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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Ms L Mezyk	**AND**	Crispins Shoes Limited

Heard by: London Central (on the CVP platform) **On**: 16-17 March 2021

Before: Employment Judge D A Pearl

Representation
For the Claimant: In person
For the Respondent: Mr J Stuart, of Counsel

JUDGMENT

The Judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal fails and is dismissed.

2. Her monetary claims, whether in contract or for unauthorised deductions from wages, all fail and are dismissed.

REASONS

1. By ET1 received on 9 November 2020 the Claimant made a claim of unfair dismissal and also various monetary claims. She was employed for over fifteen years in the Respondent store, mostly as the Store Manager and her employment terminated on 19 November 2020. The purported reason for her dismissal is redundancy.
2. The hearing of the claim was preceded by a sizeable quantity of contentious correspondence, but little is relevant to these reasons. At the outset of this hearing both parties agreed that I should hear the issues of liability first. I explained that, subject to any contrary evidence, there was nothing anywhere in the papers to suggest that the Claimant's employer was other than Crispins Shoes Limited. It was therefore likely that Mr Merikhy, the Director and Principal Shareholder would be removed as a Respondent. I also explained that without prejudice discussions conducted through ACAS would not be taken into account or even considered.

3. As to the conduct of the hearing, it took place via the CVP video platform and for the most part matters ran smoothly. Towards the conclusion of the first day, technical issues intruded and, with the assistance of the Tribunal staff, it was necessary for the Claimant to join via her telephone. Nevertheless, the last hour of the hearing was able to proceed without hitch.

4. In resolving the issues, I studied a bundle running to 399 pages. I heard evidence from Mr Merikhy and from the Claimant.

Facts

5. I should observe at the outset that it is not my function to resolve each and every disputed issue of fact. What follow are the relevant factual findings in relation to these issues. Mr Merikhy bought the Respondent firm in 2003 and it is a company that specialises in the sale of oversized women's shoes. This is described as a niche business and there is one retail outlet in Marylebone. The Claimant began employment in March 2005 as a Sales Assistant but the next year was promoted to Store Manager. This is a small company run by Mr Merikhy and there have generally been under six employees in total. The Claimant had no written contract of employment. It is accepted by Mr Merikhy that she was the most senior employee and the only member of staff with any managerial function aside from himself.

6. It is a notable feature of this case that the Claimant and Mr Merikhy appear to have got on very well and the relationship between the two of them has only broken down towards the termination of employment. Otherwise, there is no criticism whatsoever of the Claimant's performance or conduct. By the end of employment her basic salary was £29,000 a year but there were also two forms of commission that were paid on top. For these purposes, the calculations are of no relevance.

7. I have had to assess the accuracy and credibility of Mr Merikhy's evidence. Having read the papers and listened carefully to his oral evidence, I can find no basis for criticising him, either in point of detail or on the basis of exaggeration. His rationale for dismissing the Claimant is that the business faced a redundancy situation because of the consequences of the corona virus pandemic. Up until lockdown, and other than Mr Merikhy, there were three full time employees (including the Claimant) and two part-time assistants. After 23 March 2020 a part-time assistant returned to Italy and all the employees other than Mr Merikhy were put on furlough. The shop was shut, however shoes had been sold online since 2005 and these online sales continued. From 23 March 2020 to 15 June 2020 the volume of online sales was £78,000 excluding VAT. The comparable figure for the same period during 2019 was £310,000. Mr Merikhy has established with ample evidence, that as one might expect, the lockdown considerably depressed turnover.

8. On 15 June 2020 when lockdown was lifted the store reopened with social distancing rules in place. The two full time junior Sales Assistants were brought back from furlough. Tellingly, the Claimant remained on furlough "as we simply did not need her services whilst the Covid measures took affect". The other part-time employee was also kept on furlough until she began maternity leave in August. Again, the various figures in the bundle show that the business was much affected. From January to August 2020 the turnover was £567,814 compared to £1,060,534 in the equivalent period in 2019. There was a second lockdown from 5 November to 2 December and a third thereafter which has taken us into 2021. While it is the case that the business is in a fundamentally healthy state, and Mr Merikhy can look forward to a further recovery in due course, I find that survival will require careful financial management. Once lockdown is lifted, he can expect to see revenues

increase but, as he told me, there will be the matter of business rates and also rent to deal with. Past rent has been deferred. There is currently an ongoing rent review and the landlord has been seeking a large increase. Mr Merikhy told me that there are reserves available to meet these various liabilities that will arise.

9. As noted, the Claimant was retained on furlough after 15 June 2020. I further find that Mr Merikhy is accurate in recalling that between that date and August 2020 he was increasingly concerned about cutting costs in order to keep the business afloat. He saw no immediate return to pre-Covid turnover levels. During this period, he came to the conclusion that redundancies were likely to be needed. The most significant conclusion that he formed was that he would be able to absorb the Claimant's managerial duties. They had always worked closely together and there was some degree of interchange, particularly, as I find, when Mr Merikhy was absent from the office. The Claimant is entirely correct to say that she understood and was involved in almost all the areas of the business including buying. Nevertheless, what Mr Merikhy found last summer was that he would be able to cope with the Claimant's managerial tasks and duties; in effect, he considered that he was able to replace her himself. This gave rise to a redundancy situation, because a Store Manager was not required.

10. I accept that Mr Merikhy spoke with his accountant before sending the letter of 6 August 2020 to the Claimant at page 107. In that letter he notified her of the fact that she was at risk of redundancy. He said that "legal nicety required me to write to you initially". From this I infer that in preceding weeks he had informed himself of the appropriate way to proceed.

11. Mr Merikhy set out the rationale for redundancy and invited the Claimant to a meeting. It was for the purpose of consultation and it referred to an opportunity for the Claimant to make comments and suggestions about ways of avoiding the redundancy. She could be accompanied. He also said that this first meeting would be followed by a second one. It is clear that Mr Merikhy was writing in careful terms and was aware of consultation requirements.

12. On 12 August the same day as the first consultation meeting, Mr Merikhy set out to the Claimant what was termed a brief summary of their discussion. He put the matter straightforwardly. "Effectively, your role will be absorbed by mine. We will of course consider any potential alternative employment … and if you have any views … please communicate them to me as soon as possible". He also said that the company was very open to suggestions.

13. The second meeting was three days later and the Claimant had certainly suggested to him that the company could survive and that there was no need for her redundancy. The subsequent letter terminating employment maintained that the redundancy was justified and that there were no alternative roles for her; and it gave three months' notice of termination. It also referred to a right of appeal.

14. In her response on 25 August the Claimant maintained again that there was no need for a redundancy in her case. She maintained that takings since the lockdown had now improved and that things were "shifting nicely into the right direction". She referred to the proposed redundancy payment calculation of £8,608 and said that this did not reflect her contribution to the company over the years. She then set out an approximate estimation of unpaid overtime, at one to three hours per week over ten years which gave a figure between £9,360 and £28,080. She then said that she had had buying duties and responsibilities for fourteen years which were "never financially acknowledged".

15. Her letter went on to say as follows:

> "At this stage in negotiations, and in order to save myself time and trouble and the company legal costs I propose the following redundancy package:
>
> 1. In addition to all my statutory payments and benefits, an increase of my redundancy pay from statutory £8,608 to £20,000 to £30,000.
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> 2. Two to Five (plus) years of shopping at Crispins at a cost price rate (I am happy to negotiate the timeframe and number of shoes allowed per year)".

16. On 27 August 2020 Mr Merikhy wrote to the Claimant saying that he was treating the above letter as grounds of appeal. He said that as it was a small company and there was no one else to hear the appeal, he would have to hear it. On 31 August the Claimant replied to say that this was unacceptable and that she had forwarded details of the dispute to ACAS. She referred to a Tribunal case. In subsequent communications the Claimant made clear that she did not wish to pursue the appeal, but Mr Merikhy said that he would deal with it in any event.

17. In his 16 September 2020 letter Mr Merikhy set out his response to the various points made by the Claimant. On the question of overtime, he noted that this had never been mentioned at any time during the Claimant's employment.

18. In their oral evidence both parties adhered to the broad arguments that they had earlier set out. Mr Merikhy noted that there was only one occasion, after the re-opening, when four customers at once had come into the shop. He insisted that he had taken over all of the Claimant's responsibilities. He had never made anybody redundant before and he was reluctant to do so on this occasion. "There had been no redundancies until this catastrophic pandemic. You look at roles and responsibilities". He himself took a low salary and he reduced his dividend takings. At the time he took the decision, furlough was due to end in October. But for the pandemic, he would never had dismissed the Claimant. By the time the notice was about to expire, the Claimant had gone into battle, as he termed it, making unwarranted claims for back pay and overtime. He considered that the relationship had deteriorated.

19. For her part, the Claimant told me in a straightforward way that she thought his decision to make her redundant was wrong and it was a mistake, and that it made no sense to her. She was talking about the commercial rationale for the decision. She pursued the same argument when recalling the consultation meetings. She remembered saying that she did not agree with Mr Merikhy's reasoning. She thought that the business was very strong and that there was nothing to worry about.

20. The Claimant did, nevertheless, agree that she could see from the figures that she was sent on 19 August that Mr Merikhy had these in mind and that they were behind his reasoning for making her redundant. She gave him no further alternatives to redundancy and she now tells me that this was because she thought he was not listening. She was also taken to three emails that preceded her redundancy written between 26 June and 1 July. These emails evidenced the fact that business was quiet and that Mr Merikhy did not think that the outlook was very rosy, to use his term. The Claimant tells me that she believes now that he was building a case against her, but my finding is that these contemporaneous emails are good evidence of the state of the business in terms of its trading position.

21. In terms of her overtime claim, the Claimant was clear that she had no agreement that she could point to but that the claim was made on the basis of what she considered

to be fairness. She also agreed that she had never claimed any monetary compensation for extra hours worked when she accompanied Mr Merikhy to Milan, until she made this claim. She agreed that she was given an extra day off after she returned from the Milan trips.

22. Towards the end of her evidence the Claimant changed the nature of her case in an important respect. She said that she had not wanted to say this, but that she thought she was made redundant because of her age. She based this on ageist remarks she believed were made by Mr Merikhy in recent years. Having said this, she said that she wanted to leave matters there. This was at about 12:50 on the second day and that was the first time that any question of either a discriminatory motive or any other motive had ever been raised by the Claimant. As Counsel observed, this is no part of her pleaded case.

Submissions

23. Mr Stuart had made written opening submissions and he supplemented these orally. The Claimant was content to make only two observations, because she was prepared to leave matters to the Tribunal, as she had just completed her evidence. I am grateful to both of them for the way in which they have summed up matters, whether in evidence or in submissions. I shall refer to some of the relevant points below.

The Law

24. Section 139 of the 1996 Act provides that an employee is taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to "… (b) the fact that the requirements of that business – (1) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish".

Section 98(1) of the ERA 1996 provides that it is for the employer to show the reason or principal reason for the dismissal. By Section 98(2) a reason falls within the sub section if it "(c) is that the employee was redundant".

Section 98(4) provides that: "where the employer has fulfilled the requirement of sub section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) Shall be determined in accordance with equity and the substantial merits of the case"

Conclusions

25. As is clear from the Claimant's oral evidence towards the close of her case, she is reluctant to accept that there was any genuine reason to select her for redundancy. She has not specifically denied that there was a redundancy situation, but, looking at her evidence overall, I consider that I should deal with this question first.

26. I have to apply s.139 in the light of Safeway v Burrell and Murray v Foyle Meats (1999, HL). It is clear on all the evidence that this small business faced a redundancy situation. It is also my conclusion that the Claimant's dismissal was wholly attributable to the fact

that the requirements of the business for employees to carry out work of a particular kind had ceased. In particular, there was now no need for the business to employ a Manager.

27. As HHJ Clark stated in Safeway v Burrell [1997 ICR 523], subsequently approved in the House of Lords: "there may be a number of underlying causes leading to a true redundancy situation … there may be a need for economies, a reorganisation in the interest of efficiency, a reduction in production requirements, unilateral changes in the employees' terms and conditions of employment. None of these factors are themselves determinative of the stage two question. The only question to be asked is: was there a diminution/cessation in the employer's requirement for employees to carry out work of a particular kind, or an expectation of such cessation/diminution in the future? (redundancy)". The stage two question is whether the dismissal is attributable wholly or mainly to that state of affairs.

28. Here, I can be left in no doubt that the business was able to continue without a Manager and that therefore the requirements of the business for a Manager, within the terms of s.139, had ceased. The evidence of a drastic downturn in trade caused by the pandemic is clear and compelling. As I have commented, I have found Mr Merikhy's evidence to be genuine and truthful. The Claimant was free to disagree with his business reasoning and she did so. Nevertheless, he determined that her role should be absorbed entirely into his and that there was no need for a Manager of the store once it was to reopen. It may well be that the saving of costs was a prime driver of this decision, but that does not invalidate it in terms of s.139. There is no basis upon which I could conclude that there was no redundancy situation. The Claimant was not the only person in the store affected by this commercial decision, as only two store assistants were retained.

29. Although the Claimant latterly threw some doubt on the asserted reason for dismissal, the evidence points conclusively, in my view, to the fact that redundancy was the sole reason why she was dismissed. She had made a great contribution to the business over the years and had worked closely with Mr Merikhy. He was reluctant to dismiss her. There is no other reason or motive that can be detected anywhere in the case and it is, in my opinion, abundantly clear that the redundancy situation was the only reason why the Claimant's employment came to an end.

30. Turning to the question of fairness, the case has thrown up three issues that I need to deal with. The first is whether the consultation process here was sufficient. The Claimant's case is that it either was not a genuine attempt at consultation, alternatively Mr Merikhy was not listening to what she had to propose. I conclude that both of these points run counter to the evidence. The consultation exercise was clearly one that had been carefully put together. The Clamant was free to make suggestions but, in these circumstances, where she thought that the business should carry on with her in place as Manager, as had always been the case over many years, there was a fundamental difference of strategic opinion. She proposed no alternative roles and I have been unable to find any ground upon which I could fault the consultation exercise. I consider that the employer was open to any suggestions, but very reluctant to abandon the redundancy exercise, having come to the conclusion that on commercial grounds the store did not need a Manager.

31. The second issue concerns the accepted fact that before the expiry of the Claimant's notice period in November, the Government on 31 October extended the furlough scheme. I should point out in fairness to the Claimant that she did not raise this, other than in passing, as a ground of unfairness. However, I consider that I should deal with it because, had she been represented, this submission is one that might well have been made, namely that the changed circumstances before the expiry of notice render the dismissal unfair.

32. After the first hearing day Mr Stuart very kindly provided Stacey v Babcock Power Limited [1986] IRLR 3, a case in the EAT which deals with a related but different point. This was a redundancy dismissal because there was no need for the Claimant's role, which was overtaken during the period of notice by the award to the employer of a new contract. This meant that there was a continuing demand for employees to do work of the kind that Mr Stacey had been employed to do. His notice was allowed to lapse. What the EAT determined was that a change in circumstances of this sort could be taken into account in determinising whether or not the dismissal was fair or unfair.

33. There is no direct parallel here, because the underlying reasoning that lay behind the redundancy situation had not gone away by the expiry of the Claimant's notice. I recognise, however, that on the issue of fairness within s.98(4) it is permissible to argue that the notice could have been rescinded and the Claimant retained on furlough.

34. I would reject such an argument for three reasons. First, the Claimant's position was redundant and nothing had changed. Second, even had she been kept at home on furlough, there still would be a cost to the employer, a point that was made to me. Third, and perhaps the strongest consideration, the employment relationship had somewhat soured by this point in time. The Claimant had introduced the claims that I deal with below and the Respondent, understandably in my view, regarded them as without merit. The pre-existing relationship between the two protagonists had taken a considerable turn for the worse. There is no need to look for blame, and in my opinion there is none to be attributed. It is understandable that the Claimant was mightily upset by the decision to dispense with her employment; and equally understandable that Mr Merikhy was somewhat irked by the appearance of fairly large monetary claims for overtime and the like. Putting these three matters together, I consider that the Respondent acted within the range of reasonable responses open to a reasonable employer in deciding to let the notice expire, notwithstanding the creation by The Treasury of a new furlough scheme at the end of October.

35. This then leaves the issue of the appeal. Up to the offer of an appeal, I can find no reason to say that this was anything other than a fair dismissal. The Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant and there are no substantive or procedural grounds for challenging the fairness. For the sake of argument, I will accept that there are circumstances in which a fair dismissal can be rendered unfair by the failure to offer a wholly independent appeal.

36. The Claimant's case has to be that the Respondent acted unreasonably in all the circumstances in not engaging an outside consultant to deal with the appeal. Indeed, that was proposed at one point earlier in the negotiations and the Claimant referred to it in the correspondence between the parties. Mr Stuart points out that the ACAS Code of Practice of Disciplinary and Grievance Procedures specifically does not apply to redundancies. Nevertheless, in that code appeals should "wherever possible" be dealt with by a Manager who has previously been uninvolved in the case. The guidance to the code states that if there is no other manager available to hear an appeal, an employer should consider whether the owner should hear the appeal. Further: "whoever hears the appeal should consider it as impartially as possible. The ACAS guide on Handling Redundancies, in Step 8, makes the same point in that context.

37. It is therefore submitted, in my view correctly, that there is no duty on an employer to use an outside source for a hearing of an appeal. In this particular case, the company is almost as small as could be and two conclusions emerge from the evidence. First, the Respondent was acting reasonably in the decision maker deciding to hear the appeal himself. Second, he took pains, demonstrated by the terms of the appeal outcome letter, to review the various points that the Claimant had made and to give his decision on them.

This employer is a very small organisation, effectively under the control of one person. In addition, the issue of redundancy was one that arose within a small compass. The downturn was almost inevitable once Covid led to a national lockdown and it was feasible and commercially justifiable to dispense with the need for a Manager. In those circumstances Mr Merikhy was not acting unreasonably in deciding to deal with the appeal process himself. It is not a factor that could render a fair dismissal otherwise unfair.

38. In summary, I conclude that for all these reasons he acted reasonably in treating redundancy as a sufficient reason in all the circumstances for dismissing the Claimant. It is not the function of the Tribunal to put itself in the shoes of an employer, after the event, and to re-take the decision. The question is whether in acting as he did, Mr Merikhy, on behalf of the Respondent, was acting within the range of reasonable responses that were reasonably open to an employer, acting reasonably, in these circumstances. I conclude that he was so acting and that, even though the Claimant had given sterling service to this company, in the unfortunate circumstances prevailing after March 2020 the decision to dismiss her was fair within the terms of s.98(4) of the ERA 1996. The claim fails and it must be dismissed.

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Employment Judge Pearl

Dated: 31/03/2021

Reserved Judgment and Reasons sent to the parties on:

31/03/2021.

For the Tribunal Office