EMPLOYMENT TRIBUNALS

Claimant: Mrs C Howie

Respondent: Holloways Of Ludlow Design & Build Ltd

Heard at: **London South Employment Tribunal**

On: **19-20 November 2020**

Before: **Employment Judge Ferguson**
Members: **Ms H Bharadia**
Mr D Clay

Representation
Claimant: In person
Respondent: Mrs S Nelson (Director)

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. By consent, the Respondent shall pay the Claimant £1,027 gross in respect of unpaid wages and holiday pay.

2. The Claimant was unfairly dismissed.

3. Any compensatory award for unfair dismissal shall be limited to compensation for the period of three weeks that it would have taken to conduct a fair consultation process.

4. The Respondent discriminated against the Claimant by treating her unfavourably because she was exercising the right to ordinary or additional maternity leave, in that:

    a. It did not invite her to staff Christmas drinks in December 2018, and

    b. It withheld information from her about the financial position of the company and her likely redundancy.

5. The remainder of the discrimination complaints are dismissed.

6. A remedy hearing will be listed with a time estimate of three hours.

REASONS

1. By a claim form presented on 30 October 2019, following a period of early conciliation from 26 September to 16 October 2019, the Claimant brought complaints of unfair dismissal, discrimination on grounds of pregnancy or maternity leave, unauthorised deduction from wages and failure to pay holiday pay. The money claims are not defended and are agreed to amount to £1,027 gross in total.

2. It was agreed during the hearing that the issues for Tribunal to determine are as follows:

   Pregnancy/ maternity discrimination (s.18 of the Equality Act 2010 ("EqA"))

   2.1. The protected period for the purposes of s.18 is mid-November 2017 to 25 June 2019.

   2.2. Did the Respondent, in the protected period, treat the Claimant unfavourably by:

      2.2.1. Deciding to make the Claimant redundant prior to her maternity leave commencing.

      2.2.2. On or around 16 July 2018, asking the Claimant to return her company mobile, laptop, keys and changing her password for remote access.

      2.2.3. In October 2018, intending to close the Sheen Lane office and making redundancies without informing the Claimant until 7 February 2019.

      2.2.4. In November 2018, calculating the Claimant's pension incorrectly and telling the Claimant to sort it out herself.

      2.2.5. In December 2018, not inviting the Claimant to the Christmas drinks.

      2.2.6. On 14 February 2019, Amar Shukla sending the Claimant an insulting email relating to her daughter's name.

      2.2.7. On 1 April 2019, making the role of General Manager redundant.

      2.2.8. On 9 May 2019, the Claimant not being paid for KIT days worked.

      2.2.9. Not properly consulting the Claimant about her redundancy or subjecting her to the same redundancy process as other employees.

   2.3. Did the Respondent treat the Claimant unfavourably by:

2.3.1. On 1 July 2019, making the role of Project Manager redundant/ dismissing the Claimant.

2.3.2. Not responding to the Claimant's email of 18 July 2019.

2.4. Was any unfavourable treatment:

2.4.1. Because of the Claimant's pregnancy (as regards acts during the protected period), or

2.4.2. Because the Claimant was exercising or seeking to exercise or had exercised the right to ordinary or additional maternity leave (as regards any of the acts)?

2.5. Are any of the discrimination complaints out of time?

Unfair dismissal

2.6. Has the Respondent established that the reason or principal reason for the Claimant's dismissal was redundancy?

2.7. If so was the procedure followed fair within section 98(4) of the Employment Rights Act 1996 ("ERA")? Did the Respondent's decision to dismiss the Claimant fall within the range of reasonable responses that a reasonable employer in those circumstances in that business might have adopted bearing in mind the extent that the Claimant was warned and meaningfully consulted with about the proposed redundancy?

2.8. Should any reduction be made to any compensation to be awarded because of the principles in Polkey v AE Dayton Services Ltd [1987] ICR 142?

2.9. The Claimant claims an uplift due to the Respondent's failure to comply with the ACAS Code of Practice.

3. We heard evidence from the Claimant. On behalf of the Respondent we heard evidence from Sarah Nelson and Robert Burnett (both Directors of the Respondent), and from Paul Ryan, Head of Operations and Ruben Lopez, Quantity Surveyor.

FACTS

4. The Respondent is a provider of kitchens and design and build services for residential clients. The Claimant was originally employed by an associated company, Urban PA, in May 2012. She was promoted to the role of "General Manager" in August 2014, working for another associated company, Ludlow Design and Build Ltd, before being transferred ultimately to the Respondent. The Respondent has 3 directors: Robert Burnett, Sarah Nelson and Mark Holloway. It operates three showrooms in South West London and a workshop in Shropshire. It also has an office in Sheen Lane.

5. The Claimant's role was a general administrative role, which included some HR duties such as managing annual leave.

6. As at September 2018 there were approximately 20 employees, including:

   6.1. Five employees working across the three showrooms;

   6.2. A finance and administration team based at Sheen Lane, consisting of Amar Shukla, Financial Controller and, reporting to him, Denise Bower and Christine Newton (Accounts Assistants) and the Claimant (General Manager).

   6.3. Five other employees either based at Sheen Lane or working in a mobile capacity, including Ms Nelson who was based at Sheen Lane.

   6.4. Three employees based in the workshop in Shropshire.

7. On 22 December 2017 the Claimant informed Ms Nelson and Mr Burnett that she was pregnant and her due date was in July 2018.

8. Following a meeting on 5 June 2018 it was agreed the Claimant would take annual leave from 18 June 2018 and her maternity leave would commence on 16 July 2018. Her return date was 15 July 2019.

9. Before going on annual leave on 18 June 2018 the Claimant left her work laptop, keys and company mobile phone in the office. There is a dispute about whether she did so voluntarily or was asked to do so. The Claimant's evidence is that she was asked verbally but she could not remember by whom. Ms Nelson's evidence is that she never asked the Claimant to leave these items, but that she did believe it was in the Claimant's interests to leave the phone and laptop so that she would not be disturbed. Neither witness could remember this episode very clearly and there is nothing in the emails at the time to suggest that it was a managerial instruction or that the Claimant was reluctant to do it. On the balance of probabilities we find there was no such instruction.

10. At some point in early July 2018 the Claimant tried to log into her emails remotely, which was something she would commonly do to check if there was anything urgent. She discovered that the password had been changed so she could not get access. There is an email in the bundle from Marcus Cook, the Respondent's external IT consultant, confirming that the Claimant had told him on 14 June 2018 Ms Nelson was not intending to change the Claimant's passwords after she went on maternity leave, but he advised Ms Nelson on 30 June 2018 to change all of the Claimant's passwords anyway for security reasons, "especially as passwords have been lying around". He then changed her passwords and gave Ms Nelson the new password on 4 July 2018. It seems that that may not have been passed onto the Claimant until August 2018. It is not in dispute that the Claimant did not ask for her password before that date. It is also not in dispute that IT matters are not Ms Nelson's forte and it is not the sort of thing she would normally get involved in.

11. The Claimant had a baby girl in mid-July and on 17 August 2018 Ms Nelson visited the Claimant at home and brought a gift. According to the Claimant's evidence, "It was really nice to see her. We didn't talk much about work or any updates." Later that day Ms Nelson asked the Claimant to help the maternity cover employee, Gemma, with a query. The Claimant did so.

12. In early October 2018 the Claimant heard from a colleague based at one of the showrooms that she (the colleague) had been told she would not be paid for the month and could choose whether to continue working or not. The Claimant also heard at around the same time that one of the Accounts Assistants, Denise, had been made redundant.

13. The Respondent's evidence, which is not disputed on this issue, is that at the end of September 2018 the company was in severe financial difficulties. The August management reports revealed that, even with the most optimistic forecast, the company would not be able to pay the salaries of all current staff. This was mainly due to a sharp fall in sales during August. The Directors decided to forego their salaries and that the company would make redundant any roles which were not directly linked to generating income. They would also meet all staff to inform them that the company was unlikely to be able to pay their salaries in October, and therefore staff would be working in knowledge of the risk of not being paid. They decided not to meet the Claimant "as we felt that it was too stressful a time when she should be at home enjoying her new baby and we didn't want to worry her unnecessarily".

14. In November 2018 there was an issue about the Claimant's pension payments. She emailed Mr Shukla, her line manager, to say she believed the pension payments were wrong, but did not explain why. He responded saying he had checked with the payroll provider and asked whether the Claimant could elaborate on why she thought the payment was incorrect so he could go back to them. The Claimant explained that the employer contributions had been calculated on the basis of her statutory maternity pay ("SMP"), not her actual salary, which she believed was wrong. Mr Shukla then replied further saying he had spoken to the payroll company and the pensions regulator and both confirmed that the employer contribution should be based on SMP. He said if the Claimant wanted to query this further she could contact the payroll company directly. The Claimant did so and the payroll company confirmed that it should have been based on her actual salary, and that her pay would be backdated the following month. The Claimant informed Mr Shukla who then sent a longer reply explaining in more detail what he had been told by the pensions regulator and the payroll company. He noted that even the "experts" seemed to be confused, but said "at least we got there in the end!". He confirmed the Claimant's pay would be backdated on her next payslip.

15. On 7 December 2018 the Claimant emailed Ms Nelson saying that she needed to make a decision about nursery for her daughter soon, "so I just wanted to touch base and check that the plan is still for me to be based with you and accounts at Sheen." Ms Nelson accepts that she did not respond to this email. She says it was because "I didn't know how to respond and as she wasn't due to come back until July it wasn't my priority".

16. Later in December (exact date unknown), the Respondent held an informal Christmas drinks gathering at a pub in Wimbledon. The Respondent's evidence, which was not challenged, was that Mark Holloway suggested the drinks and although Ms Nelson and Mr Burnett were reluctant given the financial situation of the company and the difficult time they had all been having, they agreed to go ahead and put £200 behind the bar. Most of the London-based staff attended. No-one invited the Claimant. We accept that it was a short

notice and informal event and there were no formal invitations. Staff were informed by word of mouth or text message. Ms Nelson's oral evidence was that it did not occur to her to ask the Claimant to come to the drinks. It was not a proper party and nor was it a normal year. She accepted that the Claimant would have been invited if she had been at work.

17. On 29 January 2019 the Claimant emailed Mr Shukla and Ms Nelson as follows:

> "I hope you are both well and had a good Christmas. I would like to bring forward my return to work date and also discuss my return in general as I'm not 100% clear on what is best in terms of kit days, annual leave etc and am a bit (lot) more out the loop than I was expecting. Which I'm hoping is a good sign!
>
> Not sure if there is something you could email me with options to discuss, or if it's best to arrange a day to pop in. With some notice I should be able to arrange childcare…"

18. Ms Nelson responded the following day asking when the Claimant wanted to return and what had changed her mind. She asked the Claimant to let her know when she could come in. The Claimant responded with some suggested dates and explained that she wanted to bring forward her start date by around five weeks, and would like those weeks to be part-time. She also requested one day per week from home once she was back full-time. She said she would also appreciate "a general catch up as feeling very out of the loop and my last couple of emails went unanswered".

19. The Claimant and Ms Nelson agreed to meet on 7 February. At Ms Nelson's request the meeting took place at a Costa coffee shop near the Sheen office. There was some dispute about the reason for this, but we accept that the meeting took place in Costa because the one remaining accounts assistant, Christine, had been made redundant two days beforehand so it would have been awkward to have a meeting in the Sheen office.

20. There are some differences of emphasis as to what happened during the meeting, but the essence of the discussion is agreed. Ms Nelson told the Claimant that the company was having a very tough time. Christine had been made redundant, they had put the office on the market to rent and the company was "hand to mouth". The Claimant's maternity cover, Gemma, had left and had not been replaced. The operations side of the Claimant's role was smaller because the company was smaller, so the Claimant might be doing more project management. The Claimant said she would be happy to work as needed. She also said she could be open to a part-time role until a full-time position was available again. Ms Nelson also told the Claimant that they did not want her to return before July because things were up in the air and they needed time to figure things out.

21. On 13 February the Claimant emailed Mr Shukla about pension and tax issues. He responded the following day:

> "I am well thanks and hope Motherhood is treating you well. When I saw your last r-mail and realised that you had named your daughter 'Presley' I thought that you are in serious need of therapy! I cannot understand

> how anyone can be fixated on someone that was dead before they were even born but I guess that is the power and allure of 'the King'! Anyway I am sure that little Presley is a total bundle of joy and one that will soon be mobile…"

22. The Claimant's evidence was that she was deeply upset by this email. She felt that a conscious effort was being made to make her feel unwelcome in the business.

23. On 22 March 2019 the Claimant emailed Ms Nelson as follows:

> "I hope you are well. Following our meeting I'm hoping it's possible to have an update on where things are. When we met you had mentioned that I might not be able to come back to the GM role as the company had downsized so much since June- but also the possibility of there not being a company at all!
> Hoping things are on the up.
>
> Also, I understand your reasons for not wanting me to return to work earlier than July, however, as explained, the reason for the change was mostly financial. I have been offered some self-employed work helping a friend's nursery with some company admin a few hours a week and mostly from home. I know self employed work doesn't affect my maternity status- but wanted to make you aware and obviously hoping that it's ok."

24. Ms Nelson responded the following day, referring to Employment Tribunal proceedings brought against the company by one of the members of staff who had been made redundant in October 2018:

> "Just a quick note to say that I'm not ignoring you but haven't time to really read your mail – we had to get all of our evidence over for our case with Dabia and that took up the weekend and I wasn't able to get to your email.
>
> Please bear with me and I will get back to you."

25. By 31 March Ms Nelson had not sent a substantive response, so the Claimant emailed again:

> "I'm disappointed to have not received any further update following my email. I understand you had a deadline, but I was told I would have regular updates following our January meeting- and am still none the wiser as to what is happening with my position. Therefore I confirm the following:
>
> Return to work 24th of June, with the 24th June- 28th June taken as paid holiday from days accrued so far.
> I would then like to use the remaining of my accrued holiday so that W/c 1st, 8th and 15th of July my working days will be Mondays and Wednesdays, with annual leave used for the Tuesdays, Thursdays and Fridays of those weeks. I will then be full time from W/c 22nd July.

> In the meantime I feel that I have no choice but to accept any self-employed work offered as I need to be able to pay my bills come June/July and still have no idea if I'll actually have a suitable job to return to (the silence of 2018 was far from reassuring. However, this year the reminders of the last redundancy still being in the tribunal process almost 6 months down the line is of a noticeable concern).
>
> I would also appreciate an update regarding the pension changes. I had previously emailed Amar to ask to be kept in the loop, however, these changes take place next week and I am still yet to hear."

26. Ms Nelson replied the following day as follows:

> "We are very much looking forward to you coming back and the dates you have given in your email are all fine with us and I have put into my diary.
>
> As we discussed, with only 8 employees in London we haven't needed a General Manager to do the same as you did before you went off on maternity leave. However, we know that you would be an excellent Project Manager working on the operations side of the business with Becky and I and this is the role which we are looking forward to welcoming you into.
>
> As you know from when we last met we are in the process of renting out the Sheen office and so you would be based in Richmond with us.
>
> If you think it's a good idea then perhaps you could come to see us in Richmond and we can talk things through although probably netter to do nearer the time so that we can let you know more about what projects what we are working on."

27. The Claimant did not respond to this email. She said in her evidence she was "too shocked" to be told in a couple of sentences that the role she had been in for 6 years no longer existed. She said, "If I had not been on maternity leave on that day I do not think that is how this redundancy would have been conducted."

28. During May 2019 it was agreed that the Claimant would work a couple of KIT days. At the end of the month the Claimant noted that she had not been paid for those days and raised it with Mr Shukla. He responded saying he had asked Ms Nelson about it when he ran the payroll but she had not got back to him. He asked the Claimant to put together a time sheet. The Claimant responded:

> "That's not really fair- you could have asked me directly or sent an email out of courtesy to say you were waiting for a reply. I made every effort to help despite the incredibly bad timing." [The Claimant's daughter had been in hospital around the same time.]

29. The Claimant returned from maternity leave on 1 July 2019. Ms Nelson had asked to meet her at 9am. During that meeting Ms Nelson said that another client had pulled out of the project that was due to start and there was no longer

a Project Manager role available. She said that they had decided to make the Claimant's role redundant.

30. The Claimant's evidence was that she was upset "that I had been ignored for a year just to be let go like this. I was not offered any alternative roles, I was not offered to have someone accompany me at the meeting, I was not prepared or given the opportunity to prepare in any way."

31. The Claimant's redundancy was confirmed by letter dated 2 July 2019. The letter states:

> "As we discussed, after our previous financial problems that you already knew about, we did believe that we could bring you back in as a Project Manager and when I offered you that role in replacement of the General Manager role our spring sales had started to improve slightly.
>
> So, at the time this looked like a realistic offer. As I explained it was around the 3rd June that we first started to see the signs that things were returning back to how they were before the Spring and over the last few weeks we have found ourselves having to review all of our costs again.
>
> …
>
> As we already have a Project Manager (myself) we have taken the unfortunate decision that we are not able to have 2 people carrying out this role. This has therefore resulted in my confirming that we need to make this Project Manager role redundant with immediate effect.
>
> **Re your notice period**
>
> I am confirming that as from tomorrow 3rd July your position is being made redundant.
>
> …"

32. The Claimant was not offered a right of appeal.

33. On 18 July 2019 the Claimant emailed Ms Nelson requesting additional information about her redundancy, including the date on which her redundancy was decided and why there was no consultation process. She also asked about the process for lodging an appeal. Ms Nelson did not respond to this email. In her evidence to the Tribunal Ms Nelson did not give a reason for not responding, but said she was sorry and regretted not having done so.

34. The documents in the bundle include a letter dated 5 February 2019 to Christine Newton, who had been employed by the Respondent for more than 5 years, informing her that she was dismissed by reason for redundancy. It would appear that there was no formal consultation process with Ms Newton.

LAW

Unfair dismissal

35. Pursuant to section 98 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. 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.

36. 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."

37. In redundancy cases, 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" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

38. In Williams v Compair Maxam Ltd 1982 ICR 156, the EAT emphasised 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".

39. 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).

Pregnancy and maternity discrimination

40. Section 18 EqA provides:

> **18 Pregnancy and maternity discrimination: work cases**
>
> (1) This section has effect for the purposes of the application of Part 5 (work) to the protected characteristic of pregnancy and maternity.
>
> (2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—
>
> (a) because of the pregnancy, or
>
> (b) because of illness suffered by her as a result of it.
>
> (3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.
>
> (4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.
>
> (5) For the purposes of subsection (2), if the treatment of a woman is in implementation of a decision taken in the protected period, the treatment is to be regarded as occurring in that period (even if the implementation is not until after the end of that period).
>
> (6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—
>
> (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;
>
> (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.
>
> (7) Section 13, so far as relating to sex discrimination, does not apply to treatment of a woman in so far as—
>
> (a) it is in the protected period in relation to her and is for a reason mentioned in paragraph (a) or (b) of subsection (2), or
>
> (b) it is for a reason mentioned in subsection (3) or (4)

CONCLUSIONS

41. We address first the reason for the Claimant's dismissal because this is relevant to both the unfair dismissal and discrimination complaints.

42. The Claimant does not dispute that the Respondent was in serious financial difficulty from late 2018 onwards. Nor does she dispute that there was no need for the post of General Manager in July 2019. Matters are somewhat complicated by the fact that the redundancy letter refers to the Project Manager role being made redundant, but ultimately the role that the Claimant was due to return to is not significant. There can be no doubt that the requirements of

the business for employees to carry out work of either kind – general administration or project management – had ceased or diminished. The question is whether the Claimant's dismissal was wholly or mainly attributable to that fact.

43. The Claimant believes that her pregnancy or maternity leave was a factor in the decision to make her redundant. We do not accept that. The Respondent was attempting to reduce its overheads by making all non-essential staff redundant, and had reduced from around 20 to 8 employees. There may have been serious flaws in the way it approached the Claimant's redundancy, which we address below, but there is nothing to suggest that it had any ulterior motive. The Claimant was clearly a useful employee and she had a great deal of experience, as demonstrated by the fact that her input was needed on several occasions during her maternity leave. If the Respondent had not been in such financial difficulty it would have been in their interests to keep the Claimant on.

44. There was some suggestion in the Claimant's evidence that the Respondent had in late 2019 advertised for a part-time book-keeper, but this is disputed and there is no evidence on which we could make a finding that it happened. In any event, if it was a part-time role then it does not detract from the Respondent's case that the need for employees working either in general administration or as project managers had diminished, and the Claimant's dismissal was attributable to that.

45. The Claimant gave evidence that the senior management team at the Respondent had a negative view of women and maternity leave, and suggested that they had previously made women redundant because they had taken maternity leave. She also suggested that the Respondent avoided recruiting women who were likely to get pregnant. These allegations were strenuously denied by the Respondent. The Claimant could only give direct evidence of one previous redundancy situation involving someone who was on maternity leave. The Tribunal did not have sufficient information about it to draw any conclusions of the kind the Claimant argued for.

46. Taking into account all of the evidence we accept that there was a genuine redundancy situation and the Claimant's dismissal was wholly or mainly attributable to it.

Unfair dismissal

47. Having accepted that the Respondent has established a potentially fair reason for dismissal, the question is whether it acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, and whether the dismissal was procedurally fair, bearing in mind the guidelines in Polkey.

48. We find that there was a total failure to warn and consult the Claimant about her potential redundancy. She was deliberately excluded from the discussions about the company's financial difficulties in late 2018 and she was kept "out of the loop" until a meeting took place, at her request, on 7 February. This meeting did not constitute consultation about possible redundancy because although Ms Nelson explained that the company was in financial difficulties, she did not say that the Claimant's job was at risk. After two further emails chasing an update, Ms Nelson eventually wrote on 1 April 2019 saying, on the contrary,

"We are very much looking forward to you coming back…". That was the last exchange about the Claimant's role until she returned on 1 July. There was no warning of the news when she arrived at work, that she was to be made redundant with almost immediate effect. The Claimant was not informed in advance of the meeting what it was about, was not offered the right to be accompanied and could not prepare for it. This was compounded by the failure to offer her a right of appeal. As a result, she never had any opportunity to discuss her potential redundancy with the Respondent. We consider this was unreasonable and rendered the Claimant's dismissal unfair.

49. We have considered whether, had the Respondent followed a proper process, the Claimant would have been dismissed in any event. We find that it was, unfortunately, inevitable that she would be dismissed. It is not in dispute that Mr Shukla and two other employees were made redundant in late 2019. The Respondent's unchallenged evidence was that it now employs no permanent accounting or administrative staff at all. We accept that it has made a business decision to reduce its staff costs to the bare minimum and that the Claimant would have been dismissed following a fair process. The Claimant accepted there was "no clear role" for her. The highest she puts her case is that there "may have been somewhere in the business" she would have been needed. She has not identified any alternative role and there is no evidence of any vacancy or role she could have been moved to. Any compensatory award should therefore be reduced by 100%. Having said that, a proper process would have taken at least three weeks, so the Claimant is entitled to compensation for that period.

50. The ACAS Code of Practice for disciplinary and grievance procedures does not apply to redundancy dismissals so we cannot award any uplift.

<u>Pregnancy/ maternity discrimination</u>

51. Our findings in respect of the discrimination complaints are as follows.

Deciding to make the Claimant redundant prior to her maternity leave commencing

52. There is no evidence that the Respondent decided to make the Claimant redundant prior to her maternity leave commencing, and we make no such finding. We have accepted that there was a genuine redundancy situation and that the Claimant's dismissal was wholly or mainly attributable to it. As noted above, there is no evidence of an ulterior motive. Even assuming this complaint is in time, it fails.

On or around 16 July 2018, asking the Claimant to return her company mobile, laptop, keys and changing her password for remote access.

53. We have not accepted that there was any instruction to the Claimant to return the company equipment. As for the password issue, the Claimant believes that there was a deliberate decision to change her password and not give her the new one. That is not supported by the documentary evidence, which suggests that the password was changed on the advice of the IT consultant. Further, the new password was given to the Claimant in August 2018. There is no evidence of any deliberate attempt to prevent the Claimant having access to her work emails, and indeed it would not have been in the Respondent's interests to do

that when the Claimant was needed to help on various matters during her maternity leave. Even assuming this complaint is in time, it fails.

In October 2018, intending to close the Sheen Lane office and making redundancies without informing the Claimant until 7 February 2019

54. This is considered under the consultation issue below.

In November 2018, calculating the Claimant's pension incorrectly and telling the Claimant to sort it out herself

55. We do not accept that there is anything to suggest a discriminatory motive on the part of Mr Shukla in the way he dealt with the pension issue. It is perhaps surprising that he was given incorrect information from the payroll company and pensions regulator, but he would have nothing to gain from the Claimant being underpaid and once the correct information was given, he ensured her pay was rectified. Even assuming this complaint is in time, it fails.

In December 2018, not inviting the Claimant to the Christmas drinks

56. We have accepted that the Respondent did not hold a Christmas party in 2018 in the way that it normally would, but it is not in dispute that there were informal drinks in late December, subsidised by the Respondent, in lieu of a Christmas party. We accept there was no deliberate decision to exclude the Claimant. However, the reason she was not invited was that no-one thought about her. That was because she was on maternity leave. Had she been at work around this time, she would certainly have been invited. She was overlooked because she was on maternity leave. We therefore consider this complaint to be well-founded. We address the issue of whether it was brought in time below.

On 14 February 2019, Amar Shukla sending the Claimant an insulting email relating to her daughter's name

57. Mr Shukla has not given evidence to us so we have considered this complaint on the basis of the email alone. It was obviously a poorly-judged email, and we can see why the Claimant would be offended by it, but we find there is nothing to suggest he was motivated by the Claimant's pregnancy or maternity leave. It was simply a failed attempt at humour in the context of an otherwise entirely friendly exchange. This complaint therefore fails, even assuming it is brought in time.

On 1 April 2019, making the role of General Manager redundant

58. It is not necessarily correct to say that the Respondent "made the role of General Manager redundant" at this time. By this stage the Claimant's maternity cover had left and had not been replaced, so there was no-one in the role. The Respondent anticipated that there would be no need for the role when the Claimant returned, so had suggested she move to a project management role. We have treated this complaint as part of the Claimant's more general complaint about the lack of consultation.

On 9 May 2019, the Claimant not being paid for KIT days worked

59. Again, there is nothing to suggest that the failure to pay the Claimant for the KIT days worked in May 2019 was motivated by her pregnancy or maternity leave. It was an administrative issue and the email trail provides good evidence that the reason for the delay was a communication issue between Mr Shukla and Ms Nelson. There is no evidence that the money was deliberately withheld. This complaint therefore fails.

Not properly consulting the Claimant about her redundancy or subjecting her to the same redundancy process as other employees

60. We find that some aspects of the Respondent's failure to warn and consult the Claimant about her potential dismissal for redundancy amounted to unfavourable treatment because the Claimant was exercising the right to ordinary or additional maternity leave. We accept there is evidence which suggests the Respondent did not engage in any formal redundancy consultation process with Christine Newton. It seems doubtful, therefore, that the Respondent would have formally consulted the Claimant, with proper notice in writing, as one would expect in a fair redundancy process, even if the Claimant had not been on maternity leave. For almost the whole period of her maternity leave, however, the Claimant was excluded from information about the company and her role that other staff would have had. This isolation of the Claimant exacerbated the lack of consultation.

61. The Respondent's own evidence was that they deliberately excluded the Claimant from the discussions in late 2018. Ms Nelson argued that this was done to protect the Claimant, but that is neither here nor there. We accept that it was, taking into account the Claimant's perspective, unfavourable treatment. The Claimant mentioned on several occasions that she felt "out of the loop" and that her emails were not always responded to. It is entirely understandable that she would feel disadvantaged by this. There is always a risk that someone on maternity leave will be left out of important discussions and that is precisely what happened here. Further, Ms Nelson's desire to protect the Claimant was counter-productive. We find that Ms Nelson avoided answering the Claimant's emails in which she sought reassurance about her return to work, possibly because Ms Nelson knew there was a real risk the Respondent would have to make the Claimant redundant. When pushed, Ms Nelson wrote the email of 1 April 2019 which gave the impression everything was fine and the Claimant would definitely be returning, albeit in the project manager role. We consider Ms Nelson must have known by the time she wrote that email that it was likely the Claimant would be made redundant. Giving the Claimant the opposite impression deprived her of the opportunity to consider other employment opportunities, and it contributed to the lack of warning or consultation about her redundancy. It meant that the news on 1 July 2019 came as a bolt out of the blue.

62. The Respondent's treatment of the Claimant during her maternity leave, withholding information from her about the company's financial position and the likelihood of her redundancy, amounted to unfavourable treatment because the Claimant was exercising the right to ordinary or additional maternity leave.

On 1 July 2019, making the role of Project Manager redundant/ dismissing the Claimant

63. We consider there is nothing in this complaint not already dealt with above. We have not accepted that the decision to make the Claimant redundant was motivated by her having taken maternity leave.

Not responding to the Claimant's email of 18 July 2019

64. This was clearly bad practice, and it contributed to the unfairness of the Claimant's dismissal because the Claimant had expressly requested an appeal and she was not afforded one. However, we do not consider it was an act or omission because of the Claimant's maternity leave. She was no longer on maternity leave; she had been dismissed. There is nothing to suggest Ms Nelson deliberately failed to reply because of the Claimant's maternity leave.

Jurisdiction

65. We consider that the failure to invite the Claimant to the Christmas drinks and the lack of communication/ consultation about the redundancy situation was "conduct extending over a period", ending when the Claimant returned to work on 1 July 2019. It was all part of the Respondent's general approach towards the Claimant while she was on maternity leave, which was to keep her from the truth of what was happening with the company and her likely redundancy. The claim was therefore presented in time.

Remedy

66. We did not hear evidence or submissions on any remedy issues other than the Polkey issue. A remedy hearing will be listed and the parties will be notified of the date in due course. They should ensure that any documents they wish to rely on are sent to each other at least 7 days before the hearing and four copies brought to the hearing for the Tribunal's use.

67. In the meantime the parties are encouraged to agree the remedy between themselves. If agreement is reached they must inform the Tribunal straight away so that the hearing can be vacated.

68. The Claimant will be entitled to a compensatory award for unfair dismissal to reflect the three-week period it would have taken to conduct a proper consultation.

69. She is also entitled to compensation for injury to feelings in respect of the discrimination findings, and for any financial losses caused by the discrimination. The finding that the Claimant would inevitably have been dismissed following a fair procedure applies equally to the financial aspect of the discrimination claim, so we would not award any loss of earnings over and above the award for unfair dismissal.

70. We note that the Claimant claims losses associated with the nursery fees she had incurred. Since we have found that the Respondent deliberately withheld information from the Claimant because she was on maternity leave, we consider that this is potentially a loss flowing from the discrimination. We would need to hear further evidence about it.

71. As for injury to feelings, again we would need to hear evidence about it but we consider it likely, given the nature of the discriminatory conduct, that any award would be somewhere around the middle of the lower band of the Vento guidelines (£900 to £8,800).

_____

Employment Judge Ferguson

Date: 21 December 2020