EMPLOYMENT TRIBUNALS

Claimant: Mr D Bendall

Respondent: The Female Social Network Ltd (In Voluntary Liquidation)

Heard at: London Central **On:** 22 July 2020

Before: Employment Judge H Grewal

Representation

Claimant: In person

Respondent: No appearance

JUDGMENT

1 The Tribunal has jurisdiction to consider the complaint of unfair dismissal.

2 The complaint of marriage discrimination is struck out on the grounds that it has no reasonable prospect of success.

3 The complaints of unfair dismissal, direct and indirect race and sex discrimination, harassment and victimisation will be determined at the hearing on 17 August 2020.

4 The Claimant has made it clear in his claim form (paragraphs 36 and 47) that he does not seek to bring claims for unlawful deductions of wages, breach of contract in respect of unpaid expenses and wrongful dismissal in the Employment Tribunal.

ORDERS

1 On or before **13 August 2020** the Claimant is to send electronically to the Respondent and the Tribunal a schedule of loss setting out the compensation that he seeks and the basis of calculating the sums, a witness statement setting out the

evidence that he wishes to give to the Tribunal and a bundle of the documents on which he intends to rely. The Claimant is to bring a hard copy of the documents to the Tribunal on the day of the hearing.

REASONS

1 This preliminary hearing was listed to determine whether:

(a) the Claimant had sufficient continuous service to bring a complaint of unfair dismissal;
(b) any of the complaints of discrimination should be struck out on the grounds that they had no reasonable prospect of success or made the subject of a deposit order on the grounds that they had little reasonable prospect of success; and
(c) the Tribunal could consider any complaints of discrimination that had not been presented in time.

2 After the preliminary hearing was listed the Respondent was placed into Creditors Voluntary Liquidation. On 15 July 2020 the Liquidators wrote to the Tribunal that they had no further evidence to present to the Tribunal in this matter and that the Tribunal should send them a copy of its judgment.

Unfair Dismissal

The Pleadings

3 In the claim form the Claimant said that his employment with the Respondent started on 1 December 2017 and ended on 30 August 2019. He said that he and his wife, Fiona Bendall, had founded Bendalls Group Pty Limited ("Bendalls") in Australia in 2004 and that he began working with F Bendall in 2007. In or around 2016 The Female Social Network Pty Limited ("TFSN Australia") was incorporated in Australia. He and his wife took control of that company through Bendalls in 2017. At that time TFSN Australia was heavily subsidised by Bendalls and the FUNC (their Family Trust). On 30 January 2018 he and F Bendall incorporated the Respondent and on 27 June 2018 they incorporated TFSN Global Ltd ("TFSNGL"). At the time hand FB each owned 50% of the shares in TFSNG though FUNC. TSNG wholly owned the Respondent.

4 In the Response the Respondent said that the Claimant's employment with it started on 1 April 2019 and ended on 30 August 2019. It stated that the Claimant was employed by TFSN Australia and that his contract of employment said that that employment commenced on 9 January 2019. It said that the Tribunal did not have jurisdiction to consider the Claimant's complaint of unfair dismissal because he did not have at least two years' continuous service with the Respondent.

The Law

5 Section 94 of the Employment Rights act 1996 ("ERA 1996") provides that an employee has the right not to be unfairly dismissed by his employer. S108(1) ERA 1996 provides,

> "*Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."*

6 Section 230 ERA 1996 provides,

> "*(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*
> *(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing."*

7 Chapter 1 of Part XIV of the Employment Rights Act 1996 deals with "continuous employment". Section 218 in that Chapter provides,

> "*(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.*
> *…*
>
> *(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer –*
> *(a) the employee's period of employment at that time counts as a period of employment with the second employer, and*
> *(b) the change does not break the continuity of employment."*

8 Section 231 ERA 1996 provides,

> "*For the purposes of this Act any two employers shall be treated as associated if –*
> *(a) one is a company of which the other (directly or indirectly) has control, or*
> *(b) both are companies of which a third person (directly or indirectly) has control;*
> *and "associated employer" shall be construed accordingly."*

9 According to Harvey on Industrial Relations and Employment Law, "company" in this context means limited company. However, the company need not be one formed and registered under the United Kingdom companies legislation. Service with an overseas company may be counted along with subsequent service with a UK registered company where they were at the time of change subsidiaries of the same parent company (and regardless of whether the parent company is UK registered or not – **Hancill v Marcon Engineering Ltd [1990] IRLR 51**. The position would be the same where there has been service successively as an employee of an overseas and a UK registered company both of which were at the material time controlled by

the same person, the definition of "third person" being wide enough to cover both natural and legal persons.

10 According to Harvey "control" in this context means constitutional control of the limited company concerned, that is through voting power in the general meetings of the company. In **South West Laundrettes Ltd v Laidler [1986] ICR 445** the majority shareholder in the employing company was also the owner of 50% of the shares, with his wife holding the other 50%, in other companies. The Court of appeal held that these were not "associated employers" since a 50/50 shareholding without anything in the Articles and without a collateral agreement to confer control of votes at a general meeting on one or the other, created a situation where neither of them could be said to be in control of the second company.

11 Section 203(1) ERA 1996 provides,

> "*Any provision in any agreement (whether a contract of employment or not) is void in so far as it purports –*
> *(a) to exclude or limit the operation of any provision of this Act, or*
> *(b) to preclude a person from bringing any proceedings under this Act before an employment tribunal."*

The Evidence

12 The Claimant's case was that he had been employed by associated employers of the Respondent since 1 July 2007. The Claimant gave evidence before me and produced some documentary evidence. Having consider the oral and documentary evidence, I make the following findings of fact.

Findings of Fact

13 Bendalls Group Pty Ltd ("Bendalls") was incorporated in Australia on 20 December 2004. 100 ordinary shares were issued. Initially, F Bendall held 51 shares, the Claimant 39 shares and two other entities the remaining shares. In February 2020 95 of the shares were held by Fizzy Enterprises Pty Ltd and 5 by another Australian company. That had been the position since 27 June 2016.

14 Fizzy Enterprises Pty Ltd ("Fizzy") was incorporated in Australia on 27 June 2016. 10 ordinary shares were issued. F Bendall and the Claimant each owned 5 shares.

15 The Claimant did work for Bendalls from 2007 onwards and at some stage became an employee of the company. He was never given a contract of employment. His tax return for the period 1 July 2017 – 30 June 2018 showed that he received a salary of $86,654 from Bendalls and that the sum of $20,878 was withheld as tax.

16 The Female Social Network Pty Ltd ("TFSN Australia") was incorporated in Australia on 4 January 2016. 40 ordinary shares were issued. Initially, four different persons held 10 shares each. One of them was F Bendall. On an unspecified date in 2017 Fizzy acquired all 40 shares. Since 27 June 2018 all 40 shares have been held by TFSN Global Ltd.

17 At some stage the Claimant commenced working for TFSN Australia. He was not issued with a contract of employment. His evidence was that on 1 December 2017 his employment transferred from Bendalls to TFSN Australia. However, his tax return for 1 July 2017-30 June 2018 does not show him receiving any income from TFSN Australia. The Claimant's evidence was that as TSFN Australia could not afford to pay his salary at the time it was paid by Bendalls but was treated as an intragroup debt. At that stage Fizzy held 95% of the shares in Bendalls and 100% of the shares in TFSN Australia.

18 The Female Social Network Ltd (the Respondent) was incorporated on 30 January 2018. 100 ordinary shares were issued. The Claimant and f Bendall held 50 shares each.

19 TFSN Global Ltd was incorporated on 27 June 2018. It had one share which was owned by FUNC Enterprises Trust. FUNC Enterprise Trust had ben set up on 22 September 2016. Fizzy was the trustee and the Claimant, F Bendall and their daughter were the beneficiaries of the Trust. On the same day (27 June 2018) the one share was transferred from FUNC Enterprises Trust to Fizzy.

20 On 18 December 2018 the Claimant and F Bendall transferred all their shares in the Respondent to TFSN Global Ltd.

21 On 9 January 2019 the Claimant was promoted to Global Business Officer by TFSN Australia, and he was issued with a contract of employment. Clause 2 set out his duties and these included the following:

> "*Support and advice overseas operations, the local General Manager and TFSN global team consistent with structure*
> *Liaise with global teams to develop international learning*
> *Transition role to Global role based in the company headquarters in London."*

Clause 4.2 provided,

> "*The Employee shall be typically based in Sydney, NSW until such time as relocation to London can be made permanent."*

Clause 3.1 provided

> "*The Employee's employment will not be subjected to a probationary period given the long association between the parties."*

22 In March 2019 the Claimant relocated from Australia to London. F Bendall had relocated in January of that year. It had initially been anticipated that the Claimant would remain employed by TFSN Australia and would be seconded to work for the Respondent. However, some issues arose about the Claimant having a UK contract of employment and it was decided that he should be employed directly by the Respondent. A contract of employment was drawn up and it was signed on the Claimant's behalf using his digital signature without his knowledge. The Claimant was in Australia at the time.

23 The contract provided that the start date of his employment was 1 April 2019 and that no period of employment with any previous employer counted as part of his

period of continuous employment with the Respondent. It is a strange contract in that it contains no provision about what his salary would be. It stated that the first six months of his employment would be a probationary period and that he would report to F Bendall, his manager.

24 On 30 August 2019 he was dismissed by the Respondent without notice for gross misconduct. The dismissal letter was written on TFSN Global headed paper.

Conclusions

25 The Claimant's employment transferred from TFSN Australia to the Respondent on 1 April 2019. At that time TFSN Global Ltd held all the shares in both TFSN Australia and the Respondent. It, therefore, had control of both companies. As both companies were controlled by the same third party, they were "associated employers" as defined by section 231 of the Employment Rights Act 1996.

26 I accept that the Claimant's employment with TFSN Australia commenced before 9 January 2019. He was issued with a contract on that date because he was promoted to a new role. I accepted the Claimant's evidence that it began on 1 December 2017 and his explanation for wages from it not appearing on 2017-2018 tax return. I also accept that prior to that he had been employed by Bendalls and that on 1 December 2017 his employment transferred to TFSN Australia. On that date Fizzy held 95% of the shares in Bendalls and 100% of the shares in TFSN Australia. As both these companies were controlled by the same third party, they were "associated employers" as defined by section 231 ERA 1996.

27 It was not clear exactly when the Claimant became an employee of Bendalls, but I am satisfied that he had been employed by Bendalls for a number of years and that his employment commenced before 1 July 2017.

28 I concluded that the two changes of the Claimant's employer (on 1 December 2017 and 1 April 2019) did not break his continuity of employment because in each case the move was between associated employers. The clause in the contract of 1 April 2019, which provides that no period of employment with a pervious employer counts as part of his continuous period of employment with the Respondent, is void by virtue of section 203(1) of the Employment Rights act 1996. The Claimant, therefore, has the requisite continuous service to bring a complaint of unfair dismissal.

Discrimination claims

The Law

29 Section 13 of the Equality Act 2010 ("EA 2010) provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23). Race, sex and marriage are protected characteristics in respect of which discrimination is prohibited under the Equality Act 2010. Section 8(1) of the Equality Act 2010 provides,

"*A person has the protected characteristic of marriage and civil partnership if the person is married or is a civil partner."*

30 Rule 37(1) of the Employment Tribunals Rules of Procedure 2013 provides that at any stage of the proceedings a Tribunal may strike out all or the part of a claim or response on the grounds that it is scandalous, vexatious or has no reasonable prospect of success. Rule 39(1) provides that where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party to pay a deposit not exceeding £10,000 as a condition of continuing to advance that allegation or argument. Before making such an order the Tribunal is obliged to make reasonable enquiries about the party's ability to pay and to have regard to any such information when deciding the amount of the deposit.

31 The test of no reasonable prospect of success is a lower one that no prospect of success. In determining whether a claim has a reasonable prospect of success the issue is whether it has a realistic as opposed to a merely fanciful prospect of success – **Ezsias v North Glamorgan NHS Trust [2007] ICR1126, at paragraphs 25, 26**. The test of little reasonable prospect of success in rule 39(1) is not as rigorous as the test that the claim has no reasonable prospect of success, and thus a tribunal has greater leeway when considering whether or not or der a deposit – **Van Rensburg v Royal Borough of Kingston-upon-Thames (EAT/0095/07)**.

32 As a general rule issues of discrimination should only be decided after hearing the evidence because such cases are highly fact-sensitive (per Lord Hope in **Anyanwu v South Bank Students Union & Other [2001] ICR 391**). That, however, does not establish a rule against striking out in discrimination cases. In the same case Lord Hope said, at paragraph 39,

> "*Nevertheless I would have held that the claims should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial. The time and resources of the employment tribunal ought not to be taken up by having to hear evidence in cases that are bound to fail"*

It would only be in an exceptional case where a claim would be struck out on the basis of no reasonable prospects of success when the central facts are in dispute – **Ezsais v North Glamorgan NHS Trust [2007] ICR 1127**. The same principle applies when a judge is considering whether to make a deposit order – **Sharma v New College Nottingham (EAT 0287/11)**.

33 A tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated an employee unreasonably and that the employee has a protected characteristic – **Glasgow City Council v Zafar [1988] IRLR 36**. However, discrimination may be inferred if there is no explanation for the unreasonable treatment. That is not an inference from the unreasonable treatment itself but from the absence of any explanation for it – **Bahl v The Law Society [2004] IRLR 810**.

The complaints

34 The Claimant brought complaints of race, sex and marriage discrimination. His claim was presented on 15 January 2020. Early Conciliation ("EC") was commenced on 21 November 2019 and the EC certificate was granted on 21 December 2019.

35 It is not in dispute that from about April 2019 the Claimant and his wife, F Bendall, were experiencing marital difficulties and that their marriage was breaking down.

36 The Claimant gave limited particulars of his complaints of discrimination in his claim form. He said that his case was that from about April 2019 onwards,

> "16 … *FB* [Ms Bendall], *ER* [Ed Rieu – investor and non-executive director] *and the new investor had together formed a plan to exit the Claimant from the business and that the UK employment contract and the amended SSHA were forced through (without the Claimant's consent) to facilitate his removal once the funding round had completed. The Claimant believes that FB's motivation in this regard was that their marriage was experiencing difficulties and the FB was planning to divorce the Claimant. The Claimant believes that, faced with a choice between continuing to work with the Claimant and FB, the investors decided to back FB, which the Claimant maintains is for discriminatory reasons relating to the Claimant's gender and/or nationality and/or marital status. Further, it became clear to the Claimant that FB wanted to replace him with her best friend, Grace Fodor, (GF"), whom FB wanted to appoint a Sales Director.*
>
> *17 As their relationship deteriorated, FB became increasingly abusive and bullying towards the Claimant. For example, on 7 May 2019 she sent the Claimant an email which stated, "I hate Australian mentality and you have it droves just shit … And DO NOT say you are a founder in MY business MY efforts ever again You Leech – you don't even believe in women or have ever struck your neck out."*

37 In paragraphs 40 – 45 of his particulars of claim the Claimant said that he had been subjected to direct and indirect discrimination, harassment and victimisation. The PCPs relied upon for the complaints of indirect discrimination were: (i) a requirement that only those who "stick their neck out for women" can hold an executive leadership role in the business; (ii) a requirement that no married couples may work in executive leadership roles in the business; and/or (iii) a requirement that only those with the same "mentality" as FB may hold an executive leadership role in the business. In respect of the victimisation complaint, the Claimant said that he had complained of discriminatory treatment in his discussions with an HR consultant on 20 and 27 August 2019 and that that amounted to a protected act. He said that he had been dismissed because he had done that protected act.

38 At a preliminary hearing on 15 May 2020 I made an order for the Claimant to provide further particulars of his complaints of direct and indirect discrimination. The particulars that he was ordered to provide were by reference to the facts already set out in his particulars of claim.

39 The Claimant provided the particulars on 5 June 2020. He identified the following sixteen acts as being acts of discrimination (he alleged that they were part of a continuing act the purpose of which was to exclude him from the organisation):

(1) On 15 April 2019 ER arranged for a new stock transfer sheet to be signed to show that the Claimant had 49% of the shares in TFSNG and F Bendall had 51% (Direct race, sex and marriage discrimination);

(2) On 16 April 2019 F Bendall instructed ER to prepare a UK employment contract for the Claimant and to sign it on his behalf (Direct race, sex and marriage discrimination);

(3) On 3 May 2019 the Board (including F Bendall and ER) signed an amended SSHA which purported to remove the Claimant's veto and his protection from dismissal, and used his digital signature (Direct race, sex and marriage discrimination);

(4) On 5 May 2019 F Bendall sent the Claimant the email set out at paragraph 36 (above) (Direct race and sex discrimination and harassment);

(5) On 20 July 2019 F Bendall sent the Claimant a text message stating "*it is clear that we are done…Your belongings will be packed… Ed and Praveen will meet with you to discuss TFSN and the way forwards."* (Direct race, sex and marriage discrimination);

(6) On 20 July 2019 F Bendall attended the bank and advised them that the Claimant was no longer a director of TFSN and requested that he be removed from all company accounts and cards (Direct race, sex and marriage discrimination);

(7) On 20 July 2019 the Board issued a written resolution to remove the Claimant as a signatory from all of the Respondent's bank accounts (Direct race, sex and marriage discrimination);

(8) On 22 July 2019 a Board resolution was passed to remove the Claimant from the Australian banking mandate (Direct race, sex and marriage discrimination);

(9) On 24 July 2019 F Bendall and the Board suspended the Claimant and the suspension letter did not give him any details about the concerns which had been raised (Direct race, sex and marriage discrimination);

(10) On1 August ER gave notice to the Board of a Board meeting on 2 August to consider serving special notice to remove the Claimant as a Director (Direct race, sex and marriage discrimination);

(11) Around 2 August F Bendall sent the Claimant a text saying, "*The door is closing to come back and work with TFSN … I wonder if it would best for everybody if you resign?"* (Direct race, sex and marriage discrimination);

(12) On 12 August F Bendall sent the Claimant a text saying, "*I suggest you resign as employee… Your position is untenable in TFSN from my point of view professionally and personally."* (Direct race, sex and marriage discrimination);

(13) On 15 August the Claimant received a letter from ER accusing him of a number of alleged breaches of contract (Direct race, sex and marriage discrimination);

(14) The Claimant did not receive the full salary to which he was entitled over a six-month period (Direct race, sex and marriage discrimination);

(15) Failure to reimburse the expenses which the Claimant had incurred by the termination date and the Respondent had agreed to pay (Direct race, sex and marriage discrimination).

(16) The Claimant's summary dismissal on 30 August 2019 (Direct race, sex and marriage discrimination, indirect sex and race discrimination and victimisation).

Conclusions

40 The basis of the Claimant's direct marriage discrimination claims is that F Bendall, ER and the Board did the above acts to remove him because he was married to F Bendall and their relationship had broken down. They would not have not have treated a hypothetical comparator whose circumstances were the same but who was not married to F Bendall in the same way.

41 The focus of the claim is not the Claimant's marital status (i.e. that he was a married person) but that he was married to a particular person, F Bendall. His claim in essence is that when the marriage started to break down, she wanted him out. In **Hawkins v Atex Group Ltd [2012] IRLR 807** the EAT held that less favourable treatment on the basis that the complainant is married to a particular person only falls within section 8 EA 2010 if the ground for the treatment is specifically that they are married rather than that they are in a close relationship which happened to take the form of marriage. Underhill P stressed in that case that,

> "*it is important to get the emphasis in the right place: the question is not whether the complainant suffered the treatment in question because she was married to a particular man, but whether she suffered it because she was married to that man."*

He said, at paragraph 13,

> "*The approach which I favour, covering only cases where the employer is motivated (at least in part) by the fact of the marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage, seems to me essential if the law in this field is to remain principled and coherent."*

42 In order for the Claimant to succeed he would have to establish that if all the other facts had remained the same (i.e. that he and F Bendall had been in a close personal relationship for many years, had lived together and had a child, and had had the same involvement in the business interests, but had not been married, when that relationship started to break down F Bendall would not have wanted him out of the business). A mere assertion by the Claimant to that effect is not sufficient to establish that claim. There would have to some evidence before the Tribunal from which it could infer that the actions of F Bendall and the Board were motivated not by the fact that the close personal relationship between them (which had taken the form of a marriage) was going through an acrimonious breakdown but was motivated at least in part because they were married to each other. There is nothing in the material before me to indicate that what motivated the acts complained of was the fact that

the parties to the personal relationship which was undergoing an acrimonious breakdown were married to each other as opposed to living together like a married couple. I concluded that there was no realistic prospect of the Claimant establishing that he was treated less favourably than he would have been, if he had been in the same position but had not gotten married to F Bendall.

43 There are two aspects to Claimant's complaints of direct race and sex discrimination. The first is that a hypothetical comparator whose circumstances were the same but who was not an Australian and/or a man would not have been treated in the same way. The second is that he was treated less favourably than FB, who is English and a woman, and that the reason for the less favourable treatment was race and/or gender.

44 As far as the first aspect is concerned, he Claimant will have the same difficulties as he had with the marital status discrimination claim. He would have to establish that if the other party in the relationship breakdown had been a woman or some race than other Australian, FB and the Board would have acted differently. There is no evidence from which the Tribunal could infer that an acrimonious relationship breakdown with someone of different gender or race would have been treated any differently.

45 As far as the second aspect is concerned, it needs to be borne in mind that for most of the alleged acts of race and sex discrimination, F Bendall is either the only perpetrator or one of the perpetrators. Hence, she is alleged to be both the discriminator and the comparator. It is difficult to see how the Claimant could argue that, in a situation where they were in dispute, she treated him less favourably than she treated herself because of race or gender. The most obvious conclusion would be that she treated him the way that she did because they were in dispute. The position is different as far as the Board and ER are concerned. If they treated the Claimant less favourably than F Bendall that might lead to a finding of race and/or sex discrimination. However, the mere difference in race and gender is not in itself sufficient to shift the burden of proof to the Respondent.

46 I cannot say that the claims of direct race and sex discrimination have no reasonable prospect of success, but I consider that they have little reasonable prospect of success. I considered whether to make a deposit order in respect of them and decided against it because the Claimant's means are limited, the Respondent is not defending the claim and the hearing is listed to take place on 17 August 2020.

47 I considered that the complaints of indirect race and sex discrimination in respect of the Claimant's dismissal also have little reasonable prospect of success. The Claimant's case is that the Respondent applied tow PCPs – the first was that only those who "stick their neck out for women" can hold an executive leadership role and the second was that only those with the same "mentality" as F Bendall could hold such a role. The first is said to be indirect sex discrimination and the second indirect race discrimination.

48 The Claimant will have some difficulty in establishing that those PCPs were applied. His assertion that they were is based on messages that F Bendall sent him when their relationship was breaking down. Furthermore, he had held executive

leadership roles in the business, and it was only decided to remove him when the relationship broke down.

Employment Judge

Date 03rd Aug 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

03/08/2020

FOR THE TRIBUNAL OFFICE