EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109752/2021

Held via CVP on 15, 16 and 17 November 2021

Employment Judge: C McManus
Tribunal Members: P McColl
S Larkin

M L Webster	**Claimant** **In Person**
Marks and Spencer Group plc	**Respondent** **Represented by:-** **Mr McHugh** **(Counsel)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

- The claimant's claim of discrimination under section 19 of the Equality Act 2010 is unsuccessful and is dismissed.
- The claimant's claim for constructive dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful and is dismissed.
- The claimant's claim under Regulation 5 of the Part Time Workers Regulations is unsuccessful and is dismissed.

REASONS

Background

1. The claims are for (constructive) unfair dismissal, indirect discrimination under section 19 of the Equality Act 2010 ('the Eq Act') and Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTW Regs'). The circumstances which the claimant relies on in her claims are that when the respondent's Paisley centre store was closing she was directed to move to the respondent's Argyle Street store rather than the new Paisley store. It is her position that that was because she was a part time worker. In discussions at the outset of the Final Hearing, the claimant confirmed that in her constructive dismissal claim she relies on there having been a breach of the implied term of trust and confidence. It was confirmed that the claimant does not rely on an individual breach of contract but an accumulation of actions and a last straw. The matters identified at the outset of the final hearing as being relied upon by the claimant are:-

    i. Failing to discuss/consult with her prior to her assignment to the Argyle Street store.

    ii. Her exclusion/treatment by her line manager Kirk Russell in the lead up to the transfer.

    iii. Failure to process/complete her transfer to Argyle Street.

    iv. Failure to deal with her grievance in a timely fashion (this is relied upon by the claimant as the 'last straw').

2. The respondent denies any unlawful treatment of the claimant.

3. The claimant was unrepresented before the Tribunal and is not legally qualified. The respondent was professionally represented by Mr McHugh, instructed by the respondent's in house solicitor (Ben Palmer). A Joint Bundle was helpful prepared for these proceedings. Documents in this Joint Bundle are referred to in this Judgment by their page number (JB1 – JB209).

4. A Case Management Preliminary Hearing ('CMPH) took place before EJ Kemp on 9 August 2021. At that CMPH it was agreed that this Final Hearing would proceed remotely, via CVP (the Cloud Video Platform) and that witness statements would be used and taken as read. At that CMPH it was identified that further particulars were required from both parties. Subsequently, the claimant provided answers to questions posed by the Tribunal and identified the PCP she relied upon. The claimant relies upon the following practice in her section 19 claim:-

> The practice of relocating managers without prior consultation or reasonable consideration of their prior working hours and circumstances.
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> The disadvantage relied upon by the claimant is set out by her as follows:-
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> The practice puts employees who are female at a particular disadvantage. This is because women are more likely to have childcare responsibilities. This will disproportionately affect female workers.

5. In preliminary discussions at the commencement of these proceedings, it was agreed that the claimant's evidence would be heard first. The Issues to be determined by the Tribunal were discussed and agreed.

6. In respect of each witness, their witness statement was confirmed as being their evidence before this Tribunal. That was followed by cross examination and the opportunity for re-examination, or in respect of the claimant, the opportunity to clarify any matter which had arisen in cross examination. Evidence was heard from the claimant, then from the respondent's witnesses, who were Kirk Russell (Store Manager, Paisley store), Shirley McCullough (HR Business Partner for the respondent's Scotland Region) and Linda Murray (Store Manager, Glasgow Pollock store). There was also a witness statement from Carolyn Laughton (Deputy Store Manager Pollock store) but prior to the Final Hearing, the respondent's representative had advised that Ms Laughton would not be attending. Parties were informed that little or no weight would be put on a witness statement which was not spoken to. The

respondent's representative confirmed at the Final Hearing that they were content to proceed on that basis.

7. All documents referred to at the Final Hearing were included in a Joint Bundle, running to 209 pages. Documents are referred to by their page number in this Joint Bundle (JB1 – JB209).

Issues for Determination

8. The issues which have been determined by this Tribunal are as follows:-

(i) Did the respondent conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and confidence between the parties?

(ii) Did that conduct cause or significantly contribute to the claimant resigning from her employment?

(iii) Did the claimant resign in response to that conduct or for some other reason?

(iv) Was the claimant dismissed by the respondent?

(v) If so, what was the reason for the claimant's dismissal?

(vi) Was that dismissal a fair dismissal in terms of section 98 of the Employment Rights Act 1996 ('the ERA')?

(vii) Did the respondent apply the practice of relocating managers without prior consultation or reasonable consideration of their prior working hours and circumstances?

(viii) If so, to whom was that practice applied?

(ix) Did that practice put, or would it put persons of the same sex as the claimant at a particular disadvantage compared with others?

(x) Did that practice put the claimant at that disadvantage?

(xi) Was that practice a proportionate means of achieving a legitimate aim?

(xii) Did the respondent subject the claimant to less favourable treatment by directing that she move to the Argyle Street store?

(xiii) Was any such less favourable treatment because the claimant was a part time worker?

(xiv) Was any such less favourable treatment a proportionate means of achieving a legitimate aim?

(xv) Is the claimant entitled to any compensation?

(i) If so, to what extent, taking into account the provisions of s122 and s123 of the Employment Rights Act 1996, where appropriate, and any award for injury to feelings.

(ii) Should any uplift or reduction be applied in respect of any failure to comply with the ACAS Code of Practice?

Relevant Law

9. Section 95(1)(c) of the Employment Rights Acts 1996 ('the ERA') sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal and which is relevant to the tribunal's determination of a claim under section 95(1)(c).

10. Following *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, for the purposes of a claim of unfair dismissal, an employee is dismissed by his employer if the employee terminates the contract (with or without notice) in circumstances in which he is entitled to do so without notice by reason of the employer's conduct. The test of whether an employee is entitled to do so is a contractual one. There must be a breach of contract by the employer. It may

be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify their leaving. The employee must leave in response to the breach and not for some other, unconnected reason. Following *Leeds Dental Team Ltd v Rose [2014] IRLR 8,* the test of whether there has been a breach of the implied term of trust and confidence is objective. Following *Mahmud v BCCI SA [1997] ICR 606,* and *Bournemouth University Higher Education Corp v Buckland [2009] ICR 1042 (EAT),* in a claim in which the employee asserts a breach of the implied term of trust and confidence, he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them. Following *Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978,* in a case involving the 'last straw', the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. In such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (in Latin "*de minimis non curat lex*") is of general application. The issues for determination by the Tribunal in respect of claimant's claim of constructive dismissal were identified with reference to the Court of Appeal's decision in *Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.*

11. For a successful claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation – i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as an offer of another job. It is a question of fact for the Employment Tribunal to determine what the real reason for the resignation was. To be successful in a constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the

employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

12. Where the Tribunal makes a finding of unfair dismissal, it can order reinstatement, or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

13. Equality Act 2010:-

Indirect Discrimination (Section 19) -

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

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

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage,

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are –

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

Burden of Proof - section 136

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provisions concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings or an offence under this Act

Part- time Workers (Prevention of Less Favourable Treatment) Regs 2000

Regulation 5

Less favourable treatment of part-time workers

5.—(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

Findings in Fact

14. The following facts were admitted or found by the Tribunal to be proven:-

(a) The respondent is a large retailer of food, clothing and home wear. The respondent has approx. 80,000 employees throughout the UK. The claimant was employed by the respondent in their Paisley outlet store from 2 December 2001. The Claimant was initially employed as a Customer Assistant. The claimant became a coach, and then a Section Manager in 2004. That position was changed to Team Manager in 2020. Team Managers (including Operations Manager) in the Paisley store were line managed by the Store Manager. The Claimant's contract of employment is at JB116-119. There were changes in Store Manager and Section / Team Managers throughout the claimant's 16 years at the Paisley store. The claimant was one of three who had been a manager at the Paisley store since 2004, the others being Elaine Gibson and Kirsty Atherton. That store sold clothing and homewear as well as food. Throughout her time at the Paisley store, the claimant had no

attendance, capability, performance or disciplinary issues. She was a capable and knowledgeable food manager who also had years of experience as a Manager in Operations, Clothing, Home and with People and Performance. In 2021 the claimant was Food Manger of the Paisley Store, Elaine Gibson was Clothing and Home Manger and Kirsty Atherton was Operations Manager. There was one other Manager in the management team. Throughout her employment with the respondent that claimant has not been subject to any disciplinary, attendance, capability or performance issues. At the time of her resignation, the claimant was contracted to work 35 ½ hours a week. She was a part time worker. A full time equivalent role within the respondent's business is 39 hours. In the three or four years prior to her resignation, the claimant normally worked at the Paisley store from between 9.30am and 10.30am until between 6pm and 7.30pm. That shift pattern allowed the claimant to take her children to school in the morning, while her husband worked an early shift for the respondent (16 hours a week).

(b) In 2020, the respondent was undertaking changes in their UK stores. As part of this process, the Paisley high street store was being relocated to a new 'renewal' store in a retail outlet outwith the centre of Paisley. The respondent's departure from Paisley centre was of local significance and attracted media attention (JB116). The Paisley 'renewal' store was food only. Employees at the Paisley store were informed of this change in a Colleague Briefing on in January 2021. The claimant was not working on that day and did not attend that briefing. The claimant's husband at that time worked for the respondent. The claimant's husband was at the Colleague Briefing where employees were told about this change. This change was described as a '*relocation*'. The document at JB120 sets out in bullet points what was disclosed at that Colleague Briefing. The claimant was not given sight of that briefing note. On 22 January, Karen Latta sent to the claimant the briefing which is at JB167. The claimant was aware that it was the respondent's position that the majority of colleagues would move to the

renewal store. That was in line with media coverage about the relocation. The claimant believed it was the respondent's position that discussions would take place with individuals about their preferences, as it may not suit the person to transfer to this new store. The claimant was not asked about her preferences or whether it suited her to move to the renewal store.

(c) In February 2020, the then Store Manager of the Paisley store, Karen Latta spoke to the claimant, Kirsty Atherton and Elaine Gibson about the relocation of the Paisley store. Karen Latta said that she had received a phone call from Shirley McCulloch (HR Business Partner) to say that the Team Managers at the Paisley store may or may not be going to the Paisley renewal store. All managers had a mobility clause in their contract of employment. Colleagues below the level of Manager do not have a mobility clause in their contract of employment. On 15 February 2020 Kirk Russell started as Store Manager of the Paisley Store. Karen Latta moved to another store.

(d) The respondent has a 'Future Talent' programme. Particular employees are identified as 'future talent'. Kirk Russell was identified as future talent and selected to move to the Paisley high street store on the basis that he would then be Store Manager of the Paisley renewal store. The claimant had not been identified as 'future talent' by Karen Latta. Prior to his move to the Paisley store, Kirk Russell had identified some of those who he managed at his previous store as future talent.

(e) Between 22-28 February 2020, Kirk Russell asked the claimant to come to his office for a '*catch up'*. In that meeting Kirk Russell told the claimant that she had been selected to go to the Argyle Street store. Kirk Russell told the claimant that they would *'sort out your childcare there.*' When the claimant asked why, she was told that it was '*where other people were in their careers*'. That was a reference to others being identified as future talent and experience at the renewal store being considered to be appropriate for those so identified. Kirk Russell did not explain that to the claimant. The claimant's position was that she was not accepting

that move. The claimant was not happy about the move because there would be additional travel time and cost (of approx. £100 a month) involved in commuting to Glasgow city centre and because at that time her husband worked early shifts and the claimant took the children to school. The claimant was given no formal notification of this discussion and was not advised that she could be accompanied at that meeting. There was no contractual requirement for such notification or advise.

(f) On 24th February 2021 Shirley McCulloch visited the Paisley store for a meeting with Kirk Russell and other work colleagues. The claimant was not working on that day. Elaine Gibson and Kirsty Atherton were present at the meeting. Elaine Gibson was on annual leave but came in for the meeting. The claimant was not aware that that meeting was taking place. The claimant believed that other managers had the opportunity on that day to speak to Shirley McCulloch to discuss how they felt about the new store and tell Shirley McCulloch that they wanted to go to the new store. The claimant felt that she was denied that opportunity. The claimant asked Kirk Russell why she had not been there, as she had been told a performance calibration had taken place of all staff instore. As Food Manager, the claimant's team was the biggest majority in the store and the claimant believed that she should have had input into this calibration. Kirk Russel replied "*its ok you didn't need to be there Elaine and Kirsty have done it, we will look at it again"* . That was not looked at again with the claimant.

(g) Within the respondent's business, those who are resource leads have regular resource meetings to discuss staffing across the region. On 3 March 2021, a Resource Meeting took place. Present at that meeting were Shirley McCullough (HR Business Partner for the Scotland Region), Linda Murray (Store Manager of Pollock store). Kirk Russell also attended that meeting. That meeting was required as the business had many live vacancies across the region (as a result of career breaks, maternity etc) and the new Paisley renewal store needed to be fully staffed. Kirk Russell was present because he was to be the Store manager of the renewal store and he

wanted to understand who his team would be. He put forward staff for Paisley store. Store Managers do not usually attend resource meetings. The claimant's move was discussed at that resource meeting. As a result of the multiple vacancies across the region, a total of fourteen individual moves across the region were proposed. One of those moves was the claimant's move to the Argyle Street store in Glasgow city centre.

(h) When deciding on the team for the Paisley renewal store , the resource team sought to ensure that those who had been identified as future talent had the opportunity to work at the renewal store. Working at that store was considered to be an excellent opportunity for their career development. Haley McColgan and Alistair Reynolds were moved to the new Paisley renewal store from other stores in the region. Alistair Reynolds was identified by Kirk Russell as a suitable move to the new Paisley store as he was an established and experienced team manager. Haley McColgan was identified as 'future talent', was stepping into the team manager program and was moved on a fixed term basis. The claimant had not been identified as future talent and was not included as part of the team for the new Paisley store. The last time the claimant had had a performance review was in 2019.

(i) When the new Paisley store team had been agreed, the resource team leads looked at where outstanding vacancies were in the region. At that time, there was a role in Foods available in the Argyle Street store. It was decided that the Claimant could fulfil that vacancy. The role was deemed suitable for the Claimant as the travel time to work for her was reasonable and she had experience in foods, that the Argyle Street store required. Following that resource meeting, the claimant and one other Manager who had worked at the Paisley store were relocated to other stores.

(j) When considering invoking the mobility clause in managers' contracts o employment, the respondent does not consider the number of hours worked by the individual. This is different to the situation in grades

below manager, where the resource for hours is calculated on a store basis. For Manager grades, the resource is calculated on a regional basis. That may mean that a particular store will be over or under resourced in terms of hours worked by Managers.

(k) There was no discussion at the resource meeting on 3 March about whether individuals were full time or part time. Decisions were made based on staffing gaps across the region, while checking that the individual's travel to work was a reasonable distance, and that their experience meant they were suitable for the role. When considering the claimant at that resource meeting, no account was taken of the claimant's previous experience in roles other than as Food Manager.

(l) The claimant and one other Manager were moved from the Paisley store. Four Managers were moved into the Paisley store because they had been identified as future talent and it was considered that experience at the renewal store was important for their career development. Those four Managers are shown on the rota at JB170. At that time, all worked full time.

(m) On 9 March 2021 Kirk Russell asked the claimant to come to his office for a '*quick catch up*". Kirk Russell told the claimant that she had *'been selected for Argyle St store*" The claimant asked why. Kirk Russell shrugged and said "*the resource forum has just selected you for Argyle St. They will sort your childcare over there, you get to still do part time 4 days and they don't do late nights" You move on the 29th March*" The claimant's position in reply was that the resource forum had looked at her and made assumptions that she needed to work part time, that she has childcare issues and that late night working was an issue for her. The claimant would have made arrangements to enable her to move to full time working, if required. The claimant said '*I am not accepting this. I am the food manager instore so why would you get rid of me when moving to a food store*". Kirk Russell's reply was that other Food Managers were coming in. The claimant asked why she had been selected for Argyle Street. Kirk Russell's reply was "*That's where you've*

been selected for. Its only 12 mins on a train". The claimant asked how this selection was made and what was considered when they came down the list to my name. Kirk Russell's said, "*It's down to the Forum. It's where other people are in their careers and feedback that was given by Karen Latta"*. The claimant took from the discussion that the decision was made and there was nothing she could do about it. The claimant left the meeting to assist another team member. The claimant believed that the move to Argyle Street would be a partial demotion because she would not have the opportunity to be Duty Manager.

(n) On 10 March 2021, Ross Munro joined the Paisley store as a team support manager. The claimant was absent that day due to ill health. On 13 March 2021 he was promoted to Team Manager. Ross Munro had been identified by his line manager at his previous store (Kirk Russell) as future talent.

(o) On 11 March 2021, the claimant attended work as she was due to scribe a disciplinary meeting. That meeting did not take place. The claimant was upset about her employment situation. She spoke to Kirk Russell. She told him that she had been humiliated and wanted answers to her questions. The claimant was then absent from work. She was certified as unfit for work due to stress and anxiety until 30 March 2021.

(p) On 18 March 2021, the Claimant initiated the grievance procedure by her letter to Kirk Russell dated 16 March 2021 (JB125 & JB128). The claimant's grievance was in respect of her treatment by Kirk Russell as well as the decision to move her to the Argyle Street store. On 20 March, Kirk Russell sent an email to the claimant confirming receipt of her grievance and informing her that this had been forwarded to Shirley McCullough and the Line Managers Advisory Service ('LMAS'). LMAS assists managers with employment issues and is part of the Respondent's HR function. The respondent's Grievance Policy states that a grievance manager will be appointed and that "*they will normally arrange a grievance meeting within five calendar days of receiving your*

grievance" (JB100). A grievance meeting was not arranged within five calendar days of its submission.

(q) The claimant was due to be transferred to the Argyle Street store from 28 March 2021. The claimant did not receive any contact from the respondent informing her when and where she should attend the Argyle Street store. The claimant did not make any contact with the respondent to find out any arrangements re her starting at the Argyle Street store. The store team information on Teams (JB136) shows that that system had not been updated to reflect that the claimant was transferred from the Paisley store. The systems had not been updated in respect of this change because the change required to be inputted by the individual's Line Manger. The systems had not been updated to record that Kirk Russell was Store Manager of the Paisley store, therefore Kirk Russell did not have permission to update in respect of the claimant's change. Kirk Russell was able to update Teams in respect of individuals who had been line managed by him at his previous store, and who had then transferred to Paisley.

(r) Shirley McCullough asked Linda Murray to phone the Claimant to clarify to her the process on team manager movements across the region. That phone call was not intended to be an informal resolution of the claimant's grievance. Prior to making that phone call, Linda Murray did not have sight of the claimant's grievance letter and was not aware of all of the issues raised in that letter. Linda Murray phoned the claimant on 24 March 2021. That call was made to the claimant's mobile phone while the claimant was absent from work due to stress and anxiety. Linda Murray told the claimant that at the regular resource meeting to look at what movements may be required across the region to fill any live vacancies, that had included looking at the new Paisley store. Linda Murray told the claimant that when looking at resources, they don't look at people personally, they just move them into roles where the gaps are, and they don't advertise any vacancies. Linda Murray's position to the claimant that there was no selection process, that the moves were not performance based and that no feedback is collated was contrary to

what Kirk Russell had told the claimant. Towards the end of the call, the claimant confirmed to Linda Murray that she wished her grievance to be heard formally. Linda Murray said that she would let Shirley McCullough know this.

(s) The purpose of the informal stage of the respondent's grievance policy (JB100) is to seek to alleviate and address the concerns of an employee in the first instance, without the need for a vigorous investigation or formal grievance hearing. The telephone call that Linda Murray made to the Claimant on 24 March 2021 was solely to explain the context of the resource meeting. It was not the informal grievance stage. The claimant sought to bypass the informal stage of the grievance procedure.

(t) On 26 March 2021 Carolyn Laughton was appointed as the manager to hear the claimant's grievance. That is shown in JB179.

(u) On 29 March 2021 the claimant handed in her resignation letter in person at the Paisley store. Her reasons for resigning were as set out in that letter (JB129 – 130). Prior to resigning the claimant had checked Teams and noted that she was still on the rota to work in Paisley, although she was due to start in Argyle Street and had not been contacted about where and when she should attend the Argyle Street store. The claimant did not try to contact the respondent about the arrangements for her start at Argyle Street. The claimant had not received a notification through the People System that her details had been updated re the change to Argyle Street. At that time the claimant was still certified as unfit for work.

(v) On 31 March 2021, the claimant received a call from Carolyn Laughton (Food and Hospitality Commercial Manager, Glasgow Pollok store). The claimant missed the call and called her back. Their conversation lasted 2 minutes 16 seconds (as shown in JB133). Carolyn Laughton told the claimant that she had been appointed to hear her grievance. Caroline Laughton asked the claimant to reconsider her resignation and seek to resolve matters. The claimant expressed her concern at having had no contact about her grievance for 13 days. The claimant said that

she had resigned and that the matter had been passed to ACAS. Carolyn Laughton then sent an email to the claimant (JB131). That email stated:-

> *"Thank you for calling me back today regarding setting a date for a hearing for your grievance raised on 18th March. I am just confirming in writing that since you have no resigned on 29 March 2021 who have told me that you no longer want to go ahead with attending a grievance hearing.*
>
> *During our telephone conversation you raised that it had been 13 days from raising your grievance and you had not yet had a response. I'm sorry to hear your disappointment in this and wanted to take the opportunity to explain. The purpose of the call with Linda Murray on 24th March was to discuss the grievance and see if you could resolve your points informally. This informal approach should usually be attempted by a colleague before a formal grievance is raised, in line with the M&S grievance policy. Linda as part of the regional resource team and so wanted to offer an explanation and reassure you. I appreciate that you did not wish to resolve this informally.*
>
> *I would really like the opportunity to explore the grievance with you formally, prior to your resignation. I understand you have already expressed your desire to resigned with immediate effect, but I would encourage you to spend 48 hours reconsidering this. If you do change your mind and would like to attend the hearing, I am more than happy to arrange this for you. Alternatively, if you would like to submit anything in writing that supports your points of grievance, including a copy of your contract, and detail of the outcome you are looking for, then please email me by Saturday 3rd April.*
>
> *Thank you and I look forward to hearing from you soon.*

(a) Also on 31 March 2021 the claimant sent an email to Shirley McCullough (JB131 – 132) in the following terms:-

"*I am writing to let you know that I have just received a call from Carolyn Laughton to say she has been appointed as my grievance hearing manager.*

I am unsure if Kurt Russell has informed you, but I resigned with immediate effect on Monday, 29 March 2021 stating constructive dismissal. He would have read this letter yesterday as I left it on his desk on Monday and he was on holiday until yesterday.

I have now received a call to arrange a grievance hearing this afternoon - 13 days after the grievance was submitted and I was told on a phone call with Linda Murray last Thursday 24th March that even if I go ahead with my grievance it won't change anything.

I have also attached the said resignation letter and cc my personal email should you need it."

(b) Shirley McCulloch replied to the claimant on 31 March (JB132) in the following terms:-

"Thank you for your email, apologies for the short delay in response, I have been driving home and just picked it up.

I am aware of your resignation and am so sorry that you feel this cannot be resolved.

I have also seen your grievance, and reading the detail, was conscious that an informal resolution to this hadn't been attempted before you had submitted your formal letter. I therefore asked Linda Murray as one of our manager resource managers, to give you a call to talk

through how we manage our team resource across the 2021region .

I thought it may have been reassuring and useful for you to hear how we approach this, and that we do this on a regular basis across all stores on the region.

I appreciate you don't want to resolve informally and that you have resigned with immediate effect but as you have raised these points of grievance with us, we would still now like to formally investigate these for you. I have asked Carolyn Laughton to do this. Carolyn will be the contact for any future communication regarding any grievance points.'

(c) After the claimant's resignation the respondent investigated the matters raised by her in her grievance letter dated 16 March 2021. The outcome of that investigation was sent to the claimant in letter sent to the claimant by email on 10 May 2021 (JB150 – JB158). The grievance was not upheld.

(d) The Paisley renewal store opened on 25 May 2021..

Submissions

15. Both parties provided written submissions, which will not be repeated here. Reference is made to parties' submissions below.

16. In summary, the claimant asked that the Tribunal accept her position in evidence as being the truth.

17. The respondent's representative submitted, in summary, that there had been no breach of the claimant's contract of employment, either individually or cumulatively. The respondent's position was that the claimant resigned in response to the fact that she disagreed with her allocation to the Argyle Street store, and that that allocation was carried out in line with the

provisions of her contract. It was submitted that there is no evidence to support the claimant's assertion that she was treated less favourably due to her status as a part-time worker . It was submitted that there was not sufficient evidence to establish either PCP or relevant disadvantage for the purposes of the s.19 ~~EqA 2010~~ claim.

18. The Tribunal accepted the respondent's representative's position that the claimant could not be successful in both her claim that she had been selected to move to Argyle Street because of her part time worker status and also in her claim that she had been discriminated against contrary to section 19 of the Equality Act 2010 because the respondent had failed to consult with her and consider her childcare responsibilities (as part of her circumstances). It was noted that the claimant's position was clarified as being that she relied on the respondent having considered her part time status and making decisions based on her hours worked.

19. The respondent's representative relied upon the following cases:-

Kaur v. Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 (CA)

Braganza v BP Shipping Ltd [2015] UKSC 17 (SC)

Engel v. Ministry of Justice [2017] ICR 277 (EAT)

Carl v. University of Sheffield [2009] IRLR 616 (EAT)

Ishola v. Transport for London [2020] EWCA Civ 112

Comments on Evidence

20. The claimant was largely consistent in her evidence. It was noted that she was not willing to make concessions e.g. that what was said to her by Kirk Russell was not in itself derogatory (re the claimant taking minutes), that there was no requirement for discussion about the relocation to be formal, that not all managers from the old Paisley store had moved to the renewal store. The claimant did not accept the respondent's representative's position that her

arguments were contradictory re whether the respondent considered her part time status or not when moving her to Argle Street. Although the claimant was found to be largely credible, her perception of the cause of some events or decisions was not always accepted.

21. The claimant's position on what Kirk Russell had said to her at the meeting when she was told that she would be moving to Argyle Street did vary during her evidence in respect of some details. The claimant was however consistent that Kirk Russell had mentioned childcare. That was admitted by Kirk Russell in cross examination. The Tribunal accepted the claimant's reliance in her submissions on Kirk Russell's admission under cross examination that in his discussion with the claimant at that meeting he said '*they'll sort out your childcare'*. The Tribunal accepted the claimant's reliance on that not having been the position in Kirk Russel's witness statement. The Tribunal considered that to be very significant with regard to Kirk Russell's credibility and reliability. Given Kirk Russel's position under cross examination, the Tribunal accepted the claimant's position that Kirk Russell did not say what is set out in his statement on page 8 at paragraphs 30-33. The Tribunal noted that under cross examination Kirk Russell admitted that he had assumed the claimant had childcare considerations. The Tribunal accepted his position in cross examination that he had mentioned childcare to the claimant because he '*assumed she would be worried about it'*. The Tribunal accepted the claimant's position in her evidence that because Kirk Russell did not mention her skills and experience and did mention that she worked part time and childcare, that she took that to mean that those issues were at the forefront of his mind, rather than seeking to provide any reassurance to the claimant. That then led the claimant to believe that she had been selected to move because of her part time worker status. That belief could have been avoided had Kirk Russell handled the discussions with the claimant better. The claimant's in cross examination was '*I was moved out to allow others to be moved in'.* The Tribunal accepted that position. The reason was that the claimant had not been identified as future talent, not her part time worker status. The Tribunal accepted that the respondent had a need for a Manager at the Argyle Street store with Food experience, that the claimant

had that experience. There were other Managers who also had experience in Food. The claimant's position in cross examination of there being such a manger who lived in Argyle street was not disputed by the respondent.

22. The Tribunal accepted the claimant's reliance on Linda Murray's evidence that Kirk Russell attended that Resource Forum to help make decisions on staffing and put forward staff for the renewal Paisley store, even though he is not a Regional Lead. The Tribunal accepted the claimant's reliance on the position in Linda Murray's statement that she was not aware of the terms of the claimant's grievance and that her phone call to the claimant was not the informal stage of the grievance procedure. That phone call was not the informal stage of the dealing with the claimant's grievance. The Tribunal accepted the claimant's reliance on Linda Murray's position in her evidence that her role was purely to inform the claimant of the procedures within their resource meeting, that she was not calling to conduct an informal resolution to the claimant's grievance and that she had not seen the grievance. There was no documentary evidence to support the position that that contact had been intended to be the informal stage of the grievance process. The Tribunal was not impressed with Shirley McCullogh's evidence in that regard. That was inconsistent with the documentary evidence and Linda Murray's credible evidence. At best, there was a lack of clarity Shirley Mccullogh and Linda Murray on the purpose of Linda Murray's call to the claimant. At worst, Shirley McCullogh's position to the claimant in her email of 31 March (JB132) was disingenuous in that regard.

23. Linda Murray was found to be an entirely credible witness. The Tribunal noted the claimant's position in her evidence that she was intimidated by what she understood Linda Murray's reputation to be, rather than by Linda Murray in her conversation to her. Taking into account the claimant's evidence and Linda Murray's evidence the Tribunal accepted Linda Murray's position that she did not say to the claimant on that phone call that her grievance would not change anything. The Tribunal accepted as plausible and credible Linda Murray's evidence that she had asked the claimant if what she had said

'*changed anything for her'*. The Tribunal accepted Linda Murray's position that she was not appointed to deal with the grievance and had not undertaken that call as part of the grievance process. The Tribunal found her position in respect of the entry at JB179 to be reliable. The Tribunal accepted her evidence that '*I've been with M&S for 43 years and I've been a manager for 20 years. I'm really clear that no decision is made until the hearing manager is appointed. Anything can change. The whole point is that it is an independent person who hears the grievance*.' That was considered to be significant.

24. The Tribunal accepted the evidence of the respondent's witnesses that part-time/full-time hours were not a consideration when deciding where to place staff during the resource forum. It was accepted that at the level of manager the decision was made on skills and experience and that that could mean that a store may be over or under resourced with managers, as the manager resource was taken on a regional basis. That was consistent with the evidence that from manager level there is a mobility clause in the contract of employment. The Tribunal accepted Kirk Russel's undisputed position in his evidence that the claimant would have controlled budget on a store basis rather than a regional basis. In these circumstances, and where the claimant as a manager was used to preparing staff rota and taking into account the number of hours worked by colleagues who were below manager level and did not have a mobility clause in their contract of employment, the claimant's perception that her hours of work must have been taken into account was understandable. Her evidence was '*they would have to be aware of part time hours to resource the region.*' The Tribunal accepted Shirley McCullogh's evidence that at the resource meeting *'it is about the vacancy, not the hours.'*

25. The Tribunal accepted the claimant's reliance in her submission on Kirk Russell's position under cross examination that space had to be created to enable the "future talent" to be placed in the new Paisley store. The Tribunal accepted the claimant's position in her submission that priority space was given to those deemed "future talent" to be placed in Paisley rather than the claimant. It was Kirk Russell's evidence that at the resource meeting they were '*reviewing the resource for the new store and wanted to create space*

for future talent'. His evidence was that it was his perception that that was the '*deciding factor*.' The Tribunal accepted Linda Murray's evidence that at the resource meeting Kirk Russel had '*the opportunity to put forward the type of experience he was looking for.'*

26. In respect of Linda Murray's phone call to the claimant, Shirley McCullough's evidence was '*I spoke to the Policy team who advise on situations like this. I made the decision that maybe aspects were unclear…..I made the decision to have that call with (the claimant).'* When asked what the purpose of the call was, Shirley McCullough's evidence was '*To help understand the process gone through and the purpose of the forum*.' That was inconsistent with her position that the call was part of the grievance process.

27. The respondent did not dispute the claimant's evidence that throughout her time at the Paisley store, the claimant had had no attendance, capability, performance or disciplinary issues. The respondent did not dispute the claimant's evidence that she was a capable and knowledgeable food manager who also had years of experience as a Manager in Operations, Clothing, Home and with People and Performance.

28. The Tribunal has made findings in fact which are relevant to the issues before it. Not all evidence heard was relevant to these issues.

29. The Tribunal placed no weight on the content of the written statement from Carolyn Laughton because she did not attend the hearing and there was no opportunity for her evidence to be tested in cross examination. The findings in fact involving Caroline Laughton are taken from the claimant's cross examination. The fact that Caroline Laughton asked the claimant to reconsider her resignation and seek to resolve matters was very significant with regard to the claimant's constructive dismissal claim.

Decision

<u>Constructive Dismissal</u>

30. The Tribunal accepted the respondent's representative's reliance on the claimant's evidence that she had discussions about her relocation with Karen Latta and with Kirk Russell. The Tribunal accepted the respondent's representative's submission that the contract of employment does not require formal consultation prior to relocation of a manager. There was discussion with the claimant about the relocation, by both Karen Latta and Kirk Russell. The Tribunal accepted that that there is nothing in the contract of employment which provides that 'discussion' has to be in the form of a formal, documented meeting.

31. The Tribunal accepted the respondent's representative's submission that on the claimant's own evidence her complaints about Kirk Russell's behaviour toward her were in respect of the way the claimant felt rather than any particular examples of inappropriate behaviour. Although the Tribunal accepted the claimant's evidence, it did not conclude that that behaviour was sufficient to be a repudiatory breach of contract, particularly in circumstances where the claimant resigned prior to any resolution being able to be achieved through the grievance procedure.

32. The Tribunal accepted the respondent's representative's reliance on the claimant not having taken any steps to make enquiries re starting work at the Argyle Street store on her return form sick leave. The Tribunal accepted Kirk Russell's evidence as to why he was unable to process the claimant's transfer on the system. The Tribunal accepted that there was no evidence to suggest that the claimant would have had any difficulty with starting at Argyle Street upon her return to work from sick leave.

33. The Tribunal accepted that the use of the word 'normally' within the grievance policy gives the respondent scope for arranging a meeting outside of the 5 day timescale. The Tribunal accepted that the delay in this case did not amount to a 'last straw' for the purposes of the guidance in Kaur.

34. The Tribunal accepted that there is a distinction between managers and other colleagues, because those above Manager level have a mobility clause in their contract of employment.

35. The Tribunal accepted the claimant's position in respect of Kirk Russell's behaviour towards her. He clearly had his own agenda in respect of those he wished to join him in the Paisley renewal store and the claimant did not fit with that because she had not been identified as future talent. Kirk Russell could certainly have handed the situation with the claimant better. He could have communicated with her better in respect of the purpose of his meetings with her, rather than '*a quick catch up'*. By mentioning her part time hours and childcare, he clearly gave the claimant the impression that these were factors taken into consideration in deciding to move her. Kirk Russell's position in evidence was that they weren't mentioned '*as an issue'*. The claimant's perception that her childcare commitments and part time status were the deciding factors was understandable given they had been mentioned by Kirk Russell at that meeting. The Tribunal accepted the claimant's position that Kirk Russel's position in evidence was not entirely consistent with his position in the note so the grievance investigatory meeting (JB139).

36. It was put to the claimant that the lockdown restrictions caused delays. The claimant's position in response was '*I worked the whole way through lockdown. These people were still available. I know the process. You don't keep people hanging. You write to people inviting them to a meeting within 24 hours. All they had to do is to pick up the phone and say 'we're stowed out but we've got your grievance''.* The Tribunal accepted that criticism but required to consider whether in those circumstances there had been a breach of contract. It was noted that it was not the respondent's witnesses' position that the lockdown restrictions had caused delay in dealing with the claimant's grievance.

37. The claimant's position in her evidence was that she was not her children's primary carer and that she could have made changes to work full time, if that was what was required. It appeared that the respondent was seeking to be careful not to ask the claimant to change her hours, and that was not required by them, but they did not give the opportunity for the claimant to consider options and have discussions in a constructive way. However, the Tribunal accepted that the situation was capable of being resolved through the grievance procedure. By resigning on 29 March 2021, without pursuing the

grievance she had raised, the claimant did not allow the possibility of matters being resolved. The Tribunal accepted that the claimant felt that she could not go on. However, the facts and circumstances had to be considered against the relevant law, including relevant authoritative case law. The Tribunal required to take an objective approach. The Tribunal applied the guidance in Kaur and accepted the respondent's representative's submissions that following Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 (HL) there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held.

38. The Tribunal accepted the respondent's representative's submission that even taking all of the alleged breaches together at their height, the respondent's conduct was neither calculated nor likely to destroy or seriously damage the relationship of trust and confidence between the parties. The respondent acted within the terms of the contact of employment. There was a mobility clause for those on the claimant's grade and above. The situation could have been resolved with discussion. That discussion could have taken place in the context of the grievance raised by the claimant. The claimant was willing to be flexible and the respondent sought to resolve matters raised in the grievance. That would have allowed a discussion with the claimant about her experience and a resolution which was acceptable to both the claimant and the respondent may have been achieved. The Tribunal did not accept the claimant's position in her evidence that *'things were too far gone'* to be resolved. The claimant resigned prior to concluding the grievance process. As set out in the ACAS Code of Practice of Disciplinary And Grievance Procedures, employees have a responsibility to seek to resolve their grievance through the formal process. In the circumstances of this case there had not been a repudiatory breach of contract and the constructive dismissal claim is unsuccessful.

39. In respect of the issues for determination:-

(i) Did the respondent conduct itself in a manner calculated to destroy or seriously damage the relationship of trust and confidence between the parties?

On the basis of the findings in fact, no.

(ii) Did that conduct cause or significantly contribute to the claimant resigning from her employment?

Yes

(iii) Did the claimant resign in response to that conduct or for some other reason?

In response to the conduct.

(iv) Was the claimant dismissed by the respondent?

No

40. The Tribunal is not without criticism of the respondent in respect of the circumstances of this case, particularly in respect of the following:-

41. Strikingly, the decision to move the claimant to Argyle Street was based purely on her then current position as Food Manager, with the decision makers being unaware of the claimant's previous considerable experience as Operations Manager. There was no evidence of any checks being made for resource decisions to ensure that all relevant experience was taken into consideration when applying the mobility clause in managers' contracts of employment. Shirley McCullough's evidence was that decisions were taken at resource meetings based on the individuals skills and experience. It was her evidence that that consideration was '*in the main their current role'*. Kirk Russell's evidence was that one of the Managers moved to the Paisley store had been chosen because of their 'significant operational experience'. He was not aware of the claimant's significant operational experience. His evidence was that the decisions on resourcing the renewal Paisley store was based on '*knowledge within the room*.' Linda Murray's evidence was that they were *'not aware of (the claimant's) other experience.*' Shirley McCullough's evidence

was that she would 'invite Store Managers on a regular basis to talk about their Team Managers'. She confirmed that she relied on information from the Store Managers about individual Team Managers. There was no evidence of any checks in this process. The Tribunal accepted the claimant's reliance in her submission on the admission by the respondent's witnesses that they were not aware of her skills or experience when making resourcing decisions and moves. The Tribunal accepted the claimant's submission that it was clear from the position of the respondent's witnesses under cross examination that they knew very little about the claimant's experience throughout all store positions. The Tribunal accepted the claimant's position in her submissions that the respondent's witnesses did not check the claimant's working background or full skill set within Marks and Spencer. That was a striking omission but it could not be inferred that that was because of the claimant's part time status.

42. The process for identifying 'future talent' did not appear to be robust. At best, the system was not transparent. The claimant did not appear to be aware of the importance of being identified as future talent. Her evidence was that she was '*not aware of that as a thing'* and that 'future talent' was not identified in the respondent's policy and values. That was not disputed. Kirk Russel's evidence was that colleagues would be identified as future talent from discussions with their Line Manager as part of their performance review, and if they had been ranked as 'achieved role, often exceeds or consistently exceeds'. The claimant's position in her evidence that the last time she had a performance review was in 2019 was not disputed. There was no dispute to the evidence that the claimant had a clean disciplinary and absence record throughout her time working for the respondent. The identification of future talent was by the Line Manger. Kirk Russell could not comment on the claimant's position that she had not had a performance review for nearly 3 years. There was no evidence of any checks in place to ensure that appropriate identifications of future talent had been made by the claimant's previous Line Manager.

Part Time Workers Regulations

43. The claimant's evidence was that in the old Paisley store there has been '*3 Team Managers, 1 Store Manager and one other manager helping out."* Her position was that the other Manager in the Paisley store who did not move to the renewal store was not part of the 'core' management team. She did not dispute that that other Manager had been based at the old Paisley store and had not moved to the Paisley renewal store. It was very significant that another Manager from the Paisley store, who had not worked part time, was not moved to the Paisley renewal store. Those facts did not support the claimant's position that she had not been moved to the renewal store because of her part time status.

44. The Tribunal found that although the claimant had a genuine belief in that she had been selected on the basis of her part time hours, the evidence before the Tribunal did not prove that that was the reason. The claimant did not move to the renewal store because the respondent took steps to move those who had been identified as future talent into that store and the claimant had not been identified as future talent.

45. The Tribunal accepted the respondent's representative's submissions that on the evidence the claimant's part-time worker status was not the effective and predominant cause of the treatment complained (moving her to the Argyle Street store). The Tribunal accepted the evidence of the respondent's witnesses that part-time/full-time hours were not a consideration when deciding where to place Managers.

46. The Tribunal accepted the respondent's representative's submissions that in the absence of the treatment being motivated by part-time status the claims under these Regulations fail.

47. In respect of the issues for determination:-

- Did the respondent subject the claimant to less favourable treatment by directing that she move to the Argyle Street store?

  Yes

- Was any such less favourable treatment because the claimant was a part time worker?

  No

Equality Act section 19 - Indirect Sex Discrimination

48. The Tribunal approached its considerations of the claimant's claim under the Equality Act in terms of the Burden of Proof provisions as set out in s136 of Equality Act 2010 and the Barton Guidelines as modified by the Court of Appeal in *Igen Ltd. (formerly Leeds Careers Guidance) and ors. –v- Wong and others* 2005 ICR 931, CA (as approved by the Supreme Court in *Hewage –v- Grampian Health Board* [2012] IRLR 870).

49. In the Equality Act claim, if the claimant had proven facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the relevant provision, the Tribunal would assume that there was no adequate explanation for those primary facts. The burden of proof would then move to the respondent. The Tribunal required to assess whether the respondent had proved a non-discriminatory explanation for the primary facts adequate to discharge the burden of proof, on the balance of probabilities. The respondent required to present cogent evidence to discharge the burden of proof.

50. The PCP relied upon by the claimant was the alleged practice of relocating managers without prior consultation or reasonable consideration of their prior working hours and circumstances. The Tribunal accepted that that position was contrary to the claimant's case that she was selected for the move to the Argyle Street store because respondent had considered her part-time status and childcare arrangements, which was the claimant's final position.

51. It was not the claimant's position that she could not work full time because of her child care commitments. The claimant's position was that she could and would have made changes to her family circumstances to work full time.

What was important to the claimant was that she continue to be based in Paisley. That was not recognised by the respondent.

52. The Tribunal determined 'the crucial question' as identified by Lord Nicholls in *Nagarajan v London Regional Transport [*1999] IRLR 572, 575 i.e. the reason why reason why the claimant was treated as she was. The reason the claimant was moved from the Paisley store was because she was not identified as 'future talent'. The evidence did not support the claimant's position that she was moved from Paisley because she worked part time hours.

53. The Tribunal considered whether an inference of discrimination could be drawn from the primary facts. It was very significant that at the resource meeting decisions were made on vacancies and not hours, and that at Manager level resource is calculated on a regional basis so a particular store may be over or under resourced in Managers' hours. Following the *Barton* guidelines, as amended in *Igen*, the claimant did not prove facts from which the ET could, apart from section 136 EqA, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the purported unlawful act of discrimination against the complainant. An inference of discrimination could not be drawn from those primary facts. The burden of proof did not move to the respondent.

54. The Tribunal accepted the respondent's representative's submission that that the 'pool' for this alleged PCP would be all managers with the same/similar mobility clause. The Tribunal accepted the respondent's representative's submission that this is not the type of case that falls within the examples given in Dobson where it might be said that the childcare disparity would logically lead to group disadvantage. The Tribunal accepted their reliance on the PCP relating to location of work rather than hours/flexibility. The Tribunal accepted the respondent's representative's submission that the claimant has provided no evidence to suggest that the PCP as pleaded would place female employees at a disadvantage when compared to their male

counterparts. The Tribunal accepted the respondent's representative's submission that there was no evidence that the claimant was or would have been placed at the particular disadvantage. The Tribunal accepted their reliance on the claimant's evidence that her husband was the primary carer for the children and that she made no enquiries as to whether the new store would have been able to accommodate her taking the children to school.

55. In respect of the issues for determination:-

- Did the respondent apply the practice of relocating managers without prior consultation or reasonable consideration of their prior working hours and circumstances?

  Yes. The mobility clause in managers' contracts was used to resource stores on a regional basis. The managers' working hours were not considered as part of that process. The managers current role, the distance of their commute and whether or not the manager had been identified as future talent were considered.

- If so, to whom was that practice applied?

  To employees with a mobility clause on their contract of employment i.e. manager level and above

- Did that practice put, or would it put persons of the same sex as the claimant at a particular disadvantage compared with others?

  No evidence has been heard on the particular disadvantage to woman compared to men. The Tribunal accepted the respondent's representative's submissions that in the facts and circumstances of this case the 'childcare disparity' can not be taken as accepted.

- Did that practice put the claimant at that disadvantage?

  Yes

- Was that practice a proportionate means of achieving a legitimate aim.

Yes. The business needs of the operation were that decisions had to be made in respect of resourcing. If the move was not accepted by the employee, they had the opportunity to seek resolution through the Grievance Procedure.

56. For these reasons the claimant's claim under section 19 of the Equality Act 2010 is unsuccessful and is dismissed.

57. As all of the claims are dismissed, the claimant is not entitled to compensation.

Employment Judge: Claire McManus
Date of Judgment: 07 January 2022
Entered in register: 07 January 2022
and copied to parties