EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4104412/2020 (V)

Held remotely on 9, 10 and 11 February 2021

Employment Judge W A Meiklejohn
Tribunal Member Ms F Paton
Tribunal Member Mr J Burnett

Mrs S Saine	**Claimant** **Represented by:** **Mr R Clarke – Solicitor**
Twechar Community Action	**Respondent** **Represented by:** **Mrs S Sutton –** **Development Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) the claimant was not dismissed by reason of pregnancy and her claim of automatically unfair dismissal under section 99 of the Employment Rights Act 1996 fails and is dismissed;

(b) the claimant was unfairly dismissed by the respondent and her claim of ordinary unfair dismissal under sections 94 and 98 of the Employment Rights Act 1996 succeeds; the respondent is ordered to pay to the claimant a monetary award of **ONE THOUSAND ONE HUNDRED AND FIFTY FIVE POUNDS AND FORTY PENCE (£1155.40)**; the prescribed element is **ONE THOUSAND ONE HUNDRED AND THIRTY NINE POUNDS AND FIFTY PENCE (£1139.50)** and relates to the period from 15 May 2020 to 19 February 2021: the monetary award exceeds the prescribed element by **FIFTEEN POUNDS ANFD NINETY PENCE (£15.90)**.

(c) the claimant's claim of unlawful pregnancy discrimination under section 18 of the Equality Act 2010 fails and is dismissed.

REASONS

1. This case came before us for a final hearing, conducted by means of the Cloud Video Platform ("CVP"), on both liability and remedy. Mr Clarke represented the claimant and Mrs Sutton represented the respondent.

Nature of claims

2. The claimant brought the following complaints –

    (a) That she had been dismissed by reason of pregnancy and that accordingly her dismissal was automatically unfair in terms of section 99 of the Employment Rights Act 1996 ("ERA").

    (b) That she had been unfairly dismissed in terms of section 94 ERA and that, having regard to section 98 ERA, her dismissal was unfair.

    (c) That she had been treated unfavourably because of her pregnancy contrary to section 18 of the Equality Act 2010 ("EqA") and also contrary to section 39(2)(c) and (d) EqA.

3. These claims were resisted by the respondent. Their position was that the claimant had been fairly dismissed by reason of redundancy and had not been treated unfavourably because of her pregnancy.

Procedural history

4. A preliminary hearing took place on 16 November 2020 (before Employment Judge Susan Walker). The principal outcomes were an Order for the final hearing to take place by means of CVP, various directions covering preparation for that hearing and determination of the issues to be decided at the final hearing.

List of issues

5. The issues to be determined at the final hearing were recorded in these terms –

"*(i)* *What was the reason for the claimant's dismissal?*

(ii) *Was the reason or principal reason her pregnancy or maternity contrary to section 99 ERA?*

(iii) *If not, was dismissal within the range of reasonable responses?*

(iv) *Did the respondent treat the claimant unfavourably because of pregnancy or maternity as set out in paragraph 24 of the ET1?*

(v) *If the claimant succeeds, what should be awarded by way of compensation?*

6. Paragraph 24 of the claimant's ET1 described the alleged unfavourable treatment in these terms –

"a. not inviting the Claimant to the meeting on 31 March 2020;

b. placing the Claimant on furlough;

c. putting the Claimant at risk of redundancy;

d. taking the Claimant through the redundancy consultation process;

e. dismissing the Claimant; and

f. refusing or otherwise failing to hold an appeal hearing."

Evidence

7. We heard evidence from the claimant. For the respondent we heard evidence from Mrs Sutton, Ms K Ross, their chairperson and Ms C Storrie, a Board member. The evidence in chief of each witness was contained in a written witness statement and these statements were taken as read in accordance with Rule 43 of the Employment Tribunal Rules of Procedure 2013.

8. We had a bundle of documents extending originally to 135 pages and latterly to 138 pages following the addition of pages relating to a redundancy selection matrix and scoring. We refer to the documents by page number.

9. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have sought to focus on those parts of the evidence which had the closest bearing on the issues we had to decide.

Findings in fact

10. The respondent is a company limited by guarantee (SC216720) and has its registered office and centre of operations at Twechar Healthy Living and Enterprise Centre (the "centre"). It is a Scottish Charity registered with the Office of the Scottish Charity Regulator (SC031261). It offers a range of activities for the benefit of the local community. It is funded from a number of sources including the National Lottery, East Dunbartonshire Council and the Robertson Trust.

11. The claimant held an honours degree in Textile and Business Management, a National Certificate in Fashion Technology and a Higher National Certificate in Fashion Design and Manufacture. Prior to her employment with the respondent, she had worked in retail management across a range of small and large companies. The claimant joined the respondent on 1 July 2016. She worked as an Employability and Training Officer, initially on a part-time basis.

Employment contract

12. The claimant said that she had signed a contract of employment when she started to work for the respondent. She said that she had signed a second contract following a successful bid for funding from the Big Lottery Fund in 2019. The claimant indicated that this second contract was for a fixed term of three years, reflecting the period of the funding. Neither of these contracts was produced to us.

13. Mrs Sutton's evidence was initially that the claimant had been employed on a verbal contract. During cross-examination she agreed that there had been a written contract for a fixed term linked to funding from the Climate Challenge Fund. This covered the period from October 2017 until March 2018. Mrs Sutton said that the claimant had taken over from someone else who left. This contract was not produced to us.

14. We had two other pieces of evidence relating to whether the claimant had a written contract. The first was a sentence in the letter from Mrs Sutton to the claimant of 6 April 2020 (91) advising the claimant that she was being furloughed –

> "*Please accept this letter as notice of the Company exercising the lay off clause in your employment contract."*

15. The second was in an email sent by the claimant to Mrs Sutton on 8 April 2020 (94) –

> "*Could I please request the most recent copy of my signed employment contract please."*

16. Our view of this was as follows –

    (a) We preferred the evidence of the claimant that she had signed two contracts of employment. That was supported by her reference in her email of 8 April 2020 to the *"most recent copy"* of her contract. That implied that there had been more than one signed contract. Also, the claimant's use of the word "*recent"* was more consistent with a contract signed in 2019 than one signed in October 2017 and said to have been for a fixed term expiring in March 2018.

    (b) It seemed to us that, on the balance of probability, Mrs Sutton's reference to a "*lay off clause"* in her letter of 6 April 2020 reflected the fact that (i) she was using a template furlough letter provided by the Citizens Advice Bureau, and (ii) she had not adapted that template letter to the particular circumstances in which she was using it. It did not in our view indicate the existence of written contract containing such a provision.

Nature of claimant's work

17. As Employability and Training Officer, the claimant's focus was on securing and delivering employability courses. These were funded by the Department of Work and Pensions ("DWP"). Around May 2017 DWP introduced a new procurement system for funding applications. The claimant received training on

this and her role expanded to include preparation and submission of such applications.

18. The claimant also received training in a number of other areas. These included first aid, food hygiene and motivational skills. This training allowed the claimant to deliver training courses which generated income for the respondent. There was also a benefit to the respondent in not having to incur the cost of external contractors to deliver training which the claimant was able to deliver.

19. In or around October 2018 the claimant's DWP funding for employability courses ran out. The claimant continued to submit funding applications to DWP but without success. There was other work for the claimant to do but not DWP funded employability training. From this point the claimant's salary was subsidised by the income generated by Twechar Landscapes. This was a social enterprise established by the respondent with lottery funding to deliver training in horticulture (and which also undertook landscaping contracts). In so finding, we accepted the evidence of Mrs Sutton to that effect.

Big Lottery Fund application

20. In or around November 2018 the claimant collaborated with Mrs Sutton in a funding application to the Big Lottery Fund. This followed a study which highlighted that isolation was a problem for local residents. The outcome was a grant of £148k for a three year project which started in July 2019. The focus of this project was on wellbeing.

21. The claimant's position was that her salary cost was factored into the funding application for the wellbeing project. We understood Mrs Sutton's position to be that salary and core costs were built into funding applications, but that the salary costs included in the wellbeing project funding application were not intended to fund the claimant's salary. Mrs Sutton said that the wellbeing project did not cover employability and that the claimant had continued to seek employability work.

22. We did not see these positions as wholly irreconcilable. We accepted Mrs Sutton's evidence that the relationship between salary costs built into a funding application and who actually delivered the funded activity would vary according

to the requirements of the particular funder. There were aspects of the wellbeing project in which the claimant was involved, and other aspects in which she was not.

23. The funding for the wellbeing project therefore covered activity being undertaken by the claimant but her role remained Employability and Training Officer. The funding was not, as Mr Clarke put it, hypothecated to the claimant but to the range of activities in support of which the funding was provided. In contrast, the intention in continuing to submit applications for DWP funding was to secure funding for employability training – if that had been successful, such funding could reasonably be regarded as hypothecated to the claimant as Employability and Training Officer.

24. In or around July 2019 the claimant moved from part-time to full time hours – 40 per week including one hour's unpaid lunch break each day. In August 2019 the claimant's paid hours increased to 40 per week.

Conversation on 11 February 2020

25. The claimant met with Mrs Sutton at the café operated by the respondent within the centre on 11 February 2020. This was shortly after the claimant had been unsuccessful in a job application to the Citizens Advice Bureau. It was also shortly after the claimant discovered that she was pregnant. She did not mention her pregnancy during her conversation with Mrs Sutton.

26. According to the claimant, her conversation with Mrs Sutton touched on the subject of redundancy and Mrs Sutton told her that she "*could go anywhere in the centre and was trained to do almost everything"* and that she (Mrs Sutton) "*would not throw all that time and money away".* The claimant took reassurance from this. We understood Mrs Sutton to dispute that she had told the claimant that she could feel "*safe and secure".*

27. Our view of this was that the conversation had been casual. Mrs Sutton and the claimant had a friendly relationship at that time and it was credible that (a) she (Mrs Sutton) had praised the claimant for her flexibility and (b) the claimant had taken reassurance from this. However, there were some negatives in the background – the gardeners employed in Twechar Landscapes were serving

out their notices of redundancy and the efforts to bring in employability work were not bearing fruit.

28. On or around 11 February 2020 the claimant reduced her full-time hours from 40 to 35. There was some inconsistency between the accounts of the claimant and Mrs Sutton as to how this came about but we did not regard this as material.

Claimant discloses her pregnancy

29. By mid-March 2020 the coronavirus pandemic was taking hold. The claimant became concerned for her health and decided to tell Mrs Sutton about her pregnancy. She did so in a call to Mrs Sutton on 17 March 2020. Their discussion included the issue of whether the claimant should be attending for work at the centre.

30. This was followed by an exchange of emails between the claimant and Mrs Sutton on 17 March 2020 (82-83). The claimant told Mrs Sutton that she had sought advice from her GP and midwife and that she needed to take precautionary measures and observe social distancing. She included a link to government guidance for older people and vulnerable adults. The claimant said that she was *"happy to carry on and to [sic] the duties where necessary".* Mrs Sutton replied "*Thats fine as working from home isnt an option as the work you do is all centre related. If you get worried at all just let me know."*

National lockdown

31. This occurred on 23 March 2020. The claimant was at the centre working on an application to the DWP for funding under the Universal Credit Transition Fund ("UCTF"). If successful, this could have secured the claimant's position by providing funding for employability work.

32. When the national lockdown was announced, Mrs Sutton asked Mr M Sutton, the horticulture project manager, to tell the claimant to continue working on the application from home. This was done on the basis of the respondent's understanding that it was consistent with government guidance relating to pregnant women. The centre remained open because it houses a full-time pharmacy but all groups and classes had to stop.

33. Apart from four members who continued to work at the centre to keep it open, the respondent's staff were sent home. The respondent sought to recruit volunteers so that the centre could be a point of contact for local residents. The café kitchen was used to provide hot food to the elderly and children within Twechar. There was also a shopping and prescription service, and a befriending service to combat social isolation.

Staff meeting

34. On or around 27 March 2020 Mrs Sutton asked Ms S Hopkins, the respondent's coordinator, to contact staff to invite them to attend a meeting to be held at the centre on 31 March 2020 (there was some conflict in the evidence as to whether this took place on 30 or 31 March 2020; the point is not material). Mrs Sutton decided however not to contact staff who might be put at risk by attending the meeting or who would have had to travel from outwith the village. The claimant was not invited because she was pregnant. Another employee was not invited because he was the carer for his mother who was shielding.

35. The purpose of the staff meeting was broadly to give staff an update. Mrs Sutton was not able to give any assurance about job security. She told the staff that if they received an offer of employment elsewhere, they should feel free to take it. She made reference to voluntary redundancy.

36. During the staff meeting Mrs Sutton mentioned that the claimant was pregnant. The claimant was offended by this because she had not made her pregnancy known. Mrs Sutton's evidence was that the claimant's pregnancy was known about. We were not able to resolve this conflict of evidence.

37. The claimant was offended in relation to the staff meeting. We formed the view that her offence was more about not being told that the meeting was taking place rather than not being invited to it. She described herself as feeling "*embarrassed and upset"* when she found out about the meeting after it had taken place. She said that she felt "*excluded"* and *"belittled and unimportant".*

38. Another employee, Ms C Stirling, was unable to attend the staff meeting due to childcare difficulties. Mrs Sutton spoke to her later the same day. Their conversation included the subject of voluntary redundancy. Ms Stirling

described this in a Facebook message to the claimant, in answer to the claimant's question "*did you tell her that you wanted to do voluntary redundancy ?"*, in these terms –

> "*I can't remember exactly and I only said I would take voluntary redundancy if it was needed but then no one had to take it."*

39. Mrs Sutton's description of her meeting with Ms Stirling was that she (Ms Stirling) did not understand what redundancy was and was concerned for Ms S McCormack who worked in the centre café. This was because Ms McCormack had required to cancel her wedding and fertility treatment, and Ms Stirling wanted to save Ms McCormack's job. We found this to be credible and consistent with Ms Stirling's reference to taking voluntary redundancy "*if it was needed".*

40. We did not know when the Facebook exchange between the claimant and Ms Stirling took place but we believed that it must have been some time after 31 March 2020 because (a) that would explain Ms Stirling's inability to *"remember exactly"* and (b) her reference to "*no one had to take it"* indicated that she was looking back at what had transpired at the time of the staff redundancies.

UCTF email

41. On 31 March 2020 the claimant received an email from DWP (90) acknowledging her UCTF application and advising that *"owing to the challenging circumstances presented by the coronavirus outbreak we have come to the decision to temporarily suspend the Transition Fund application process".* The DWP email also stated that the application would be held on record "*in the event we are able to progress with the process later in the year".* The claimant forwarded this to Mrs Sutton.

First furlough letter

42. The respondent sought advice from the CAB. They were provided with a template furlough letter. The claimant spoke with Mrs Sutton on 6 April 2020 and was told that she would now be "*off on furlough".* Mrs Sutton then emailed the claimant on 6 April 2020 (91) advising that she was being laid off (see

paragraph 14 above) and that she was being designated a "*Furloughed Worker".* Mrs Sutton's letter continued –

> "*This arrangement will be reviewed on a monthly basis and we reserve the right to end your furloughed employment status at any time and revert you back to your original employment status.*
>
> *You should keep this letter safe, as your Employment Contract is amended by this letter. The remaining terms of your employment shall be unaffected by this change."*

Redundancy process starts

43. Mrs Sutton's evidence was that she met with Ms Hopkins and asked her to provide information about "*what staff were currently funded by specific grants, a list of jobs/roles that were not currently funded by specific grants, what services were we asked to carry out during Covid and how many qualified staff would we need that were in those specified posts and what jobs/services could be retained after the lockdown, and the length of service of current employees".* This reflected the terms of an undated document (103).

44. Mrs Sutton's evidence was that she then "*drew up a list based on the information provided and selected, along with Shirley, a list naming employees who may be facing redundancy".* She continued –

> *"From that list 5 employees were scored according to our scoring matrix and following from that process I sent an email to Samina asking her to arrange a date and time when it would be convenient to attend a meeting to discuss the continuation of her post."*

45. The respondent produced a document entitled "Redundancy selection criteria and scoring matrix" (104-106) which set out the following criteria – Knowledge, Absence, Skills, Disciplinary, Qualifications and Length of Service. This document detailed how scores between 1 and 5 should be allocated in respect of the first five criteria. In the case of Length of Service, the document stated "*May also be used where applicable".*

46. The actual scoring matrix relating to the claimant was not produced by the respondent for inclusion in the bundle of documents but was added during the hearing (136-138). This recorded the scores allocated to the claimant against the criteria of knowledge, absence, skills, disciplinary and qualifications. It stated her length of service as 3 years. It also recorded the scores of those who had been assessed, as follows –

- Chantelle Stirling 23
- Claimant 17
- Ross McClement 21
- Stephanie Young 23
- Caitlin McNicoll 19

47. The claimant's scoring matrix had space for an "*Employee signature"* and two spaces for a "*Management signature".* Next to each of the management signature spaces was printed "*Date 10-4-20".* The management signature spaces contained the signatures of Mrs Sutton and Ms Ross. The employee signature space was unsigned.

48. Ms Ross was clear in her evidence that she had not signed the claimant's matrix on 10 April 2020. She said that she had signed it around the same time as she had sent an email to Mr Sutton and Mrs Sutton (102) for *"the man from the insurance company".* This was a reference to an email she had sent recording what had been discussed at her meeting with Mrs Sutton on 20 April 2020. Ms Ross thought she had sent this in October/November 2020.

49. Mrs Sutton's evidence, as recorded at paragraph 44 above, was that she had sent an email to the claimant *"following"* the scoring matrix process. That email was sent on 8 April 2020 (93) and stated –

> "*Can we arrange a date and time for you to come down to the Centre to discuss the continuation of your post please."*

50. Mrs Sutton was unable to recall with certainty when the scoring matrix had been completed. She accepted it could not have been on 10 April 2020 in light of the

terms of her email to the claimant on 8 April 2020. She indicated that it was probably done on 7 April 2020. She could not explain why it was dated 10 April 2020.

51. There was an exchange of emails between the claimant and Mrs Sutton on 8-10 April 2020 (94-95). On 8 April 2020, the claimant asked for a copy of her most recent contract (see paragraph 15 above). Mrs Sutton replied on 9 April 2020 –

> "*You don't have a signed contract. Your hours have varied since you started with us due to the demand of work so we never issued you with a written contract. We have always had a verbal agreement that if we could get employability contracts then we could keep your post in place and we have had many conversations regarding this.*"

52. The claimant and Mrs Sutton then exchanged emails on 10 April 2020 agreeing to meet at the centre on 14 April 2020. The claimant told Mrs Sutton that she would be accompanied at this meeting by Ms F Sherry who would be taking notes.

53. The respondent was not at this time engaging with any of the other employees named in the scoring matrix. It seemed to us that, on the balance of probability, the respondent prepared a redundancy selection matrix because they were following advice from the CAB. We did not have any evidence as to what advice had been sought from the CAB but, again on the balance of probability, it seemed to us likely that the respondent had disclosed that there was a need to reduce headcount with some, but not all, employees being made redundant.

Second furlough letter

54. During the morning of 14 April 2020 Mrs Sutton sent a second furlough letter to the claimant (99-100). The reason for sending the second letter was not disclosed in the evidence but we noted that, unlike the first furlough letter of 6 April 2020 (91), this letter sought the claimant's agreement to a temporary variation of her contract of employment. The claimant confirmed her agreement in her email to Mrs Sutton of 14 April 2020 (101) sent shortly after her receipt of the second furlough letter.

Meeting on 14 April 2020

55. Later on 14 April 2020, Mrs Sutton met with the claimant. Mrs Sutton was accompanied by Mr Sutton who took minutes (97-98). The claimant was accompanied by Ms Sherry (erroneously referred to in the minutes as Ms Rooney).

56. Mrs Sutton's evidence about this meeting was as follows –

> "*The meeting was held as a first consultation meeting and was attended by myself, Samina, her friend Fiona Cherry [sic] and Mel Sutton who was there to take minutes. We discussed the reason for the meeting, the situation that had led to the meeting and the current situation of funding for her post. I repeated to Samina this consideration of potential redundancy was not due to her pregnancy as she had suggested and added that no final decision had been made as we were continually seeking guidance from ACAS and CAB."*

57. The claimant's evidence about the meeting was as follows –

> "*Sandra did introductions and immediately went on to say that I was being made redundant. Sandra Sutton explained that a scoring matrix had been used where length of service and versatility were considered. This was the first time anyone had ever mentioned a "scoring matrix". I pointed out that I had three years' service, which is longer than some of the other staff. In reality it was nearer 3.5 years' service. Sandra pointed out that if it had not been for COVID19 I would have been able to continue working.*
>
> *Sandra brought up funding applications and discussed that the most recent one for the DWP transition fund had been suspended. I brought up that I had a contract, which I had signed in July 2019. Sandra did not deny this at the meeting but said that she would look into it. This contract was based on the three year block funding from the Big Lottery Fund."*

58. Mr Sutton's minute began as follows –

> "*Sandra began meeting thanking Samina and Fiona for attending then stated the reason for the meeting was to discuss Samina being made redundant.*
>
> *Sandra explained that a scoring process had been implemented to fairly choose which employees would be made redundant. The scoring process took into account length of service and whether staff could be slotted in elsewhere."*

59. The meeting on 14 April 2020 was described in the respondent's ET3 response form in these terms –

> "*By email dated 8th April the Claimant was invited to attend a consultation meeting regarding the continuation of her post in the absence of funding. That meeting took place on 14th April and the Claimant was advised at that time that her position was to be made redundant. At that time the Claimant was on furlough and remained on furlough following the meeting."*

60. The claimant became upset as soon as Mrs Sutton mentioned redundancy. She asked if she was being made redundant because she was pregnant. The minutes disclosed that Mrs Sutton responded to this by stating that "*it was based on her length of service and that there was no money coming in to the Centre".*

61. The claimant asked why she had not been invited to the meeting on 31 March 2020, where there had been mention of possible redundancies. Mrs Sutton was recorded in the minutes as explaining *"it was because she was socially isolating".* The claimant then asked about the date when she would be made redundant and Mrs Sutton replied that that *"she was waiting for more advice from ACAS".*

62. There was a conflict in the evidence as to whether Mrs Sutton had given the claimant her scoring matrix or at least shown it to the claimant. The claimant denied that she had seen the scoring matrix at the meeting. Mrs Sutton's evidence was inconsistent, and she seemed unclear as to whether she had (a) described the content of the scoring matrix to the claimant, (b) shown it to the claimant or (c) given a copy of it to the claimant. Her final position was that a

copy of the scoring matrix was handed to the claimant, she was informed of her score and she (Mrs Sutton) tried to discuss it with the claimant.

63. If that happened, it did not feature in the minutes. There was reference to a "*scoring process"* near to the start of the minutes but no mention of the scoring matrix. We accepted Mrs Sutton's evidence that a copy of the scoring matrix was "*on the table"* but we did not believe that it had been given or shown to the claimant nor that it had been discussed with her.

64. Our view of this was that Mrs Sutton intended, no doubt based on the advice she had received, that the meeting on 14 April 2020 should be for the purpose of consultation with the claimant about being placed at risk of redundancy. She brought a copy of the scoring matrix to the meeting intending to discuss it with the claimant. However, as soon as redundancy was mentioned, the claimant understood this to mean that she was being dismissed as redundant and became upset. If Mrs Sutton had a game plan for the conduct of the meeting, it was blown off course by the claimant's reaction. There was no consultation – in the normal sense of discussion before a final decision is taken.

Meetings with directors

65. In the course of 20 April 2020 Mrs Sutton met separately with Ms Storrie and Ms Ross. The meeting with Ms Storrie was in the nature of a casual encounter outside the centre. That it preceded Mrs Sutton's meeting with Ms Ross was confirmed in the evidence of Ms Ross – *"Mrs Sutton informed me that she had also had a meeting with fellow board member Christine Storrie earlier that day….".*

66. Both meetings were predicated on Mrs Sutton's understanding of the Coronavirus Job Retention Scheme ("CJRS"). This understanding was that (a) the furlough scheme was only intended to support jobs which would still exist after the period of lockdown and (b) as the claimant's position was no longer viable, her job would no longer exist and so she could not remain on furlough.

67. Mrs Sutton's meeting with Ms Ross was a little more formal. They discussed the minutes of the meeting held on 14 April 2020 and their understanding of advice from the CAB regarding the CJRS. They also discussed the absence of

funding for the claimant's employability work. They concluded that the only option was to proceed with making the claimant redundant. No minute of this meeting was taken but, considerably later, Ms Ross sent a letter to Mr Sutton and Mrs Sutton (102) recording her recollection of it.

68. Mrs Sutton and Ms Storrie came to the same conclusion at their meeting.

Meeting on 27 April 2020

69. On 21 April 2020 Mr Sutton sent an email to the claimant (110) inviting her to a meeting at the centre on 27 April 2020. The purpose was stated to be a review of the claimant's temporary furlough. The real purpose was to dismiss the claimant by reason of redundancy but the claimant was not told that.

70. The meeting on 27 April 2020 was brief because Mrs Sutton had to attend an online funeral. Only Mrs Sutton and the claimant were present. A note was prepared (111). It confirmed that the respondent was taking the claimant off the furlough scheme and issuing her with notice of redundancy.

Email of 27 April 2020 and response

71. The claimant sent an email to Mrs Sutton on 27 April 2020 (113-114) in which she asserted that it was at the respondent's discretion whether they took her off furlough or not. She suggested that she could have been kept on furlough until 8 June 2020 then given notice until 26 June 2020 when she would be close to entitlement to Statutory Maternity Pay ("SMP").

72. Mrs Sutton replied by letter dated 1 May 2020 (116-117). In this she said as follows –

> "*The reason you have been made redundant is because there has been no further finance coming in for the post you have held since the 5th May 2017.*
>
> *You were aware that in order to finance your post we would be reliant on gaining contracts from the DWP and private business and despite our efforts we were unsuccessful in winning these contracts with the last contract being delivered on the 15th October 2018.*

I continued to employ you for a further 17 months to help you upskill by TCA financing courses namely Train the Trainer courses in Food Hygiene and First Aid, the UK Goals Programme and a consultant led course in July 2019 on planning and writing successful funding applications, all done in order to get us contracts from private companies and the DWP.

You knew that you were being kept on in order to be supported in this way but you were also aware that this could not go on indefinitely and that redundancy would be on the cards. On numerous occasions we have had ongoing discussions regarding the issue of redundancy and from those discussions it was made clear that it was imperative to generate income from the delivery of training courses.

The furlough scheme is intended for businesses to retain employees who would be made redundant as a result of the Coronavirus. To reiterate, when you were put on furlough at the start, it was done in good faith but when the reasons for putting employees on furlough were clarified by the Government, it was obvious that I should continue with the redundancy process. The income you generated from DWP for the post you occupied ceased in October 2018. You are not being made redundant because of the Coronavirus, you are being made redundant because there is no future income for the post.

In addition, the Government has clearly stated that employers can continue with redundancy processes at this time and since there is, and will be, no job for you to do, it is right and proper that the redundancy process is carried out at this time, as originally planned."

73. We have set this out in full because it was the first time that the respondent explained to the claimant in clear terms the reason why she was being dismissed as redundant. Conspicuous by their absence from Mrs Sutton's letter are any references to the scoring matrix and the claimant's length of service.

74. The claimant emailed Mrs Sutton and Ms Ross on 4 May 2020 (118-120) pointing out a number of contradictions between the terms of the letter of 1 May 2020 and what she had previously been told. Specifically –

(a) The claimant disputed that there had been ongoing discussions about redundancy. She asserted that the only discussion had been at the meeting on 11 February 2020.

(b) The claimant disputed what Mrs Sutton said about the furlough scheme. She argued that this conflicted with what was recorded in the minutes of the meeting on 14 April 2020.

(c) The claimant argued that she had been told that she was being dismissed because of Covid-19 and that she should have been kept on furlough.

(d) The claimant alleged that she was being singled out because she was pregnant to avoid the respondent having to pay SMP.

75. Mrs Sutton acknowledged the claimant's email on 11 May 2020 (121) and referred her back to the letter of 1 May 2020.

Other employees

76. In the course of the evidence we asked what had happened to each of the respondent's other employees around the time of the events which led to the claimant's dismissal. We understood that the position was as follows (although we acknowledge that this may not be entirely accurate and may have been superseded by events)–

- Mrs Sutton – Development Manager – still employed
- Mr Sutton – Project Manager, Twechar Landscapes – now in charge of social enterprise, gardening
- Ms Hopkins – Co-ordinator – still employed
- Ms J Blair – Outdoor Activity Leader – still employed
- Mr S Paterson – Gardener – made redundant
- Mr B Whiteford – Gardener – made redundant
- Mr J Hopkins – Gardener – made redundant

- Mr A McMillan – Gardener – made redundant
- Ms M Ralston – worked with children – still employed
- Ms S Marklow – worked in café – still employed
- Ms S McCormack – worked in café – still employed
- Mr M Duffy – Community Jobs Scotland (gardening) – still employed
- Ms K O'Neill – café/cleaning – still employed
- Ms Stirling – worked with children – still employed
- Ms C McNicoll – worked with children – made redundant
- Mr R McClement – worked with children – made redundant
- Ms M Given – worked in café – made redundant?
- Ms S Young – worked in café – made redundant

77. The four gardeners who were made redundant were given notice of termination of employment in December 2019 and left on or around 31 March 2020. The other redundancies occurred after the claimant's dismissal.

Comments on evidence

78. The claimant was clear and confident when giving her evidence and was a credible witness.

79. Ms Ross and Ms Storrie were less confident but were also credible in respect of their relatively limited involvement in the sequence of events leading to the claimant's dismissal.

80. Mrs Sutton came across as someone who had struggled to deal with the impact of the coronavirus pandemic on the respondent. She found herself confronted by a set of circumstances with which she was ill-equipped to deal. She had to rely on advice, the usefulness of which would depend on the accuracy and relevance of the questions in response to which it was provided.

81. When describing the *“bigger picture”* of how the respondent operated and the challenges it faced, Mrs Sutton was a credible witness. When dealing with the details of how she had handled the claimant’s redundancy dismissal, Mrs Sutton was less reliable. She accepted during the hearing that the scoring matrix approach to the claimant’s dismissal had been flawed. She found it difficult to maintain the position that the meeting on 14 April 2020 had been for the purpose of consultation (not helped in that regard by the way the respondent’s case was put in their ET3). We did not find Mrs Sutton to be untruthful at any point but she had some difficulties with her recollection of events.

Submissions

82. Mr Clarke provided a comprehensive written submission which he supplemented orally at the hearing. We have attached a copy of his written submission to our Judgment and so we will not paraphrase it here.

83. Mrs Sutton focussed on the fact that the claimant’s employability work had dried up some 17 months before her dismissal, that she had thereafter been subsidised by other income streams and that there was no job for the claimant to return to after furlough. She acknowledged that the respondent might not have fully understood the procedure to be followed when dealing with redundancy. She accepted that the chronology of events around 7-10 April 2020 was confusing. She also accepted that the claimant should not have been included in a selection matrix since the real reason for her redundancy dismissal was that *“her employability job wasn’t there”.*

Applicable law

84. The right not to be unfairly dismissed is found in section 94(1) ERA –

> “*An employee has the right not to be unfairly dismissed by his employer.”*

85. In terms of section 98(2)(c) ERA redundancy is one of the potentially fair reasons for dismissal. Where the employer has shown a potentially fair reason, under section 98(4) ERA the fairness or otherwise of a dismissal -

> “*(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."

The meaning of redundancy is found in section 139(1) ERA which, so far as relevant, provides as follows –

"*….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, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

86. Section 99 ERA provides, so far as relevant, as follows –

"*(1) An employee who is dismissed shall be regarded….as unfairly dismissed if –*

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State .

(3) A reason or set of circumstances prescribed under this section must relate to –

(a) pregnancy, childbirth or maternity…."

87. Regulation 20 of the Maternity & Parental Leave etc Regulations 1999 provides, so far as relevant, as follows –

"(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded….as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3)…

(2) An employee who is dismissed shall also be regarded….as unfairly dismissed if –

(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant;

(b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and

(c) it is shown that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was a reason of a kind specified in paragraph (3).

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with –

(a) the pregnancy of the employee…."

88. Section 18 EqA provides, so far as relevant, as follows –

"(1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –

(a) because of the pregnancy, or

(b) because of illness suffered by her as a result of it."

89. Section 136 EqA provides, so far as relevant, as follows –

"*(1) This section applies to any proceedings relating to a contravention of this Act.*

(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 subsection (2) does not apply if A shows that A did not contravene the provision….

(6) A reference to the court includes a reference to –

(a) an employment tribunal…."

Discussion and disposal

90. We approached our deliberations in line with the agreed list of issues.

What was the reason for the claimant's dismissal?

91. Although we found that the claimant signed a new contract of employment in 2019 around the time that the respondent secured funding from the Big Lottery Fund, we were not persuaded that her role within the respondent changed. She remained the Employability and Training Officer. This was how she described herself, for example in her email to Mrs Sutton of 6 April 2020 (92). This was also consistent with her continuing to seek funding for employability work.

92. Because (a) the claimant had not been successful in securing further employability work after October 2018 and (b) she had undertaken various training courses, she was able to turn her hand to a variety of tasks. Some of these – such as cooking classes – were included in the wellbeing project funded by the Big Lottery Fund. When the classes delivered by the respondent had to stop at the time of national lockdown in March 2020, we could see that it might have appeared to Mrs Sutton that the claimant formed part of a pool of selection for redundancy purposes.

93. However, in our view, that perception was incorrect. The true position was that the claimant was the only Employability and Training Officer employed by the respondent in March 2020. Given the lack of employability work, that role was

already at risk before March 2020, and certainly before the claimant disclosed her pregnancy.

94. We noted that the claimant's salary was subsidised by Twechar Landscapes and that this operation was to cease in March 2020, and we considered that this begged the question of why the claimant was not considered for redundancy at the same time as the gardeners. We came to the view that this was because (a) the hope of securing fresh funding for employability work remained alive – as evidenced by the UCTF application – and (b) the claimant had other skills which were being utilised.

95. Accordingly, when the respondent addressed the question of staff redundancies in April 2020, the claimant's role was already at risk. The respondent's requirement for an Employability and Training Officer had already ceased or diminished. That could have changed if the UCTF application had been successful, rather than being suspended on 31 March 2020, but it did not. The reason for the claimant's dismissal was that her role was redundant.

Was the reason or principal reason her pregnancy or maternity contrary to section 99 ERA?

96. In our view, no. The claimant's pregnancy was a coincidence of timing. It had no bearing on the respondent's decision to dismiss the claimant. The reason for dismissal was redundancy, as described above.

If not, was the dismissal within the range of reasonable responses?

97. Having found that the respondent had shown a potentially fair reason for dismissal, we considered the application of section 98(4) ERA (see paragraph 85 above). We reminded ourselves of what the Employment Appeal Tribunal said in ***Williams v Compair Maxam Ltd [1982] IRLR 283***. They highlighted the need for –

- Giving as much warning as possible of impending redundancies.

- Consultation with the trade union (where applicable).

- Establishing objective criteria for selection.

- Ensuring that the selection is made fairly in accordance with the chosen criteria.
- Considering alternatives to redundancy dismissal.

98. Not all of these steps will be applicable, particularly where there is no trade union involved. Taking these steps, or such of them as are appropriate, will not necessarily avoid redundancy. We could accept that Mrs Sutton intended that there should be some consultation with the claimant before a final decision to dismiss as redundant. However, in reality that did not happen.

99. A number of things went wrong. The scoring of the redundancy selection matrix was fundamentally flawed because the claimant and the other four employees were not genuinely in a pool of selection. The claimant was the only Employability and Training Officer. Her role was in no sense interchangeable with the others in the putative selection pool.

100. There was no advance warning or consultation about the redundancy process. The chosen criteria were not objectionable per se, but the claimant was given no opportunity for input into the process. While it may have been the intention that the meeting on 14 April 2020 was for the purpose of consultation, that was not how it unfolded. It was clear from the minutes that Mrs Sutton told the claimant at the start of the meeting that the reason for the meeting was to discuss the claimant being made redundant. That indicated that the decision (to dismiss the claimant by reason of redundancy) had already been taken.

101. If, as it appears, the idea was to proceed on the basis of the scoring matrix, then the claimant should have been given a copy and the rationale for her scoring should have been discussed with her. We found that the claimant was not shown the matrix. We also found that the reasons given at the meeting on 14 April 2020 and in Mrs Sutton's letter of 1 May 2020 bore little resemblance to the matrix. At the meeting Mrs Sutton referred to the claimant's length of service and versatility. In her letter Mrs Sutton referred to *"no further finance coming in"* and there being "*no future income for the post".* The reasons in Mrs Sutton's letter reflected the truth behind the claimant's redundancy dismissal, but that

should have been made clear from the outset and not concealed behind a sham selection matrix (at least so far as the claimant was concerned).

102. There was no consideration of any alternative to redundancy. We would be slow to criticise Mrs Sutton for having some difficulty in understanding the operation of the CJRS. The fact that the CAB provided two versions of the furlough letter illustrates the point. We accept that Mrs Sutton's belief that the claimant could not remain on furlough was genuinely held. However, when her view was challenged by the claimant on 4 May 2020, Mrs Sutton could have (a) treated this as an appeal against dismissal and/or (b) revisited the question of whether the claimant could remain on furlough, but did not do so.

103. For these reasons we found that the claimant's dismissal did not fall within the band of reasonable responses and was unfair. That unfairness included the procedure followed by the respondent in carrying through the dismissal.

Did the respondent treat the claimant unfavourably because of pregnancy or maternity as set out in paragraph 24 of the Statement of Claim?

104. The focus of Mr Clarke's submissions was on the failure to invite the claimant to the staff meeting on 31 March 2020. However, this was only one of the elements of alleged unfavourable treatment set out in paragraph 24 of the claimant's statement of claim. The full list is set out in paragraph 6 above. We deal with these in the order of that paragraph.

(a) Not inviting the claimant to the meeting on 31 March 2020

105. Mr Clarke argued that unfavourable treatment was akin to detriment. He referred to ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285***. In that case Lord Hope of Craighead said (at paragraph 34) –

> *"….the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."*

106. Lord Hope continued (at paragraph 35) –

> "*But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Lord Brightman. As he put it in Ministry of Defence v Jeremiah [1980] QB 87, 104B, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?"*

107. Mr Clarke referred to the Equality and Human Rights Commission: Code of Practice on Employment (2011) at paragraph 5.7 which deals with the meaning of "*unfavourable treatment"* in section 15(1)(a) EqA in the context of disability discrimination –

> "*For discrimination arising from disability to occur, a disabled person must have been treated "unfavourably". This means that he or she must have been put at a disadvantage. Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably."*

108. We considered that this was a fair parallel to draw and that the meaning of "*unfavourably"* for the purpose of section 15(1)(a) EqA was the same in section 18(2) EqA.

109. It was not in dispute that the reason Mrs Sutton did not ask the claimant to the staff meeting on 31 March 2020 was because she was pregnant. As Mr Clarke correctly reminded us, there is no "*justification"* defence in section 18 EqA (unlike section 15 EqA). The issue was therefore – was it unfavourable treatment?

110. We looked at the circumstances. The staff meeting took place against the unprecedented background of a recently announced national lockdown. Government advice was to stay at home. There was public awareness that some groups of people were being classed as vulnerable. The staff members

who Mrs Sutton chose not to invite were identified on the basis of these prevailing circumstances.

111. It seemed to us that, from the perspective of a reasonable employee, any disadvantage in not being invited to a staff meeting when pregnant needed to be balanced against the advantage of not being exposed to the risk that attendance at that meeting might entail. Viewed in the context of all the circumstances any disadvantage to the claimant was (a) not material and (b) not unfavourable treatment.

(b) Placing the claimant on furlough

112. The purpose of the CJRS was to preserve jobs. The evidence did not disclose how many of the respondent's employees had been furloughed but we understood it was not just the claimant. Although the claimant's job was not ultimately preserved, we did not consider that the act of placing her on furlough, viewed in the context of the prevailing circumstances, amounted to unfavourable treatment.

(c) Putting the claimant at risk of redundancy

(d) Taking the claimant through the redundancy consultation process

113. This was what the respondent intended to do at, and following, the meeting on 14 April 2020. However, as we have recorded above, what actually happened was that the claimant was told by Mrs Sutton that she was being made redundant. The "*at risk"* stage simply did not happen and there was no *"redundancy consultation process".*

(e) Dismissing the claimant

114. We found that the claimant was dismissed because she was redundant, not because she was pregnant. That effectively dealt with this point.

(iii) Refusing or otherwise failing to hold an appeal hearing

115. Again, we found that this treatment was not because the claimant was pregnant. It was an aspect of the respondent's unfortunate handling of the claimant's redundancy dismissal.

116. Before moving on to the final issue, namely compensation, we will deal with two points made by Mr Clarke in his submissions to us. Mr Clarke argued that, in terms of section 136 EqA, the burden of proof had passed to the respondent. It was not in dispute that the claimant possessed the protected characteristic of pregnancy at the relevant time, nor that she had been dismissed. However, we were satisfied that the respondent had shown that the reason for the claimant's dismissal and for the treatment said to have been unfavourable was that she was redundant and not because she was pregnant. That meant that the respondent had shown, for the purpose of section 136(3) EqA, that it did not contravene section 18 EqA.

117. Mr Clarke argued that the circumstances of the claimant's dismissal did not come within the definition of redundancy in section 139 ERA. That argument was predicated on (a) the claimant's role having *"varied"* when the respondent secured funding from the Big Lottery Fund and (b) the respondent's need for an employee to perform that varied role not having ceased or diminished. We did not agree. We found that the claimant's role had not changed (see paragraph 23 above). The *"work of a particular kind"* for the purpose of section 139(1)(b)(i) ERA was employability work and at the time of the claimant's dismissal, that had ceased or diminished. All three elements of the test in ***Safeway Stores plc v Burrell [1997] IRLR 523*** were satisfied.

Remedy

118. The final issue was expressed in these terms –

"If the claimant succeeds, what should be awarded by way of compensation?"

119. Having found that the claimant's "*ordinary*" unfair dismissal claims succeeded, we addressed ourselves to the matter of compensation. We worked from the figures contained within the claimant's schedule of loss (52-55), which figures we did not understand to be disputed. At the time of her dismissal the claimant's normal gross and net weekly pay were £342.00 and £301.08 respectively. The employer's weekly pension contribution was £6.51.

120. At the date of her dismissal the claimant was 39 years of age and had three complete years of service That meant that the basic award was £342.00 (a week's gross pay) x 3 (years' service) x 1 (the applicable multiplier in view of the claimant's age). This produced a figure of £1026.00.

121. In terms of section 122(4)(b) ERA there required to be deducted from the basic award the amount paid by the respondent to the claimant on the ground that her dismissal was by reason of redundancy. This was £1010.10. The difference between this and the amount of the basic award was £15.90.

122. We reminded ourselves that the compensatory award should, in terms of section 123(1) ERA, be "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".*

123. We gave consideration to how the compensatory award in this case should be calculated. The claimant's redundancy dismissal had been procedurally unfair. One approach would be to calculate the compensatory award based on the claimant's loss of earnings and then apply a reduction following ***Polkey v AE Dayton Services Ltd [1988] ICR 142*** to reflect the percentage likelihood that the claimant could have been dismissed fairly at a later date or if a proper procedure had been followed.

124. An alternative approach, if we believed the claimant would definitely have been dismissed at the end of the period during which a fair procedure should have been applied, was to compensate the claimant for her loss during that period – ***O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615***. We believed this was the preferable approach in this case. Given Mrs Sutton's understanding of the CJRS and her view that the claimant's role as Employability and Training Officer had effectively disappeared, dismissal was inevitable.

125. Mr Clarke urged us, if we took this approach, to award compensation for a period of six weeks. We believed that was too long and that, looking at matters in the round, it would have taken no more than four weeks for proper

consultation to have taken place. We therefore decided to award compensation on that basis. If the claimant's employment had continued for a period of four weeks, she would have on the balance of probability have remained on furlough. We therefore decided that she should be awarded 4 (weeks' pay) x £301.08 (a week's normal net pay) x 80% (to reflect her reduced pay while on furlough). That totalled £963.46.

126. We also decided to award the claimant (a) £250.00 in respect of the loss of her statutory employment protection rights and (b) £26.04 in respect of the loss of employer pension contributions for a period of four weeks.

127. We had information about the claimant's earnings following her dismissal but as these did not commence until around July 2020 we did not bring them into our calculations. The sums awarded to the claimant are therefore (a) a basic award of £15.90 and (b) a compensatory award of £1139.50 (ie a total of £1155.40).

128. The attention of parties is drawn to the attached schedule in terms of the Employment Protection (Recoupment of Benefits) Regulations 1996.

Employment Judge: William Alexander Meiklejohn
Date of Judgment: 17th February 2021
Entered into Register: 27th February 2021
Copied to parties