EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Morgan**

Respondents: **Synthetic Turf Management Limited**

Heard at: **Newcastle CFCTC by CVP** **On: 21 - 23 March 2022**
Deliberations: 9 May 2022

Before: **Employment Judge Arullendran**

Members: **Ms BG Kirby**
Ms J Johnson

Representation:

Claimant: **Mr Stephen Morgan (Claimant's father-in-law)**
Respondents: **Mr Sam Healey (counsel)**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Claimant's claim of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is not well-founded and is dismissed.
2. The Claimant's claim of automatic unfair dismissal pursuant to section 99 of the Employment Rights Act 1996 is not well-founded and is dismissed.
3. The Claimant's claim of pregnancy-related discrimination pursuant to section 18 of the Equality Act 2010 is not well-founded and is dismissed.
4. The Claimant's claim of unauthorised deduction of wages contrary to section 13 of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1. The Claimant has brought claims of unfair dismissal, automatic unfair dismissal for reasons related to her pregnancy and discrimination on grounds of pregnancy. The Claimant has also brought a claim for the unauthorised deduction of wages on the basis

that she was underpaid her salary from 2017 onwards, that her working days were cut from 5 to 4 days per week from 1 July 2021 and that the Respondent removed her company car and mobile telephone without her consent.

2. The Respondent resists all the claims, maintains that the Claimant's dismissal was for reasons of redundancy and that there was no unauthorised deduction of wages.

The hearing

3. The issues to be determined by the Employment Tribunal were agreed between the parties at the preliminary hearing on 12 May 2021 and were subsequently modified at the hearing to reflect the accurate wording of the legislation as follows:

    1. Have any of the Claimant's allegations of discrimination been presented out of time?
    2. If so, do any of the Claimant's allegations amount to a continuing act?
    3. If any allegation is out of time, is it just and equitable to extend time?
    4. Did the Respondent have knowledge that the Claimant was pregnant at the relevant time?
    5. If the Respondent had knowledge of the Claimant's protected characteristic at the relevant time, did the Respondent treat the Claimant unfavourably in relation to working hours, working arrangements, salary, emoluments and dismissal?
    6. If the Respondent treated the Claimant less favourably, was this because of the Claimant's protected characteristic?
    7. If the Tribunal finds that the Claimant has suffered discrimination, what financial losses has the discrimination caused the Claimant?
    8. Has the Claimant taken reasonable steps to mitigate the loss she states she has suffered?
    9. If not, for what period of loss should the Claimant be compensated?
    10. Has the Claimant suffered injury to feelings and at what Vento band level?
    11. What was the reason or principal reason for the Claimant's dismissal?
    12. If the reason was redundancy, did the Respondent at reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?
    13. Was there a redundancy situation?
    14. Was dismissal for redundancy within the range of reasonable responses available to the Respondent?
    15. Did the Respondent appropriately warn the Claimant and consult with her and did the Respondent make reasonable efforts to find alternative employment for the Claimant?
    16. In the alternative, if the Claimant was not dismissed for reason of redundancy, was the Claimant dismissed for another potentially fair reason, in particular, some other substantial reason?
    17. Was the Claimant dismissed for a reason connected with her pregnancy or maternity?
    18. The Claimant has received a redundancy payment equal to the basic award. Has this been correctly calculated?
    19. If the Tribunal finds that the dismissal was unfair, what financial loss has the dismissal because the Claimant?
    20. Has the Claimant taken reasonable steps to mitigate her loss?

21. If not, for what period of loss should the Claimant be compensated?
22. Has the Respondent correctly calculated the Claimant notice payments and redundancy payment and any accrued holiday pay based upon the correct weekly wage applying at the time?
23. If the Tribunal finds that the dismissal was procedurally unfair, would the Claimant have been dismissed in any event should a different procedure have been followed, whether by reason of redundancy, some other substantial reason or gross misconduct on account of taking, on her last day of employment, documents from the Respondent that she was not authorised to take and belonged to the Respondent?
24. If so, should the Claimant's compensation be reduced in accordance with the principles of Polkey v AE Dayton Services Ltd [1987] ICR 142?
25. What was the Claimant's contractual rate of pay at the time of her dismissal?
26. What was the Claimant's notice period?
27. Did the Claimant receive her notice pay from the Respondent?
28. Did the Respondent make an unauthorised deduction to the Claimants pay? If so, was the deduction required or authorised to be made by virtue of a statutory provision? Or a relevant provision of the workers contract? Or has the Claimant previously signified in writing her agreement or consent to the making of the deduction?
29. Did the Claimant present the claim within the relevant time limit or is the claim out of time?

4. The Claimant confirmed that she was not seeking to amend her claim to add a claim of harassment and, therefore, the original issue relating to harassment, as set out in the case management order of 12 May 2021, was not included in the list of issues as agreed above.

5. Neither the Claimant nor the Respondent made any requests for reasonable adjustments to be made because of a disability. The Claimant was pregnant at the time of this hearing and it was agreed that she would request breaks as and when required. Mr Morgan informed the Tribunal on the final day of the hearing that he was feeling unwell and it was agreed that he could request breaks as and when required.

6. The Claimant's representative, who is a family member and not legally qualified, stated at the beginning of the hearing that he wished to adduce evidence relating to the Respondent's treatment of two other employees in the past. The Respondent objected to this request. We explained that the claims in front of us were that the Claimant was dismissed because of her pregnancy and discriminated against because of her pregnancy and that this does not involve a comparison with other employees. The Tribunal took a break of two hours to read the relevant statements and documents. Upon returning to the hearing room, the Claimant's representative made further arguments that he wanted to adduce evidence relating to the Respondent's treatment of two previous employees, despite our earlier ruling on the issue, and he referred to the case of O'Brien v Chief Constable of South Wales Police [2005] UKHL 26 on the question of admissibility of evidence of similar facts. The Respondent objected to this further argument on the grounds that it was not proportionate or keeping within the overriding objective. The unanimous decision of the Employment Tribunal was that the Claimant is not permitted to adduce evidence relating to similar facts because it was a not logically

probative in that it is not relevant to how others were treated when the tests to be applied by this Tribunal is whether the pregnancy of this Claimant was the sole principal reason for her dismissal. Further, the Claimant was not intending to call the previous employees as witnesses which would result in the evidence being, at best, hearsay evidence and would have little probative value.

7. The Claimant has referred to a number of sensitive medical issues in her witness statement relating to individuals who have not been called as witnesses at this hearing. We raised concerns with the parties about such evidence, particularly as it appears to be irrelevant in relation to the issues as set out above. It was agreed that the Respondent would not ask questions of the Claimant about such matters as the individuals concerned had not been contacted prior to the hearing in order to obtain their permission to release such information into the public domain and because such matters are irrelevant to the Claimant's own dismissal.

8. We explained the overriding objective to the parties and made it clear that all parties are required to deal with others with courtesy and respect throughout the hearing, particularly given that the Claimant and Respondent are related and there is reference to a family feud in the papers. Mr Morgan displayed hostility towards the Respondent's witnesses throughout the hearing, despite the Tribunal repeatedly warning him that his conduct was unacceptable. Mr Morgan persistently made negative comments about the answers provided by the Respondent's witnesses to questions put in cross examination and failed to follow the instructions given by the Employment Judge to treat the witnesses with courtesy and respect. The hearing was halted at one point as Mr Morgan was making rude noises during the Respondent's evidence. Whilst Mr Morgan's actions were unacceptable and not in keeping with the overriding objective, our decision is based purely upon the evidence and the applicable law.

9. We heard witness evidence from the Claimant, Jonathan Bell (managing director), Louise Ramage (shareholder) and Stephen Nixon (maintenance director).

10. We were provided with 2 joint bundles of documents consisting of 686 pages (the majority of which were not referred to by the parties) and a supplementary bundle from the Claimant consisting of 22 pages. All the page numbers in this Judgement refer to pages from the main bundle.

11. The Claimant was represented by her father-in-law who was without experience of Tribunal hearings, although Mr Morgan had the advantage of assistance from a solicitor outside of this hearing. We explained the process to the parties and advised the Claimant's representative that he could ask the Tribunal to provide him with assistance with the Tribunal process, but we could not run the case for him. We explained that the witness statements would be taken as read and witnesses would not have permission to add further evidence in chief without seeking permission from the Tribunal, that any matter not challenged in cross examination would be taken to have been accepted by the other side and that we would only read the documents in the hearing bundle which we were referred to during evidence.

12. The Respondent's witnesses were advised of their right not to incriminate themselves in a potentially criminal matter when giving evidence in this Tribunal about the alleged fraudulent claims for the furlough grant and that they had the right to remain silent.

13. The Claimant did not make oral submissions and relied upon a written closing submission. Those submissions are not reproduced in full in this Judgement but have been taken into account in their entirety. The Respondent made closing submissions by reference to a skeleton argument, the contents of which we have taken into account in its entirety, although it is not reproduced in this Judgement in full.

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 July 2013. She was originally employed as an office manager and became the corporate manager in November 2013 with a salary of £18,000 per annum. On 2 March 2015 the Claimant became a sales manager and received a salary of £20,000 per annum. In January 2019

the Claimant became the internal contracts manager and she remained in this post until her dismissal.

16. The Respondent company provides specialist products in the field of synthetic grass design, installation and maintenance. It is common ground that at the time of the Claimant's dismissal there were two employees (Mr Bell and Mr Stanley) in addition to the Claimant. It is also common ground that Mr Stanley is based in the Midlands and that the Claimant and Mr Bell worked at the Respondent's north-east site.

17. The Claimant and Mr Bell are family members and it is common ground that there was some history of a family dispute which the Claimant and Mr Bell were not involved with.

18. The Claimant was provided with a company car in addition to her salary of £18,000 when she became a corporate manager in 2014. A copy of the contract of employment for the post of corporate manager, dated 25 January 2014, can be seen at pages 100 to 115. It is common ground that there is an error with the date at paragraph 1.1 of the contract of employment which states that the employment commenced in 2014, instead of 2013.

19. It is common ground that the Claimant retained the use of the company car and was given a mobile telephone to use in her role as a sales manager, in addition to receiving a salary of £20,000 per annum. A copy of the revised contract of employment dated 20 January 2015 for the position of sales manager can be seen at pages 116 to 130. Details of the increase in the Claimant salary from £18,000 to £20,000 can be seen in the minutes of the meeting between the Claimant and Mr Bell which took place in 2015, a copy of which can be seen at page 131. It is common ground that the Claimant remained in this role until early 2019. The Respondent paid the Claimant £20,000 per annum until around April 2018.

20. The Claimant says that she was given a further revised contract of employment in 2017 in which her salary was increased to £22,000 per annum, as set out at paragraph 7 of that document (page 137). A copy of the contract of employment relied upon by the Claimant can be seen at pages 132 to 146. We note that at paragraph 7.1 of that contract it is stated that "*New salary commencing February 25th, **2015**"*, our emphasis. The Respondent says that it never agreed to increase the Claimant salary in 2017, or at any other time, and the Respondent does not accept that it produced the contract at page 132. Although the final page of the contract, at page 146, has been signed by Mr Bell and the Claimant, the Respondent says that, as no date appears on that page, it could have been taken from a previous contract. The Respondent could not find copies of the Claimant's contract of employment in its office after the Claimant's dismissal and suggests that the relevant documents had been removed from the office. We prefer the evidence of the Respondent because the Claimant was not able during cross examination to give any account of discussions with the Respondent in 2017 about a pay increase, but admitted there was a discussion in 2018 where she was awarded a pay increase, as shown on her payslips. We find it inherently unlikely that, had there been a discussion and an agreement that the Claimant would receive a pay increase, that she would not check her payslips or her P60 each year to ensure that she was receiving the correct amount. We are unable to make findings about the validity of the contract of employment the Claimant relies upon, but looking at all of the evidence in the round, it is more likely than not that that there was no discussion and no agreement in

2017 about the alleged pay rise. It is also entirely consistent with the information provided to the Claimant by the accounts manager on 15 June 2020 (the contents of that email are set out in paragraph 30, below) that the Claimant was not awarded £22,000 per annum as a salary. On the balance of probabilities, we find that the Claimant's correct salary, as of 2017, was £20,000 per annum. We are unable to make findings as to who produced the contract of employment dated 2017, when it was produced or how it came into existence, but we can see that there are several mistakes in that document and it is probable that the figure of £22,000 is also a mistake, along with the commencement date of 2015.

21. The Respondent increased the Claimant salary to £21,000 in or around April 2018 and copies of the Claimant's payslips with the relevant increase payments can be seen at pages 169 to 173. This is further consistent with our finding that the Claimant was in receipt of £20,000 per annum. In mid-2018 it was agreed between the Respondent and Claimant that she would relinquish her sales role and she stopped going to visit customers off-site. Instead, the Claimant assisted another director, Mr Peacock, with supply chain duties. There is no evidence that the Claimant did not agree to this change in her role.

22. The Claimant was paid £21,000 per annum by the Respondent from April 2018 onwards and it is common ground that the Claimant never raised any grievances or questioned the Respondent about the amount being incorrect. The Claimant says that she did not notice, either from her payslip or her P60s, which she agrees she received on a regular basis, that she was receiving £21,000 per annum instead of £22,000 and that the discrepancy only came to light when her father-in-law looked at her wages in readiness for commencing Tribunal proceedings.

23. In January 2019 the Respondent's internal management was restructured due to a buyout which left Mr Bell as the sole director. A management meeting was held on 13 February 2019 following the buyout and a copy of the agenda can be seen at page 314. It was decided that the Respondent company would no longer offer installation services directly to its customers and that there would be a reduction in the headcount by five employees, leaving three employees namely Mr Bell, Mr Stanley and the Claimant. As the Claimant's role was to support the outgoing director, this naturally resulted in her workload being affected. The Claimant says that her workload was not affected by this restructuring. We prefer the evidence of the Respondent because the Claimant accepted that the Respondent company no longer provided installations directly to customers, as it previously had, which must have had some effect on her workload and there was a consequent reduction in the headcount, which is not disputed.

24. In or around February 2019 the Claimant and Respondent discussed the changes to her job role and the Claimant indicated that she wished to return to an office-based role. Mr Bell decided, as he had a personal relationship with the Claimant, to create a new role of Internal Contracts Manager which had not previously existed within the organisation. Mr Bell considered that this new role did not attract the salary of £21,000 per annum because the Claimant's overall responsibilities had reduced significantly after the departure of Mr Peacock, however he decided that would retain the Claimant's salary at £21,000 because he wanted to maintain a good relationship with her. Part of the Internal Contracts Manager role was to support an associated company, Lion Lawns Limited,

with general administrative duties including putting together job packs, RAMS and ordering plant hire and materials. The Respondent estimates that this constituted approximately 10% of the Claimant's role. Around the same time, the Respondent took the decision that the Claimant no longer required a company car in her Internal Contracts Manager role and the Claimant returned the car to the Respondent on 4 February 2019 where it became a pool car. It is common ground that the Claimant did not raise any grievances or complaints with the Respondent about the return of the company car. The Claimant says that she still needed the use of a company car and that it was removed from her without her consent, but she felt that there was no point in arguing with Mr Bell. The Claimant says that the removal of the company car was an act of harassment, but Mr Morgan accepted on the Claimant's behalf that the Claimant was not pregnant at the time the company car was removed and, therefore, this could not be an act of pregnancy related harassment. We prefer the evidence of Respondent because it appears to be consistent and reasonable in the circumstances. There is no evidence that the Claimant disagreed with Mr Bell about the removal of the company car or that she could not use it as a pool car, when necessary. In the questions asked by the Tribunal, the Claimant said that she did not look for an alternative job at this time and continued working for the Respondent without any complaints. We find that it is more probable than not that there was a discussion about the removal of the company car around the same time as the changes which took place in the Claimant's role and that Claimant agreed to this change at the time, particularly as she raised no complaint or grievance about it, continued working and did not look for an alternative post elsewhere. No evidence has been presented that the Claimant's relationship with the Respondent was such that it would have been futile for her to make such a complaint.

25. Given the number of changes which had taken place within the Respondent organisation since the beginning of 2019, Mr Bell was of the view that much of its work could be outsourced to other organisations, although he did attempt to recruit a marketing manager, a contracts manager and a business development manager without success and none of those employees stayed with the Respondent company for any appreciable length of time. The Claimant has sought to make much about the reasons these employees did not remain in employment with the Respondent, however we make no findings about such reasons as they are immaterial in terms of the Claimant's dismissal. The Respondent decided in or around April 2019 to stop offering sled tracks and logos which accounted for around £200,000 of its annual turnover and only supplied artificial grass. This inevitably had some effect on the Claimant's duties which the Respondent estimates it at around 50%. At the same time, the Claimant was no longer required to monitor the email account of Lion Lawns Limited which further reduced her workload. The Claimant says that she was still performing the same duties after April 2019 as she had been prior to the changes made by the Respondent. We prefer the evidence of the Respondent as it is consistent with the changes made to its business model of significantly reducing the services it supplied to its customer. The Claimant's evidence was that the Respondent provided a logo to one customer after the changes in 2019, which suggests that she knew the Respondent was not providing this service on a large scale to customers any longer. The Claimant has not disputed that the Respondent started using independent contractors more often in its work and, although we accept that some of her duties would still have remained, it is implausible to suggest that the amount of work the Claimant was required to undertake had not diminished at all.

26. It is common ground that the contract for the mobile telephone which had been used by the Claimant came to an end in December 2019. The Respondent took the decision not to renew the contract on the basis that the Claimant was working in the office where a landline telephone was available to her, although the Respondent allowed the Claimant to retain the handset. The Claimant says this was an act of harassment, however it is common ground that the Claimant did not raise any complaint or grievance about this issue and she did take out her own personal contract with a mobile telephone company to use the old handset and a subsequent handset which the Respondent allowed her to have when the first handset stopped working. We prefer the evidence of the Respondent as it is entirely consistent with the evidence that the Claimant was no longer working in a sales role and was based in the office. We do not accept that the removal of the mobile telephone could possibly have been an act of harassment given that the Claimant was not pregnant at the time and there is nothing in the account given by the Claimant which suggests that there was any disagreement between her and the Respondent when this decision was made. The fact that the Claimant made no effort to raise a complaint about this issue suggests that she accepted this decision at the time.

27. On 20 March 2020 the Claimant sent an email to the Respondent stating that she was attending a hospital appointment at 10 AM that day. Copies of the email exchange between the Claimant and Mr Bell can be seen at pages 428 to 431. It is common ground that the Claimant had not previously requested time off to attend a hospital appointment, although the Respondent has a policy of requiring two weeks' notice. The Claimant did not say in any of her messages her reasons for attending the hospital. The Respondent agreed to the Claimant taking the following Monday off to attend a further hospital appointment and the exchanges between the parties are extremely amicable. The Claimant says that she told the Respondent she was attending the hospital as she was undergoing IVF treatment, however Mr Bell says that he was not told the reasons for the hospital attendance by the Claimant and he did not ask her to provide a reason. We prefer the evidence of the Respondent because there is no evidence that the Claimant informed the Respondent that she was attending hospital for IVF treatment, either in writing or verbally. We are persuaded by the amicable nature of the email exchange that the Claimant had a good relationship with Mr Bell and that the Respondent made every effort to accommodate the Claimant with taking time off work, regardless of her reasons.

28. It is common ground that on 23 March 2020 the UK started its first period of lockdown due to the Covid 19 pandemic. The Respondent closed its business and the Claimant was placed on furlough. The Respondent topped up the Claimant's salary so that she received 100% of her salary throughout the period of furlough. A copy of the Respondents letter advising the Claimant about the furlough arrangements can be seen at page 432. On 1 June 2020 the Respondent wrote to its employees to arrange meetings to discuss their return to work. The Claimant attended her meeting with Mr Bell on 4 June 2020.

29. The Respondent says that it discussed the Claimant's job role and responsibilities with her at the meeting of 4 June 2020, the downturn in the company's financial performance and the outsourcing of work. The Respondent says that the Claimant herself suggested reducing her work from 5 days to 4 days per week because the Respondent had indicated that the job role did not support working five days. The Claimant says that the

Respondent did not discuss any of the above matters with her at the meeting of 4 June 2020 and that she was told by Mr Bell that her work was being reduced to 4 days per week. It is common ground that the Claimant did not raise any grievances with the Respondent or make any complaints about the reduction of her hours from 5 days to 4 days per week. The Claimant says that she did not raise any complaints because Mr Bell was a bully and that she had decided to look for another job because her hours had been reduced. The Claimant applied for 1 job after July 2020, but she was not successful with that application. We prefer the evidence of the Respondent as it is entirely consistent with the email exchanges between the parties about discussing arrangements for returning to work and the numerous emails about the reduction of hours and consequences on the amount of salary the Claimant would receive, as set out below. Nowhere in any of these email exchanges has the Claimant stated that she did not want to reduce from working five days per week to four days or that she could not complete her work within four days each week, which suggests that there was insufficient work for her to work full-time. Further, the Claimant did not give any specific evidence about any alleged acts of bullying, nothing has been presented about what was said or done or when such incidents are alleged to have taken place. There is no evidence on which this Tribunal can conclude that the Claimant was subjected to bullying in the workplace.

30. On 15 June 2020 Ms Ramage, the accounts manager, sent an email to the Respondents' accountants to find out what the Claimant salary would be if she reduced her working week to 4 days. A copy of the relevant email can be seen at pages 436 to 437. The reply from the accountants states "*She is normally on £21K so 4 days would be £16800 (£1400 pm gross) … So her net monthly pay will be £1106.24 for 4 days (previously £1318.44 for 5 days).*" The Claimant accepted in cross examination that she was forwarded a copy of the email from the accountant on 15 June 2020 at 12:25 PM. Therefore, the Claimant should have been alerted at this point to the fact that her annual salary was indeed £21,000 per annum. However, the Claimant made no complaint about the contents of this email and accepted the salary of £16,800 gross each month.

31. Mr Bell spoke to the Claimant on 15 June 2020 about returning to work and working four days per week. The Claimant asked if she could have the Friday off as this was the same day her mother did not work and this was agreed by the Respondent. The Claimant returned to work on 1 July 2020, working four days per week at £21,000 per annum on a pro rata basis. However, the Claimant had a new start time of 9 AM instead of 8:30 AM and Mr Bell agreed to pay the Claimant at the same rate of pay despite the reduction in her daily hours, which was to the Claimant's advantage.

32. On 4 August 2020 a new Contracts Manager began his employment with the Respondent. Mr Bell had hoped that the new manager would increase the number of contracts the Respondent was performing, which would in turn increase the Claimant's workload in supporting those functions. However, the role did not work out as there was no increase in revenue and it came to an end on 9 September 2020.

33. It is common ground that Mr Bell knew the Claimant wanted to start a family. The Claimant underwent a successful embryo transplantation on 21 August 2020. The Claimant says that she informed Mr Bell on 3 September 2020 that she was pregnant. The Respondent's evidence is that Mr Bell was not in the office on 3 September 2020, as he was out on site visits all day, and he was not told by the Claimant about her

pregnancy at this time or at any time before her dismissal. The Claimant says that Mr Bell knew she was undergoing IVF treatment and that this was the reason for her numerous absences to attend hospital and, therefore, he knew she was likely to become pregnant. We prefer the evidence of the Respondent because there is no evidence that the Claimant informed the Respondent in writing or verbally of her undertaking IVF treatment or her pregnancy and the majority of her attendances were on days she was not at work in any event, which Mr Bell would not need to know about. The Respondent's evidence is entirely consistent with the email sent by Mr Bell to the Claimant on 29 October 2020, as set out below, in which he is clearly congratulating the Claimant for the first time having heard the news of her pregnancy. The Claimant did not at any stage reply to this message indicating that Mr Bell already knew about her pregnancy or that they had already had a discussion about it. In the circumstances, it is more probable than not that Mr Bell did not know about the Claimant's pregnancy until he saw the Facebook post on 28 October 2020.

34. The Respondent met with the Claimant on 28 September 2020. There are no minutes from this meeting but it is common ground that Mr Bell told the Claimant that he considered her role to be redundant. The Respondent's evidence is that he discussed with the Claimant the changes which had been made to the structure of the organisation which had resulted in a significant reduction in the amount of work the Claimant was required to do, coupled with a significant loss of work as a result of the pandemic. The Respondent says that the Claimant was offered the option of attending a further consultation meeting the following week, but that the Claimant said that she would prefer for the redundancy to be confirmed that day because she was happy to leave and did not want to come back in to the office. The Claimant's evidence is that the Respondent did not discuss the reasons for the redundancy with her at all and merely handed her the redundancy letter terminating her employment with 30 days' notice and that it was Mr Bell who did not want the Claimant to work her notice. A copy of the letter can be seen at page 484. In reply to questions asked by the Tribunal Mr Bell said that, had the Claimant said that she wanted to attend a further consultation meeting, he would not have given her the dismissal letter and would have arranged a further meeting to take place. We prefer the evidence of the Respondent as there it is more likely than not that the Respondent explained the reasons for the redundancy and offered the Claimant a second meeting as the Respondent had already taken advice from a solicitor about the redundancy process and it is more probable than not that Mr Bell was following that advice. It is inherently improbable that an employee would not ask any questions upon being handed a letter of dismissal after having worked at the company for a number of years. Even if the Claimant was in shock, we would expect an employee to ask questions about the dismissal the following day, but that did not happen and, therefore, we find the Claimant evidence improbable.

35. The Claimant spoke to Mr Nixon after she had been told about her redundancy and told him that she was upset at losing her job because she was pregnant. Mr Nixon's uncontested evidence is that he urged the Claimant to tell Mr Bell about her pregnancy as it might prompt him to change his mind, but the Claimant refused to do this. Mr Nixon then offered to inform Mr Bell of the pregnancy on the Claimant's behalf and ask him to reconsider his decision, but again the Claimant refused to allow him to do this.

36. The Claimant says that her dismissal was planned months in advance by the Respondent. She claims that Mr Bell resigned as a director of Lion Lawns Limited in November 2020 and the company was dissolved in January 2021 so that Mr Nixon could take over her duties at the Respondent company, but that her dismissal was brought forward by her announcement of her pregnancy. Mr Nixon's evidence is that Mr Bell had no input into the decision to dissolve Lion Lawns Limited and he is not an employee of the Respondent company, although he works for an associated company which deals with the maintenance of lawns. We prefer the evidence of the Respondent as there is no evidence that there was a long-term plan by the Respondent to dismiss the Claimant in order for Mr Nixon to take her job. The uncontested evidence of the Respondent is that the Claimant's position has not been filled by another employee and that the remaining duties are carried out by Mr Bell and independent contractors.

37. On 29 September 2020 the Claimant returned her laptop and keys to the Respondent but she did not ask any questions or raise any concerns about the redundancy.

38. On 23 October 2020 the Respondent sent the final pay and P45 to the Claimant, as set out at page 485. On 29 October 2020 the Claimant sent an email to Ms Ramage complaining that her redundancy payment should not have been calculated on her weekly wage payable when she was working 4 days per week, but should have been calculated at the rate payable at 5 days per week because she "*didn't want to drop to 4 days*.". The Claimant also stated in this email that she thought she should have received more notice and that thought the dismissal "*might have been more to do with me having IVF which was no secret , Jon knew all about my hospital attendances and my transplantation."* A copy of that email can be seen at page 486.

39. Mr Bell wrote to the Claimant on 29 October 2020, as set out at page 492. The opening line of this message reads "*Hope you are well and I've just heard about the twins!!... great news for you both."* as he had seen the Claimant's announcement of her pregnancy on Facebook the previous day. He set out in this email an outline of the discussion he held with the Claimant prior to agreeing the reduction to her working week from 1 July 2020, that the redundancy was as a result of the restructuring of the business regardless of winning or losing work, that he was aware the Claimant was trying for a baby but that he had never been told about the Claimant undergoing IVF treatment and that he did not know about the pregnancy prior to the dismissal.

40. On 29 October 2020 the Claimant sent an email to Mr Bell, as set out on pages 491 and 492, querying her payments of notice pay and redundancy. The Claimant also said in this email "*it seems hard to imagine that you didn't know about my pregnancy, unless you thought maybe my appointment for IVF implantation meant something else."* The Claimant also alludes in this email to the Respondent company performing well financially and perhaps the reason for the dismissal not being redundancy.

41. It is common ground that the Respondent had miscalculated the Claimant's entitlement to notice pay and the shortfall of three weeks' pay was paid to the Claimant after the mistake had been identified.

42. In reply to questions asked by the Tribunal, the Claimant said she should have been forewarned of the redundancy by the Respondent and that the company should have

adopted a proper procedure. The Claimant also said that, had a proper procedure been used, she could have discussed the possibility of moving to a sales role or going on furlough. The Respondent evidence is that there were no other roles available within the company at all.

Submissions

43. The Claimant submits that Mr Bell knew about her pregnancy at the time of her dismissal, particularly as other people in the office knew about it and one of those people would have told Mr Bell. She submits that there was no redundancy situation because the Respondent company had been performing well financially, suggesting that the real reason for her dismissal was her pregnancy. The Claimant submits that the redundancy was a sham, that it was contrived to facilitate her dismissal and was hastened by the fact of her pregnancy. The Claimant also submits that she has been underpaid salary in the sum of £1000 per annum since 2017, which amounts to an unauthorised deduction of wages. Further, she submits that the financial loss of the company car, mobile phone and the loss of salary from reducing her working days from 5 to 4 days per week all amount to unauthorised deduction of wages because they were implemented without her consent. Mr Morgan submits that, although some of the claims of deduction from wages are out of time, it would be just and equitable to extend time.

44. The Respondent submits that the reason for the Claimant's dismissal was redundancy as the company had been undergoing restructuring and had been in a state of flux for some time, leading to a shift to a consultancy model through using independent contractors and, thus, reducing the need for employees. The Respondent submits that the dismissal was fair as the Claimant did not wish to attend a further consultation meeting and there were no alternatives available to the redundancy. The Respondent did not know about the Claimant's pregnancy at the time of the dismissal and, therefore, submits that the dismissal was not for reasons related to her pregnancy. The claim that the Respondent withdrew the company car a mobile telephone as acts of discrimination or harassment are without foundation because the Claimant was not pregnant at the time those decisions were made. The Respondent submits that the underpayment of notice pay has since been rectified and the Claimant has received her full entitlement. The Respondent submits that the Claimant was never awarded a salary in the sum of £22,000 per annum and therefore there has not been an underpayment of wages, but that, in any event, the Claimant has waived this breach by continuing to work. The Respondent submits that the Claimant agreed to reduce her working hours from five days per week to 4 days and specifically asked for the Friday as a nonworking day and, therefore, this does not amount to an unauthorised deduction of wages.

The law

45. Section 98 of the Employment Rights Act 1996 ("ERA") states at subparagraph 4

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –

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

46. Section 139 of the Employment Rights Act 1996 states at subparagraph 1

"For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
…
(b) the fact that the requirement of that business –
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
have ceased or diminished or are expected to cease or diminish."

47. With respect to the calculation of a redundancy payment, the "calculation date" is set out in section 226 of the Employment Rights Act 1996. This section provides that where an employee was dismissed with no notice, or with less than minimum statutory notice, the calculation date is the date on which the contract of employment ends

48. Section 99 of the Employment Rights Act 1996 states that

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –
(a) The reason or principal reason for the dismissal is of a prescribed kind, or
(b) The dismissal takes place in prescribed circumstances.
…
(3) A reason or set of circumstances prescribed under this section must relate to –
(a) pregnancy, childbirth or maternity"

49. Section 18 of the Equality Act 2010 states at sub paragraph 2 that

"A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
(a) Because of her pregnancy, or
(b) …"

50. Section 18 of the Equality Act 2010 states at sub paragraph 6

"The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, …"

51. In the case of Shittu v South London and Maudsley NHS Foundation Trust EA-2020-000575 the Employment Appeal Tribunal decided that it is only open to the ET to refuse to award any loss of earnings compensation, or to limit compensation to a period, as opposed to making a percentage deduction where the ET is 100% confident that dismissal would have occurred on the same day, or a later period if has identified.

52. In the case of James W Cook and Co (Wivenhoe) Ltd v Tipper and ors [1990] ICR 716 the Court of Appeal held that it is important to bear in mind that Tribunals are only concerned with whether the reason for the dismissal was redundancy and not with the economic or commercial reason for the redundancy itself. In the case of Moon and ors v Homeworthy Furniture (Northern) Ltd [1977] ICR 117 the Employment Appeal Tribunal ruled that there was no jurisdiction for the Tribunal to consider the reasonableness of the decision to create a redundancy situation where the employees sought to demonstrate that the Respondent's factory was viable when the Respondent had already decided that it was not economically viable.

Conclusions

53. Applying the relevant law to the facts, we find that Respondent did not know the Claimant was pregnant at the time of her dismissal because there no evidence the Claimant told the Respondent either verbally or in writing that she was pregnant at any stage prior to her dismissal. Mr Bell did not find out about the Claimant's pregnancy until he read the Claimant's Facebook post on 28 October 2020. The uncontested evidence from Mr Nixon was that he advised the Claimant to tell Mr Bell about her pregnancy in the hope that he might change his mind, therefore suggesting that Mr Bell had made his decision without knowledge of the Claimant's pregnancy. Therefore, we find that the reason for the Claimant's dismissal had nothing whatsoever to do with her pregnancy, nor was it the sole or principal reason for the Claimant's dismissal. In such circumstances, both the pregnancy-related automatic unfair dismissal and pregnancy discrimination claims are not well-founded and are dismissed because there can be no discrimination where the Respondent is not aware of Claimant's protected characteristic, i.e. pregnancy. It is impossible for the Respondent's decision-making process to be tainted with discrimination if the decision-maker does not know that the employee in question is pregnant. In this case, it appears that the Claimant has rewritten her version of events and memories with hindsight in the knowledge of her own pregnancy and she has attempted to present her version of events in order to achieve her desired outcome. We do not suggest that the Claimant has not been truthful, but we recognise the fallacy of memory in such situations.

54. In terms of the ordinary unfair dismissal claim, we find that the reason for the dismissal was redundancy because there was a diminution of work of a particular kind arising from a restructuring of the company and the consequent reduction in the Claimant's work following the contracting out of the majority of the services to third parties. The fact that some of the Claimant's duties may still exist and are carried out by the remaining employee or outsourced to independent contractors does not nullify the Respondent's reasons to dismiss the Claimant. Mr Morgan spent a considerable amount of time cross-examining the Respondent's witnesses on their annual accounts, seeking to establish that the Respondent was not in financial dire straits and could afford to continue employing the Claimant. Applying the guidance given in the cases of James W Cook and Co (Wivenhoe) Ltd and Moon, as set out above, it is not for this Tribunal to determine whether the Respondent company was experiencing financial difficulties or not when it made its decision to restructure its organisation and adopt a wholly outsourced method of working. There is no requirement under section 139 of the ERA for there to be a financial reason behind the cessation or diminution of work of a particular kind, nor is there any requirement for there to be a negative financial reason for the Respondent to

dismiss an employee for reasons related to redundancy. In the circumstances, we have not made any findings of fact about the financial performance of the Respondent company at the relevant time, particularly given that the Claimant was unable to establish an improper reason for her dismissal. In such circumstances, there is no requirement for this Tribunal to look behind the Respondent's decision to restructure the organisation.

55. We find that the Respondent is small employer with three employees at the time of the Claimant's dismissal, without a dedicated human resources department. Mr Bell took some legal advice before dismissing the Claimant and knew he had to hold consultation meetings with the Claimant and he wrote out the letter of dismissal, with some assistance from his solicitor, prior to the meeting on 28 September 2020. It was the Claimant who did not want to attend a second consultation meeting or work her notice. Although the letter of dismissal had already been written by Mr Bell, he would not have given it to the Claimant if she had indicated a willingness to attend a further consultation meeting. The process could have been better in that the Respondent should have warned the Claimant that her job was at risk of redundancy prior to the meeting, he should have taken notes at the meeting and provided a mechanism for appealing against the dismissal, although he did advance an invitation in the letter of dismissal for the Claimant to raise any questions with him. However, we find that the process, although not ideal, fell within the range of reasonable processes that might be adopted by an employer with three employees and we cannot say that no reasonable employer, with the size and administrative resources of the Respondent, would ever have followed such a process. In the circumstances we find that the Claimant's dismissal was fair and the ordinary unfair dismissal claim is not well-founded and is dismissed.

56. Even if we are wrong about the ordinary unfair dismissal claim and the fairness of the redundancy process, we find that, had the Claimant been warned about the proposed redundancy before she attended the consultation meeting, she would still have been dismissed on 28 September 2020 given her evidence to this Tribunal that she would have discussed an alternative sales role or furlough. We note that the Claimant's evidence was not that she should not have been dismissed at all or that her existing role would have continued, but that she should have been given an alternative role in sales, which did not exist. There is no requirement for the Respondent to create a role in a redundancy situation such as this and there was no evidence that the Respondent has any need for a sales employee. The decision as to whether an employee should have been placed on furlough or not would have been one for the Respondent to take, but that was never raised with this Respondent on 28 September 2020 or any time thereafter, plus it would still have resulted in a cost to the Respondent. In the circumstances, we find that there is a 100% chance that the Claimant would still have been dismissed on 28 September 2020 even if a different procedure had been adopted and applied by the Respondent, particularly as the Claimant did not want to attend any further consultation meetings and did not want to work her notice.

57. As set out in the findings of fact, above, the Claimant's correct contractual rate of pay was £21,000 per annum and she was paid this on a pro rata basis at the date of her dismissal. The redundancy payment is excluded from the definition of wages pursuant to section 27(2)(b) ERA and, therefore, a claim cannot be brought under section 13 ERA for the unauthorised deduction of wages. In terms of the entitlement to a redundancy payment as set out in section 162 ERA, the relevant date for the redundancy payment

calculation is equivalent to the effective date of termination, i.e. the date on which the notice expired. The Claimant was in receipt a pro-rata salary of £16,800 per annum because she was working four days per week and she has received a statutory redundancy payment based on this amount. Applying the law in respect of the calculation date, as set out in section 226 (5) ERA, the Claimant has received the correct amount of redundancy payment from the Respondent in accordance with section 162 ERA. The Claimant's claim for the unauthorised deduction of wages in respect of an underpayment of redundancy pay is not well-founded and is dismissed.

58. Similarly, the Claimant was entitled to notice pay calculated in accordance with section 226 ERA, are set out above. The Claimant has received notice pay calculated at one week's pay for each complete year of service at the rate of her annual salary of £16,800 and, in the circumstances, we find that she has received the correct amount of notice pay from the Respondent. Therefore, the Claimant's claim for the unauthorised deduction of wages in respect to an underpayment of notice pay pursuant to section 13 ERA is not well-founded and is dismissed.

59. We accept the submissions made by the Respondent that the withdrawal of the company car and mobile telephone does not meet the definition of wages, at set out in section 27 ERA 1996. The Claimant's claims in respect of the withdrawal of the company car and mobile telephone cannot be brought under section 13 of the ERA as they are excluded by virtue of section 27(5) ERA because they are benefits in kind and are not to be treated as wages. Therefore, the claims brought under section 13 ERA for the unauthorised deduction of wages in respect of these benefits is not well-founded and must be dismissed.

60. However, even if we are wrong about the claims relating to the car and mobile telephone, the time limit for submitting claims to the Employment Tribunal for the unauthorised deduction of wages is set out in section 23 ERA and can essentially be described as three months from the date of the unauthorised deduction, or the last deduction in a series of deductions, as extended by the ACAS early conciliation provisions. A claim should have been submitted to the Employment Tribunal within three months of the alleged deduction, which Mr Morgan has accepted in his closing submission. The test for extending time under section 23 ERA is not whether it is just and equitable, as Mr Morgan has stated in his closing submission, but rather whether it was reasonably practicable for the claim to be bought in time. The ET1 was submitted on 4 January 2021. No evidence has been presented by the Claimant in front of this Tribunal as to why it was not reasonably practicable for her to submit a claim within three months of the alleged deduction (March 2019 and March 2020 on the Claimant's case as set out in her further particulars) and, therefore, we find that it was reasonably practicable for her to have submitted the claims in time and, as such, the claims under section 13 ERA for the unauthorised deduction of wages in respect of the company car a mobile telephone fall to be dismissed as being out of time.

61. We note that neither the Claimant's ET1, further particulars of claim or the list of issues set out in the Case Management Order of 12 May 2021 identify the Claimant as making a claim of breach of contract in respect of the removal of the company car and mobile telephone. We accept the Respondent's submission that there is no breach of contract claim in front of us as it has not been pleaded in such terms: Qureshi v Victoria University

of Manchester [2001] ICR 863 and Anya v University of Oxford [2001] EWCA Civ 405 applied.

Employment Judge Arullendran

Date: 10 May 2022

Note: This has been a remote hearing which has not objected to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable, no-one requested the same and all the issues could be determined in a remote hearing.