EMPLOYMENT TRIBUNALS

Claimant: Ms Fiona Harrison

Respondent: Heritage Venues Limited

Heard at: Reading **On: 25 and 26 October 2023**

Before: Employment Judge Gumbiti-Zimuto
Members: Mrs S Laurence-Doig and Mr B McSweeney

Appearances
For the Claimant: Mr Cormac Devlin, counsel
For the Respondent: Mr Alec Small, counsel

RESERVED JUDGMENT

The claimant's complaints of unfair dismissal, indirect sex discrimination and part-time working detriment are well founded and succeed.

REASONS

1. In a claim form presented on the 2 February 2023, the claimant complains that the respondent has unfairly dismissed her, indirectly discriminated against her on the grounds of sex and subjected her to a detriment for working part-time.

2. The claimant gave evidence in support of her own case. The respondent relied on the evidence or Ms Valerie Pearson and also on the written statement of Ms Charlotte Alberto. The parties have also provided the Tribunal with a trial bundle of documents. From these sources we made the findings of fact we considered necessary for us to decide the issues before us in this case.

3. The respondent is a company that provides bespoke wedding, catering and events planning in Berkshire. From 16 April 2016 until 18 October 2022 the claimant was employed by the respondent as a Senior Events & Operations Co-Ordinator.

4. Around the time of the claimant's dismissal, the respondent employed 23 employees.

5. Between 2021-2022 the claimant went on maternity leave, returning to work part-time for 20 hours a week from 3 May 2022.

6. Upon the claimant's return to work she was informed that her line management duties were removed. There is some dispute between the claimant and the respondent about what was said about this change. The claimant states that she was told by the Director of Events & Operations, that managing team members was not possible while working part time hours as she would be needed elsewhere during the peak of the wedding season.

7. The respondent's version is that the claimant was told that as her return from maternity leave was during the peak of the wedding season, all her focus had to be on delivery of weddings, so it was better for the claimant to get used to things again and get up to speed and then when things quieten down, they could look at more senior responsibilities. Ms Pearson stated that the claimant's hours had halved on the claimant's return so for her to have a new report line would have been unreasonable. Ms Pearson says that the expectation was that the claimant was to take up the "Senior parts" of the role at a later time, there was no question of demotion or salary cut for the claimant. The claimant's salary was not cut. The essential difference between the claimant and respondent on this aspect of the evidence is whether the removal of "Senior duties" was a temporary expedient or a permanent change.

8. In July 2022 the claimant applied for the role of Events & Operations Manager. Although the claimant was working part-time she made it clear that she would increase her working time to four days a week in order to secure the role. The claimant was interviewed for the role but was not successful.

9. At a board meeting for the respondent on 27 September 2022, it was decided that it would be necessary to make redundancies. Ms Valerie Pearson was tasked with looking into the respondent's options. Ms Pearson states that she looked at each permanent role within the company against the needs of the business and identified four roles as being at risk of redundancy. Two of the roles identified were within the Operations department. In the redundancy process it was determined that the respondent's needs would be met by the loss of the "Senior duties and 20 hours per week".[1]

10. In a meeting on 3 October 2022 the claimant was informed that she was being placed at risk of redundancy. This was confirmed in a letter, of the same day, which included the passage:

> "As part of the consultation procedure, we also wish to explore with you whether there are options available other than redundancy in order to fulfil the Company's business needs. If you have any viable suggestions or

[1] Statement of Valerie Pearson paragraph 14.

> proposals to put forward beyond the measures we have already introduced, please contact Alys by no later than 5th October."

The claimant was informed that there would be a consultation process.

11. Although the claimant does not accept that there was a genuine redundancy situation, the Tribunal is satisfied that in view of the respondent's financial situation and the 2023 forecast, it was decided to make redundancies and four roles were identified as at risk.

12. The claimant was placed in a "pool of one" for the purposes of selection for redundancy. The reason that the claimant was not put in such a pool was explained by Ms Pearson in answer to the suggestion from the claimant that the respondent was taking the view that it was going to make the claimant redundant because she was part-time. Ms Pearson said:

> "we needed a certain number of hours to manage the weddings …the primary thing was we could not afford to lose a full-time member [of staff] we did not need to create a pool and we were advised that we could afford to lose those hours. So the end result might be the same but the motivation was completely different"

13. At the time that this redundancy exercise was being carried out the claimant although described as being in the role of Senior Events & Operations Co-Ordinator, the role that the claimant was performing was in practice the same as two other colleagues (Julia and Rachel) save that the claimant was working part-time hours.

14. The claimant was removed from the client rota for 2023 on or about the 4 October 2023. The respondent states that this came about because the claimant had told her colleagues in a WhatsApp group that she was being made redundant and one of those colleagues then removed the claimant from the client rota. It is the respondent's case that the claimant was reinstated on to the rota after this came to the attention of management however there is no documentary evidence to support the suggestion that the claimant was reinstated to the client rota after her removal. In her statement Ms Pearson fails to state that the claimant was reinstated into rota, and she is unable to name the person who changed the rota.

15. The claimant asked for more time to prepare her proposals for ways of avoiding redundancy and was given an extension of time to produce her proposals. The claimant prepared a number of proposals which she put forward as ways in which her redundancy could be avoided. The claimant went through her proposals during the consultation meeting with Ms Pearson on the 10 October 2022.

16. During the consultation meeting on the 10 October the claimant suggested a job share as one of the proposals. The respondent's witness Ms Pearson stated that the job share was not feasible. One of the factors that she gave as an explanation for why it was not feasible was that any job share with the claimant would involve part-time working. Part-time working

presented, for Ms Pearson, problems which might result in delays in responses to customers affecting the service delivered. Ms Pearson also relied on the fact that one named operations team member is allocated to each couple (i.e. to each client for a specific wedding) and they remain with the couple through to their wedding. This she considered presented a problem for the service provided by the respondent when it involved a job share and part-time working.

17. There is a dispute between the claimant and the respondent as to whether the claimant was told at the 10 October consultation meeting that she would no longer be meeting with couples as part of her role. Ms Pearson says that this is wrong and states that it is not recorded in the respondent's version of the minutes of the 10 October. The suggestion does appear in the claimant's version of the minutes. The respondent's version of the minutes indicate that there was a discussion about meeting with couples, and that the claimant asked the question whether she should continue to meet with couples. The respondent's notes indicate that the claimant was told that it is up to her whether she did so or not, and that the claimant was told that she should inform the respondent so that cover could be arranged if the claimant did not want to meet with couples during the redundancy process. The Tribunal's view is that the differences between the two versions may be explained by the perspectives from which they came to the meeting but our view is that it was made clear to the claimant that she was not required to meet with couples and she interpreted this as an instruction or directive whereas Ms Pearson suggests that it was an option. We are satisfied that the claimant was not going to be allocated any further couples during the redundancy process. On balance we consider it more likely than not that the claimant's recollection is likely to be an accurate recollection of what she was told.

18. A final consultation meeting took place on the on 13 October 2022, this had been brought forward from the 17 October at the request of the claimant. At this meeting it was confirmed that the claimant was to be dismissed for redundancy. This was confirmed in a letter to the claimant. The claimant was told that she had the right to appeal and she did so.

19. During the course of the final consultation meeting Ms Pearson accepted that the claimant's role was "similar but not identical" to her colleagues in the operations team who had not been selected for redundancy. The Tribunal consider that the significant differences include that claimant was part-time working, senior to her colleagues and had wider experience in the respondent's business than her colleagues. We also note that Ms Pearson told the claimant:

> "There are significant shared duties, but of course, Fiona was a senior and although there wasn't a great opportunity to exercise that when you returned because of the reduced number of hours, the advice we've been given is that it is based on unique job titles, not the duties."

20. There was mention of the claimant being found employment in another business involving one of the respondent's directors and there was also

mention of the claimant being able to work on a self-employed basis as a Freelance Events Manager. The former never materialised and the claimant refused the latter.

21. The claimant's employment was terminated on 18 October 2022.

22. In a letter dated 19 October 2022 the claimant appealed the decision to dismiss her on the grounds of redundancy. The claimant's appeal was considered by Ms Charlotte Alberto, a company director, who asked that Ms Pearson and Ms Hilbourne carry out a redundancy selection assessment for the claimant and her two colleagues in the operations team. The result of this exercise was that the claimant was scored the lowest. This exercise is criticised by the claimant but is relied upon by the respondent as showing that the selection of the claimant for redundancy would have been made anyway even if a selection pool of all three members of the operations team had been undertaken. For the reasons we set out below we came to the conclusion that this was an exercise which sought to justify the decision already made rather than to test whether the correct decision had been made. The outcome of the claimant's appeal was notified to her in a letter from Ms Pearson (p183).

Unfair dismissal

23. The claimant claims that she was unfairly dismissed contrary to sections 94 and 98

24. Employment Rights Act 1996 ("ERA'). Section 139 ERA states that "an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to… (b) the fact that the requirements of that business (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

25. The parties reminded us of *Williams v Compair Maxam Ltd* [1982] ICR 156 in which the following principles which a reasonable employer should adopt in a redundancy situation were expounded: (a) The employer will seek to give as much warning as possible of impending redundancies to enable affected employees to consider possible alternative solutions; (b) The selection criteria should, so far as possible, not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service; (c) The selection should be made fairly in accordance with the criteria; (d) The employer should consider whether alternative employment could be offered. In relation to the question of a pool for selection of candidates for redundancy we were referred to *Capita Hartshead Ltd v Byard* [2012] ICR 1256 includes the following guidance:

(a) *"It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the*

> *question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted"* (per Browne-Wilkinson J in *Williams v Compair Maxam Limited [1982] IRLR 83* [18];
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> (b) *[9] ... the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn"* (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM) ;
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> (c) *"There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem"* (per Mummery J in Taymech v Ryan [1994] EAT/663/94);
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> (d) The Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has *"genuinely applied"* his mind to the issue of who should be in the pool for consideration for redundancy; and that
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> (e) Even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

26. In this case the question is whether the identification of the claimant as part of a pool of one was fair. There are circumstances when it is permissible for employers to identify a redundancy pool of one person (*Wrexham Golf Co. Ltd v Ingham,* (EAT/0190/12)).

Conclusions on unfair dismissal

Reason for redundancy

27. The claimant disputes that the reason for her dismissal was redundancy and submits that the respondent has failed to discharge its burden of proof in proving the reason for dismissal under section 98(1)(a) ERA. Our conclusion is that the claimant was dismissed because of redundancy. The evidence that was given by Ms Pearson, which in our view was not contested by other evidence, was that the respondent's requirements for the employees to carry out work of a particular kind, that of events and operations co-ordinator, ceased or diminished or was this likely to be so. Further the claimant's dismissal was caused wholly or mainly by the cessation or by the diminution of requirements for employees to carry out such work.

28. We are satisfied that the reason for the claimant's dismissal was redundancy.

Fairness

29. The Tribunal find that the claimant and her colleagues (Julia and Rachael) at the relevant time did materially the same job. At the relevant time, although the claimant's job title was Senior Events and Operations Co-Ordinator, she had not been carrying out "senior duties" following her return from maternity leave.

30. The material difference between the three roles was that the claimant's role was part-time. The respondent took the view that it could not afford to lose a full-time role, and this was critical to the decision to dismiss the claimant. It also meant that the decision to dismiss the claimant was in effect already made before the redundancy consultation process was carried out.

31. The fact that the claimant was part-time in our view was the determinant of whether the claimant was placed in a pool of one and selected for redundancy. The respondent would not consider a job share option because this would have involved some element of part-time working.

32. The claimant was told, in a consultation meeting, that she did not have to contact couples during the redundancy process. The fact that the claimant was removed from the rota and we have been unable to see any documentary evidence to support the respondent's assertion that the claimant was reinstated on to the rota. Taking these matters together we conclude that the decision to dismiss the claimant was in practical terms already determined before the redundancy process was carried out.

33. The Tribunal were troubled by aspects of the scoring matrix exercise carried out by the respondent at the appeal stage. The claimant's original scores for timekeeping and relevant skills appear to the Tribunal to be unjustifiably low. We bear in mind that the respondent accepted in evidence during the Hearing that the claimant's time keeping, and performance were not in question. The Tribunal note that in the second version of the scoring matrix the claimant's scores were increased. The respondent states that the fact that the claimant's scores were reviewed and increased shows the application of a fair process to the claimant. The claimant says it shows the opposite.

34. The respondent included a criterion which inevitably meant that the claimant, as a part-time employee was bound to score lower than her colleagues, namely the criterion relating to the ability to take on 66 events per year. The use of this criterion in our view also appears to have been unfairly applied to the claimant because the respondent does not give the claimant any credit or adjustment to reflect that the claimant was willing to increased her hours to four days per week which would have resulted in a higher score.

35. The answers given to question in evidence from Ms Pearson suggested that in carrying out the scoring exercise the respondent was seeking to justify the claimant's dismissal as opposed to assessing who between the three employees in the operations team should be made redundant. We concluded that there is force in the claimant's criticism that the remarking exercise was carried out with a view to defending the respondent's position in anticipation of these proceedings and was in fact an ex post facto justification of the decision to dismiss the claimant. Our conclusion therefore is that the scoring matrix was not objectively or fairly applied.

36. We have come to the conclusion that the claimant was unfairly dismissed. We did not consider that a *Polkey* reduction should be made in this case because we cannot be satisfied that if a fair process had been followed that the claimant would have been dismissed or was more likely to be dismissed than either of her colleagues having regard to the factors such as absence record, time keeping, disciplinary record, job performance, quantity of work, relevant skills and future potential. In our view it would not be just and equitable to simply reduce the award by a third because there were three employees that should have been in scope.

Discrimination on the grounds of sex

37. The claimant claims that the respondent has discriminated against her on the grounds of her protected characteristic of sex contrary to sections11, 19 and 39 (2) (c) Equality Act 2010 (EA). The claimant complains that she has been subject to indirect discrimination.

38. Section 19(1) EA provides that the claimant needs to show that the respondent applied to her a provision, criterion or practice ("PCP") which is discriminatory in relation to her sex. Section 19(2) EA, provides that a PCP is discriminatory if: (a) A applies, or would apply, it to persons with whom B does not share the characteristic, (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (c) it puts, or would put, B at that disadvantage, and (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

39. The parties have referred us to *Dobson v North Cumbria Integrated Care NHS Foundation Trust* [2021] ICR 1699 where it is said that in the context of indirect sex discrimination, judicial notice has been taken of the childcare disparity between men and women. The parties have referred to *Home Office v Holmes* [1984] ICR 678 for the proposition that a higher proportion of women than men work part-time.

40. The claimant also asked us to note that in order to satisfy the test of objective justification, the employer must show that the PCP is "reasonably necessary" to achieve its objective: *Chief Constable of West Yorkshire Police v Homer* [2012] ICR 704 (SC).

41. The claimant also relied on *Hardy and Hansons v Lax* [2005] ICR 1565, the Court of Appeal upheld the tribunal's decision that the employer had discriminated against the claimant when it refused to allow her to work part-time or job share following her return from maternity leave. Pill LJ held at §49 that the tribunal was entitled to form the view that the employer had insufficiently explored the possibility of job sharing and overstated the objections to job sharing. Including the following observation by Pill LJ:

> "The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which

> may or may not arise from job sharing in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action."

42. The claimant, in her claim form, relied on three PCP's (i) requiring staff to work full-time; (ii) requiring staff in the role of Senior Events & Operations Co-Ordinator to work full-time; (iii) using part-time work status as a selection criterion in a redundancy exercise. She stated that these PCP's put women at a particular disadvantage compared with men.

43. The claimant says that, as a consequence of the application of the PCPs, she was dismissed contrary to section 39 (2) (c) EA 2010 and/or not afforded access to opportunities for promotion or transfer under s.39(2) (b) EA 2010 and/or subjected to detriment contrary to s.39 (2) (d) EA 2010; That the respondent cannot show that the PCPs were a proportionate means of achieving a legitimate aim. The true reason for the claimant's dismissal, and the manner in which the redundancy exercise was carried out, was her part-time working pattern.

44. The respondent states that claimant accepted in her evidence that the first and second PCPs were not PCPs which were applied to her.

45. In respect of the third PCP, the respondent says there is no evidence that it deliberately or specifically used part-time status as the reason for identifying roles to be made redundant. If the third PCP is found to exist, then the respondent accepts that it would put women at a particular disadvantage when compared to men, and, that the third PCP put the claimant at that disadvantage. In those circumstances the respondent states that the issue then turns to justification. The respondent says this was a proportionate means of achieving the aim of maintaining the levels of service the company needed to deliver its clients, in the context of a situation that required lower operating costs.

Conclusions on sex discrimination

46. The claimant accepted that the first PCP was not established.

47. The claimant continues to rely on the second PCP, namely requiring staff in the role of Senior Events & Operations Co-Ordinator to work full-time, however, in her evidence the claimant accepted that the respondent did not apply this PCP to her.

48. The respondent while conceding that the third PCP, using part-time work status as a selection criterion in a redundancy exercise, is arguable, denies that it was applied to the claimant. The respondent states that this was not what they did when identifying which roles were to made redundant. The conclusion of the Tribunal is that the claimant was selected for redundancy because she was a part-time worker. The evidence of Ms Pearson in our view effectively concedes that this is the case she however seeks to make a distinction between not wanting to lose a full-time worker and selecting a part-time worker for redundancy. In our

view the fact that the claimant was part-time was the principal reason for the claimant's selection for redundancy.

49. The parties agree that third PCP would put women at a particular disadvantage when compared with men and that it did put the claimant at that disadvantage.

50. The respondent contends that there is justification for the PCP. The respondent relies on the alleged competitive nature of the wedding organisation business and the requirement for perfection and suggests that part-time working hampers being competitive and interferes with the ability to achieve perfection. The respondent says that there are practical disadvantages in making a full-time person redundant because they would need to recruit a part-time person which has several implications including recruitment and cost which are disadvantageous which the respondent is entitled to take account of.

51. The claimant submits that the respondent did not seek to justify the decision to adopt part-time working as the determinative criterion in the redundancy selection, as the evidence of Ms Pearson proceeds on the assumption that the claimant's job was to be selected for redundancy.

52. The conclusion of the Tribunal is that there were a number of matters raised by the respondent which seek to justify the decision to select the claimant for redundancy. The respondent rejected the idea of job share, however the respondent in our view did not give a clear exposition for why a job share would not have worked. The respondent's evidence on job share in our view was a series of generic statements which in essence set out the sort of challenges that the respondent or any employer might have to address when setting out to employ people on a job share: without setting out why they were int his case insurmountable or reasonably considered as sufficient to reject a job share.

53. The evidence that the respondent gave in our view did not provide us with evidence from which we are able to conclude that the respondent was justified in the decision to select the claimant for redundancy using the discriminatory criterion.

<u>Part-time working detriment</u>

54. Regulation 5 (1) (b) of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides that a part-time worker has the right not to be treated less favourably than a comparable full-time worker.

55. A comparable full-time worker includes workers who are employed by the same employer under the same type of contract and are engaged in the same or broadly similar work and full time workers who are based at the same establishment as the part-time worker.

56. Where an employee brings a claim it is for the employer to identify the ground for less favourable treatment.

Conclusions on part-time detriment

57. The respondent states as follows in its written submissions:

> 16. At its heart, this claim comes down to the fine factual and causal distinction between whether the Claimant was subjected to the detriments on the ground that she was a part-time worker, or whether it was the fact that she worked part-time that meant she was in a different position. The distinction is a fine, one, and on a simply 'but-for' test, would be arguably inconsequential, and even in this case, the end result is arguably the same. But the underlying reason for the treatment does matter, and it is a distinction which is recognised in case law, such as in the case of *Forth Valley Healthcare Board v Campbell* (EA-2020-SCO-000093) In that case the Claimant, working part time worked four hours on weekday shifts, and over 6 on weekend shifts. Company policy was to give a paid 15 minute break for every 6 hours worked, the Claimant was therefore ineligible for breaks during the week, and argued that this was unfavourable treatment for a part-time worker. On appeal, the EAT held that the ET had erred in applying a simple 'but-for' test (i.e. had he not been part-time and been working full hours he would have had the breaks) but reg 5(2) clearly states that reg 5(1) (the right) only applies if the treatment is *on the ground that the* worker is a part timer. The ground was the length of hours, not the status and so the claim failed.
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> 17. In this case, the ground is the Claimant's inability to handle the number of clients required by the business, not that she was a part-time worker. In essence, there is a similarity to the causation test in direct discrimination claims, where the less favourable treatment must be *because of* the protected characteristic, it's akin to an element of *mens rea.* Here the Respondents did not make the Claimant redundant or fail to consider alternatives to redundancy *on the ground that* she was a part-time employee, it was on the primary ground that her role was no longer able to meet the needs of the business, admittedly because she was a part-time employee, it is in essence a fine distinction between 'a chicken and egg' but employment law consistently recognises that such distinctions are key.
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> 18. This may be argued to be a difference without distinction, in which case the Respondents submit that the question then shifts onto the justification question in paragraph 4.5.

58. We reject the respondent's contention and do indeed consider that in this case it is a distinction made without a difference. The Tribunal's conclusion is that the claimant was selected for redundancy because of her part-time working status. On the facts of this case and having considered the approach that the respondent has taken we do not consider that it is possible to make the distinction that the respondent seeks to argue for. The claimant did the same job as her colleagues in the operations department, Julia and Rachael, the only difference is that the claimant was part-time. The respondent wanted to maintain the full-time workers. The respondent created for the purposes of the redundancy selection a requirement for the employees to take on a minimum of 66 events, this made it impossible for the claimant as a part-time worker to comply.

59. Turning to the question of justification for the reasons we have set above we do not consider that the respondent has justified the use of the part-time worker status as a selection criterion for redundancy.

Conclusions

60. The Tribunal find that the claimant's complaints are well founded and succeed.

Directions for remedy hearing

61. The remedy hearing shall take place by video hearing on the **15 January 2024** commencing at 10 am.

62. The parties must provide to the other side any further disclosure of documents relating to remedy withing 7 days of receiving this judgment.

63. The parties must confirm that they have disclosed to the other side all documents relevant to remedy by **18 December 2023**.

64. The parties are to exchange any further witness statements relating to remedy by **8 January 2024**.

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Employment Judge Gumbiti-Zimuto

Date: 20 November 2023

Sent to the parties on: 5 December 2023

For the Tribunals Office