Case No: 2300461/2019

EMPLOYMENT TRIBUNALS

Claimant: Miss B Samuel

Respondent: Citizens Advice Merton & Lambeth

Heard at: **London South Employment Tribunal (by remote video hearing)**

On: **14-17 June 2021 & 15 July 2021 (in chambers)**

Before: **Employment Judge Ferguson**

Members: **Ms T Bryant**
Ms K Omer

Representation
Claimant: Ms A Nanhoo-Robinson (counsel)
Respondent: Mr C Bourne (counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The Claimant's complaints of age and sex discrimination are dismissed upon withdrawal.

2. The Claimant's complaint of unfair dismissal fails and is dismissed.

3. The Claimant's complaint of automatic unfair dismissal (whistleblowing and/or trade union membership/activities) fails and is dismissed.

4. The Claimant's complaint of detriment due to trade union activities fails and is dismissed.

5. The Claimant's complaint of direct race discrimination fails and is dismissed.

6. The Claimant's complaint of victimisation fails and is dismissed.

REASONS

INTRODUCTION

1. The Claimant was employed by the respondent, latterly as Senior Information & Gateway Office Manager, from 8 March 2008 until she was dismissed by reason of redundancy following a reorganisation in 2018. Her effective date of termination was 4 October 2018.

2. By a claim form presented on 8 February 2019, following a period of early conciliation from 12 December 2018 to 9 January 2019, the claimant brought the following complaints:

   2.1. Ordinary unfair dismissal

   2.2. Automatic unfair dismissal (whistleblowing and/or trade union membership/ activities)

   2.3. Age discrimination

   2.4. Sex discrimination

   2.5. Victimisation

   2.6. Detriment because of trade union activities

3. The claimant withdrew the complaints of age and sex discrimination during closing submissions. The issues in respect of the remaining complaints were agreed to be as follows:

   Unfair dismissal

   1. Did the Respondent terminate the Claimant's contract of employment for a potentially fair reason pursuant to s. 98 (2) of the Employment Rights Act 1996 ("the ERA")?

   2. Was the decision to select the Claimant for redundancy fair and reasonable?

   3. Did the Respondent conduct meaningful consultation with the Claimant during the redundancy process?

   4. Did the Respondent discharge its obligations in relation to redeployment?

   5. Did the decision of the Respondent to dismiss the Claimant fall within the 'band of reasonable responses' test within the meaning of s. 98 (4) of the ERA?

   6. Should the Tribunal find the dismissal was unfair, does the Tribunal consider it appropriate to reduce any damages in accordance with the *Polkey* principle and/or in relation to contributory fault under s. 123 (6) of the ERA?

   Trade Union Detriment

7. Was the Respondent's decision to select the Claimant based on the Claimant trade union related activities and duties (s.146 TULCRA)? and, if so, was the Respondent's sole or main purpose preventing or deterring the Claimant from taking part in the activities of an independent trade union at an appropriate time or penalizing her for doing so within the meaning of TULR(C)A 1992, s. 146(1)(b)?

8. Was the decision to terminate the Claimant's contract of employment based on the Claimant's trade union related activities and duties (s.152 TULCRA)?

Direct race discrimination

9. Was the decision to select the Claimant based on the Claimant's race? Was the Claimant treated less favourably than other employees because of her race? The Claimant relies on a hypothetical comparator of a white person in the same circumstances as her.

Victimisation

10. Did the allegations of race discrimination against Mr Bradley made on 04th June 2018 amount to a protected act?

12. Was the Respondent's decision to dismiss the claimant on grounds of redundancy based on the protected acts made by the Claimant?

Whistleblowing (s. 43A to 43L, and s. 103A of the ERA)

14. Does the Claimant's alleged disclosure of 30th May 2018 amount to a qualifying disclosure within the meaning of s. 43B (1) of the ERA?

15. Was the Respondent's decision to provisionally select the Claimant due to the Claimant's protected disclosure?

16. If the above is shown was this the reason, or principal reason, the Respondent dismissed the Claimant contrary to s.103A of the ERA?

4. It was agreed that issues relating to remedy (other than those set out above) would not be addressed until after the Tribunal's judgment on liability.

5. Because of restrictions relating to the Covid-19 pandemic, the hearing took place by remote video hearing with the consent of the parties. We heard evidence from the Claimant and, on her behalf, from Fay Gordon, Marquette Cain, Nicholas Sanders, Anna Rogers and Jaye Blake. On behalf of the Respondent we heard from Suzanne Hudson and Jac Nunns. We had a bundle of 671 pages and a number of other documents that were handed up during the hearing.

FACTS

6. The Respondent is an independent charity that provides a range of advice and support services to those who live, work or study in the London boroughs of Lambeth and Merton. The Respondent is a member of a national network of over 280 charities that deliver advice services across the country, within the national Citizens Advice framework.

7. The Claimant commenced employment with the Respondent on 8 March 2008, initially part time. She took on a full time position from June 2014. At the date of termination of her employment on 4 October 2018, the Claimant was employed as Senior Information & Gateway Office Manager (IGOM) at the Respondent's Streatham office (also referred to as the Lambeth office). The Respondent operated two other offices, each with its own IGOM. The IGOMs were responsible for the administration of the offices and managing volunteers.

8. The Respondent recognised the trade union, Unite, in a sole recognition agreement entered into on 28 March 2017, which followed a ruling of the Central Arbitration Committee. Meetings of a Joint Negotiating and Consultative Committee (JNCC) took place regularly with Unite's full-time officer, Andy Murray, and employee representatives including the Claimant.

9. The Claimant claims that she was badly treated by a former Chief Executive of the Respondent, Hayley James, who occupied the role from May 2015 until March 2017. After Ms James left the Respondent had an interim Chief Executive until late September 2017 when Suzanne Hudson was appointed to the role. Ms Hudson has remained in the role to date.

10. In January 2017 the Claimant was advised of the likelihood of redundancies and given notice of termination. She expressed an interest in the newly created role of Senior IGOM and was appointed to that position by the Respondent's Head of People, Peter Bradley, in April 2017.

11. The Respondent is governed by a Board of Trustees. The Chief Executive has delegated responsibility for the operational running of the charity and reports to the Board. The Chief Executive is supported by two senior managers and together they make up the Senior Management Team (SMT). At the relevant time, in 2017/18, the SMT consisted of Ms Hudson, Karen Brunger (Head of Advice Services) and Peter Bradley (Head of People).

12. A meeting of the Board was due to take place on 21 February 2018. In preparation for the meeting Ms Hudson prepared a draft budget for the following financial year, together with forecasts for years 2 and 3, which was circulated around one week before the meeting. On staffing costs the budget proposed a 2% increment for staff from 1 April 2018. No redundancies were planned.

13. On 19 February 2018 the Respondent received a judgment on remedy arising from an Employment Tribunal claim by a former employee. The Judgment was expected but the size of the award, £165,000, was twice the amount the Respondent had been advised was likely, an excess of £80,000. The draft budget that had been circulated before the Employment Tribunal judgment shows that the Respondent had budgeted for £85,000 to cover the judgment. It also shows that the Respondent's reserves were relatively low, just over £250,000 after taking into account the £85,000 provision for the Tribunal award. This was the equivalent of between three and four months' operational costs.

14. When the Board met on 21 February it was agreed that the Respondent had no option but to develop a new draft budget reflecting the significant risks to the charity's position as regards its reserves and financial viability as a result of the Employment Tribunal judgment.

15. A meeting of all staff was called for 28 February 2018 at which they were informed of the judgment, the financial position of the Respondent and that a new budget would have to be prepared. A meeting of the JNCC took place on 8 March 2018.

16. Ms Hudson prepared a new draft budget overview. She explained in her evidence to the Tribunal that she had already identified around £40,000 savings in supplier costs and it had been agreed the Respondent needed to identify further savings £40,000 to meet the additional £80,000 in the Tribunal Judgment that had not been budgeted for.

17. The revised draft budget noted that the Trustees had agreed at the Board meeting they would be unable to implement salary increments in the year 2018/19. It then put forward three potential options to cut staff costs:

> "1) All staff take a 6.5% reduction in salary. Although our salaries are comparable to other London-based CAs, we know they tend to fall around average or within lower half of range. If trustees were to implement a 6.5% reduction across the board we would loose the majority of staff and would not be able to recruit to positions. **This option is not being recommended.**
>
> 2) We restructure the team based on rationale of demands on charity (services/clients/contracts) and full cost recovery. Following consultation the additional costs of redundancies/notice periods would also need to be factored in. This could be as high as £16k/£18k for some individuals. The overall reduction in the staff team would therefore need to be significant to ensure the costs of redundancies are met through reduced ongoing expenditure. **Depending on the outcome of […] this option may well need to be considered but at the current time and with advice from Simpson Miller it is recommended this is our contingency option if 3) below is not agreed with the team.**
>
> 3) We seek agreement of the staff team to implement reduced hours for roles where capacity reflects demands of the charity or where individual members are willing to consider. This option prioritises retaining staff roles as requested by the Union. **This is my priority recommendation.** Simpson Miller's advice is that if the staff team agree to this approach we can have one-to-one meetings with roles identified. If majority of those individuals do not agree with change of contract terms, we then commence consultation across the team. If all or majority of individuals agree to terms of contract change, we implement without consultation. If one or two of team refuse, Simpson Miller's advise that we have the option to implement on unilateral basis."

18. The document then sets out the proposal to reduce hours for some roles. This involved closing two of the three offices to new clients on Fridays. The third office was already closed on Fridays. It was proposed to reduce the working hours of all three IGOMs (including the Claimant) and the Merton Supervisor from five to four days a week. It was also proposed to reduce the Children's Centre coordinator role to 30 hours a week.

19. Ms Hudson proposed that a previously agreed increase in her own hours from 30 to 37.5 would not take place, so she would be paid on the basis of 30 hours a week and continue to work "as needed". She explained in her oral evidence that the £40,000 saving could have been achieved by her cut in hours and the five roles identified reducing to four days a week.

20. Ms Hudson also explained in her oral evidence that for a small charity such as the Respondent the only realistic way of recouping a large unexpected liability such as the Tribunal award was through reducing immediate costs. She said they were not able to offer a temporary reduction in hours because future income was always uncertain, so there would have been no guarantee of a return to working five days a week.

21. Ms Hudson said that the other factor in the decision was the low level of reserves at the time. She said that if they had taken the funds out of the already low reserves, the Respondent would not have been able to meet the costs of closing down the charity.

22. The revised budget was approved at a Board meeting on 18 April 2018.

23. The three options were set out in an email to all staff on 26 April 2018, i.e. a 6.5% pay cut across the team, "a reduction in working hours approach", although this would not impact all roles, or consultation on potential redundancies. Staff were invited to state their preferred option. It was clear that redundancies would only be required if neither of the other two options was achievable.

24. A meeting of the JNCC took place on 10 May 2018 at which Unite raised concerns about the proposals. Following the meeting Mr Murray submitted a written document with comments and questions. He expressed disappointment that the Respondent's focus was on reducing staff costs and queried the fact that the budget assumed no significant new funding. The union proposed that all three proposals be put on hold while alternative solutions are explored. Ms Hudson responded to the document on 16 May 2018. She explained that savings had been made from non-staff costs as well. She also said that some new funding had been budgeted for, but grant applications take considerable time.

25. On 30 May 2018 a further JNCC meeting took place attended by Andy Murray, the Claimant and Anna Rogers (another Unite employee representative), Ms Hudson and Caroline Taylor, a Trustee of the Respondent. By this stage it was clear that the staff had not agreed to the 6.5% pay cut so the Respondent was proposing to consult with the employees affected by the proposed reduction in hours or, in the alternative, redundancies.

26. During the meeting the Claimant told Ms Hudson and Ms Taylor that some staff members had met the claimant in the Tribunal case who told them that he had offered to settle for £65,000. The Claimant's evidence was that Ms Hudson became very angry, demanding to know who had met him. Ms Hudson accepted in cross-examination that she was surprised, disappointed and upset, but denied that she was angry. She said that due to confidentiality obligations the Respondent could not disclose any information to staff about any negotiations.

27. The Claimant and the other two IGOMs were informed the following day that the three posts were in a pool who were at risk of redundancy if it was not possible to achieve the required cost saving by a reduction in hours.

28. Those in the other two roles identified in the revised budget, namely the Merton Advice Supervisor and the Children's Centre Coordinator, were also similarly informed they were at risk of redundancy.

29. In the meantime the Claimant had taken a period of sick leave due to work-related stress and a dispute had arisen with Mr Bradley following a return to work interview on 23 May 2018. One of the areas of dispute related to a request that the Claimant be based downstairs when the office is open to the public instead of her normal office upstairs. Mr Bradley informed Ms Hudson that the Claimant had raised a number of issues by email and as a result a meeting was arranged on 4 June with the Claimant, Ms Hudson and Mr Bradley.

30. During the meeting on 4 June 2018 the Claimant alleged that she was being treated differently by Mr Bradley and that she believed it was racially motivated. The Claimant became upset and Ms Hudson ended the meeting. The Claimant and Ms Hudson went to a café to discuss the matter further. Ms Hudson's evidence was that the Claimant retracted the allegation of race discrimination against Mr Bradley and said it solely related to the previous Chief Executive, Ms James. The Claimant was not asked about this in cross-examination so we cannot make a finding that she retracted the allegation against Mr Bradley.

31. On 6 June 2018 Ms Hudson emailed the Claimant enclosing summary notes of the meeting on 4 June. She also said in the email:

> "CAML as an equal opportunities employer takes all allegations of discrimination extremely seriously and will conduct formal investigations where this is necessary and appropriate. If you – or any member of the team – wish to raise allegations or have evidence then team members can do so informally with me (as Chief Executive) or through the formal grievance process. Of course, any allegations will be treated extremely seriously and investigated where it is appropriate."

32. It is not in dispute that the Claimant did not pursue the complaint of race discrimination any further.

33. On 5 June 2018 Ms Hudson emailed all staff to confirm that formal consultation with those at risk of redundancy had commenced. She asked that anyone interested in reducing their hours or in voluntary redundancy let her know.

34. On 8 June 2018 a first consultation meeting took place with all three IGOMs (the Claimant, CS and DG). Ms Hudson conducted the meeting. Ms Rogers attended as a union representative. Ms Hudson confirmed that the proposed restructure involved either the reduction of all three IGOM roles to four days a week, or the creation of two new full-time IGOM roles.

35. On 13 June 2018 Ms Hudson emailed all three IGOMs to inform them of two new vacancies, a "Trainer – Volunteer Advisers" (1 day a week) and a "Personal Budgeting Support Adviser" (4 days a week). She asked them to let

her know if they were interested in any of the available roles, i.e. the two new vacancies and the IGOM roles (either 4 days or 5 days a week).

36. The Claimant requested copies of the job descriptions for the new vacancies and they were provided to her.

37. The Claimant's second consultation meeting took place on 20 June 2018. She was accompanied again by Ms Rogers. The other two IGOMs were not present. The Claimant said that she would not be able to accept reduced hours. The Claimant also said the new vacancies did not seem relevant to her skills and experience. Ms Hudson asked if the Claimant would consider voluntary redundancy. The Claimant said no. The Claimant asked for a job description for the proposed five-day IGOM roles and this was provided to her. It was agreed the Claimant would let Ms Hudson know her preferences by the end of the week.

38. It is not in dispute that the other two IGOMs were prepared to reduce their hours to four days a week. Ms Hudson did not specifically ask them about voluntary redundancy in their second consultation meetings.

39. On 26 June the Claimant confirmed by email that she was interested in the five-day IGOM role. She said this was despite the fact that it would involve a reduction in salary of almost £3,000 for her (because she was a Senior IGOM).

40. On 26 June 2018 Ms Hudson sent all three IGOMs the proposed selection criteria for a redundancy selection process. The other two IGOMs agreed the selection criteria. The Claimant objected to the weighting given to sickness record and as a result the weighting was reduced from 15% to 10%.

41. Mr Bradley conducted the scoring exercise for the three IGOMs. The Claimant scored the lowest. One of the issues noted in the score sheet by Mr Bradley was "evidence of challenging relationship with Head of Advice Services" (Ms Brunger). Ms Hudson's oral evidence was that Mr Bradley discussed the scores with her and provided evidence to support all of the comments he had included.

42. On 5 July 2018 the Claimant's score sheet was sent to her. The other two IGOMs were not sent their score sheets. Ms Hudson said that this was because the Claimant had scored the lowest, so she was the one proposed to be made redundant.

43. The Tribunal bundle included a table of the scores given to all three IGOMs with comments. Apart from the Claimant's scores which the Respondent agreed to change during the consultation process the Claimant did not take issue in the Tribunal proceedings with her own scores or those given to the other IGOMs.

44. On 6 July 2018 the Claimant emailed Ms Hudson saying that she wished to raise a grievance against Mr Bradley because of the statement in the score sheet alleging a challenging relationship with Head of Advice Services. She claimed that the statement was vindictive and the matter had never been brought to her attention. She alleged that this statement and others in the selection criteria were "inaccurate and engineered to ensure that I was scored very low in the selection process".

45. Ms Hudson confirmed that she would deal with the Claimant's concerns as part of the redundancy consultation process and they would discuss them in the next meeting.

46. The Claimant set out in full her complaints about the scoring in an email on 13 July 2018. The Claimant took issue with several of the comments made by Mr Bradley.

47. A further consultation meeting took place on 17 July 2018, attended by the Claimant, Ms Hudson and Mr Murray. Ms Hudson agreed to delete the reference to the challenging relationship with Ms Brunger and to consider revising the scoring. She also agreed to discount 16 days of sickness absence on the basis that they were work-related. This reduced the Claimant's sickness days from 37 to 21. All of the other points raised by the Claimant were discussed.

48. On 23 July 2018 Ms Hudson sent the Claimant a revised score sheet. The scores were increased in response to the two points above. Ms Hudson said she found "no reason to revise the scoring further", but does not appear to have given any detailed response. The Claimant's overall score was still lower than the other two IGOMs.

49. The Claimant responded on the same day saying that she was expecting to be provided with notes of the meeting on 17 July and that she would like to go to Stage 2 of the grievance process. Ms Hudson provided the notes the next day. She said that any concerns about the redundancy process and the scoring exercise would be discussed within the consultation process.

50. In the meantime, the Respondent had also been consulting with Unite about the proposed restructure. On 27 June 2018 the Claimant and Ms Rogers, in their capacity as Unite workplace representative, sent a proposal for how the Respondent could meet the unexpected liability from the Tribunal judgment. They suggested reducing the Senior Management Team from three to two roles, or reducing the SMT roles to four days a week. They also suggested that the Administrator role could be absorbed into the IGOM roles. They urged the trustees to meet the £40,000 deficit from reserves, and repeated the suggestion that the situation had arisen as a result of "the failure of trustees to achieve a sensible settlement in respect of the ET Judgment".

51. A formal response to the proposal was provided by Jac Nunns, Chair of the Board of Trustees, on 24 July 2018. She explained that it was not possible to meet the cost from reserves without "putting the organisation in a precarious financial position and acting outside our legal responsibilities as trustees". She also explained that Ms Hudson had reduced her hours to four days a week, and that Mr Bradley had also agreed during the consultation process to reduce his hours. As for the suggestion about the Administrator role, she said that they had considered where posts could be combined to minimise redundancies, and they remained of the view that the proposed changes were the most appropriate.

52. A final individual consultation meeting with the Claimant was due to take place on 26 July 2018 but the Claimant was unable to attend because she was unwell.

53. On 26 July 2018 Ms Hudson wrote to the Claimant to confirm that the Respondent had decided to make her redundant. The Claimant was given 10 weeks' notice so her employment was due to terminate on 4 October 2018. The letter said that if any suitable positions became available during the notice period the Claimant would be informed of them.

54. The Claimant submitted an appeal against the decision on 14 August 2018. The grounds of appeal were as follows:

> "Consultation process - inadequate consultation
>
> 1. I do not believe that CAML adequately responded to Unite proposals submitted on 27 June 2018 which sought both to retain client facing posts and protect services to the local community.
>
> 2. At a JNCC meeting on 1 May 2018 Unite was informed that CAML was seeking 40K in savings and the decision by CAML to make three current compulsory redundancies will achieve savings way in access of this figure and this is different to the information that we were presented with.
>
> 3. IGOM's was offered alternative employment which was not suitable alternative employment and was more suited to an adviser so was not a real offer that could be considered by IGOMs. The post(s) being to train advisers and debt case worker.
>
> 4. I was prepared to discuss suitable alternative employment but a proposal from Unite sent to CAML 27h June 2018, asking CAML and the trustee board to consider amalgamating the role of administrator by the three existing IGOMS has not been considered by CAML.
>
> Whistle-blowing
>
> 5. I do not believe that my redundancy will enable CAML to provide adequate level of service to Merton and Lambeth residents.
>
> I had a conversation at a JNCC meeting on 30th May where I advised the CEO of a conversation held with the ex-employee who won two cases against CAML and was awarded £160K of uninsured losses for one of the cases, with the CEO becoming alarmingly angry that a conversation had taken place.
>
> Grievance Process
>
> 6. I am appealing against the manner in which the grievance I raised against the selection criteria have been dealt with and your decision on how you feel my grievance should be dealt with.
>
> Union Membership

> 7. I also believe I am being victimised as a Unite Workplace representative at CA Merton and Lambeth and that is why I was selected for redundancy, As a union representative I am at the forefront of taking forward complaints by staff and representing staff in challenges that is faced by CAML to the CEO/Trustee Board and putting forward proposals."

55. An appeal hearing took place on 4 December 2018, chaired by Ms Nunns. The Claimant did not attend but provided written submissions.

56. The Claimant's appeal was rejected by letter dated 19 December 2018. The letter responded to the numbered points in the Claimant's appeal as follows:

> "1. Comprehensive responses were given to the Unite proposals, on 25 July (doc 25).
>
> 2. It was apparent CAML needed to make savings of £40,000 within the financial year. You gave no explanation about your conclusion that the decision by CAML was to make three compulsory redundancies or about what savings would be made or in what way the information presented was different. We saw evidence that CAML had sought to retain you on reduced hours and had consulted with you about alternative roles within the new structure.
>
> 3. You confirm that IGOMs including yourself were offered alternative roles but these were declined because you said these were not suitable.
>
> 4. We examined documents 9, 12, 33 from Unite to the board and document 48, the board response. We found that Trustees did make comprehensive responses to Unite enquiries with the matter of the administrator role dealt with under the heading "Other roles".
>
> 5. The business review and restructuring decisions included a comprehensive analysis of client demand and we are satisfied that the restructured service support better meets Lambeth residents' demands.
>
> We considered the impact of your statement that you advised the CEO of a recent connection to the claimant against CAML, the person to whom the recent award had been made. The panel felt that any reasonable person would be affected by this news but what is described as "alarmingly angry behaviour" is unsubstantiated. This was in May, the meeting was attended by others and no complaints were made at the time or following.
>
> We noted that the Employment Tribunal related to events in the past to which the CEO had no connection.
>
> 6. We considered the grievance you raised against the selection criteria, seeking our decision on how we feel your grievance should be dealt with. The issues raised related to the redundancy process and the advice was to deal with them concurrently as it would not have been practical to run a separate grievance process. The documents show that the points you

made were taken into account and those changes that you had asked for were made.

7. There has been no evidence presented to support the claim that you were victimised by being selected for redundancy because of your status as a Unite Workplace Representative. It is clear from the documents that attempts were made to retain you in a reduced role on the same terms and conditions or in another role."

57. In the meantime, Mr Bradley had left the Respondent. Ms Hudson's unchallenged evidence was that he informed her in mid-October that he intended to leave, and an agreement was reached for him to leave in mid-November 2018.

58. It is not in dispute that after the Claimant's dismissal, the two remaining IGOMs covered the three offices. The Respondent also advertised for a temporary Information Support Officer, one or two days a week, after the Claimant's dismissal. Ms Hudson's evidence was that the Respondent now only employs one IGOM.

59. Around the time of the Claimant's dismissal the Respondent advertised for a full-time Advice Service Co-ordinator for a specific project with a housing association. It is not in dispute that the Claimant could not have done this role because she was not trained as a qualified adviser. The post was also advertised for someone with two years post certified experience.

60. Around the time of the Claimant's dismissal or shortly afterwards the Respondent also advertised for Advisers. Again, the Claimant could not have taken up any of these posts because she was not a qualified adviser.

THE LAW

Unfair dismissal

61. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of potentially fair reasons, or "some other substantial reason". Redundancy is a fair reason within section 98(2) of the Act.

62. Redundancy is defined in s.139 ERA 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—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or

(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.

63. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

64. In redundancy cases, the employer will not normally be considered to have acted 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" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

65. In Williams v Compair Maxam Ltd 1982 ICR 156, the Employment Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These include, so far as relevant to the present case, considering whether the employee could be offered alternative employment instead of being dismissed. The EAT emphasised, however, that the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead it should ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted".

66. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey).

Whistleblowing

67. As to whistleblowing, the ERA provides, so far as relevant:

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

…

47B Protected disclosures

A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

…

103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

…

68. For the purposes of s.43B the employee must prove that he or she held a reasonable belief that the information disclosed tended to show a relevant failure. This involves a subjective assessment of what the employee believed at the time of the disclosure and an objective assessment of whether that belief could have been reasonably held, taking into account the position of the employee (Babula v Waltham Forest College [2007] ICR 1026).

Discrimination

69. The Equality Act 2010 ("EqA") provides, so far as relevant:

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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

…

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

…

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

…

70. Race is a protected characteristic under the EQA.

Trade Union Detriment/ unfair dismissal

71. The Trade Union and Labour Relations (Consolidation) Act 1992 provides, so far as relevant:

146 Detriment on grounds related to union membership or activities

(1) A worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of—

…

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so…

152 Dismissal of employee on grounds related to union membership or activities

(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

(a) was, or proposed to become, a member of an independent trade union,

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time…

CONCLUSIONS

Unfair dismissal

72. The first issue for us to determine is whether the Respondent has established that the reason for the Claimant's dismissal was redundancy. There are two elements to this question. First, was there a genuine redundancy situation? Secondly, was that the real reason for dismissal?

73. As to whether there was a genuine redundancy situation, we remind ourselves that it is not for us to determine whether the Respondent had good reasons for deciding to restructure in the way that it did. That could only be relevant if we took the view that the whole process was a sham designed to result in the Claimant's dismissal for another reason. There is no basis on which we could take that view. On the contrary, there is strong evidence that the Respondent's decision-making was thoughtful, and that Ms Hudson and the Board of Trustees genuinely believed the restructure was in the best interests of the charity. The Respondent engaged in a lengthy consultation process, during which careful consideration was given to any alternative proposal put forward by staff or the union. It is undeniable that the Respondent was in a position of financial crisis, having to meet an unexpected liability of £80,000 at time when its reserves were already critically low. It is a matter for the Respondent how it chooses to respond to such a crisis. Ms Hudson gave cogent and logical evidence about why this cost had to be met from operating costs. The proposed restructure involved a diminution in the requirements for employees to carry out work of a particular kind, namely the work of the IGOMs. This was in part because of the decision to close two of the offices to new clients on a Friday. We note that the Claimant's role still does not exist. There was undoubtedly a genuine redundancy situation.

74. We are also satisfied that redundancy was the real reason for the Claimant's dismissal. The decision to dismiss followed a lengthy individual and collection consultation process and the Claimant scored the lowest in an objective assessment.

75. The Claimant's suggested alternative reasons for her dismissal, namely her trade union activities, race discrimination, victimisation and whistleblowing, are addressed and rejected below.

76. In deciding whether the Respondent acted reasonably in deciding to dismiss the Claimant, we must consider whether it warned and consulted the Claimant, adopted a fair basis on which to select for redundancy and took such steps as may be reasonable to avoid or minimise redundancy by deployment.

77. The Claimant does not argue that there was inadequate consultation. There was extensive consultation, both individually and via the union. We note that the Respondent considered all alternative proposals put forward, including a temporary reduction in hours, meeting the liability from reserves, or reducing staff costs from the SMT. It was entitled to reject those in favour of the proposed restructure.

78. The Claimant argued that the Administrator role should also have been included in the pool for redundancy selection because the IGOMs were capable of doing the tasks of an Administrator. This is not in reality an argument about the pool. The argument made during the consultation process was that the Administrator role should be disestablished and divided amongst the IGOMs.

That would have been an entirely different way of restructuring the organisation. The Respondent was entitled to take the view that its proposed restructure was preferable and the Tribunal cannot interfere with that.

79. As for whether the Respondent adopted a fair basis on which to select for redundancy, other than the Claimant's arguments that she was targeted due to her race or for other reasons giving rise to her separate complaints, no complaint is made in these proceedings about the selection process or the Claimant's eventual score. The selection criteria were adjusted at the Claimant's request and she was able to challenge her individual scores, with some success.

80. We note that the Claimant did challenge her scores more generally, as well as some of the comments, during the consultation process, and Ms Hudson does not appear to have provided a full response to the points the Claimant raised, but we have heard no evidence on the matters that formed the basis of the scores. We therefore cannot find that the selection process was anything other than fair and objective. Further, there is no basis on which we could find that, if the points the Claimant raised in the consultation process about her scores had been accepted, her score would have been higher than either of the other IGOMs. The Claimant has not challenged their scores at any stage, and they both had considerably higher overall scores than the Claimant.

81. The Claimant relies on two aspects of the consultation process to suggest that it was not objective: the fact that she was given her scores before the other IGOMs, and the fact that Ms Hudson asked the Claimant whether she was interested in voluntary redundancy during the second consultation meeting, but did not ask the same question of the other IGOMs. We do not consider there is anything unusual or suspect about the fact that the Claimant was given her scores. Ms Hudson explained in her evidence that this was because the Claimant was the one who had scored the lowest and was therefore facing redundancy. It is logical that the Claimant would be given her scores so that she had an opportunity to challenge them before a final decision was made. As for being asked about voluntary redundancy, the Claimant was the only IGOM not prepared to take a cut in hours. That decision is what led to the need to make one of the IGOMs redundant, so it was unsurprising that Ms Hudson would ask the Claimant about voluntary redundancy at that stage. We note that she did not press the matter after the Claimant said she was not interested, and that all staff had already been asked by this stage to let Ms Hudson know if they were interested in voluntary redundancy. We do not consider either matter suggests that the process was not objective.

82. As for redeployment, the only vacancies that arose prior to the Claimant's dismissal were the two new roles that the Claimant was informed of during the consultation process and the roles for qualified advisers that were advertised around the time that her notice period ended. The Claimant did not express an interest in any of these roles at the time. It was suggested by Ms Nanhoo-Robinson that the Respondent should have considered training the Claimant as an adviser. We do not consider that to be a realistic suggestion. The Respondent was in a financial crisis and needed to save money urgently; it would not have been a sensible or legitimate use of funds to spend several months training the Claimant for a role she had not even expressed an interest in.

83. The other roles mentioned by the Claimant during the hearing as potentially suitable all arose after the end of her employment. In particular the Respondent was not aware of Mr Bradley's departure until mid-October, after the end of the Claimant's employment.

84. We conclude that the decision to dismiss the Claimant for redundancy was reasonable and the unfair dismissal complaint therefore fails.

Trade union detriment/ unfair dismissal

85. The Claimant confirmed at the start of the hearing that this complaint was about her dismissal only. We have treated it as a complaint under s.152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992. The issue to be determined is whether the reason or principal reason for dismissal was the fact that the Claimant had "taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time".

86. The Claimant effectively withdrew this complaint in cross-examination, and it was not pursued in closing submissions.

87. For completeness, we should say that there was no evidence of any animosity towards the union by either Ms Hudson or Mr Bradley. Ms Hudson's evidence, that she values the union's support for staff, and finds their input helpful, was not challenged. Nor is there any evidence of animosity towards the Claimant carrying out her activities as a union representative.

88. The Claimant's case was put on the basis that both she and Ms Rogers were union representatives and they were both made redundant. She also relies on the fact that the "at risk" letters were sent the day after a JNCC meeting.

89. There is nothing in the timing point. There were frequent JNCC meetings around this time about the proposed restructure. It so happened that by the end of May 2018 it had become clear that the staff would not accept a general pay cut, so the Respondent would need to pursue the restructure, including possible redundancies. Letters were sent on 31 May 2018 to all five roles affected. The fact that two of them were union representatives does not suggest any connection between that role and the ultimate decision to dismiss. Logical reasons had been put forward for their roles being affected by the restructure. There is no basis on which we could find that there was an ulterior motive relating to trade union activity.

90. We heard some evidence about Ms Rogers allegedly being targeted by being invited to a disciplinary meeting on 30 or 31 May 2018, and about her role being re-advertised in 2019. It is no part of our role to assess the fairness of Ms Rogers's dismissal or other treatment and there was nothing that we heard that gave rise to any concerns that the Respondent was targeting union representatives in general.

91. Finally, we note that the Respondent made considerable effort to avoid compulsory redundancies. If the Claimant had been willing to accept a reduction in hours to four days a week she would not have been made redundant. The Claimant accepted that in cross-examination, and it fatally

undermines her argument that she was targeted because of her union activities (or for any other reason).

92. We therefore do not find that the reason or principal reason for the Claimant's dismissal was the fact that she had taken part in trade union activities.

Direct race discrimination

93. The Claimant's case on race discrimination has never been clearly articulated. In her oral evidence she ultimately said that Mr Bradley had been treating her less favourably since, at the latest, 2017 because of her race, and that he decided to try to get rid of her in 2017 when he promoted her to Senior IGOM. She suggested that the role was created for her in the knowledge that it would later be removed and she would then be made redundant. That would be an elaborate way of orchestrating a redundancy and we would need strong evidence to find that it happened. There is no evidence at all to support the suggestion.

94. The Claimant gave evidence about having been treated differently to the other IGOMs in the past, in that questions were raised about her receiving a paid lunch break, and about her start time. Even if that is correct, there is nothing to suggest it had anything to do with the Claimant's race. On the Claimant's own case she never made any complaint of race discrimination until she mentioned it in the meeting of 4 June 2018. Given that she was not someone who was afraid to raise issues, we consider that she would have raised the matter earlier if there had been any grounds to believe it was related to her race.

95. The Claimant also suggested that Mr Bradley had failed to deal with complaints by black volunteers and that that was evidence of racial prejudice. Again, no-one alleged at the time the volunteers' treatment was related to race. The Claimant accepted in cross-examination that she and the volunteers had ample opportunity to raise that concern if they believed there was a problem. Even if Mr Bradley failed to respond adequately to the complaints of two volunteers who were black, that is nowhere near sufficient to establish facts from which we could conclude that the Claimant's dismissal was because of her race.

96. We note that, the Claimant having raised the issue in the meeting on 4 June 2018, Ms Hudson expressly invited the Claimant to raise a formal grievance and said that the matter would be investigated. The Claimant did not respond. The Claimant also did not allege race discrimination in her appeal against dismissal.

97. The Claimant accepted in cross-examination that Ms Hudson was not affected by matters of race when looking at the Claimant's scores and issuing the revised score sheet. The Claimant would therefore need to establish that Mr Bradley targeted her because of her race, marking her unfairly below the other IGOMs, and Ms Hudson failed to notice his unfair scoring when she reviewed it. As noted above, apart from the matters that were accepted and reflected in the revised scores, the Claimant has not challenged in these proceedings any of the comments or scores from her final assessment, so there is no basis on which we could find that they were wrong or unfair, such as to shift the burden to the Respondent.

98. Overall we consider that none of the matters raised by the Claimant amount to facts from which we could conclude, in the absence of an explanation, that the Claimant's selection for redundancy was because of her race. We have also accepted, above, that redundancy was the real reason for dismissal. We reiterate the points made in that context.

Victimisation

99. The Respondent accepted in closing submissions that the allegation of race discrimination made by the Claimant on 4 June 2018 was a protected act.

100. The question for us is whether the Claimant was dismissed because she did that protected act. The Claimant faces the same difficulties here as with her complaints of race discrimination and automatic unfair dismissal. First, she has not challenged her revised scoring, and has not challenged the scoring of the other two IGOMs. We therefore have no basis to find that there was anything untoward about it. Secondly, it is not in dispute that the Respondent sought to avoid the Claimant's redundancy, and that she would not have been made redundant if she had agreed to reduce her hours to four days a week. That is entirely inconsistent with Mr Bradley having decided after the meeting on 4 June 2018 to target the Claimant for dismissal.

101. For completeness we should say that we do not accept the argument made by Mr Bourne in closing submissions that if Mr Bradley had resolved to get rid of the Claimant in 2017 then the Claimant's protected act on 4 June 2018 cannot have been a reason for her dismissal. We have not accepted that Mr Bradley resolved to dismiss the Claimant in 2017, and in any event the argument is simplistic. The protected act could, as a matter of logic, have been the trigger for Mr Bradley to target the Claimant in the selection exercise. The real problem is that there is no evidence that he did. The Claimant had agreed objective criteria, and there is no basis on which we could find that Mr Bradley manipulated the scores of either the Claimant or the other IGOMs. The two issues that Ms Hudson agreed to adjust made no difference to the Claimant's overall position.

102. We also note that there is no evidence of Mr Bradley having taken against the Claimant because of the allegation made at the meeting on 4 June. The Claimant did not take it any further, and we could not assume that he would have been prejudiced against her as a result of a single comment that was not pursued formally.

103. Finally, we note that the Claimant did not allege in her appeal against dismissal that her dismissal was because of the protected act.

104. For all those reasons the victimisation complaint fails.

Whistleblowing

105. We do not accept that the Claimant made a qualifying disclosure. The Claimant relies on having mentioned in the meeting on 30 May 2018 that the claimant in the earlier Tribunal proceedings said he had offered to settle the case for £65,000. It was pointed out to Ms Nanhoo-Robinson at the start of the hearing that the Claimant had not identified any legal obligation that she

contended the information disclosed tended to show had been breached. No such legal obligation was identified at any stage during the hearing. Nor do we consider that the Claimant could reasonably have believed the information tended to show the Respondent had breached any legal obligation. The Respondent was legally represented in the earlier Tribunal proceedings and had said throughout the consultation process that it followed the legal advice it received. It those circumstances, even if the Claimant reasonably believed the information to be true, the Respondent could not have breached any legal obligation simply by following legal advice and the Claimant could not reasonably have believed otherwise.

106. Further, there is no basis on which we could find that the Claimant's dismissal was to any extent motivated by her having raised this matter in the meeting of 30 May. By that stage the Respondent had already proposed a restructure that involved the Claimant's hours being reduced or one IGOM being made redundant. Once it was known that the pay reduction across the board was not agreed, that proposal was put into effect. The two other IGOMs were put at risk on the same day as the Claimant, and the Respondent continued its attempts to avoid compulsory redundancies.

107. The complaint of automatic unfair dismissal therefore fails and is dismissed.

Employment Judge Ferguson

Date: 20 July 2021