EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Marta Cap	**v**	**Socks World International Ltd**

Heard at: Watford
On: 23,24,25 and 26 (deliberation) September 2024
Before: Employment Judge Alliott
Members: Mrs J Hancock
Miss A Telfer

Appearances
For the Claimant: In person (with an interpreter: Polish)
For the Respondent: Ms E Afriyie (consultant)

RESERVED JUDGMENT

The judgment of the tribunal is that:

1. The claimant was unfairly dismissed.

2. The respondent failed to provide the claimant with written statement of particulars of employment.

3. The claimant's claims of automatically unfair dismissal, detriment for taking time off for dependents, harassment related to race, direct race discrimination, indirect sex discrimination and equal pay are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent either on 27 March 2017 (claimant) or 6 April 2017 (respondent). She was dismissed with effect on 1 April 2022. By a claim form presented on 28 June 2022, following a period of early conciliation from 24 April to 31 May 2022, she brings complaints of unfair dismissal (s.98 Employment Rights Act 1996), automatically unfair dismissal (s.99 Employment Rights Act 1996), detriment for taking time off for dependents (s.47C Employment Rights Act 1996), harassment related to race (s.26 Equality Act 2010), direct race discrimination (s.13 Equality Act 2010), indirect sex discrimination (s.19 Equality Act 2010), an equal pay claim (s.65 Equality Act 2010*)* and a claim for failure to provide written statement of particulars of employment (sections 1 and 38 Employment

Rights Act 1996). The respondent defends the claims The respondent's reason for dismissal is redundancy.

The issues

2. The agreed list of issues were set out in the case management summary of Employment Judge Smeaton dated 11 July 2023. They are as follows:-

> "The Issues
>
> 1. Time limits
>
> 1.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 30 January 2022 may not have been brought in time.
>
> 1.2. Were the discrimination complaints made within the time limit in s.123 Equality Act 2010 ('EqA 2010')? The Tribunal will decide:
>
> 1.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
>
> 1.2.2. If not, was there conduct extending over a period?
>
> 1.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
>
> 1.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
>
> 1.2.4.1. Why were the complaints not made to the Tribunal in time?
>
> 1.2.4.2. In any event, is it just and equitable in all the circumstances to extend time?
>
> 1.3. Were the unfair dismissal/automatic unfair dismissal/detriment complaints made within the time limits in s.111 and s.48 of the Employment Rights Act 1996 ('ERA 1996')? The Tribunal will decide:
>
> 1.3.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination/the date of the act or failure to act to which the detriment complaint relates?
>
> 1.3.2. If not, for the detriment claim, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
>
> 1.3.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.3.4. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Unfair dismissal

2.1. What was the reason or principal reason for dismissal? The Respondent says the reason was redundancy.

2.2. If the reason was redundancy, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:

2.2.1. the Respondent adequately warned and consulted the Claimant. The Claimant says there was a failure to adequately consult and that the Respondent created the dismissal letter on 2 March 2022, before meeting with her on 4 March 2022;

2.2.2. the Respondent adopted a reasonable selection decision, including its approach to a selection pool. The Claimant says that no one else was considered for redundancy;

2.2.3. the Respondent took reasonable steps to find the Claimant suitable alternative employment. The Claimant says no alternative work was offered or considered; and

2.2.4. dismissal was within the range of reasonable responses.

3. Automatic unfair dismissal – s.99 ERA 1996 and regulation 20 of the Maternity and Parental Leave etc Regulations 1999 ('MAPLE 1999')

3.1. Did the Claimant take time off on 1 March 2022 because of the unexpected disruption or termination of arrangements for the care of her child?

3.2. Did the Claimant take, or seek to take, time off on other occasions? If so:

3.2.1. Did that amount to time off within the meaning of s.57A ERA 1996?

3.2.2. Did the Claimant comply with the requirements of s.57A(2) ERA 1996 on any of those occasions?

3.3. Was the principal reason for the Claimant's dismissal that she had taken that time off on 1 March 2022 (or any other occasion satisfying the requirements of s.57A ERA)?

3.4. Alternatively, if the principal reason for the Claimant's dismissal was redundancy, was the principal reason for the Claimant's selection that she had taken time off on 1 March 2022 (or on any other occasion satisfying the requirements of s.57A ERA 1996)?

4. Remedy for unfair dismissal

4.1. Does the Claimant wish to be reinstated to her previous employment or re-engaged on comparable or other suitable employment?

4.2. Should re-instatement or re-engagement be ordered?

4.3. If there is a compensatory award, how much should it be? The Tribunal will decide:

4.3.1. What financial losses has the dismissal caused the Claimant?

4.3.2. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

4.3.3. If not, for what period of loss should the Claimant be compensated?

4.3.4. 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?

4.3.5. If so, should the Claimant's compensation be reduced? By how much?

4.4. What basic award is payable to the Claimant, if any?

5. Detriment – s.47C ERA 1996 and regulation 19 MAPLE 1999

5.1. Were there occasions on which the Claimant took, or sought to take, time off under s.57A ERA 1996?

5.2. Did the Claimant comply with the regulations of s.57A(2) ERA 1996 on any such occasion?

5.3. Did the Respondent do the following?

5.3.1. Mr Erdal told the Claimant that she was the only employee who took such time off.

5.3.2. The Respondent applied different rules to the Claimant, telling her that she could have only up to two hours at a time off for appointments and then had to use annual leave, but not applying that rule to anyone else.

5.3.3. The Respondent did not give the Claimant a pay rise in the period December 2021-January 2022.

5.4. Has the Respondent shown that any acts or deliberate failures to act were done for reasons other than that a prescribed reason?

6. Harassment related to race – s.26 Equality Act 2010 ('EqA 2010')

6.1. Did the Respondent do the following things?

6.1.1. On or around 22 October 2020, Mr Erdal shouted at the Claimant and, when she had responded, turned to Ms Ayre and said (about the Claimant), "What did she say?"

6.1.2. The Respondent changed the Claimant's dob description/role four times during her employment.

6.2. If so, was that unwanted conduct?

6.3. Did it relate to race? The Claimant says, in respect of 6.1.1, that Mr Erdal was seeking to imply that because of her Polish accent, the Claimant could not communicate clearly in English.

6.4. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7. Direct discrimination because of race – s.13 EqA 2010

7.1. Did the Respondent change the Claimant's job description/role four times during her employment?

7.2. Was that less favourable treatment?

The tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The Claimant says she was treated worse than Ms C Anderson, Miss P Smyth and Miss L Ayre. Alternatively, the Claimant relies on a hypothetical comparator.

7.3. If so, was it because of race?

7.4. Did the Respondent's treatment amount to a detriment?

8. Indirect sex discrimination – s.19 EqA 2010

8.1. A 'PCP' is a provision, criterion or practice. Did the Respondent have the following PCP:

8.1.1. A requirement that employees attend work without taking time off for family reasons, such as a child being sick or a childminder being sick?

8.2. Did the Respondent apply the PCP to the Claimant?

8.3. Did the Respondent apply, or would the Respondent have applied, the PCP to men?

8.4. Did the PCP put women at a particular disadvantage when compared with men in that a greater proportion of women are required to provide emergency childcare when other arrangements break down or the child is too ill to be cared for by others?

8.5. Did the PCP put the Claimant at that disadvantage?

8.6. The Respondent does not rely on a legitimate aim defence.

9. Remedy for discrimination

9.1. Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

9.2. What financial losses has the discrimination caused the Claimant?

9.3. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4. If not, for what period of loss should the Claimant be compensated?

9.5. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

9.6. Should interest be awarded? If so, how much?

10. Equal pay – s.65 EqA 2010

10.1. Was the Claimant's work broadly similar to that of Mr A Shah?

10.2. Are such differences as there are between their work not of practical importance in relation to the terms of their work?

10.3. Was the rate of pay in the Claimant's contract less favourable than the corresponding term in Mr Shah's contract?

10.4. Has the Respondent shown the difference in terms to be due to a material factor?

10.5. Has the Respondent shown the material factor does not involve treating the Claimant less favourably because of her sex than the Respondent treated Mr Shah?

10.6. If the Claimant has shown the material factor is indirectly discriminatory on grounds of sex, has the Respondent shown it is a proportionate means of achieving a legitimate aim?

10.7. How much should the Claimant be awarded?

11. Written particulars – s.1 ERA 1996 and s.38 Employment Act 2002 ('EA 2002')

11.1. When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars?

11.2. If the claim succeeds, are there exceptional circumstances which would make it unjust or inequitable to make the minimum award of two weeks' pay under s.38 EA 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

11.3. Would it be just and equitable to award four weeks' pay?"

The law

Unfair dismissal

3. S.98 of the Employment Rights Act 1996 provides as follows:-

> " 98 General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
> …
>
> (c) is that the employee was redundant,
> …
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

4. S.139 of the Employment Rights Act 1996 provides as follows:-

> "139 Redundancy.
>
> (1) For the purposes of this Act 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."

5. As per the IDS Employment Law Handbook on redundancy at 8.80:-

> "In Williams and Others v Compair Maxam Ltd [1982] ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. It stressed, however, that in determining the question of reasonableness it was not for the employment tribunal to impose its standards and decide whether the employer should have behaved differently.

Instead it had to ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted."

6. And at 8.81:

"The factors suggested by the EAT in the Compair Maxam case that a reasonable employer might be expected to consider were:

- Whether the selection criteria were objectively chosen and fairly applied.
- Whether employees were warned and consulted about the redundancy.
- Whether, if there was a union, the union's view was sought, and
- Whether any alternative work was available."

7. And at 8.83:

"Procedural fairness and ruling in "Polkey"

…

With regard to redundancy dismissals, this meant, in the words of Lord Bridge, that "the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation".

8. And at 8.96 under "Range of pools available":

"However, in all cases, the employment tribunal must be satisfied that the employer acted reasonably and, in considering whether this was so, the following factors may be relevant:

- Whether other groups of employees are doing similar work to the group from which the selections were made.

- Whether employee's jobs are interchangeable.

- Whether the employee's inclusion in the unit is consistent with his or her previous position, and

- Whether the selection unit was agreed with any union.

As a result, the pool is usually composed of employees doing the same or similar work, and the employer risks a finding of unfairness if it includes in the pool a range of different job functions."

9. And at 8.97:

"A tribunal will judge the employers choice of pool by asking itself whether it fell within the range of reasonable responses available to an employer in the circumstances. As the EAT put it in Kvaerner Oil and Gas Ltd v Parker and others EAT 0444/02,

> "different people can quite legitimately have different views about what is or is not a fair response to a particular situation... In most situations there will be a band of potential responses to the particular problem and it may be that both of solutions X and Y will be well within that band."

Indeed, the identification of an appropriate pool for selection is an area in which tribunals must take care not to substitute their own view for that of the employer."

Automatically unfair dismissal

10. Section 99 of the Employment Rights Act 1996 provides as follows:-

> "99 Leave for family reasons.
>
> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
>
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
>
> (b) the dismissal takes place in prescribed circumstances.
>
> (2) In this section " prescribed " means prescribed by regulations made by the Secretary of State.
>
> (3) A reason or set of circumstances prescribed under this section must relate to—
>
> …
>
> (d) time off under section 57A"

11. Section 57A of the Employment Rights Act 1996 provides as follows:-

> "57A Time off for dependants.
>
> (1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
>
> (a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
> …
>
> (d) because of the unexpected disruption or termination of arrangements for the care of a dependant.
> …
>
> (2) Subsection (1) does not apply unless the employee—
>
> (a) tells his employer the reason for his absence as soon as reasonably practicable, and
>
> (b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent."

12. Regulation 20 of MAPLE 1999 provides as follows:-

> Unfair dismissal

20.—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act to be regarded for the purposes of Part X of that Act as unfairly dismissed if—

(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3)

…

(3) The kinds of reason referred to in paragraphs (1) and (2) are reasons connected with—

…

(e) the fact that she took or sought to take—

…

(iii) time off under section 57A of the 1996 Act."

Detriment for taking time off for dependents

13. Regulation 19 MAPLE 1999 provides as follows:-

"Protection from detriment

19.—(1) An employee is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph (2).

(2) The reasons referred to in paragraph (1) are that the employee—

…

(e) took or sought to take—

…

(iii) time off under section 57A of the 1996 Act"

Harassment

14. Section 26 of the Equality Act 2010 provides as follows:-

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect."

Direct race discrimination

15. Section 13 of the Equality Act 2010 provides as follows:-

"13 Direct discrimination

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

16. Section 23 Equality Act 2010 provides as follows:-

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case."

Indirect discrimination

17. Section 19 of the Equality Act provides as follows:-

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's 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."

Equal pay

18. Section 65 of the Equality 2010 provides as follows:-

65 Equal work

(1) For the purposes of this Chapter, A's work is equal to that of B if it is—

(a) like B's work,
…

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work."

19. As per the IDS Employment Law Handbook on Equal Pay at 5.6:-

"Same or broadly similar work

The initial focus in a 'like work' claim is on the nature of the work being done by the claimant and the comparator, and whether this is the same or broadly similar – Section 65(2)(a) EqA 2010. This is a question of fact for the employment tribunal, which can be answered by a general consideration of the type of work involved, and of the skill and knowledge required to do it.

As the wording suggests, it is not necessary that the two jobs under comparison are identical; the work only needs to be 'broadly similar'. This allows for the comparison of jobs which, on the face of things, appear to be somewhat different."

20. And at 5.8:

"In deciding whether work is broadly similar, the EAT has warned tribunals against attaching too much significance to insubstantial differences."

21. And at 5.12:

"Differences of practical importance

Once it is shown that, in general terms, the work is of a broadly similar nature, the tribunal must go on to consider the details of the claimant's and the comparator's jobs and enquire whether any differences between them are of 'practical importance in relation to terms and conditions of employment.' Tribunals are guided to some extent by s.65(3). This provides that when comparing job differences, tribunals should consider:

- The frequence or otherwise with which any such differences occur in practice, and

- The nature and extent of the differences.

The Equality and Human Rights Commission "Code of Practice on Equal Pay" notes in this regard that differences such as additional duties, levels of responsibility, skills, the time at which the work is done, qualifications, training and physical effort could all be of practical importance – Paragraph 36".

The evidence

22. We were provided with a bundle of 312 pages. During the course of the hearing we were provided with a credit report by the claimant which runs to 5 pages and the termination letter dated 4 March 2022.

23. We had witness statements and heard evidence from:

    (i) The claimant.

    (ii) Mr Ali Erdal, Managing Director of the respondent. Mr Erdal gave evidence with the assistance of a Turkish interpreter.

    (iii) Mr Mehmet Mousa, Sales Director at the respondent.

    (iv) Ms Lisa Ayre, General Manager at the respondent.

The facts

24. The respondent is a company specialising in the import and distribution of socks, underwear and leisurewear.

25. At the material time, in late 2021 and early 2022, the respondent employed 10 people, excluding Mr Ali Erdal. Four employees were employed in the warehouse.

26. Of the remaining six employees, Lisa Ayre was the General manager and Mehmet Mousa was the Sales Director.

27. The claimant worked principally with Lisa Ayre and her job title was Wholesale and Shipping Administrator. Mehmet Mousa ran what was referred to as the Retail/Internet Department. He had three members of staff reporting to him; Mr Anish Shah whose job description was Senior Merchandiser. Ms Coralie Anderson, whose job title was Production Co-ordinator (which included quality control). Ms Paige Smyth, who was a Merchandiser.

28. The claimant started work with the respondent in March/April 2017 as a Purchasing Shipping Administrator on a salary of £19,000. Mr Anish Shah began a couple of weeks before the claimant as a Senior Merchandiser on a salary of £30,000. Anish Shah had worked in merchandising since 1995. We have a copy of his CV and it is clear to us that Mr Shah had significant experience in merchandising having worked for companies such as Debenhams, Liberty, McCord, as well as experience in wholesale merchandising and offshore procurement.

29. At no time following her employment by the respondent was the claimant provided with a written statement of particulars of employment. That is clearly contrary to the duty under s.1 of the Employment Rights Act 1996. We find that there are no exceptional circumstances which would make it unjust or inequitable to make the minimum award of two weeks' pay. Given that the failure extended for nearly five years, we consider it would be just and equitable to award the claimant four weeks' pay. Reference was made to an employee handbook but nothing has been produced before us. During the claimant's employment she had periods off sick and on maternity

leave and changed her jobs three times and yet the claimant had nothing in writing to ascertain her employment terms.

30. The claimant's salary rose to £21,000 in November 2017 on the successful completion of her probation period.

31. Towards the end of 2017, Coralie Anderson was employed by the respondent. She was allocated to the shipping section and the claimant moved job to the wholesale section. The claimant worked in wholesale from about December 2017 until May 2018.

32. In about May 2018, the claimant moved job to become a merchandiser in order to cover another employee's maternity leave. As a merchandiser the claimant worked for Mehmet Mousa. In September 2018, the claimant's pay was increased to £25,000. The claimant worked as a merchandiser until September 2019 when the claimant went on maternity leave.

33. Ms Paige Smyth was employed in August 2019 in order to cover the claimant's period of maternity leave.

34. The claimant returned from maternity leave in September 2020. On her return she was allocated to the Wholesale & Shipping Department and received a pay rise to £29,000.

35. We note that, on her return from maternity leave, the claimant did not go back to the job she had been doing immediately prior to her maternity leave, namely merchandiser. Whilst the claimant had been covering another employee's maternity leave as a merchandiser, that other employee did not return from maternity leave in or about May 2019. Given the absence of any written particulars of employment, we consider it reasonable for the claimant to have regarded her position as a merchandiser as a permanent one from about May 2019 onwards.

36. The claimant told us that she enjoyed her role as Purchasing Shipping Administrator and as a merchandiser. As such, we find that moving the claimant to become a merchandiser was not unwanted conduct.

37. The claimant gave evidence that she did not particularly want to move to wholesale in December 2017 and would have preferred to return to her merchandising job on her return from maternity leave. As such, we find that those changes in jobs were unwanted conduct. Nevertheless, we find that the claimant made no contemporaneous complaint about the change in her jobs and, indeed, her move to the Wholesale & Shipping Department involved a pay rise of £4,000 which we find was welcomed by the claimant.

38. As regards the claimant's move to wholesale in December 2017, we find that the reason was that Coralie Anderson had been recruited and her skillset in terms of Production Co-ordinator including Quality Control better suited her to shipping. We find that the claimant, having successfully completed her probation period, was moved to wholesale in part as her skillset involved Polish as her first language and in that role she would be dealing with Polish suppliers. Consequently, we find that the change of the

claimant's job title/job in December 2017 was not related to the claimant's race.

39. We have considered carefully the respondent's reasons for not allowing the claimant to return to her role as a merchandiser when she returned from maternity leave and assigning her to the Wholesale & Shipping Department. On this issue we took particular notice of the oral evidence of Mehmet Mousa. He told us that there had been a drop in Polish customers due to Brexit, that the respondent had hired someone new (namely Paige Smyth), and that she was doing a really good job. He went on to state:

> "Like we have seen your first language is not English. In order for me to build the business she was more suited to the role for what I needed as her first language was English."

40. He went on to state that the main role of the claimant when working for him had been dealing with Polish customers.

41. We find that the actual comparators cited by the claimant, namely Ms C Anderson, Ms P Smyth and Ms L Ayre, are not appropriate comparators. This is because none of those individuals were returning from maternity leave in circumstances where the claimant did not have an absolute right to go back to her former job. In our judgment, a hypothetical comparator in not materially different circumstances would be a non-Polish employee returning to from maternity leave in circumstances where her ability to speak a foreign language to foreign suppliers was less required, and communication skills in the English language was more required.

42. Having seen and assessed the claimant, we find that her English was reasonably good but she was far from fluent and needed an interpreter on occasions. We accept that issues concerning language may well translate into issues concerning race. However, in these circumstances, in our judgment, the decision related to communication skills and was not related to the issue of race. We find that a hypothetical comparator would have been treated in exactly the same way. Consequently, we do not find that this was less favourable treatment.

43. On 22 October 2020, a few weeks after the claimant had returned from her maternity leave, there was an incident involving the claimant, Ali Erdal and Lisa Ayre. In her application to amend her claim, the claimant puts it as follows:-

> "Mr Erdal shout on me on the front of my colleagues saying as soon you back all is wrong his factory in Turkey do not understand me etc. he saying also I change some document template which is they do not understand. He also said to me when Miss Lisa Ayre doing this documents was much better but I didn't change anything I fallow same way as she did before. When I try to explain to Mr Erdal he didn't listen to me he turn to Miss Lisa Ayre and ask her "What she say?" Lisa replay to him exactly same words as me. I did feeling in this moment really bad I remember that I did started cry and couldn't stop Coralie and Paige fallow me to the other office and try to come down."

44. In the list of issues it is suggested that Ali Erdal was seeking to imply that because of her accent, the claimant could not communicate clearly in English.

45. The context of the exchange between the claimant and Ali Erdal was that Ali Erdal thought the claimant had made errors in communicating with a factory in Turkey. The claimant denied that she had made any errors. Ali Erdal said he had received a complaint from Turkey.

46. Having seen and assessed Ali Erdal, it is clear to us that he has a forceful character and we have no doubt that, on occasions, he could speak harshly to employees.

47. Lisa Ayre confirms that Ali Erdal had come in as a factory had made a complaint. She states that, in her opinion, the claimant was talking too fast and quietly for Ali Erdal to understand as English is not Ali Erdal's first language. She accepts that Ali Erdal did get frustrated and turned to her to ask her to explain. She does not recall the exact words but does not recall thinking that the exchange was offensive.

48. Whilst both Ali Erdal and the claimant speak some English, they both requested, and used from time to time, interpreters in Turkish and Polish respectively. We find that Ali Erdal probably did raise his voice and shout at the claimant. We find that Ali Erdal probably did, in response to the claimant's comments, ask Lisa Ayre what the claimant had said. Given the tone of how that was probably said, we find that that was unwanted conduct as far as the claimant was concerned. We find that Ali Erdal's actions were not related to the claimant's race. His actions were because, as far as he was concerned, the claimant had made a mistake and was denying it. We do not need to make any finding as to whether or not the claimant had actually made a mistake but we find that Ali Erdal genuinely thought that she had. We find that the nature of his comment, asking for clarification as to what the claimant had said, was not on the grounds of the claimant's race but was in order to try and understand what she had said.

49. The claimant has advanced that the respondent had a PCP, namely "a requirement that employees attend work without taking time off for family reasons, such as a child being sick or a childminder being sick"

50. The claimant has three children. Unfortunately, following the advent of covid, one of the claimant's children had a reduced immune system and was prone to falling ill on a fairly regular basis. It was common ground that, during the course of 2021, the claimant might average one day a month unpaid leave in order to care for her dependent child. The claimant's evidence was that she could take such time off whenever she wanted and it was always allowed. The claimant had no complaints about Lisa Ayre, her immediate line manager, and we have seen numerous examples of the most friendly and supportive texts between them when Lisa Ayre granted time off to care for her sick child.

51. Consequently, we find that the respondent did not have the PCP contended for and the indirect sex discrimination claim fails.

52. The claimant's principal complaint concerns comments allegedly made by Ali Erdal referencing her unpaid leave. The claimant told us, and we accept, that she was the only female employee with children.

53. There was an incident in January 2021 when the claimant returned to work late. She was due back at work on 4 January but her ferry was cancelled. That had the knock on effect of invalidating her covid test and she was delayed in returning to the UK. Having returned to the UK she was advised by Lisa Ayre to follow government guidelines in terms of obtaining tests and shielding. The net effect is that the claimant, through no fault of her own, only returned to work on 10 January, ie, six days late. Ali Erdal's evidence was to the effect that any comments he may have made about the claimant's absence were made in the context of this period of absence which was wholly unrelated to taking time off for dependents.

54. We find that Ali Erdal's comments in relation to the claimant's days off to look after her son were made on a number of occasions. We find that Ali Erdal probably did tell the claimant that she was the only employee who took such time off. In her oral evidence, the claimant added that Ali Erdal said to her that no one else took so much time off and that she was never paid her full salary because she had the odd day off. We do not find that making these comments constituted a detriment. We find that the context was Ali Erdal commenting on and managing the claimant's very frequent justified absences from work.

55. The claimant contends that the respondent applied different rules to the claimant, telling her that she could only have up to two hours at a time off for appointments and then had to use annual leave but not applying that rule to anyone else. It is the respondent's case that it did have a rule that, if an employee needed to attend an appointment, either for themselves or a dependent, they could have up to two hours off paid. However, if the appointment resulted in more than two hours off, then the employee was required to use half a day or a day's annual leave. The respondent's case was that that rule was applied to all employees. Whilst the claimant tried to point to one example of Lisa Ayre taking more than two hours off but not registering it as holiday, by the end of the case the claimant accepted that the rule was applied to all employees.

56. Apart from the warehouse operation, the respondent's business was divided into two main categories. One has been called the Wholesale & Shipping Department. Amongst her other duties, this was run by Lisa Ayre with the claimant reporting to her. The other department was Retail/Internet. This was run by Mehmet Mousa with Anish Shah, Coralie Anderson and Paige Smyth reporting to him.

57. Whilst the respondent has presented the two departments as being largely separate, we find that there was a significant crossover in both Lisa Ayre and the claimant providing work for the Retail/Internet Department. For example, the claimant would often be asked to help communicate with Polish customers of the Retail/Internet Department. In addition, the claimant often placed orders and dealt with suppliers in the Retail/Internet Department. During the course of the evidence the claimant took us to many examples of this happening in the bundle.

58. The basic distinction drawn between Wholesale and Retail/Internet was as follows. The wholesale operation consisted of taking orders for and despatching stock that was already in the warehouse. The Internet/Retail Department was more complex in the sense that customers would be approached to see what they wanted, orders would be taken, the orders would be placed with manufacturers, the stock would be imported, warehoused and then shipped when the customer needed it.

59. The Internet/Retail Department formed the vast bulk of the respondent's business in 2021. The most significant client was FM who sold on Amazon. FM accounted for 65% of the respondent's turnover. Another major client was B&M which is a retail outlet with 1,000 stores.

60. Anish Shah was responsible for the FM, B & M and one other major client. It is clear to us that Anish Shah, due to his seniority and experience, was responsible for managing client relationships with these important customers. We find that, whilst the claimant may have dealt with smaller customers, her job did not involve the same level of client relationship care. We find that Anish Shah's job was a lot more complex than the claimants. He was involved with product development in conjunction with the major clients. Again, whilst the claimant may have placed orders and dealt with suppliers, we find that her level of involvement and responsibility was far inferior to Anish Shah's. We find that most of the work on the Retail/Internet Department that the claimant did, apart from Polish communication, was to undertake tasks delegated to her or to cover other colleague's work.

61. Consequently, we find that the claimant's work was not the same as or broadly similar to Anish Shah's work.

62. On 1 March 2022, the claimant had to take time off to care for her dependent child. This was, as usual, granted.

63. On Friday 4 March 2022, the claimant was called to the showroom 10 minutes before the end of her shift by Lisa Ayre and Ali Erdal. At that meeting she was told that her position was going to be redundant and she was given four weeks' notice. She was told that she was not required to work her notice. We were not told when the letter giving the claimant notice of redundancy was given to her. It was not even in the hearing bundle and we had to ask for it. The letter states as follows:-

> "… the company has decided to make the post of Sales/Shipping Administrator redundant. This is due to us closing down the wholesale part of the business due to a downturn in business and it no longer being profitable.
>
> As Socks World International is unable to offer you any suitable alternative employment, we are hereby giving you notice that your employment with the company will terminate on 01st April 2022. This is due to your position having to be made redundant, and in no way reflects your performance in your job, which has been entirely satisfactory."

64. It is the claimant's case that the termination of her employment was because she had taken time off on 1 March 2022 to care for a dependent and/or that she had taken time off on previous occasions. It follows that the claimant is maintaining that the redundancy situation was a sham. In

addition, the claimant is contending that, even if the redundancy was not a sham, then her selection for redundancy was because she had taken time off to care for a dependent.

65. As already found, the claimant clearly did take numerous days off to care for a dependent child including on 1 March 2022. Further, we find that the claimant did comply with the requirements of s.57A(2) on those occasions by informing the respondent of the reason for her time off.

66. We have examined the evidence that there is concerning the redundancy situation. The main thrust of the claimant's argument was that there were plenty of orders coming into the Wholesale Department and that there was plenty of work for her to do. In addition, that she was doing some work for the Retail/Internet Department.

67. Various items of financial information have been placed before us. The nature of the financial information placed before us has not been entirely satisfactory as it has consisted solely of turnover. No accounts dealing with the profitability of the Wholesale Department have been provided. The financial information that we have been provided with does show that for the Wholesale Department sales were decreasing year on year from 2020. We have been provided with three different documents purporting to show wholesale sales in 2021. The three are inconsistent and contain errors. Further, the figures show that wholesale continued to sell through 2022 and 2023, albeit that Ali Erdal stated that it was principally getting rid of existing stock.

68. In the circumstances, we have looked at what evidence we have concerning the issue of ceasing to operate the Wholesale Department. We have been provided with the following:

    68.1 On 5 October 2021, Lisa Ayre sent an email to an e-commence site provider as follows:-

> "I spoke to Ali. Do you know when the annual renewal is due as we have decided to no longer continue with the e-commerce site.
>
> Over the last year our business has changed a lot and we now do very little wholesale business. As such we only take a handful of orders via the website and so it is no longer worth continuing."

    68.2 On 2 February 2022, Lisa Ayre sent an email to the provider of a Stock Management system as follows:-

> "Since the pandemic the way in which we operate has changed significantly and instead of holding stock we are moving away from the wholesale type business and moving more to working on a made to order basis.
>
> Unfortunately with this change we will no longer be getting much use from the 4 sale system.
>
> We would like to end this from the end of this month please as it is no longer cost effective for us."

68.3 Lisa Ayre and Ali Erdal gave evidence that they first discussed the potential redundancy of the claimant's position in December 2021. We have a text message from Lisa Ayre to Ali Erdal dated 11 February 2022. This states:-

> "Also Marta's now on holiday (half term) – she booked it last month… but once we spoken to Hasan we can work out if we need to make any deductions once we have decided final date."

We find that that text message was a reference to the claimant's potential redundancy. We find that that was obviously prior to 1 March 2022 and, consequently, we find that the decision to make the claimant redundant was not due to her taking time off for a dependent on 1 March 2022.

69. In support of her contention that her redundancy was related to her time off on 1 March 2022 the claimant gave evidence that on 2 March 2022 she overheard Ali Erdal directing Lisa Ayre to create the termination letter. This conversation was denied by Lisa Ayre and Ali Erdal. It was Lisa Ayre's evidence that she had created the termination letter a week or so prior to 4 March 2022. On balance we prefer the respondent's evidence on this issue. However, even if a direction was made to create the termination letter after 1 March 2022, as already found, it is clear to us that the decision had been made prior to 1 March 2022.

70. In the claimant's appeal letter and in her witness statement and in her claim form the claimant makes the following comment:-

> "I do understand that you wanted to abandon the small wholesalers because you do not want to deal with them, but I did not expect that I would be redundant because of that."

71. This confirms to us that the claimant was aware that the respondent was retreating from its wholesale business.

72. We have considered whether the move to make the claimant's position redundant was because of her frequent days off to care for her dependent child. We find that that is not the case. We find that there was a genuine redundancy situation in that the respondent was moving out of the wholesale business and there was a reduction in the requirements of the respondent for the claimant to do work of the type she had been doing. It is not for us to re-examine the business case for the cessation of the Wholesale Department.

73. The meeting on 4 March 2022 fell woefully short of providing a fair redundancy procedure. The claimant was not warned and there was no meaningful consultation.

74. We have examined the respondent's position that there was a pool of one and as such, any warning or consultation would have been effectively futile.

75. We have found that Anish Shah was a in a senior position to the claimant doing a different job. As such, we find it was reasonable for him not to be included in the pool. We find that although Coralie Anderson had been employed after the claimant joined the respondent, the nature of her job was

different to that which the claimant was doing. Coralie Anderson's job title was Production Co-ordinator which involved quality control. When asked to detail what she did, Lisa Ayre told us that her duties included conducting a ranging audit, creating specifications for leisure items, checking shipments matched what had been approved, arranging the Umbro hologram, checking fabric weight and checking "Lab Dib" matches (we were not told what Lab Dib refers to but it appears to be related to colour match). We find that Coralie Anderson was doing a different job to the claimant and, consequently, we find that not placing her in a pool for redundancy was reasonable.

76. Paige Smyth had joined the respondent after the claimant. Paige Smyth had been recruited as maternity cover for the claimant as a merchandiser in the Retail/Internet Department. It was urged upon us that Paige Smyth had a greater involvement in sales but that was not dependent on her own initiative but with Mehmet Mousa. We find that the claimant's role did involve dealing with sales as and when required. Further, that, probably due to a downturn in the amount of activity in the Wholesale Department in 2021, the claimant was doing quite a few tasks for the Retail/Internet Department. In the circumstances, we find that the failure to include Paige Smyth within the pool for redundancy was outside the range of reasonable responses of a reasonable employer. Consequently, we find that the decision to terminate the claimant's contract of employment was both procedurally and substantively unfair.

77. We find that the reason for the claimant's dismissal was redundancy and not because she had taken time off for a dependent child. Further, we find that the reason for the claimant's selection for redundancy was not that she had taken time off for a dependent child.

78. Given that we have found that there should have been a pool of two with Paige Smyth, we have gone on to consider what were the chances of the claimant losing her job in any event had a fair procedure been adopted. In terms of potential objective selection criteria, one factor is that, as of March 2022, Paige Smyth had worked in the Retail/Internet Department for two years four months whereas the claimant had a total of one year four months experience in that department. Their salaries were broadly comparable at £30,000 compared with £27,000. Lisa Ayre suggested that criteria such as experience, performance, work ethic/team working ability, future potential and efficiency would have been scored and that the claimant's score would have been less than other employees in the pool. She also points to the fact that Mehmet Mousa was keen to maintain his existing team for continuity. Against that, the claimant had worked for the respondent for longer than Paige Smyth and had had the versatility to work in various areas. Whilst the claimant's communication skills could be questioned, Mehmet Mousa gave evidence that there had never been any complaints from customers. The respondent has not placed before us much material on which we can base our assessment. There were no appraisals of sale figures etc to provide any objective scoring. Indeed, in her witness statement Lisa Ayre states:-

> "Paige Smyth was an employee that the company saw had the potential to take the company forward."

That could not be more subjective.

79. Given the paucity of proper evidence upon which we can make a more informed decision, in our judgment, and in all fairness, we have assessed the chances of the claimant being dismissed for redundancy at 50%.

80. The claimant was not given a pay rise in the period December 2021 – January 2022.

81. This head of claim appears to have been added late by way of amendment. None of the witness statements deal with it. The claimant gave evidence that in January 2022 Anish Shah told her that he had had pay rise. Her amendment application references all her colleagues receiving a pay rise between 1 December 2021 and 31 January 2022. However, in cross examination when it was put to her that not everyone got a pay rise at the same time she said she didn't know.

82. It is the respondent's case that there was no formal salary review process and that pay rises were effectively dealt with on an ad hoc basis by Ali Erdal. It was submitted that not every employee received a pay rise and pay rises were not given every year. The evidence on both sides was unsatisfactory.

83. We find that pay rises probably were dealt with on an ad hoc basis by Ali Erdal. Further, even if others did receive a pay rise in December 2021 - January 2022, then the fact that the claimant did not is explained by the decision that had been made to make her redundant and we find was not for a prescribed reason

Conclusions

84. By reference to the list of issues, our conclusions are as follows:

85. The discrimination claims have been found not proved.

86. In any event, they relate to events prior to September 2020 and 22 October 2020. As such, they are 20 months out of time. We do not find there was conduct extending over any other period.

87. As far as the unfair dismissal/automatically unfair dismissal and detriment complaints are concerned, the detriment claims have been found not proved and the unfair dismissal/automatically unfair dismissal claims were in time.

88. We find that the reason for dismissal was redundancy.

89. We find that the respondent did not adequately warn or consult the claimant.

90. We find that the respondent did not adopt a reasonable selection decision and that the selection pool should have included Paige Smyth. We find that the choice of a pool of one was outside the range of reasonable responses of a reasonable employer.

91. We find that there was no alternative work available for the claimant.

92. We find that the dismissal was not within the range of reasonable responses of a reasonable employer.

93. We find that the claimant did take time off on 1 March 2022 because of the unexpected disruption or termination of arrangements for the care of her child.

94. We find that the claimant did take or seek to take time off on other occasions. We find that that was time off within the meaning of s.57A ERA 1996 and that the claimant did comply with the requirements of s.57A(2) ERA 1996.

95. We find that the principal reasons for the claimant's dismissal was not that she had taken that time off.

96. We find that the principal reasons for the claimant's selection for dismissal was not because she had taken time off for dependents.

97. We find that Mr Erdal did tell the claimant she was the only employee who took such time off.

98. We find that the respondent applied the rule about time off for appointments and annual leave to all employees.

99. We find that the respondent did not give the claimant a pay rise in the period December 2021-January 2022.

100. We find that Mr Erdal's comments and the fact that the claimant did not get a pay rise were done for reasons other than for a prescribed reason.

101. We find that on or about 22 October 2020 Ali Erdal shouted at the claimant and turned to Ms Ayre and said "What did she say". We find that that was unwanted conduct. We find that it was not related to her race.

102. We find that the respondent did not change the claimant's job description/role four times during her employment. We find that her job description/role changed three times. We find that the first and third changes were unwanted conduct.

103. We find that they did not relate to race.

104. We find that the changes in the claimant's job description/role two times during her employment were not less favourable treatment.

105. We find that the respondent did not have a PCP of a requirement that the employees attend work without taking time off for family reasons such as a child being sick or a childminder being sick.

Equal pay

106. We find that the claimant's work was not broadly similar to that of Mr A Shah.

107. We find that such differences as there were between their work was of practical importance in relation to the terms of their work.

108. We find that the claimant's rate of pay was less than Mr Shah's contract.

109. We find that the respondent has shown the difference in terms to be due to a material factor.

110. We find that the respondent has shown that the material factor does not involve treating the claimant less favourably because of her sex than the respondent treated Mr Shah.

111. We find the respondent was in breach of its duty to give the claimant a written statement of employment particulars and that it would be just and equitable to award four weeks pay.

Remedy

112. We find that the Acas Code of Conduct on Disciplinary and Grievance Procedures is not engaged and, consequently, there should be no uplift. Remedy to be dealt with.

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Employment Judge Alliott

Date: 30 October 2024

Sent to the parties on: 01/11/2024

For the Tribunal Office

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