EMPLOYMENT TRIBUNALS

Claimant: Ms Natalie Leslie

Respondent: Ssangyong Motor UK Limited

Heard at: Bristol **On:** 31 October 2022 (part heard) and 29 to 30 March 2023

Before: Employment Judge C H O'Rourke
Mr H Adam
Ms S Maidment

Representation:

Claimant: in person
Respondent: Mr G Probert - counsel

REASONS

(Having been requested subject to Rule 62 of the Tribunal's Rules of Procedure 2013)

1. The Claimant was employed by the Respondent, as a Fleet Sales Assistant, at their then head office in Luton, from September 2016 to 31 October 2020, the Respondent stating that her employment having been terminated on grounds of redundancy. The Claimant considers that both her dismissal and other alleged unfavourable treatment was discriminatory either because of her sex, or because of her returning from maternity leave.

2. As a consequence, she brings the following claims, as set out in the case management order of 15 November 2021 [37] (and by way of subsequent application made on 1 July 2022) and as further agreed at the outset of the Hearing:

   2.1. Direct Pregnancy and Maternity Discrimination (s 18 Equality Act 2010 ('EqA')

2.1.1 No comparator is required.

2.1.2 The Claimant alleges the following unfavourable treatment, which, it is not in dispute, the dates of the alleged events fall within the 'protected period':

2.1.2.1 On 27 April 2020, not permitting her to return to the same job, from maternity leave (also pleaded under the Parental and Maternity Leave Regulations 1999 ('MPL Regs');
2.1.2.2 On 17 February 2020, increasing her workload;
2.1.2.3 On 17 February 2020, asking her whether she wanted to consider redundancy;
2.1.2.4 On 25 February 2020, saying that her children would be '*home distractions'*.

2.1.3 If found to be unfavourable treatment, was it because of her pregnancy/maternity leave?

2.2 Direct Sex Discrimination (s.13 EqA)

2.2.1 It is not in dispute that the Claimant was dismissed.

2.2.2 Applying **Webb v EMO Air Cargo (UK) Ltd No.2 [1995] IRLR 645 HL**, if the unfavourable treatment was because of, in this case, maternity, she does not need to show less favourable treatment than a male comparator.

2.2.3 Was the dismissal because of her maternity?

2.3 Unfair Dismissal

2.3.1 Has the Respondent shown the reason for dismissal, in this case, redundancy?

2.3.2 Did the Respondent act reasonably in all the circumstances in treating that as sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.3.2.1 The Respondent adequately warned and consulted with the Claimant.
2.3.2.2 The Respondent adopted a reasonable selection decision, including its approach to the selection pool;
2.3.2.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment;

2.3.2.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.4 Limitation. It is agreed that time limits arise in relation to the discrimination claims. It will therefore be necessary, applying s.123 EqA, to determine whether or not the Tribunal should exercise its discretion to extend time, on the basis that it would just and equitable to do so.

The Law

3. We reminded ourselves of the statutory tests (as set out above).

4. We either referred ourselves, or were referred by Mr Probert to the following authorities:

   a. **Royal Mail Group Ltd v Efobi [2021] UKSC 33**, which confirmed that the burden of proof does not shift to the employer to explain the reasons for its treatment of the employee, unless the employee is able to prove, on the balance of probabilities, those matters which they wish the tribunal to find as facts, from which, in the absence of any other explanation, an unlawful act of discrimination can be inferred.

   b. **Amnesty International v Ahmed [2009] UKEAT IRLR 884**, in which then President Underhill confirmed that when deciding whether a claimant has proven discriminatory conduct by the respondent, the Tribunal should consider what inferences, if any, can be drawn from the primary facts, the mental processes (conscious or unconscious), the surrounding circumstances and explanations provided by the respondent.

   c. Mr Probert referred us to a range of authorities in his written skeleton argument, to which we shall refer below, as we consider appropriate.

The Facts

5. We heard evidence from the Claimant. On behalf of the Respondent, we heard evidence from Ms Vanessa Cox, the Claimant's line manager and a Ms Laura Jenkins (née Cuthbert), an HR manager. We also read, without objection from the Respondent, a statement from a former colleague of the Claimant's, a Ms Danielle Hale, but as she did not attend to give evidence, we gave it little weight.

6. Chronology. We set out the following chronology in this matter:

    a. 29 July 2019: the Claimant went on maternity leave and the Respondent engaged a Ms Molly Sheehy as her maternity cover. It was agreed evidence that the Claimant carried out some training and handover with Ms Sheehy, before going on leave.

    b. 17 February 2020 (all dates hereafter 2020): The Claimant and Ms Cox met in a coffee shop.

    c. 25 February: The Claimant, Ms Cox and Ms Jenkins met for a return-to-work meeting, at which the Claimant made an oral flexible working request (FWR).

    d. 28 February: The Claimant was informed by letter that her request was refused. The letter referred to '*home workspace and distractions'* as a factor in the decision [121].

    e. 27 April: End of Claimant's maternity leave, with an expected return to work date of 11 May (allowing for two weeks' leave). However, the Covid pandemic intervened and the Claimant was placed on Furlough, to conclude on 30 June [125].

    f. 1 June: The Respondent announced a potential redundancy situation, to include the closing of the Luton head office and its move to Swindon [129]. (We take judicial notice that depending on the route chosen the return distance between the locations ranges from 164 to 208 miles, with driving times ranging between 3hrs 20 mins and 4 hrs.) The Claimant was individually warned of the possibility of redundancy on the same date and invited to a consultation meeting on 4 June [133].

    g. 4 and 10 June: Consultation meetings were held with the Claimant [137 and 141].

    h. 12 June: The Claimant's dismissal on grounds of redundancy was confirmed, with an Effective Date of Termination (EDT), subject to mutual agreement, of no later than 31 October [143].

    i. 2 July: Having previously had her fixed term contract extended to 3 July, Ms Sheehy was informed that it would be extended to 24 July [151].

    j. 8 July: Ms Jenkins emailed several staff members, including the Claimant, notifying them of a vacancy for a business manager role, inviting applications [153]. The Claimant did not apply.

k. 25 July: Ms Sheehy's contract was further extended, to 31 October, in the role of interim business manager [159].

l. 25 September: The Claimant raised a grievance, challenging her dismissal, on the basis that she considered that her role still existed and was being filled by Ms Sheehy [199].

m. 27 September: The Claimant further alleged maternity discrimination [203].

n. 5 October: A grievance meeting was held, with Ms Cox and Ms Jenkins in attendance [207].

o. 9 October: Ms Jenkins wrote to the Claimant, dismissing the grievance, less an admission that a photograph of Ms Sheehy, on the Respondent's media website, listing her as a Fleet Executive Assistant, was not removed when she, the Respondent stated, had moved on from that role and for which Ms Jenkins apologised [211].

p. 31 October: Claimant's EDT.

q. 10 December: the Claimant presented her ET1.

7. Limitation. We were invited, correctly, by Mr Probert, to consider this issue first, as, without the Tribunal having jurisdiction to consider the discrimination claims, they cannot be determined. It is common ground that they have been brought out of time and therefore, unless the requirements of s.123 EqA can be met, we do not have jurisdiction to hear them. The following factors are of relevance:

    a. The maternity-related direct discrimination allegations date from 17 and 25 February and 27 April 2020.

    b. The direct sex discrimination claim dates from (applying the principle in **Galilee v Commissioner of Police of the Metropolis [2018] ICR 634 UKEAT**) the date that permission was given to amend the claim to include it, i.e. 1 July 2021.

    c. Based on the date of presentation of the claim, any allegations that arose prior to 11 September 2020 are potentially out of time. So, taking the maternity claims at their highest, as a course of conduct ranging from February to 27 April, they are at least four months out of time. The direct sex discrimination claim, based on the date of dismissal, is approximately eight months out of time.

d. We were referred to well-known case law as to the application of s.123, which, in summary, sets out the following principles:

   i. There must be a good reason for the delay and the longer the delay, the better the reason required.
   ii. The balance of prejudice to the parties, in dismissing the claim, or permitting it to proceed.
   iii. It is for the Claimant to satisfy the Tribunal that it would be just and equitable to extend time, the exercise of discretion being the exception rather than the rule.

8. The Claimant's case. We set out the following evidence:

   a. The Claimant did not specifically address this issue in her statement. By implication, however, it seems that she considered that she had been previously naïve and too trusting of the Respondent, in particular Ms Cox and that it was not until she, to her mind, discovered, in or around September 2020 that Ms Sheehy was continuing to work in the Fleet Sales role that she began to realise the true situation.

   b. In cross-examination, the Claimant's evidence as to her perception at the time as to feeling discriminated against was inconsistent. In answer to a query as to why she hadn't raised a complaint or grievance in the February – April period as to possible discrimination, she said that she did not feel, at the time that she was being discriminated against. However, in answer to a question about the refusal of her FWR, she said that she considered this decision not to have been properly considered by the Respondent, or to be for practical business reasons, but to be '*more personal than anything else'*. She said that she had previously worked from home, so '*what was the problem and that it seemed that the Respondent was not accepting my return to work.'* She went on to confirm that she viewed this decision, at the time, as discriminatory and that she said so to Ms Cox, face to face (but not using the word 'discrimination') but was unsure when she did so. She does not mention this discussion in her witness statement.

   c. When challenged why she had not alleged discrimination at the time, she said that she '*was eager to return to work'* and also, by implication from her statement, did not wish to be seen to be 'rocking the boat'. She did not appeal against the FWR refusal, or (apart from what she now says she said to Ms Cox) complain of any form of discrimination either at the time, or in her grievance, until her email addendum to the grievance, of 27 September. She

said that it was only by '*looking back that I considered that I was being discriminated against.'*

d. She accepted in cross-examination that she was aware of the Respondent's equal opportunities policy and that if she felt that there was a breach of the policy, she needed to raise any concerns as to discrimination, which would be dealt with '*seriously and speedily'* [59].

e. She is clearly, from the manner of her conduct of this Hearing, an intelligent and educated woman.

9. Conclusion on Limitation. We conclude that it would not be just and equitable to extend time for the Claimant to bring her discrimination claims, for the following reasons:

a. On her own evidence, even though somewhat inconsistent, she clearly thought, at the time that her FWR was refused (so, late February/early March 2020) that she was being discriminated against on grounds of maternity.

b. It was clear from her evidence that despite her feeling this at the time, knowing of her rights and the application of the Respondent's policies, she decided not to 'rock the boat' as she was keen to return to work.

c. While this is perhaps an understandable reason for not acting at the time, she then, when informed of her dismissal on grounds of redundancy, on 12 June, still did not allege discrimination, when, it might be argued, she had nothing to lose.

d. The delay in her eventually bringing such a claim is lengthy and for which a good reason is needed, and the Claimant has not, in this case, provided such a reason, having made a tactical decision at the time not to bring such a claim and only very belatedly raising the issue, almost as an afterthought.

e. We considered the balance of prejudice to the parties in making such a decision and concluded that the balance fell in the Respondent's favour. Firstly, these claims are being heard three years after the initial events arose and the Respondent witnesses' difficulties in recalling such events over that time period was apparent from their evidence. Secondly, as we will indicate below, these claims are weak. Thirdly, the Claimant is still able to continue with her unfair dismissal claim and is not, therefore, left without any recourse against the Respondent.

f. We don't consider therefore that the Claimant has met the burden of persuading the Tribunal to exercise its discretion to extend time (**CC Lincolnshire Police v Caston [2009] EWCA Civ 1298**).

10. Unfair Dismissal. The only claim within time, therefore, is that of unfair dismissal. We consider the issues in that claim as follows:

a. The Claimant asserts that her role was not genuinely redundant, as it continued to be filled by Ms Sheehy and that therefore effectively the redundancy was a sham, to replace her with Ms Sheehy. She referred to the following evidence in this respect:

i. Ms Sheehy had been copied into an email of 17 September by Ms Jenkins, about the payment of parking charges [183], indicating to the Claimant that Ms Sheehy was still working in Fleet and that Ms Sheehy also continued to use both 'fleet' and 'ops' email addresses.
ii. She said that Ms Sheehy also had involvement in 'Country and Field' sales, which had been part of the Claimant's role.
iii. A picture of Ms Sheehy on a Respondent website describing her as 'Fleet Executive Assistant' [255].
iv. An undated reference on Ms Sheehy's own Facebook profile listing her employment as 'Fleet Executive'.
v. A photograph of Ms Sheehy at an external event.

b. The Respondent's evidence countering these assertions, was as follows:

i. Ms Cox confirmed that Ms Sheehy left the Fleet department on 24 July, following the office relocation and that she (Ms Cox) was the only person left in that team, in the newly-titled role of PR and Key Relationships Manager.
ii. At the point of the parking charges email, Ms Sheehy was in the temporary role of interim business manager, as the footnotes to her emails attest. The 'fleet' email address was maintained because that was an address that was familiar to dealers and therefore seen as convenient to retain.
iii. Ms Jenkins said both in evidence and in her response to the grievance that the photograph of Ms Sheehy on the Respondent's media website was an oversight on the Respondent's part, as it was not a site that either she or Ms Cox referred to very often and for which oversight Ms Jenkins apologised.
iv. Ms Cox said, in respect of the 'Country and Field' issue that that responsibility had been handed over to 'ops' prior to the Claimant going on maternity leave and that this was why,

therefore, Ms Sheehy continued to refer to it, as her role was in 'ops'.

v. As to Ms Sheehy's Facebook, the Respondent could not account for how Ms Sheehy chose to describe her role, or when she did so and whether or not she routinely updated her profile. They pointed out also that the Facebook entry is undated.

vi. For external events, particularly those running over many days, and at scale, such as, in this case, the Badminton Horse Trials, it was necessary to draft in staff from throughout the Company to assist and there was, therefore, nothing unusual in Ms Sheehy being in attendance.

c. Conclusion on this Issue. The Claimant failed to adequately challenge the Respondent's evidence on this point. This was clearly a very challenging time for the Respondent and its managers, with Covid restrictions, furlough, redundancies and a major office move to contend with. It is inevitable, in those circumstances that some details will be overlooked and procedures allowed to slip. All the evidence indicates to us that this is precisely what happened with Ms Sheehy's position. Her continued use of a 'Fleet' email address (as well of course as an 'Ops' address, where her role was based) was convenient and less disruptive for dealers. The website photograph was clearly an oversight and promptly rectified when raised. The Claimant simply failed to shake or counter the Respondent's evidence on this matter and we are satisfied, therefore that Ms Sheehy did not continue in the Claimant's role, but moved to another entirely separate role.

11. Accordingly, therefore, the Claimant's role was genuinely redundant.

12. There was no dispute from the Claimant that she had been adequately warned of redundancy and been consulted with.

13. She was in a 'pool of one' and therefore there was no requirement for any redundancy scoring matrix for that role.

14. She gave no indication at any point that she was willing or able to either work at or relocate to Swindon, with, as stated, an approximately four-hour return travel time. In cross-examination on this point, her evidence was evasive. When it was suggested to her that she had said that she wouldn't relocate, she said that she '*was never asked'*, but when pushed, went on to say '*she had given no thought to it'*. We found this answer to be implausible, as clearly the office move was a major issue. The Claimant provided no evidence that she had at the time said that she was willing to move to or work in Swindon, instead seeking to place the onus on the

Respondent to formally ask her and to record that fact. We are entirely satisfied that there was no question at the time of the Claimant being willing to relocate to or work in Swindon and indeed in closing submissions the Claimant said that at the time she was very rooted in her home town of Luton, with the implication that she wouldn't have contemplated a move, but that she has since reconsidered that link to Luton and has since relocated for other employment.

15. The only other issue is whether the Respondent made reasonable efforts to offer suitable alternative employment. Both Ms Cox and Ms Jenkins said they did, by reference to specific roles, such as the business manager role, but that the Claimant did not apply for any such roles. The Claimant does not raise this issue in her witness statement, or contest that she applied for roles for which she was not considered. We agree with Mr Probert that the adverse references to the Claimant's abilities to fill the business manager role [245] are a 'red herring' as she did not apply for that role, in any event. We conclude, therefore that the Respondent did make reasonable efforts to offer suitable alternative employment, within its limited resources to do so, at the time.

16. We conclude, therefore that the Claimant's dismissal was fair, on the legitimate grounds of redundancy.

17. Discrimination Claims. While we have dismissed those claims for limitation reasons and therefore do not, strictly, need to give them further consideration, we briefly set out our views in respect of them, as follows:

    a. There was no requirement to provide the Claimant with return to her old job, if it no longer existed (which we have found to be the case). She had been on Additional Maternity Leave and therefore the requirement was only to provide an alternative suitable role, if practicable.

    b. There was no worthwhile evidence that her workload was significantly increased. There were proposed changes, but with some aspects being removed and others being inserted. In any event, the Claimant never engaged in that changed role.

    c. The evidence as to whether she was, as she alleges, asked to take redundancy, is entirely unclear and open to retrospective interpretation. What is clear is that the meeting of 17 February was an informal one, between formerly friendly colleagues. Ms Cox was aware at the time of concerns within the Company as to structural changes and quite naturally discussed those with the Claimant. These circumstances understandably gave rise to discussions as to potential redundancies, with each witness saying that the other

raised the subject. We could not have concluded, therefore that the Claimant had proved this allegation.

d. We do not view discussion with a mother of new-born child (and already a mother of two other children), who was requesting home working, as to her ability to work from home, taking into account childcare, as being a detriment or unfavourable treatment. In the context of a FWR, it is an entirely legitimate concern of an employer that any parent, with childcaring responsibilities, is going to be able to cope, both from the Company's perspective and their own. Indeed, referring to the phrase used by the Claimant several times, not to make such enquiries could have been a breach of the 'duty of care' the Respondent had for the Claimant.

e. Finally, having found the Claimant's dismissal to have been fair, on grounds of redundancy, it is self-evident that it cannot have been an act of discrimination.

Judgment

18. For these reasons, the Claimant's claims of unfair dismissal and discrimination fail and are dismissed.

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Employment Judge O'Rourke
Dated: 18 April 2023

Reasons sent to the Parties on 19 April 2023

For the Tribunal Office