EMPLOYMENT TRIBUNALS

Claimant: **Ms S Ridley**

Respondents: **HB Kirtley t/a Queens Court Business Centre**

Heard at: **Newcastle CFCTC** **On:** **11 & 12 October 2021**

Before: **Employment Judge Arullendran**
Members: **Mr S Carter**
Ms D Winship

Representation:

Claimant: **In person**
Respondents: **Ms A Kirtley**

REASONS

1. Judgement having been given orally on 12 October 2021, the Claimant wrote to the Tribunal on 13 October 2021 and requested written reasons to be provided.

2. The Claimant submitted her claim form to the Employment Tribunal on 14 January 2021 and made claims of unfair dismissal, automatic unfair dismissal on the grounds of pregnancy and pregnancy related discrimination. The Respondent resisted all the claims.

3. The issues to be determined by the Employment Tribunal were agreed by the parties at the preliminary hearing on 14 April 2021 to be as follows:

   3.1 **Unfair dismissal**

   3.1.1 Was the Claimant dismissed? The Respondent accepts that she was dismissed.

   3.1.2 If the Claimant was dismissed, what was the reason or principal reason for dismissal?

3.1.3 Was the reason or principal reason for dismissal related to pregnancy, childbirth or maternity as more particularly provided for in section 99 of the Employment Rights Act 1996?

3.1.4 The Respondent maintains that the reason for dismissal was redundancy, which is a potentially fair reason for dismissal.

3.1.5 If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. The Tribunal will usually decide, in particular, whether:

- 3.1.5.1 the Respondent adequately warned and consulted the Claimant;
- 3.1.5.2 the Respondent adopted a reasonable selection decision, including its approach to a selection pool;
- 3.1.5.3 the Respondent took reasonable steps to find the Claimant suitable alternative employment;
- 3.1.5.4 dismissal was within the range of reasonable responses.

3.2 **Remedy for unfair dismissal**

3.2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

- 3.2.1.1 What financial losses has the dismissal caused the Claimant?
- 3.2.1.2 Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?
- 3.2.1.3 If not, for what period of loss should the Claimant be compensated?
- 3.2.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some of the reason?
- 3.2.1.5 If so, should the Claimant's compensation be reduced, and by how much?
- 3.2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 3.2.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it by [sic]?
- 3.2.1.8 Does the statutory cap of 52 weeks' pay or £88,519 apply?

3.2.2 What basic award is payable to the Claimant, if any?

3.3 **Pregnancy and Maternity Discrimination (Equality Act 2010 section 18)**

3.3.1 Did the Respondent treat the Claimant unfavourably by dismissing her?

3.3.2 Did the unfavourable treatment to take place in a protected period?

3.3.3 If not did the Respondent implement a decision taken in the protected period?

3.3.4 Was the unfavourable treatment because of the pregnancy or because the Claimant is seeking to exercise the right to ordinary or additional maternity leave?

3.4 **Remedy for discrimination or victimisation**

3.4.1 Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effects on the Claimant? If so, what should it recommend?

3.4.2 What financial losses has the discrimination because the Claimant?

3.4.3 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

3.4.4 If not, for what period of loss should the Claimant be compensated?

3.4.5 What injury to feeling has the discrimination caused the Claimant and how much compensation should be awarded for that?

3.4.6 Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?

3.4.7 Is there a chance that the Claimant's employment would have ended in any event? If so, should have compensation be reduced as a result?

3.4.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.4.9 Did the Respondent or the Claimant unreasonably fail to comply with it?

3.4.10 If so is it just and equitable to increase or decrease any award payable to the Claimant and by what proportion, up to 25%?

3.4.11 Should interest be awarded and, if so, how much?

<u>The hearing</u>

4. We heard witness evidence from the Claimant, Ms Alex Kirtley (daughter of the Respondent) and Ms Claire McGee (manager). We were provided with a joint bundle of documents consisting of 78 pages and a further 7 pages were added to the bundle by the Claimant in respect of her mitigation documents (see below).

5. The Claimant was represented by Mr Henshall of Paul Doran Law throughout the proceedings from submission of the ET1 until 8 October 2021, which was the last working day before this hearing. However, the Claimant appeared in person at this hearing and it transpired that there had been a failure by the Claimant's solicitor to comply with some of the orders made at the Case Management hearing of 14 April 2021 in respect of preparation for this final hearing, as set out below.

6. The start of the hearing was delayed on the first day because the hearing files (or bundle), handed in by the Claimant that morning to the Tribunal, were in disarray with several different pages missing from each file and all of them unbound stacks of loose papers. Whilst it is not the responsibility of the Tribunal to correct such issues, we decided on this occasion to assist the Claimant by copying and replacing each of the missing documents and by binding each of the files before starting the hearing. We note that the Claimant's solicitor had responsibility for the preparation of the hearing file.

7. The case management order of 14 April 2021 made it clear that this hearing would deal with issues of remedy in addition to the substantive claims. We asked the Claimant at the start of the hearing whether documents in relation to mitigation had been disclosed to the Respondent. The Claimant told us that she had not disclosed such documents to the Respondent and that she only had one hard copy of the relevant documents with her. Again, whilst it is not the responsibility of the Tribunal to rectify such issues, particularly as the case management order of 14 April 2021 stated, at paragraph 10, that the documents to be exchanged by the parties included documents relevant to financial loss and injury to feelings, we decided that the Tribunal would photocopy the Claimant's mitigation documents and add those seven pages to the end of the hearing file (numbered 79 to 85), a copy was also provided to the Respondent and it was explained that the parties would have time to read the relevant documents whilst the Tribunal was reading the witness statements and relevant pages from the hearing file.

8. During the preliminary conversation at the start of the hearing it became apparent that the parties did not exchange witness statements in accordance with the case management order of 14 April 2021, which provided at paragraph 21 that such statements must be exchanged by 7 July 2021. Despite being professionally represented by a solicitor, the Claimant did not exchange witness statements with the Respondent until 8 October 2021, which was the last working day before this hearing. No explanation has been provided to this Tribunal as to why statements had not been exchanged in accordance with the Tribunal orders. I note that paragraph 24 of the case management order provides that the parties could agree to vary the date of any order by up to 14 days without the Tribunal's permission, but not if this would affect the hearing date. As witness statements were due to be exchanged on 7 July 2021, the latest date for compliance, had the parties agreed variation, would have been 21 July 2021.

9. Ms Kirtley's witness statement has four appendices attached to it. She explained that appendix 2 and 3 also appear in the hearing file, that appendix 1 was disclosed to the Claimant solicitor but had not been included in the file and appendix 4 did not exist at the time documents were exchanged and the hearing file produced as it is a document which was only created on 6 October 2021. The Claimant did not raise any objections to the late submission of appendix 4 and she accepted that she had already seen appendix 1 in May 2021 when documents were exchanged. In the circumstances, the Tribunal decided that, as there were no objections from the Claimant, the appendices to Ms Kirtley statement would be admitted into evidence. Again, it was explained to the parties that they would have the opportunity to read

the relevant statements and documents when the Tribunal took a break to carry out its reading. The Tribunal started reading all the relevant statements and documents at 11:14 AM and the parties were asked to come back to the hearing room at 1 PM, whereupon we started hearing evidence from the Respondent.

10. The Claimant indicated on two occasions that she had not had sufficient time to prepare her questions in cross examination, despite the break from 11.14 AM to 1 PM. We asked the Claimant on three separate occasions whether she wanted to take a break so that she could prepare her questions before resuming the cross examination of the Respondent's witnesses, however she said that she did not want to have such a break. We pointed out to the Claimant that she had not asked any questions in cross examination about the pregnancy, the majority of her questions dealing with why she was not provided with a reference and why she had never met the Respondent's caretaker who had been made redundant at the same time as her. We referred the parties back to the list of issues set out in the case management order of 14 April 2021 on several occasions throughout the hearing and indicated that these were the issues that we needed to hear evidence about and, on the third occasion of the Tribunal asking the Claimant whether she wanted to take a break to write down her cross examination questions, the Claimant agreed that she would look at the list of issues and try to think of questions she might ask in relation to the pregnancy dismissal and discrimination claims. After the break, the Claimant returned to the hearing room and informed the Tribunal that she had prepared a list of questions, but that none of them were to do with the pregnancy dismissal or discrimination claims.

11. The Claimant told the Tribunal that she did not agree with Ms Kirtley's evidence about being offered an alternative job at the final consultation meeting. We asked the Claimant why she did not ask about any question about this when she was cross-examining Ms Kirtley, to which she replied that she did not realise that she could have asked those questions. In the circumstances, the Tribunal recalled Ms Kirtley at the end of the first day of the hearing so that the Claimant could ask her questions in cross examination with reference to the meeting of 17 September 2020 only.

12. On the morning of the second day of the hearing, the Tribunal asked the parties for details of the days and number of hours the Claimant normally worked for the Respondent because the Claimant's solicitor had not completed any of the information required at boxes 6.1, 6.2, 6.4 and 6.5 of the ET1 and this information was required in order to make our findings of fact. Both parties agreed that the Claimant normally worked 12.5 hours over five days per week, but that there was flexibility on both sides. The Claimant became very upset at this point because she felt the Respondent was being untruthful. We explained to the Claimant that the only information we required was the number of hours she ordinarily worked and that nobody was accusing her of not being flexible and that it did not affect our assessment of the claims of unfair dismissal and discrimination.

13. The Claimant became even more upset when she started reading out her closing submission. As she had written out the entirety of her closing submission, the Tribunal gave the Claimant the opportunity to either rely on the written submission or take a break and make oral submissions when she felt calmer. The Claimant decided

that she wanted the Tribunal to read her closing submission, however, as she only had one copy with her, it was decided that the Tribunal would take a break and make sufficient photocopies for the panel and the Respondent to read.

14. The findings of fact, as set out below, are made on the balance of probabilities, taking into account the witness evidence of the parties and the documents we were referred to in the Tribunal bundle. We have not read any of the documents in the bundle which were not referred to in the statements or during evidence. This case is heavily dependent on evidence based on people's recollection of events which happened over a year ago. In assessing that evidence we bear in mind the guidance given in the case of Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case, Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. In the Gestmin case, Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties, including employees and family members. It was said in that case: '*Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*.' Therefore, we wish to make clear from the outset that simply because we do not accept one or other witness' version of events in relation to a particular issue this does not mean we consider that witness to be dishonest. Where the two sides have disagreed about the evidence, we have looked at all the surrounding circumstances and decided which account is more likely to be accurate. We are not saying that anyone has lied to the Tribunal, but we accept that people can remember things differently whilst being completely honest with us and with themselves. Our job is to weigh up the evidence on both sides and make decisions based on what is more likely to be correct, that is sometimes weighing up the evidence of 51% against 49%.

The facts

15. The Claimant began her employment with the Respondent on 1 April 2011 and was employed as a part-time cleaner, working in the evenings for two and a half hours after the office staff left the building, from around 5pm onwards, or later. The Respondent had in place measures to deal with the Claimant's absences from work, such as when she took holidays.

16. The Respondent is a small family business with a portfolio of residential lettings and commercial property. It operates blocks of business premises where it provides accommodation and reception support to its clients. It is common ground that the Claimant was employed to clean the offices at Queens Court in Middlesbrough after

the business day had ended and the clients had gone home. This suited the Claimant because her husband works full-time during the day. It is also common ground that the Claimant has another part-time job at a factory where she works 2 days per week. The Respondent does not have a HR function, nor does it employ anyone with knowledge of HR processes, but relies on information it can source on the Internet, such as the ACAS website. Ms Kirtley is nominally responsible for HR within the Respondent company.

17. On 18 March 2020 the Respondent called a meeting at Queens Court, where the Claimant was based. The meeting was arranged to discuss the changes the business had been experiencing since the start of the Covid-19 pandemic, particularly the fact that some of the business tenants had started working from home and had been asking for rent relief from the Respondent. The Respondent discussed the uncertain times ahead of them and the possibility of job losses.

18. The Respondent held a second meeting, which took place on 23 March 2020, at which the Claimant was in attendance. At this meeting everyone discussed the new clause to the employees' contracts of employment which allowed the Respondent to temporarily lay off all the employees, if required. The Claimant signed this amendment to her contact of employment on 24 March 2020 and a copy of this can be seen at Appendix 1 to Ms Kirtley's witness statement. Appendix 1 states "*During the current climate we are proposing to make a change to your employment contract to include a layoff clause with immediate effect. As a business in order to protect all employees and the [sic] avoid the spread of Covid-19 we believe this is the best solution and will hopefully avoid the need to make redundancies at this time*.".

19. It is common ground that the first national lockdown was announced by the government on 23 March 2020, which was immediately after the Respondent had held its meeting with the Claimant to make changes to her contract of employment and where they also discussed how the business was going to survive if their tenants did not pay their rents.

20. The Coronavirus Jobs Retention Scheme ('the scheme') was announced by the Chancellor of Exchequer in March 2020. The scheme was to provide support for employers to enable them to continue the employment of their employees by paying part of their employees' salaries rather than lay them off. The original version of the scheme ran until 30 June 2020, however the Chancellor then extended the scheme to run until the end of October 2020. The scheme which ran from 1 July 2020 introduced 'flexible furlough' to help employees back into work with employers contributing towards the cost of their furloughed employee's salaries to replace part of the contribution made by the Government. Under the scheme, for each month that an employee was furloughed, the employer paid the employee the lower of, either 80% of the employee's regular wage or £2,500. The employer could, but was not obliged, to pay the employee their full wage, although the Respondent did pay the full amount in this case. From 1 July 2020 the flexible furlough scheme allowed employees to be brought back to work, with their agreement, for any pattern of part-time working. The employees were paid their usual wages for hours worked while remaining eligible for the scheme for any of their normal hours not worked.

21. The Claimant was placed on furlough when the scheme started and the Respondent discussed with its manager, Ms McGee, the possibility of job losses and changes to job roles, along with the situation with rent arrears and the possibility of the business going into administration.

22. On 23 June 2020, towards the end of the first lockdown, the Respondent sent an email to all its tenants to inform them of a change to company procedure whereby they would no longer offer cleaning services for the offices which were being rented out and that the clients would have to clean their own offices and be responsible for hygiene. A copy of this email can be seen at Appendix 2 to Ms Kirtley's witness statement. The email states that the reception would remain closed and the situation would be reviewed at the end of July 2020. This email also states that the Respondent would be responsible for sanitising the daily touchpoints once the reception was reopened and that "*Each office is responsible for their own hygiene and cleaning of their office space*". The reason given by the Respondent for this change was due to "*the current guidelines*" which had been issued by the government for dealing with the pandemic.

23. On 21 July 2020 the Claimant told Jill Kirtley of the Respondent company that she was pregnant. The Claimant's evidence is that Mrs Kirtley laughed on hearing this. The Respondent's evidence is that Ms Kirtley did not laugh at the Claimant and that she congratulated the Claimant on her news. We cannot make any findings on whether Mrs Kirtley laughed during this conversation or not, however we are satisfied that Mrs Kirtley congratulated the Claimant on her news and she may have laughed during this conversation, but there is nothing in the Claimant's own evidence or the professionally drafted witness statement that suggest the laughter was anything other than an expression of surprise or pleasure on hearing the Claimant's news or that it was meant in a negative way.

24. On 31 July 2020, the receptionist based at the Queens Court business centre handed in her notice as she had found another job elsewhere due to the Respondent's difficult financial situation.

25. On 17 August 2020 Mrs Jill Kirtley telephoned the Claimant and said the company was looking at the possibility of making people redundant because none of the business clients had returned to the premises after the end of the first lockdown. The Claimant's evidence is that Mrs Kirtley said that the Claimant would not want to be working with twins, or words to that effect. The Respondent's evidence is that no such comment was made, but that the conversation was about the financial situation of the company and that the Claimant's position was at risk of being made redundant. We prefer the evidence of the Respondent because it is corroborated by the evidence given by Ms Alex Kirtley during this hearing that she was in the same room as Mrs Kirtley and overhead her side of the conversation throughout the whole of the conversation.

26. On 23 August 2020 the Claimant sent a letter to the Respondent complaining against the decision to make her redundant, a copy of which can be seen at page 58 of the bundle. In this letter the Claimant complains that she has been unfairly selected for redundancy because her position as a cleaner still exists and that she wanted to

continue to work after having the twins. The Respondent telephoned the Claimant on 25 August 2020 to assure her that discussions about the redundancy situation had started before she had told them about her pregnancy and that the pregnancy did not play any part in their decision. The Respondent also told her that she was not the only person who was at risk of redundancy as the caretaker was also in the same position after 18 years of employment. The Respondent told the Claimant that she would be consulted further about the proposed redundancy and that the company were following a process for that. The Claimant has made much in her cross examination of the Respondent's witnesses about the fact she had never met the caretaker, suggesting that such a person never existed. We prefer the Respondent's evidence that they have employed a caretaker for 18 years and the reason why the Claimant never met him was because the caretaker worked on weekdays from 9 AM to 5 PM, but he often left work at 4 PM because he had to travel to Sunderland and he never worked on weekends or bank holidays. We prefer the Respondent's evidence because it is entirely reasonable that an organisation like the Respondent should employ a caretaker and the Claimant has not adduced any evidence that the Respondent has created this fictitious character just for the purposes of this claim, which is what she has implied. Further, the Respondent's account is corroborated by the evidence of Ms McGee who confirmed that she has personally know the caretaker throughout the period of her employment with the Respondent.

27. On 30 August 2020 the Claimant sent a letter of appeal to the Respondent, a copy of which is at pages 59-60 of the bundle. In this letter the Claimant states that she was protected by the furlough scheme and that she did not expect to return to work until the furlough scheme had come to an end, but that she was likely to be giving birth at around that time. The Claimant also states in this letter that it would be a challenge for her to work early mornings and late afternoon because she works those hours in her second job, that her husband also works daytime hours and that it would be hard for her to find another evening cleaning job but that she was prepared to be flexible.

28. The Respondent wrote to the Claimant on 1 September 2020 in reply to her letters of 23 and 30 August and a copy of this can be seen at page 61 of the bundle. The Respondent explained that the financial situation had been discussed with all the staff at the meetings of 18 and 23 March 2020 and that the business situation had got even worse since the lockdown had been lifted as they only had 2 clients using the Queens Court site. The Respondent's uncontested evidence is that they previously had up to 30 clients at the Queens Court site. The letter of 1 September from the Respondent also explained to the Claimant that the clients had to now clean their own offices and there was no need for an out of hours cleaner. The Respondent also stated that the decision to make the changes in the workplace were taken before the Claimant had informed them of her pregnancy and therefore her pregnancy had nothing to do with it.

29. The Respondent sent "at risk of redundancy" letter on 9 September 2020 to the 4 employees who worked at the Queens Court site, including the Claimant, a copy of which can be seen at page 62 of the bundle. The Claimant was asked in this letter to attend a consultation meeting on 10 September 2020 and the same procedure

was followed for the other at-risk employees. However, the Claimant did not receive the letter in time to attend the meeting.

30. The Claimant wrote to the Respondent on 11 September 2020, a copy of which is at page 63 of the bundle, asking to rearrange her consultation meeting. The Respondent tried to contact the Claimant on 3 or 4 occasions to rearrange this meeting, without success. The Claimant says that she had a missed call from the Respondent on her telephone, therefore she telephoned the Respondent on 17 September 2020 to arrange the consultation meeting which then took place the following day.

31. Prior to the consultation meeting, Ms Alex Kirtley and the manager, Ms McGee, discussed the alternatives which might be available to the Claimant's redundancy. They discussed the fact that the receptionist's work would need to be covered as she had got another job elsewhere and there was a need for the receptionist to clean the touch points in the communal areas during the day when the building was re-opened.

32. The Claimant attended a consultation meeting with Ms Alex Kirtley on 18 September 2020. Ms Kirtley had already prepared the Claimant's letter of redundancy in advance of the meeting as she had written it at the same time as preparing the letters for the other employees who were made redundant at the same site. The Claimant's evidence is that the Respondent did not consider any alternatives to the redundancy. In cross examination, the Claimant said, for the very first time, that the only alternative discussed with her was the fact that there was no accountancy position available. The Respondent's evidence is that they discussed with the Claimant the option of her working as the receptionist on a part time basis during office hours and cleaning the touchpoints in the communal areas but that she refused this, saying that she could not work during those hours. We prefer the Respondent's evidence as it is both plausible and consistent with the uncontested evidence of Ms McGee that the company needed to cover the receptionist's position and that the management had decided to speak to the Claimant about it at the consultation meeting. We do not find it plausible that the Respondent would have discussed the position of an accountant with the Claimant as she is not qualified to work in such a role and the Respondent's uncontested evidence is that they have never had such a role at Queens Court. Further, the Claimant's evidence in relation to mitigation is that she had been looking for cleaning jobs for the evening as she could not work during the daytime and this is entirely consistent with the evidence given by the Respondent at this hearing. We also note that the ET1 drafted by the Claimant's solicitor makes no mention of the Respondent discussing the position of an accountant but states at paragraph 11 of the grounds of complaint "*The Claimant proposed alternatives to redundancy, but these were not considered by the Respondent*." However, no details are provided in the ET1 or the professionally drafted witness statement of the Claimant as to what alternatives the Claimant proposed, nor has the Claimant said anything in evidence at this hearing about any alternatives that she had proposed at the consultation meeting.

33. The Respondent's intention was to post the letter of redundancy to the Claimant at the end of the consultation meeting if the alternative job had not been accepted by her. However, as she was in the building, the Respondent handed the redundancy

letter to the Claimant at the end of the consultation meeting as no alternative had been agreed upon. A copy of the letter can be seen at page 66 of the bundle. It is common ground that the Claimant did not appeal against her dismissal after 18 September 2020, although no reasons have been given for this by the Claimant.

34. It is common ground that the neither the Claimant or the Respondent kept any notes of the consultation meetings or discussions throughout the redundancy process. The Claimant stated in the ET1 that the alleged failings in regard to the redundancy procedure were the failure to consult, consider alternatives and/or offer alternative work.

35. It is common ground that the Claimant received her statutory redundancy payment, notice pay and accrued holiday pay upon termination of her employment.

36. The Respondent did not open Queens Court until January 2021 and they still only have 4 clients using the building. The Respondent reduced its workforce from 4 employees to 1 part time employee (Ms McGee) and they do not employ a cleaner at Queens Court.

37. The Claimant has applied for some cleaning jobs since the date of her dismissal but she has concentrated on evening work because she says she cannot work during the daytime as her husband works those hours.

Submissions

38. The Claimant made submissions by reference to a four-page handwritten document, the contents of which we have not produced in full in these reasons, however we have taken the entirety of those submissions into account when making our decision.

39. The Claimant submits that her position with the Respondent was protected by the furlough scheme and therefore the reason for her dismissal was not redundancy. She also submits that the real reason for her dismissal was her pregnancy because she would not be able to return to work at the end of the lockdown. The Claimant believes that her job with the Respondent still exists and she believes that the Respondent did not follow reasonable procedures at the time of dismissal.

40. The Respondent submits that it followed the same procedure for all the affected employees at Queens Court and, therefore, the Claimant was not unfairly dismissed. The Respondent warned all of the employees that it was experiencing financial difficulties from March 2020 onwards and the same process was applied in terms of consultation meetings with all the affected employees. The Respondent submits that it has provided references for all the employees who have been dismissed, but the Claimant has not requested a reference from them. The Respondent also submits that the Claimant was not dismissed because of her pregnancy and she has not been unfairly treated because of the pregnancy, but that the process had started long before the Claimant became pregnant. The Respondent accepts that it probably should have placed the redundancy letter in the post rather than handing it to the Claimant.

The Law

41. We refer to section 99 of the Employment Rights Act 1996 ("ERA") which provides that an employee shall be regarded as having been unfairly dismissed if the reason or principal reason for the dismissal is related to the pregnancy of the employee. In such circumstances the dismissal would be automatically unfair.

42. We refer to section 139(1)(b) ERA 1996 which sets out the definition of redundancy, i.e. an employee is taken to have been dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the 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. What this means is that the definition of redundancy is met where there is a need for *fewer employees* in a particular business even if the work itself still exists and even where the existing work is then shared out between the remaining employees. There is no requirement under the ERA for the job itself to have disappeared for there to be a redundancy situation in law: Safeway Stores plc v Burrell [1997] ICR 523, EAT and Murray and another v Foyle Meats Ltd [1999] ICR 827, House of Lords.

43. We refer to section 18 of the Equality Act 2010 ("EQA") which sets out the law on pregnancy discrimination. This section provides that an employer discriminates against a woman if it treats her unfavourably because of her pregnancy. Section 18(6) EQA provides that the protected period in relation to a woman's pregnancy begins when her pregnancy begins and ends at the end of ordinary or additional maternity leave, if applicable, or if she returns to work sooner than the end of the maternity leave.

44. The test to be applied by the Tribunal in cases of pregnancy related discrimination under the EQA is whether the pregnancy was an *effective cause* of the employer's decision to dismiss her. We note that this is a different test to that under the ERA, where the pregnancy must be the *reason or principal reason* for the dismissal.

45. The burden of proof in discrimination case is set out at section 136(2) EQA 2010 which provides *"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*." The way this provision works is that it is for the Claimant to prove facts from which this Tribunal could decide that there had been pregnancy discrimination and, only if the Claimant can initially prove that, the burden then passes to the Respondent to show that the reasons for their actions had nothing whatsoever to do with the Claimant's pregnancy.

46. We refer to the case of Madarassy v Nomura Plc [2007] IRLR 246 in which the Court of Appeal held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. "Could conclude" must mean that "a reasonable Tribunal could properly conclude"

from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the Respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage, the Tribunal needs to consider all the evidence relevant to the discrimination complaint, such as evidence as to whether the act complained of occurred at all.

47. We also refer to the decision of the Supreme Court in Royal Mail Group v Efobi [2019] EWCA Civ 18 in which the Court confirmed that wording of the burden of proof requirements in section 136 EQA does not make substantive changes to the preceding law, as set out in Madarassy, above, which still remains good law.

Conclusions

48. We have no doubt that the Claimant feels that it was unfair to make her redundant and most, if not all, people in that position would think that it was unfair, that they should have been kept on, or that someone else should have been selected in their place. That is perfectly natural, but it does not make the dismissal unfair in law, although we accept it feels unfair to the person who is made redundant, especially when she was pregnant at the time.

49. Both the Claimant and Respondent have done their best trying to represent themselves in what is a very technical area of law and we are grateful for the help they have provided to this Tribunal.

50. Both sides accept that the Claimant was dismissed, but what we have to decide is whether the dismissal was for reasons of redundancy or if it was connected to the pregnancy and also whether a fair procedure was followed by the Respondent. We also have to decide whether the Claimant's pregnancy was an effective cause of the Respondent's decision to dismiss her for the purposes of the discrimination claim.

51. Applying the relevant law to the facts we find that the reason or principal reason for the Claimant's dismissal was redundancy because of the financial situation the Respondent company was in, as demonstrated by the events from March 2020 onwards. The Respondent had to make savings because its clients had stopped or reduced paying their rents because they were working from home and the Respondent did not require 4 employees at Queens Court whilst they had no or very few clients operating from their premises. The Respondent went from having up to 30 paying clients at Queens Court to only 2 after the first lockdown had ended in June 2020. Even though the Respondent was receiving furlough payments from the government during this period, the uncontested evidence of the Respondent was that they still had significant outgoings that they had to meet on a regular basis whilst they were receiving very little income from their clients. The Respondent sought to make savings in all aspects of its business including its photocopiers and contracts with third parties but they did not know what the future held and they were not able to obtain any other financial support from elsewhere, which led to them looking at making further savings through redundancies. Whilst we accept that some cleaning work was still being undertaken at Queens Court in communal areas, there is no

requirement for the entirety of a particular job to have disappeared in order for the situation to meet the definition of redundancy under section 139 ERA. We do not accept the Claimant submission that this was not a real redundancy situation because her job still existed because that is not the test to be applied by this Tribunal. We do not accept that the Claimant was in some way "protected" from redundancy because she was receiving furlough payments. The reality of the situation is that the Respondent was experiencing dire financial circumstances, irrespective of the furlough grant, and needed to make savings which this led to them reducing the workforce at Queens Court from four people down to one person working part-time and we accept that this meets the definition of redundancy, as set out above.

52. We find that the Claimant's pregnancy was not a reason for the dismissal as the Respondent had started discussions about the possibility of a redundancy process being implemented as early as March 2020 because of the financial difficulties they were facing, which was well before the Claimant became pregnant or informed the Respondent of her pregnancy. Further, there were several employees who were either made redundant or left the business as a result of the financial situation and the Claimant was dismissed as part of that process, along with the other employees, and was not singled out in any way. The Respondent had already made changes to the Claimant's contract of employment by inserting a layoff clause, it held meetings with all the affected employees in March 2020 where it outlined the financial situation at that time and its hope to avoid redundancies and it informed its clients on 23 June 2020 that it would no longer provide cleaning services to any of them, which was before the Respondent knew about the Claimant's pregnancy. We accept that the Covid-19 pandemic had started a chain of events in March 2020 which led to the Claimant's redundancy and that her pregnancy was not an effective cause of the redundancy. In all the circumstances, we find that the Claimant's dismissal was not automatically unfair because the reason or principal reason was not connected with her pregnancy.

53. In terms of the ordinary unfair dismissal, we find that the Respondent warned the Claimant and other employees at Queens Court from March 2020 that their jobs were at risk of being made redundant and then they held at least two consultation meetings, a telephone and an in person meeting, with the Claimant prior to her dismissal. The Claimant was the only cleaner and the Respondent was not required to apply a selection criteria or create a pool for selection in this case to choose between several different employees. The only remaining position was that of manager and it has not been argued before us that the Claimant was capable of carrying out the role of manager. We also find that the Respondent took reasonable steps to find alternative employment for the Claimant as they offered her the part time position of receptionist. The Claimant has not said in her evidence what proposals she had made as an alternative to redundancy and no attempt has been made to provide this evidence in her witness statement, despite it being professionally drafted by her solicitor. In the circumstances, we find that the Respondent might have been able to handle the redundancy process better by, for example, making sure that they sent letters to the Claimant in good time and keeping notes, but we accept that the Respondent did its best given that it is a small family business without a HR department. We are satisfied that the fact the Respondent did not keep notes of the consultation meetings and wrote the letter of dismissal before the final consultation

meeting had taken place did not render the process unfair, particularly as we accept that the letter of dismissal would not have been given to the Claimant had she accepted the alternative position as a receptionist, and it has not been argued before us that no reasonable employer could have undertaken a similar process. In the circumstances, we find that it was reasonable for the Respondent to treat the redundancy as a sufficient reason for the Claimant's dismissal, given the size and administrative resources of the Respondent's undertaking. We also find that the dismissal was within the range of reasonable responses open to an employer in these circumstances and it has not been argued before us that the decision fell outside the range of reasonable responses.

54. Given that we have found the Claimant's dismissal to have been fair, there is no requirement for this Tribunal to make any findings on issue number 3.2, as set out above.

55. In terms of the discrimination claim, we find that the Respondent did treat the Claimant unfavourably by dismissing her and that the dismissal took place during the Claimant's protected period as it was after she became pregnant but before she had completed her maternity leave.

56. Applying the guidance in Madarassy and the burden of proof as set out in section 136 EQA, we find that, although the Claimant was pregnant at the time of her dismissal, there are no facts which could lead this Tribunal to find that the pregnancy materially influenced or was an effective cause for the Respondent to select the Claimant for redundancy. There is no evidence at all that it crossed the Respondent's mind that the Claimant may be exercising her right to maternity leave in the future as no evidence has been presented that there had been any discussion throughout the redundancy selection process about the Claimant taking maternity leave in the future. There is no evidence that the Respondent viewed the Claimant's pregnancy in negative terms at all. We are satisfied that the Respondent began its process of considering redundancy months before they had knowledge of the Claimant's pregnancy and they applied the same redundancy process to the Claimant as they did to the other affected employee. We do not accept the Claimant's assertion that the redundancy process was in any way a sham or contrived to cover up the fact that the Respondent wanted to dismiss her for other reasons. We note that the ET1 and witness statement, both professionally drafted on behalf of the Claimant by her solicitor, do not mention at all the central argument pursued by the Claimant at this hearing that the redundancy of the caretaker was entirely fictional or created in order to cover up the real reason for her own dismissal. A lengthy period of time was spent by the Claimant on cross examination on this point, however we accept the Respondent's evidence that they had employed the caretaker for 18 years and the reason why the Claimant had never met him was because the caretaker worked from Monday to Friday during the daytime and often left work at 4 PM as he had to travel to Sunderland and the Claimant did not begin work until after 5 PM each day. Further, the caretaker did not work weekends or bank holidays and this provides a reasonable explanation as to why she did not see him on such occasions. We are satisfied that there is no evidence of a cover-up by the Respondent or that the Claimant's pregnancy was an effective cause of the Respondent's decision to make her redundant.

57. However, even we are wrong and there is sufficient evidence for the burden of proof to pass to the Respondent, we find that the Claimant's pregnancy did not in any way whatsoever play any part in their decision to make the Claimant redundant. There is no evidence that the Claimant's pregnancy was in any way inconvenient to the Respondent. We note that the Claimant's own evidence is that the Respondent had measures in place for dealing with her absences from work, such as when she was on holiday, and there is no evidence in front of us that the Respondent was influenced by the fact that the Claimant may take maternity leave some time in the future at the time they made the decision to make her redundant.

58. Given that we have found the Claimant was not discriminated against by the Respondent for reasons related to her pregnancy, there is no requirement for us to make any findings under issue number 3.4, as set out above.

59. In all the circumstances, as set out above, we find that the Claimant's claim of automatic unfair dismissal under section 99 ERA 1996 is not well-founded and is dismissed. The Claimant's claim of unfair dismissal under section 98 ERA 1996 is not well-founded and is dismissed. The Claimant's claim of pregnancy discrimination contrary to section 18 EQA 2010 is not well founded and is dismissed.

Employment Judge Arullendran

Date: 2 November 2021