mrs Cavanaugh realistically sustaining a position with Folsana after the events of autumn 2018 are sufficiently serious that it would be unjust to the respondent for them not to be reflected in the outcome of these proceedings. Similarly, the prospect that any employment in the medium to long term would have entailed a material reduction to her monthly salary (either because she would have been redeployed to the lower paid accountancy role or a lower paid administration role) is a realistic one.

(66) In the circumstances my judgment is that Mrs Cavanaugh's compensatory award should be reduced by 40% to reflect, albeit in a very broadbrush way, the various possible scenarios outlined above.

(67) The parties also invited me to determine the appropriate ACAS uplift, if any, at this stage in the proceedings. Having regard to the authorities mentioned above, and particularly to **Stockman**, I do not consider that this is a case whether the Code of Practice applies as a matter of law. There is therefore no scope within s207A for any uplift to be applied.

(68) I indicated to the parties at the conclusion of the hearing that I would give directions in respect of remedy (if necessary) as part of this Judgment. A Remedy Hearing has now been listed with a half-day time estimate to take place at **10.00am** on **9th March 2020**. The directions are set out in the Judgment above. The parties should inform the tribunal as soon as possible if the remedy hearing is not required, or if any application to postpone the hearing date is necessary (a full explanation of reasons for any postponement application will be required).

**Employment Judge Dunlop**

Date: 20.11.2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

2 December 2019

FOR EMPLOYMENT TRIBUNALS