



EMPLOYMENT TRIBUNALS

Claimant: Mrs J Burn
Respondent: Mr J A Sparrow and Mrs R Sparrow T/A “RRS Recovery Services”
Heard by CVP 14-16 June 2022

Before: Employment Judge Rogerson
Members: Mr R Webb
Mr J Rhodes

Representation

Claimant: herself
Respondent: Ms L Halsall (Counsel)

RESERVED JUDGMENT

1. The claimant’s complaints of direct marital discrimination (section 13 and section 8 Equality Act 2010) are not well founded and are dismissed.
2. The claimant has not satisfied the requirements of section 38 Employment Act 2002 (failure to give employment particulars) and that complaint also fails and is dismissed.

REASONS

Issues

1. By a claim form presented on 30 October 2021, the claimant brought complaints of direct marital discrimination. At a preliminary case management hearing on 12 January 2022 the issues to be determined were identified and orders were made to help the parties to prepare for this hearing (see pages 82- 95 in the bundle).

2. The claimant alleges 4 acts of less favourable treatment were committed by Mr J. A Sparrow (the respondent) because she is married, relying on the protected characteristic of marriage (section 8 Equality Act 2010). These are:
 - 2.1 In May 2021, Mr Sparrow discussed placing the claimant on furlough leave with Mr Burn (the claimant's husband) before he discussed this with the claimant.
 - 2.2 On 29 August 2021 Mr Sparrow told Mr Burn that the claimant's job was in jeopardy following Mr Burn's resignation and had discussed the claimant's employment with Mr Burn having previously been told not to do so.
 - 2.3 On 23 September 2021 the claimant was given notice of dismissal notice ending her employment on 30 September 2021.
 - 2.4 On 29 September 2021 the respondent required the claimant to either data cleanse her personal laptop or provide her laptop to the respondent to perform a data cleanse.
3. It was agreed that the first complaint if proven may have been presented out of time but the common issues for all the alleged unlawful acts were:
 - 3.1 Did the respondent do the alleged acts? (allegation 2.1 is denied by the respondent. The context for allegation 2.2 was disputed and allegations 2.3 and 2.4 are admitted but the reason for the treatment was in dispute).
 - 3.2 Was it less favourable treatment? The Tribunal will decide whether the claimant was treated worse than someone else was treated (actual comparator) or would have been treated (hypothetical comparator) recognising that there must be no material differences between the circumstances of the comparator and the claimant.
 - 3.3 Was it because of the claimant's marriage?

The Comparators

3. For the 'data cleanse' allegation, the claimant relies upon an actual comparator we have referred to as Ms S who worked for the respondent from April 2019 to February 2021. She worked as a Day Call Operator based at the respondent's York depot. She resigned in February 2021. Ms S is not married. After resigning Ms S was not asked to data cleanse her laptop or have her laptop cleansed or required to provide any warranties (see paragraph 66 of the claimant's witness statement 'CWS'). Alternatively, the claimant relies on a hypothetical comparator in the same material circumstances as the claimant but who was not married.
4. The respondent disputes that Ms S is an appropriate comparator because it says the circumstances of the claimant and Ms S are materially different. The claimant was a Night Call Operator. She worked exclusively from home. She used her personal laptop to perform her role. She was not living with and in a close relationship with a senior employee of the respondent who had left to work for a competitor at the time she left her employment. None of those material circumstances applied to Ms S. The respondent contends that a hypothetical comparator in the same material circumstances as the claimant would have been treated in the same way as the claimant was treated.
5. The claimant also relies upon an actual comparator Mr W who worked as a commercial fitter/roadside technician based at the York depot. Mr W was in a

relationship with Miss K who worked for CS (a company supplying parts to the respondent). Although the claimant initially identified CS as a 'direct competitor' during cross examination she accepted CS was a 'supplier of parts' and not a direct competitor which was a material difference in circumstances. The claimant relies upon a discussion she had with Mr W when she discussed the respondent's confidentiality concerns. Mr W told her no one had raised any concerns with him regarding confidentiality of information "even though he had heard lots of conversations at the York depot that could have been regarded as confidential" (see para 63 CWS).

6. The respondent disputes Mr W an appropriate comparator because of the difference in the material circumstances of Mr W and the claimant. Mr W was a fitter not a Night Call Operator. Mr W's role did not give him the same access as the claimant had to the respondents operating system (Apex). He worked at the depot and not from home. He was not in a close relationship or living with a senior employee of the respondent who was leaving the business to work for a competitor.
7. Ms S attended the hearing to give evidence. Mr W did not attend to give evidence and had not provided a witness statement. The claimant therefore relies upon her recollection of the discussion with Mr W set out above.
8. The respondent denies it treated the claimant less favourably because of her marriage. For the admitted conduct of dismissal/data cleanse the respondent relies upon the genuinely held confidentiality concerns held by Mr Sparrow. The claimant worked exclusively from her home shared with Mr Burn a senior employee of the respondent who left to work for a direct competitor. As a result of those circumstances the respondent was concerned about the risk of disclosure of sensitive/confidential information to a competitor and she was dismissed for that reason and not because she is a married person.
9. It was important at the outset to set out the parties' position on the appropriate comparators because this was not the first time the comparator issue had been raised. It had been explained to the claimant at the preliminary hearing that in making the comparison the circumstances which are relevant to the treatment are the same or nearly the same. The claimant refers to these discussions in her witness statement (paragraph 70 CWS) confirming the Employment Judge and the respondents counsel had previously "raised concerns regarding my claim for marital discrimination on the grounds of who I was married to. However, there is case law in the form of Dunn -v- The Institute of Cemetery and Crematorium Management UKEAT/0531/10DA in support to argue her treatment was marriage specific and specific to that marriage". It was clear that the claimant placed great reliance on this case to prove her claim and establish liability and she was less reliant on proving the necessary facts.
10. At this hearing, Miss Halsall helpfully provided a separate bundle including all the relevant authorities on marital discrimination. The claimant was given time overnight to consider them and Ms Halsall's written closing submissions before the parties made submissions. Our approach was to see what if any positive findings of fact we could make as to the reason why and if a hypothetical comparator was to be constructed that comparator must be in the same material circumstances as the claimant without her protected characteristic (an unmarried person) to establish whether the reason for the alleged unlawful treatment is the fact that the claimant is a married person.

11. At this hearing the claimant's approach to the correct hypothetical comparator was to try to strip out any of the material circumstances unhelpful to her case. We confirmed we would make our findings of fact about each alleged unlawful we would examine the motivation of the decision maker (Mr Sparrow) to establish the reason for his treatment and whether he (consciously or unconsciously) was significantly influenced by the claimant's protected characteristic (marriage).

Section 38 Employment Act 2002: Failure to give the claimant a statement of employment particulars.

12. If the claim of unlawful discrimination succeeds the claimant seeks an additional award of compensation of 2 or 4 week's pay pursuant to section 38 Employment Act 2002, in relation to the respondent's alleged failure to provide a written statement of particulars.

13. There was a factual dispute about whether the respondent had given the claimant a contract of employment. The respondent contends that the claimant was given a contract when she commenced her employment and/or when the contracts of employment were updated in 2020. The claimant denies ever being given a contract of employment. The respondent was unable to produce a signed copy of the contract or any evidence to show how the contract was issued to the claimant.

14. Mr Sparrow very candidly accepted that he could not prove she was given a contract. He relied upon his assumption she had been given a contract because other employees had contracts. The only direct evidence he was able to give was that he gave the contracts to Mr Burn to 'courier' over to Hull for distribution to individual employees. He does not know for certain what happened afterwards and did not follow it up afterwards to check Mr Burn had given the claimant her contract of employment.

15. Mr Burn denied being given the contracts to distribute and denied giving the claimant her contract of employment. The claimant denied she had ever received any contract of employment.

16. Mr Sparrow has very reasonably accepted that given that direct evidence and the lack of any other evidence if the claim of direct marriage discriminations succeeds the claimant would be entitled to the additional award of a minimum of 2 week's pay.

17. Schedule 5 of the Employment Rights Act 2002 lists jurisdictions to which the which section 38 applies which include discrimination in work cases. Subsection 38(2) and (4) provide as follows:

(2) If in a case of proceedings to which this section applies:

(a) the employment tribunal finds in favour of the worker but makes no award to him in respect of the claim to which proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker (to give a written statement of employment particulars)

the tribunal must subject to subsection (5), make an award of the minimum amount to be paid by the employer to the worker and may, if it considers it just and equitable in all the circumstances, award the higher amount instead.

(4) *In subsection (2)-*

(a) *references to the minimum amount are to an amount equal to two weeks' pay.*

(b) *references to the higher amount are to an amount equal to four weeks' pay.*

Evidence

18. The Tribunal heard evidence from:

1. The Claimant
2. Ms S
3. Mr A Burn.
4. Mr John Anthony Sparrow (joint partner of the business)

19. A joint bundle of documents was also provided to the tribunal containing the contemporaneous evidence the parties relied upon.

Assessment of Credibility

20. We found Mr Sparrow's was a straightforward witness who answered questions fully, truthfully, and directly. He made concessions when it was appropriate to do so. During questioning his recollection of events was detailed and clear. In contrast, we found Mr Burn was evasive and less straightforward. At times giving contradictory evidence. We felt he was more focussed on trying to support his wife's case rather truthfully recalling an event. Mrs Burn's recollection of events was less reliable in part because she was relying on what Mr Burn had reported to her. Overall, we accepted and preferred Mr Sparrow's evidence on any disputed issue because he was a credible witness whose evidence was supported by other evidence we saw and heard.

Findings of fact

21. The respondent is small successful family run vehicle recovery service specialising in both light and heavy vehicle breakdowns and recovery. It employs 25 employees with depots in York, Doncaster, and Hull.

22. The HR side of the business is managed by the 2 directors of the business Mr and Mrs Sparrow. The directors do seek external legal advice when they need advice and assistance for example, preparing contracts of employment or on termination of employment.

23. The respondent provides a 24 hour call out service and has well established contracts with several motoring organisations as well as main car and commercial dealers and accident body shops in Yorkshire. The business was started in 2007 as a trading partnership between Mr John Anthony Sparrow and his wife Rebecca Louise Sparrow and has continued thereafter as a family business with support from other family members as and when required.

24. Mr Burn was employed by the respondent from 8 February 2016 initially as a Recovery Driver until he was promoted to the senior management team as the Hull Depot Manager on 17 October 2020. He resigned from that role on 29 August 2021 to take up new employment with the respondent's main

competitor in Hull “BTS” with his notice period on garden leave ending on 12 September 2021.

25. Sometime after Mrs Burn’s dismissal she also joined BTS, as a call operator. Currently both Mr and Mrs Burns are working at BTS.
26. In February 2016, Mr Burns was issued with a contract of employment for his role as a recovery driver (pages 278-285). Although he does not recall signing the contract, we accepted it was his signature on the contract confirming his acceptance of the contract terms. It was a standard contract of employment drafted by the respondent’s solicitors used for all employees at that time, until contracts were updated by the respondent’s solicitors in 2020.
27. In October 2020, Mr Burns was promoted to Hull Depot Manager to join the senior management team. In the letter confirming his promotion (page 294) reference is made to the new terms being added to his existing employment contract. Mr Burns was not issued with an updated contract of employment and continued to work under the terms he agreed in his 2016 as varied to reflect his promotion.
28. His contract of employment is a standard contract including terms intended to protect the respondent’s confidential information to protect its business interests. For example Clause 21 identifies confidential/sensitive information including “*details of the requirements of contractors fees and commissions charged to or by them, the business expansion plans, business strategy or marketing plans, employees remuneration, accidents or investigations relating to the business, confidential reports, trade secrets, know-how and confidential transactions, information given in confidence by clients and suppliers etc*”.
29. Mr Sparrow explained these clauses were included in all contracts of employment because over time the business had gained some very good contracts as the main recovery services provider in the area, and it was felt that the business needed to protect confidential information from being leaked to a competitor. He confirmed that in the Hull area, one of the respondent’s main competitors was ‘BTS’ the recovery business where the claimant and Mr Burn now work.

Background to Mrs Burn’s employment with the Respondent.

30. When Mr Sparrow first started the business, he carried out the Night Control Operator role with some assistance from family members. This arrangement was manageable at the time because of the low volume of night work. However, the volume of work increased from 2014- 2019 and a Night Shift Operator was recruited. That post became vacant in August 2019. Mr Burn knew about the vacancy and suggested Mrs Burn for the role.
31. Mr Sparrow confirmed that it was not unusual to employ staff by word of mouth based on recommendations and he trusted Mr Burn’s judgment.
32. Mr Burn acted as the go between passing messages on between Mr Sparrow and Mrs Burn. Page 358 in the bundle confirms messages were passed in relation to the arrangements for the interview and in relation to Mrs Burn attending training at the York depot. Mr Sparrow agreed that Mr Burn could drive Mrs Burn to the York depot every day to attend the training. Mrs Burn could not drive, and this arrangement made it easier for her. From the text

messages we saw it was clear to us that Mrs Burn was happy for Mr Burn to act as her go between in these discussions with Mr Sparrow.

33. At the interview, Mr Sparrow allowed Mr Burn to accompany Mrs Burn. The claimant was employed as the Night Control Operator working nights shifts (4 nights a week). It agreed she would work exclusively from the home she shared with Mr Burn.
34. In October 2020, Mr Burn was interviewed for promotion to Hull Depot Manager. He requested that Mrs Burn attend the interview. Mr Sparrow agreed and recalled that during the interview, Mrs Burn had vouched for Mr Burn's abilities as a manager based on her experience of working for him previously.
35. It was clear there was no history of any animus towards the claimant and Mr Burn or the fact they were married. On the contrary Mr Sparrow showed them preferential treatment. Mr Sparrow was supportive and did not view the fact they were married as a problem or negatively in any way. Mr Sparrow does not have any particularly strong views about marriage. Although he is married, his sons are in close relationships but are not married. He treats their partners as part of the family regardless of marital status because for him 'marriage' has no bearing on how he treats people. He applied the same beliefs and values he holds in his private life to the workplace. For him an employee's marital status was not relevant to his relationship with that employee.
36. Historically the Night Control Operator role has always been home based to allow the employee to rest and sleep between calls during quieter periods. This meant that after the claimant completed her training in York, she worked from home and was rarely at the York depot.
37. Mr Sparrow was aware that because "*Jo (the claimant) worked from home Alan (Mr Burn) was often around during the hours Jo was working*". Mr Sparrow knew this because when he was speaking to Jo, Alan would often intervene with queries and they would chat together during her shift.
38. Towards the end of his employment Mr Burn asked Mr Sparrow if it was ok for Mrs Burn to train him on the Apex system to improve his skills as a depot manager. The respondent had downloaded this system onto Mrs Burn's personal laptop so she could perform her role. Mr Sparrow agreed to that request not knowing at the time that Mr Burn intended to leave the business (page 359).

Allegation 2. 1: Disputed May 2020 Furlough Conversation

39. The claimant alleges that in May 2021 during a telephone call between Mr Sparrow and Mr Burn, Mr Sparrow informed Mr Burn that Mrs Burn was going to be placed on furlough. This was because there was a shortage of night-time recovery work because there were less cars out on the roads because of the pandemic.
40. Mrs Burn relies on what Mr Burn told her about the call after it had taken place. She says there was "no reason" for Mr Sparrow to tell Mr Burn she was going to be furloughed before she was told. Mr Burn had nothing to do with her employment. She accepts Mr Sparrow did telephone her (either that day or the next day) to tell her he was putting her on furlough. She admits she was angry during that call but denies shouting at Mr Sparrow. She says that during

that call she told Mr Sparrow he should not discuss any work matters relating to her with Mr Burn.

41. Mr Sparrow denies making 2 calls that day to tell Mr Burn and the claimant that the claimant was going to be furloughed. He agrees with the claimant that there was no reason for him to make 2 calls and why he only made one call that day to Mrs Burn to inform her she was going to be furloughed. He recalls that during that call the claimant was very unhappy and angry at being furloughed and she threatened to resign. Immediately after his call with the claimant Mr Burn telephoned Mr Sparrow to apologise for Mrs Burn's outburst.
42. During cross examination Mr Burn initially admitted making this call to Mr Sparrow to apologise for Mrs Burn's behaviour. He then backtracked suggesting that Mr Sparrow made an earlier call and had referred to upsetting his 'Mrs' recalling he had used the term 'Mrs' to refer to the claimant. We did not find Mr Burns evidence was credible. Mr Sparrow did not use the term 'Mrs' in the call Mr Burns made that day. Mr Sparrow always referred to the claimant as 'Jo' not "the wife" or 'Mrs' as Mr Burn suggested. In the text messages we saw Mr Burn (not Mr Sparrow) used the term "Mrs" or "the wife" to refer to Mrs Burn (in one text stating "*chatting with the wife*" (page 358) and in another "*is it ok if I bring my Mrs with me tomorrow*" (page 359)).
43. On this dispute of fact, we to prefer Mr Sparrow's evidence to that of the claimant and Mr Burn because it was more credible and was supported by other evidence we saw and heard. There was only one call made by Mr Sparrow to Mrs Burn to inform her she had been furloughed and in that call Mrs Burn did not tell Mr Sparrow he should not discuss any work matters relating to her with Mr Burn.
44. This allegation has not been proven by the claimant.

Allegation 2.2: Discussion between Mr Sparrow and Mr Burn following his resignation on 29 August 2021.

45. The claimant could not give any direct evidence about this matter and relies on what Mr Burn told her about that meeting. At paragraph 44 of her witness statement, she states:

*"On 29 August during a meeting regarding my husband Alan Burn handing his notice in, Anthony Sparrow again discussed my employment with Alan Burn. He stated that **should Alan Burn leave he would have concerns regarding confidentiality of information including a fear that I might potentially share such information with Alan Burn and that my job would be in jeopardy.** He repeated this statement at least twice during their meeting leaving my husband Alan Burn feeling that it was potentially an attempt to blackmail him into staying with the company"*

46. Prior to this meeting on 29 August 2021 Mr Burn had emailed his resignation to Mr Sparrow who had asked him to attend the York depot to discuss it.
47. At paragraphs 10 and 11 of Mr Burn's witness statement he states:

*"10. **The first thing he said to me was that if I left my wife's (Joanne Burns) employment would be in jeopardy.** I asked him why and he stated **confidentiality and data protection.** He then went on to ask me why I was leaving, and I stated that I was disgruntled with the way vehicles were being maintained and the manner in which staff were being treated.*

11. He went on to ask me about **my future employment plans and I told him nothing was set in stone**. I did not really know what I wanted to do next or even whether I would stay in the recovery business. Anthony Sparrow then went on to reiterate that **if I went in the recovery business my wife's (Joanne Burn) job would be in danger**. I almost felt like whether it was intentional or not he was trying to blackmail/threaten me into staying with the company. The meeting ended there.”

48. Mr Sparrow confirmed that he requested the meeting to discuss Mr Burn's reasons for resigning, hoping that he could persuade him to change his mind. His evidence about that discussion was as follows:

“21. During that conversation Mr Burns **did indicate he had offers from other rival firms as well as offers outside the industry**. I can confirm that this wasn't surprising the industry is very incestuous, with employees moving around different firms often. However, it did immediately occur to me **that if we had an employee with confidential information based in a household and a close personal relationship with an employee working directly for a rival**, that might throw up some issues which we would need to consider. I did say to Alan that **this could impact on Jo's job because it was immediately apparent to me that this could be an issue**.

22. The meeting was very amicable and was left that Alan would let us know when he had decided which offer, he was taking up (some of the offers were not in the industry). Although I had indicated that **if he were to work for rival firm that would give us some potential problems** that was as far as it went, and I thought it was important to be open with him. I can confirm that at no point during the conversation was I considering, the fact that Jo and Alan were married. What I was thinking about was **the close personal relationship which I had witnessed on numerous occasions and my knowledge of how industry contracts are won and lost and the information which would be potentially available to our competitors in his household**

23. I can confirm that I did not consider that I needed to speak directly to Jo to discuss the possible impact on her because **at that point Alan had not made his intentions clear and also we had not really any firm thoughts about what it could mean for her position**. I did not know whether Alan would have reported the conversation back to Jo – that really was his business not mine. We had **left it with him agreeing to come back to us and he never did so**. Had he in fact gone to work outside the industry no confidentiality issues would have been raised, but Jo's position would still have been terminated due to the financial constraints on the business.

24. I can honestly say to the tribunal that I never gave any thought to Jo's marital status at any point until she raised the issue after her termination. **My only concern was that she was working in a household with someone who was potentially going to work for a competitor and thus information which was highly confidential and relevant to many aspects of our job would be potentially at risk**. Anyone living in the same household with a direct competitor in this way would have caused similar concern **whether the relationship was marital, siblings, parental, or cohabitation**. This issue had never arisen before and I was uncertain how it would impact on others and on Jo, which was what I said. At no time during my investigation

*into how to handle this including taking legal advice and generally considering what information was available through the various platforms used to undertake the night control work did the fact of Jo being Alan's wife enter into my mind as a consideration. **My only concern was whether the information was potentially at risk and what steps we may need to take to secure it. Whilst waiting for Alan to confirm his position we began discussing what impact this could have and how we should handle it**"*

49. Mr Sparrow explained that the information that had been downloaded onto the claimant's laptop included the Apex system used by the respondent which includes data which could be highly damaging in the hands of a competitor. He referred to pages 191-210 which were screen shots of the 18 types of data on the system that could be accessed including pricing information, the customer data base, driver database etc. Although the claimant might not have to use all that information to perform her role, because of her role she was allowed access to it. These were highly sensitive data (such as prices for major contracts that were regularly having to be retendered) but also the respondent's customers' personal details which was confidential data protected by GDPR rules.
50. Again, when Mr Burn's evidence about the discussion was tested in cross examination it was inconsistent and changed. He initially suggested he did not have any discussion 'at all' with Mr Sparrow about job offers. He told Mr Sparrow he had no idea what he was going to do so would not have discussed the possibility of working for a rival company. If that was true, he could not explain how Mr Sparrow would have known about the offers (he admits he had) at the time of this discussion. He cannot explain the context in which Mr Sparrow would have raised confidentiality concerns and his account suggests the first thing Mr Sparrow said was that the claimant's job was in jeopardy which makes no sense without any context to explain why it might be in jeopardy.
51. In her closing submission the claimant invites us to find that "at no time between 29 August and 23 September or after did Mr Burn tell Mr Sparrow that he was going to work for a competitor or had offers from a competitor". Unfortunately, that submission was not supported by the evidence given by the claimant and Mr Burn. We preferred and accepted Mr Sparrow's detailed and clear evidence as set out above. Not only was he able to recall the job offers which were discussed outside the recovery service industry (haulage) and with rival firms but he could not have known any of those details unless Mr Burn had told him. More importantly his account provides the missing context of the discussion about the confidentiality concerns which were raised in this discussion if he went to work for a rival firm. Otherwise, the discussion about confidentiality and the impact this might have makes no sense. It is likely that Mr Burn wanted to tell Mr Sparrow about the offers he had to work elsewhere. The context provided by Mr Sparrow fits with the conversation. Mr Sparrow was being direct and upfront with Mr Burn. Mr Sparrow had indicated that if he were to work for rival firm that might give the respondent some potential problems but at that stage no decision had been made and some offers (haulage) would not have caused any potential problems for the business. At no point during that conversation was the fact the claimant was married a consideration. Mr Sparrow was thinking about the close personal relationship which he had witnessed between Mr and Mrs Burn on numerous

occasions in the past and his personal knowledge of how industry contracts are won and lost and the information which could potentially be available because they were living in the same house.

52. We accepted Mr Sparrow's evidence that anyone living in the same household in that situation with an employee employed by a direct competitor, would be a cause of concern, whether the relationship was marital, siblings, parental, or cohabitation. He had never had to consider these circumstances before because the situation had never arisen before. He was uncertain about the potential impact on Mrs Burn's employment depending on the offer accepted and wanted to be upfront and honest with Mr Burn about his concerns.
53. Mr Sparrow admits he did not discuss these concerns with the claimant because it would have been premature at that stage. Although Mr Burn agreed he would let Mr Sparrow his decision he did not tell Mr Sparrow he had accepted the offer to work for the respondent's competitor 'BBS'.
54. It was only after Mr Burn left the respondent's employment on 12 September 2021 that Mr Sparrow found out that Mr Burn was going to work for BBS. Mr Burn lack of transparency gave Mr Sparrow more reason to be wary about the situation going forward.
55. The claimant's understanding about the discussion is consistent in part with Mr Sparrow. She accepts Mr Sparrow had a genuine fear that she might share the respondent's confidential information with Mr Burn. As she puts it "***should Alan Burn leave, Mr Sparrow would have concerns regarding confidentiality of information including a fear that Mrs Burn might potentially share such information with Alan Burn and that her job would be in jeopardy***". This evidence was consistent with Mr Sparrow's evidence that he was genuinely concerned about the need to protect confidential information that the claimant could be sharing with their direct competitor.
56. Interestingly, the claimant (paragraph 19 CWS) refers to the steps she took after 12 September 2021 to 'ensure confidentiality' was maintained in her home (her workplace) when Mr Burn was working for BBS. She said she did this because she did not want to supply her employer with "reasons to terminate her employment".
- "After 12 September 2021, Alan Burn's leaving date, I began to work from a home office separate from where my husband was. Alan Burn had no access to my work, or any information related to my work. We did not discuss my work"*.
57. There would be no reason for the claimant to take any of those steps, if she did not believe there was a real risk that confidential information might be shared with Mr Burn (inadvertently if not deliberately) because she was working from home. This was the same risk that Mr Sparrow was concerned about on 29 August 2021.

Allegation 2.3: The claimant's dismissal

58. In May 2021 as a result of the pandemic, and before any confidentiality concerns had arisen the respondent had been considering whether the operator role for the night shift was viable because of the reduced workload.

59. The respondent had decided to reorganise the night shift work bringing it back to be done by family members as and when required. Mrs Sparrow viewed the role as a “luxury the business could no longer afford”. the pandemic had a serious impact on lifestyles as people were staying at home not using their cars. There was a national driver shortage due to Brexit and consequential rise in costs for their wages and volumes of work had not returned to pre-pandemic levels.
60. At a board meeting on 25 May 2021 the reduced workload had been discussed (page 217) specifically the night controller role. The decision made at that board meeting was to “bring night control back in house to save wages”. These minutes show that reorganisation was being considered well before Mr Burn handed in his resignation. The claimant was the only employee covering the night shift between 10 pm and 7am which was significantly impacted with calls during this time reduced by 70-80%.
61. On 23 September 2021 the claimant was informed by letter (pages 112-115) that her employment was terminated from 30 September 2021 for the following reasons:
- “There are several reasons for this decision, including reorganising your area of work and in addition we have wider concerns around confidentiality and working from home”.

Allegation 2.4 The data cleanse request

62. The letter of dismissal also refers to the claimant’s obligations in relation to returning company property, confidentiality and GDPR. The relevant parts are.

“Company Property.

I understand that you have been using your own personal laptop for work purposes and in order to comply with our obligations both under General Data Protection Regulations and our service level agreements with our supplier we need to make arrangements for the data to be cleansed securely from your laptop relating to all company information.

Confidentiality.

Please note that you remain bound by obligations of confidentiality and furthermore in law the following specific information is protected as confidential. (The letter then lists the information including system information on Apex.)

GDPR

I also wish to ensure that you are aware of your personal legal obligations under GDPR with regards to personal data. Within your role you have been a data processor for information for the company which includes information relating to customers or suppliers and their “personal Identifiable data” also known as “PID”. You must not in any circumstances retain use or otherwise keep for any purposes “PID” or information relating to the company and its customers or suppliers. To otherwise do so may be a criminal offence for which the company would be legally obliged to report you personally to the Information Commission Office (ICO) who may choose to take legal action.

Therefore, it is essential that you return all data and information and allow us to cleanse the same from your laptop and any other device used to ensure you can comply with your legal obligations under the Data Protection Act and GDPR”.

63. In the claimant’s witness statement (paragraph 45 CWS) she refers to this letter and to her written response to it, dated 24 September 2021 in which she states:

*“Having already heard that Antony Sparrow had **shared a fear** with my husband Alan Burn that **I would share confidential information with him I responded to state that I felt this was marital discrimination”.***

64. In this letter the claimant makes the connection between the decision to terminate her employment and the respondents fear of a breach of confidentiality recognising that those circumstances were material to her treatment but also raises for the first time ‘marital discrimination’.

65. The claimant also expressed concerns about providing her laptop for a data cleanse and suggests a password change would be adequate to stop her accessing the data. She refused to agree to any of the proposals made.

66. On 29 September 2021 (upon advice) Mr Sparrow responded to the points raised. The relevant parts of his letter are set out below:

*“With regards to **the Company needing to cleanse the data from your personal devices we trust you understand the need for us to ensure that PID is secure and has not been downloaded from the system either purposefully or otherwise stored in any cache or otherwise retained.** We set out clearly in the termination letter the obligations you have regarding the information and data that is held and stored on your personal devices. **If you are refusing the company access to your devices to ensure this data cleanse is completely correctly then in the alternative we will require you to complete the attached warranties and undertakings to reasonably satisfy us that the data has been properly deleted and cleansed and if it comes to light that you have failed to comply with the requirements set out in the warranties and undertakings we have the right to take further legal action in relation to this point”.***

67. The letter makes it clear why the respondent was requesting the data cleanse or offered an alternative of a warranty. Ultimately, the claimant agreed to have the data cleanse undertaken by the respondent.

68. The letter also makes the respondent’s position on alleged ‘marital discrimination’ very clear (page 122/123) by providing a detailed explanation as to why the respondents disputed the claimant’s assertion identifying the appropriate hypothetical comparator to explain its position:

Reasons for your termination/allegations of marital discrimination

“Firstly, we can confirm that the reason for your dismissal is absolutely not because you are married to Alan or any other person and therefore you have not been subjected to any form of discrimination because of your marital status.

*As noted in your termination letter, and in the discussions that were had with Alan prior to his termination, **the Company have serious and legitimate concerns regarding the confidentiality of information***

when you have a close personal relationship (of any kind) and/or working and residing in a property with a senior ex-employee of RRS who we understand is proposing to work for a direct competitor.

We also noted in your termination that is not the sole or principal reason for your dismissal and the Company also made the decision to reorganise the work within your area- which we are entitled to do so- after reviewing the current arrangements.

We trust this explains why the Company consider you have not been subjected in any way to discrimination of any kind as -very simply put- even if you and Alan weren't married but living together or had a close personal relationship of any kind, we would have still had genuine and reasonable concerns regarding highly confidential and sensitive information that led us to reviewing the current situation".

69. The claimant (paragraph 46 CWS) challenges the rationale provided by relying on her comparators Mr W and Ms S referred to earlier in these reasons. She asserts that Mr Sparrow terminated her employment due to "being disgruntled with my husband Alan Burn that I was discriminated against because of **who I was married to and not for the given reasons**".
70. After the claimant's dismissal the night control operator duties were reorganised in the way planned which has resulted in a considerable cost saving for the respondent.

Submissions

71. The claimant and Miss Halsall helpfully provided detailed written submissions which the Tribunal considered before reaching its decision.
72. The claimant had the opportunity to read and consider Miss Halsall's written closing submissions and the case authorities bundle overnight before making her closing submissions.
73. The claimant as a lay person was not expected to present any legal argument in this area of the law but has helpfully set out her understanding for the tribunal to consider.
74. The cases Miss Halsall referred to were:
1. Dunn-v The Institute of Cemetery and Crematorium Management (UKEAT/0531/10DA)
 2. Hawkins -v- Atex Group Ltd and Others (2012) IRLR 807.
 3. Gould -v- St John's Downshire Hill UKEAT/002/20.
 4. Boswell-v- Ministry of Defence ET case No 1401879/12
 5. Chief Constable of Bedfordshire Constabulary-v- Graham (2002) IRLR.

Applicable Law

75. Direct Discrimination

"Section 13(1) Equality Act 2010 (EqA) prohibits direct discrimination which occurs when:

"A person (A) discriminates against another (B) if because of a protected characteristic A treats B less favourably than A treats or would treat others".

Section 8 defines the protected characteristic of marriage and civil partnership and provides that:

*“A person has the protected characteristic of marriage and civil partnership if the **person is married** or is a civil partner”*

76. Burden of Proof

Section 136 EqA deals with the burden of proof in relation to any alleged unlawful discrimination and provides that:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision”.

77. Guidance has been provided by the courts as to how the burden of proof provisions should be applied by Tribunals. In Hewage and Grampian Health Board 2012 ICR 1054 SC Lord Hope endorsed the view of Mr Justice Underhill (then President of the EAT) in Martin -v- Devonshire Solicitors 2011 ICR 352 EAT that:

*“The burden of proof provisions in discrimination cases are important in circumstances where there is **room for doubt as to the facts** necessary to establish discrimination-generally the respondent’s motivation...**they have no bearing where the Tribunal is in a position to make positive findings on the evidence one way or another** and still less where there is no real dispute about the respondent’s motivation and what is in issue is the correct characterisation in law”.*

78. If the Tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then that is the end of the matter see Laing -v- Manchester City Council 2006 ICR EAT (a case involving race discrimination)

79. More recently in Royal Mail-v- Efobi 2021 I WLR 3863 the Supreme Court held that in applying the burden of proof provisions there was a two stage process for analysing complaints of discrimination, whereby, at the first stage the burden was placed on the claimant to prove, on the balance of probabilities, facts from which the employment tribunal **could conclude in the absence of an adequate explanation that an unlawful act of discrimination had been committed** that if such facts were proved the burden moved to the employer at the second stage to explain the reasons(s) for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasons **at the first stage all the evidence had to be considered from whatever source it had come not just evidence adduced by the claimant”.**

80. An employment tribunal may only find that there are ‘facts’ if the tribunal decides **it is more likely than not** that the relevant assertions are true. This means that the **claimant has the burden of proving on the balance of probabilities those matters which he or she wishes the tribunal to find as facts** from which the inference could properly be drawn (in the absence of

any other explanation) that an unlawful act was committed. This is not the whole picture as along with those facts which the claimant proves the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn.

81. The Supreme Court also endorsed the Hewage approach and confirmed that it remains the case under section 136(2) that:

*“The bare facts of a difference in status and a difference in treatment only indicate the possibility of discrimination. They are not, **without more**, sufficient material from which a tribunal ‘could conclude’ that the respondent had committed an act of unlawful discrimination”* (referring to the judgment of Lord Mummery in Madarassy-v- Nomura International Plc 2007 EWCA Civ.33)

Comparators

82. Section 23(1) Equality Act 2010 provides that:

“On a comparison of cases for the purposes of section 13 14 or 19 there must be no material difference between the circumstances relating to each case”

83. The claimant is relying on a comparison of case for her complaint of direct marital discrimination and has identified 2 comparators Mr W and Ms S .

84. The Equality and Human Rights Commission Code of Practice on Employment (ECHR 2011) at paragraph 3.23 refers to section 23(1) of the Equality Act 2010 and provides guidance to tribunals about how this section should be applied:

*“In comparing people for the purposes of direct discrimination there must be **no material difference between the circumstances relating to each case**. However, it is not necessary for the circumstances of the two people (that is the worker and the comparator) to be identical in every way, **what matters is that the circumstances which are relevant to the treatment of the worker are the same or nearly the same for the worker and the comparator**”.*

If there is no actual comparator a tribunal may consider how a hypothetical compactor would have been treated.

Paragraphs 3.24-3.26 of the ECHR refers to hypothetical comparators and provide that:

“in practice it is not always possible to identify an actual person whose relevant circumstances are the same or not materially different, so the comparison will need to be made with a hypothetical comparator.”

“constructing a hypothetical comparator may involve considering elements of the treatment of several people whose circumstances are similar to those of the claimant but not the same.”

85. In this case the claimant makes her case relying upon her marriage to a particular person, Mr Burn and her assertion that she was dismissed because her employer was “disgruntled with her husband”. The claimant relies upon the case of Dunn-v Institute of Cemetery and Crematorium Management 2012 ICR 941 EAT to support her position that the treatment she complains about was marriage specific treatment because of her marriage to a particular person, Mr Burn.

86. The 'marriage specific' she relies upon is drawn from the case of Chief Constable of the Bedfordshire Constabulary -v-Graham 2002 IRLR EAT. In that case the Chief Constable rescinded an offer of promotion to a female police officer primarily due to restrictions contained in section 80 PACE concerning the compellability of spouses to give evidence against one another. It was considered that Ms Graham would not be a competent and compellable witness in the event of any criminal proceedings being taken against her spouse, who would have been her Divisional Commander had the promotion taken place. Upholding the decision of the employment tribunal, the EAT ruled that the reason for the rescission of the promotion offer had been 'marriage-specific'. The issue of competence and compellability would not have arisen had the female officer been in a close relationship other than a marital one with the Divisional Commander. It followed that the Chief Constable had, on the ground of marital status, treated the female officer less favourably than he had treated or would treat an unmarried person of the same sex, contrary to section 3 Sex Discrimination Act 1975 (now section 8 EqA)
87. That reasoning was expressly approved by the EAT in *Dunn*, where a female claimant complained of marriage discrimination when she was allegedly treated less favourably in the way grievances were investigated because of the employer's unhappiness with her husband, who was employed in the same organisation. An employment tribunal rejected the claimant's claim of marital discrimination. On appeal, the EAT (His Honour Judge McMullen presiding) summarised the issue in the case as being whether section 3(SDA 1975) covered discrimination against a person **because of some characteristic of the particular individual he or she was married to** or because of some specific connection between the act of discrimination complained of and that individual. The EAT acknowledged that the claimant might have been treated in the same way if she had been in a close relationship other than marriage with her partner but suggested that this would not have defeated her marriage discrimination claim. Essentially, in the EAT's view, a person who is married or in a civil partnership is protected against discrimination under section 3 SDA (and now under section 8 EqA) **both on the ground of his or her marital or civil partnership status per se and on the ground of his or her relationship with the other partner**. On this basis, any less favourable treatment which is 'marriage-specific' is unlawful. Although the EAT did not deal with the comparator question in any depth, it did emphasise that the statutory comparison was 'between a married person and an unmarried person, and nobody else'.
88. A different approach to marital discrimination cases was taken by the EAT in Hawkins -v- Atex Group Ltd and ors 2012 ICR 1315 by the then President, Mr Justice Underhill, who disapproved the approach taken in *Dunn*. He suggested that it failed to grapple sufficiently with the subtleties of marital discrimination and the EAT had not carried out the correct analysis of the statutory provisions. In *Hawkins* the EAT held that less favourable treatment based not on the mere fact that the claimant is married but on the fact that he or she is in a close relationship with another employee (which would include marriage) does not comprise marital discrimination within the meaning of what is now section 8 Equality Act 2010.

89. Mrs Hawkins was married to the Chief Executive of AG Ltd. For some years she provided her services through a service company jointly owned by her and her husband, but from January 2010 she became directly employed by AG Ltd as its Marketing Director. In June 2010, she was suspended pending an investigation into various allegations, including that she and her husband, contrary to the express concerns of AG Ltd, had employed themselves and their daughter. When H was dismissed along with her husband and daughter, she claimed that her dismissal comprised direct marital discrimination contrary to section 3 SDA. An employment tribunal struck out that claim on the basis that it had no reasonable prospect of success, reasoning that there was no evidence to suggest that AG Ltd was motivated specifically by the fact that H and her husband were married, **rather than simply by the closeness of their relationship**. On appeal, the EAT upheld the tribunal's decision. In Underhill P's words: *'It is impossible to conceive of a "marriage-specific" reason for the conduct complained of, and none is alleged in the Particulars of Claim: whether or not the suspicions of conflicts of interest or nepotism which plainly led the respondents to act as they did were justified, they would as a matter of common sense have arisen equally whether the claimant and Mr Hawkins were married or not.'*
90. In effect, the EAT was saying that the question in these cases is not whether the claimant suffered the treatment in question because he or she is married to a particular spouse but whether the claimant suffered it because he or she is married. Tribunals must therefore distinguish between cases where the close relationship between the employee and his or her spouse is the reason for the treatment, and those where the fact of the relationship being one of marriage is the true reason.
91. We found it helpful in deciding this case to apply the guidance given in Hawkins to apply the correct approach to the facts in this case:

*"9. The starting point must of course be the language of section 3 itself. In my view it is clear (to use the terminology of the 2010 Act) the characteristic protected by section 3(1) is the fact of being married - or, to put it the other way round, that what is proscribed is less favourable treatment on the ground that a person is married. That is what the language used says. The same is true of the section in its pre-amendment form: "marital status" naturally means the fact of being married. **The relevant comparator is thus likewise a person who is not married.** Since in any comparison for the purposes of this section the relevant circumstances must be the same but for the protected characteristic, the appropriate comparator will usually be someone in a relationship akin to marriage but who is not actually married: I will use the old and well understood albeit much deprecated phrase "common law spouse" rather than the modern "partner" which does not have so specific a meaning.*

10. The paradigm case caught by section 3 is thus where a woman is dismissed or otherwise less favourably treated - simply because she is married. Such cases seem outlandish now, but they were very common into the post-war era, even if they had become rarer by the time of the introduction of the 1975 Act. I think it likely that it was that kind of case that Parliament principally had in mind when section 3 was first enacted.

11. A rather less straight forward case is where the reason for the treatment in question comprises both the fact that the complainant is married and the identity of her husband- that is where she is (say) dismissed not simply because she is married but because of who she is married to. On ordinary principles such a case will fall within section 3 because the fact that she is married is an essential part of the ground of the employer's action, even though the identity of her husband is an additional element. But it is important to appreciate that this will not be so in every case where a woman suffers less favourable treatment because of her relationship to her husband. **It is essential that the fact that they are married is part of the ground for the employer's action.** As Ms Sen Gupta succinctly put it, it is important to get the emphasis in the right place: the question is not whether the complainant suffered the treatment in question because she was married **to a particular man**, but whether she suffered it because she was **married** to that man. Some subtleties are involved here. In many perhaps most, cases of this kind the ground for the employer's action will not be the fact that the complainant and her husband are married **but simply the closeness of their relationship and the problems to which that is perceived to give rise:** applying the other half of the "two-part test", a common law wife would have been treated in the same way. **The employer may in giving his reasons for the conduct complained of have referred to the fact that the two of them are married or have used the language of husband and wife, but if that merely reflects the fact that in their particular case the close relationship takes the form of marriage, and he would have treated her the same if they were common law spouses, then section 3 will not apply.** Deciding whether the fact that the complainant is married - rather than simply that she is in a close relationship with the man in question is the ground of the employer's action (in either of the ways identified in paragraph 7(2) above) will often be easy enough: but sometimes it may be more difficult. There will certainly be some cases where the reason is indeed "marriage specific": one example is Chief Constable of the Bedfordshire Constabulary -v- Graham (2002) IRLR 239".

12. Mr Burgher did not accept the analysis in the previous paragraph. He submitted that if in a given case, the close relationship to which the employer objects, takes the form of marriage there should be no need to ask anything further: the marriage is the ground of the action, irrespective of whether the complainant would have been treated the same way if she had been simply a common-law spouse. As for s5(3), it all depends how you define the relevant circumstances: in this case, you cannot strip out the fact of marriage and yet leave in the equation the closeness of the relationship which is an incident of that marriage. That is a seductive submission because often (though not always) to subject a spouse to a detriment because of his or her relationship to the other spouse will be unfair, and it is natural to feel that the law should provide a remedy: but in my view wrong. **Although marriage and a close personal relationship usually go together, they are conceptually separate and are not inevitable corollaries of one another. They are properly to be treated as separate factors, save in the case where the fact of marriage is indeed the criterion for the action complained of.**

*13. I am reinforced in that conclusion by policy considerations. It is, I believe, commonly accepted that it will sometimes be legitimate for employers to accord different treatment to employees who are parties to a close personal relationship, for essentially all kinds of reasons alluded to by Atex in the present case-conflicts of interest and perceptions of favouritism, nepotism and the like: and such treatment may be 'less favourable'. Yet if the law were as Mr Burgher submits such treatment would be absolutely unlawful in cases where the parties in question were husband and wife, since direct discrimination is of course incapable of justification. This is not in my view a result that Parliament is likely to have intended to achieve, particularly since the identical treatment would not be unlawful (subject to a possible claim of sex discrimination or unfair dismissal...) if the employees in question were in an equally close relationship but did not happen to be married: that seems to me to be an arbitrary and unacceptable anomaly. **The approach I favour covering only cases where the employer is motivated (at least in part) by the fact of marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage, seems to me essential if the law in this field is to remain principled and coherent.** It leaves the section with a real, though less wide, sphere of operation, see paragraph 10 above"*

92. More recently the approach in Hawkins was approved by the EAT in Gould - v- Trustees of St John's Downshire Hill EAT 0115/17 a case brought under the Equality Act 2010 in which (the then President, Mrs Justice Simler) provided a helpful reconciliation of the case law,

93. Mr Gould (G) was dismissed from the position of minister at a North London church when it was discovered that he was experiencing marital difficulties. He brought an employment tribunal claim against the church's trustees for direct discrimination on the ground of marriage. However, the claim was struck out because G had 'not engaged the protected characteristic of marriage'. The tribunal took the view that G's pleaded case was that he had been dismissed because of his marriage difficulties, rather than the marriage itself. In reaching this decision, the tribunal relied upon the EAT's judgment in Hawkins.

94. Upon, Appeal, the EAT observed that the fact of being married need not be the only or main reason for the alleged less favourable treatment: it is sufficient if it played an 'operative part'.

"16. Accordingly, what is prohibited by sections 8 and 13 EqA is less favourable treatment because of the protected characteristic of marriage. It is the fact of being married that is protected here. However, as with other protected characteristics, the fact of being married need not be the only reason or main reason for the treatment. If the fact that a claimant is married plays an operative part in the reason or reasons the employer has for treating that person less favourably that is sufficient to engage the protection"

95. G's pleadings were clear in asserting that the decision to dismiss was for the composite reason that he was married and having marital difficulties. In other words, the alleged reason for dismissal was 'marriage-specific' the fact that

he was married rather than merely having a relationship was an essential part of his case. The EAT therefore overturned the tribunal's decision to strike out G's claim. This was not tantamount to treating marital difficulties as a proxy for marriage under section 8 EQA. The EAT emphasised that '*context was everything*': here there was an employer who held marriage in particular regard and an employee whose marriage and marital difficulties had allegedly played a significant part in his treatment. In Hawkins by contrast, it was the closeness of the relationship that formed the reason for the impugned treatment, not the marriage itself. The judgment refers to the critical passages (9-13) of the judgment in Hawkins which we have set out above.

Conclusions

96. In deciding this claim, we have followed the Hawkins/Gould approach favoured by the respondent to approach in Dunn favoured by the claimant. We looked at the totality of the evidence in making our findings of fact, and from those findings considered the context, Mr Sparrows attitude to marriage, his treatment of the claimant prior to the impugned treatment, his reason for the treatment and whether the fact of being married was an operative part of the reason.
97. The issue for the Tribunal to decide was whether any of the 4 alleged acts had occurred to establish the context to that treatment and then consider the reason for it and whether it was less favourable treatment because of the fact the claimant is married.
98. The first alleged act of less favourable treatment was not proved. In May 2021 Mr Sparrow had not had a discussion with Mr Burn about putting the claimant on furlough before he discussed it with the claimant. He had only made one call to the claimant on that occasion to inform her she was being furloughed. During that call the claimant did not tell Mr Sparrow that he should not discuss any work matters relating to her with Mr Burn (see findings of fact at paragraphs 39-44). Having found the allegation has not been proved we did not go on to consider jurisdiction issues. The allegation is not well founded and is dismissed.
99. The second act of alleged less favourable treatment was the discussion between Mr Sparrow and Mr Burn on 29 August 2021 following Mr Burn's resignation. We accepted Mr Sparrows account of the discussion (see paragraph 48). He was genuinely concerned about the risk that confidential information could be leaked to a direct competitor because of the close personal relationship between the claimant and Mr Burn and the fact that the claimant was working exclusively from the home which provided the opportunity for it to happen. This was the same risks the claimant had recognised when she took steps at home to avoid it happening. Mr Sparrow had previously witnessed 'information sharing' during Mr Burn's employment which had not been a concern when they both worked for him but was a concern when one of them was working for a competitor. He reasonably formed the view there was a genuine risk of information being shared with a direct competitor and was genuinely concerned about the consequences this could have to the respondent's business. Mr Sparrow knew from experience how industry contracts were won and lost, and the value of the information the claimant could access on the system (see paragraph 49). He would have formed the same view of anyone employee who was living and working in the

same household with a direct competitor's employee, whether the relationship was marital, siblings, parental, or cohabitation. It was clear from Mr Sparrows evidence that if the offer Mr Burn accepted was not with a rival firm, the respondent would not have need to take any further action to protect confidential information because there was no risk to the business (although the night work would still have been reorganised).

100. The third act is the discussion on 29 August 2021 between Mr Sparrow and Mr Burn. The claimant relied upon this discussion as the second occasion Mr Sparrow is alleged to have discussed her employment with Mr Burn instead of with the claimant. The first occasion the claimant relies upon is the furlough discussion in May 2021 which we found did not occur. There was no previous history of animus towards the claimant as a married person to support an adverse inference being made. Mr Burn had agreed to tell Mr Sparrow which job offer he accepted because he knew Mr Sparrow was genuinely concerned about the risk of confidential information being leaked if Mr Burn did decide to go to work for a direct competitor.
101. When Mr Burn decided to do exactly that he did not tell Mr Sparrow. Mr Sparrow only discovered this was after Mr Burn left on 12 September 2021. The claimant's understanding of the discussion on 29 August 2021 was that Mr Sparrow and Mr Burn agreed and understood confidentiality was only a concern if Mr Burn took ***up employment (with a rival firm)***.
102. While the tribunal can agree it was a detriment for the claimant to find out from Mr Burn that in those circumstances her job may be in jeopardy, the reason why she was dismissed was not because the claimant is married. It was because of the close relationship between the claimant and Mr Burn and the fact they were living in the same home which was also the claimant's workplace. The fact the claimant took precautionary steps to prevent confidential information being shared for those reasons supports this conclusion. (***"After 12 September 2021, Alan Burn's leaving date, I began to work from a home office separate from where my husband was. Alan Burn had no access to my work, or any information related to my work. We did not discuss my work"***). These actions confirm the claimant understood (from 13 September 2021) the respondent's concern about confidential information being leaked was ongoing which was nothing to do with the claimant's marriage.
103. Historically the claimant had received preferential treatment because of her marriage to Mr Burn in relation to her recruitment, her training, being allowed to have a say at his promotion interview. Mr Sparrow's personal views about marriage were neutral. He was married and worked with his wife. His children were not married. The fact the claimant is a married person did not in any way inform his decision making because it did not matter to him. There was no evidence from which any adverse inference could be made of any less favourable view towards 'marriage' or 'married' people to support a finding it was the claimant's marriage or was marriage specific. In fact the only potentially negative references made in conversation about the claimant as a married person were the remarks made by Mr Burn referring to her as "the Mrs.' or "the wife" (see paragraph 44).
104. On 23 September 2021 the claimant was dismissed with notice ending her employment on 30 September 2021. 2 reasons for termination were given

“reorganising your area of work and in addition we have wider concerns around confidentiality and working from home”. Those reasons are not accepted by the claimant who maintains she was dismissed because she is married or as she puts it because of “**who I was married to and not for the given reasons**”.

105. The reasons given by the respondent are supported by the positive findings of fact made that there was a need to reorganise the work because of the reduction in work (paragraph 61) and the respondents had a genuine fear about the risks around confidentiality and working from home after Mr Burns took up employment with a competitor. The tribunal is satisfied that those reasons are genuine and do not disclose either conscious or unconscious discrimination. The respondent was only motivated by the fact that the claimant was at the time of her dismissal in a close relationship which happens to take the form of marriage and working from home. When the claimant first raised a complaint of marital discrimination with the respondent a detailed and clear explanation was provided by the respondent in their letter dated 29 September 2021.

Reasons for your termination/allegations of marital discrimination

“Firstly, we can confirm that the reason for your dismissal is absolutely not because you are married to Alan or any other person and therefore you have not been subjected to any form of discrimination because of your marital status.

As noted in your termination letter, and in the discussions that were had with Alan prior to his termination, the Company have serious and legitimate concerns regarding the confidentiality of information when you have a close personal relationship (of any kind) and/or working and residing in a property with a senior ex-employee of RRS who we understand is proposing to work for a direct competitor.

We also noted in your termination that is not the sole or principal reason for your dismissal and the Company also made the decision to reorganise the work within your area- which we are entitled to do so- after reviewing the current arrangements.

*We trust this explains why the Company consider you have not been subjected in any way to discrimination of any kind **as -very simply put-even if you and Alan weren’t married but living together or had a close personal relationship of any kind, we would have still had genuine and reasonable concerns regarding highly confidential and sensitive information that led us to reviewing the current situation**”.*

106. Those reasons for dismissal are supported by the findings of facts made about the discussion that did take place on 29 August 2021, the claimant’s understanding of those discussions and acknowledgement that the respondent’s genuine fears were about confidential information and the steps the claimant took herself from 13 September 2021 to protect confidential information being seen or shared with Mr Burn while she was working for the respondent and Mr Burn was going to work for a competitor. The claimant working exclusively from home provided Mr Burn the opportunity to see/share/discuss confidential information the claimant only had access to in her role as an employee of the respondent.

107. Those reasons for dismissal had nothing whatsoever to do with the fact the claimant is married. The claimant contends it was marriage discrimination because of the 'particular person' she is married to. We do not agree that is how the protected characteristic is framed in section 13 and 8 Equality Act 2010. It is the fact of her marriage or must be marriage specific and is not about the 'particular person' the claimant is married to. The protected characteristic only covers "*cases where the employer is motivated (at least in part) by the fact of marriage as such, rather than by the closeness of a relationship which happens to take the form of marriage*"
108. Even if we approached the question by constructing a hypothetical comparator in the same material circumstances as the claimant at the time of dismissal, that hypothetical comparator would also have been dismissed. We agreed with Miss Halsall the hypothetical comparator would be, someone who is not married but in *a close personal relationship (of any kind) and/or working and residing in a property with a senior ex-employee of the respondent who was working for a direct competitor resulting in confidentiality concerns*".
109. The conclusions about the dismissal provide the context for the final act the claimant complains about which is the data cleanse request made on 23 and on 29 September 2021. The claimant viewed the request was "to cleanse or have cleansed her personal laptop in so far as it contained any work related confidential or personal data". Ms Halsall submits that no one in the organisation was in the same situation as the claimant. Her personal laptop had the respondent's data base containing information which could be used by a competitor to the respondent's disadvantage. She submits the claimant was not treated less favourably a hypothetical comparator (in not dissimilar circumstances) would have been treated. The comparators Mr W and Ms S were not in the same material circumstances as the claimant for the reasons discussed earlier in these reasons. We agreed with Ms Halsall that they were not the appropriate comparators. The claimant was trying to strip out any material circumstances of those comparators that did not help her case. Ms S resigned voluntarily she was not working from home when she resigned. She was not using a personal laptop with the respondent's data base on it. She was not in a close personal relationship (of any kind) and/or working and residing in a property with a senior ex-employee of the respondent who was working for a direct competitor resulting in confidentiality concerns. Mr W was not in a close relationship with a direct competitor employee which would result in confidentiality concerns. The data cleanse request was specific to the claimant's particular circumstances and was made for the reasons given by the respondent at the time: "*to allow us to cleanse the same from your laptop and any other device used to ensure you can comply with your legal obligations under the Data Protection Act and GDPR*". Those were the genuine and real reasons for the request and do not disclose either conscious or unconscious discrimination because the claimant is married.
110. As to the authorities the claimant has very helpfully made some points based on her understanding of the cases which we were referred to. Her short point about **Hawkins** and **Gould** are that these cases have no similarity to her case. The claimant only relies on **Dunn** which she believes bears the closest resemblance to her case. At paragraph 23 of her written submission, she states:

“In this case, at appeal it was decided Mrs Dunn had been treated less favourably due to who she was married to. The EAT held that the ET was wrong to hold that the protection of married persons does not include protection of a person who is discriminated against on the grounds that she is married to a particular person. Although the respondent did not discriminate against married people in general, the claimant was entitled to claim that her treatment was marriage specific and specific to that marriage. The background to the case was that she was treated less favourably because her husband was in dispute with the respondent and that led to constructive dismissal and marital discrimination. The relevance to my case is that I was dismissed due to ill will bore to my husband due to his leaving the company”

111. We make the following short points in response to that submission.
1. We have preferred and adopted the approach in Hawkins for the reasons we have set out in the applicable law section of these reasons (paragraph 76-96).
 2. Subsequent EAT cases have approved the approach in Hawkins most recently Gould which considered the position under the Equality Act 2010.
 3. The claimant appears to be asserting “ill will towards Mr Burns” was the reason for her dismissal in which case she does not appear to be asserting the reason for her dismissal was because she is a married person.

For those reasons the claim of direct marital discrimination (section 8 and 13 Equality Act 2010) is not well founded and is dismissed. Consequently, because that claim fails, the claim made under section 38 Employment Act 2002 which is contingent on a successful claim is also not well founded and is dismissed.

Employment Judge Rogerson

Date 30 September 2022.

RESERVED JUDGMENT & REASONS SENT
TO THE PARTIES ON

4 October 2022

CM Haines

FOR EMPLOYMENT TRIBUNALS

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.