



EMPLOYMENT TRIBUNALS

Claimants: Mr G Varga
Mrs E Varga Homa

Respondents: Three Pillars Contractors Limited
Rufford Court Limited

Heard at: Nottingham

On: Monday 8, Tuesday 9, Wednesday 10, Thursday 11 and
Friday 12 March 2021

Before: Employment Judge M Butler

Members: Mr K Rose
Mr J D Hill

Representatives

Claimants: Mr D Bunting, Counsel
Respondents: Ms K Barry, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

1. The first Claimant's claim of indirect race discrimination is dismissed on withdrawal.
2. His claim of unfair dismissal is not well founded and is dismissed.
3. The second Claimant's claims of unfair dismissal and victimisation are not well founded and are dismissed.

REASONS

Interpreters

1. The Claimants are both Hungarian nationals. A Hungarian interpreter attended on each day on the substantive hearing for the benefit of the first Claimant. At the commencement of their engagements, the interpreters took the interpreters oath.

The claims

2. Mr Varga (the first Claimant) brought claims of unfair dismissal and indirect race discrimination against Three Pillars Contractors Limited (the first Respondent). He withdrew the indirect race discrimination claim immediately before giving his oral evidence. Mrs Varga Homa (the second Claimant) brought claims of unfair dismissal and victimisation against Rufford Court Limited (the second Respondent).

3. The above claims were consolidated by order of Employment Judge Adkinson dated 21 April 2020. The first Claimant was employed as a plumber/handyman by the first Respondent. He claims his selection for redundancy in September 2019 was unfair because it was not a genuine redundancy because the Respondent still had a requirement for him to work. The second Claimant who was employed by the second Respondent, claims that her selection for redundancy in September 2019 was unfair in that there was still work available for her to undertake and, secondly, it amounted to a detriment as a result of an act of victimisation because she had previously brought a claim against the second Respondent for maternity and pregnancy discrimination after returning to work following a period of maternity leave. In both cases, the Respondent argues that the reason for the dismissals was redundancy.

The law

4. Section 139 of the Employment Rights Act 1996 (ERA) contains provisions regarding redundancy. Section 139(1) provides:

“(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-

(a) the fact that his employer has ceased or intends to cease:-

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(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.”

5. Section 139(2) provides that:

“(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one.”

6. Section 98 Employment Rights Act 1996 provides that:

“In ascertaining whether a dismissal of an employee is fair or unfair it is for the employer to show the reason or principal reason for that dismissal and that it is, inter alia, that the employee was redundant (section 98(2)(c).”

7. Section 98(4) Employment Rights Act provides that:

“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.

8. Section 27 of the Equality Act 2010 (EQA) provides:

“(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-

(a) B does a protected act, or

(b) A believes that B has done or may do, a protected act.

9. Section 27(2) EQA provides that bringing proceedings under the EQA is a protected act.

10. We were referred to the following case law:-

- **Excel Technical Mouldings Limited v Shaw EAT 0267/02**
- **Associated Society of Locomotive Engineers and Firemen v Brady [2006] IRLR 576 EAT**
- **Maund v Penwith District Council [1984] IRLR 24CA**
- **Langstone v Cranfield University [1998] IRLR 172 EAT**
- **Cox v Wildt Mellor Bromley Limited [1978] 157 EAT**
- **King v Eaton Limited [1996] IRLR 199 CS**
- **Capita Hartshead Limited v Byard [2012] IRLR 814 EAT**
- **Barratt Construction Limited v Dalrymple [1984] IRLR 385 EAT**
- **Euroguard Limited v Rycroft EAT 842/92#**
- **Martin v Devonshire’s Solicitors [2011] EqLr 108 EAT**
- **Laing v Manchester City Council and Another [2006] ICR 1519 EAT**
- **Polkey v AE Dayton Services Limited [1987] UK HL8**
- **Voith Turbo Limited v Stowe [2005] IRLR 228 EAT**

The issues

11. In relation to the unfair dismissal claims, the issues to be determined by the Tribunal are:-

- (i) What was the principal reason for dismissal and was it a potentially fair one under section 98(1) and (2) ERA?
- (ii) The Respondent asserts in both cases that it was redundancy.
- (iii) If so, was the dismissal fair or unfair in accordance with section 98(4) of the EQA and did the Respondent in all respects act within the so called "band of reasonable responses?".

12. In relation to the second Claimant's victimisation claim:-

- (i) It is not disputed that the second Claimant did a protected act in presenting a complaint of discrimination to the Tribunal that was received by the second Respondent on or about 4 September 2019;
- (ii) Was the detriment of being dismissed because the second Claimant did the protected act?

The factual background

13. Many of the facts in this case are not disputed. By way of background it is useful to explain the relationship between certain legal entities as they are relevant to the issues in the case. Ms S Bhogaita gave evidence on behalf of the Respondents. She is a Director of all of the companies involved in this case. They are the first and second Respondents and also two other companies, Midland Meadows Limited and Nyumba Yako Limited.

14. Midland Meadows Limited owned the property known as Rufford Court which was leased to Rufford Court Limited. This property in Bulwell, Nottingham, had for some time been run by the second Respondent as a bed and breakfast business. When that business was to cease trading, the lease of Rufford Court was surrendered and a new lease granted to Nyumba Yako Limited. Thereafter, it would seem the building was sublet to Nottingham City Council who would use it as emergency accommodation for homeless and vulnerable people.

15. It is the second Respondent's case that the bed and breakfast business was losing money and that, after discussions with other board members of Midland Meadows Limited (who are all family members of Ms Bhogaita), it was decided to close down the bed and breakfast business and sublet to Nottingham City Council in the same way they had done for another business at 230 Cinderhill Road, Bulwell.

16. It was Ms Bhogaita's evidence that the second Claimant was initially the receptionist at the bed and breakfast business but subsequently at her own request, became the Manager. Her duties included working on reception, sometimes cooking breakfasts, cleaning, booking guests and checking them in and out. The new business, in that the property would be wholly let to Nottingham City Council, would require no staff and therefore the second Claimant's role was redundant.

17. The second Claimant maintains that there would still have been work to do for her at Rufford Court in that a Manager would still be required or that there would be work in one of Ms Bhogaita's other companies which she could undertake. She further maintains that the reason for the dismissal was not redundancy but the fact that she had brought a claim against the second Respondent for maternity and pregnancy discrimination which was served on the second Respondent about 2 weeks before her redundancy consultation commenced.

18. The first Claimant worked as a plumber/handyman for the first Respondent. As noted above, this is also a company run by Ms Bhogaita. Ms Bhogaita said that the first Claimant worked on major projects involving the renovation and conversion of buildings bought by Midland Meadows Limited. Many of these projects involved the conversion of commercial premises into residential flats. The work was done through the first Respondent of which the first Claimant was the only employee. The remainder of the construction work was undertaken by independent contractors who worked alongside the first Claimant.

19. When he first commenced employment, the first Claimant worked under a zero hours contract but Ms Bhogaita said she always tried to give him 40 hours work per week and this was confirmed by the first Claimant.

20. Ms Bhogaita's evidence was that the final project that the first Respondent worked on was due to end in January 2020. She was not looking to source further projects for the first Respondent due to her personal circumstances. These concerned the fact that she intended to support her grandmother in Kenya who was ill, her father, who was due to have surgery, and who Ms Bhogaita was helping to relocate to Nottingham along with her mother and the fact that she and her partner wished to start a family which would involve her partner undergoing fertility treatment abroad. These, she said, were the reasons for the first Claimant being made redundant. The first Claimant maintains that the first Respondent continued to undertake construction work and that his redundancy was not, therefore, genuine and was also based on the fact that his wife had brought a discrimination claim against the second Respondent.

21. The discrimination claim brought by the second Claimant was withdrawn because she could not afford to finance that claim. With the help of legal representation, she brought claims of unfair dismissal and victimisation on the basis that hers was not a genuine redundancy and the bringing of the first claim was a protected act as a result of which she suffered the detriment of dismissal.

22. It is also accepted by all of the witnesses in this case that Ms Bhogaita and the Claimants were close friends. They socialised outside work and Ms Bhogaita was Godmother to their youngest child.

The evidence

23. We heard oral evidence from Ms Bhogaita and the two Claimants. We also had an agreed bundle comprising 359 pages and an additional document was produced at the hearing by the Respondents being board minutes of a meeting of the Directors of Midlands Meadow Limited on 24 August 2019 and which we have numbered 360 and 361. References to page numbers in this judgment are to page numbers in the bundle.

24. We found the evidence of Ms Bhogaita to be entirely credible. She carefully explained how the various companies operated and gave straightforward answers to all questions put to her. Some of the evidence in relation to her personal circumstances was clearly difficult for her but she did not, in our view, attempt to exaggerate the extent of those circumstances.

25. Her evidence in relation to the lack of documentation relating to such matters as contracts for work and invoices was honestly given. She explained that buildings were bought by Midland Meadows Limited and the first Respondent undertook renovation or conversion work without written contracts. Whilst the Claimants sought to make much of this, in our view it was entirely realistic given that all the companies were connected and run by Ms Bhogaita and her parents.

26. We also noted that Ms Bhogaita did not seek to rely on the first Claimant's zero hours contract to avoid having to make notice or redundancy payments. She volunteered that he consistently worked 40 hours per week and she treated him as an employee which from a legal perspective was the correct thing to do. She gave evidence that the first Claimant was involved mainly in projects which involved the renovation and conversion of buildings and said this took her 95 to 98 per cent of his working time. The remainder involved ad hoc maintenance work at other properties owned by various companies controlled by Ms Bhogaita and her family.

27. Ms Bhogaita also gave evidence in relation to the many photographs the first Claimant produced somewhat late in the day to support his contention that the first Respondent continued its construction activities after he was made redundant. The Tribunal's view was that these photographs did not really support the first Claimant's contention. Some were little more than a worker standing in a car park. Ms Bhogaita confirmed that some activities had continued but there were not significant projects as no further properties have been bought by any of her companies. She confirmed that ad hoc work had been carried out on some properties but this had been undertaken by independent contractors, some of whom had worked alongside the first Claimant whilst he was still employed. Further, during the course of her own construction businesses, she had made good contacts with suppliers and during the 2020 lockdown due to the pandemic she had been able to source building materials for other businesses which she did on an irregular basis when asked for assistance.

28. We did not find the evidence of the second Claimant to be entirely reliable. This was because there were certain inconsistencies in it and she made claims which were not supported by her evidence. During the course of her evidence, we did make allowances for the fact that English is not her first language but she did not wish to use the services of the interpreter who, in any event, was translating the evidence for the benefit of her husband.

29. The second Claimant did not dispute the duties she carried out for the second Respondent when the bed and breakfast business was running. But there was inconsistency in her evidence in this regard. At the end of the third day of evidence she confirmed that she accepted the bed and breakfast business had ceased to operate and that there was no requirement for a manager because the business which took over the building operated in a way which did not require any staff.

At the start of the second day, however, her evidence was that a manager would still be required to deal with issues of minor maintenance which would be notified by telephone. She said that she understood the Respondent did not need her but still needed someone to be on site or available on the telephone. She confirmed that she had not decided to change her evidence from the previous day and confirmed that the second Respondent did not need reception work, cooking, or someone to take bookings. She said that she accepted the bed and breakfast business ceased trading and that others who worked there, as independent contractors, had those contracts terminated. She maintained that Ms Bhogaita made her redundant because of her discrimination claim.

30. The second Claimant also confirmed during her evidence that some of her grounds of appeal (page 228) did not form part of her case before the Tribunal. These were that she was dismissed because she would not become self employed and also that she refused to work weekends. These particular issues caused us to question the reliability of the second Claimant's evidence and it seemed to us that certain matters had been raised by her which had absolutely no basis whatsoever in any of the facts before us. Further, they were not supported by any documentary evidence.

31. It was unfortunate for both Claimants that some of the issues they raised in their appeals had not previously been raised and were not pursued during the course of this hearing. This did nothing to contradict our perception that their evidence was unreliable. We do not say this in a way that indicates their evidence was untruthful but, having broadly accepted the factual background in relation to the two Respondents, they appear to have misinterpreted or misunderstood the legal position and pursued claims which run contrary to the evidence before the Tribunal.

32. For the above reasons, whenever there was a dispute as to the evidence, we preferred the evidence of Ms Bhogaita.

The facts

33. In relation to the issues before us, we find the following facts:-

(i) The first Respondent is a construction company involved in renovation and conversion projects largely, but not exclusively, for its associated companies. Ms S Bhogaita is a Director of all of the associated companies. The first Claimant was employed by the first Respondent as a plumber/handyman from 1 January 2017 until 18 November 2019.

(ii) Towards the end of 2019, Ms Bhogaita resolved to take a step back from this and her other companies for personal and family reasons. Accordingly, the final substantive project the first Respondent undertook completed in January 2020 and no further projects were sought. The first Respondent continued to operate in relation to ad hoc maintenance work and sourcing building supplies for other construction companies.

(iii) The first Claimant was the only employee of the first Respondent.

(iv) The first Claimant was put at risk of redundancy at a meeting on 13 September 2019 and this was confirmed by letter (page 100). A further consultation meeting took place on 18 September 2019 (page 103) and the first Claimant, having raised no issues or challenges to his redundancy, was given notice of termination of employment by reason of redundancy by letter dated 18 September 2019 (page 104).

(v) He subsequently appealed some 8 weeks later but his appeal was unsuccessful.

(vi) Ms Bhogaita instructed independent HR consultants to assist in relation to this dismissal and that of the second Claimant and we are satisfied that they properly investigated the various issues raised by the Claimants.

(vii) Having been given notice of dismissal, the first Claimant was not required to work during his notice period but was placed on garden leave in order that he had time to seek alternative employment.

(viii) The second Claimant was initially employed as a receptionist by the second Respondent from 1 January 2015 and was given the title of manager on her return from maternity leave towards the end of 2018.

(ix) After making 4 flexible working requests during the first 6 months after her return from maternity leave, she brought a claim for maternity and pregnancy discrimination against the second Respondent which was served on the second Respondent on or around 4 September 2019.

(x) Prior to that on 24 August 2019, there was a board meeting of the Directors of Midlands Meadow Limited at which it was proposed and agreed that the second Respondent's lease of Rufford Court would be surrendered and a new lease given to Nyumba Yako Limited which would entail the bed and breakfast business operating at Rufford Court ceasing and the building used to provide emergency housing for Nottingham City Council.

(xi) On 18 September 2019, the second Claimant was placed at risk of redundancy in a meeting with Ms Bhogaita and an independent HR consultant (page 212a). Minutes of that meeting were taken (page 212b) and there was another consultation meeting on 20 September 2019 which is recorded at page 213.

(xii) There was a second consultation meeting on 27 September 2019 which was minuted (page 218) and the second Claimant's concerns were considered by the independent HR consultant. The second Claimant was given notice of termination of employment by reason of redundancy by letter dated 28 September 2019 (page 221).

(xiii) The second Claimant appealed her dismissal on the grounds that she believed her role was still being undertaken by another person and that she was dismissed due to putting in a claim for discrimination.

(xv) Her appeal was investigated at a meeting on 12 November 2019 (page 227) but dismissed.

(xvi) The second Claimant was the only employee of the second Respondent.

(xvii) The second Respondent produced accounts which confirmed a significant amount of deterioration in the financial situation of the second Respondent to the extent that net assets of £8,948 in 2018 had become a net liability of £13,959 in 2019.

Submissions

34. For the Claimants, Mr Bunting provided extensive written submissions and talked to the for the benefit of the Tribunal. Ms Barry made oral submission. Whilst we only briefly summarised those submissions, we confirm we have considered them in some detail in reaching our conclusions.

35. Mr Bunting submitted that, in respect of both Claimants, there was no genuine redundancy situation. His basis for this argument in relation to the first Claimant was the absence of any evidence of contracts for project work or invoices and other relevant documents. He further stated that there was available work for the first Claimant after his dismissal. He argued that redundancy was not the sole or principle reason for the first Claimant's dismissal.

36. In relation to the second Claimant, he also cited a lack of evidence of the change of use of Rufford Court from a bed and breakfast business to emergency housing for the City Council. There was much conjecture about Ms Bhogaita's actions which he described as being entirely conscious and contrived.

37. In relation to both Claimants he submitted that consultation arose when the two Respondents' proposals were still at formative stage. Inadequate information was given to the Claimants who were given inadequate time to respond and whose responses to consultation were inadequately considered. He also submitted there was a failure to pool the Claimants or to properly consider alternative employment.

38. For the Respondents, Ms Barry said the definition of redundancy in the ERA was met. In relation to the first Claimant the majority of his time was spent on fixed renovation and conversion projects and only 2 to 5 per cent on maintenance work. There was no requirement for a plumber/handyman moving forward and no evidence of any future projects for the first Respondent. She noted that the first Claimant did not take any issue with this reasoning until 8 weeks after his dismissal.

39. She submitted that the lack of documents was not surprising in a small building environment and acknowledged that everything was done verbally. Ms Bhogaita had given detailed personal reasons for stepping back from project work and the first Claimant knew about them and accepted them.

40. In relation to the second Claimant, the position was more straightforward. The second Respondent ceased to carry out the bed and breakfast business and there was no requirement for the second Claimant to carry out work of a particular kind. Evidence had been given that the bed and breakfast business was losing money.

41. In relation to both Claimants, she submitted a fair redundancy procedure had been carried out. It was a very tall order to consider that Ms Bhogaita went to a lot of trouble to close down two businesses purely because the second Claimant had brought a discrimination claim.

Conclusions

42. At first blush the Tribunal accepts that the scenario presented to us might seem somewhat suspicious. The second Claimant presents a claim for maternity and pregnancy discrimination and within a matter of weeks both she and her husband are given notice of redundancy. Mr Bunting submitted there were no concrete proposals for the redundancies prior to the claim being submitted. However, the response to the second Claimant's claim confirms that the second Respondent had met with the landlords of Rufford Court on 24 August 2019 to "discuss the financial situation that the Respondent faced" (page 156). The minutes of the relevant board meeting (page 360) confirmed this meeting and set out the fairly detailed proposals to close the bed and breakfast business, surrender the lease and going forward use the property as a venue for emergency housing for the City Council. We accept that this meeting took place and these matters were discussed based on what we consider to be the reliable evidence of Ms Bhogaita.

43. In relation to the first Claimant, we do not accept that there was continuing work available for him after his dismissal. Mr Bunting relied on the **Excel** case but, in our view, the facts of that case are clearly distinguishable from the facts of the case before us. The first Claimant accepted he was the only employee of the first Respondent. He accepted that other work was carried out by independent contractors. He accepted that at least 95 per cent of his work was undertaken on projects. His evidence that the first Respondent continued to trade in the same way as before is unconvincing in that it consists of many photographs of dubious relevance and which, in any event, were explained to our satisfaction by Ms Bhogaita.

44. We noted that the first Claimant in his witness statement at paragraph 16 said "therefore, the loss of one contract that I did a couple of hours a month is not enough for me to lose my job in redundancy". When pressed on what he meant by this, he was unable to give any kind of explanation and concluded that he did not know. He also accepted that he had raised matters in his appeal which did not form part of his case before us. He readily accepted that he had not pursued these matters.

45. His case rests on establishing the redundancy was not the sole or principal reason for his dismissal. This in turn rests on whether we accept that it was connected to his wife's discrimination claim. We are satisfied that the proposals by the first Respondent in relation to Rufford Court predate the receipt of the second Claimant's claim. There is no evidence before us that the projects on which the first Claimant spent 95 per cent of his time continued or that there were any further projects on which he could have worked.

46. Accordingly, we find that the only reason for the first Claimant's dismissal was that he was redundant in that there was no continuing requirement of the first Respondent to employ him to do work of a particular kind.

47. In relation to the second Claimant, we rely on much of her own evidence insofar, that is, as it was consistent. In cross examination, although she changed her evidence very slightly the following day, she said quite categorically that she accepted that the second Respondent had ceased trading in the business of a bed and breakfast at Rufford Court and there was no further requirement for a manager. We accept that, having turned over the property to Nottingham City Council, Ms Bhogaita was truthful in her evidence that there was no further requirement for her to employ the second Claimant or any of the other constructors who had worked at that building.

48. Ms Bhogaita also gave evidence that, after receiving the second Claimant's first claim form, her working and social relationship with the second Claimant (and the first Claimant) continued as normal. Neither of the Claimants gave any evidence to contradict this statement. We note that the second Claimant withdrew her claim but Ms Bhogaita's evidence was that she was relaxed about it since the second Respondent had legal expenses insurance and had been advised that the second Claimant's prospects of success were poor.

49. Much has also been made of the number of companies in which Ms Bhogaita has an interest. These are family companies. Properties are bought, renovated or converted and then sold. It does not surprise us when these associated companies are run by members of the same family that there is little by way of documentary evidence of contracts for one company to carry out work for another. For the same reason, it does not surprise us that there is little documentary evidence of the change of use from a bed and breakfast business to emergency housing. We do not profess to be planning experts but it would surprise us if any change of use permission was necessary given the similar nature of the businesses.

50. The Respondents engaged independent HR consultants to assist and participate in the redundancy processes. Mr Bunting suggested that letters of instruction should have been disclosed. We do not agree. We suspect that his reason for making reference to the lack of documentation is to imply that something untoward had happened but we have taken a more pragmatic view. We rely on the evidence that has been presented to us. We found Ms Bhogaita's evidence to be reliable and that of the two Claimants less so. There is sufficient evidence in our view to support Ms Bhogaita's case. The Claimants have been unable to persuade us that any of their arguments that an unfair process has been followed can be substantiated.

51. We have also considered the redundancy process itself in the light of the allegation that there was insufficient scrutiny of the ownership of the various companies and the interest Ms Bhogaita had in each of them. In particular, it did not seem to be known to the independent HR consultants that Mr Bhogaita had an interest in the landlord company of Rufford Court and an interest in Nyumba Yako Limited which was to take over the lease. We did not, however, think this argument was particularly relevant. The Employment Judge enquired of Mr Bunting at the end of his submissions as to what the position would have been if the second Respondent had continued with its lease of Rufford Court and merely started the new venture with Nottingham City Council itself. His reply supported the Tribunal's own view that it would have not made any difference. Certainly in relation to the second Claimant, therefore, there was no further requirement for her to carry out her duties at Rufford Court.

52. In relation to the second Claimant's somewhat confused evidence as to the fact there was work available in the associated companies, apart from a rather bland statement that such work may have been available, she did not specify where or doing what other than to refer to sometimes being on site and taking phone calls. We are satisfied that the sole reason for the termination of her employment was that she was redundant.

53. In relation to the second Claimant, it follows that although she did a protected act by submitting her first claim, the detriment of dismissal was not a consequence of doing that protected act. Accordingly, her victimisation claim must also fail.

Employment Judge M Butler

Date 22 April 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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