EMPLOYMENT TRIBUNALS

Claimant: Mrs J Malone

First Respondent: Orion Paint Limited

Second Respondent Andrew Cowell

Heard at: Manchester (remotely, by CVP) **On:** 4 and 5 October 2021
1 November 2021
(in Chambers)

Before: Employment Judge Rice-Birchall
Ms L Atkinson
Ms S Khan

REPRESENTATION:

Claimant: In person
Respondent: Ms Gould, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was fairly dismissed by the respondent. Her claim of unfair dismissal fails and is dismissed.

2. The claimant was not wrongfully dismissed and is not owed notice pay by the respondent. The claimant's claim fails and is dismissed.

3. The claimant's claim of equal pay fails and is dismissed.

4. The claimant is not owed holiday pay by the respondent. Her claim for holiday pay fails and is dismissed.

5. The claimant is not owed any redundancy pay. Her claim for redundancy pay fails and is dismissed.

REASONS

Introduction

1. By a claim dated 8 November 2020, the claimant brought claims of unfair dismissal; failure to pay redundancy, holiday and notice pay; and equal pay. She considers that she was entitled to notice pay and a redundancy payment based on continuity of employment from 1995 and/or October 2000 when she had a break and worked for another organisation.

Evidence and Witnesses

2. We had a bundle of documents and heard evidence from the claimant in person and Jonathan Bruce, Director of Ident Creative Limited on behalf of the claimant and from the Second Respondent (R2).

The Issues

3. The issues for the Tribunal to determine are as follows:

1. **Unfair dismissal**

Unfair Dismissal

1.1 The claimant accepts she was dismissed.

Reason

1.2 Has the first respondent shown the reason or principal reason for dismissal? The first respondent say that the reason was redundancy. The claimant disputes that was the reason and says that it was because she had made complaints about the second respondent in a grievance on 3 March 2020 and which the respondents did not want to investigate and, further, because of the complaints she had made. She alleges that the second respondent also made threats to sack her throughout her employment and was unhappy that she had a second job.

1.3 Was the reason a potentially fair reason under section 98 Employment Rights Act 1996?

Fairness

1.4 If so, applying the test of fairness in section 98(4), did the first respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

1.5 If the reason was redundancy, the Tribunal will usually decide, in particular, whether:

1.5.1 The first respondent adequately warned and consulted the claimant;

1.5.2 The first respondent adopted a reasonable selection decision, including its approach to a selection pool and any scoring within the pool;

1.5.3 The first respondent took reasonable steps to find the claimant suitable alternative employment;

1.5.4 Dismissal was within the range of reasonable responses.

2. **Wrongful dismissal / Notice pay**

2.1 What was the claimant's period of notice? This will involve the Tribunal deciding when the claimant's period of continuous employment commenced.

2.2 Was the claimant paid for that notice period?

3. **Equal Pay**

3.1 Did the first respondent employ Mr Tom Cowell on like work to the claimant?

3.2 If so, did the first respondent treat the claimant less favourably than Mr Tom Cowell by paying him more than the claimant in contravention of the sex equality clause?

3.3 Can the respondent show that any reason for a difference in pay was because of a material factor?

4. **Holiday Pay**

4.1 Did the first respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended? The claimant says she had 12 days accrued but untaken.

5. Redundancy Payment

5.1 When did the claimant's period of continuous employment for the purposes of a redundancy payment commence?

5.2 What is the correct calculation of the claimant's redundancy payment?

5.3 Is any further amount due to the claimant?

6. **Remedy**

6.1 How much should the claimant be awarded?

Findings of Fact

4. The Cowell family owned and ran a number of businesses, most of which were originally set up by Mr W Cowell, R2's father. These included: Orion Paints Limited (Orion), established 1994; TGS Doors Limited (went into administration in January 2009), Centreforce (a partnership which ceased trading on 26 March 2010); and W Cowell Property Management (which the Tribunal understands was a sole proprietor business).

5. Mr W Cowell, who was R2's father, was the majority shareholder in TGS Doors Limited. R2 was a minority shareholder in that business until his father died in 2006, from which time R2 had an equal shareholding with others (who the Tribunal believe to be R2's siblings). That business, in any event, went into administration in 2009.

6. W Cowell trading as Centreforce (Centreforce) was a partnership which supplied ironmongery and commercial property development. R2 was a partner in that business, as was Mr W Cowell, until his death, and Mrs Taylor (who the Tribunal believes is one of R2's siblings).

7. The Claimant became a loyal and trusted employee of various businesses the family owned and ran. The relationship was such that, when the Claimant resigned to go and work for an entirely separate business on 4 September 2000, Mr W Cowell asked her to return and she did so on 9 October 2000. That period, between 4 September 2000 and 9 October 2000, was a break in the continuity of the claimant's employment.

8. The Tribunal found the claimant's employment history within the various family businesses to be very confusing indeed. The Tribunal accepted the claimant's evidence that she may have been working for a number of the family businesses at any one time. There was no contract of employment and the only relevant documentary evidence was the payslips, which indicated which one of the family businesses was responsible for paying the claimant, and the claimant's P60s.

9. The Tribunal found that, from 9 October 2000 until 20 July 2003, the Claimant worked for TGS Doors Limited, following the short break in her employment.

10. All of the claimant's P60s, from 2004/5 until 2009/10 indicate that the claimant was employed by Centreforce. That is consistent with the respondent's position that the claimant was employed by Centreforce throughout that period, but appears to be inconsistent with the claimant's national insurance record which records her employer as Mr W Cowell. However, the Tribunal understands that the full title of Centreforce was Mr W Cowell trading as Centreforce, which would explain the discrepancy.

11. As regards the payslips, from 2 February 2006 until 25 January 2007, the claimant's payslip were stated to be from TGS Doors Limited. This is inconsistent with employment by Centreforce during that period. However R2 offered the explanation that Centreforce was too small to have its own payroll. In any event, TGS Doors Limited ceased trading during 2009. Approximately twelve months before the claimant commenced work with Orion, an administrator was appointed.

12. In around 2007, there was a change of location for the claimant. She moved to work in Orion's office. The nature of the claimant's work between the various businesses didn't ever significantly change. For example, she had been sometimes working in the shop, which was work which related to Orion, prior to her employment with Orion.

13. From 14 February 2008 until 18 February 2010 the payslips were stated to be from WCowell Property. That is the business the claimant believed she was employed by, if any, as it was paying her wages. As a result, the Claimant's understandable view was that her work was for any/all of the family businesses.

14. It then appears that the claimant was working for Centreforce, and continued to do so until Centreforce stopped trading on 26 March 2010. R2 at that point offered the claimant employment in his business Orion Paints Limited. From the Claimant's perspective there was no clear break in her employment at this time and it was never spelt out to her that she could be entitled to a redundancy payment as a result of Centreforce ceasing trading or that she would be working for Orion Paints moving forwards. There is no evidence of a TUPE transfer at that time. From the claimant's perspective, she was employed by the family in whichever business there was work to be done.

15. Therefore, from 2010, the claimant was paid, and employed, by Orion Paints Limited, albeit that there was some residual Centreforce work to do, and even though there was no real difference to the work the claimant did. In these circumstances, the claimant's belief that she had continuity of employment was understandable.

Breakdown in relationship

16. The claimant had been a valuable member of staff of the family businesses for many years. However, a series of events, which R2 refers to as a change in the claimant's attitude and a drop in work standards, led to breakdown in the relationship between the claimant and R2. They had known each other for a long time (some 22 years) and had been very fond of each other, as evidenced by the language used in the recorded meeting (see below).

17. In or around February 2019, R2's son, Tom, was working in a nightclub and R2 was concerned about him given his accounts of drugs and violence. As a result, R2 wanted Tom to come and work with him in Orion Paints Limited. In order to persuade to him to do so, R2 wanted to offer him a rate of pay equivalent to that which he was earning in his former role. This was an hourly rate greater than that paid to the claimant by just over £2 per hour.

18. Tom was given the responsibility of increasing the R's presence online and on social media. Hitherto, the claimant had had responsibility for R1's online presence, along with Kirsty who also worked for Orion, both of whom had been trained by Jonathan Bruce, from whom we heard evidence. When Tom started, the claimant was given the role of training and supporting him.

19. Not only was Tom given the role to focus on social media full time but also funding was made available to him which had not previously been available to the claimant. His role did also include working in the shop, but he didn't like to do it and

would take the opportunity to leave site to do errands when possible. The claimant was upset that she hadn't been offered the opportunity to apply for that role, but was also generally aggrieved that Tom was paid more than she was, especially since she was responsible to train him.

20. The claimant had use of a company vehicle, from around 2006, and for a short period her husband was also insured on the car (although this was at no extra cost to R1). The claimant was also entitled to a small bonus if she attended work on time.

21. Following Tom's appointment and from around September 2019, according to R2, there was a change in attitude and drop in work standard by the claimant. The Tribunal does not accept that there was a drop in work standard, but accepts that the claimant may have felt aggrieved by Tom's appointment on a higher wage, which may have been perceived as a change in attitude by R2.

22. From September 2019, the claimant began to keep a record of what was happening at work because R2 discussed with her a number of examples, including a £15 direct debit; a late VAT return and a County Court Judgment from nPower, of what he considered to be a drop in standards. In evidence, the claimant gave explanations which were consistent with explanations which she gave to R2 whilst she remained employed. For example, R2 would postpone payments and then be annoyed and blame the claimant when he was chased or threatened with legal action to encourage payment. These explanations were not accepted at the time by R2. The Tribunal finds that R2 did not "listen" to the claimant and was not prepared to properly consider her explanations. He seemed to be trying to make a case that she was not good at her job. As a result, the relationship between the claimant and R2 became strained, the claimant became "low", and did not, for the first time, attend the Christmas party because she didn't feel up to it. She explained how she felt to R2's sisters, who continued to be involved in the businesses.

23. During a conversation, when discussing the claimant's notable absence from the Christmas party, R2 said, "it must be my fault." The Tribunal considers that when he said "it must be my fault", in a conversation about the claimant's non-attendance, R2 acknowledged that he was at least partly to blame for her absence. Given her length of employment, the relationship she had clearly had with the family, and that she had always attended the Christmas party, the Tribunal considers that R1/R2 should have taken steps at this stage to speak to the claimant and to seek to resolve the issue.

24. The claimant considered that she was being treated unfairly and felt the need, around January 2020, to protect herself by relying on email for work communication, rather than oral communications, so that she had an audit trail. R2 asked the claimant why she was doing it, which she explained, but this effectively put an end to all informal communication between R2 and the claimant, such that there was no longer any chat between them. The claimant described how R2 would not speak to her when he came into the office from this point. This was exemplified by the fact that he would sometimes speak to her via his son Tom, whilst she was in the room. The Tribunal considered that, for R2 to behave in this way over a number of months, in such a small workplace in which they worked together every day, was unprofessional and bullying behaviour by R2, as the employer of a long term and trusted employee. This was particularly the case as R2 had not followed up the

claimant's explanations for why the tasks he accused her of not performing well had not been done, or why they had been delayed, or why he perceived they had been done badly.

25. In February 2020 the claimant went off sick. The relationship breakdown with R2 was having a serious impact on her mental health. However, she did not want to tell R2 about the effect he was having on her and so the excuse she gave for her absence to the respondent was that had a bad cold. The claimant texted Lynn Taylor via What's App with her explanation.

26. R2 knew that the claimant had a second job in a bar and when someone mentioned that they thought she would still be at work in the bar he went to check up on her. He discovered that she was indeed still working in her second job at the bar. The claimant considered this behaviour of R2 to be "bordering on harassment". R2 took the fact that the claimant was working elsewhere as evidence of the claimant not telling the truth.

27. When the claimant returned to work, on 2 March 2020, R2 tackled the claimant about the fact that she was off sick but still working in the pub. He considered that the claimant "retaliated" by explaining her point of view because she had been caught out "being dishonest". However, the Tribunal accepts the claimant's account which was that she could no longer face working for R2, given the extent to which the relationship had broken down, and that this meeting allowed her the opportunity to raise the issues that had been bothering her. The Tribunal does not accept that this was any form of "retaliation" by the claimant, but that it did give her the opportunity to explain why she was so unhappy. This cannot have come "out of the blue" for R2, as the claimant had challenged him for blaming her for things at work and had insisted that communications should be via email.

28. The meeting continued the following day.

29. The claimant did not want to continue the meeting as she had not really prepared for it. R2 said: "should we just sack you then?", but then said that he didn't want to. He said: "I love you and I've loved you 22 years of being here. But …it was wrong you know." The Tribunal understands this to be a reference to the fact that the claimant had attended her workplace in the pub but had not come to work. The claimant responded to say: "It wasn't Andrew, what's wrong is what you have been doing to me over the last couple of months…..the way you spoke to me before Christmas. At that meeting it appeared that there was some intention for things to go back to "the way they were". However, that never happened. Although this was an opportunity to put things straight between the claimant and R2, it didn't happen that way. R2 went on holiday, and then the pandemic started.

30. On 16 March 2020, R2 wrote to the claimant to lay her off for a four week period. The claimant responded on 19 March 2020 to ask for lay off pay. All other staff members, with the exception of Tom and R2, were also laid off. R2 replied to say that he could not afford to pay the claimant and that there had been a serious decline in customers since the virus outbreak.

31. On 30 March 2020, R2 wrote to the claimant about furlough. The letter explained how furlough worked and explained that the claimant would receive 80%

of her pay whilst on furlough. The claimant agreed to be placed on furlough in an email dated 10 April 2020.

32. In that same email, the claimant also referred back to the conversations between herself and R2 about the workplace issues. She explained that she had hoped to confirm what was discussed in writing and then to give the written confirmation to R2 with a view to further discussion. However, R2 hadn't been in the office on 16 March 2020 and the claimant hadn't been in work since that date due to being laid off and then furloughed. It was a long email which set out all of the claimant's issues in detail.

33. R2 responded. He apologised for not getting back to the claimant sooner and promised to talk through the points raised and said that he was committed to getting back to the way things had been between them. No meeting was arranged at that time because of the furlough rules on meetings.

34. Things in the respondent's business became worse during the pandemic, and, on Monday 1 June 2020, R2 contacted the claimant to discuss a potential redundancy situation. Email confirmation of the conversation was also sent by R2 to the claimant that day, explaining that because of a downturn in the business which had been exacerbated by coronavirus, the claimant's role was at risk of redundancy. The email marked the commencement of a formal consultation process and explained that an HR consultant had been engaged to manage the redundancy process. The email confirmed that, if redundancy was confirmed, the claimant's last day of employment would be 31 August 2020 and that she would receive a statutory redundancy payment on the September pay day. The redundancy payment outlined in that letter was £3462, which R2 had calculated according to the claimant's length of service with Orion Paints since 2010.

35. On 5 June 2020, R2 spoke to the claimant, by way of consultation, by telephone. The claimant queried her redundancy payment but did not have any other questions or raise any issues regarding the potential redundancy.

36. On 8 June 2020, R2 wrote to the claimant to confirm the termination of her employment by reason of redundancy. The claimant was to remain on furlough until 31 August 2020 when her employment would terminate. All four of the respondent's employees were made redundant. Just R2 and his son, Tom, remained in the business.

37. By a letter dated 15 June 2020, the claimant responded to R2. The claimant disputed that the commencement of her employment was in 2010, and stated that, in her opinion, her employment had commenced in 1995, and that her redundancy payment should be calculated accordingly.

38. R2 replied the following day. He explained that, as far as he was concerned, her employment with the respondent had commenced in March 2010 and that, although he accepted that the claimant had worked within the other companies, there had been no transfer of her employment; the other companies she had worked for were separate entities and the other companies had each, in turn, "folded". He also confirmed that any remaining work would be performed by him and his sisters and that the claimant had made an error as regards the way in which she thought her notice period should be calculated. R2 also confirmed that the claimant would

receive full pay for her notice period, rather than 80% which the claimant received as furlough pay. Finally, R2 gave the claimant notice that she should use all of her outstanding holidays during her notice period. More precisely, he confirmed that the claimant's remaining 12 days of holiday should be taken from 14-31 August 2020.

39. The claimant responded again to explain that she disagreed with the calculation of her length of service and notice pay and to state that she would engage ACAS. She also set out her position that, although she accepted that the work in the future would be carried out by R2 and his sisters, her grievance was "an influencing factor" in the decision to dismiss her.

The Law

Unfair dismissal

40. Section 94 Employment Rights Act 1996 ("ERA") provides a right not to be unfairly dismissed. Section 98 states that redundancy is a potentially fair reason for dismissal.

41. Section 139(1) ERA reads as follows: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 attributed to –(b) the fact that the requirements of that business –(i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish".

42. The Tribunal's consideration of fairness under section 98(4) ERA requires an assessment of the reason at the time the decision to dismiss was made and in the context of fairness and the size and administrative resources available to the respondent in accordance with equity and the substantial merits of the case. Section 98(4) ERA states: "the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case".

43. The leading case on reasonableness in relation to redundancy is *Polkey v A E Dayton Services Ltd [1987] IRLR 503* in which the House of Lords held that an employer will normally not act reasonably (and a dismissal will therefore be unfair) unless it: warns and consults employees, or their representative(s), about the proposed redundancy; adopts a fair basis on which to select for redundancy; and considers suitable alternative employment. An employer must search for and, if it is available, offer suitable alternative employment within its organisation.

Statutory redundancy pay

44. Section 135 ERA provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy.

45. Section 162 ERA provides a statutory formula for the calculation of such a redundancy payment. It provides that the amount of a redundancy payment shall be calculated by: “(a) determining the period, ending with the relevant date, during which the employee has been continuously employed, (b) reckoning backwards from the end of that period, the number of years of employment falling within that period, and (c) allowing the appropriate amount for each of those years of employment.”

Continuous employment

46. Part XIV, chapter 1 ERA deals with continuous employment.

47. Section 212(1) ERA says: “Any week during the whole or part of which an employee’s relations with his employer are governed by a contract of employment counts in computing the employee’s period of employment”.

48. If an employee stops work for one employer and is immediately employed by an associated employer (as defined in section 231 of ERA 1996) continuity is preserved.

49. Section 231 ERA defines an associated employer as two employers where: “One is a company of which the other (directly or indirectly) has control; or both are companies of which a third person (directly or indirectly) has control. "Control" means the holding of the majority of voting power at shareholders’ meetings.

50. If an employee leaves their job and is employed by an employer who is associated with that first employer, continuity of employment is preserved. The periods of employment with both the original employer and the associated employer will count towards the employment period.

51. The periods of employment with both the original employer and the associated employer will count towards the employment period (section 218(6), ERA 1996). The most obvious example would be when an employee transfers from one group company to another within the same corporate group, such as from a parent company to a subsidiary, or from one subsidiary to another.

52. The definition of "associated employer" requires control (whether direct or indirect) by the other employer or by a third person (who controls both employers). It has been held that this means legal control in the sense of a majority shareholding in the company and that "de facto" control (in other words, how the company is in fact run) is not sufficient. However, where the legal ownership of a company is not transparent, it is permissible for an employment tribunal to draw inferences from the surrounding evidence (including matters relating to de facto day-to-day control) in order to determine the question of legal control.

Equal Pay

53. The Equality Act 2010 implements the principle that men and women should receive equal pay for equal work.

54. Anyone employed under a contract personally to do work is entitled to contractual terms that are as favourable as those of a comparator in the “same employment” of the other gender if they are employed on equal work. In this case the claimant alleges that she was employed on “like work” to that of Tom Cowell.

55. The law achieves this by implying a "sex equality clause" into a woman's contract of employment, which operates so as to replace her less favourable term(s) with the equivalent more favourable term(s) of a man's contract.

56. The sex equality clause does not operate if the employer shows that the difference in contractual terms is due to a material factor which is neither directly nor indirectly sex discriminatory. A factor that is ostensibly gender-neutral but which, in practice, has a disproportionate adverse impact on women will need to be objectively justified by the employer.

57. Two jobs involve "like work" if the work is "the same or broadly similar" and any differences that exist are "not of practical importance in relation to the terms of their work", having regard to the frequency or otherwise with which such differences occur in practice, and the nature and extent of the differences" (*section 65(2) and (3), EqA 2010; section 1(4), EqPA 1970*).

58. While a job description is relevant to whether the work is the same or broadly similar, the focus is on the actual work undertaken. Tribunals should analyse the question in two stages:

- On a general consideration of the type of work done and the skills and knowledge needed, is the work the same or broadly similar?
- On a more detailed consideration of the work done, are any differences of practical importance in relation to the terms and conditions of employment?

Where the claimant's work is more onerous or more responsible than that of her comparator, she can still argue that it is "like work.

Holiday Pay

59. An employer must pay an employee for any annual leave the employee has accrued but not taken when their employment ends.

60. An employer may give notice ordering a worker to take statutory holiday on specified dates *(*regulation 15(2), Working Time Regulations 1998*).* Such notice must be at least twice the length of the period of leave that the worker is being ordered to take *(*regulation 15(4)(a*)*). There are no explicit requirements about the form that this notice must take.

Conclusion

Continuity of employment

61. There is no question of any continuity of employment prior to 9 October 2000 when the Claimant returned to work for one of the family businesses, TGS Doors Limited, following a short break during which she left to go to work for another employer. That period, between 4 September 2000 and 9 October 2000, was a break in the continuity of the claimant's employment.

62. The Tribunal needs to consider whether, when the Claimant's employment "transferred" to Orion when Centreforce ceased trading in 2010, her employment was continuous. The claimant alleges that her employment should be regarded as continuous from 2000 (in the alternative to her continuity commencing in 1995 when she first started work for the family businesses).

63. There was no "gap" between the claimant's employment with Centreforce and her employment with Orion. Therefore, the question to determine is whether the claimant stopped work for one employer and was immediately employed by an associated employer (as defined in section 231 of ERA 1996), so as to preserve continuity, or whether, in fact, the two companies were not associated in which case there is no continuity. There is no presumption of continuity in a case such as this.

64. The Tribunal needs therefore to consider whether the definition set out in section 231 ERA is satisfied.

65. This is not a case in which an employee has transferred from one group company to another within the same corporate group, such as from a parent company to a subsidiary, or from one subsidiary to another.

66. The Tribunal accepts that the situation was confusing and that the Claimant would consider that she had continuity of employment, particularly in circumstances in which she was not offered a redundancy payment when her employment with Centreforce came to an end.

67. However, the definition of an associated employer is not satisfied. Whether the claimant had been employed by Centreforce or W Cowell Property Management prior to working for Orion, she had been employed by a partnership or by a sole proprietor business, neither of which satisfy the definition of associated employer. Centreforce was not an associated employer of Orion. Accordingly, there is no continuity of employment prior to 2010.

68. The Tribunal sympathises with the claimant however. She had never had a contract of employment, and her role was never clearly defined. She should have been entitled to a redundancy payment when, in 2010, Centreforce ceased trading, but that was never given to her.

Notice pay and redundancy pay

69. The claimant was paid the correct amount of notice pay and statutory redundancy pay based on continuous employment since 2010.

Unfair dismissal

70. The Tribunal is satisfied that redundancy was the principal reason for the claimant's dismissal.

71. The claimant's allegation that her dismissal arose because she had made complaints about R2 which R2 did not want to investigate is unfounded. The claimant further alleges that the second respondent also made threats to sack her throughout her employment and was unhappy that she had a second job.

72. The Tribunal is satisfied that R2 did not have an issue with the claimant having a second job. Rather, R2 was concerned that the reason she gave for her absence from work was inconsistent with her continuing to work in her second job.

73. The Tribunal is further satisfied that there was no genuine intention to sack the claimant and that, ultimately, R2 did want to resolve the issues between himself

and the claimant, but that the pandemic and events which arose as a result of the pandemic, overtook and were prioritised over that resolution.

74. The Tribunal has no difficulty in concluding that redundancy was the reason for the claimant's dismissal in circumstances in which the pandemic had caused a significant downturn in business such that all the respondent's employees, bar Tom, a family member, were dismissed by reason of redundancy. There was evidence to show that the respondent's business was already struggling prior to the pandemic, but it appears that the pandemic was the final straw.

75. The claimant was therefore dismissed for a potentially fair reason under section 98 ERA.

76. The first respondent acted reasonably in all the circumstances (including its size and administrative resources) in treating that reason as sufficient reason to dismiss the claimant. Although the claimant's grievance was not dealt with prior to termination of her employment, which would have been desirable, this did not render the dismissal unfair in circumstances in which the pandemic prevented all face to face meetings and caused a significant downturn in business for the respondent.

77. The claimant was adequately warned and consulted. The claimant did not argue against her redundancy or raise any objection when she was consulted with. Although the consultation took place by telephone, there was at the time a prohibition on face to face meetings, and the claimant had, by then, been furloughed.

78. There was no selection as all of the first respondent's employees, bar Tom, a family member, were dismissed by reason of redundancy.

79. There was no suitable alternative employment available.

80. Accordingly, dismissal was within the range of reasonable responses.

Holiday pay

81. The first respondent did not fail to pay the claimant for annual leave the claimant had accrued but not taken when her employment ended.

82. The claimant says she had 12 days accrued but untaken, but the respondent required her to take it during her notice period and gave her appropriate notice to do so in June 2020. The notice given was at least twice the length of the period of leave that the claimant was being ordered to take in accordance with the WTR.

83. Accordingly, the claimant is not due any holiday pay.

Equal Pay

84. The first respondent did not employ Tom Cowell on like work to the claimant. The claimant was primarily employed to perform administrative work, a small part of which was a responsibility for the first respondent's online presence. The role that Tom was given was not administrative, and didn't include banking or paying bills, for example. Although he would occasionally go to the bank, he didn't fill in the paperwork and add the money up. That was the claimant's role.

85. The majority of Tom's role was the social media aspect and the majority of the claimant's role was administrative. Although there was some overlap, this was not like work

86. In any event, that claimant was not treated less favourably by the first respondent paying Tom more. The reason for paying him more was unrelated to sex as it was primarily because R2 didn't want Tom to work in the nightclub any longer and wanted to encourage him to work with him, which Tom would not have done unless his salary was matched. It was within R2's right to give what work there was to a family member in these circumstances. This was a material factor.

87. All of the claimant's claims fail and are dismissed.

Employment Judge Rice-Birchall
Date: 19 March 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
22 March 2022

FOR THE TRIBUNAL OFFICE