EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000075/2024

Held in Glasgow on 24, 25, 26 and 27 June 2024

Employment Judge M Robison
Tribunal Member N Elliot
Tribunal Member G Mckay

Mrs A Passmore	**Claimant** **In Person**
SSUK Ltd	**Respondent** **Represented by** **Mrs K Wedderburn** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claims of unfair dismissal and marriage discrimination are not well-founded and are dismissed.

REASONS

1. The claimant lodged a claim in the Employment Tribunal on 24 January 2024 claiming unfair dismissal and marriage discrimination following her dismissal.

2. The respondent resists the claims, asserting that the claimant was dismissed for a potentially fair reason namely redundancy, and they deny discrimination because of marriage.

3. At this hearing, the Tribunal heard evidence from the claimant. For the respondent the Tribunal heard from Keith Forbes, former managing director and decision maker and Simon Cahill, former sales director and claimant's one time line manager who heard the appeal.

4. A file of productions was lodged, the claimant having forwarded the documents upon which she intended to rely to the respondent and a joint file having been prepared as directed. The claimant however produced her own documents folder which she wished to reference. Given that file contained all of the documents contained in the joint file, these were cross-referenced throughout the hearing to the duplicates in the joint file.

Findings in fact

5. On the basis of the evidence heard and the documents lodged the following relevant facts are admitted or proved.

6. The respondent is a company which delivers and installs audio-visual equipment and solutions across the UK.

7. The claimant worked for the respondent as an account manager from 16 December 2016 to 27 October 2023 when she was made redundant.

8. The claimant had previously worked in same sector, and had met her husband, Scott Passmore, in 1998 while working together. They married in 2004 and have two sons. They subsequently worked together at the same companies.

9. Towards the end of 2015, the claimant's husband was head hunted by the respondent to join the company as an account manager, director and shareholder.

10. When he joined the company, it was agreed that the claimant would also join as an account manager. The claimant focused on the education sector, and schools in particular, where she had previously built up experience.

11. The claimant was initially engaged on a basic salary of £36,000. That was reduced to £28,300 with the agreement of Mr Passmore but the claimant was not consulted and was not aware that it had been reduced. She did not pay attention to her salary at that point, because it was paid into a joint account.

12. The claimant had a company car and contribution towards a mobile phone. The claimant had to account to the respondent for miles driven for work and

for private use because the respondent had in turn to account to HMRC. The respondent leased company cars and would require to pay a penalty if their cars exceeded a maximum mileage.

13. The claimant and husband separated on 31 January 2022.

14. As sales director, Mr Passmore was the claimant's line manager. When he became commercial director in January 2022, the claimant was line managed by Simon McCahill.

15. Latterly, the company directors consisted of Alex Adleigh, Keith Forbes, sometime managing director, Simon McCahill, who took over as managing director in January 2023, and Scott Passmore, sometime sales director and sometime commercial director.

16. The claimant took primary responsibility for the practical aspects of childcare, while working full time. This freed up her husband to concentrate on his role in the company. After they separated she would on occasion require to alter her work schedule due to her husband asking her to collect their son from school on the days he had custody.

17. In or around May/June 2023, the claimant consulted a lawyer about a divorce. In July 2023, the claimant's lawyer wrote to her husband to advise that they had been consulted regarding separation and division of matrimonial assets.

18. On 18 July 2023, during a text exchange between the claimant and her husband when she got upset, he told her to "take an hour and calm yourself down". She responded, "I can't take an hour as your counterpart will no doubt deduct that from my wages since he's on my case constantly as well. Funnily enough because he probably thinks I want SSUK when I don't".

19. On 2 September 2023, the morning after her son stayed with her, the claimant picked up his jacket from her husband's house as she required to take it to school.

20. On 4 September 2023, Mr McCahill telephoned the claimant because he was concerned that she was unusually quiet in a Teams meeting earlier that day.

They had a discussion about the separation during which he asked, "what do you think you are entitled to".

21. On 25 September 2023, the respondent called a meeting of directors to discuss a restructuring. This related to concerns about levels of business for the remainder of 2023 and the beginning of 2024. It was recorded that there was a £1 million revenue gap between target and revenue achieved. The monthly target set had not been met in five of the previous months of 2023. It was decided that efficiencies had to be made, including moving procurement to the sales function. It was decided that redundancies would be required in particular in the engineering and sales teams. It was noted that all directors were in agreement. Mr Passmore attended that meeting.

22. It was agreed that Mr McCahill and Mr Forbes would speak to the respondent's external HR consultant, Hugh Hendry, regarding the redundancy process.

23. It was also agreed that although he was then sales director Mr Passmore should not be involved in the redundancy selection process of the account manager pool (sales team). This was because the claimant, as the wife of a director, was in the pool and at risk of redundancy. They believed that questions could be asked either way, if she was made redundant or if she was not, were he to be involved.

24. On 9 October 2023, a director's meeting was called when it was agreed that the respondent would make a short term loan of £124,000 to Mr Passmore. A further £24,000 was subsequently agreed.

25. On 12 October 2023, a letter was sent to all members of the sales team, namely Allan Hunt, Ross Pomfret, David Young and the claimant. That letter advised that there was to be a reorganisation and restructuring which would involve reducing staff and this meant that their position as an account manager was at risk. A meeting was arranged for 17 October 2023 to "inform and consult" on the situation.

26. On 17 October 2023, the claimant met with Mr Forbes. Mr Hendry, whom she had never met, also attended the meeting to advise and take notes. She was not aware that he was a long standing consultant to the respondent.

27. Mr Hendry noted that the reason for the meeting was to inform the claimant that the company was considering reducing its workforce by approximately 10%. Those redundancies were in the sales and procurement group and as a consequence the claimant's position was identified as one of the positions at risk of redundancy. During the meeting the claimant advised of challenges in her role, and in particular issues with the North Lanarkshire Council account. She was advised that the respondent was considering alternatives; and they were looking for suggestions to alleviate the need for redundancies; and that volunteers were being considered. In the event that there were no volunteers she was told that the company would use selection criteria based on aspects of employees' performance. The claimant was advised that there would be a further meeting to update her on the situation. That meeting lasted around 35 minutes. Similar meetings with the others in the pool were much shorter, at around 10 minutes.

28. By letter dated 20 October 2023, that claimant was advised that there would be "a process of selection which will be based on the criteria outlined at [the] meeting" and that "the company will explore and consider alternative solutions which may help to alleviate the need to select staff for redundancy". A further meeting was arranged to take place on 24 October 2023 to "further consult on the matter".

29. On or around 24 October 2023, Mr Forbes completed the scoring matrix with provisional scores upon which to base further consultation. The scores were based on his knowledge of the account managers and on figures obtained from the respondent's database. He looked at relative gross profit for invoices paid for the period from January to September 2023.

30. On 24 October 2023, meetings were arranged when the scoring criteria were given to staff affected, each being shown a redacted copy of the scoring against their own name, with the intention of consulting on the scores.

31. On 24 October 2023, the claimant met with Mr Forbes and Mr Hendry, who again took notes. She was advised that no alternative work had been identified and that the selection process had been completed. She was shown a copy of the scoring matrix with redactions. That matrix showed the criteria assessed, namely skills and experience; flexibility; work rate performance; attitude; and attendance.

32. The meeting notes state at the end that “it was apparent that Mrs Passmore did not feel comfortable attending the meeting and as a consequence she did not engage in any meaningful discussion with KF and left abruptly”.

33. That meeting was short, lasting less than 10 minutes, whereas the other meetings with others in the pool lasted longer. The claimant’s position is that she left when the meeting concluded.

34. After those meetings, the directors, including Mr Passmore, met and made a decision to proceed with redundancies, with two from sales and one from procurement. It was noted that: any sales redundancies would include commission on jobs invoiced by 1 December 2023; company sims to be retained; and “if Angela to keep her phone as she paid half of it. If David/Allan phone to be retained by SSUK. Ross runs own phone so would keep. Cars to be kept for two weeks but explain that no expenses or fuel card to be used”.

35. On the morning of 25 October 2023, the claimant attended her GP and was signed off sick for two weeks due to “stress at work”.

36. That day, 25 October 2023, at 8.50 am the claimant sent an e-mail to Mr Forbes to express her concerns about the redundancy process. She also set out personal issues which impacted on her after her move to the respondent, relating to her mother’s illness and sudden death, and the subsequent failure of her marriage. She stated that since her husband had custody of their son on Mondays and Thursdays this had freed her up to work late. She then expressed concern about recent difficulties with accounts, but that most recently the situation had improved since she had been allocated Falkirk. She mentioned there were other opportunities in the pipe line. She also advised that she had looked over figures for the period for 2 to 24 October 2023 at

"opps created" and "opps closed" for herself and her peers which she said showed good figures for her relative to others. She said that she was fully committed to the company and to her customers and she did not want to work elsewhere.

37. She concluded, "I have made myself ill over this and all I ask is that you come out of machine mode and let your head and your heart both decide. We are all human and this has not been easy to write. I wasn't going to say any of this to you as its personal but Scott said I should and I trust his judgement".

38. Mr Forbes did not reply to the e-mail, but later that day (25 October 2023) at around 5 pm, he telephoned the claimant. He advised that she would be invited to another meeting and that she was at risk of redundancy. When pressed, he confirmed that she was to be made redundant. The claimant did not take this news well and said "fuck your meeting".

39. That day, the claimant invited her husband into her house to visit their son who was also ill. He was present when she received the telephone call from Mr Forbes. The claimant passed him the fit note provided that day by her doctor. This fitnote was not received by the respondent.

40. The scoring matrix was dated 26 October 2023 which is the date that it was finalised to be included in letters to those to be made redundant. The claimant scored 32 overall. Mr Young and Mr Tunicliffe scored 33, and they were also made redundant. Mr Pomfret scored 37 and Mr Hunt scored 41. The claimant scored lower than all others in regard to flexibility and lower than others in work rate performance, except for Mr Young.

41. By letter dated 27 October 2023 Mr Forbes advised that, "During our telephone conversation on Wednesday 25th October 2023 and despite you being advised of a further meeting arranged for you on Friday 27th October 2023 you intimated that you would not be attending this meeting. We would therefore confirm to you that this exercise has been completed and unfortunately the company has not identified any alternative position or solution which would avoid this course of action and as a consequence of your scoring being less than others in your group this has resulted in your

selection for redundancy. This redundancy of which you have now been advised will be effective from 27th October 2023 (your last day of employment)." A table showing calculations relating to redundancy pay and other outstanding pay was included as well as the matrix. The claimant was advised of her right of appeal.

42. By e-mail dated 2 November 2023, the claimant advised she intended to appeal on the basis that the decision was unfair and wrongful because "I was only given 7 days total from the start of the process (17 October) to being told (over the phone) by yourself on 25th October that unfortunately "I was one of them". I do not feel that this was a meaningful amount of time nor do I think it was carried out in a professional or humane manner. I feel I have been unfairly treated after my solicitor requested transparency across my husband Scott Passmore's salary and shares at SSUK only a couple of months earlier, which I know was discussed with you and the other directors".

43. By e-mail dated 6 November 2023, the claimant was advised by Mr McCahill that her appeal would be heard on 13 November 2023. He sent a follow up email on 10 November 2023 because he had not heard from her. The claimant's solicitor responded, asking to postpone the meeting. Mr McCahill offered 21 November 2023. The claimant's solicitor advised that the claimant may wish to make written representations rather than attend in person.

44. After a follow up email from Mr McCahill on 20 November 2023, by e-mail dated 21 November the claimant's solicitor advised that the claimant "remains signed off as unfit to work by her doctor and is therefore not fit to attend the appeal hearing". This was the first Mr McCahill was aware that the claimant was signed off sick. The claimant's solicitor attached written submissions, setting out three grounds of appeal.

45. The first ground was that there was no genuine redundancy situation in terms of s.139 ERA. The claimant argued that the process was a sham as there was no significant diminution in the type of work performed by her and no need to reduce the sales team by two. The fact she had recently received a commission payment of almost £1,000 showed that there was a significant

amount of work available, and more in the pipeline. She said that the team were busy and work was regular and consistent.

46. The second ground of appeal was that she was unfairly selected for redundancy, which she argued was not based on the scoring matrix as alleged but rather as a result of the breakdown of her marriage. She stated that the scoring matrix did not withstand scrutiny and did not reflect her true commitment to the business and/or the realities of her recent performance; that she had been penalised for following her husband's instructions; that there was a clear pattern of behaviour which she had fully documented showing developments in her personal life, particularly relating to the ongoing divorce proceedings, which seemed to have significant repercussions.

47. The third ground of appeal was that the process followed was a sham and the decision was predetermined. She said that she had been told conflicting and inaccurate information throughout. She said that the process as a whole was not meaningful, for example being dismissed over the phone prior to the conclusion of the consultation period and failing to ascertain whether there was any alternative employment or part-time working.

48. Mr McCahill responded by letter advising that having investigated, he had decided that the decision should remain unaltered, and set out the reasons as follows.

49. With regard to the first ground, he said that there was a genuine redundancy situation and that "the requirement to reduce the number of jobs in the sales and procurement group was based on the company's assessment of the overall workload both prior and anticipated, and the economic effect that the diminution of work was having on the business. In order to address this situation it was necessary to reduce the number of staff in certain areas and reorganise its working processes to meet the business needs at this time and for the future. Ultimately there were three people whose positions were redundant, all of whom had sole or part focus within the sales team and including another account manager". He advised that recent resignations had

resulted in the operations team reducing by 10%, and they were not to be replaced.

50. In regard to ground two, he advised that her personal affairs had no bearing on the selection process or the decision and that Mr Passmore was not consulted or involved in the selection process. He advised that, “the scoring and assessment criteria were based on company records and objective individual performance data and were carried out by a senior director who has a long standing knowledge and experience of the job requirements and staff in these roles. This selection criteria which was explained to you at your meetings was in my view carried out in an objective and fair manner”.

51. With regard to ground three, he stated that she had been advised that her position may be at risk, of the proposed reduction in the number of jobs and the proposed selection criteria. He advised she was given the opportunity to discuss the matter and offer any alternative suggestions to avoid redundancies, but she put forward no suggestions. She was informed that they intended to complete the process in approximately two weeks when the respondent looked at alternatives and volunteers.

52. The letter continued, “All other members of the affected group were similarly informed of the situation and consulted at meetings and I understand that some were accompanied at their meetings by a trade union official. In the absence of any evidence supporting your assertions that you have been told conflicting and inaccurate information throughout it is my view that the information conveyed to you at these meetings was correct and accurate and that the company had in the period between your first meeting and your redundancy endeavoured to seek and identify meaningful alternative employment solutions within the business without success. I therefore do not accept that the process was in your words a “sham” and “unfair”.

53. In or around February 2024, the respondent engaged an account manager to focus on the private sector. The respondent now employs 38 staff, reduced from 49 in September 2023.

Tribunal deliberations and decision

Observations on the witnesses and the evidence

54. We appreciated that this was a difficult case for the claimant, not least because she is currently going through a divorce. Having worked with and for her husband who remains a director, we accepted that there was a cross over between her work and her personal life, and the claimant believed that events in her personal life had impacted the decision to terminate her employment.

55. We thought it was very sensible of Mrs Wedderburn not to call the claimant's husband, and as we noted at the time, and will be clear from this judgment, that decision has not impacted on the outcome, given the evidence heard.

56. While the claimant's position generally was very different from that of the respondent, there were in fact few material facts in dispute. It was, as is often the case, an issue of an alternative interpretation of events.

57. One matter of dispute is what exactly was said to the claimant by Mr Forbes during the telephone call of 25 October 2023. While we accepted that Mr Forbes' intention in phoning her was to respond to her e-mail, and that he intended only to tell her that there was to be a further meeting, when pressed by the claimant we accepted that he did confirm that she was one of those selected for redundancy. We were of the view that must have been the case otherwise the claimant would not have reacted the way she did. Ultimately, we did not consider that to be a material fact which impacted on the outcome.

58. Another fact in dispute related to whether the claimant was shown the results of the selection process. She said that she was shown a "blank" matrix. Mr Forbes said that it was redacted. We were unclear exactly what had been redacted but we came to the conclusion that the other scores and names were redacted. We concluded that the claimant was at the very least shown her own scores at the meeting on 24 October 2023. As we understood it, it was intended that there would be a discussion about the scoring at this meeting before the scores were finalised. Again that conclusion was not material.

59. The claimant also took issue generally with the respondent's assertion that the respondent was in financial difficulties. One matter she relied on to support her contention was the fact that the respondent had lent her husband a large sum of money. We heard evidence that the respondent was in a financial position to afford to make a short term loan, and we accepted, looking at the figures, that there was an appropriate rationale for that. Beyond that, we were taken to financial figures which confirmed that the respondent's concerns about profit margins and failing to meet targets for 2023 were not without foundation.

60. However more generally, as discussed further below, we did not accept the claimant's proposition that the reason she was made redundant was because she had separated from her husband. For the reasons discussed below, we accepted the evidence of the respondent's witnesses, not least because the claimant in evidence appeared to accept the explanations for at least some of the treatment. Otherwise we have found that there are essentially innocent explanations for actions which contributed to the claimant's belief that the respondent had deliberately made her redundant because it was convenient to terminate her employment after she and her husband had separated.

61. We turned then to consider first the question of marriage discrimination, applying the law to the facts as found. Since any discrimination found would be relevant to the question whether dismissal was unfair, we then moved to consider the unfair dismissal question.

Marriage discrimination

62. The claimant claims that she was directly discriminated against because of marriage. Section 13(1) of the Equality Act 2010 sets out the legal provisions relating to direct discrimination and means that an employer will discriminate against an employee if, because of a protected characteristic, they treat their employee less favourably than they treated or would treat others. That usually involves a comparison with another person who is in the same or similar circumstances but who does not share the relevant protected characteristic.

63. Here the protected characteristic is marriage. It should be noted that the relevant definition is set out in section 8(1) of the Equality Act 2010, that is that a person has the protected characteristic of marriage (or civil partnership) if the person is married (or is a civil partner). This provision is not about different treatment because of “marital status”. So that means that a claimant will require to show that she was less favourably treated than another person (real or hypothetical) – who is not married - because of marriage.

64. In cases involving direct discrimination, the burden of proof is often relevant, and the provisions of section 136 of the Equality Act 2010 mean that where the claimant has shown facts from which the Tribunal could raise an inference of discrimination, then the burden of proof will shift to the respondent to prove that there has been no discrimination whatsoever.

65. The claimant argued that the decision to dismiss her by reason of redundancy amounted to direct marriage discrimination. She argued that certain treatment prior to her dismissal also amounted to marriage discrimination (such that it was a continuing act of discrimination).

66. The claimant raised three points in particular during the preliminary hearing which took place on 5 April 2024, when it was recorded that she would argue that the following amounted to direct marriage discrimination, namely:
    - On 4 September 2023, after correspondence had been sent from her lawyer to Mr Passmore, Mr McCahill phoned the claimant and said to her “what do you think you are entitled to”.
    - On 18 July 2023, in a text message the claimant’s husband said to her to “take an hour out”. The claimant said she could not do so as Mr McCahill would deduct it from her salary; and
    - On 2 September 2023 the claimant had to rearrange her working day to make arrangements to take her son’s jacket to school as her husband had not provided him with a jacket.

67. We have found that these events did occur. However, we noted that the claimant accepted that Mr McCahill would not deduct wages and she said this comment was “tongue in cheek”. We therefore do not accept that anything

was said or done in that regard that could be said to be less favourable treatment, which would amount to a disadvantage or detriment.

68. Further the claimant said in evidence that she had collected her son's jacket from her husband the morning after she had already taken her son to school, and that she had to go back to school with it. We were not however aware of that resulting in any adverse consequences, so again we could not say that this supported any suggestion that could amount to less favourable treatment. That was not least because this seemed to have nothing to do with the respondent but appears to be a purely personal matter.

69. We also noted, with regard to the telephone conversation with Mr McCahill on 4 September 2023, that Mr McCahill had telephoned the claimant because he was concerned that she was unusually quiet in a Teams meeting that day. The claimant herself said that it was "nice" of him to do so. We accepted Mr McCahill's evidence that his enquiry was prompted by a discussion with the claimant about the circumstances of her separation from her husband, which was on a personal level, and not related to the respondent's financial decisions.

70. We do not accept therefore that any of these individual incidents was less favourable treatment, and indeed it could not even be said that there was treatment at the hands of the respondent which could have supported any argument that she had suffered a detriment.

71. We conclude therefore that these three incidents, of themselves, could not be said to amount to marriage discrimination.

72. In submissions however, the claimant also sought to rely on these background incidents to support her contention that she had been made redundant because of marriage.

73. The claimant asserted that although it was suggested that she was a poor performer, she got no training and was left to get on with it. She claimed that when the company was making money and she was married they were happy to keep her on but not when she had separated from her husband. She

described her employment with the respondent as "buy one get one free" and a "package deal" but that when she was no longer his partner, they were not a package anymore so they got rid of her. She argued that the evidence confirmed that the respondent had dealt with Mr Passmore in regard to pay issues instead of directly with her, and that this showed that he had decision-making responsibilities over her and over the decision to make her redundant.

74. Her position was that the situation changed when she sought legal advice regarding the separation and in particular after her solicitor had written to her husband seeking disclosure of his financial circumstances, which would include information about his shareholding. Although there was no correspondence between the claimant's lawyers and the respondent, she was aware that her husband had spoken to his fellow directors about their separation. She came to believe that thereafter Mr McCahill "had it in for her". She came to the view that each time there was correspondence from the lawyers there were work repercussions.

75. The claimant asserted in submissions that there was a cross over between her domestic life and her work. In particular, she believed that, when it came for example to an assessment of "flexibility" she was marked down but that was because she had on occasion to alter her working days to accommodate child care. She argued that it was only because she had taken care of the domestic side of the relationship, in regard to childcare etc, that allowed her husband to become exceptionally good at his job and that she saw herself as having sacrificed her career to help him to build his. She submitted that her husband had engineered the situation to ensure that she was made redundant and put into further financial distress; and that it was clear from the evidence that the company would do anything to retain her husband.

76. As noted above, she also took issue with the respondent's assertions about their financial position, suggesting that it was their most profitable year ever; that her figures were improving; that the company's finances were sufficiently healthy to allow them to pay a large loan to her husband.

77. She also questioned the reliance by Mr Forbes in particular on figures relating to her sale/commission/profit during 2023. She argued that the respondent had made Mr Young and Mr Tunicliffe redundant as a strategic manoeuvre to exit her from the business. She also relied on the fact that they had taken on a new account manager some four months after she had been made redundant.

78. We gave consideration to the claimant's submissions and our findings in fact when assessing whether it could be said that the claimant had been discriminated against because of marriage.

79. We took account of the fact that the claimant relied on certain specific incidents to support her claim. We have concluded above based on the evidence that we heard, not least the claimant's own evidence, that these allegations could not in themselves be relied on to support a claim for marriage discrimination because they could not be said to amount to less favourable treatment or detriment.

80. However, being made redundant is self-evidently unfavourable treatment, and the claimant would need to point to a real or hypothetical comparator in the same or similar circumstances who was not married but treated better (not made redundant) to establish marriage discrimination.

81. From the evidence we heard, we understood that Mr Pomfret, who was not made redundant, is also married, that he has a young family and that his wife works full-time. Mr Young is, we understood, unmarried, although he and his partner, who also works full-time, have a young family. Mr Young was made redundant, but not Mr Pomfret. This would tend to suggest that the claimant was not less favourably treated than others in similar circumstances.

82. Even if we were to set the comparator question aside, and focus on the reason why (as permitted by *Shamoon v RUC* 2003 UKHL 11), there was no evidence to support the claimant's claim that she was treated the way she was because she was married per se. The fact that Mr Young was also made redundant would tend to support that. The claimant's own position, beyond asserting that

the whole redundancy exercise was a sham, was that Mr Young was made redundant because he had only worked there for two years.

83. If we understood the claimant's position correctly, she appeared to be arguing that she was treated the way she was because of who she was married to, or perhaps more accurately, who she was separating from. The cases about marriage discrimination (such as for example *Hawkins v Atex Group Ltd* 2012 ICR 1315) make it clear that where the reason for the treatment is because of who the claimant is married to, rather than the fact that they are married per se, then that will not be sufficient to establish marriage discrimination.

84. In any event, as discussed further, when it came to the reason why, we came to the view that the treatment of the claimant by the respondent did not even have anything to do with the fact she was married to Mr Passmore, or that she was separating from or seeking a financial settlement from her husband.

85. We agreed with Mrs Wedderburn that there were no facts proved by the claimant which raised an inference of discrimination, such that the burden of proof would shift. We came to that conclusion for the following reasons.

86. On the matter of the respondent's response to communications from her lawyers to her husband, there was no evidence led to support her assertion that each time there was correspondence from her lawyers there were repercussions at work. Although we heard details about certain matters at work, we did not hear evidence which would link those specifically in time to correspondence from lawyers.

87. With regard to the claimant's belief that Mr McCahill's attitude towards her had changed, specifically after her solicitor had written to her husband about financial settlement on divorce, we did not accept that the evidence supported that contention.

88. We noted that the letter from the claimant's solicitor relied on was to the claimant's husband. We noted that no correspondence was sent directly to the respondent. Mr McCahill accepted that he knew about the separation and

he knew that the claimant had consulted a solicitor, because of general conversations which he had with Mr Passmore, but also with the claimant.

89. We accepted Mr McCahill's evidence that his query about what the claimant understood she was entitled to following divorce was a general enquiry which followed on from a discussion with the claimant about the separation. We noted the claimant herself had said in a subsequent text to her husband that it was "nice" of him to call her, and that the call related to his concerns that she had been unusually quiet in a meeting.

90. We noted in particular that Mr McCahill had been the claimant's line manager between around January 2022 until January 2023 when he was made managing director. His position was that he would then have a lot less to do directly with the claimant when he was not her line manager, and that may have appeared as if he was not paying her as much attention as he had been when he was having monthly meetings with her. We accepted that because it was entirely plausible.

91. Further, with regard to the concerns about her car usage, we got the impression that the claimant did not fully understand the implications of the requirement to report to HMRC for private mileage and also that there may be penalties for going over maximum mileage when lease cars were returned. Although this was a matter that we might expect Mr McCahill would have delegated, we accepted that this was a legitimate concern on his part.

92. Further, with regard to the claimant's suggestion to her husband that she could not take time off work because her pay would be reduced by Mr McCahill, she accepted in evidence that was "tongue in cheek" and there was no possibility of that happening, as Mr McCahill confirmed.

93. The claimant also made a reference in evidence to Mr McCahill not being able to "look her in the eye" following the redundancy decision. We did not however accept from the evidence we heard that his attitude towards her changed because of her separation from her husband.

94. The claimant's evidence was that she had been reassured when she was told by her husband knew nothing about the redundancies, but she submitted that he had after all been involved in the decision-making. However, we accepted the evidence of Mr Forbes and Mr McCahill that although Mr Passmore had been involved in the decision to make a number of staff in the sales team redundant, he had not been involved in the selection process itself. We accepted Mr Forbes evidence in particular that they had specifically decided that it was not appropriate for Mr Passmore, despite him being sales director, to be involved in the process because of the implications that might have if his wife were made redundant, or if she were not.

95. We also accepted, not least because the position was supported by documentary evidence, that profit margins were considerably lower than target, and that the business costs were based on an expectation of a much higher turnover. We accepted that it was this that prompted the decision to reorganise and restructure, and that this meant that some staff would need to be made redundant. This is supported by what happened subsequently, that is that head count reduced from 49 at that time to 38 today.

96. The question then was what evidence did the respondent rely on in regard to the selection for redundancy, upon which we would assess whether there was unfair, that is discriminatory, selection.

97. On the matter of flexibility, although there was a lack of clarity about the "flexibility" scoring, we understood initially that this related to flexibility in relation to product knowledge in different situations, or as Mr Forbes put it, moving from "one genre to another". We understood this, along with skills and experience, to include technical knowledge. We noted that the claimant herself accepted that she had less technical aptitude than others, and that she would on occasion get assistance from a colleague, Martin. Mr Forbes said others were more technically competent, and Mr Hunt for example had an engineering background.

98. Mr Forbes did appear to go on to suggest that this criterion also related to who could be “sent to any job, day or night”, which seemed to indicate flexibility in regard to when work was done as well as what work was done.

99. However, considering the former type of flexibility, we came to understand, not least from Mr McCahill’s evidence, that the account managers across the board were afforded more flexibility than other staff. We understood that this was because of the way that account managers worked, and we accepted that all account managers would have been afforded similar flexibility in regard to work and domestic life. Specifically, there was no evidence that the respondent had marked the claimant down because of adjustments she had made to her schedule because of childcare commitments, whether because of her husband’s requests or otherwise.

100. Further, when it came to the evidence to support the criteria of “work rate performance”, we did not accept that the claimant’s income from sales was as she presented it, and certainly not better than other colleagues in the pool. The claimant accepted that her sales figures for 2023 were not so good, but she suggested this was because she had recently lost some accounts, and she asserted that they were about to improve. We heard that she had presented figures relating to the first three weeks in October just before her dismissal which tended to show an improvement and better performance relative to others in the pool. Mr Forbes’ position was that this was a snapshot for three weeks of October, and that he had focused on the figures for the first nine months of the year. We noted that Mr Forbes stated that looking at that snapshot for all account managers, it was clear to him that the respondent was not bringing in sufficient income to make the profit which was targeted. We heard in evidence that he had based his calculations on the claimant having made a net profit of £44,000 based on invoices closed, whereas the claimant had calculated based on commission earned which meant that her net profit was a good bit higher. We heard that there were reasons for the discrepancy and in particular that the timing of payment of commission could account at least to a certain extent for the difference. In any event, we accepted in the round that profit margins not on target, and that the claimant

was, relatively speaking, one of the poorer performers when it came to the gross profit figures.

101. Notwithstanding what the claimant took from the evidence, we accepted that the claimant's performance was acceptable, that she was not underperforming but rather, given a need to consider running costs and profit margins, that she did not perform as well relative to others.

102. In summary, we found that the reason the claimant was dismissed was not related to marriage or even who she was married to, but is explained by the fact that the respondent needed to restructure for financial reasons. The claimant was in turn selected for redundancy because she did not perform as well as others in the pool. The claimant's claim for marriage discrimination must therefore be dismissed.

Unfair dismissal

103. Section 98(1) of the Employment Rights Act 1996 (ERA) provides that, in determining whether dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within s.98(2), which includes redundancy. A dismissal for redundancy is therefore potentially fair. Section 139(1) states that an employee will be redundant where "the dismissal is wholly or mainly attributable to 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".

104. Section 98(4) provides that where the employer has established a potentially fair reason for dismissal, then the Tribunal must decide having regard to the reason shown by the employer, in all the circumstances, including the size and administrative resources of the employer's undertaking, whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case.

105. Procedural fairness is an integral part of the reasonableness test (*Polkey v A E Dayton Services* 1987 IRLR 503). If there is a failure to adopt a fair procedure at the time of dismissal, a dismissal will not be rendered fair simply because the unfairness did not affect the end result. For an employer to be considered to have acted reasonably in a redundancy case, an employer will be expected to have warned and consulted affected employees, adopted a fair basis for selection and taken reasonable steps to redeploy affected employees.

106. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439).

107. In this case, the respondent asserts that the reason for dismissal was redundancy. The claimant argued that there was no genuine redundancy situation, and essentially that "redundancy" was a sham.

108. Although there were others who were made redundant, the claimant argued that there was no need for redundancies, because the respondent had been making profits in the year that she was made redundant. She argued that the situation was a pretext, that the respondent wanted a reason to dismiss her, because she had separated from her husband.

109. We did not accept the claimant's submission given the evidence we heard as discussed above. We looked in some detail at the KPI dashboard which showed profits below targets for some months in the first part of the year 2023, and projected losses in the second half of the year, and reduced profit margins despite a turn over similar to the previous year. We accepted that the evidence supported the respondent's position that a restructure was in these circumstances necessary.

110. We understood the claimant to suggest that the respondent had made others redundant so that making her redundant would look legitimate. She appeared to suggest that the respondent was looking for a reason to dismiss Mr Tunifcliffe in any event and that Mr Young had also been dismissed in order

to justify making her redundant. We did not accept that the evidence supported that, which would have meant that the respondent was going to some considerable lengths, making redundant others who were not genuinely redundant, to cover up for their decision to make the claimant redundant.

5 111. We did hear evidence that another account manager had been taken on some four months after the claimant had been made redundant. Mr Forbes' evidence was that a decision had been made to allocate a budget to target corporate sales, which we understood to be private sector. We heard evidence that the new account manager had been headhunted and that he 10 had particular expertise in that sector. We did not accept this indicated that the roles in sales were not redundant at the time, or that the claimant ought not to have been selected. We also heard evidence that the head count had subsequently reduced by around 10, from 49 to 38.

112. Given the other evidence which we heard about the respondent's financial 15 circumstances during 2023, we accepted that there was a financial imperative at that time to reorganise and restructure and that there was a genuine redundancy situation.

113. Having accepted that there was a genuine redundancy situation, we came to consider whether the respondent acted reasonably in dismissing the claimant 20 for redundancy.

114. We considered whether affected employees had been appropriately warned and consulted. We heard evidence that those at risk of redundancy were first warned on 12 October 2023. There was a meeting on 17 October 2023. The claimant was unhappy that there was a "stranger" at that meeting, but we 25 accept that it was entirely appropriate that the respondent's HR consultant should have attended that meeting. There was a further meeting on 24 October 2023. Although the claimant's impression of that meeting was different from the respondent's and different from what was intended, we do accept that meeting was an opportunity for the claimant to discuss the matrix 30 scores, although she chose not to take advantage of that opportunity. We

accept that the claimant was given sufficient opportunity to engage in the consultation process.

115. Instead however she wrote a lengthy e-mail setting out her concerns. We have found that instead of replying Mr Forbes decided that it would be more appropriate to telephone not least given the claimant suggestion that he was in “machine mode”. That telephone call did not go as intended, and although the claimant expressed concern that she was made redundant over the phone, we came to the view that she had pressed Mr Forbes into confirming that she had been selected for redundancy. We do not however accept that the claimant’s portrayal that she was “dismissed over the phone” was accurate, and certainly in the circumstances did not render the process unreasonable.

116. We considered whether the respondent adopted a fair basis for selection. We heard evidence about the matrix and the criteria selected to form the basis of the scoring. We concluded, given in particular the members’ industrial experience, that the criteria used was standard. We concluded, as discussed above, that the respondent had evidence to support the scoring, by reference to the figures but also by reference to Mr Forbes’ opinion. Indeed we understood the claimant to have accepted in evidence that those who were retained had better performance figures. To the extent that she was marked lower than others in regard to “flexibility” we understood that primarily related to a range of product knowledge, and that the claimant accepted she had less technical aptitude than others. Further, we noted that in terms of scores that, while she had the lowest score, this was close to the other two who were also made redundant. Even if she had scored better on some criteria, there was a considerable gap between her score and the scores of those account managers who were retained.

117. We considered whether they had taken reasonable steps to redeploy affected employees. We heard evidence that this had been discussed in the consultation meetings. The claimant in evidence suggested that it was for the respondent, not employees, to come up with alternatives to redundancy. She accepted that there had been a discussion about the possibility of doing work

in the office but that had quickly been discounted because of the travel that would involve for her. Although part-time was not discussed, the claimant said that it was not an option for her anyway to reduce her income. Although we heard that another account manager was taken on some four months after she was made redundant, the evidence was that she would not have been considered for that role not least because her experience was largely in the public sector.

118. Accordingly, we accepted that there was a genuine redundancy situation, and that there had been an appropriate attempt at consultation and that it could not be said that the claimant had been unfairly selected for redundancy.

119. While we accept that a redundancy for discriminatory reasons is likely to be unfair, as discussed above, it could not be said on the basis of the evidence that we heard that the claimant was made redundant because of marriage or in breach of the Equality Act provisions relating to marriage discrimination.

120. We concluded that, in all the circumstances, the employer acted reasonably in treating redundancy as a sufficient reason for dismissal. The claim of unfair dismissal must also be dismissed.

Employment Judge: M Robison
Date of Judgment: 16 July 2024
Entered in register: 16 July 2024
and copied to parties