EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103320/2020 (V)

Held by Cloud Video Platform (CVP) on 16 & 17 November 2020

Employment Judge M Sangster

Miss S Deans	**Claimant** **In Person**
McCalls Limited	**Respondent** **Represented by:** **Mr I Hawthorne -** **Managing Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was unfairly dismissed, and the respondent is ordered to pay to the claimant the sum of Four Thousand, Four Hundred and Fifty One Pounds and Seventy Four Pence (£4,451.74) by way of compensation.

REASONS

Introduction

1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

2. The claimant presented a complaint of unfair dismissal. The respondent admitted that the claimant had been dismissed, but stated that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal.

The respondent maintained that they acted fairly and reasonably in treating redundancy as sufficient reason for dismissal.

3. At the outset of the proceedings the claimant indicated that she was no longer seeking reinstatement or reengagement, but was instead seeking compensation.

4. The respondent led evidence from a number of their employees, as follows:

   a. David Johnston (**DJ**), Manager of the respondent's Glasgow store; and

   b. Alison Irvine (**AI**), Payroll and HR Administrator.

5. The claimant gave evidence on her own behalf.

6. The respondent lodged 22 documents, extending to 35 pages, in advance of the hearing. A further document, the letter confirming termination of the claimant's employment, was lodged by the respondent during the course of the hearing. The claimant lodged 3 documents in advance of the hearing.

Issues to be Determined

7. The issues to be determined in this case were:

   a. Was the dismissal fair or unfair in accordance with s98(4) of the Employment Rights Act 1996 (**ERA**)?

   b. If the claimant was unfairly dismissed what compensation should be awarded?

Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

9. The respondent sells and offers hire of highland dress. Their head office is in Aberdeen. They also have stores in Edinburgh, Elgin, Dundee, Glasgow, Broughty Ferry and Tillicoultry.

10. The claimant commenced working with the respondent, as a sales consultant in their Glasgow store, in August 2014. She initially worked on a full time basis. On her return to work following maternity leave 5 March 2018, she moved to working on a part time basis, working 24 hours per week.

11. The claimant was latterly paid £8.23 per hour, amounting to £197.58 gross/£194 net per week. She was a member of the respondent's stakeholder pension scheme.

12. The respondent employed 7 people in the Glasgow store. In addition to DJ and the claimant, there was a supervisor (William) and 4 other sales consultants. Two of the sales consultants (Adam and Robert) worked full time. The other sales consultants worked on a part time basis: Leanne worked Thursdays and Fridays and Chloe worked weekends only.

13. In March/April 2018, the claimant was absent from work due to sickness and stress for a period of 5 days. In May 2019 the claimant experienced a miscarriage and was off work for 4 days as a result of complications arising from this.

14. In the summer of 2019 the claimant was offered alternative employment and intimated her resignation to DJ. Before this was processed however the claimant had a change of heart. She spoke to DJ about this. He confirmed that he was happy for the claimant to remain in her role and destroyed her letter of resignation.

15. In February 2020, the claimant was absent for 2 days as a result of sickness.

16. In the period from the start of 26 October 2019 to the end of February 2020, the claimant swapped her Saturday shift with a colleague, or for another shift, on 3 occasions. On each occasion she discussed this with DJ and he approved her request. The reason for her doing so was that her partner had started new employment so was no longer able to look after their child on a Saturday and the claimant's parents, who now looked after her young child on a Saturday, were unable to do so due to illness. Had she not done so, she

would have required to take dependant care leave. DJ was aware of this. Prior to this, she had only done so on one occasion, in February 2019.

17. On 24 February 2020, Ian Hawthorne (**IH**), the respondent's managing director, sent an email to all store managers. The email set out that the company had incurred substantial losses over the last two months and that revenue was reducing. Reference was made to the fact that the statutory minimum wage was due to increase with effect from 1 April 2020. Details of a plan to increase income were outlined, together with a number of options for cost reduction, principally related to cutting staff costs in some way.

18. Following discussions with managers each of the respondent's stores, it was determined that consideration would be given to making redundancies in each store. A document was provided to each store manager, by the respondent's head office, which they were asked to use as a template for a discussion with each member of staff in their store. The document stated as follows:

'*Regrettably, with the drastic downturn in trade, and the uncertain times ahead of all of us, in order for McCalls to continue beyond this crisis, drastic actions are urgently needed.*

As part of this we will be speaking to everyone individually about options open to us to reduce our costs throughout this crisis –the largest cost unfortunately is wages. Undoubtably, we will have to make some very difficult decisions in the next few days, but as a result may be in a better position to survive and remain an employer after the duration of the pandemic.

We have to consider redundancies as we will only be able to retain essential core staff.

Redundancy criteria

1/ Transferable skills

2/ Length of service

3/ Absence record.

In order for us to best access and make the right decisions for the company, please give your honest answers to the following questions. Would you be willing to consider;

1/ Working in any capacity, in any department should the need arise?

2/ Accept a contractual reduction in hours temporarily until recovery?

3/ Take annual holidays for part or all of any forced closure?

4/ Consider relocation to work in another Branch?

5/ Redundancy package with zero hours contract in order to retain their services both prior to forced closure and after restrictions are lifted?'

19. DJ met with each member of staff in his store on 20 & 21 March 2020 and went through the template document, recording the answers given by each member of staff to four of the five questions posed. The first question was deemed not relevant, given the size of the Glasgow store.

20. DJ meet with the claimant on 20 March 2020. The claimant indicated that she would be willing to accept a temporary reduction in hours, would take holidays for part or all of any forced closure and would be willing to relocate to the Edinburgh branch if required. She stated that she would not be willing to take a redundancy package and move onto a zero hours contract. She asked what would happen if the company went into liquidation or administration and what sums she would receive. DJ indicated he would get back to her in relation to this.

21. At the conclusion of the meeting, DJ indicated to the claimant that she should go home as she was feeling unwell, with Covid-19 type symptoms. She remained absent the following day also.

22. On 21 March 2020 DJ announced to all staff present that, as a result of Covid-19 and the impact it was having on the business, redundancies were now inevitable. He explained that the ultimate decisions would be made by the

managing director and general manager and each store manager was collating information to provide to them. He stated that the selection process would include length of service, transferable skills, absence record and manager's notes. The claimant was not present at the meeting as she was ill.

23. In response to the questions posed to staff in the Glasgow store, most, if not all, indicated that they would accept a temporary reduction in hours. The full time sales consultants, Adam and Robert, had 2 and 3 years' service respectively. The other part time sales consultants, Leanne and Chloe, had 13 and 2 years' service respectively. The claimant had 5 years' service.

24. At 17:34 on Sunday 22 March 2020 DJ sent an email to IH and Carol Howie (**CH**), the respondent's general manager, headed *'Urgent Coronavirus Closure Plans'*, stating as follows:

'E-mail received and understood. As much as I would love to keep the team together, I understand the needs to cut costs upon return until such time we are trading normally again. I would suggest Sandra is made redundant, Adam who wanted hours reduced (24 hours) can have that reduction and, if savings are still required, would reduce Roberts contractual hours temporarily as he agreed as per consultations. William, Leanne and Chloe I would like to keep as per normal. I believe we could then re-open with the same store trading hours albeit with minimum (but more efficient) staffing.

My main reason for the suggestion of Sandra's redundancy is down to reliability. Although her absence in last year is shown as 13 days, it doesn't take into account the number of Saturday shifts that she has swapped. I don't think that if the chips are down, and we are tight for staff that I could depend on her when I need her.

I believe she claims some form of benefits, her partner has recently started working etc.. which is obviously the human element to the decision and childcare was becoming more of an issue hence the Saturday/Sunday shift issue of reliability. Hope this helps and is timely enough. Can discuss further tomorrow if required.'

25. National lockdown, as a result of the COVID-19 pandemic, was announced on 23 March 2020. That day, DJ again met with all staff present in the store (the claimant was not scheduled to work that day, so was not present) and stated *'given the government's recent support announcement McCall's is delighted to offer everyone here assembled the opportunity to 'go on furlough'.* He stated that this would take effect from the following day, when the shop would close, and that they would receive 80% of their gross salary during the furlough period.

26. At 18:52 on 23 March 2020 the claimant received a text message from DJ, which had been sent to all members of staff in the Glasgow store. The text message stated that, in accordance with government advice to close all non-essential stores immediately, the store would be closing from close of business on 24 March 2020 until further notice. He stated that during that period *'we will all be 'on furlough' which means we cannot be at our workplace. During his period, under furlough you will receive 80% of your gross salary.'*

27. On 24 March 2020, DJ was informed by CH that his recommendation for redundancy had been approved by her and IH and he should inform the claimant of this. He telephoned the claimant at around 17:00 that day and informed her that she was being made redundant and that she would receive all sums due to her at the end of that week. She was very shocked. She asked him if everyone was being made redundant and he stated *'no, just you'*. She asked why she had been selected and DJ stated that she had not done anything wrong, but lacked motivation. He stated that it was evident to him that she had not been happy with her working arrangements since returning from maternity leave in 2018. He stated that she would receive a letter confirming the termination of her employment.

28. DJ based his conclusion that the claimant lacked motivation and was unhappy with her working arrangements since her return to work from maternity leave, two years prior to then, on the following:

    a. Her sickness absences;

b. The fact that she had handed in her notice the previous year; and

c. The fact that she had swapped shifts on 4 occasions since her return.

29. DJ sent a letter to the claimant, dated 24 March 2020, headed *'Reference: Notice of Redundancy'*, stating as follows:

'As per our telephone conversation on Tuesday 24th March, please accept this letter as written notice of impending redundancy. As discussed with you on Friday, 20 March 2020 due to the financial impact to trade the coronavirus is having and will continue to have after reopening, the general economic climate, impending increases in operational costs and downturn in store sales, I have no option but to terminate your employment with McCalls Ltd. This letter is confirmation that we are providing you with five weeks payment in lieu of your termination date, being Tuesday, 31st March 2020. On top of that, you will also receive a redundancy payment in line with the five years of full service as well as any unused annual holiday allowance minus any absence.

On a personal note Sandra, I wish you every success in your future career, and have thoroughly enjoyed working with you over the years. I can confirm I would be a referee for any future employers wishing a reference for you.

All monies owed should be paid into your account as normal as part of this month's (March) parent. Once again Sandra I wish you every success in your future career.'

30. On 30 March 2020, the claimant wrote to IH asking why she had been informed she would be placed on furlough leave, but was then informed she would be made redundant the following day. She also asked who had made the decision, why she was the only one in the Glasgow store selected for redundancy and whether staff appraisal markings, skills, qualifications and experience were taken into account. She did not receive a response. The letter was sent by post only and was returned to the claimant a number of months later by the postal service.

31. The claimant's employment terminated on 31 March 2020. She received 5 weeks' pay in lieu of notice, a statutory redundancy payment and outstanding holiday pay.

32. Staff in other stores were also dismissed on grounds of redundancy at the same time as the claimant. As a result, there were no alternative roles available within the respondent's organisation which the claimant could have undertaken.

33. On 2 April 2020, the claimant emailed AI and asked to be placed on furlough leave. She was informed this was not possible.

34. The other employees in the Glasgow store remained on furlough until 7 July 2020, when the store reopened. Since that date they have gradually returned to work. The respondent continues to utilise the furlough scheme on a flexible basis. Adam has since reduced his hours to 16 per week. The supervisor has left and has not been replaced.

35. The claimant started alternative employment on 4 August 2020. This is a temporary role, expected to last until the end of February 2021. Her contract is for 12 hours per week, but she works additional hours whenever she is able to do so. She continues to search for a more secure and permanent role.

36. Since starting the alternative role, the claimant has received the following net sums:

    a. 24 August 2020 - £455

    b. 24 September 2020 - £612

    c. 23 October 2020 - £717

37. This amounts to an average of £148.66 net per week for the 12 week period to 23 October 2020. The claimant is likely to continue to receive these average earnings for the remainder of the contract.

38. The claimant did not receive any additional benefits in the period from March to August 2020.

Respondent's submissions

39. Mr Hawthorne submitted that the respondent had commenced internal discussions about the prospect of redundancies across all of their stores in February 2020, prior to any indication of lockdown. The claimant was made aware of the prospect of redundancy prior to lockdown. The decision therefore not a product of Covid-19, but was exacerbated by it.

40. The job was redundant and the claimant was the weakest member of the team. The respondent conducted a fair and objective consultation process and selected the claimant for redundancy based on her poor attendance, lack of flexibility, shift swapping, the fact that she gave notice of termination the previous year and, most importantly, her manager's belief that when the chips were down he would not be able to rely upon her. A number of individuals, from different stores, were made redundant at the same time as the claimant. The same process was followed for each individual. The claimant was not singled out.

41. No alternative employment was available which could be offered to the claimant. The respondent was making redundancies across all their stores.

Claimant's submissions

42. The claimant stated that she brought the claim as a result of the manner of her dismissal. There was no consultation. She was not informed why she was selected. She was not given any opportunity to challenge or appeal against her selection. She had been informed on 20 March 2020 that the respondent was considering a number of cost-cutting options, including redundancy. The first she heard that the respondent was proceeding with redundancies was when she received the call to inform her that she had been selected and was being made redundant. Losing her job in this way has been a struggle financially and emotionally.

Relevant Law

43. S94 ERA provides that an employee has the right not to be unfairly dismissed. It is for the respondent to show the reason (or principal reason if more than

one) for the dismissal (s98(1)(a) ERA). That the employee was redundant is one of the permissible reasons for a fair dismissal (section 98(1)(b) and (2)(c) ERA). Where dismissal is asserted to be for redundancy the employer must show that what is being asserted is true i.e. that the employee was in fact redundant as defined by statute.

44. An employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that his employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish (s139(1) ERA).

45. In ***Safeway Stores plc v Burrell*** [1997] IRLR 200 the EAT indicated a 3-stage test for considering whether an employee is dismissed by reason of redundancy. A Tribunal must decide: -

a. Whether the employee was dismissed?

b. If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?

c. If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?

46. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

47. The House of Lords in ***Polkey v A E Dayton Services Ltd*** 1988 ICR 142 held that *"in the case of redundancy, the employer will not normally have acted reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within its own organisation".*

Discussion & Decision

48. The Tribunal referred to s98 ERA, which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: firstly, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(1) and (2) ERA. If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair. This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

49. The Tribunal referred to the definition of redundancy in s139(1) ERA. That states that an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that their employer has ceased or intends to cease to carry on that business in the place where the employee was so employed, or the fact that the requirements of that business for employees to carry out work of a particular kind have ceased or diminished, or are expected to cease or diminish.

50. The Tribunal considered each of the factors set out in ***Safeway Stores plc v Burrell***. It is clear that the claimant was dismissed, so the first element was satisfied. It is also clear that the respondent had determined that it required to cut costs and that this would done by reducing wage costs. A conclusion was reached, in relation to the Glasgow store, that this could operate with one less sales consultant. The requirement for employees to carry out work of a particular kind had accordingly diminished. The second test was accordingly also satisfied. In relation to the final point, the Tribunal was satisfied that the claimant's dismissal was wholly caused by the fact that the respondent determined that, in order to reduce costs, the number of sales consultants

working in the Glasgow store would require to be reduced. The Tribunal were accordingly satisfied that there was a genuine redundancy situation. The Tribunal were also satisfied that the claimant was dismissed solely as a result of that.

51. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason shown by the respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439 that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

52. In considering whether the respondent in this case acted reasonably in treating redundancy as a sufficient reason for dismissing the claimant, the Tribunal had regard to the guidance laid down in ***Polkey*** in relation to whether the respondent acted reasonably in treating redundancy as sufficient reason for dismissal. Taking each factor in turn, the following conclusions were reached.

Warning and Consultation

53. Only one meeting took place with the claimant where the possibility of redundancy was mentioned. The Tribunal found that the meeting with the claimant on 20 March 2020 amounted to a warning that redundancies may become necessary only. There was however no consultation with the claimant in relation to the potential redundancy situation, the method of selection or the application of the selection criteria. She was informed of the proposed selection criteria, but not invited to comment on this. She was not afforded any opportunity whatsoever to challenge the basis for her selection for redundancy or to put forward suggestions for ways to avoid redundancy. Rather, once she was selected, the respondent simply informed her that she was to be dismissed.

Fair basis for selection

54. The Tribunal was satisfied that the respondent acted reasonably in determining the pool of employees from which selection for redundancy should be made, namely sales consultants in the Glasgow store.

55. In relation to the method of selection and the selection criteria used, however the Tribunal found that this was subjective and based on incorrect assumptions/facts on JD's part, rendering it inherently unfair. The Tribunal reached this conclusion for the following reasons:

a. The Tribunal noted that the respondent's stated intention, as per the note provided to store managers to use as the basis for discussions with each member of staff, was to use three specified selection criteria. It is clear however that this was not done. No matrix was prepared by DJ to objectively assess which employee should be selected for redundancy by reference to transferrable skills, length of service and absence record. Indeed transferrable skills and length of service formed no part of the selection process. Instead, DJ based his decision on the following factors:

i. His subjective view in relation to the claimant's reliability, evidenced by the terms of his email to IH and CH dated 22 March 2020; and

ii. His subjective view that the claimant lacked motivation and had been unhappy with her working arrangement since returning from maternity leave in 2018, evidenced by the explanation he gave to the claimant on the telephone on 23 March 2020 as to why she had been selected for redundancy.

b. His views on the claimant's reliability/motivation were based on the following:

i. An incorrect assessment of the claimant's absence record. In his email of 22 March 2020 he states that the claimant had had 13 days' absence in the last year. This is factually incorrect. The claimant had had 13 days absence in the *two* years prior to her selection for redundancy, 4 days of which had been as a result of having a miscarriage. Whilst JD strenuously asserted to the Tribunal that the

claimant's absence as a result of her miscarriage had not been taken into account in selecting the claimant for redundancy, and his decision was based on her having 9 days' absence only, it was quite clear from the reference to 13 days' absence in of DJ's email of 22 March 2020 that this was not the case and the claimant's absence as a result of her miscarriage was indeed taken into account. No reasonable employer would have proceeded on this basis. In the 12 months prior to her selection for redundancy, excluding her absence as a result of her miscarriage, the claimant in fact had 4 days' absence (including 20 & 21 March 2020).

ii. The fact that she swapped shifts on 4 occasions. JD was aware that three of these were due to the fact that the arrangements she had put in place for childcare had broken down and, on each occasion he approved the shift swap, as an alternative to the claimant requiring to take dependant care leave. No reasonable employer would have then taken this into account in selecting the claimant for redundancy.

Consideration of alternative employment

56. There were no redeployment opportunities for the claimant within the respondent's organisation. There were accordingly no steps which the respondent ought reasonably have taken to avoid or minimise redundancy by redeployment within its own organisation.

Conclusions

57. Given these findings, the Tribunal concluded that the respondent accordingly acted unreasonably in treating redundancy as a sufficient reason to dismiss the claimant. No reasonable employer would have dismissed the claimant for redundancy in the circumstances. The claimant's dismissal was accordingly unfair.

Calculation of Compensation

Basic Award

58. As the claimant received a statutory redundancy payment, no basic award is payable.

Compensatory Award

59. The claimant's employment terminated on 31 March 2020. She had not secured permanent alternative employment by the date of the Hearing, a period of 33 complete weeks. The Tribunal find that there is no immediate prospect of the claimant securing permanent alternative employment and that a period of one year's loss is reasonable. The Tribunal notes that, had the claimant remained in employment with the respondent, she would have been placed on furlough leave and, as a result, would likely only have received 80% of pay, namely £155.20 per week, net. The Tribunal calculated the compensatory award as follows:

Loss of earnings to hearing - 33 weeks at £155.20	£5,121.60
Less sums earned – 12 weeks at £148.66	£1,783.92
Financial loss to hearing	**£3,337.68**
Future loss to 28 Feb 2021 - 15 weeks at £6.54	£98.10
Future loss for March 2021 – 4 weeks at 155.20	£620.80
Future loss	**£718.90**
Loss of statutory rights (2 weeks' gross pay)	**£395.16**
Total Compensatory Award	**£4,451.74**

Employment Judge: Mel Sangster
Date of Judgment: 30th November 2020
Entered in register: 22nd December 2020
Copied to parties