EMPLOYMENT TRIBUNALS

Claimant: **Mrs C May**

Respondent: **Symmetric Systems Limited**

Heard at: **Bristol (by video)** **On: 24, 25 and 28 August 2020**

Before: **Employment Judge O'Rourke**
Mrs Richards Wood
Mr Ley

Representation
Claimant: **in person**
Respondent: **Mr Magee - Counsel**

RESERVED JUDGMENT

1. The Respondent unfairly dismissed the Claimant.

2. The Polkey principle applies to that dismissal, to reduce any award by 60%.

3. The Claimant's claims of pregnancy/maternity discrimination, breach of reg.10 of the MPL Regulations, automatic unfair dismissal and victimisation, fail and are dismissed.

4. A remedy hearing (by video), with a time estimate of half a day, will be listed on the next available date.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent as an operations and support manager, for approximately four and a half years, until her dismissal, with effect 14 January 2020, on alleged grounds of redundancy.

2. The Claimant was on maternity leave at the time. As a consequence of that dismissal, she brings claims of maternity discrimination (s.18(4) Equality Act 2010 ('EqA')), breach of reg.10(2) Maternity and Parental Leave Regulations 1999 ('MPL'), victimisation (s.27 EqA), automatic unfair dismissal (s.99 Employment Rights Act 1996 ('ERA')) and 'ordinary' unfair dismissal (s.98

ERA). The original claim was brought on 24 January 2020, but the Claimant subsequently applied to amend her claim to include one of victimisation, which application was granted by the Tribunal at a case management hearing on 16 July 2020.

3. The Respondent is a claims management company, which, at the relevant time, it is not disputed, was predominantly involved in the Payment Protection Insurance (PPI) market.

4. The issues in respect of each claim are as follows:

   a. Maternity Discrimination (s.18 EqA).

      i. There is no dispute that the Claimant suffered the detriment of being dismissed, during the protected period of her pregnancy.

      ii. Was her dismissal because of her pregnancy?

   b. Maternity Regs (reg.10).

      i. Was it not practicable, by reason of redundancy, for the Respondent to continue to employ the Claimant under her existing contract of employment?

      ii. If so, was there suitable alternative employment (as defined by reg.10(3)) that could have been offered to the Claimant, but was not?

   c. Victimisation (s.27 EqA).

      i. It is not disputed that the Claimant carried out a 'protected act', by either alleging maternity discrimination and/or threatening to take these proceedings, in her appeal against dismissal, of 28 October 2019 [57].

      ii. Has the Claimant established what the detrimental action relied upon is? In this respect, the Claimant states that as a consequence of answers the Respondent (in the person of Mr Smart, its managing director) gave, on 22 January 2020, to a questionnaire from the Claimant's mortgage protection insurance company [28], that Company declined to honour the policy and refused to cover her mortgage payments.

      iii. Did the Respondent subject the Claimant to that detriment?

      iv. Was any such detriment because of the protected act?

   d. Automatic Unfair Dismissal (s.99 ERA). Was the reason, or principal reason for the Claimant's dismissal, her pregnancy, childbirth, maternity or the taking of maternity leave?

e. 'Ordinary' Unfair Dismissal (s.98 ERA).

i. Has the Respondent shown the reason for dismissal? The Respondent states redundancy, or, in the alternative, Some Other Substantial Reason (SOSR), but the Claimant asserts that it was due to her maternity.

ii. Was the dismissal procedurally fair? Procedural fairness would require adequate and meaningful consultation, the consideration of a pool for selection, a fair method of selection and consideration of the possibility of suitable alternative employment.

iii. If the dismissal were found to be procedurally unfair, the Respondent would seek to rely on the Polkey principle, as to the assessment of appropriate remedy.

The Law

5. In addition to those authorities to which we have referred ourselves below, Mr Magee referred us to the following:

a. **Simpson v Endsleigh Insurance Services Ltd [2001] ICR 75 UKEAT**, as to the definition of 'suitable alternative work' in reg.10 MPL.

b. **Taylor v OCS Group Ltd [2006] IRLR 613 EWCA**, as to whether or not an internal appeal could 'cure' any prior lapses in procedure.

c. **Capita Hartshead Ltd v Bayard [2012] IRLR 814 UKEAT**, as to pool selection.

The Facts

6. We heard evidence from the Claimant and on behalf of the Respondent, from Mr Simon Smart, its managing director and Mr Paul Costelloe, a minority shareholder and who was involved in the consultation process.

Chronology

7. We set out an uncontentious list of relevant dates and events.

(1) 14 August 2019 – the Claimant went on maternity leave.

(2) 13 September 2019 – the Claimant came into the office to meet with Mr Costelloe (the content and nature of this discussion is in dispute).

(3) 1 October 2019 – there was an exchange of text messages between the Claimant and a colleague, Amy Piper, the senior process manager and the Claimant's line-manager, in which redundancies were generally discussed and also the potential for a reduction in salary. The Claimant indicated the possibility of breaking her maternity leave to cover for Ms Piper, who was herself due to go on such leave in December [46].

(4) 10 October 2019 – the Claimant referred in an email to being requested to agree to a salary reduction of £10,000 (not disputed by the Respondent), but she did not agree [50].

(5) 14 October 2019 – the Claimant received a letter confirming notification of dismissal on grounds of redundancy [51].

(6) 28 October 2019 – the Claimant appealed against her dismissal [57], referring to potential discrimination on grounds of her maternity.

(7) 15 November 2019 – the Claimant received the outcome of her appeal, from Mr Smart, rejecting it [63-66].

(8) 19-22 November 2019 – there was an exchange of emails between the Claimant and Mr Smart, as to the possibility of her being paid her redundancy and all SMP due to her, in an advance payment, but Mr Smart concluded, subsequently, on his accountant's advice that he could not do this [69]. There was then a suggestion by Mr Smart that if the Claimant '*drop the appeal'*, advance payments could be made at the end of that month [70]. It was not disputed by either party that this is, in fact, a reference to these proceedings, not the internal appeal, which had already, obviously, concluded. The Claimant responded, agreeing that she would '*drop the appeal'* [71] and the payment was subsequently received.

(9) 9 December 2019 – the Claimant sent Mr Smart a questionnaire from her mortgage protection insurers, for his completion [79A].

(10) 12 December 2019 – the Claimant entered into ACAS Early Conciliation, which was subsequently extended to 24 January 2020 [90].

(11) 7 January 2020 (all dates hereafter 2020) – the insurers sent a request for further information to Mr Smart [121].

(12) 9 January – Mr Smart wrote to the Claimant stating, '*to say we are disappointed would be an understatement, you have been supported substantially over the years and the harm that you have caused to so many is enormous and unforgivable'* [82].

(13) 23 January – Mr Smart completed and returned the insurance questionnaire to the insurers [120], stating that '*if you require any further information please do not hesitate to contact me as there was limited space to respond in full on the form provided.'*

(14) 24 January – the Claimant presented this claim to the Tribunal.

(15) 31 January – the insurers wrote to the Claimant, declining to accept liability for her claim. They referred to her answer to a question put to her, when applying for the policy in March 2019, when she said '*no'* to the question '*Do you know of any redundancies, restructure, re-organisation, financial or contractual threats within the business you work in, even if you do not believe actions will result in you becoming*

unemployed?'. They considered that answer, in the light of her knowledge of the PPI deadline, incorrect and invalidated the policy [91].

(16) 3 - 12 February – the insurers wrote again asking Mr Smart for '*any evidence to support your claim that Mrs May was aware of her job being at risk in 2017?'* [119]. Mr Smart responded on 10 February, referring to '*the most obvious form of evidence … was all over the national press since August 2017 …'*. He also referred to emails sent to all staff re the PPI deadline for the bringing of claims (August 2019) [118]. On 12 February, having been asked for copies of these '*announcement emails'*, he responded, stating that '*there wasn't an announcement as such prior to the potential redundancy announcement. It was well known to all staff that we would likely be shutting down following the completion of any remaining claims after the deadline'* [116].

8. Maternity Discrimination/Automatic Unfair Dismissal. We consider both of these claims together as a similar question arises in both – was the Claimant's dismissal because of her pregnancy/maternity leave (or, in the case of automatic unfair dismissal, was it at least the principal reason). We find that her dismissal was not on those grounds , for the following reasons:

   a. We were satisfied that the Respondent had to consider redundancies, due to the dramatic downturn in the PPI market, due to the August 2019 deadline.

   b. Only one of the previous four managers retained their position, indicating to us that the Claimant was just one of several to be made redundant/take voluntary redundancy/be dismissed without redundancy (having less than two years' service) [organisation chart 115].

   c. The Claimant seemed to us to have been a valued employee of the Respondent and doing a good job, reflected by her being given a £10,000 pay rise, in the previous year and also having had her notice period extended from one month to three. We are confident that had the redundancy situation not existed, brought on by the PPI deadline, the Claimant would have returned to her old position, or something similar to it, following her maternity leave.

   d. Despite her pregnancy and the taking of maternity leave, Ms Piper remains in the Respondent's employment.

9. Breach of Reg 10 MPL. Reg. 10 requires an employer to offer an employee on maternity leave, whose position is at risk of redundancy, a 'first option' (i.e. in preference to other employees) on any suitable alternative employment that is available. Such employment must be '*of a kind which is suitable both in relation to the employee and appropriate for her to do in the circumstances … and its provisions as to the capacity and place in which she is to be employed, and as to other terms and conditions of her employment, are not substantially less favourable to her* (in comparison to the previous contract).' **Endsleigh** indicates that 'suitability' should be judged from the perspective

of an objective employer, not from the employee's perspective and that it is up to the employer, knowing what it does about the employee's personal circumstances and work experience, to decide whether or not a vacancy is suitable. In respect of this head of claim, therefore, we find, for the following reasons that there was no such suitable alternative employment:

a. Only one managerial role remained, that of Ms Piper's, the senior process manager, which she was filling and which was not therefore available for the Claimant.

b. Such roles as otherwise remained were administrative only, on the National Living Wage and were not, therefore, when viewed by an objective employer, 'suitable' in terms of status or salary.

10. Victimisation.

a. Did the Respondent submit the Claimant to the detriment of losing her mortgage protection insurance cover? For detriment to occur, the employee, in his or her actual condition, must be worse off than would otherwise be the case. Then he or she is at a disadvantage and has suffered a detriment. The test is whether a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment (**Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**). However, subsequently, in **Derbyshire v St Helens Metropolitan Borough Council [2007] ICR 841 UKHL**, it was confirmed that such belief on an employee's part must be 'objectively reasonable' in all the circumstances. The Equalities and Human Rights Commission Employment Code summarises 'detriment' as '*anything which the individual concerned might reasonably consider changed their position to the worse, or put them at a disadvantage.'* In considering that guidance, we find that the Claimant was not victimised, for the following reasons:

i. It is clear to us that the manner in which Mr Smart responded to the insurance questionnaire was motivated, at least in part, by his perception of the Claimant having reneged on the 'deal' he considered he had struck with her as to '*dropping the appeal*', i.e. this Tribunal claim. His feelings on that matter were clearly expressed by him in his email of 9 January 2020 [82]. When challenged in cross-examination as the email's tone, he apologised, stating that they '*had been friends for a long time and she had gone back on our agreement … I was upset and angry'*. However, we nonetheless do not consider that the Claimant suffered a detriment as a consequence. It is obvious that Mr Smart went beyond merely responding to the insurer with basic information, instead using expansive language and offering even more information if required, '*as there was limited space to respond in full on the form provided*'. However, the question we

must ask ourselves is was the Claimant's position worse as a consequence? We don't consider that it was, for the following reasons:

1. She accepted in cross-examination that she had unintentionally mislead the insurer when she made the application, in particular in her answer to the question as to whether or not she was aware of any '*re-organisation, financial or contractual threats within the business you work in, even if you do not believe actions will result in you becoming unemployed?'*. It seems highly likely, therefore that once the insurer became aware that the bulk of the Claimant's employer's business was PPI and that she was a manager in that business and therefore obviously fully aware of relevant facts that her policy would have been invalidated, in any event.

2. Any honest answer by Mr Smart would have resulted in the same answer. The fact that he somewhat 'gilded the lily' made no difference to the overall outcome.

11. Unfair Dismissal. We consider the following:

a. Has the Respondent shown the reason for dismissal? Having found that, in respect of maternity discrimination/automatic unfair dismissal that the Claimant was not dismissed for those reasons, then we find that redundancy was the reason and which is clearly a potentially fair reason.

b. Was the dismissal procedurally fair? We find that it was not, for the following reasons:

i. Mr Costelloe held a group consultation meeting with all staff on 13 September, to discuss the possibility of redundancies. Following that meeting a letter a letter dated 13th, was sent out to employees [43-45]. It stated that a '*further formal meeting will follow and you can bring a colleague or trade union official with you to any of the formal meetings, if you wish.'* The Claimant said that while she did have a meeting with Mr Costelloe on the 13th, it was a one-to-one informal meeting and that she did not attend any group meeting that took place on that day and nor was she sent a copy of the letter. She said that her discussion with Mr Costelloe did not result in her considering that her role was at risk, with the focus seeming to be on the admin team and that the first she was aware of her position being at risk was when she received the notification of redundancy letter on 14 October [51]. She said that instead there was discussion as to her filling in for Ms Piper, when she went on maternity leave and that she offered to reduce her hours. While Mr Costelloe recalled the offer to reduce hours, he did not recall any discussion about maternity

leave cover and he kept no notes. We prefer the Claimant's evidence on this point, for the following reasons:

1. The Response states that she did not attend the group meeting [21] and Mr Costelloe was unable to explain that discrepancy.

2. Mr Costelloe's own correspondence is confusing on this point, as his email of the 13th, refers to a group meeting 'on the previous day'.

3. There was no evidence of the letter being sent to her, despite the Respondent being given the opportunity, in this Hearing, to make further enquiries.

4. The Claimant's evidence was clear on this point.

ii. Whatever happened on the 13th/12th, it is undisputed evidence that there were no further consultation meetings of any kind with the Claimant, prior to receiving her notification of redundancy.

iii. She was completely unaware of the assessment process by which her position was chosen for redundancy, to include the criteria used and her scoring for those criteria. She was never shown the matrix [111] and given no opportunity to contest her scores, or to discuss other possible criteria that might have been applied. Even at that, Mr Smart said in evidence that other unknown criteria were also applied, in making the decision. The Claimant disputed her scoring in relation to her sick leave, being scored three instead of a maximum of four, for having taken 2.5 days' sick leave. She said that those days were for ante-natal classes and should not therefore have been taken into account. The Respondent was unable, at this hearing, to provide evidence on this point (despite being given another opportunity to do so) and of course, had consultation taken place, it could have been one of several subjects discussed, such as, for example, the possibility of reduced hours/salary and maternity cover. Her worst score (1) was for the consideration that '*most of her tasks can be automated'*, for which again she had no opportunity to comment on, or dispute.

iv. The pool contained all the permanent employees, regardless of skill level, salary or position. We are conscious of the guidance in **Hartshead**, as to not 'second-guessing' employers on the composition of the pool, but don't consider, in this case that the Respondent seriously '*applied their mind to the problem*'. There was no corroborative evidence as to when this matrix was created and how it was used during the process. It had all the appearance

to us of a document that was created for form's sake, rather than for substance.

v. Bizarrely, one of those listed in the matrix, Ms Piper, scored her colleagues, despite her own position being apparently at risk.

vi. There was only limited evidence as to any active consideration by the Respondent as to suitable alternative employment. While the notification of redundancy letter refers to such consideration, neither Respondent witness gave any impression that issue was in any way foremost in their minds and of course, in the absence of consultation, there was no opportunity to discuss such matters.

vii. We do not accept that because of the size of this Company that it should be given some leeway in respect of the lack of procedure adopted. The Respondent, on its own evidence, had more than ample time to consider the possibility of having to make redundancies and therefore to plan accordingly. It was Mr Smart's choice not to be in UK at this important time for his employees, when he could have had a more 'hands-on' approach to the procedure, instead choosing to delegate it to Mr Costelloe, who was neither a director, nor employee of the Respondent. While the Respondent does not have an HR representative, this is not a company unused to legal proceedings, or to taking legal advice and there was no reason apparent to us why they could not have done so at this point. Even a cursory examination of the ACAS website offers much useful advice on this subject. In any event, Mr Smart himself refers to having '*taken professional advice and continue to do so'* on this issue and also to same ACAS website, in his response to the Claimant's appeal [64].

viii. Nor do we agree that applying **Taylor v OCS**, Mr Smart's handling of the Claimant's appeal rectified the multiple procedural failures of the Respondent. That case involved the 're-hearing' of a disciplinary matter and while we accept that the principle could also apply in a redundancy dismissal, we do not consider, for the following reasons that Mr Smart's handling of the Claimant's appeal did so:

1. The appeal was not stated to be and nor was it, a 're-hearing' (in other words, the 're-running') of the redundancy procedure. That procedure had already taken place and was not re-considered, in totality. There was no question, from the letter's tone, of any re-hearing, but simply an attempt to justify the previous decision.

2. It was dealt with on paper only and the Claimant was given no opportunity to put her case in person (even by video).

3. While it seeks to address the issues raised by the Claimant, it focuses on the justification for redundancies, both in general and in respect of the Claimant's position in particular, but doesn't really deal with, or even recognise, or attempt to rectify the procedural failings set out above. Mr Smart, instead, based on his assertion as to having taken '*professional advice'*, did not consider that there were any such failings.

12. *Polkey*. As we find the dismissal procedurally unfair, we go on to consider as to whether *Polkey* applies and if so, to what percentage, in terms of reduction of any award. We note the guidance in **Software 2000 Ltd v Andrews [2007] IRLR 568 UKEAT**, in particular that:

'(4) Whether that is the position (as to whether employment would have ceased in any event) *is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.'*

13. We find that the *Polkey* principle does apply in this case, to the extent of reducing the Claimant's award by 60% and do so for the following reasons:

a. We consider that there was a less than 'fifty-fifty chance' that the Claimant's employment would have continued, even had there been a fair procedure, based on the reduction in managerial roles and the downturn in the bulk of the Respondent's business.

b. There were, however, factors that due to the complete failure to genuinely consult, were never properly canvassed with the Claimant, to include a pay reduction, reduction in hours, maternity cover for Ms Piper, or even perhaps a job-share between her and the Claimant, on the former's eventual return from maternity leave. While the Respondent contends that the Claimant ruled out taking a pay cut, she did so without the benefit of any background information, upon which to sensibly make such a decision. She did however offer a reduction in hours and both she and Ms Piper also discussed maternity cover and who knows what subsequent job-sharing possibilities might have arisen, had there been the appropriate and 'meaningful' consultation, the entire point of which is discuss such matters, with the intention, if possible, of avoiding redundancies. We accept that there were some differences between hers and Ms Piper's roles and experience, but there was uncontested evidence that the Claimant had stood in before for Ms Piper. The Claimant was clearly a valued employee and is obviously an intelligent person, who had shown (as Mr Smart stated) considerable flexibility in

the past and could no doubt do so again. We don't accept, therefore that there could not have been, if considered necessary, some blending of the roles.

c. While it is correct, as the Respondent points out that the Claimant said in her letter of appeal that she no longer wished to work for the Respondent, we accepted her evidence that she said so because she '*had had no consultations with anybody and did the best I could* (in setting out her appeal)*. My son* (her very recently-born child) *was very unwell and I was extremely hurt and wrote something I wouldn't do now, being emotional at the time.'* and that this had been her first time to be involved in such a process. We do not consider, therefore that had adequate and meaningful consultation taken place that she would have felt this way.

d. Clearly, as indicated in **Software 2000**, there must be a degree of speculation in our finding in this respect, as it is difficult to predict, with any certainty, as to what might have occurred, had a fair procedure been adopted, but we consider, based on the evidence before us that a 60% Polkey reduction is appropriate.

Conclusion

14. For these reasons, therefore, we find as follows:

a. The Respondent unfairly dismissed the Claimant.

b. The *Polkey* principle applies to that dismissal, to reduce any award by 60%.

c. The Claimant's claims of pregnancy/maternity discrimination, breach of reg.10 of the MPL Regulations, automatic unfair dismissal and victimisation, fail and are dismissed.

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Employment Judge C H O'Rourke

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Date 1 September 2020

JUDGMENT & WRITTEN REASONS SENT TO THE PARTIES ON

9 September 2020

FOR EMPLOYMENT TRIBUNALS