EMPLOYMENT TRIBUNALS

Claimant: **Ms N Clark**

Respondent: **Goldex Investment Ltd**

Heard by Cloud Video **On:** **15-16 March 2021**

Before: **Employment Judge Reed**
Ms J Saunders
Ms M Leverton

Representation
Claimant: In person
Respondent: Mr A Williams, solicitor

JUDGMENT

The unanimous judgment of the tribunal is that:

1 The claimant was unfairly dismissed

2 There is no order for reinstatement or re-engagement

3 There is no basic award, the claimant having received her statutory redundancy payment

4 The claimant is awarded a compensatory award of £1,721, to which the recoupment regulations do not apply

5 The respondent indirectly discriminated against the claimant on the ground of sex

6 The claimant is awarded £8,000 together with £2,026.27 in interest as compensation for injury to feelings.

WRITTEN REASONS

1. In this case the claimant Ms Clark said that she had been unfairly dismissed by her former employer, Goldex Investment Ltd ("the Company"). She also alleged that the circumstances surrounding her dismissal were such that she had been indirectly discriminated against on the ground of sex. For the Company it was accepted that Ms Clark had been dismissed by them but it was said that the reason for her dismissal had been redundancy or "some other substantial reason" and furthermore that that dismissal had been fair. It was accepted that a provision, criterion or practice had been applied to Ms Clark – specifically that she work full time – and that such a practice would particularly disadvantage women, but it was said that the application of that rule had been justified.

2. We heard evidence on behalf of the Company from Mr Brar, managing director, Ms Brar, an HR manager, and Mr Hemachandra, operations manager. We also heard from Ms Clark herself and our attention was directed to a number of documents. We reached the following findings of fact.

3. Ms Clark was employed by the Company from March 2009. The Company operates Cost Coffee franchises in the South of England.

4. Ms Clark's position changed throughout her employment but at the time of her dismissal it appeared she was operations manager. There was a little uncertainty on that subject. The Company said she had not been so described for some time before her dismissal but they described her as operations director in her letter of dismissal and we concluded that was accurate.

5. She was away on maternity leave between May 2016 and March 2017, and upon her return worked part-time. Her hours varied and she was simply paid for the hours she did work. In broad terms they amounted to a three-day week.

6. There was some dispute between the parties as to how her position developed in the course of 2017. The Company suggested that she became a day facto area manager. That was a subordinate role to that of operations manager whereas Ms Clark considered that she remained an operations manager to whom area managers reported albeit that she had certain responsibilities that might be regarded as those of an area manager.

7. In any event, she continued to work part-time throughout the rest of the year. At the end of 2017, Mr Brar decided to undertake a re-organisation of the Company. Essentially, he decided that henceforth there should be no managers working part-time. He rang Ms Clark either at the end of December or the early part of January and communicated that fact to her.

8. In the course of that conversation, Ms Clark made it clear to Mr Brar that she simply was not in a position, because of her childcare responsibilities, to work full-time.

9. Mr Brar attended the premises where Ms Clark worked on 9 January 2018 and they had a discussion that replicated their earlier telephone call. Mr Brar indicated that he wanted managers, including Ms Clark, to work full-time and she indicated that that was not possible for her.

10. It was left that Mr Brar would look into the alternatives and a further meeting took place between them on 24 January at which he indicated to Ms Clark that she could not continue in place as a part-time employee and therefore since she could not work full-time, she was being made redundant. Her dismissal was effected by a letter dated 20 February 2018.

11. Ms Clark lodged a grievance in relation to her treatment which essentially was an appeal against dismissal and which was rejected by the Company.

Unfair dismissal

12. Under s98 of the Employment Rights Act 1996 there are five potentially fair reasons for dismissal and the Company said that the reason, in this case, was redundancy.

13. Ms Clark suggested that the entire process was a sham and that the reason for her dismissal was not any genuine requirement of the Company but rather a desire to dispense with her services. We rejected that suggestion. We accepted Mr Brar's evidence that he implemented the change in question believing it was commercially advantageous. Whether that amounted to redundancy was a separate question.

14. If the reason for dismissal was that Ms Clark could not work full-time, it was certainly arguable whether that amounted to a redundancy ie a reduced requirement for employees to do work of a particular kind. If the kind of work remained the same and the number of employees was unaltered, albeit that the number of hours changed, that might not amount to a redundancy situation. However, that was not something that detained us. If the reason for dismissal was not redundancy then it was a bona fide reorganisation. In that situation, it would amount to "some other substantial reason of a kind such as to justify the dismissal of an employee holidng the position which the employee held" and therefore potentially fair on that ground.

15. The real question for us to determine was whether, pursuant to s98(4) of the 1996 Act, the Company acted reasonably in treating redundancy or "some other substantial reason" as justifying the dismissal of Ms Clark.

16. Ms Clark suggested her dismissal was both procedurally and substantively unfair. Procedurally, she said the Company had failed to undertake any meaningful consultation with her before deciding to dismiss her. We accepted that any reasonable employer, in the position of the Company, would have consulted with Ms Clark before deciding to dismiss her. In other words, it would have canvassed its plans with her, listened to and considered what she had to say, and then finalised its plans. That was conspicuously what did not happen in this case.

17. In Mr Brar's oral testimony he said that he did not give consideration as to whether there could be a job share in relation to Ms Clark's job. He would

not even consider it. He simply took the view that it was not feasible for Ms Clark to work part-time. He also went on to say that he did not discuss his rationale for taking that position with her in the course of their discussions.

18. Consultations are a two-way process. It is not simply a matter of giving information (although in this situation the Company had failed even to do that, since the argument against part time employees was not canvassed with Ms Clark). It is important that an employer takes on board with an open mind representations made by potentially affected employees. Mr Brar made it clear that he had not done so in this case. This was not meaningful consultation and rendered the dismissal unfair.

19. Turning then to the substance of the decision, was it reasonable for Mr Brar to conclude that, Ms Clark declaring that she could not work full-time, she should no longer be an employee of the Company?

20. It might have been the case that the nature of the Company's business was such that part time working simply could not be accommodated. If that was so, we would have expected the rationale to be fully articulated.

21. The best argument that Mr Brar could put forward was that where he had had job shares in the past and there had been an issue, each employee blamed the other. For that reason the position of area manager could not be shared. That simply did not appear to us to be a persuasive argument.

22. We remind ourselves that there are many organisations, large and small, that do have part time and job share employees. There could have been something about the Company's operations that would render that situation untenable but a suggestion that jobsharers might try to avoid censure by piling blame on eachother was not a satisfactory rationale.

23. Mr Brar did give the possibility of part time work (and in the case of Ms Clark, a continuation of the part time work she was already employed to do) any real consideration. He did not consider how he might accommodate the claimant in her part-time position. He simply set his face against it. In those circumstances we were bound to conclude that he had acted unreasonably and that the dismissal was unfair on substantive as well as procedural grounds.

Sex discrimination

24. Under s19 of the Equality Act 2010 a person (A) discriminates indirectly against another (B) on the ground of sex if A applies to B a provision, criterion or practice which
    a) A applies to persons of the other sex
    b) puts persons of the same sex as B at a particular disadvantage
    c) puts B at that disadvantage
    d) A cannot show it to be a proportionate means of achieving a legitimate aim.

25. It was accepted that there was a provision, criterion or practice of the respondent namely the requirement that employees, certainly in Ms Clark's position, should work full-time. That had application regardless of the sex of the employee concerned. We were entitled to take judicial cognisance of

the fact that the vast majority of childcare is carried out by women. That is liable to result in the hours they can work being more restricted than that workable by men, so there is “particular disadvantage” to women if they are required to work full time. We accepted the evidence of Ms Clark to the effect that her childcare responsibilities were such that in practice she could not work full time, such that she was put to the relevant disadvantage.

26. It followed that the Company could only avoid liability if it could establish that the full time requirement was a proportionate means of achieving a legitimate aim.

27. It came as something of a surprise to us that this was not actually addressed in the written statement of Mr Brar, but we were prepared to accept that the legitimate aim he was pursuing was the efficient running of the business. We then had to ask whether the application of the rule, resulting in the dismissal of Ms Clark, was a proportionate means of achieving that aim.

28. We reminded ourselves of the rationale given by Mr Brar – the likelihood, as he saw it, of “blame-shifting” between jobsharers. This argument was no more impressive in the context of the discrimination claim than it was in relation to unfair dismissal. It might well be that there was something peculiar to this business that meant that it was simply impossible to accommodate a part-time employee in a senior post but the rationale of Mr Brar in attempting to establish that position was less than convincing. The possibility of employees blaming each other if something went wrong seemed to us a pretty poor justification for taking that view.

29. It followed that whatever legitimate aim the Company had (and efficiency seemed to be the most apt one), the implementation of the rule, resulting in the dismissal of Ms Clark, was not a proportionate means of achieving it. We therefore concluded that Ms Clark’s indirect sex discrimination claim succeeded.

30. Turning then to remedy and dealing with unfair dismissal first, the claimant did not seek an order for reinstatement or re-engagement. She was not entitled to a basic award, having received her statutory redundancy payment.

31. After some discussion on the subject, the parties agreed a figure for loss of wages (and therefore the compensatory award) set out above.

32. The only further issue was the award for injury to feelings in relation to the claim of discrimination. We accepted that Ms Clark had been most upset by her treatment. Her confidence had taken quite a blow and she had taken a relatively low grade job immediately afterwards, for that reason. However, she had gone on to a further management position in due course.

33. Although this was a one-off matter (dismissal), it was a relatively serious one that had clearly impacted Ms Clark. In the circumstances we concluded that the appropriate award for injury to feelings was £8,000. To that sum we added interest at the rate of 8% per annum for some 38 months, or £2,026.27.

Employment Judge Reed
Date: 11 May 2021