EMPLOYMENT TRIBUNALS

Claimant: Mrs V Gardner

Respondent: Stuart McBain Limited

Heard at: Liverpool **On:** 18, 19, 20 November 2018

Before: Employment Judge Aspinall
Mr G Pennie
Mr P C Northam

REPRESENTATION:

Claimant: In person, supported by her husband
Respondent: Mr Searle, Counsel

JUDGMENT for the respondent having been sent to the parties on 5 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims

1. By a claim form presented on 19 September 2018 the claimant brought claims under the Employment Rights Act 1996 for unfair dismissal and under section 18 of the Equality Act 2010 for pregnancy related discrimination. Early Conciliation had taken place between 14 August and 14 September 2018 against the respondent and an Early Conciliation Certificate number R303306/18/23 was issued on 14 September 2018.

2. The claimant says she was discriminated against in that she was unfairly selected for redundancy and was not offered a suitable alternative role that arose during what would have been her maternity leave period.

3. The claimant concedes that there was a genuine redundancy situation in this case and that the relevant pool for selection was the four fee earners who were

considered. She says that the figures were manipulated to ensure that she was selected.

4. The respondent resisted these claims in its Response Form dated 6 November 2018 and maintains that all times the selection was fair and that it was based on criteria which had been agreed. It says the pool had agreed that the criteria for selection was based on efficiency (70%) and length of service (30%).

5. There was a preliminary hearing for case management before Employment Judge Shotter on 19 January 2019 at which the following list of issues was agreed.

List of Issues

6. The agreed issues are:

6.1 What was the reason for the claimant's dismissal?

6.2 Was the claimant dismissed for redundancy or a reason relating to her pregnancy or maternity?

6.3 Was there a suitable alternative employment position that arose during the consultation exercise for which the claimant should have been considered?

6.4 Was the dismissal fair in all the circumstances having regard to the respondent's size and administrative resources?

6.5 If a procedural flaw is found with the dismissal does the "no difference rule" set out in Polkey v A E Dayton Services Ltd [1988] ICR 152 apply?

The hearing

7. The Tribunal heard evidence from Mrs Gardner, the claimant.

8. The Tribunal heard evidence from Mr McBain, the owner of the firm and the dismissing officer.

9. The Tribunal heard evidence from Mr Evans, an independent appeal decision maker.

10. The Tribunal read the transcripts of covert recordings made by the claimant in the redundancy process.

11. The Tribunal saw the written statement of Mr Daniel Rigby who did not attend.

12. There was an agreed bundle of documents of 148 pages.

The Facts

Background

13. The respondent is an accountancy practice in Liverpool. Its owner Mr Stuart McBain is an accountant who ran this practice and other business interests. He had

a managerial and marketing role for the practice and carried out accountancy work in the practice from time to time but the accountancy work was largely undertaken by his staff.

14. The claimant was employed by the respondent as an accountant from 7 March 2005 until termination of her employment on 30 May 2018. The claimant had a written contract of employment with an attached job description for her role. The contract of employment was dated 7 November 2011 and contained salary figures as at that date but it was agreed that at the date of redundancy the claimant's salary was £ 36 000

15. The respondent's accountancy firm is a small practice with long serving employees and, until the redundancy situation, close working relationships. In January 2018 the claimant made her employer aware that she was pregnant. She subsequently provided her MATB 1 Certificate giving an expected date of delivery of her baby during the week commencing 13 August 2018.

Redundancy situation

16. It was conceded by the claimant that in April 2018 a genuine redundancy situation arose. It was apparent that the firm would need to make two fee earner posts redundant.

The agreed pool

17. Everyone agreed that the pool of workers comprised the four fee earners in the firm; the claimant, Anna, Michaela and Daniel.

18. Anna had a similar length of service to the claimant, but she had the highest billing in the year to March 2018. Anna, in addition to her other duties, worked off site for a client called AJS for 40% of her time at an agreed fee to the firm. There was some flexibility in when Anna attended the client site, but the contract between the respondent and AJS provided that there were a fixed number of days for a fixed fee per year charged at an agreed hourly rate. Those days and the payments for them might fluctuate month to month throughout the year to meet the needs of the client. Sometimes Mr McBain referred to this as "onsite work" and sometimes as fixed fee for fixed time work. He compared it to being a member of the client organisation (akin to a secondment).

19. Michaela had a similar length of service to the claimant and was the second highest value build fee earner.

20. The claimant had 13 years' service, again similar length of service to Anna and Michaela, but was the lowest billing excluding Daniel. The claimant did some work described as "research and development" work. This was accountancy work in which tax returns were prepared which claimed a tax allowance for the client for its research and development work, thus reducing a client's tax liability. This was understandably work for which clients were willing to pay more and so was lucrative work. The claimant alone did this work.

21. Daniel, a trainee accountant, had the least service and also the lowest billing. Daniel was always going to be at risk and was indeed made redundant.

3 April 2018: Informing the staff about the potential redundancy situation

22. The staff were notified of the potential redundancy situation in person at a group meeting which took place on 3 April 2018. Mr McBain told the staff that there was a redundancy situation and they all agreed that this was the case. They had seen a reduction in the work coming in. Selection criteria were proposed. The staff were consulted on those criteria and following discussion it was agreed that they would not rely solely on the billing but that in order to be fairer the selection criteria would comprise efficiency and length of service.

Selection criteria agreed

23. The formula for the calculation of efficiency was agreed to be total fees (otherwise described as "value billed") divided by the time incurred to generate those fees ("hours billable") for each fee earner.

$$Efficiency = \left(\frac{value\ billed}{hours\ billable}\right)$$

In recognition of the fact that some fee earners did work that others did not do, and so as to achieve some commonality of the work against which efficiency was to be measured, it was agreed that the formula would be applied to three main areas of work common to the four fee earners. It was Mr McBain's intention to include only work in respect of which the fee earners could influence the efficiency, so to include work done at an agreed fixed fee at an hourly rate for a fixed amount of time, for example, like the work Anna did for AJS, would not be a fair measure of efficiency.

24. The four employees at risk all agreed to this criteria on 3 April 2018. The Tribunal did not see the notes of that meeting, though they were attached to a letter which it did see dated 4 April 2018, which recorded the content of the meeting and set out what had been agreed in terms of the criteria.

25. The letter of 4 April from Mr McBain to the claimant said:

> "I write further to the initial, group consultation meeting of yesterday…
>
> The pool for redundancies will comprise of the four fee earners…
>
> I believe that the number of fee earners will need to be reduced from four to two and therefore that two redundancies may be necessary..
>
> The criteria I propose to use for the selection are speed/efficiency of the work (70%) and length of service (30%)…..
>
> I propose for the efficiency criteria to be based on the firm charging clients a fixed fee for all work done, and then from the three areas of work common to all four fee earners, namely accountancy, VAT returns and self assessment tax returns….
>
> Total fees can be determined by work classification/fee earner…

a note of the time taken to do the job is made by the fee earner, **efficiency is therefore total fee income divided by time** to get an average rate per hour.

The highest fee earner is then given a 100% score for the work done and the other three fee earners then score a percentage of their fees compared to the 100% score. The length of service is scored similarly, the person with the longest service scores 100% and staff with lower service are awarded a percentage based on the 100% score.

The 70% is applied to test 1 and the 30% to test 2 to get an overall percentage score. If requested in order to demonstrate this assessment I can produce a list of individual invoices, their job classification, time allocation and fees all produced by the fee earners. My proposed sample period is our financial year to 31 March 2018."

26. The letter went on to invite the claimant to an individual meeting for consultation on the pool and the selection criteria. The claimant was informed of her right to be accompanied to that meeting.

27. A meeting was arranged for the claimant on 5 April 2019 but was postponed by agreement to take place on 23 April 2019. By coincidence, this was also the date on which the claimant attended an antenatal appointment and obtained her MATB1 certificate.

First Individual consultation meeting

28. On 23 April a meeting took place between the claimant and Mr McBain. This meeting was covertly recorded by the claimant so the transcript was available to the Tribunal.

29. At the meeting there was some discussion about the pool for selection and whether or not Daniel should be included. It was common ground that Daniel should be in the pool. He earned a comparable salary to the other fee earners and there was commonality in the work done. There was a discussion then about whether Kayleigh should be included in the pool and it was agreed that she was not as her role was administration and payroll.

30. Mr McBain shared with the claimant the thoughts he had had about the criteria and why he had discounted last in first out as a test. He explained that he had considered turnover alone:

"I just thought that was completely unfair, on the basis that no fee earner has ever been responsible for getting work; it's always been my responsibility, and no fee earner has ever done anything that has caused us to lose work. So therefore the obtaining of the work and the getting the clients in is nothing to do with the fee earner,"

31. In the transcript of the covert recording Mr McBain continued to share with the claimant the other tests he had considered for selection

> *"And then the allocation of work was always done on a very ad hoc basis, generally, on the idea that if you have done it before you'll do it again ….people want to feel some kind of ownership of the jobs…. There has been no recognised process for the allocation of work"*

32. Mr McBain continued to talk about the way in which he arrived at the component parts of the selection criteria:

> *"at the moment there's only two… so the weighting of them is 70,30 and that the idea was just to get, of the eight areas of work, is one that all four fee earners undertake, which is the three areas of VAT, Self Assessment and accountancy, and then it's about how much time is actually spent divided by the…..the amount of money divided by the time to get efficiency……. So in terms of the two tests is that – you understand the tests do you?*

33. The claimant replied that she did understand the tests. Mr McBain asked

> "*Ok, The fairness and appropriateness of the first and second test ?"*

34. The claimant raised concerns about fairness in work allocation and the respondent said that that was why he hadn't wanted to just measure turnover. Turnover alone or billing alone as a selection criteria would not be fair. The claimant agreed. She said "*Yes, that's what I am saying, that it's difficult because how do you then find a fair test ? It's not easy to find a fair test"*

35. Mr McBain was willing to consider any implications of unfair work allocation. He asked the claimant what would be a better way and the claimant said she did not know and " *I don't know what the solution would be because the distribution is what it is".* She said *"I think because we all work on different things it's hard to find a fair way across the board no matter what."*

36. Mr McBain indicated that he needed to go away and think about the test and when the claimant said that it was only her opinion, he replied;

> *"No, well, your opinion matters, This is not a … this is actually not democracy, this is everybody has to agree to it all"*

37. There was discussion about how redundancy might be avoided, and broad discussion about possible costcuting. There was also discussion about pay cuts or reduction in hours. Mr McBain said *"I would be a liar to say that I have not thought this one through"* and they go on to consider the cost and salary implications of staff going on reduced hours.

38. Mr McBain allowed this broad discussion but commented, "*I do not want to keep moving the goalposts*". He had put money in to fund the business and this could not continue. The staff had all agreed that there was a genuine redundancy situation.

39. The meeting concluded with the criteria agreed and Mr McBain going away to apply the criteria but also to consider what the claimant had said about work allocation and potential historic bias.

Second individual consultation meeting

40. By a letter of 26 April 2018 the claimant was invited to attend a second meeting on 27 April. The letter said:

> "*It was generally accepted that no criteria can be perfect and that there were no fundamental objections to those proposed."*

It went on to say:

> "*I regret to inform you that you have been provisionally selected for redundancy."*

41. On 27 April at 9.00am the parties met, and this is the second occasion on which the claimant made a covert recording. This meeting lasted only about 11 minutes. The claimant challenged why only she and Daniel were having a meeting. She argued that the other two in the pool had been made safe prematurely. Mr McBain said at the meeting that they were not out of the consultation process but that the proposal was at that stage that there were two of four redundancies to be made.

42. At the meeting there was discussion about what data to share with those in the pool. Mr McBain had decided to give the claimant not just her own figures or anonymised comparator data but all of the data. The claimant protested about possible impact of uplift on the figures and Mr McBain offered, "*If you can come up with an alternative test which is fairer than the only one we have got then come up with it, brilliant, I just don't know any other test that's going to be fairer than the one we've got".*

Meeting adjourns and reconvenes into THIRD individual consultation

43. The 27 April meeting broke at around 9.11am and reconvened at 9.41am. This is the second meeting of 27 April but the third time the parties met on a one to one basis and again it is covertly recorded. At this point the claimant had seen a spreadsheet on which work undertaken by Anna for AJS Solicitors, the fixed fee fixed time work, was entered not as part of the accountancy section but under a heading "sundry". The claimant argued that it had been hidden to falsely inflate Anna's hours. If AJS was included the claimant was in second place and not redundant. If AJS was excluded the claimant was in third place and would be made redundant.

44. The discussions at that meeting continued with the claimant saying that the AJS work should be included for Anna. Mr McBain disagreed. The pool had agreed at the previous meeting the areas of work over which the test would be applied and he did not want to change that agreement now. The claimant then argued that she wanted an alternate denominator, not hours billable but some other way of measuring efficiency; that is to say that she wanted to change the test. By the conclusion of the meeting the claimant said:

> "*I don't really know where we are meant to go from here because if I'm honest, Stuart, you've made my work in her pretty impossible on an ongoing basis because I don't respect or trust you anymore, I'm absolutely disgusted*."

45. The relationship between them was breaking down. The respondent offered another adjournment and invited the claimant to go and use that time for a second time to see if, using the agreed formula for efficiency, she could manipulate the data herself to achieve a different outcome.

Fourth individual consultation meeting (third meeting of 27 April 2018)

46. There was a third meeting that day (the fourth time the parties met on a one to one basis). The claimant asked the respondent to include all categories of work this time and not just the three that had been agreed in the letter of 4 April. The respondent agreed to look at an alternate way of running the data on the valid test of efficiency. He even agreed to allow the claimant to go through the entire database and to look at the categories of work to ensure commonality. The claimant spent time doing this and argued that two further clients, Applied and Calm, (also fixed fee for fixed time at agreed hourly rate; like AJS) ought also to have been included and that they had been excluded to inflate Anna's score.

47. The respondent again reiterated the test of efficiency. Total amount of time that has actually been taken and what the total amount of fees that have been earned are per person. The respondent was willing to go line by line through the time billed and allow the claimant to say which things she said should be included and which things should not. The claimant said that she had not proposed to do that.

48. The claimant repeated her allegation that the test had been manipulated and when the respondent asked her directly why he would do that she says, *"quite clearly because you would know who was staying and who was going"* and *"because then you'd keep the staff you want to keep".* She was alleging favouritism, that Mr McBain favoured the Anna and Michaela over her.

49. There was an agreement by the respondent in that fourth consultation meeting that the efficiency test, value billed over hours billable, would be run on the whole database work, not just the three areas that had been agreed with the pool.

Fifth individual consultation meeting

50. The claimant was then invited to a further meeting to take place on 28 April 2019. The letter of invitation warns her that her employment may be terminated as a result of this meeting and informed her of her right to be accompanied at the meeting.

51. The claimant emailed the respondent in response to this invitation. She persisted in arguing that the calculation ought to be value billed divided by hours billed to put her in second place and not redundant. She says in the letter, *"this result was again clearly not satisfactory to you despite being the result of your own proposed calculation method".*

52. It was not Mr McBain's proposed calculation method, he did not deviate from his focus on measuring efficiency by dividing the value billed by *hours billable.* The claimant wanted him to divide value billed by hours billed, he had never agreed to that and nor had the rest of the pool.

53. The claimant says in her letter by email on 2 May 2018 to Mr McBain *"my continuing working relationship is unsustainable going forward"*. The letter does not mention pregnancy discrimination. It makes no accusation of maternity or pregnancy related motivation. The claimant just says, *"it's not good for myself or the baby".* The claimant proposes that the respondent *"takes this time to consider a fair conclusion"*. The claimant concluded her letter saying,

> "*I think we can all agree that it is in everyone's best interests that we accept that my position with the company is untenable. This is a sad conclusion but one I have come to accept. I cannot work for someone where there is no longer trust or respect*."

Meeting arranged for 14 May 2018 but did not go ahead

54. Following receipt of this email there was a further meeting arranged for 14 May. Mr McBain and Mr Gorecki (a note taker) convened and waited for the claimant to attend but she did not. She had pre-booked annual leave that day. The meeting was postponed until 18 May 2018.

Sixth individual consultation meeting

55. Mr McBain and the claimant attended this meeting which took place in a private room off site on 18 May 2018, along with Daniel Rigby who came to support the claimant. Mr Gorecki was there by agreement to take notes. At the meeting Mr McBain outlined the position as at that date. The notes of that meeting are at page 127 of the bundle.

56. Mr McBain handed out notes from the previous meetings and said that this meeting was to consolidate previous meetings and go through all of the concerns raised. Mr McBain also provided copies of relevant documents. They were the statement from Tuesday 3 April informing staff of the redundancy, a document entitled "statistics", applying the efficiency test, a document showing total turnover figures for the practice and turnover per client and a document called classification comparison.

57. The disagreement between the claimant and the respondent, particularly in relation to the application of the test and the inclusion or exclusion of the AJS work, continued. Mr McBain repeated that AJS was not included as the fee earner had no control over the amount of time taken to do the work, it was a fixed fee for fixed time arrangement at an agreed hourly rate so it was not a measure of efficiency. Mr McBain said it was a situation in which, in effect *"the fee earner were in fact treated as a member of staff of the said organisation"*. The claimant disagreed and said that the billing was variable over time and not fixed. Mr McBain conceded that some months more days were worked or fewer days were worked but the arrangement was a fixed annual number of days for a fixed annual fee, month by month they may be up or down but over the whole year it was fixed.

58. The claimant then argued that staff in the office at the respondent had to do work that wasn't always billed. Mr McBain agreed that this could be the case and that is why it was agreed that the test would be applied over the three areas of commonality.

59. The notes of the meeting then record "VG wanted to change the calculation basis". Mr McBain stated again that the efficiency test was based on what the fee earner could control. It had been devised by the company having taken advice, and agreed with the staff as not perfect but the most accurate equation for measuring efficiency. The notes record "*debate continued on billed / billable"*

60. There was discussion about the respondent's manpower planning projections for 2018/2019. The claimant said they were unrealistic as they were based on 8 working hours in a day. She felt 6 hours per day was more realistic and that the firm would be short staffed going forward on his calculation. The meeting concluded with the claimant and respondent having to agree to disagree about the basis on which Mr McBain had planned for meeting the needs of the clients in the future.

The dismissal letter

61. Following this meeting Mr McBain issued a dismissal letter dated 22 May. This letter again set out what he had aimed to achieve in the selection criteria. The letter said:

> *"As you are aware I proposed to use an efficiency test for 70% of the assessment and length of service for the remaining 30% and it was the efficiency part that was queried."*
>
> *"I wanted to compare like with like in terms of the work done/invoiced….. I wanted to look at things that were in the fee earner's control"*
>
> *"the majority of the work undertaken by this firm is based on a fixed rate for the job (fixed fee work) with the notable exception of R & D work which is done on a percentage success basis and AJS and Applied which are done on a rate per hour (hourly rate work). I trust that you understand and accept that the test was based on something the fee earner had control of, namely the rate at which the fixed fee work is done and also that you understand that R&D work and the hourly rate work cannot be used to assess efficiency in the same way"*

62. The letter recorded the disagreement that the claimant had been voicing about the AJS work and Applied work. The letter terminated her employment with effect from 22 May and gave her a right of appeal.

Intention to appeal

63. The claimant emailed the respondent on 2 June 2018 signalling her intention to appeal. Mr McBain appointed Mr Chris Evans to hear the appeal and asked the claimant on 7 June 2018 if that choice was acceptable to her. The respondent offered a note taker for the appeal and consulted the claimant about dates for the appeal.

Appeal hearing on 19 June 2018

64. The appeal hearing took place on 19 June and with the consent of the respondent by its appeal officer Mr Chris Evans the claimant recorded the hearing on her phone. Mr Gorecki made notes. All the previous documentation was available to the appeal hearing.

65. Mr Evans said that the inclusion of the AJS work seemed to be the major issues. The claimant agreed that it was. The notes record the following grounds of appeal:

65.1 the time the claimant spent on R&D work was not included in the calculation.

65.2 it was unfair to calculate on site and off site work differently.

65.3 an employee called Claire had been offered a pay rise.

65.4 the manpower projections should have been 6 hours per day and not 8.

65.5 The claimant said that she felt she was being picked on because she was pregnant. She said she could not now return to work for the respondent.

Alternate role

66. An administration and payroll post paying approximately £8,000 per annum became available during the consultation period. It was not offered to the claimant.

Appeal decision making process

67. Following the appeal meeting Mr Gorecki's notes were made available to the claimant and to Mr Evans. The claimant's transcript of the recording from her phone was made available to Mr Evans.

68. The appeal officer reverted to the respondent and called for copy documentation and spoke to the claimant in making his further enquiries.

69. *The pregnancy issue:* The claimant had said at the appeal meeting that she felt she was picked on as she was pregnant. Mr Evans made enquiries of Mr McBain about pregnancy related motivation. He was satisfied that pregnancy was not a factor in Mr McBain's decision making. Mr Evans asked Mr McBain how the firm would have coped if the claimant had been retained only then to go on maternity leave. He replied that Mr McBain had said he would cover the maternity leave period, he would do the fee earning work himself. He had done this before for other pregnant members of staff. It wasn't an issue. It was his intention to do more accountancy work.

70. *The manpower projections*: This was not addressed in the appeal outcome letter.

71. *Claire's pay rise*: This was not addressed in the appeal outcome letter. By that time Claire had resigned.

72. *The AJS and Applied issue: on-site/off-site work*: Mr Evans considered the claimant's argument that Mr McBain had removed these clients from the scoring so as to manipulate the figures. Mr Evans considered that the legitimate reason for removing the clients was *"the charging structure was different"* meaning that the efficiency test would produce an anomalous result if they were included. Mr Evans, who initially thought that the claimant might have a point, looked again at this issue and spoke to the respondent and concluded that selection was in accordance with the process and test that had been proposed and agreed.

73. *The R&D work*: This was not specifically referred to in the appeal outcome letter but the letter sets out a rationale for what was included so as to ensure the test was measuring efficiency. Mr Evans states *"the whole efficiency test is based on the time taken for the fixed fee work".*

74. Mr Evans also considered issues other than those raised in the appeal meeting. He considered whether or not the position that became available should have been offered to the claimant, alternatives to redundancy including Claire's resignation and the allegation that letters had been sent to employees telling them that their jobs were safe.

75. *The alternative offer / Claire's resignation*: Mr Evans saw the letter from 2 May 2018 that the claimant had sent to Mr McBain. He was also aware that the role was an £ 8000 role whereas the claimant had been in a £ 36000 accountancy role. He did not feel that the role was a suitable alternative. Mr Evans had spoken to Mr McBain and questioned him about why the role wasn't offered in any event. Mr Evans was satisfied that the reason it hadn't been offered was because Mr McBain thought it would add insult to injury to offer that role after the email he had from the claimant in which she had said *"my position with the company is untenable".* Mr Evans himself had asked the claimant on 19 June 2018 if she would work for the respondent again and she had said no.

76. *The safe letters*: Mr Evans obtained copies of the letters sent to the other staff and was satisfied that they did not say that the jobs were safe. They were sent at a time when it was clear that staff had not been removed from the pool. Mr Evans felt that the letter writing was handled properly.

77. The outcome of the appeal was set out in a document dated 8 August 2018. Mr Evans dealt specifically with the efficiency test, the excluded clients issue and the failure to offer suitable alternate work. In the round the appeal officer dismissed the appeal. The claimant was made redundant.

78. Her baby was born in August 2018. She presented her claim in September 2019.

The Law

<u>Unfair Dismissal</u>

79. Section 98 of the Employment Rights Act 1996 (ERA) sets out the law on unfair dismissal relevant to this case. It says:

> (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 … a reason falling within subsection (2) …
>
> (2) A reason falls within this subsection if it….(c) is that the employee was redundant…
>
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (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 reasonably 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.

Redundancy

80. Section 139 of ERA defines redundancy. It says:

> (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-
>
> …(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.

The reason for dismissal

82. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

Reasonableness in redundancy

83. Where the reason for dismissal is redundancy, the Tribunal must consider whether the employer acted reasonably or unreasonably in treating redundancy as a sufficient reason to dismiss. In a case called *Williams v Compair Maxam Ltd [1982] IRLR 83*, the Employment Appeal Tribunal (EAT) set out the standards which should

guide Tribunals in deciding whether a dismissal for redundancy is fair under s 98(4). In that case unions were involved. The EAT said that reasonable employers will seek to act in accordance with the following principles:

83.1 The employer will seek to give *as much warning as possible* of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

83.2 The employer will *consult* the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will *seek to agree with the union the criteria to be applied in selecting the employees to be made redundant*. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

83.3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to *establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked* against such things as attendance record, efficiency at the job, experience, or length of service.

83.4 The employer will seek to ensure that *the selection is made fairly in accordance with these criteria* and will consider any representations the union may make as to such selection.

83.5 The employer will seek to see whether instead of dismissing an employee he could offer him *alternative employment*.

84. It is not for the Tribunal to substitute its view for that of the respondent. The Tribunal can intervene only where the respondent has acted so unreasonably that no reasonable employer could have acted in that way.

85. Nor is it for the Tribunal to carry out a detailed re-examination of the way in which the selection criteria have been applied. It is sufficient for the employer to have set up a good system for selection and administered it fairly. The Court of Appeal in a case called *British Aerospace plc v Green [1995] IRLR 437* said “in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt signs of conduct which mars its fairness will have done all that the law requires of him”.

86. On the issue of consultation an employer will not usually dismiss fairly for redundancy unless it makes reasonable efforts to consult its employees. In the case *R v British Coal Corporation and Secretary of State for Trade and Industry ex parte Price and Others* [1994] IRLR 72, per LJ Glidewell:

> "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 whom he is consulting. I would respectfully adopt the tests proposed by Hodgson J in *R v*

Gwent County Council ex parte Bryant, reported, as far as I know, only at [1988] Crown Office Digest p19, 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.

The fairness of the procedure as a whole

87. Where the employee appeals against dismissal, the Tribunal must examine the fairness of the procedure as a whole, including the appeal: *Taylor v. OCS Group Ltd* [2006] EWCA Civ 702.

88. Where an employer has failed to follow procedures, one question the Tribunal must *not* ask itself in determining fairness is what would have happened if a fair procedure had been carried out.

89. However, that question is relevant in determining any compensatory award under section 123(1) of ERA: *Polkey v. A E Dayton Services Ltd* [1988] ICR 142. The Tribunal is required to speculate as to what would, or might, have happened had the employer acted fairly.

Pregnancy and maternity discrimination

90. Section 18 of the Equality Act 2010 provides that a person discriminates against a woman if in the protected period in relation to a pregnancy of hers that person treats her unfavourably because of the pregnancy.

91. It also provides that she will be discriminated against if that person treats her unfavourably because she is on compulsory maternity leave or because she is exercising or seeking to exercise the right to ordinary or additional maternity leave.

92. The protected period means the period that begins when the pregnancy begins and ends when her maternity leave period ends or when she returns to work (if sooner)

Burden of proof

93. The burden of proof provision appears in section 136 of the Equality Act 2010 and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

The claimant's submissions

94. The claimant submitted:

94.1 That the criteria were manipulated to ensure her selection. She says that her pregnancy was not the sole reason for this manipulation. It was also the case that Mr McBain had personal favourites and this was part of the reason for her selection alongside her pregnancy. This submission is rejected for the reasons set out below. The test was agreed, it was objective and it was applied fairly.

94.2 That the AJS client had been hidden on a spreadsheet under "Sundry" to manipulate the figures. AJS did appear under "Sundry" but the claimant had full access to the database and Mr McBain was willing to allow her to run the efficiency test on all the clients on the database. He had not hidden it.

94.3That there was no distinction between the work Anna did for AJS and the work the rest of the pool did. The claimant submitted that the AJS work should not have been excluded from the calculation. The Tribunal accepts the submission of the respondent that the AJS work was done at an hourly rate for a fixed number of attendances at an hourly rate for a fixed agreed fee across the year. The Tribunal accepts the respondent's position that it believed that including hourly rate work would not measure efficiency.

94.4 The claimant says that the respondent proposed a new calculation to use all work areas and that this was to further manipulate the figures. The Tribunal rejects the submission. The respondent's willingness to allow the claimant access to data so as to apply the agreed criteria, namely the efficiency test, to that data was not manipulation but was meaningful consultation which goes beyond that required by law.

94.5 The claimant submitted that there was historical bias in work allocation which meant that it was difficult to apply selection criteria fairly. The Tribunal accepts the respondent's position that it agreed the three areas over which the criteria would be applied with all members of the pool and that it was only when the application resulted in the claimant being in the potentially redundant post that she sought to argue for the adjustments to the areas of work to be included. The respondent invited conversation about which clients the claimant said should and shouldn't be included and gave the claimant access to the database to attempt to run the data differently, provided always that it was applying the agreed efficiency test. By ensuring that the test was applied to all fee earners over areas of commonality the respondent sought to minimise or equalise the impact of any historical bias in work allocation.

95.5 The claimant submitted that her appeal was not fair as Mr Evans was so heavily influenced by the respondent that the appeal became a rubber stamping exercise. The Tribunal heard from Mr Evans and rejects the submission that his appeal was a rubber stamping exercise. Mr Evans met with the claimant, allowed her to record the meeting, subsequently sought documentation and spoke to Mr McBain on three occasions and carefully considered what the claimant had said. Mr Evans recorded his decision making in a letter and even dealt in the letter with issues that the claimant had raised not at appeal, but earlier in the consultation meetings.

95.6 The claimant submitted that her approaching maternity leave "had a big part" in the redundancy selection. The Tribunal accepts the respondent's submission that it played no part in the selection process. The respondent applied objective criteria that had been agreed and that focused on efficiency. The claimant was covertly recording some of the individual consultation meetings and yet very little mention is made of the pregnancy, maternity or leave period. It is mentioned by the claimant in the third individual consultation meeting once. In Tribunal very little mention was made of the pregnancy or maternity discrimination by the claimant. The focus, in consultation and in Tribunal was on the application of the agreed criteria.

95.7 The claimant submitted that the respondent had changed the basis on which it calculates how to meet the needs of its clients in future. She argued that the hours billable per day in the respondent's future planning calculations should have been 6 per day and not the 8 per day it calculated. In this way she sought to reopen a point she had conceded all along that there was a genuine redundancy. The claimant was seeking to argue that 2 staff would not be enough going forward. The respondent was entitled to make its own planning calculations for its future. The Tribunal accepted the respondent's evidence that Mr McBain himself would do accountancy work in the practice if it found itself short.

95.8 The claimant submitted that she took her selection very personally. The respondent accepted that redundancy is something that nobody wants and that that is why Mr McBain had tried to be so accommodating in consultation. It was important to the respondent that the claimant could see that the application of the selection criteria, the efficiency test, was not personal.

Respondent's submissions

96. The respondent's submission that the claimant was dismissed fairly by reason of redundancy is accepted.

Application of Law to Facts

The reason for dismissal

97. The claimant was dismissed by reason of redundancy. What was in Mr McBain's mind was the need to reduce the fee earning pool from four to two. Redundancy is a potentially fair reason for dismissal. Pregnancy or maternity or, as argued by the claimant, favouritism, were not factors in the respondent's decision to dismiss.

98. The Tribunal went on to consider question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) in the circumstances (including the size and administrative resources of the employer's undertaking) and whether or not the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee.

Reasonableness

99. The respondent is a small business with previously close working relationships. It is a specialist accountancy business. It conducted consultation including six individual consultation conversations with the claimant over a seven week period in April and May 2018 including providing off site premises for a private discussion. It provided a note taker and permitted the claimant to have a work place colleague with her. It provided an independent third party to hear the appeal.

100. The claimant was given enough warning to be able to find out relevant facts, to consider possible alternative solutions and to consider alternative employment. Warning was first given in the meeting on 3 April 2018. The redundancy took effect on 30 May 2018.

101. The claimant was consulted about the redundancy situation as part of group consultation on 3 April 2018 and in six individual conversations over a period of seven weeks. Discussion ranged around ways of avoiding redundancy altogether, the makeup of the pool, the criteria for selection and the efficiency test. The consultation was done at a time when proposals were still at a formative stage.

102. The pool was given adequate information on which to respond. The claimant knew she was at risk of redundancy. She accepted in evidence that there had been a downturn in work. The claimant was able to challenge the respondent's calculations for its need for fee earners in the future. The claimant argued that calculating to include 8 fee earning hours per day was excessive and that the reality would be closer to 6 fee earning hours per day. This showed the Tribunal that she had had detailed information about the need for reduction in the number of employees.

103. The claimant was able to contribute to discussion as to the membership of the pool (there was discussion about whether or not Kayleigh and Daniel should be in the pool).

104. The claimant (initially) agreed the criteria for selection. The respondent could have just used turnover but wanted something that was a fairer measure of the contribution of the individual. The criteria were agreed to be efficiency (70%) and length of service (30%). They did not depend solely on the opinion of the person making the selection. They could be objectively checked against the figures for efficiency and the length of service records.

105. The formula for calculating efficiency is at the heart of this case. The respondent says the agreed formula was value billed divided by hours billable; as that is a measure of efficiency. The claimant agreed that efficiency was an appropriate test. The efficiency test was then applied and resulted in a rank order. It showed the claimant to be redundant. Understandably, she tried to challenge the outcome. The claimant in effect proposed an alternate formula in which value billed was divided by hours billed. The formula was rejected by the respondent because it is not a measure of efficiency. The respondent wanted to measure the actual time it took the fee earner (hours billable) because that was largely within the fee earner's control.

106. The claimant also, alternately proposed that on the agreed formula AJS, Applied and Calm had been wrongly excluded from Anna's calculation. The claimant also, alternately proposed that the agreed formula should be applied across the whole database and not just the three areas of work where there was highest commonality which had been agreed.

107. The fact that the claimant was able to propose an alternate test, to have seen the data and been able to manipulate it, to make arguments about the inclusion and exclusion of clients and the areas of work to which the formula should be applied showed the Tribunal the depth, breadth and detail of the consultation in this case.

108. The claimant was given time and access to data and was asked to agree the dates and times of the next meetings. Over a period of seven weeks with six individual conversation meetings, depending on how you count 27 April meetings, the respondent engaged in detailed conversation about the formula, its application to the pool, the component parts of the numerator and denominator and specific clients and specific work undertaken by each fee earner.

109. The Tribunal finds there was meaningful, full and fair consultation in this process, and even when emotion and language was running high (the claimant said the respondent had shown stupidity, had fucked up and she said "I don't respect or trust you any more") the transcripts of the covert recordings show that the respondent remained calm and focussed on the efficiency test which had been agreed. The Tribunal records this not to be critical of what was a highly charged situation but because it notes that the claimant clearly felt able to speak openly in these meetings. Mr McBain gave conscientious and detailed consideration to what the claimant proposed.

<u>Was there a suitable alternative employment position that arose during the consultation exercise for which the claimant should have been considered?</u>

110. The role that arose was not a suitable alternative. It was a junior administration role and at a much lower rate of pay.

111. The Tribunal accepts that if it had been offered it is possible that the claimant might have taken the low pay administrator role. It is also possible that she might not. The Tribunal makes no criticism of the respondent for not offering it: it was not a suitable alternative role and in the light of the communications between them at the time it is understandable that Mr McBain may have felt that the claimant might be

insulted by the offer, particularly given the terms of her 2 May 2018 email in which the claimant says her position is untenable.

Was the claimant dismissed for redundancy or a reason relating to her pregnancy or maternity?

112. The claimant argued that she was dismissed for a pregnancy related reason in that Mr McBain knew that if she had not been selected for redundancy she would go on maternity leave in the summer and that would leave him short staffed. The Tribunal rejected that argument. It accepted the evidence of Mr McBain that the practice would cope. It had coped with maternity leave before and he would work there himself. The Tribunal was referred to the Claim Form, the transcripts of the covert recordings, the evidence of the claimant in Tribunal and the statement of Daniel Rigby. It accepted that scant reference was made to pregnancy or maternity in the claimant's case. The Tribunal saw no signs of any conduct by the respondent to mar the fairness of this dismissal.

Fairness as a whole

113. The claimant's submission that the appeal was a rubber stamping exercise is rejected. The appeal officer Mr Evans met with the claimant and allowed her to record the meeting. He considered all of the documentation from the previous individual consultation meetings and, in response to concerns the claimant raised, he adjourned the appeal hearing to go away and make further enquiries. He spoke to the respondent on three occasions about the issues of concern to the claimant and he sent his decision in writing. The appeal was dismissed.

Conclusion

114. The issue in this case was the application of the selection criteria as they affected the second and third ranking positions in the pool. The respondent satisfied the Tribunal that on the fair application of the agreed objective selection criteria the claimant ranked third and was made redundant.

115. The Tribunal concludes that the respondent acted reasonably in treating redundancy as a sufficient reason for dismissal in this case. The claim for unfair dismissal fails. The claim for pregnancy and maternity related discrimination is not well founded and fails.

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Employment Judge Aspinall
Date: 3 February 2020

REASONS SENT TO THE PARTIES ON

20 February 2020

FOR THE TRIBUNAL OFFICE

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