Case Numbers: 1601431/2019
1601435/2019
1601439/2019
1601444/2019

EMPLOYMENT TRIBUNALS

Claimants:	(1) Mrs C Hart (2) Ms L Holbrook (3) Mrs E Holden (4) Ms N Lewis
Respondents:	(1) Mr Mohammed Salman (2) Ms Anam Rashid (3) Premier Supernews Limited
Heard at:	Remotely, by video **On:** 23 March 2022
Before:	Employment Judge S Moore Mr M Lewis Mr P Pendle

Representation
Claimants: Mr Cowley, CAB
First Respondent: Mr Howells, Counsel
Second and Third Respondent: No appearance

JUDGMENT

Employment Tribunals Rules of Procedure 2013 – Rule 21

1. The first respondent has subjected the claimants to unlawful sex discrimination contrary to Section 13 Equality Act 2010.

2. The first respondent has unfairly dismissed Ms Holbrook, Ms Holden and Ms Lewis contrary to Section 94 Employment Rights Act 1996.

3. The claimants claims for notice pay succeed.

4. The claimants claims for unpaid holiday pay fail and are dismissed.

5. The claimants claims for automatic unfair dismissal following a TUPE transfer fail and are dismissed.

6. Mrs C Hart's claim for pregnancy / maternity discrimination fails and is dismissed.

7. The first respondent is ordered to pay the claimant the amounts set out in the schedule below.

REASONS

Background and introduction

1. The background to this case is complex. The claims were presented on 15 August 2019. The claimants brought claims of unfair dismissal, sex discrimination and pregnancy / maternity discrimination (Mrs Hart only who also did not have sufficient continuity of service to bring an unfair dismissal claim). They were initially lodged against the first respondent with "Select Convenience" cited as the place of employment. There was confusion over the precise identity of any respondent and the Tribunal sought to clarify upon whom the claims should be served. Various applications were subsequently made to amend the claims so as to add notice pay and holiday pay claims in October 2019 and in December 2019 to add further respondents as well as a claim for automatic unfair dismissal under TUPE. Further confusion had arisen following a letter sent by Ms Rashid (second respondent) dated 6 December 2019 in which Ms Rashid informed the claimants that she was the new owner of Select Convenience and had bought the business in April 2019.

2. The claims were not served upon the first respondent until 20 September 2020. A preliminary hearing was listed for 7 December 2020 notice of which was sent at the same time as the notice of claims. No response was entered. The claims were re-served on the first respondent Mr Salman and the second and third respondent, Ms Rashid and Premier Supernews Ltd on 2 December 2020 by post to the Select Convenience store.

3. No response was entered by Mr Salman but on 7 December 2020 Mr Salman sent an email to the tribunal forwarding the notice of the preliminary hearing on the 7 December 2020. Mr Salman explained that he had attended that hearing and spoken with a judge and there was no-one else on the call. He stated he had explained to the judge that he moved outside the UK permanently and any further correspondence will be sent through email. He followed this email up with a further email on 30 December 2020 stating that he had not heard anything regarding that email.

4. The hearing on 7 December 2020 had been postponed by letter dated 2 December 2020 and there is no record of that hearing proceeding.

5. On 29 December 2020 a response was entered by M/s M&M Solicitors on behalf of Ms Rashid. The response denied the claims on the basis that she was not aware of the employees when she took over the business. She also

referred to the business being taken over by what is now the third respondent of which she was a director.

6. A preliminary hearing took place on the 11th March 2021 before Judge Jenkins. This recorded that there was no appearance or representation for the first respondent (Mr Salman). The record of the preliminary hearing records that Mr Howells of Counsel attended on behalf of Miss Rashid and Premier Supernews Limited.

7. Judge Jenkins granted the applications to amend. He directed that the claims be re-served on all of the respondents together with the two amendments and they would be given the usual 28 days to file a response. They were duly reserved on 28 March 2021 using the email address that Mr Salman had communicated on in his correspondence to the tribunal in December 2020. The claims were also served on Ms Rashid and Premier Supernews Ltd to M/s M&M solicitors' email address that had been set out in their response originally filed on 29 December 2020. The responses were due by 25 April 2021.

8. No responses were filed.

9. On 18 May 2021, M/s M&M solicitors sent a witness statement for Mr Salman to the claimant's representative copied to the employment tribunal. It should be noted that this was the same firm of solicitors that were on record as acting for Ms Rashid who was said to have taken over the business in December 2019. This was not accompanied by the prescribed ET3 response form as required by Rule 16 of the Employment Tribunal Rules of Procedure and was rejected on 16 June 2021.

10. On 21st of June 2021 M&M solicitors made an application under rule 20 to file "the defendants" response out of time. They did not specify for whom they were acting in this regard. This time the prescribed response form was provided along with further copy of the witness statement from Mr Salman in the form of a rider to the ET3. On 24 June 2021 M&M solicitors confirmed in writing they were instructed only by Mr Salman.

11. On 19 July 2021 Judge Jenkins refused the application for an extension of time because the reason that had been provided by M&M solicitors in their letter of 21 June 2021 was that the solicitor who had been dealing with the file had an issue with his heart on 4 June 2021 which had resulted in heart surgery. Judge Jenkins concluded that this did not provide an explanation for the failure to submit the response by the specified date of 25 April 2021.

12. In the meantime the claimants were directed to submit schedules of loss so that consideration could be given as to whether or not rule 21 judgments could be issued or whether hearing would be required.

13. On 19 August 2021, M&M solicitors sent to the Tribunal an appeal against Judge Jenkin's decision dated 19 July 2021 to refuse the application for an extension of time to present a response. It was not understood at that time that M&M solicitors had mistakenly sent their appeal to the Employment

Tribunal in Cardiff rather than the Employment Appeal Tribunal. The respondent was asked to update the tribunal regarding the progress of the appeal by 13 December 2021. A preliminary hearing was listed for 20 December 2021. On 10 December 2021 M&M solicitors wrote again to the Cardiff employment tribunal asking to hear from the tribunal in respect of the appeal.

14. A preliminary hearing took place on 20 December 2021 before Judge Howden Evans. It was recorded that Mr Howells attended for all of the respondents. It would appear that Mr Howells was under the impression that the appeal had been properly lodged at the EAT but had not yet been considered at the sift. Judge Howden- Evans listed a Rule 21 hearing to take place on 23 March 2022.

15. Judge Howden also made an order which we considered ourselves bound by that there would be no cross-examination of the witnesses by the respondents.

16. On 15 March 2022 the Tribunal in Cardiff received a forwarded email from the London Central employment tribunal from M&M solicitors again chasing an update on their appeal. On 17 March 2022 Judge Harfield directed that the respondent be informed that they needed to advise enquiries about their appeal to the EAT and not Cardiff Tribunal.

17. On 21 March 2022, a “no response received” letter was served on Ms Rashid and Premier Supernews Limited who by this time were noted as the second and third respondent to these proceedings. This was in fact in error as a response had been entered by those individuals on 29 December 2020. M&M solicitors were directed to confirm whether they continue to represent first respondent Mr Salman and whether they were representing any of the other respondents. On 22 March 2022 M&M solicitors made an application for a postponement of the hearing that was due to start on 23 March 2022 on the basis that they were acting for Mr Salman and had not received a response to their appeal and that the other respondents had not made any contact in respect of the hearing and or all parties being unaware of whether they would be in attendance of the hearing.

18. This application to postpone the hearing was refused.

<u>The hearing on 23 March 2022</u>

19. The tribunal had a bundle of documents prepared by the claimants representatives. We also heard witness evidence from all of the claimants and had before us schedules of loss. None of the respondents attended but Mr Howells was instructed to attend the hearing to represent the first respondent noting that he was unable to cross examine as per the direction of Judge Howden Evans. Mr Howells was permitted to make legal submissions.

20. An oral judgment was given in respect of liability. There was insufficient time to declare the amounts awarded Mr Howells requested written reasons.

Claims and issues

Mrs C Hart – 1601431/2019

21. Mrs Hart brought claims of direct sex discrimination, maternity discrimination, notice pay, holiday pay and automatic unfair dismissal following a TUPE transfer. Her ET1 was presented on 15 August 2019. Early conciliation commenced on the 26 June 2019 and the certificate was issued on 26 July 2019 .

Ms L Holbrook – 1601435/2019

22. Ms Holbrook brought claims of unfair dismissal, direct sex discrimination, notice pay, holiday pay and automatic unfair dismissal following a TUPE transfer. Her ET1 was presented on 15 August 2019. Early conciliation commenced on the 26 June 2019 and the certificate was issued on 26 July 2019.

Ms E Holden – 1601439/2019

23. Ms Holden brought claims of unfair dismissal, direct sex discrimination, notice pay, holiday pay and automatic unfair dismissal following a TUPE transfer. Her ET1 was presented on 15 August 2019. Early conciliation commenced on the 26 June 2019 and the certificate was issued on 26 July 2019.

Ms N Lewis – 1601444/2019

24. Ms Lewis brought claims of unfair dismissal, direct sex discrimination, notice pay, holiday pay and automatic unfair dismissal following a TUPE transfer. Her ET1 was presented on 15 August 2019. Early conciliation commenced on the 26 June 2019 and the certificate was issued on 26 July 2019.

Findings of fact

25. We made the following findings of fact on the balance of probabilities.

26. The claimants were all previously employed as Sales Assistants, except for Ms Holden, who was the Assistant Manager, at the Select Convenience store in Friars Walk shopping centre in Newport.

27. Ms Hart commenced employment on 1 April 2018. She worked 10 hours per week.

28. Ms Holden commenced employment on 1 October 2015 and worked 30 hours per week.

29. Ms Lewis commenced on 1 September 2016 and worked 16 hours per week.

30. Ms Holbrook commenced employment on 1 November 2015 and also worked 16 hours per week.

31. In December 2018 the first respondent, Mr Salman purchased the business from the previous employer of the claimants and their employment transferred to Mr Salman under the TUPE Regulations. We did not have sight of any contracts of employment or any documentation regarding the TUPE transfer.

32. At some point after the TUPE transfer, Mr Salman brought in his brother Mr Hassan to manage the shop. Elaine Holden's Assistant Manager duties were removed and undertaken by Mr Hassan from that point. Mr Salman also engaged a new male full-time employee in addition to the claimants and from this point all overtime was offered to that male employee.

33. In August 2018 Ms Hart commenced her maternity leave. Ms Hart never met Mr Salman prior to her dismissal. She visited the shop when in town to see her colleagues and met Mr Hassan. Before she was made redundant Ms Hart informed Ms Holden that her husband was changing shifts which would enable her to work whole days as they planned to split childcare.

34. In late February 2019 Mr Salman asked to meet with Ms Holden in Muffin Break, which was a coffee shop near the convenience store. He advised Ms Holden that she and the other claimants would be made redundant and instructed Ms Holden to relay that information to her colleagues. This was the extent of the consultation procedure.

35. Ms Holden and Ms Holbrook were subsequently sent letters signed by Mr Salman advising they were being made redundant on 15 March 2019. These contained details of a total amount they would receive but no breakdown. We did not see a letter for Ms Lewis but that does not mean one was not sent. The letters refer to meetings on 13 March 2019 however there were no such meetings except for the meeting with Ms Holden in Muffin Break as outlined above.

36. Ms Lewis's last date of employment was 27 March 2019. Ms Hart was informed her last day was 28 March 2019. Ms Holbrook and Ms Holden's last day was 3 April 2019.

37. Ms Holden's payslip dated 31 March 2019 has the name Premier Supernews Ltd printed at the top of the payslip. This was prior to the date Ms Rashid had told the Tribunal the TUPE transfer had taken place in her letter dated 6 December 2019. A search at Companies House revealed that Premier Supernews Ltd was incorporated on 4 February 2019. The only director listed for Premier Supernews Ltd is Mrs Anan Rashid. It remains unclear to this Tribunal what the relationship is between all of the respondents and why M& M Solicitors have been instructed by all three respondents at stages of these proceedings.

38. Since the claimants were dismissed, the male employee engaged to work full time has continued to work in the shop and in addition a further male employee was hired who also works full time hours.

39. On 14 May 2019 Ms Hart sent a text message to Mr Salman to ask where her P45 was. She was aware that her colleagues had received their P45's yet she had not done so. She sent later text advising that she could have worked full-time but had not been offered it. Mr Salman replied as follows:

"yeah I can imagine. Elaine was manager and she couldn't do weekends, so you can imagine if the store manager can't work on weekends and the new people keep everything in mind"

40. Ms Hart replied that she had met the manager (referring to Mr Hassan) and that he had been informed that she could work weekends and opens (referencing opening up shop). She pointed out that she used to work 12 hour shifts in the shop and covered all the manager duties when she was on holidays and had only changed contract when she was pregnant. She pointed out that she should have been called in for a meeting along with everyone else. Mr Salman replied that they (referencing apparent new owners) didn't want to continue with five staff otherwise he was happy to have transferred all of them to the next owner. He went on to say that none of the staff was willing to work more than 16 hours when he needed them to and that Elaine (Ms Holden) could not work weekends and that he had never met Ms Hart. He said he was "kind of struggling but the new management want to cut down expenses big-time and they only want full-time staff." Ms Hart responded that she had been told that she had not been told about full-time positions available and that was news to her. Mr Salman stated in a later text that he made "the girls redundant with good cause" and the new staff only want "5 or 6 days staff. No part timers".

41. All of the claimants' witness statements contained allegations that <u>Mr Salman</u> had been overheard making comments showing preferential treatment for male members of staff. The claimants were asked about this by the tribunal. Ms Hart accepted she had never heard the comments directly and she never worked with Mr Salman. Ms Holden also confirmed that she had not heard the comments directly and been told about them by Ms Lewis and Ms Holbrook. Ms Lewis's evidence was that Mr Hassan and the male employee in the shop had stated to Ms Lewis and Ms Holbrook that men were stronger, could work longer and could do more than they (female staff) were capable of. Ms Holbrook confirmed this account and stated that it had not been Mr Salman who had made the comments but Mr Hassan. She said that Mr Hassan said he preferred male staff as they worked harder and stronger but she could not remember anything else.

42. On 28 May 2019 grievance letters were sent on behalf of the claimants to Mr Salman by their representative. These grievances alleged that Mr Salman had hired further male members of staff on a full-time basis since the claimants made redundant. It also alleged that Mr Salman been overheard making comments showing preference to her email members of staff only. The letter asserted that discrimination on the grounds of sex had

been highlighted by dismissing all the female members of staff whilst retaining the male members of staff. No reply was ever received to those grievance letters.

43. In September 2019, Ms Hart was looking at Gumtree and noticed an advertisement for a convenience store in a prime location of Newport city centre. A copy of the advertisement was in the bundle and was dated 12 September 2019. The poster been made by someone called Salman which is of course the surname of the first respondent. The advert was accompanied by a photograph of the Friars walk shopping centre. The description was for shop sale £15,000 per week including lottery. It posted details of the lease, rents and rates and stated that a quick sale was wanted as the person posting the ad was relocating to Australia.

44. Within Gumtree there is an ability to press an SMS button to text the seller and when she did so it automatically went on her text exchange outlined above from Mr Salman. She therefore concluded that had not sold the shop at all in April 2019 and was only just trying to sell the shop at that time. We agree with Mrs Hart that this was the only plausible conclusion that could be reached in light of the advert ands the phone number being the same as Mr Salman's. We further find that the second respondent cannot have accurately represented the situation to the Tribunal when she wrote in December 2019 to advise she had taken over the business in April 2019 because the shop was still for sale by the first respondent in September 2019 and further, one of the payslips prior to the dismissals was from the third respondent.

45. We further find on the basis of this evidence that at no time has there been a TUPE transfer from Mr Salman to any other business individual and as such liability for these claims remains with Mr Salman.

46. The Tribunal heard no evidence on the holiday pay claims in any witness evidence.

<u>Findings in respect of remedy</u>

<u>Mrs C Hart</u>

47. Mrs Hart's rider to ET1 and witness statement confirmed she worked 10 hours per week and her gross pay was £78 per week. Her ET1 form under the wages section stated her gross pay was £125 per week, which was the figure in the schedule of loss. We have calculated her notice pay based on the pleaded claim and witness statement figure of £78 per week gross and find she was due one week's notice pay based on one complete year of service at the effective date of termination.

48. At the time of the hearing, Mrs Hart had not found alternative employment. The reason provided by the claimant was that she needed to find employment that fitted with a husbands rota at work. Mrs Hart felt she should have been considered fairly for any position available as she

previously worked very hard for the first respondent and the previous owner. Mrs Hart had spoken to the other claimants and been told about the comments that had been made about women not being able to work long hours. To Mrs Hart working in the shop was not only a job or a wage, she loved working there with the people she worked with. The claimants worked as a team and made sure the job got done with shifts being covered and they all loved going to work. Mrs Hart suffered from PTSD before getting her job due to a tragic personal bereavement. With the help and encouragement of her colleagues and contact with the customers her confidence went up and she was happy to get up and go to work every morning. All of the regular customers knew Mrs Hart and came into the shop daily or weekly. To never go back after maternity leave was not going to be an option for her and she could not wait to go back to work. Since she was dismissed her family has suffered financially and it has put a strain on her marriage. She has been unable to treat her children to weekend activities.

<u>Ms E Holden</u>

49. Ms Holden's gross monthly pay was £1070 with a gross weekly pay working out at £246.92. Her net weekly pay was £230.33. She received a payment of £1242.90 on termination. This was not broken down and we do not know how it was calculated. She was aged 59 years old and had completed 3 years of service at the effective date of termination. Her statutory redundancy pay should have been £1111.14.

50. Ms Holden was in receipt of jobseekers allowance for six months following her dismissal. She obtained alternative employment in October 2019 at an equivalent rate of her pay whilst employed by the respondent. Her loss of earnings was limited to 26 weeks.

51. When she was dismissed she felt very angry at the way she had been made redundant. She felt that her age worked against her when looking for other work. She still feels upset when she things about how she was made redundant but tries to get on with life.

<u>Ms L Holbrook</u>

52. Ms Holbrook's gross monthly pay was £501 which equated to a net weekly pay of £115.62. She received a redundancy payment of £375.00 as such no basic award is awarded.

53. She has been in receipt of universal credit since she was made redundant. Ms Holbrook found alternative employment on 8 April 2019 earning the same wage as she did with the respondent and she remains employed in this post. She felt angry and upset about her dismissal. She had worked there for three years and felt part of team and found it upsetting to have to leave the shop. The claimant didn't want to hear the comments she heard from Mr Hassan and the male employee and she still finds it hard to talk about those comments.

<u>Ms Lewis</u>

54. Ms Lewis worked 16 hours per week and commenced employment on 1 September 2016. Her gross weekly pay was £115.62. We did not have before us her redundancy letter but no basic award was sought in the schedule of loss and as such we have assumed she received a redundancy payment which negates her basic award.

55. Ms Lewis had suffered with anxiety and loss of confidence prior to obtaining the job at the select convenience store. When she was offered the job she was very happy to work there and met a lot of nice people resulting in her confidence starting to come back. When she was told she was being made redundant this caused her anxiety to get worse and she was placed on medication. Ms Lewis told the tribunal in her impact statement that she still does not understand what happened. Ms Lewis obtained another job from December 2020 but left in August 2021 due to an increase in her anxiety and confidence issues.

The Law

Unfair dismissal

56. Redundancy is a potentially fair reason for dismissal under S98 (2) ERA 1996.

57. The reasonableness requirements arising from S98 (4) ERA 1996 were set out in a redundancy case of **Williams v Compair Maxim Ltd [1982] IRLR 83** (per Browne-Wilkinson J) :

58. Reasonable employers will seek to act in accordance with the following principles:

- The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

- The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

- Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against

such things as attendance record, efficiency at the job, experience, or length of service.

- The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

- The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment.

59. Regarding consultation, the EAT in **Mugford v Midland Bank [1997] IRLR 208** summarised the position as follows:

- Where no consultation about redundancy has taken place with either the trade union or the employee the dismissal will normally be unfair, unless the industrial tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances of the case.

- Consultation with the trade union over selection criteria does not of itself release the employer from considering with the employee individually his being identified for redundancy.

- It will be a question of fact and degree for the industrial tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee on the grounds of redundancy.

Unauthorised deduction from wages

60. S13 ERA 1996 provides that an employer shall not make a deduction form wages of a worker unless authorised by statute or contract, or they have previously agreed in writing consent to the deduction. Holiday pay is defined as wages under S27.

61. S86 ERA 1996 sets out the right to be paid minimum notice to be given to terminate a contract of employment.

Direct Sex Discrimination

62. Section 13(1) of the Equality Act 2010 ("EQA 2010") provides that direct discrimination takes place where a person treats the claimant less favourably because of the protected characteristic of sex than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to

each case.

63. Under s136 EQA 2010, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in **Igen Ltd v Wong [2005] IRLR 258** regarding the burden of proof (in the context of cases under the then Sex discrimination Act 1975). The Tribunal must approach the question of burden of proof in two stages.

64. The first stage requires the complainant to prove facts from which the ET could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act if the complaint is not to be upheld. To discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex," (per Gibson LJ).

65. In **Nagarajan v London Regional Transport and others [1999] IRLR 572 HL** held that the Tribunal must consider the reason why the less favourable treatment has occurred. Or, in every case of direct discrimination the crucial question is why the Claimant received less favourable treatment.

66. The key to identifying the appropriate comparator is establishing the relevant "circumstances". In **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** this was expressed as follows by Lord Scott of Foscote:

"...the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

67. **Hewage v Grampian Heath Board [2012] IRLR 870 (SC)** endorsed the guidelines in **Madarassy v Nomura International [2007] IRLR 246 (CA**) concerning what evidence is required to shift the burden of proof. Facts of a difference in treatment in status and treatment are not sufficient material from which a Tribunal could conclude that on the balance of probabilities there has been unlawful discrimination; there must be other evidence.

Pregnancy and maternity discrimination cases – S18 EQA 2010

68. The relevant section for the purpose of Mrs Hart's claim is S18 (4) whereby Mrs Hart was on maternity leave at the relevant time.

Discrimination – remedy

69. S124 EQA 2010 provides:

> **(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).**
> **(2) The tribunal may—**
>
> > ***(a)*** **make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;**
> >
> > ***(b)*** **order the respondent to pay compensation to the complainant;**
> >
> > ***(c)*** **make an appropriate recommendation.**

Regulation 7 TUPE 2006 regulations

70. This provides that where either before or after a relevant transfer, any employee of the transfer roar or transferee is dismissed, that employee is to be treated for the purposes of part 10 of the 1996 act (unfair dismissal) is unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

Conclusions

Automatic Unfair dismissal – TUPE

71. We concluded that these claims do not succeed as we found there had not been a TUPE transfer from the first respondent to the second or third respondent as was evidenced by the Gumtree advertisement placed by Mr Salman in September 2019.

Unfair dismissal – Employment Rights Act 1996

72. We first of all considered whether the respondent has shown the reason for the dismissal was redundancy.

73. Having regard to the definition of dismissal by reason of redundancy under section 139 ERA 1996, we do not consider that the respondent has shown there was a redundancy situation. The business carried on operating the same hours and in the same location. There was no evidence before us that could lead us to conclude that work of a particular kind had diminished. At least one full-time employee continued to work at the store as well as Mr Hassan and a further male full time employee was taken on after the redundancies. These intentions were corroborated by Mr Salman himself in the text message exchange with Ms Hart albeit he tried to suggest it was the new owner's intentions when they must have been his own given no TUPE transfer took place.

74. We concluded that the reason the claimants were dismissed was that the respondent wanted to replace part-time female staff with full-time male employees. We specifically find that the respondent did not wish to employ

female staff in light of the comments that were made by Mr Hassan and the comments made by Mr Salman in the text exchange we have referred to above. This was not merely limited to part time staff but the gender of the staff and a clear preference for male staff was expressed. Stereotypical assumptions were made regarding women's ability to fulfil obligations and working patterns.

75. As we have found there was not a fair reason under S98 (2) ERA 1996, we are not obliged to go on to consider whether the respondent has acted reasonably under S98 (4) ERA 1996. Nonetheless we consider it appropriate to set out our conclusions in this regard. We have no hesitation in concluding the respondent did not act reasonably. There was no fair assessment of the selection pool. The male employees were not placed in the pool. There was no consultation with any of the claimants prior to the decision being reached. The only consultation that took place after the decision had orally been made was with Ms Holden at a meeting in a coffee shop following which Ms Holden was then instructed to relay that information to the other claimants. Whilst we acknowledge the size and administrative resources of the respondent, we do not consider that this was reasonable or adequate consultation. Furthermore, there was no consultation with any of the claimants as to whether they could change their hours to accommodate the purported business needs of the respondents. There were simply assumptions made because they were women working part-time and that it would be better somehow to have a full-time man employee covering those hours with no explanation before us as to why this would be the case. We had no evidence on search for alternative employment.

Notice pay

76. There was no evidence before us that the claimants were paid any notice pay. We therefore find, in accordance with Section 86 ERA 1996 that the claimants were entitled to be given the minimum notice as provided in this section following their dismissal for redundancy.

Mrs C Hart – pregnancy / maternity discrimination

77. It was common ground that the dismissal amounted to unfavourable treatment.

78. We have concluded that the unfavourable treatment was not because the claimant was exercising or seeking to exercise the right to maternity leave. We accepted Mr Howells' submission that she was one of four employees dismissed the other three of which were not on maternity leave and also dismissed. We have found that the claimants were dismissed as the respondent did not want to employ part time female staff. We also accepted Mr Howells submissions that her case had not been pleaded as less favourable treatment due to lack of consultation and further that the lack of consultation could not be due to maternity leave as all of the claimants had no consultation.

79. For these reasons we dismiss this claim.

Sex discrimination

80. Again it was common ground that the dismissal was capable of amounting to less favourable treatment.

81. Mr Howells submitted that no comparator had been proposed. We do not agree. The claims were pleaded citing male colleagues as the claimants were made redundant and replaced by male colleagues. The first respondent employed a male full time colleague as well as bringing in Mr Hassan as manager. They were not selected for redundancy. There was no evidence they were even considered for the selection pool.

82. We also consider that in addition, the claimant had proved facts from which we could conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the claimants. These facts were the comments made by Mr Salman about wanting full time staff and Mr Hassan and the male employee we have set out above. No explanation has been provided for those comments and it is difficult to see what explanation could have been put forward in any event.

83. For these reasons we find these claims succeed.

Holiday pay

84. These claims were not dealt with in the witness statements. There was an amount set out in the schedules of loss but this was limited to a number of days claimed. We had no evidence on the holiday year and how many days had been taken or what the shortfall was said to be. We concluded that the claimants had not proved the claims and they are dismissed.

Remedy

Unfair dismissal

85. None of the claimants sought a basic award on their schedule of loss.

86. In respect of the compensatory award we have concluded as follows.

87. We had no evidence of mitigation from any of the claimants. The burden of proof was on the respondent to show the claimants have failed to mitigate.

88. In respect of Ms Holbrook we make no compensatory award as she secured new employment on 8 April 2019 at the same level of wages as when employed by the respondent.

89. In respect of the other three claimants we have taken a broad brush approach and the knowledge of the Tribunal in respect of the retail employment marker at the time of the dismissal which was a year before

the pandemic. That market in South Wales and the Newport area was relatively buoyant. There are multiple large retail outlets and also multiple supermarkets in the vicinity. In the absence of any evidence in respect of mitigation we have concluded that a period of 16 weeks loss is the just and equitable amount having regard to the losses sustained by the claimants (in addition to their notice pay).

Loss of statutory rights

90. We aware each claimant the sum of two week's pay in respect of their loss of statutory rights.

Injury to feelings - Sex discrimination

91. The claimants sought injury to feelings at the top of the bottom Vento band of £9,100.

92. The lower Vento band at the time of dismissal was between £900 - £8,800.

93. We took into account that the claimants were subjected to a discriminatory dismissal as well as the comments made about female employees compared to male employees and the impact this has had on the claimants. There was cogent albeit limited evidence on the extent of the injury to feelings. We concluded that an appropriate level of award for injury to feelings was £6,500.

Notice pay

94. The amounts are calculated and set out in the schedule below.

ACAS Uplift

95. When we gave our oral judgment we awarded a 10% uplift for failing to follow the Acas Code of Practice on Disciplinary and Grievance Procedures. Upon producing these written reasons we reconsider of our own volition under Rule 70, this particular section of the Judgment as the Code does not apply to redundancy dismissals. We therefore revoke the award of a 10% uplift.

Schedule of remedy – the first respondent is ordered to pay the claimants the following sums

Claim No	Name of claimant	Claim	Type of award	Amount the first respondent is ordered to pay
1601431/2019	Mrs C Hart	Notice pay		£78 gross
		Sex discrimination	Loss of earnings (16 weeks pay)	£1248.00 gross
			Injury to feelings	£6500
			Interest on injury to feelings	£1618.41
Grand Total				**£9444.41**
1601435/2019	Ms L Holbrook[1]	Unfair dismissal		£0[2]
		Loss of statutory rights		£231.24
		Notice Pay		£346.86 gross
		Sex discrimination	Injury to feelings	£6500
			Interest on injury to feelings	£1608.43
Grand Total				**£8686.53**
1601439/2019	Ms E Holden	Unfair dismissal	Compensatory award (16 weeks pay)	£3950.72 gross
			Loss of statutory rights	£493.84
		Notice pay		£740.76 gross
		Sex discrimination	Injury to feelings	£6500
			Interest on injury to feelings	£1608.43
Total				£13,293.95
Minus overpayment of redundancy pay (£1242.90-£1111.14)				-£130.86
Grand total				**£13,163.09**

Ms Holbrook received a statutory redundancy payment negating any basic award and no compensatory award is made for reasons set out in paragraph 88 above.

Claim No	Name of Claimant	Claim	Type of award	Amount the first respondent is ordered to pay
1601444/2019	Ms N Lewis	Unfair dismissal	Compensatory award (16 weeks @ £115.62)	£1849.92
			Loss of statutory rights	£231.24
		Notice pay		£231.24 gross
		Sex discrimination	Injury to feelings	£6500
			Interest on injury to feelings	£1618.41
Grand Total				£10,430.81

Employment Judge S Moore

Date: 5 May 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON 9 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche