EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4101260/2020 (V)

Held via Cloud Video Platform (CVP) on 21 and 22 September 2020

Employment Judge M Whitcombe
Tribunal Member Mrs LJ Taylor
Tribunal Member Mr SF Evans

Klaudia Cierpial	**Claimant** **Represented by:** **Ms E Drysdale** **(Solicitor)**
UK Soccershop Limited **ML3 6EF**	**First Respondent** **Represented by:** **Ms L McKenna** **(Solicitor)**
Simon Pretswell trading as "UK Soccershop"	**Second Respondent** **Represented by:** **Ms L McKenna** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is as follows.

(1) By consent, the first respondent is dismissed from the proceedings.

(2) The claim against the second respondent for unpaid entitlement to paid annual leave is withdrawn and dismissed.

(3) The claim against the second respondent for automatically unfair dismissal contrary to section 99 of the Employment Rights Act 1996 fails and is dismissed.

(4) The claim against the second respondent for pregnancy and/or maternity discrimination contrary to section 18 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. The claimant was formerly employed for just over 5 months in the business known as "UK Soccershop" and based at premises in Buchanan Business Park, Stepps. The business is an online retail business which supplies replica football shirts and other items to customers around the world. The claimant worked primarily as a printing coordinator. In that capacity her job involved matching customer orders with the printing material needed to personalise them by adding the names and numbers requested by the customer.

2. The claims arise from the claimant's dismissal with effect from 11 January 2020. The claimant alleges that she was dismissed because she was pregnant and proposing to take maternity leave. The respondent alleges that the reason for the claimant's dismissal was redundancy, and that it was one of a number of dismissals made for that reason over a period of about two months in early 2020.

Claims and issues

3. The claims and issues were discussed and recorded at a preliminary hearing for case management on 10 July 2020 (EJ Whitcombe). They subsequently narrowed in the following ways.

    a. It was agreed by the start of this hearing that the claimant was employed by the second respondent (Simon Pretswell as a sole trader) and not by the first respondent (a limited company). It was therefore agreed that the first respondent should be dismissed from the proceedings. From this point onwards, we will refer to Simon Pretswell simply as "the respondent".

    b. The claim for unpaid holiday pay was withdrawn at the start of this

hearing.

c. A distinct claim for discrimination in relation to a risk assessment was abandoned by the time of closing submissions.

4. The claims under consideration by the end of the hearing were therefore as follows.

a. A claim for automatically unfair dismissal on the basis that the sole or principal reason for dismissal was pregnancy or maternity, contrary to s.99 of the Employment Rights Act 1996 ("ERA 1996").

b. A claim for direct discrimination because of pregnancy and/or maternity contrary to s.18(2)(a) or (4) of the Equality Act 2010 ("EqA 2010").

5. Since the claimant had less than two years' continuous service with the respondent there cannot be any claim for "ordinary" unfair dismissal in accordance with s.98 ERA 1996. Either the claimant establishes the automatically unfair reason for dismissal or the claim must fail.

Evidence

6. We heard evidence from the following witnesses in the following order.

a. The claimant, Klaudia Cierpial.

b. Simon Pretswell, the respondent. He is the owner of the business and he alone took the decision to dismiss the claimant.

c. William Pretswell, the father of Simon Pretswell, who was not employed in the business but who assisted in various ways from time to time. Primarily, he was called to explain the circumstances in which an Excel spreadsheet of redundancy selection scores was prepared.

d. Raymond Goodall, Warehouse Team Leader. Primarily, he was called to deal with the claimant's training on warehouse tasks and her activities in the warehouse. The focus of the hearing had moved away from those matters by the time of closing submissions.

7. All of those witnesses gave evidence on oath, confirmed the accuracy of the final versions of their witness statements and were cross-examined.

8. We were also provided with an indexed and paginated joint file of documents. We are very grateful for the obvious effort that went into making that available in pdf format as requested, with helpful hypertext links. Each side also relied on very small supplementary files of documents.

Findings of fact

9. Having heard the evidence and submissions, we made the following relevant findings of fact. Some were either agreed or undisputed. Where there was a dispute regarding the facts we made our findings on the balance of probabilities.

10. The respondent started the business of UK Soccershop when he was at university. It is an online-only retail business which originally operated from his home. It currently operates from premises in Stepps. The business is somewhat seasonal. There are peaks in demand prior to Christmas and also when football teams released their new strips for a new season. International football tournaments can also generate increased business. The first few months of each calendar year were typically a quiet time for the business and order numbers were relatively low.

11. The claimant and the respondent first met when the claimant applied for a job in one of the respondent's other businesses, "Geek Gear Limited". The vacancy had already been filled but the respondent was so impressed with the claimant that he wanted to find a space for her somewhere within his businesses. At that time the respondent was expecting a large increase in the sales volumes of UK Soccershop and so the claimant was offered the role of printing coordinator in that business. The claimant commenced employment on 8 August 2019. The claimant was a hard-working, helpful and highly valued employee throughout her employment.

12. The claimant's duties as printing coordinator involved the matching of customer orders with the correct printing material for personalisation. Orders

were then passed to the printing team for printing. Names and numbers would then be printed on football shirts in accordance with customer requests.

13. Towards the end of August 2019, shortly after the commencement of the claimant's employment, the respondent's business encountered difficulties. The Amazon US account was an important source of business and it was suspended without warning and with immediate effect. The respondent worked with Amazon to understand why that action had been taken and to resolve any issues but the account was not restored until early December 2019. About 14,000 orders were lost. The estimated consequential loss of revenue during that period was in the region of $500,000. Amazon also imposed new restrictions on the sales that could be made through its US marketplace. Those restrictions meant that future sales levels would be restricted and would never return to historical levels.

14. On 21 November 2019 the claimant informed the respondent by email that she was pregnant. The claimant asked for that information to be kept confidential but wanted to inform the respondent in case she had to finish early from time to time or attend medical appointments. The respondent replied by email the same day congratulating the claimant and asking, "*how far along are you at the moment? Are you still planning to work the same hours at Christmas as I'll need to have a quick re-think if you are not?*" The claimant replied within a few minutes saying that she thought that she was only a couple of weeks pregnant and that she was definitely planning to work the same hours as had been previously agreed, especially in December 2019. The claimant also indicated that she might not be able to work at her normal speed on some days if she felt unwell, although she would always try her best.

15. The respondent reviewed the performance of his business towards the end of 2019. It was obvious to him that the business was having significant problems. The primary cause was the impact of the lost Amazon sales, both in the recent past and also in the longer-term future. The seasonal nature of the business also meant that the first few months of 2020 were expected to be quiet anyway. Even allowing for the fact that January was expected to be a quiet month there was a loss of business equating to about 1500 orders. In the

much more buoyant month of December 2019 there had been a drop of about 4000 to 5000 orders compared to expectations. The respondent concluded that he had to take urgent action to reduce costs and to stabilise the business. He decided that he needed to reduce the number of employees, although he hoped to limit the reduction in headcount by acting quickly. Ultimately, he concluded that he needed to reduce the headcount from 42 employees to 26 employees in order to be able to continue trading. He found this a difficult exercise because he did not want to lose any of his staff and delayed taking action for as long as possible while looking for solutions.

16. The evidence in the respondent's witness statement regarding the dismissal of 16 employees for redundancy over a 2 month period was corroborated by additional documents produced during the hearing (a table summarising the redundancies made on particular dates, supported by P45s). Once produced, the claimant did not challenge the accuracy of that table and appeared to abandon the suggestion previously made in cross-examination that the only employees made redundant were the claimant and her partner, and that the suggestion of a wider redundancy exercise was a complete fabrication on the respondent's part in order to obscure the true reason for her own dismissal. That suggestion was not maintained in closing submissions. We accept the respondent's evidence on this point. We accept that an unexpected loss of revenue coupled with a seasonal drop in business after Christmas meant that the respondent had to take urgent action in order to cut costs. We also accept that the respondent decided that there was no alternative to a reduction in wage costs necessitating a number of redundancies. We accept that the dismissal of the claimant was just one of 16 redundancies made at around the same time.

17. Nine employees were dismissed as redundant prior to the business reopening after the Christmas break on 3 January 2020. Two more employees were dismissed as redundant on 7 January 2020. Three more employees, including the claimant, were dismissed as redundant on 11 January 2020. One more employee was dismissed on 31 January 2020 and another on 28 February 2020. In total 16 employees were dismissed as redundant, reducing the

headcount from 42 employees to 26 employees.

18. The claimant had some insight into the problems in the business. She emailed the respondent on 7 January 2020 telling him that she was concerned about her role and that there was not enough work to do. Another employee had also been working as a printing coordinator and the claimant's view was that two people were not required to do that job. Although the claimant clearly thought that she was appointed to be the sole printing coordinator we find that the respondent did not tell her that at any stage.

19. In the same email the claimant asked about her maternity entitlements and the way in which maternity leave would operate.

20. The respondent replied the same day confirming that there was a problem and that he was trying to solve it. Order volumes through January would be in the region of about 150 per day which meant that there were too many people employed in every department. He alluded to the problems with the Amazon US account and also to a disappointing lack of progress in other negotiations for increased business through Amazon. The respondent's email stated, "*It is clear that it is not sustainable to continue with the current level of staff. I am currently exploring every permutation to see what I can come up with to retain as many people as possible, however decisions will need to be made.*"

21. In the same email the respondent also addressed issues arising from the claimant's planned maternity leave. He asked, "*With regards your situation, when is the baby due as I will have to think about how to amend things so you are not doing things like lifting boxes, etc and also make plans for when you're off?"*.

22. The claimant replied the same day informing the respondent of her due date and also saying, "*I agree with you 100% that there is too much staff for quieter times like this however yes we will need them once it starts to get busy.*" The claimant also indicated a willingness to be trained to carry out other tasks if there was insufficient work for her as a printing coordinator.

23. In a further email of 7 January 2020 the respondent explained once again that he was considering a number of options regarding a restructure. He also referred to the claimant's due date and asked whether the claimant had any initial thoughts on her plans after the baby arrived. The respondent asked whether he should plan on the assumption that the claimant would not be back before Christmas. We think that was an entirely reasonable question to ask in the circumstances. The claimant's reply stated that her partner would remain full time while she became "*a stay-at-home mum for the time being*" but did not actually answer the question about a planned return date. The respondent asked that question again in a further email saying "*just to confirm, you definitely aren't planning to come back before Christmas?*". We do not think that it was unreasonable for the respondent to chase an answer to that important question and we do not think that his email reveals any resentment of the claimant's entitlement to maternity leave.

24. The claimant came to be selected for redundancy in the following manner. A selection pool was formed of five employees, including the claimant, who were trained and capable of carrying out the printing coordinator role. The selection criteria were the same as the ones the respondent had used for the previous redundancies. The experience of the non-legal members of this Tribunal is that those selection criteria, or similar ones, are commonly used in industry. They appear to us to be objective and reasonably related to the respondent's legitimate business needs. The criteria included experience, attendance record (disregarding pregnancy-related absence), disciplinary record, skills (particularly whether the employee concerned was "multi-trained") and performance. Each of the members of the pool were scored by the respondent personally having looked at timesheets, absence forms and other relevant records. The employees in the pool were then ranked by score in order to determine who should be selected for redundancy.

25. The claimant scored lowest with 19 points out of a possible 25. The other scores were, in ascending order, 22, 23, 23 and 25. The claimant's lowest scores were a 3 for "experience" and a 2 for "multi-trained". The tribunal does not find either score surprising given the fact that the claimant had been

employed for a relatively short time and that she had only recently begun to receive some training for alternative work in the warehouse. We heard no evidence to suggest that she was fully trained in warehouse or any other work beyond that of the printing coordinator. Those were the scores primarily responsible for the claimant's ranking as fifth out of five. She scored highly for attendance, discipline and performance, which is entirely consistent with the high regard in which she was held for her work as a printing coordinator.

26. The claimant did not challenge any of the scores during this hearing. She did not suggest that any of them were manipulated in order to ensure that she was selected for redundancy. We find that the scoring process was carried out conscientiously and was genuinely based on the material available to the respondent at the time of scoring.

27. The claimant was informed that she had been selected for redundancy in an email dated 11 January 2020. She was to be paid in lieu of notice and her dismissal was effective from 11 January 2020. The respondent explained that although he saw a lot of potential in the claimant and had high hopes for her progression within the business his own goals had changed. The problems with Amazon were the latest in a long line of major blows over the previous couple of years and the respondent had decided to develop a leaner, less risky business model necessitating a reduction in staff costs and a switch to a greater number of part-time staff working flexible hours.

28. The same email referred to possible opportunities in the respondent's other business, Geek Gear. Although the respondent described it as an offer of employment we think that is going too far. However, we do think that the respondent was inviting the claimant to express an interest in employment with Geek Gear and we note that of the 16 employees made redundant (see above) 3 found alternative employment with Geek Gear. We think that the possibility of employing the claimant in that business was real and that it was genuinely raised by the respondent.

29. On 13 January 2020 the claimant raised a grievance by email which the respondent treated as an appeal. The claimant alleged that she had been

chosen for redundancy because she was pregnant and because she would not have returned to work from maternity leave prior to the Christmas 2020 busy period. The claimant asserted that the profitability of the business and the need to reduce the staff headcount were not the real reasons for her dismissal. The respondent replied the same day to explain why he felt unable to change his decision. He referred to the fact that other staff had been "let go" and that the review was ongoing. He explained that he then had five more employees than during the equivalent period the previous year, despite a 25% reduction in revenue. He did not envisage an increase in order volumes in the foreseeable future. He reiterated a willingness to offer work in the future if he was able to accommodate the claimant, even if only on a short-term basis.

Legal principles

Unfair dismissal

30. Since the claimant lacks the necessary two years' minimum continuous service for an "ordinary" claim of unfair dismissal she must establish that she was dismissed for one of the reasons which are exceptions to that requirement. The default requirement for at least two years' continuous service derives from s.108(1) ERA 1996 and the exceptions are listed in s.108(3) ERA 1996.

31. In this case the claimant relies on s.99 ERA 1996 which, if established, would also mean that the dismissal was automatically unfair. The effect of that section is that if the reason (or the principal reason where there is more than one reason) for dismissal was one of a *prescribed kind*, or takes place in *prescribed circumstances*, then the dismissal shall be regarded as an unfair dismissal.

32. "Prescribed" means prescribed by regulations made by the Secretary of State, which for present purposes means the Maternity and Parental Leave etc Regulations 1999, which govern the entitlement to maternity leave. Rather than quote those regulations in full, we will note their practical effect in a case of this sort.

a. Regulation 20(1) provides that a dismissal will be automatically unfair under s.99 ERA 1996 if the reason or principal reason was (among other things) the pregnancy of the employee or the fact that they sought to take ordinary maternity leave or additional maternity leave.

b. Regulation 20(2) provides that a dismissal will be automatically unfair if the reason or the principal reason was redundancy, *and* it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking holding positions similar to that held by the employee and who have not been dismissed by the employer, *and* it is shown that the reason (or if more than one, the principal reason) for which the employee was selected for dismissal was (among other things) their pregnancy or the fact that they sought to take ordinary maternity leave or additional maternity leave.

33. Regulation 10 has no application in this case since redundancy did not take place during maternity leave.

Pregnancy and maternity discrimination

34. Section 18(2) EqA 2010 provides (so far as relevant to this case) that a person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably because of the pregnancy.

35. Section 18(4) EqA 2010 provides that a person (A) discriminates against a woman if A treats her unfavourably because she is exercising, or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.

36. Unsurprisingly, there was no dispute in this case that dismissal constitutes “unfavourable treatment” for those purposes or that it took place within the protected period as defined by subsection (6).

Burden of Proof

37. The burden of proof in proceedings relating to a contravention of the Equality Act 2010 is governed by section 136 of that Act. The correct approach is set out in section 136(2) and (3). References to "the court" are defined so as to include an employment tribunal.

> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

38. The Court of Appeal has repeatedly stressed that judicial guidance on the burden of proof is no more than guidance and that it is no substitute for the statutory language.

39. We have taken into account the well-known guidance given by the Court of Appeal in ***Igen Ltd v Wong*** [2005] ICR 931 (sometimes referred to as "the revised ***Barton*** guidance"), which although concerned with predecessor legislation remains good law. It was approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054. ***Ayodele v Citylink Ltd*** [2018] ICR 748, CA confirmed that differences in the wording of the Equality Act 2010 have not changed the test or undermined the guidance in ***Igen Ltd v Wong***.

40. First, the claimant must prove certain essential facts and to that extent faces an initial burden of proof. The claimant must establish a "*prima facie*" or, in plainer English, a "first appearances" case of discrimination which needs to be answered. If the inference of discrimination *could* be drawn at the first stage of the enquiry then it *must* be drawn at the first stage of the enquiry, because at that stage the lack of an alternative explanation is assumed. The consequence is that the claimant will necessarily succeed *unless* the respondent can discharge the burden of proof at the second stage.

41. However, if the claimant fails to prove a "*prima facie*" or "first appearances" case in the first place then there is nothing for the respondent to address and nothing for the tribunal to assess. See ***Ayodele*** at paragraphs 92-93 and ***Hewage*** at paragraph 25.

42. At the first stage of the test, when determining whether the burden of proof has shifted to the Respondent, the question for the tribunal is not whether, on the basis of the facts found, it *would* determine that there has been discrimination, but rather whether it *could* properly do so.

43. The following principles can be derived from ***Igen Ltd v Wong*** (above), ***Laing v Manchester City Council*** [2006] ICR 1519 EAT, ***Madarassy v Nomura International plc*** [2007] ICR 867, CA and ***Ayodele v Citylink Ltd*** (above), which reviewed and analysed many other authorities.

    a. At the first stage a tribunal should consider all the evidence, from whatever source it has come. It is not confined to the evidence adduced by the claimant and it may also properly take into account evidence adduced by the respondent when deciding whether the claimant has established a *prima facie* case of discrimination. A respondent may, for example, adduce evidence that the allegedly discriminatory acts did not occur at all, or that they did not amount to less favourable treatment, in which case the tribunal is entitled to have regard to that evidence.

    b. There is a vital distinction between "facts" or evidence and the respondent's "explanation". While there is a relationship between facts and explanation, they are not to be confused. It is only the respondent's *explanation* which cannot be considered at the first stage of the analysis. The respondent's *explanation* becomes relevant if and when the burden of proof passes to the respondent.

    c. It is insufficient to pass the burden of proof to the respondent for the claimant to prove no more than the relevant protected characteristic and a difference in treatment. That would only indicate the *possibility* of discrimination and a mere possibility is not enough. Something more

is required. See paragraphs 54 to 56 of the judgment of Mummery LJ in ***Madarassy***.

44. However, it is not always necessary to adopt a rigid two stage approach. It is not necessarily an error of law for a tribunal to move straight to the second stage of its task under section 136 of the Equality Act 2010 (see for example ***Pnaiser v NHS England*** [2016] IRLR 170 EAT at paragraph 38) but it must then proceed on the assumption that the first stage has been satisfied. The claimant will not be disadvantaged by that approach since it effectively assumes in their favour that the first stage has been satisfied. The risk is to a respondent which then fails to discharge a burden which ought not to have been on it in the first place (see ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraphs 71 to 77, approved by the Court of Appeal in ***Madarassy***). Tribunals must remember that if and when they decide to proceed straight to the second stage.

45. It may also be appropriate to proceed straight to the second stage when the claimant compares their treatment to that of a hypothetical comparator. Sometimes the reason for the treatment, and the question whether there is a *prima facie* or "first appearances" case of discrimination, will inevitably be intertwined with the question whether the claimant was treated less favourably than a comparator, especially a hypothetical comparator. In cases of that sort the decision on the "reason why" issue will also provide the answer on the "less favourable treatment" issue (see Lord Nicholls in ***Shamoon v Chief Constable of the RUC*** [2003] ICR 337 at paragraphs 7 to 12 and Elias LJ in ***Laing v Manchester City Council*** [2006] ICR 1519 EAT at paragraph 74).

46. In a similar vein, the Supreme Court in ***Hewage*** (above) observed that it was important not to make too much of the role of the burden of proof provisions. They required careful attention where there was room for doubt as to the facts necessary to establish discrimination but they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Submissions

47. The representatives largely made their submissions in writing, adding brief oral submissions. In those circumstances we think that little useful purpose would be served by repeating those submissions here. Instead, we will deal with them as appropriate in the course of our reasoning below. That should be sufficient for these reasons to be "***Meek***-compliant". There is no requirement in rule 62(5) to set out the parties' submissions at all, still less in full or in a separate section of the Tribunal's reasons.

Reasoning and conclusions

Discrimination

48. The claimant has persuaded us that the burden of proof passes to the respondent for the following reasons. At this stage of the analysis, we must disregard the respondent's explanation for the treatment (essentially selection for redundancy following a scoring exercise against objective criteria).

49. There is neither any dispute that the claimant was treated unfavourably by being dismissed, nor that she possessed the necessary protected characteristic. She was pregnant and she proposed to take maternity leave. The respondent was aware of those facts. While those are *necessary* preconditions of a successful claim they are not, without more, *sufficient* for the burden of proof to pass to the respondent. We have therefore considered carefully whether there are in this case any additional "***Madarassy***" factors sufficient to pass the burden of proof to the respondent. We think that there are.

50. The timing of the claimant's redundancy, occurring about 50 days after notification of pregnancy with the busy Christmas period in between, is an additional relevant factor. It might be suggested that the timing calls for an explanation. Another relevant matter is the fact that email communications about job security and the downturn in business often served a dual purpose, dealing also with matters relevant to maternity leave and its impact on the business. It might be suggested that the issues were linked, so far as the

respondent was concerned. Those additional factors are in no way conclusive on their own, but in our judgment they are nevertheless sufficient, when combined with unfavourable treatment and possession of the protected characteristic, to amount to facts from which we *could* conclude, in the absence of any other explanation, that the reason for the unfavourable treatment was pregnancy or maternity.

51. We have therefore considered whether the respondent has adduced sufficiently cogent evidence to discharge the burden upon it of showing that the reason for dismissal was in no sense whatsoever the claimant's pregnancy or maternity. We have concluded that the respondent has easily discharged that burden for the following reasons.

52. First, there is compelling evidence of a downturn in business and a pressing need to cut costs. There was no real challenge to that economic reality, and the claimant did not ultimately argue that the respondent had no real need to cut costs, or that the redundancy exercise was a sham. The claimant's original suggestion in cross-examination that it was simply untrue that the respondent had made any redundancies other than the claimant and her partner was abandoned when the respondent produced P45s substantiating the dismissal of other employees.

53. That is not, of course, the end of the matter. The question arises whether a genuine redundancy situation might in some way have been manipulated, so as to be a pretext or smokescreen for the dismissal of a pregnant woman who planned to take maternity leave. However, we are satisfied that there was no manipulation and that the claimant's selection for redundancy was genuinely attributable to her scores in the selection exercise. The claimant did not challenge the fairness of the scores themselves, rather she challenged the composition of the pool for selection and the choice of selection criteria.

54. We see nothing suspicious in the selection criteria, which were objective and typical of the sorts of criteria often adopted by employers in redundancy selection exercises. They were rationally connected to the respondent's business needs – to reduce headcount and therefore costs while retaining the

most experienced, best performing and most flexible workforce possible. That explains the inclusion of the criteria "experience" and "multi-trained" (the criteria primarily responsible for the claimant's ranking), measuring the extent to which a given employee could work flexibly in a number of different roles. There is certainly no direct evidence that criteria were chosen to ensure that the claimant, as a pregnant woman, was ranked lowest in the pool. We see no basis for an inference that the criteria were chosen for that reason either.

55. The selection pool also seems entirely rational to us, and we find no basis for an inference that it was manipulated to bring about the claimant's dismissal. It seems to us entirely rational and appropriate to include within the pool not only those employees who had recently been carrying out the role of printing coordinator, but also those other employees who were trained to do so and who could be required to do so. That would ensure that employees with similar capabilities were ranked alongside each other. If the pool were to be drawn more narrowly it would fail to compare all of the employees who might carry out a Printing Coordinator role following the restructure.

56. Employees would normally argue for the broadest possible pool in order to maximise the chances of their own retention, but in this case the claimant argues that it was too broad and that it was deliberately enlarged to ensure that the claimant was ranked lowest (see paragraph 12a of the claimant's written submissions). We do not accept that argument. Even if the pool had been confined to just two employees (i.e. the claimant and the other member of staff who had also been working as a printing co-ordinator in the run up to Christmas) the claimant would still have finished the lower of the two and would still have been selected for redundancy. The claimant scored less than any other candidate in the pool and that would remain true even if certain other members of that pool had not been included in the first place. In fact, the other member of staff who had also recently been working as a printing coordinator was ranked second lowest and was also made redundant a short time later. The size of the pool had no bearing on the number of dismissals, as the claimant's submissions seem to imply at paragraph 12b.

57. Had the claimant had two years' service, then it is doubtful that the procedure adopted by this respondent would have been sufficient to be found fair in accordance with s.98(4) ERA 1996 and well-known case law on redundancy procedure. To highlight just one obvious point, there was no real consultation at all. The claimant was informed of the respondent's decision and the economic basis for it, but she was not informed of her scores, the criteria adopted or the evidence base for those scores, still less *consulted* about them. Consultation would normally entail a chance for the employee to make representations and a meaningful consideration of any representations the employee chose to make. However, we mention this only to explain why it is *not* a relevant factor in our reasoning. The respondent asserts that it adopted the same procedure in all of the redundancy dismissals carried out in early 2020 and we have not been referred to any evidence to suggest otherwise. In those circumstances we find that all affected employees were subjected to the same flawed procedure. The claimant was not singled out in that sense. In those circumstances there is no room for an inference that the lack of consultation demonstrates manipulation of the redundancy process.

58. We also note that the respondent signalled a willingness to re-hire the claimant in his other business Geek Gear, or possibly at a future date in UK Soccershop itself. While it would be wrong to regard that as a formal job offer, the willingness to discuss the possibility of employment elsewhere suggests to us that the respondent had no difficulty with the disruption, cost or other implications of the claimant's pregnancy and planned maternity leave. We do not think it was an empty gesture either since other displaced staff found alternative work with Geek Gear.

59. We do not draw any adverse inferences from the fact that the respondent was in discussions with the claimant about her intentions in relation to maternity leave at around the same time as the redundancy selection exercise (paragraphs 13a and 13c of the claimant's written submissions). Both issues were very much live at the same time. Both the claimant and the respondent were in the habit of dealing with both issues in the same email. The respondent was right to address both issues and it also suggests to us an

open mind regarding the claimant's chances of retention in the business following the re-organisation. It was legitimate for the respondent to seek an indication of the claimant's intentions in order to assess the implications for workforce planning, especially when looking forward to a busy and commercially important time later in the year. However, we reject the suggestion that the respondent was displeased that the claimant would have been on maternity leave at the busiest time of year. He had several other staff who could carry out the printing coordinator role if necessary. We also accept the respondent's evidence that others could quickly be trained to perform that role too, just as the claimant was herself.

60. Paragraph 13c of the claimant's written submissions highlights the respondent's references in correspondence to "risk" and "flexibility", suggesting that those phrases betray an assumption that the claimant was a either risk or inflexible because she was due to take maternity leave. We think this submission misrepresents the way in which the respondent used those terms. The respondent's desire to retain "flexible" staff must be read in context: he was concerned to retain staff who were flexible in terms of skills, training and to some extent working hours too. We see no basis for an inference that a desire for "flexibility" betrays an antipathy towards pregnant women or the taking of maternity leave. Similarly, when read in context the respondent's references to "risk" mean the risks flowing from an unexpected downturn in business combined with substantial fixed salary costs.

61. We reject the claimant's suggestion (in evidence if not in submissions) that the handwritten redundancy selection matrix was fabricated. The argument was based on the agreed fact that the tidier Excel spreadsheet containing the same scores was created much later. We accept the respondent's evidence that the Excel sheet was merely created to improve the presentation of the pre-existing handwritten document. There was in the end no challenge to William Pretswell's corroborative evidence on this point. We do not accept that the handwritten table was created after the Excel spreadsheet and in order to bolster it, once it was revealed that the Excel sheet had been created after dismissal.

62. We draw no inferences one way or the other from the fact that the claimant's partner was made redundant at the same time (paragraph 13d of the claimant's written submissions). The claimant's partner did not give evidence, he did not bring a claim of his own and we did not hear evidence of the reasons for his selection. It is impossible to draw any conclusions and the fact of his dismissal takes matters no further.

Discrimination - conclusion

63. Overall, we have concluded that the respondent genuinely responded to a worrying downturn in business by cutting costs and that he did so by reducing the headcount and making redundancies. Further, we have concluded that the redundancy selection process, though procedurally flawed in some ways, was consistently applied to all staff, regardless of their protected characteristics. The flawed procedure applied to all. We find no evidence of deliberate manipulation of the process to ensure that the claimant was dismissed. On the contrary we find that the claimant was selected for redundancy simply because she scored the lowest out of the five employees in a rationally selected pool. For those reasons, the respondent has satisfied us that the reason for the claimant's selection for redundancy was in no sense whatsoever the fact that she was pregnant or the fact that she proposed to take maternity leave. There was accordingly no breach of section 18(2) or (4) EqA 2010.

64. The discrimination claim therefore fails and must be dismissed.

Unfair dismissal

65. Although the legal test is different we think that we can keep our reasoning short.

66. It is for the claimant to satisfy us that the reason for dismissal was pregnancy or maternity, as considered in more detail above. The claimant has failed to persuade us of that on the balance of probabilities. For the reasons set out in the preceding section of our reasons, we conclude that the reason for dismissal was simply redundancy, and that the claimant's selection for

redundancy followed the application of non-discriminatory and rationally chosen selection criteria to reach scores which were not challenged before us. Neither pregnancy nor maternity leave formed any part of the reason for dismissal, still less were they the sole or principal reason for it. The tests in regulations 20(1)(a) and 20(2) of the Maternity and Parental Leave etc Regulations 1999 are not satisfied.

67. The unfair dismissal claim also therefore fails and is dismissed.

Employment Judge: M Whitcombe
Date of Judgment: 23 September 2020
Entered into register: 30 September 2020
and copied to parties