EMPLOYMENT TRIBUNALS

Claimant **Respondent**

1. **Ms Rebecca Smith** **v** **Yours Clothing Limited**
2. **Ms Emma Beaver**

Heard at: Bury St Edmunds **On**: 31 January, 1 & 2 February, 24 & 25 May 2022

Before: Employment Judge K J Palmer
Members: Mrs C Smith
Mrs E Deen

Appearances
For the Claimant: Mr L Pike (solicitor)
For the Respondent: Mr C Milson (counsel)

JUDGMENT

1. First Claimant

 1.1. The First Claimant's claim for unfair dismissal fails and is dismissed.

 1.2. The first claimant's claim for a protective award pursuant to s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 fails and is dismissed.

2. Second Claimant

 2.1. The Second Claimant's claim of unfair dismissal fails and is dismissed.

 2.2. The Second Claimant's claim for pregnancy and maternity discrimination under s.18 of the Equality Act 2010 fails and is dismissed.

 2.3. The Second Claimant's claim for unlawful detriment contrary to s.47C of the Employment Rights Act 1996 fails and is dismissed.

REASONS

1. This matter came before us listed for a 3 day hearing on 31 January, 1 and 2 February 2022. We did not have the benefit of either of the files before us but we are grateful to the parties for the provision of a bundle and a bundle of witness statements. The claims had been consolidated by Employment Judge Ord on 25 March 2021 on the grounds that they appeared to give rise to common or related issues of fact and law.

The claim of Ms Smith

2. The claim of Ms Smith was presented to the Watford Employment Tribunal on 29 December 2020. She was at that time, and remains, represented by Mr Liam Pike of PJH Law who drafted the ET1. In her ET1 she pursues claims for unfair dismissal pursuant to her dismissal purportedly by reason of redundancy on the 30 September 2020 and a claim for a protective award under s.189 of the Trade Union and Labour Relations (Consolidation) Act 1992 for an alleged failure of the respondents to effectively consult under the provisions of s.188 of that Act.

The second claimant Ms Emma Beaver

3. Ms Beaver presented a claim to the Watford Employment Tribunal on 29 December 2020. In it she pursues claims for unfair dismissal, pursuant to her dismissal on 30 September 2020, purportedly by reason of redundancy and a claim for pregnancy and maternity discrimination under s.18 of the Equality Act 2010 and a further claim for an unlawful detriment contrary to s.47C of the Employment Rights Act 1996.

Case management and issues

4. Whilst these cases were consolidated somewhat, unusually, the cases were not subject to any case management prior to the full merits hearing coming before us. Accordingly, it was necessary for us to case management the claim both at the outset of this hearing and during the course of it.

5. It must be remembered that a claim can only proceed on the basis of the pleading. There has been no case management of the claimants's claims throughout the life of these claims up to this point. Both parties claim unfair dismissal and they claim that their dismissal on 30 September 2020, which the respondents argue was a fair dismissal by reason of redundancy was, in fact, unfair. That part of their claims is clear. The tribunal heard evidence and we will refer to the law in due course in reaching a judgment on this claim.

Ms Smith

6. Ms Smith, who was elected as an employee representative, pursuant to the respondent's efforts to comply with s.188 of TULRCA 1992, also pursues a claim for a protective award under s.189 on the basis of the respondent's alleged failure to comply with s.188.

7. Ms Smith's pleading, drafted by her professional representative, argues that there has been such a failure but is incomplete in that it does not specify precisely the nature of her claim for a protective awards. It emerged at the end of this hearing that Mr Pike, on behalf of Ms Smith, was under the impression that Ms Smith's claim was a claim for a protective award for all of those individuals who were dismissed at the same time as her by reason of redundancy and in respect of which she acted as one of the nominated employee representatives under s.188. However, her ET1 is entirely silent on this point and does not even venture clearly that she is pursuing such a

claim on her own behalf. This is precisely the kind of thing that might originally have been dealt with at case management stage.

8. At the very end of submissions we then sought further submissions from Mr Pike and Mr Milsom as to what precisely was the nature of Ms Smith's protective award claim what we had to reach a judgment on. Mr Pike argued that it was implicit that by referring to Ms Smith as having been nominated as a representative that she must be claiming for all those dismissed which we understand number some 39. Mr Milsom on the other hand argues that this cannot possibly be the case. No claim is ventured for anyone other than Ms Smith herself. He said it would be an odd circumstance indeed were individuals to be included in a claim before this tribunal who had no knowledge that they were so included. We find ourselves ad idem with Mr Milsom's argument that nowhere in her ET1 has Ms Smith ventured a protective award claim for anyone other than herself. It would be usual in such circumstances for the other individuals to be referred to and named. That has not happened here. She does not even mention Ms Beaver whose claim hers is now consolidated with. It seems to us that at an early stage in the proceedings it may have been possible for Mr Pike to seek leave to amend that part of Ms Smith's ET1 to include claims for a protective award on behalf of the 39 including Ms Beaver. However, that did not happen. It might even have been possible for Mr Pike to venture such an application at the outset of these proceedings. He did not. In fact, he did not even seek to amend her ET1 at the very end of the proceedings when the matter was addressed, likely due to the fact that it would have been very unlikely to succeed. Therefore we can only conclude that Ms Smith's protective award claim is only live in respect of herself and no one else.

Ms Beaver

9. Ms Beaver pursues an unfair dismissal claim that arises out of her dismissal on 30 September 2020 purportedly by reason of redundancy. She argues that her dismissal was unfair.

10. She also pursues to further claims which are briefly put in her ET1.

Pregnancy and maternity discrimination s.18 Equality ACT 2010

11. Ms Beaver pursues a claim that she was discriminated against on the grounds of her pregnancy in that during the last few months of her pregnancy she was given little work. She says that she was told by a colleague that the owner of the business did not trust buyers who were pregnant as they would not be in the business to see how their product performed. She also argues that the redundancy scoring disadvantaged her and that that was related to her pregnancy because the scoring was done in the last 12 months of the claimant's time in the business prior to her maternity leave taking affect. She said that would therefore have naturally disadvantaged her the period should have been a much longer period stretching back before then. She said she was prevented from carrying out her full duties due to pregnancy discrimination.

12. Unlawful detriment contrary to s.47C of the Employment Rights Act 1996. Ms Beaver also pursues a claim for an unlawful detriment contrary to s.47C of the Employment Rights Act 1996. Her maternity leave commenced on 28 March 2019 and she was due to return to work on 6 April 2020. She said that she was not permitted to return to work and was selected for furlough because she had taken maternity leave.

13. She also argued that she suffered a detriment in that the redundancy scoring process disadvantaged her as she had exercised her right under s.57A of the Employment Rights Act 1996 to take time off for her dependent and that that one day had been counted against her in the computation of the absentee criteria in the scoring process for redundancy and that that amounted therefore to an unlawful detriment contrary to 47C of the Employment Rights Act 1996.

14. We heard evidence over the course of the first three days of this hearing from a variety of witnesses. We heard evidence from both claimants, from Kay Clay on behalf of the respondent who is HR and Training Director at the respondent. We heard evidence from Anthony Talbot at the respondent who is the Trading Director. We heard evidence from Beth Watson at the respondent who is the Product Support and Supply Chain Director. We heard evidence from Anna Heather at the respondent who is the Finance Director. Anthony Talbot and Beth Watson were the individuals who scored the claimants during the redundancy process.

15. It became obvious during the course of the first three days that three days were not going to be enough to hear this matter and, accordingly, two further days were listed. In that event, the fourth day was taken up entirely with Mr Milsom and Mr Pike's submissions and the fifth day was for the tribunal to deliberate and reach the judgement

Findings of fact

16. Over the course of this lengthy hearing we heard a great deal of evidence and there was considerable cross examination. We do not propose to recount every single aspect of the evidence heard only that which we consider relevant to the issues before us and we make findings of fact on that basis.

17. The first and second respondents began employment as buyers for the respondent on 12 January 2015 and 23 May 2015 respectively.

18. The respondent company is a large retailer of clothing whose principal income is derived from shops. The claimants were part of the Buyer Team which comprised a number of employees, some board members with buying responsibilities, eight buyers, four junior buyers and five buying assistants. The respondent, in these proceedings, categorised the eight buyers into two categories, four specialist buyers, four category buyers. They say the claimants were two of the four category buyers. The argue that there were discreet specialisms within the buyer responsibilities.

The Covid pandemic

19. As we all know, the world faced an unprecedented difficulty in the early part of 2020 and it must be remembered that that time in March 2020 when the UK went into its first lockdown, owners of businesses were facing what was considered to be potentially a complete failure of their businesses resulting in liquidation and mass redundancies. At that time, no one knew what the future would hold and in such exceptional circumstances many businesses had to take drastic action. That, to an extent, was ameliorated by the corona virus job retention scheme introduced by the government in the first lockdown. But, of course, some businesses still suffered grievously. Most particularly those engaged in hospitality and retail. The Respondents are in retail and whilst they availed themselves of the corona virus job retention scheme in placing of a great many individuals on furlough, they had to face the possibility of total business failure as throughout the business as a whole

20. it was necessary for the respondents to close 40 stores and make 432 redundancies. This problem was compounded by the fact that clothing was regarded as non-essential retail whereas supermarkets, who also sell clothing, benefited from being labelled as "essential" retail and there were therefore able to continue to sell clothing. By July 2020 the respondent had sustained an estimated £22 million hit in sales. Accordingly, all departments were asked to consider headcount in the course of a drastic review in April 2020.

21. They deemed it necessary and appropriate to make redundancies in buying and in the department in which the claimants were employed. The exercise was undertaken by the respondent's Human Resources Department in respect of which we heard from Kay Clay and in the case of these claimants the scoring was undertaken by Mr Talbot and Mr Watson from whom we heard evidence. The respondents resolved to pool four individuals in the Buyer Team of which one would be retained and three dismissed by reason of redundancy. The first and second claimants were part of that pool. Others in the Buyer Team were not included in the pool and it is argued by the claimants in this matter that in fact three others should have been included. They are Susanne Robinson, who was a Range Co-ordination Manager and was also a board member who was paid considerably more than the claimants, Bethany Hellwell, a Junior Buyer on a significantly lower salary than the claimants, and Stefanie Stott, Head of Buying for Yours London.

22. It is a significant tenet of the claimants' claims that the pool should have been a pool of seven and not four and that that is a significant factor in their unfair dismissal.

23. The respondents argue that these three performed different roles. Ms Robinson was considerably senior and served as a board member. She was on a much higher salary. They say Ms Hellwell was very junior and was on a salary approximately half of that of the claimants and performed a different function. They say Ms Stott performed a role specific to customers and was not what they described as a Category Buyer.

24. It may be worth mentioning that prior to the covid 19 pandemic the company traded from 166 stores in the UK, Republic of Ireland and Germany and derived approximately 60% of its sales from people going into stores and buying products. The remaining sales were derived mainly from online orders fulfilled by the company's distribution centre in Peterborough. Prior to the pandemic the company employed approximately 1,300 people of which 1,000 were in store based roles. The claimants had been amongst 170 people across the head office and warehouse who had been placed on furlough form 18 March 2020. The second claimant had been due to return from maternity leave in April 2020. The pool of four alighted upon were the claimants, Rhoen Nicholson and Nicki Bagshaw, all of whom, in these proceedings, have been described by the respondent as Category Buyers. Category Buyers are buyers who bought a specific category of product in large quantities up to six months in advance predominantly for stores. The other four buyers described by the respondent in these proceedings as Specialist Buyers were, according to the respondent, focussed somewhat differently on specific customer type rather than a category of product and involved buying smaller quantities of product mainly for slae online.

25. This is how the pool of four was determined according to the respondent. The claimants argue that there was much greater flexibility amongst the buyers and the pool should have included the three mentioned above. The respondent's case is that the respondent concentrated on the type of work that was no longer needed or that the company needed less of under a proposed new structure. They say that Bethany and Stefanie did not buy a specific category of product but rather they bought a whole range of product for a specific market and the predominantly bought for online sale rather than stores.

26. The claimants argue that this is an artificial distinction.

27. The process commenced on 11 May 2020. All affected employees, including the claimants, were emailed. The email attached a letter informing the employees that they were at risk of redundancy. An announcement was also attached. They were invited to attend an initial individual consultation meeting on 20 May. A detailed briefing statement explaining the nature of the restructure and why the company was proposing to make it, and a timetable for what happens next was sent through by Andrew Killingsworth, the CEO and owner of the respondent. On 13 May a detailed email was sent through by Kay Clay to all affected employees giving a full explanation as to the need for collective consultation and explaining the process for election of employee representatives.

28. On 13 May, Emma Beaver sent through a detailed email raising various questions. There were subsequently answered by Kay Clay. The first claimant volunteered to be an employee representative and communicated this fact to Kay Clay on 11 May. She was duly appointed and informed of this fact by email on 14 May. Four employee representatives were appointed. It was explained to all employees that group consultation meetings would take place and run in parallel with individual consultation meetings. The first group consultation meeting took place by video link on 18 May. The tribunal have

before it detailed notes of that meeting. Present on that meeting by video link was Kay Clay, Lee Porter, Commercial Director, Anthony Talbot, Trading Director and Anna Heather, Finance Director. The various appointed representatives, including the first claimant, also attended. A fact sheet was sent to all affected employees on 19 May.

29. First individual consultation meetings took place on 20 May. Both of the claimants were involved in such meetings. The tribunal had before it detailed notes of both the collective consultation meeting and the individual meetings which took place on 18 and 20 May respectively. Selection criteria were discussed at the individual meetings and at the collective consultation meeting.

30. At the individual meeting the second claimant queried who would be undertaking the scoring and it was explained that two individuals would score against the selection criteria with the scores being aggregated. There was a discussion with the second claimant that as Anthony Talbot was likely to be one of the scorers he would have to seek feedback from those that knew Emma in the business because she had been out of the business when Anthony Talbot joined and he did not know her personally. The second claimant seemed content that Mr Talbot seek detailed feedback prior to scoring her from managers with whom she had worked.

31. Both collective and individual consultation continued in that on 22 May Kay Clay emailed all of affected employees and all representatives attaching copies of documentation received from the Department of Work and Pensions regarding the support they could provide. She reminded the employees and the four representatives that if anyone wished to put forward any proposals or considerations they should.

32. Emma Beaver did volunteer an alternative selection criteria which she sent to the employee representatives. This was on 26 May, one day before the second group consultation meeting with those appointees. Various queries were raised at that collective consultation meeting and these were answered. Notes of the meeting were then subsequently distributed, A Q & A document was prepared and distributed subsequent to the meeting.

33. Queries about the selection criteria and how they would be scored and assessed were responded to and recorded in the notes of the meeting and in the Q & A document. After the group meeting a PowerPoint presentation was also circulated to affected employees together with the meeting note sand the Q & A document.

34. The next, and as it turned out, final collective consultation meeting took place on 1 June 2020. The second claimant sent a detailed list of questions to Kay Clay querying a number of issues including the pool that she had been placed in and queried why that pool was not larger. She also raised questions about how being on maternity leave would affect her. All of these questions were answered in detail by Kay Clay. Kay Clay also sent a further detailed letter to the first claimant explaining in detail how the selection criteria would be applied and scored.

35. A further group consultation meeting took pace with the representatives on 1 June. Notes and documents arising from the meeting were circulated to affected employees. Further queries were raised by the first claimant and these were responded to by Kay Clay on the same day. The second claimant also raised further queries ands these were also responded to by Kay Clay.

36. The tribunal has reviewed the document and the process engaged above. The tribunal accepts that in an ideal world many of these meetings, if indeed not all, would have bene conducted on a face-to-face basis. Responses and answers would not have been provided by email or letter. However, it must be remembered that at this time the country was in a national lockdown. We consider that the respondent conducted a detailed consultation and engaged with both the representatives on a collective basis and the claimants on an individual basis to an exemplary level. Queries that were raised were answered with great speed. No subject was off the discussion agenda. Employees and representatives alike were encouraged to make suggestions,. It is true that not all suggestions were accepted or put into practice. However, some certainly were.

37. It must be remembered that the respondent and indeed many other businesses at that time were facing an extraordinary set of circumstances the like of which businesses had not experienced before. We do consider that in the circumstances the respondent did everything they possibly could to engage with the employees where were affected by the proposed redundancies. In their evidence the claimant argue that more detailed consultation could have taken place but it must be remembered that a business decision taken by an employer should be discussed with those affected employees and the method and processes for selection need to be discussed by way of consultation which they were. However, ultimately, it is a decision for the business and those running it. Often a commercial business decision can be a bad one. Tribunals will not seek to look behind the commercial considerations for a redundancy decision unless there is an obvious reason to do so such as it is a sham to mask other reasons for a dismissal. It must be remembered that in the vast majority of cases suggestions put forward by employees during the consultation process are not taken up by the employer. This does not mean that there has been a failure to consult. If act, in this case at that time on furlough was extended and the dismissal date was pushed back.

38. The respondents then conducted the scoring in the pool and Kay Clay wrote to both claimants on 3 June indicating that the scoring would proceed. This letter explained that once complete individual consultation would continue if required. The email also included further details once again about the selection criteria and the scoring. The scoring was undertaken by Anthony Talbot and Beth Watson separately with the scores being combined to create an average. Ultimately, Rowan Nicholson received the highest score. Despite them having scored separately Rowan Nicholson finished top of both Anthony Talbot and Beth Watson scoring.

39. Meetings were then arranged with the claimants and they were invited to comment on the scoring and raise issuers within 48 hours. Both did so. They

challenged the scoring and these challenges were reviewed by the scorers who decided not to amend their scores.

40. Thereafter, a notice of redundancy was issued on 12 June. These letters gave notice of termination to take effect on 30 September 2020. Both claimants were given the opportunity of appealing against the decision.

41. We heard evidence from Kay Clay that during the notice period the respondent fulfilled their duty to consider alternative roles by keeping both claimants up to date with vacancies within the business both by vacancies being posted on the company website or being specifically informed about them. She said that the claimants were given the opportunity of applying for any vacancies either through the recruitment site or by emailing the HR Team.

42. In this hearing we have heard much from the first claimant that she could have fulfilled a role as a Footwear Buyer pursuant to the retirement of the respondent's foot buyer in May 2020. Kay Clay's evidence is that before seeking an external candidate for that role the respondent check whether anyone internally had the requite skills to fulfil it and they determined that no one did, including the first claimant. The first claimant had a modicum of experience in footwear buying but it is the respondent's position that they needed someone with at least 10 years' experience due to the specialist nature of the job and the regulatory requirements in respect of footwear which accompany such a role. There was also a merchandising role for an ecommerce training manager which was not brought to the attention of the claimants until 8 September when Kay Clay emailed them both pointing out both the footwear buyers role and the ecommerce training manager role.

43. Both claimants indicated an interest some nine days later on 17 September, by which time the roles had been filled.

44. After dismissal in November, the second claimant requested that she be re-employed by the respondent and placed on furlough leave. In fact, it is the claimants case in respect of both first and second claimants that they should have been retained and kept on furlough irrespective of the redundancy decision for as long as possible. The respondent say that this would have been a misuse of the furlough scheme and that whilst the intention of the furlough scheme was to retain employees in the workplace, it should not be used as a substitute to keep employees in position where there was no longer a requirement for them to perform their role.

The second claimant's claims under s.18 for maternity and pregnancy discrimination and for unlawful detriment contrary to s.47C of the Employment Rights Act 1996.

45. We have outlined the nature of these claims above in so far as they appear in the pleadings. Whilst they are not properly pleaded and are incomplete it is necessary to make some findings of fact in respect of them.

<u>Pregnancy and maternity discrimination</u>

46. In her pleading, the second claimant essentially raises three points in support of this aspect of her claim.

    46.1 The first is that she says that she was given little work during the last few months of her pregnancy and that there was no explanation as to why.

    46.2 The second is that she was told verbally by another colleague that the owner of the business did not trust buyers who were pregnant as they would not be in the business to see how their product performed as they would be on maternity leave.

    46.3 The third is that she was discriminated against on the basis that the scoring covered the period of the 12 months preceding the point of scoring determination which covered the claimant's time in the business prior to maternity leave meaning that she was scored over a period where she was prevented from carrying out other full duties due to pregnancy discrimination. She expands upon this in her witness statement and it is in the witness statement that much of her claim in this respect is advanced for the first time.

47. The respondents direct us to some context with respect to the second claimant's claim in this respect. Mr Milsom tells us that over 90% of the workforce at the respondent are female, that the second claimant successfully returned from her first maternity leave in February 2017 and made a part-time working request which was accommodated without issue and she was in fact given enhanced duties which she welcomed.

48. He points out that prior to her witness statement the second claimant gave no suggestion of adverse treatment in response to maternity leave either during her first maternity leave or in the intervening period before the announcement of her second period of maternity leave on 20 November 2018. He says none of the incidents proffered for the first time in her witness statement at paragraph 18 to 22, were put to the respondent's witnesses. He refers us to page 162 of the bundle and her communications with the Chief Executive and owner Andrew Killingsworth. In particular, the second claimant's email of 29 March 2019 where to say the least she is glowing about the treatment that she has had at the respondent and in her praise of Mr Killingsworth to the extent that she even says:

> "Without wanting to come across as an arse kisser I can say very genuinely you are an absolute pleasure to work for, your enthusiasm for the company is infectious and your management style is very motivating."

49. It should be remembered that this was an email sent as she was off on the very maternity leave she complains caused her to be the subject of discrimination at the hands of Mr Killingsworth.

50. When asked why points concerning this aspect of her claim were not put to the respondent's witnesses Mr Pike said that it was because the allegations were against Mr Killingsworth and he had not been called to give evidence.

51. In the ultimate redundancy process only 5 of 61 individuals on maternity leave were made redundant whether compulsory or voluntarily. The remainder returned to work.

52. In her witness statement the second claimant expands upon those claims between paragraphs 18 and 23.

53. The tribunal has carefully considered this evidence and on balance we are not swayed by the evidence of the second claimant in her witness statement and under cross examination in this respect, We think the email she sent to Mr Killingsworth is very telling. She raised no complaint until her claim was presented and even then only in the most basic and perfunctory terms. It was only when she produced her witness statement that these basic allegations were enlarged upon. None of the allegations were put to the respondent's witnesses. We believe therefore on the balance of probabilities the weight of evidence was in the respondent's favour. We do not accept the claimant's evidence in this respect. We do accept the scoring was done to include the 12 months preceding her departure on maternity leave but we deal with this later in our conclusions.

<u>Unlawful detriment contrary to s.47C Employment Rights Act 1996</u>.

54. The claim here falls into three categories and was once again put in most perfunctorily terms in the ET1 and has not been expanded upon until the witness statement. The second claimant argues that she was not permitted to return for work and was selected for furlough because she had taken maternity leave. She says she was scored down in the redundancy scoring process because she exercised her right under s.57A to take time off for her dependent and that this is reflected in the fact where absences were scored, she was marked down for taking a day off on 11 December 2018 which is detailed as time off with dependents.

55. Other than the second claimant's assertion we have seen no evidence to suggest that she was selected for furlough on the basis of her having taken maternity leave. On balance, therefore, we do not consider that this has been made out.

56. The tribunal accepts that reference to time off with dependent was referred to in the scoring of both Beth Watson and Anthony Talbot under the criteria of attendance records. However, it is a fact that this was not put to them in evidence. We deal with this later in our analysis of the law and conclusions.

57. Post dismissal both employees pursued an appeal. That appeal was heard by Anne Heather form whom we heard evidence. We consider that Ms Heather gave her evidence concisely and clearly and we consider that a proper and detailed appeals process was conducted which effectively amounted to a re-hearing of the issues. Anne Heather considered the self-same points that had been raised previously prior to the dismissal taking

effect that is, the pooling, the scoring, the consultation, in the second claimant's case a maternity discrimination allegation and other aspects not previously raised. After careful consideration she decided that none of the allegations could be upheld and she wrote a detailed letter setting out her conclusions on 14 July 2020 to the second claimant and letter had been sent to the first claimant on the same day dealing with her allegations of appeal. We regard the appeal to have been well conducted and considered in detail. We are not going to set out each and every term of the appeal and the response.

Submissions

58. We received extensive written submissions from both Mr Pike on behalf of the claimants and Mr Milson on behalf of the respondent. These ran to some 30 pages. We then had a full day oral submissions on top. We do not propose to repeat those submission in detail save where we have already mentioned them.

The law

<u>Unfair dismissal claims of the first and second respondent.</u>

59. Claims for unfair dismissal fall under s.98 of the Employment Rights |Act 1996. It states as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> . . . .

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is 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."

60. In this case the respondent argues that the reason for dismissal was redundancy and that under 98(4) the dismissal was reasonable and therefore fair.

61. Ultimately, in all unfair dismissal claims, the determination under 98(4) is subject to guidance set out in authorities. In particular, the case of Iceland Frozen Food v Jones [1983] ICR 17 which reminds the tribunal that in assessing fairness under 98(4) the tribunal must consider whether the decision to dismiss an employee fell within the band of reasonable responses of an employer to the circumstance with which it was faced. Whilst that is a principle taken from a conduct case, the concept still applies in redundancy terms.

62. However, further guidance on an employer's conduct during a redundancy process feeds into the decision as to whether a decision to dismiss was ultimately reasonable. For that we must look at specifically those cases dealing with redundancy.

63. The leading case with respect to redundancy dismissals is the case of Williams and others v Compair Maxam Ltd [1982] ICR 156. Whilst this has been subject to some refinement it remains the leading case. It tells us that the dismissal must lay within the range of conduct which a reasonable employer could have adopted. It sets out guidance which is not to be treated as a checklist or tick box exercise but suggests a number of guidelines. There are as follows:

63.1 Early warning: The employer should give as much warning as possible about the redundancies. This should allow the employer to inform them of all the relevant facts and consider alternative solutions.

63.2 Consultation with a union: If there is a union the employer should ensure that there is a consultation with the union.

63.3 Fair selection criteria: If there isn't a union the employer should attempt to establish criteria for selection which do not depend solely upon the opinion of the person making the selection. These criteria should be able to be judged against things such as attendance record, efficiency, disciplinary record, experience etc.

63.4 Fair selection in accordance with criteria: Once the employer has decided upon the fair selection criteria the employer then needs to ensure that selection is made in accordance with these criteria.

63.5 Consideration of alternative employment: The employer will seek to see if instead of making employees redundant he could offer alternative employment to them instead.

64. There is much authority which guides employment tribunals on being too over analytical when considering redundancy procedures. The case of Buchanan v Tilcon Limited [1983] IRLR 417 tells us that where an employee makes a general complaint of unfair selection the employer does not have to prove to a tribunal that its grading of employees was carried out accurately. The Employment Appeal Tribunal ("EAT") held that where an employee's complaint is unfair selection all that the employer has to prove is that the method of selection was fair in general terms and that it was reasonably applied to the employee concerned. Where the tribunal as in that case had accepted that the senior official doing the selecting had made his decision fairly using information he had no reason to question to demand that he prove the accuracy of that information by direct evidence was unreasonable and unrealistic.

65. The Buchanan case was subsequently followed on Eaton Limited v King and Others [1985] IRLR 75 EAT. Here, once again, the general fairness of the employer's application of the selection criteria was considered. In the employment tribunal's view the absence of evidence as to how the marks had been arrived at made it impossible for it to decide that the selection criteria had been fairly applied to any of the claimants. It held that the employees had not been fairly selected. The EAT overturned the tribunal's finding. On a proper application of the principles established in the Buchanan case, all the employer has to show was that it had set up a good system of selection which had been reasonably applied. So long as there was nothing in the tribunal's findings to suggest that the assessments were not carried out honestly and reasonably. The observations in these cases are that an employer need only demonstrate that it had established a good system of selection which had been administered fairly were expressly approved by the Court of Appeal in British Aerospace Plc v Green and others [1995] ICR 1006 Court of Appeal.

66. Lord Justice Waite in British Aerospace Plc v Green observed:

> "So in general the employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness will have done all that the law requires of him."

67. The EAT has therefore thought that it was plain from those remarks that in order for claimants to succeed in such a case there needed to be some sort of unfair conduct on the employer's part which could mar the fairness of the system such as evidence of bad faith, victimisation or discrimination.

68. Difficulties can arise where a tribunal subjects the employer's assessment of its employees to too great a scrutiny. In the case of Semple Fraser Llp v Daly EAT 0045/09 a tribunal was overturned by the EAT in that it had erred in

subjecting the employer's scores to such minute scrutiny when there was no evidence of underlying unfairness in the application of the selection criteria.

69. All of these authorities tell us that it is unhelpful for tribunals to descend into minute scrutiny of a scoring exercise where, on the face of it, the employer has used a reasonable and fair process and applied it reasonably. It is the fact that in every redundancy exercise someone will be selected. It is inevitable that that person will be disappointed. It does not mean that anything is served by minute scrutiny of the scoring and a rescoring exercise should not be undertaken by a tribunal. Ultimately, that would only result in another person being selected.

70. This was a fact that was ably pointed out to us by Mr Milsom.

71. It is clear therefore from the authorities that a tribunal must be very cautious when descending into the minutiae of the application of a selection process.

72. Of course, a tribunal must also take into account other factors when assessing fairness as set out in the principles in the Williams v Compair Maxam case. It must be reasonably satisfied that employers have given adequate notice and have properly consulted with the employees at risk over a period of time prior to a decision being made. A right to question the outcome of a selection exercise may be desirable although it is not essential. Certainly, a right of appeal should be given. Moreover, a tribunal is bound to examine whether an employer has reasonably considered any suitable alternative employment. We were directed by the advocates on the question of whether a failure to consider furlough as an alternative to dismissal can render a dismissal unfair. We were directed to the Mhindurwa v Lovingangels Care Limited 3311636/20 which is a decision of first instance. Mr Milsom countered with first instance decision of his own and Handly v Tatenhill Aviation Limited and France v Bannockburn and their respective citations are ET 2603087/20 and ET 4107116/20.

73. It will depend on the circumstances of each case, but it is for an employer to decide whether it is appropriate to continue employees on furlough rather than proceed with redundancy. It is an exceptional case where such a decision will be held against an employer and a failure to keep employees on furlough would render an otherwise fair redundancy process and dismissal unfair.

Collective consultation

74. Collective consultation is governed y s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA").

> "188 Duty of employer to consult F1. . . representatives.
>
> (1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be [F3affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.]

(1A) The consultation shall begin in good time and in any event—

(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least [F445 days] and

(b) otherwise, at least 30 days,

before the first of the dismissals takes effect."

75. Consultation must begin in good time and must in any event begin at least 30 days before the first of the dismissals takes effect where more than 20 redundancies are proposed in a 90 day window. In good time means no more or less than time sufficient for a fair consultation to take place working back from the final date which is the first date of dismissal.

76. There is an obligation to elect appropriate representatives if any affected employees under s.188 (1)B) In this case there is no suggestion by the claimants that this process was flawed.

77. Under s.188(2) the consultation shall include consultation about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissal.

78. Section 188(4) states that the employer shall disclose in writing to the appropriate representatives:

(a) The reasons for his proposals,

(b) The numbers and descriptions of employees who it proposed to dismiss as redundant,

(c) The total number of employees of any such description employed by the employer at the establishment in question,

(d) The proposed method of selecting the employees who may be dismissed.

(e) Thew proposed method of carrying out the dismissals with due regard to any agreed procedure including the period over which the dismissals are to take effect.

(f) The proposed method of calculating the amount of any redundancy payments to be made,

(g) The number of agency workers working temporarily for and under the supervision or direction of the employer,

(h) The parts of the employer's undertaking in which those agency workers are working and xxx type of work those agency workers are carrying out.

(i) The information shall be given to the appropriate representatives.

79. Section 88(7) states that if in any case there are special circumstances which render it not reasonably practicable for the employer to comply with the employer to comply with the requirement of ss.(1A)(2) or (4). The employer shall take all such steps towards compliance with that requirement as are reasonably practicable in those circumstances. This is known as the special circumstances defence.

80. The Acas guidance on handling large scale redundancies states that it is not necessary for the parties involved to reach agreement for the consultation to be complete. As long as there has been genuine consultation with a view to reaching agreement, an employer can end that consultation. This should be done only when they can demonstrate that they have listened and responded to the views and suggestions raised.

81. We were reminded by Mr Milsom of the case of Akavan Erityisalojen Keskusliitto (AEK) and others v Fujitsu Siemens Computers [2010] ICR 444, that it is not necessary for all of the information in 188(4) to be provided at the outset of the consultation.

82. Special circumstances are not defined but Clarkes of Hove Limited v Bakers Union [1978] ICR 1076 found that a special circumstance must be something exceptional out of the ordinary or uncommon. Often compulsory liquidation or an immediate cessation of work are special circumstances which are put forward.

83. In this case we have an exceptional set of circumstances in that the coronavirus lockdown in March 2020 and the closing of 40 of the respondent's shops prompted the redundancy process.

84. We are asked by Mr Milsom to consider that, where necessary, if we find a failure by the respondent to comply with the appropriate provisions of s.188, we should consider that a special circumstance existing under s.188(7). We have already determined that on the face of the pleadings there is only one claim of for a protective award in front of us and that is on behalf of the first claimant. Section 189 deals with the pursuance of the complaint before this tribunal and tells us about the making of a protective award if we find a complaint well founded.

85. We know that the maximum award, and indeed the starting point, is an award of 90 days from the date on which the dismissal takes effect. The case of Suzy Radin Ltd v GMB and Others [2004] ICR 893 reminds us that the regime is designed to be punitive and not compensatory. However, the existence of special circumstances is likely to require a substantially lesser award.

Maternity and pregnancy discrimination

86. Section 18 of the Equality Act 2010 states as follows:

> "18 Pregnancy and maternity discrimination: work cases
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.

> (2) 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 the pregnancy, or
>
> (b) because of illness suffered by her as a result of it.
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."

87. The burden of proof is upon the claimant to show that she was treated unfavourably because of the pregnancy or because of illness suffered by her as a result of it. Sub section 3 tells us that discrimination occurs if a woman is treated unfavourably because she is on compulsory maternity leave and ss.4 if she is seeking to exercise or has exercise or sought to exercise the right to ordinary or additional maternity leave.

88. As with all discrimination cases the initial burden of proof is upon the complainant. The claimant must establish facts giving rise to allegations of less favourable treatment but also evidence to suggest that the treatment was on the grounds of the protected characteristic. A mere finding of different treatment and the existence of the protected characteristic are simply not enough. This is known as the Madarassay principle defined as the "something else" which must connect the protected characteristic to the different treatment. Madarassay v Nomura [2007] ICR 867.

89. We are directed to the case of Chief Constable of Kent Constabulary v Bowler EAT 0214/16 where it was observed:

> "Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not of itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristics".

90. We are directed by Mr Milson to the case of Eversheds Legal Services Ltd v De Bellin [2011] ICR 137. This is authority for the principle that whilst the Equality Act 2010 prohibits discrimination against employees on one of the protected grounds it does not licence preferential treatment on the basis of any of the protected characteristicsAn employee who positively discriminates in favour of an employee because he or she has a protected characteristic will leave itself open to discrimination claims from other employees who do not share that characteristic.

Detriment contrary to s.47C of the Employment Rights Act 1996

91. This section provides:

> "47C Leave for family and domestic reasons.
>
> (1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
>
> (2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
>
> (a) pregnancy, childbirth or maternity,
>
> (aa) time off under section 57ZE,
>
> (ab) time off under section 57ZJ or 57ZL,
>
> (b) ordinary, compulsory or additional maternity leave,
>
> (ba) ordinary or additional adoption leave,
>
> (bb) shared parental leave,
>
> (c) parental leave,
>
> (ca) F7 ... paternity leave,
>
> (cb) parental bereavement leave, or
>
> (d) time off under section 57A."

92. In this case the second claimant argues that she was subjected to a detriment under 47C(2)(d).

93. That section refers to time off under s.57A of the same Act

> "57 A Time off for dependants.
>
> (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
>
> (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
>
> (b) to make arrangements for the provision of care for a dependant who is ill or injured,
>
> (c) in consequence of the death of a dependant,
>
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or

(e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.

(2) Subsection (1) does not apply unless the employee—

(a) tells his employer the reason for his absence as soon as reasonably practicable, and

(b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent."

Conclusions

Unfair dismissal

94. The tribunal concludes that the dismissal of the first and second claimants was fair under the provisions of s.98 of the Employment Rights Act 1996.

95. There is no doubt in the tribunal's judgment that the dismissal of the first and second claimants were for redundancy. The employer made a commercial decision faced with the unprecedented possibility of total collapse of the business at the outset of the first lockdown in March 2020 and the closing of 40 of its outlet stores, to restructure and make a series of redundancies. Throughout the business, over a period of time, over 400 redundancies were made. At the time the claimants were dismissed some 39 redundancies were made. A tribunal will not look behind a genuine commercial decision of an employer unless there is a valid reason to do so. Commercial decisions are taken on a daily basis by those running businesses and sometimes they are bad commercial decisions. That is not relevant. What is not in dispute here is that businesses were faced, at that time, with a set of circumstances which they could never imagine they were going to face. It was inevitable that redundancies would be considered. This is particularly so in a business like the respondents that was hit so hard by the lockdown imposition.

96. We therefore have no difficulty in finding that the dismissal was by reason of redundancy and, accordingly, that is a potentially fair reason under s.98(2) of the Employment Rights Act.

Section 98(4) and the fairness of those dismissals.

97. Applying the tests in Williams v Compare Maxim and taking into account the other authorities we have cited above we consider that adequate individual consultation was undertaken by Kay Clay and Human Resources in the run up to redundancy dismissal notices being dispatched in June 2020 with dismissals taking effect in September of 2020. We were impressed with the evidence of Kay Clay and the documentation in the bundle showed a real intent to engage with employees and deal with their queries arising out of the redundancy process. It is not always going to be the case and in fact usually

is not the case that suggestions put forward and queries raised by employees in such circumstances caused the employer to change the structure of the process. However, proper consultation definitely took place in this case. Individual face-to-face meetings were, of course, not possible but meetings by Zoom and other virtual means meant that a proper consultation did happen. We have carefully considered the documents in the bundle, which number a great many, which were sent to all employees at risk of redundancy. We are satisfied that such consultation was more than adequate.

98. There has been much criticism in the claimants' cases of the selection of the pool into which they were placed in ultimately selected for dismissal by reason of redundancy. We accept the respondent's explanation as to why only four were placed in that pool. Arguably, there were other buyers who could have been included. The claimants argue that three other buyers should have been included. We accept the respondent's explanation as for the reasons for not including Suzanne Robinson, Bethany Hellwell and Stefanie Stott. Suzanne Robinson was clearly performing a different function to the claimants and her role encapsulated wider responsibilities including that she served as a board member. Bethany Hellwell was a very junior employee earning almost half that which the claimants were earning. There was no logic in including her in the pool. Stefanie Stott performed a specialist buying function. We accept the respondent's explanation in this respect.

99. With respect to the criteria chosen we have no issue with the criteria. In fact, it entirely mirrored the criteria which is suggested in the appropriate Acas Code of Conduct. Even the claimants in this case have not queried the criteria. They have however queried the scoring and rely upon the authorities above countenance parties from seeking tribunals to examine the minutiae of the scoring in too much detail. Kay Clay did an excellent job in marshalling a process including a set of fair and objective criteria and she selected two individuals to conduct the scoring and added their scores together. That is an eminently fair and reasonable way of scoring individuals. Whilst there was a disparity between the scoring of Mr Talbot and Ms Watson, the adding together of those scores meant that any disparity was expunged. Interestingly, looking at their scoring individually, whilst one was inclined to award higher marks across the board, they both individually came to the same conclusions which conclusion were endorsed when the scores were added together. We see no reason to question their scoring. There is nothing which obviously suggests that the scoring was by some reason rendered unfair. The suggestion that Ms Beaver being scored for the 12 months prior to her maternity leave rendered her scoring unreasonable or unfair is rejected. The suggestion of favouritism on the part of one of those scoring due to a relationship with one of the employees who was not selected is also rejected. We found no credible evidence to support that.

100. We would comment that in particular, the pleading of the second claimant at paragraph 76 of her particulars attached to her ET1 suggests that the redundancy process was somehow predetermined and volunteers the type of conspiracy theories to which tribunals are often referred. We find this a most unattractive argument. Nothing in the evidence we have heard suggests that there was any conspiracy. At the end of any redundancy exercise there are

always going to be those who are unhappy due to having been selected. A redundancy process is not a counsel of perfection. The process must be reasonable and fair and applied reasonably and fairly with no obvious maladministration by those conducting it. We are very satisfied that in this case there was a fair and reasonable process, fair and reasonably applied.

101. We therefore find no grounds for the dismissal being rendered unfair in the devising and application of that criteria and scoring process.

102. Looking at the attempts to consider suitable alternative employment by the respondent one might venture some criticism in that it may have been possible for the claimants attention to be drawn to the footwear buyer and Ecommerce job at an earlier stage but we do not consider there is anything sinister in that failure. We accept the evidence of Kay Clay that neither of the claimants were suitable for those roles. In the case of the footwear buyer this is despite the fact that the first claimant considers that she was suitable albeit that she only performed the role previously for a very short period of time. We accept the respondent's suggestion that the role required someone with much more experience. Nevertheless, it might have been helpful to bring these roles to the attention of the claimants before 8 September 2020. However, we do not regard those jobs as suitable alternative roles and therefore that failure cannot render what is a fair dismissal unfair.

103. In all the circumstances we consider that a proper redundancy procedure was followed and implemented entirely fairly and, accordingly, under s.98(4) we consider the dismissals to be fair.

<u>Collective consultation</u>

104. The claim before us is a claim for a protected award under s.188 by the first claimant. Having carefully considered the plethora of documentation which was sent to the elected representatives and the level of engagement conducted by Kay Clay, we do not consider that such a claim is merited. In our judgment, the provisions of s.88 as set out above were adequately complied with. There is a dispute between the parties as to when consultation effectively started. The claimants say it was not until the first collective meeting on 18 May and the respondents say it was when information was initially given and the process of election of representatives commenced on 11 May. Nevertheless, the first of the dismissals did not take place until 30 September 2020, so there is no doubt in our minds that consultation commenced in good time and certainly there was much more than the requisite 30 days envisaged under s.188 in this case. We consider that all of the requirements of s.184 were complied with in the various documentation that was supplied throughout the course of the three collective consultation meetings and the exchanges outside those meetings.

105. We therefore do not think that there has been any failure to comply and it is not necessary for us to consider whether there were special circumstances under s.188(7). We would comment however that it is difficult to image that such special circumstances would not have been deemed to exist in the

unprecedented circumstances that businesses were facing in March 2020 and that was faced by this business in particular.

Pregnancy and maternity discrimination second claimant.

106. For the reasons we have set out above in our findings of fact, we do not find credible the claimants claim in pregnancy and maternity discrimination with respect to her assertions that she was disadvantaged at work prior to the point of her departure on maternity leave. The weight of evidence is firmly against her in this respect as we have pointed out. The lack of clarity in the pleading, the failure to address any of the issues throughout the process of consultation and appeal until these proceedings were launched, and the failure to raise the issues relied upon until the production of her witness statement, lack credibility. Her actions in praising with great lavish the owner of the business prior to her departure on maternity leave, also renders much of her evidence with the taint of incredulity. The general position at the respondents with respect to the treatment of others and the second claimant previously, is also a factor in our concluding that we do not accept the second claimants evidence in this respect.

107. As to the second part of her claim that the way in which the scoring was done constituted discrimination on the grounds of the earlier argument that she was discriminated against by not being given work, that also fails as it lacks credulity in light of our findings.

Unlawful detriment contrary to s.47(c)

108. Much the same can be said of the way in which this part of the second claimant's claim was pleaded. It looks like something of an afterthought. No mention was made of it at the time of the process and it was only raised subsequently and then in a very perfunctory way.

109. We have made a finding of fact that there is no evidence to support the fact that the claimant was selected for furlough because she had taken maternity leave. Therefore, that aspect of her claim under s.47(c) must fail.

110. As to the second part of her claim, it is the case that both scorers included in her assessment in the category of absence, one day when she was said to have taken time off with a dependent. However, we have no detail as to the nature of that time taken off. Nothing in this respect was put to the respondent's witnesses and, in any event, this aspect of her claim has been inadequately put. It would have been necessary for her to show that the time off taken fell within one of the categories set out in 57A. No evidence has been put before us that time taken off fell into any of the categories set out in 57A(1)(a) to (e) and, therefore, in our judgment, this aspect of the second claimant's claim does not even get off the ground. For that reason it is dismissed.

111. For all the reasons given above, both the first and second claimant's claims fail and are dismissed in their entirety.

1 July 2022

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Employment Judge K J Palmer

Sent to the parties on: 7 July 2022

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For the Tribunal Office