Neutral Citation Number: [2025] EAT 20

Case No: EA-2024-000256-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 19 February 2025

Before :

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT)

Between :

MARSTON (HOLDINGS) LTD

Appellant

- and –

MRS A PERKINS

Respondent

- -
- -

Lydia Seymour and Elizabeth Grace (instructed by Lindsay Neal, in-house solicitor) for the **Appellant**
Naomi Ling (instructed by Advocate) for the **Respondent**

Hearing date: 21 January 2025
- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 17 February 2025

SUMMARY

Indirect sex discrimination – section 19 Equality Act 2010

Unfair dismissal – reason for dismissal – redundancy – section 98 Employment Rights Act 1996

The claimant had complained of indirect sex discrimination arising out of a provision, criterion or practice ("PCP") that she travel significant distances, which put her at a disadvantage due to her childcare responsibilities. She had also complained of unfair dismissal. The Employment Tribunal ("ET") had upheld both claims. The respondent appealed.

Held: allowing the appeal

Indirect sex discrimination

It was unclear from the reasons provided whether the ET had approached the question of group disadvantage on the basis that the childcare disparity meant this was intrinsic in the PCP or simply an obvious consequence of it. It had also failed to properly engage with the application of the PCP as a general rule, rather than in terms of its particular application to the claimant.

Unfair dismissal

Although the ET had appeared to accept that the claimant had previously accepted that she had been dismissed by reason of redundancy, it considered she should not be bound by that earlier statement of her position, going on to find that she had not been made redundant and that the respondent had failed to demonstrate a fair reason for the claimant's dismissal, which was thus unfair. The respondent had, however, understood that redundancy, as the reason for dismissal, was not in dispute and it was unfair for the ET to adopt the course that it did without first permitting the parties to address this issue. Moreover, the ET's reasoning did not properly engage with the ways in which the respondent had put (or would have put) its case, such that it could not properly understand why it had lost.

THE HONOURABLE MRS JUSTICE EADY DBE (PRESIDENT):

Introduction

1. The questions raised by this appeal relate to the approach an Employment Tribunal ("ET") should take to issues of group disadvantage and justification in a complaint of indirect sex discrimination, and to the determination of the reason for dismissal in a claim of unfair dismissal when the claimant had earlier accepted that she had been dismissed by reason of redundancy.

2. In giving this judgment, I refer to the parties as the claimant and respondent as below. This is the full hearing of the respondent's appeal against the judgment of the ET sitting at Liverpool (Employment Judge Ainscough sitting with Mr P Dodd and Mrs J Pennie over three days in August and October 2023, with a further two days of deliberations in chambers in October and November 2023), sent out to the parties on 16 January 2024, upholding the claimant's claims of indirect sex discrimination and unfair dismissal. The respondent appeals against that judgment on seven grounds, falling under the following headings: (1) indirect sex discrimination: disadvantage (grounds 1-4); (2) indirect sex discrimination: justification (ground 5); (3) unfair dismissal: reason for dismissal (grounds 6 and 7).

3. The claimant acted in person before the ET and at all earlier stages of the appeal; for the purposes of this hearing, however, she has had the benefit of representation by Ms Ling of counsel, acting *pro bono*. The respondent appeared by counsel before the ET, although not by Ms Seymour and Ms Grace, who now represent its interests.

The factual background

4. The respondent is a national company concerned with the enforcement of penalties, such as unpaid council tax, parking fines and so on. The claimant's continuous employment started in 2005, albeit her contract was dated 2009; she was employed by the respondent as Head of Enforcement, Local Taxation, and her contract recorded that her place of work was Helmshore. As Head of Enforcement (a grade 3 manager role within the respondent), the claimant was responsible for the management of the administrative team and for field agents; as the ET found, there was no contractual requirement for her to travel within her role. At the relevant time, the claimant had primary caring responsibility for her two children, both under five.

5. During the course of 2021, the respondent's enforcement services division was re-structured. On 27

July 2021, the claimant's then line manager (Ms Alessi) advised that it was the respondent's intention to create one enforcement services centre, based in Helmshore, to be managed by the claimant as Head of Enforcement Services/Head of Enforcement Services Centre; the management of the field based enforcement agents would be transferred elsewhere, but enforcement work from Darlington, Epping and Birmingham would transfer to Helmshore and the claimant would be responsible for a bigger administrative team. The ET found that the claimant experienced no reduction in her work as a result of this re-structure, although there was a change to the tasks she was required to undertake.

6. At the end of July/early August 2021, Mr Burton became the claimant's line manager. In September, October and November 2021, the claimant declined to attend face-to-face team meetings in (respectively) Epping, Birmingham, and Daventry, explaining that this was due to her childcare responsibilities; on each occasion, Mr Burton accepted she could attend the meetings remotely, by Teams. On 18 August 2021, the claimant asked Mr Burton for clarification of her new job title and job description; ultimately, in October 2021, she was advised to create her own job description, which she sent to Mr Burton on 1 November 2021.

7. On 28 January 2022, Mr Burton told the claimant she needed to travel to Epping to manage the remaining team members there; the Epping team had raised concerns which (as the ET found) related to Mr Burton's lack of transparency about their roles. In early February, the claimant responded, saying that if her role required travel it was no longer suitable for her, confirming that, although she could travel reasonable distances, she had to be able to return in time for childcare. On 23 February 2022, Mr Burton added the phrase "*travel as when required*" to the respondent's job description for a grade 3 manager. On 3 March 2022, he told the claimant that, if she did not comply with the travel requirement, this could lead to disciplinary action.

8. On 9 March 2022, Mr Burton wrote to the claimant stating it was now the respondent's intention that the Enforcement Services Centre would be spread across Epping, Birmingham and Helmshore; the claimant was told there was a need to travel in her role and have face-to-face meetings, albeit this could be pre-planned to assist with childcare.

9. On 11 March 2022, the claimant submitted a grievance about the lack of job description and the requirement to travel. Mr Burton responded on 24 March 2022, saying she had already informally agreed to

the new role; as the ET found, it was Mr Burton's view that the work the claimant had carried out over the last ten months was in transition to the position now clarified following the restructure. He informed the claimant that the confirmed position was that enforcement services would be transferred to Helmshore as previously advised, but the Epping office would remain open longer than anticipated. Recording the claimant's position as being that she was unable to travel due to childcare, Mr Burton said there was a need to travel to link in with other services and other operational managers (the ET found this rationale differed to the requirement to travel to manage the staff in Epping), and she was officially put on notice of a potential redundancy situation.

10. On 25 March 2022 the claimant responded, saying she was unable to travel and therefore unable to perform the role. In a letter that day, inviting the claimant to a consultation meeting, the respondent's position was stated to be that travel could be limited to one day per month; if this was not acceptable, however, the change would be enforced and could lead to the termination of the claimant's employment by reason of redundancy. On 28 March 2022, Mr Burton clarified that the options for the claimant were either enforcement of the respondent's changes, fire and re-hire under a new contract, or redundancy.

11. On 2 April 2022, the claimant attended the first consultation meeting with Mr Burton and a member of HR; she confirmed that if her employment was to be terminated, she would rather proceed down the redundancy route. Mr Burton advised that, because of her position and seniority, there was an expectation that the claimant would travel; it was said this was the culture within the respondent's business and that travel would break down barriers, whereas a failure to travel could impact on future acquisitions.

12. On 22 April 2022, the claimant was invited to a second consultation meeting, the invitation including the observation that her lack of travel created barriers, and this was the main issue. At the meeting on 25 April 2022, however, Mr Burton was unable to give specific examples of barriers created by the claimant's lack of travel, albeit he reiterated it was the company's culture to travel to meetings. The conclusion of that meeting was that a role existed, but with travel. No alternative roles were identified.

13. On 27 April 2022, the claimant was given notice of her redundancy; by 6 May 2022, she had left the business. The claimant's job was subsequently given to another woman.

14. On 3 May 2022, in one composite document, the claimant appealed against her dismissal and raised a grievance; she complained of unfair selection for redundancy, of a failure to consider alternative

employment, and of indirect sex discrimination (it was the claimant's contention that the practice of requiring Grade 3 Managers to travel significant distances put women (who were the primary carers of children) at a particular disadvantage). After a hearing on 20 May, on 9 June 2022 the claimant was informed of the dismissal of her appeal and grievance, albeit there was no engagement with her complaint of indirect sex discrimination.

The ET claim

15. On 31 August 2022, the claimant presented a claim to the ET in which she complained of unfair dismissal and indirect sex discrimination.

16. The unfair dismissal claim was put as follows:

> "My role as Head of Enforcement Local Taxation was identified for redundancy in July 2021. Despite repeated attempts by myself to be provided with a new job description, no formal process was undertaken at that time or in subsequent months ... I was informally advised of an alternative suitable role, which I agreed to on the basis it was expressed to me. It was not until March 2022, 8 months after I had taken on significant additional workload to enable my transition in to this new role, that the goal posts were moved to include an element of significant travel (to London and Epping which are a 9 hour-plus round trip for me). Furthermore when I had raised my limitations regarding travel over the course of the 8 months, I was told that it was not a problem and could continue to meet via MS Teams as was done throughout the business. As I was unable to fulfil this new requirement (which I believe was a disingenuous requirement), due to childcare limitations, a formal consultation process was undertaken which resulted in my redundancy. Had a formal consultation taken place at the point my role of Head of Enforcement Local Taxation was identified for redundancy, my opportunities might have been different. During the consultation process, I put forward the argument that the alternative role could be undertaken without significant travel; the frequency and reason for the travel both in written correspondence and expressed verbally had been inconsistent with nothing to substantiate the reasons given; however, there was evidence to the contrary demonstrating that it was not company culture or custom. I therefore maintain that there was a reasonable alternative role which I was the most suitable candidate to undertake. I believe the reason this was rejected was because the structure had been pre-determined, which did not involve me in the position ... Therefore, the discussions around travel were disingenuous as this requirement was added as a way to ensure I could not accept the alternative role, and it could therefore be successfully given to the pre-determined individual."

17. In setting out her claim of indirect sex discrimination, the claimant stated:

> "I was very clear to the business that it was not ... that I was unwilling to undertake any travel, but I was unable to commit to the job description including "travel when required", considering the distances involved and time it would take to complete said journeys, for the sole reason of my childcare commitments. I informed them that if my circumstances permitted, I would attend any face to face meeting, but as I hold the burden of childcare for my two young children, I could not commit to a carte blanche statement. Their inconsistencies in correspondence, and unwillingness

> to provide any solid clarification in verbal discussions, created a situation where there was no option for me. The travel locations included London and Epping, which would have involved a 9-hour plus round trip from my home address which they were unwilling to take into consideration. I therefore believe I have been the subject of indirect sex discrimination as a mother and a female. I evidenced to them that adjustments could be made, and in fact in the appeal hearing, it was confirmed that feedback regarding my performance from across the business was "amazing", despite the vast majority of communication held with colleagues remotely. Therefore, the role could have continued to be done with meetings held over MS Teams when required, as is done extensively throughout the business on a daily basis, and I could have continued in the alternative role of Head of Enforcement Services, as offered to me in July 2021."

18. The respondent resisted both claims. In respect of the complaint of unfair dismissal, it contended that the claimant had been dismissed for a fair reason, namely redundancy, a fair procedure had been followed, and the decision was not tainted by discrimination. As for the complaint of indirect sex discrimination, the respondent did not accept that the claimant had been put at a particular disadvantage as a result of the requirement for travel, but, in any event, contended this was a proportionate means of achieving a legitimate aim, namely business efficacy and staff morale.

19. A case management preliminary hearing took place on 16 January 2023, at which it was recorded (relevantly) as follows:

> "(12) The claimant complains about her dismissal. The claimant accepts that she was made redundant by the respondent, in circumstances of a genuine redundancy situation. The claimant further accepts that there was no unfairness in the identification of her as redundant.
> (13) The claimant's *[sic]* will say that the respondent did not make sufficient or proper efforts to find alternative work that would have avoided the need for her employment to be terminated. Specifically, the claimant will say that there was a discussion about a specific role with the title of "Head of Enforcement Services" or "Head of Enforcement Services Center". The claimant appears to accept that an offer of this role was made to her. The claimant will say that the offer was later clarified to involve the need for travel, which she will say she could not easily do due to childcare responsibilities.
> ...
> (17) *Unfair Dismissal*
> (a) There is no dispute that the claimant was dismissed and that the reason for dismissal was the potentially fair reason of redundancy.
> (b) There is no dispute that the claimant was fairly selected as redundant from her role as Head of Enforcement Local Taxation.
> (c) The claimant will say that her dismissal was unfair on the sole ground that the respondent did not make sufficient effort to find a suitable alternative role. The claimant will specifically refer to the role of "Head of Enforcement Services", or "Head of Enforcement Services Center" as an available role that could have avoided the need for her dismissal if the requirement for travel in that role had been removed or reduced sufficiently.
> (18) *Indirect Sex Discrimination*
> (a) The claimant will rely on a Provision Criterion or Practice ("PCP") related to the need for travel in the role she refers to as potentially available.

> (b) The respondent accepts that the role in question was stated to involve the need to travel. The respondent will say that this was clarified to be no more than "once every 1-2 months".
> ...
> (d) The claimant will say that a requirement for travel put her at a disadvantage because she had childcare responsibilities. The disadvantage is that she could not take the role due to these childcare responsibilities and so was dismissed as redundant. The claimant will say that this requirement would be applied to any person filling the role in question, and would be more likely to put women at a disadvantage than men, because more women take primary responsibility for childcare.
> (e) The respondent does not, at this time, concede that, for employees in roles comparable to the claimant's, there continues to be an imbalance of childcare responsibilities between genders.
> (f) The respondent will say that ... any indirect discrimination was justified as a proportionate means to achieve a legitimate aim. The respondent's representative indicated that the respondent relies on business efficacy and staff morale as legitimate aims."

20. The ET having allowed the claimant further opportunity to clarify how the provision, criterion or practice ("PCP") was to be framed, she subsequently explained that this was "*The requirement to undertake travel including of significant distances*". This was incorporated into the final list of issues.

The full merits hearing and the ET's decision and reasoning

21. At the full merits hearing in August and October 2023, the claimant disputed that her role was redundant; she maintained that the position was still being performed, but with the requirement to travel. Even if there was a redundancy situation, the claimant contended that a suitable alternative would have been a role with travel within a reasonable distance, although it was her case that she could in fact manage the team remotely. The claimant further argued that she had proven group disadvantage, as women were the primary carers of children, and that she had suffered an individual disadvantage because she was unable to obtain childcare over and above that she already had in place.

22. For the respondent, it was contended that the reason for the claimant's dismissal was redundancy, a point that had not been put in dispute; rather, the issue for the ET was whether the dismissal was within the band of reasonable responses. In this regard, the respondent submitted that requiring the claimant to travel significant distances in her new role was a reasonable alternative, particularly as it had sought to minimise this and to help arrange travel in line with her childcare. As for the complaint of indirect sex discrimination, noting that the PCP relied on by the claimant was a "*requirement to undertake travel including of significant distances*", the respondent "*accepted that this PCP was applied to employees doing C's role and that it*

would be applied to men and women". Acknowledging that the ET could take judicial note of the fact that women were primary carers of children, the respondent argued this was insufficient to prove group disadvantage, observing that there was no statistical or actual evidence that others were unable to comply with the requirement to travel significant distances; further, there needed to be evidence that this disadvantage was caused to the claimant. In any event, the respondent contended that this was a proportionate means of achieving its legitimate aims of improving business efficacy and staff morale, relying in this regard on the evidence of Mr Burton, who had spoken of why in-person meetings were considered necessary in the respondent's business in helping to "*break down barriers and cement relationships*", in particular in coming out of the pandemic and where flexibility was needed "*with new acquisitions, to properly transition knowledge*".

Indirect sex discrimination

23. Considering first the claimant's complaint of indirect sex discrimination, the ET approached this on the basis that the respondent admitted the PCP "*of requiring the claimant to travel significant distances within her role*". The ET found this was a PCP applied equally to men and women grade 3 managers.

24. Referring to the judgment of the EAT in **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699, the ET stated that it had:

> "74. ... taken judicial notice of the fact that women are the primary carers of small children".

25. The ET also said it had "*taken note*" of paragraph 4.11 of the **Equality and Human Rights Commission's Employment Statutory Code of Practice** ("the EHRC Code") *"- that [a PCP] can be intrinsically liable to disadvantage a group with a particular protected characteristic*". In fact that sentence derives from paragraph 4.10 of the **EHRC Code**; paragraph 4.11 refers to situations in which "*the link between the protected characteristic and the disadvantage might be obvious*".

26. The ET concluded that:

> "76. ... a woman who is the primary carer of two small children would not be able to perform all elements of the Grade 3 management role with a requirement to travel significant distances, because of the difficulty in finding childcare to cover the hours the woman would be away from home."
> Further explaining:
> "77. The Tribunal took judicial notice of the fact that, unless a woman can employ a live in childcare provider, it is only possible to secure childcare between the hours

> of 7am and 6pm. The requirement to travel significant distances would require a woman to leave home before 7am and return after 6pm. The requirement to travel significant distances would therefore put women, as primary carers, at a particular disadvantage."

27. The ET found the pool for comparison was all grade 3 managers, within which the claimant was the only woman. It found:

> "78. ... female Grade 3 managers, as primary carers, in comparison with male Grade 3 managers, would be put at a particular disadvantage by the requirement to travel significant distances."

28. As for the claimant's position, the ET accepted her evidence that her husband was not available to care for their two small children and that it was impossible to obtain childcare for long durations to allow her to leave home in the early hours and return late in the evening without hiring a live-in childcare provider. Finding that, as a result of the application of the PCP, the claimant could be expected to travel to Epping, Sheffield, Birmingham and London, the ET accepted that, on the balance of probabilities, it was unlikely she would be unable to return by 6.00pm to pick up her children from childcare, further noting that, in order to get to these locations, she would have to leave in the early hours, when no childcare was available. The ET accordingly held that the PCP put the claimant at a disadvantage as she could not perform that part of the role.

29. Turning to the question of justification, the ET recorded the respondent's contention that the PCP was justified on the basis of business efficacy and staff morale. In relation to staff morale, the ET found the issues relied on by the respondent arose from concerns held by the Epping team relating to Mr Burton and another manager. On the evidence before it, the ET was satisfied that the claimant had the confidence of the Epping staff despite the remote management. As for the potential creation of barriers to relationships and the effect this might have on future acquisitions, the ET found this had nothing to do with the claimant, and agreeing to restrict travel for her would not have set a dangerous precedent for future acquisitions; more generally, the ET concluded there was no evidence that such an agreement would be detrimental to the running of the respondent's business. In this regard, the ET noted that Mr Burton had been unable to provide details of any suggested barriers at the second consultation meeting and there was no evidence that the claimant had been unable to manage the team or that her performance had been hindered as a result of not travelling in the previous ten months. The ET concluded:

> "85. ... it was not proportionate to require travel of significant distances in the

> claimant's role to fulfil the aim of business efficacy and staff morale. Instead, it appears that this was the culture within the respondent and something that the respondent wanted but not what was needed.
> 86. The claimant had done the job for a period of ten months without complaint and had the confidence of the staff in contrast to David Burton who was working face to face with staff. The Tribunal determines it was not reasonably necessary to travel significant distances to achieve the legitimate aims.
> 87. The claimant was willing to travel reasonable distances and meet face to face or virtually if significant travel was required. The Tribunal determines the legitimate aims could have been achieved in this way."

30. The ET therefore upheld the claimant's complaint of indirect sex discrimination.

Unfair dismissal

31. Considering first the reason for the dismissal, the ET noted that, in her ET1, the claimant had asserted that this was redundancy, although she complained that her dismissal for this reason had been unfair. Similarly, the list of issues (drawn up at an earlier stage in the proceedings) had recorded that:

> "The parties agree that there was a potentially fair reason for dismissal under section 98 Employment Rights Act 1996, namely redundancy."

At the full merits hearing, however, in her evidence and submissions, the claimant disputed she had been dismissed for redundancy, contending there was no reduction in the work she had performed and pointing out that Mr Burton's evidence was that the respondent had opted for redundancy rather than a disciplinary process in respect of what it said was the claimant's breach of contract.

32. The ET appeared to accept that the claimant had conceded the issue of redundancy at an earlier stage, but did not find this was conclusive, holding:

> "96. ... the Tribunal does not determine that the claimant's concession during the case management hearing was binding on the claimant. The claimant is a litigant in person, and it is clear from appeal and grievance and from the evidence she gave during the final hearing and in submissions that she only opted for the redundancy reason because she did not want the respondent to pursue a disciplinary investigation."

33. Going on to consider whether there was a redundancy, accepting that the claimant's job title no longer existed and some of her work was transferred to other parts of the business, the ET found that the rest of her role, along with new elements, was performed by the claimant under a new title; as such, it determined that:

> "98. ... the need for the claimant to work for the respondent was not redundant"

reasoning:

> "... this does not meet the definition of redundancy set out at section 139 of the Employment Rights Act 1996. The respondent did not cease to carry on the business for the purposes of which the claimant was employed or in the place that the claimant was employed. In fact, the respondent proposed to move more work to Helmshore for the claimant to manage. In addition, the requirements of the respondent's business for the claimant to carry out the role of the management of Enforcement services in Helmshore did not cease or diminish."

34. Acknowledging the claimant's earlier acceptance of redundancy as the reason for her dismissal, the ET found that she:

> "99. ... had no choice but to agree to a redundancy dismissal rather than a disciplinary dismissal to protect her future prospects for employment going forward. This is not the same as the claimant agreeing that there was a genuine redundancy situation."

Concluding that the real reason for the claimant's dismissal had been:

> "100. ... because she would not travel significant distances following the respondent's reorganisation."

35. Having found this was the reason for the claimant's dismissal, the ET did not consider it established an (alternative) reason that was capable of being a fair reason for the purposes of section 98(2) **ERA**:

> "102. ... The respondent's witnesses ... provided no evidence that there was a risk to the respondent's operation of the business if the claimant, in her very particular circumstances, was allowed to manage her teams remotely. There was no evidence from the respondent of the future acquisitions or of particular details of employees who would similarly have problems travelling significant distances.
> 103. The respondent relied on the legitimate aim of business efficacy and staff morale. The claimant provided evidence that the team that she managed remotely had no criticism of her management but in fact had criticism of David Burton and another colleague who were based in Epping. The claimant had successfully managed that team remotely over a period of months.
> ...
> 105. The Tribunal determines that the respondent has not provided evidence that there was a sufficient reason to introduce the requirement for significant travel. Instead, the Tribunal determines that the respondent has a culture of requiring Grade 3 Managers to travel significant distances without ever assessing if there was a real need for such a requirement."

36. The ET duly concluded that the claimant's complaint of unfair dismissal should be upheld.

The grounds of appeal and the respondent's submissions in support

Indirect sex discrimination: disadvantage

37. The first four grounds of appeal relate to the ET's approach to the question of group disadvantage, contending: (1) the ET mischaracterised **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699, failing to independently consider whether women suffered a group disadvantage

as a result of the PCP; (2) it further erred in determining that a woman who is the primary carer of two children "*would not*" be able to perform all elements of the grade 3 manager role; (3) and it similarly erred in taking judicial notice that "*unless a woman can employ a live in childcare provider, it is only possible to secure childcare between the hours of 7am and 6pm*"; (4) the ET ought to have constructed a hypothetical group of female managers in order to test the question of group disadvantage.

38. The respondent objects (ground 1) that the ET failed to consider any evidence relating to the pool to which the PCP applied, or to the population more broadly; its conclusion was entirely reliant upon what was said to be judicial notice of the fact that "*women are the primary carers of small children*" (emphasis added) (ET paragraph 74), going on to find that "*female Grade 3 managers, as primary carers, in comparison with male Grade 3 managers, would be put at a particular disadvantage by the [PCP]*" (ET paragraph 78); such findings went well beyond what could be appropriate as judicial notice and were perverse: the ET was entitled to conclude that women were more likely to undertake primary care of small children, but not that women were the primary carers. The ET's error, was demonstrated by its reference PCPs that are "*intrinsically liable*" to disadvantage people who share a particular protected characteristic, when, as Baroness Hale observed in **Essop & Ors v Home Office (UK Border Agency)** [2017] 1 WLR 1343 SC, there is "*nothing peculiar to womanhood*" in taking the larger share of caring responsibilities; the ET also wrongly characterised **Dobson** as stating that judicial notice could be taken "*of the fact that women were the primary carers of children*"; it did not go that far. The error was relevant to the ET's approach to the question of justification: an analysis of justification that started with an erroneous premise that all women (and no men) were primary caregivers – and, hence, that everyone disadvantaged by the PCP was a woman – would inevitably be flawed.

39. Equally (ground 2), the ET had erroneously and perversely assumed that a woman who is the primary carer of two small children would not be able to travel significant distances (failing to explain what it meant by this), and had wrongly and perversely (ground 3) taken judicial notice of what it stated to be the position that "*unless a woman can employ a live in childcare provider, it is only possible to secure childcare between the hours of 7am and 6pm*" (ET, paragraph 77); while the existence of a childcare disparity was uncontroversial, the assertion as to childcare between certain hours was not. Moreover (ground 4), assuming the relevant pool was all grade 3 managers, the ET made no findings as to the characteristics of

this pool, save that the claimant was the only woman; it ought to have (i) considered what proportion of hypothetical female grade 3 managers would have been put at a disadvantage by the PCP (taking account of the fact that the claimant was replaced by another woman) and (ii) compared that to the proportion of male grade 3 managers who were disadvantaged by the PCP. The ET had fallen into the error (*per* **Dobson**, paragraph 50) of assuming a childcare disparity was sufficient to establish particular disadvantage without further analysis.

Indirect sex discrimination: justification

40. By ground 5, the respondent contends the ET failed to apply the correct test for justification; specifically: (1) there were no clear findings as to whether the ET accepted that the respondent's pleaded legitimate aims (business efficacy and staff morale) were in fact the aims being pursued; (2) it had also made no findings as to the discriminatory impact of the PCP on the disadvantaged class; but (3) focused solely on the application of the PCP to the claimant, when its focus ought to have been on the proportionality of the PCP in the circumstances of the respondent's business. More generally, (4) the reasons provided were inadequate.

Unfair dismissal

41. The respondent's grounds of appeal in relation to the ET's decision on unfair dismissal are two-fold: by ground 6, it argues that the ET wrongly allowed the claimant to change her pleaded position and/or withdraw her concession that the reason for dismissal was redundancy, upholding the claim on that changed basis; by ground 7, it is said that the ET applied the wrong test to the question whether there was a redundancy situation within the meaning of section 139(b) **ERA**.

42. In respect of ground 6, the respondent notes that, at the outset of the hearing it was common ground that the reason for the dismissal was redundancy: that was the claimant's pleaded case, she had accepted she was made redundant in a genuine redundancy situation at the earlier case management hearing, and it was recorded as agreed in the list of issues. The claimant had not applied to amend her claim and the ET had not invited submissions on whether the earlier concession was binding, but had nevertheless upheld the claim on the basis that the respondent had not proved a fair reason for dismissal. In holding the claimant was not

bound by her earlier concession, the ET failed to consider the preceding question as to the scope of her pleaded case, although it recorded that the ET1 had "*asserted that the reason for her dismissal was redundancy*" (ET, paragraph 91); as such, if she wished to advance a positive case that she was dismissed for a reason other than redundancy, the claimant ought to have applied to amend her claim; in the alternative, she needed to apply to withdraw her earlier concession and, to the extent the ET considered this question, it failed to have regard to relevant factors/proceeded on the basis of that which was irrelevant (that the claimant was acting in person (not determinative), and that she had "opted" for redundancy to avoid a disciplinary process (which related to her position during her employment, not to the way she put her case in the ET proceedings)). In any event, the ET ought to have properly canvassed the position with the respondent before determining the point.

43. Moreover, by ground 7, the respondent contends the ET failed to have regard to the definition of redundancy under section 139(b)(ii) **ERA**, which included a diminution in the requirement for employees to carry out work of a particular kind *in the place* where the employee was employed. In this case, the ET had accepted that there was a diminution in the requirement for employees at the claimant's workplace to carry out the work of managing field agents in Helmshore; it had, however, wrongly asked itself whether there was sufficient work for the claimant personally following the re-organisation, instead of addressing the question whether those parts of her role which had been transferred meant that the section 139(b)(ii) test was met.

The claimant's case

Indirect sex discrimination: disadvantage

44. Accepting that the ET paraphrased **Dobson** in an insufficiently nuanced fashion, the claimant says (contrary to ground 1) this gave rise to no error of law: she was the only woman to whom the PCP was applied and the only woman so disadvantaged. Similarly (in relation to ground 2), while, in considering whether a PCP requiring travelling significant distances would tend to place women at a particular disadvantage when compared to men, the ET expressed itself in unqualified terms, the fact that it included the caveat "*unless a woman can employer a live in child care provider*" (ET, paragraph 77) demonstrated it was not making an absolute finding that no woman who was the primary carer for small children would be unable to comply; in any event, for the same reasons as for ground 1, there was no error of law. In

addressing ground 3, the claimant says the observation regarding the difficulties of securing childcare had to be seen in context: it was considering this question in the circumstances of a primary carer, who was most likely to be a woman; as industrial jury, it was entitled to draw on its own knowledge and experience (see **Kirton v Tetrosyl Ltd** [2003] ICR 37 EAT). As for ground 4, there was no requirement to construct a hypothetical pool to test group disadvantage: the correct pool was a matter of logic, dictated by those to whom the PCP applied (grade 3 managers). Insofar as the ET was criticised for assuming that male grade 3 managers were not disadvantaged, this was evidence the claimant was not required to lead (**Dobson**, paragraphs 33-35), in particular as the respondent did not suggest there was any evidence to the contrary. As for what was said to be an assumption that women '*are*' primary caregivers: having concluded that group disadvantage was made out (ET, paragraph 78), the ET was considering the question of individual disadvantage and could refer exclusively to the claimant's own circumstances.

Indirect sex discrimination: justification

45. Turning to ground 5, the claimant contends the ET appropriately tested the respondent's general assertions by reference to her case. As stated at paragraph 25 **Homer v Chief Constable West Yorkshire Police** [2012] 3 All ER 1287, it was relevant to ask whether an exception for everyone adversely affected by the rule would represent a more proportionate means of achieving a legitimate aim; in the present case, as the claimant was the only one adversely affected, it was appropriate to ask whether an agreement to restrict travel for her would have set a dangerous precedent. As for the argument that the proportionality balancing act was not carried out, the ET had found the respondent's case failed at the prior, "*reasonably necessary*", stage (ET, paragraph 86), so the balancing exercise would, by extension, be determined against the respondent. The ET's reasons were adequate to its task: a "*critical evaluation*" (*per* Pill LJ, paragraph 33 **Hardy & Hansons plc v Lax** [2005] ICR 1565 CA) could only be carried out where there was evidence to be evaluated. Moreover, to fall back on "*culture*" as a complete justification (as the ET found the respondent had) ran counter to the whole purpose of the protection, which was to subject cultural, traditional, or otherwise entrenched practices, which result in structural inequality, to rational and evidential analysis.

Unfair dismissal

46. In relation to ground 6, the claimant points out that her pleaded case had referred to her role being "*identified for redundancy*", not that redundancy was the reason for dismissal; it was not a concession that the legal test for redundancy was made out, or that this was the (principal) reason for her dismissal. Moreover, it was open to the ET to find that the true reason for dismissal was not that advanced by either side (**Kuzel v Roche Products Ltd** [2008] ICR 799, paragraph 60), and the dicta of Langstaff J at paragraph 16 **Chandok v Tirkey** [2015] ICR 527 was not wholly pertinent to claims of unfair dismissal where, once raised, the ET was required to determine a statutorily mandated series of questions. While the agreed list of issues recorded that redundancy was the reason for dismissal, that was not binding, and, where it is apparent that the list of issues does not properly reflect the dispute between the parties, it can be incumbent upon the ET to question whether it needs to be amended: **Mervyn v BW Controls Ltd** [2020] IRLR 464 CA. To the extent the respondent was saying that there was a procedural irregularity in the ET's approach in this case, the notice of appeal had failed to give adequate particulars as required by paragraph 3.10 of the **EAT Practice Direction 2023**.

47. Addressing ground 7, the claimant observes that it was insufficient for the purposes of section 139(b)(ii) **Employment Rights Act 1996** that a particular kind of work in a location diminishes: there must be a reduction in the need for employees. In this case, the ET found that, while some of the claimant's work was transferred to other parts of the business, more work was moved to Helmshore for her to manage: the requirement for an employee to carry out the management of enforcement services in Helmshore did not cease or diminish. Whether that was "*work of a particular kind*" was a question of fact for the ET; while the ET did not make an express finding, its reasoning made clear it did not consider that the work transferred away from the claimant, or the work moved to Helmshore, was of a different kind. In any event, the ET found the reason for the claimant's dismissal was "*because she would not travel significant distances*" (ET, paragraph 100), which it held was not a fair reason for the purposes of section 98 **Employment Rights Act 1996**.

The legal framework

Unfair dismissal

48. Section 94 of the **Employment Rights Act 1996** ("ERA") provides that an employee has the right not to be unfairly dismissed. That concept is then explained by section 98, which (relevantly) provides that:

> "(1) ... it is for the employer to show- (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it- ... (c) is that the employee was redundant, ..."

49. For the purposes of the **ERA**, "*redundancy*" is (relevantly) defined by section 139, as follows:

> "(1) ... an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to- ... (b) the fact that the requirements of that business- ... (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."

50. As Lord Irvine of Lairg LC observed in **Murray and anor v Foyle Meats Ltd** [1999] ICR 827, at p 829G-H, this provision makes clear that the ET must answer two questions of fact: (1) whether a particular state of economic affairs exists (relevantly, whether the requirements of the business for employees to carry out work of a particular kind in a particular place have ceased or diminished, or are likely to do so); (2) whether the dismissal was attributable (wholly or mainly) to that state of affairs.

51. In addressing the first question, it would be insufficient to satisfy section 139(1)(b)(ii) that a particular kind of work in a particular location ceases or diminishes; it is necessary that there is a reduction in the need "*for employees*" to carry out that work in that place (see the discussion in **Safeway Stores plc v Burrell** [1997] ICR 523, at p 530C-F). As for what is "*work of a particular kind*", that is a question of fact that will require the ET to look at the tasks undertaken and the skills involved, which are not to be simply elided with the person undertaking the work or the qualifications they might hold (see the discussion in **BBC v Farnworth** [1998] ICR 1116 EAT, at pp 1122G-1123E)

52. Turning to the reason for dismissal, that is a question of causation, and, again, one of fact for the ET (*per* **Murray v Foyle Meats**). The burden of establishing the reason for the dismissal, and whether it is capable of being fair for the purposes of section 98 **ERA**, is on the respondent and if it fails to discharge that burden the ET will be bound to find the dismissal was unfair. Where no issue has been taken with the reason pleaded by the respondent, however, it can be an error of law for the ET not to approach the question of fairness under section 98 on the basis of that reason, see per Wood J at pp 5H-6B **Post Office (Counters) Ltd v Heavey** [1990] ICR 1 EAT; albeit, whether a failure to do so will impact upon the fair hearing of the

case will depend on whether the difference between the reason relied on by the respondent and that found by the ET is one of substance or merely of labelling, **Hannan v TNT-IPEC Ltd (UK) Ltd** [1986] IRLR 165 EAT at paragraph 22, and **Secretary of State for Justice v Norridge** UKEAT/0443/13 at paragraph 31.

Indirect sex discrimination

53. Indirect discrimination is defined by section 19 **Equality Act 2010** ("EqA") as follows:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if— (*a*) A applies, or would apply, it to persons with whom B does not share the characteristic, (*b*) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it, (*c*) it puts, or would put, B at that disadvantage, and (*d*) A cannot show it to be a proportionate means of achieving a legitimate aim.
> (3) The relevant protected characteristics are—
> …
> sex;
> …"

Disadvantage

54. In determining the question of disadvantage, the first step must be to identify the appropriate pool of men and women for comparison (**Barry v Midland Bank plc** [1999] ICR 319, at p 333H). By section 23 **EqA**, however, it is further provided that:

> "(1) On a comparison of cases for the purposes of section … 19 there must be no material difference between the circumstances relating to each case. …"

The pool of those upon whom the effect of the PCP is evaluated must thus be populated by persons who – apart from the protected characteristic in issue – are in circumstances that are the same or not materially different. As Lady Hale explained in **Essop v Home Office (UK Border Agency); Naeem v Secretary of State for Justice** [2017] UKSC 27; [2017] ICR 640, SC*:*

> "41. … all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of s.19(2)(b) which requires that "it" – ie the PCP in question – puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does

> not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In general, therefore, identifying the PCP will also identify the pool for comparison."

55. In addressing the arguments before the Court in **Naeem**, Lady Hale drew on guidance provided by Sedley LJ in **Allonby v Accrington and Rossendale College** [2001] EWCA Civ 529, in which it was noted that identifying the pool was not a matter of discretion or of fact-finding but of logic. As Choudhury P observed in **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699, EAT:

> "22. … the starting point for identifying the pool is to identify the PCP. Once that PCP is identified then the identification of the pool itself will not be a question of discretion or of fact-finding but of logic."

56. Although it is thus for a claimant to identify the PCP which she seeks to impugn (as Sedley LJ stated at paragraph 12 of **Allonby**: *"…. If the [claimant] can realistically identify a [PCP] capable of supporting her case … it is nothing to the point that her employer can with equal cogency derive from the facts a different and unobjectionable requirement or condition*."), having regard to that PCP, it is then for the ET to determine the appropriate pool, and there may be - depending on the PCP in issue - a range of logical options open to it; as Cox J opined in **Ministry of Defence v DeBique** [2010] IRLR 471, EAT:

> "147. In reaching their decision as to the appropriate pool in a particular case, a tribunal should undoubtedly consider the position in respect of different pools within the range of decisions open to them; but they are entitled to select from that range the pool which they consider will realistically and effectively test the particular allegation before them."

And, as Sedley LJ observed in **Grundy v British Airways plc** [2007] EWCA Civ 1020, [2008] IRLR 74:

> "31. … Provided it tests the allegation in a suitable pool, the tribunal cannot be said to have erred in law even if a different pool, with a different outcome, could equally legitimately have been chosen."

57. As explained at paragraph 4.19 of the **EHRC Code**, once the pool has been identified, the question for the ET is whether there is a particular disadvantage to people sharing the relevant protected characteristic; that is, a comparison must be made between the impact of the PCP on the people within the pool with, and without, the protected characteristic. In this regard, particular disadvantage can be shown in various ways, including by direct evidence, the use of statistical materials, or by the taking of judicial notice. As the EAT observed in **Dobson v North Cumbria Integrated Care NHS Foundation Trust** [2021] ICR 1699:

> "56. ... particular disadvantage can be established in one of several ways, including the following: a. There may be statistical or other tangible evidence of disadvantage.

> However, the absence of such evidence should not usually result in the claim of indirect discrimination (and of group disadvantage in particular) being rejected *in limine*; b. Group disadvantage may be inferred from the fact that there is a particular disadvantage in the individual case. Whether or not that is so will depend on the facts, including the nature of the PCP and the disadvantage faced. Clearly, it may be more difficult to extrapolate from the particular to the general in this way when the disadvantage to the individual is because of a unique or highly unusual set of circumstances that may not be the same as those with whom the protected characteristic is shared; c. The disadvantage may be inherent in the PCP in question; and/or d. The disadvantage may be established having regard to matters, such as the childcare disparity, of which judicial notice should be taken. Once again, whether or not that is so will depend on the nature of the PCP and how it relates to the matter in respect of which judicial notice is to be taken."

58. In **Dobson**, the claim of indirect sex discrimination related to a flexible work requirement, which was said to give rise to a particular disadvantage for women as they bore a greater burden of childcare responsibilities than men, which could limit their ability to work certain hours ("*the childcare disparity*"). The ET had rejected that claim as it considered no evidence had been adduced that demonstrated that "*women as a group were (or would be) disadvantaged by the requirement to work flexibly*". Upholding Ms Dobson's appeal, the EAT held that the ET had erred in failing to have regard to the matters it had recorded at paragraph 56 (b), (c) and (d) of its Judgment.

59. On the particular question whether judicial notice might be taken of the childcare disparity, the EAT noted (citing passages from **Phipson on Evidence** 19th Ed at paragraphs 3-01-3-03 and 3-17) that:

> "42. ...
> a. There are two broad categories of matters of which judicial notice may be taken: (i) facts that "are so notorious or so well established to the knowledge of the court that they may be accepted without further enquiry"; and (ii) other matters that "may be noticed after inquiry, such as after referring to works of reference or other reliable and acceptable sources". b. The Court *must* take judicial notice of matters directed by statute and of matters that have been "so noticed by the well-established practice or precedents of the courts": c. However, beyond that, the Court has a discretion and may or may not take judicial notice of a relevant matter and may require it to be proved in evidence; d. The party seeking judicial notice of a fact has the burden of convincing a judge that the matter is one capable of being accepted without further inquiry."

60. In **Homer v Chief Constable of West Yorkshire Police** [2012] UKSC 15, [2012] 3 All ER 1287, at paragraph 14, Lady Hale had noted that the statutory requirement under section 19 **EqA**:

> "was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

61. Having reviewed the case-law relevant to this question in relation to the childcare disparity, the EAT in **Dobson** was clear:

> "46. ...
> (b) Whilst the childcare disparity is not a matter directed by the statute to be taken into account, it is one that has been noticed by the courts at all levels for many years. As such, it falls into the category of matters that, according to **Phipson**, a tribunal must take into account if relevant."

62. As for how this ought to be addressed by an ET, the EAT provided the following guidance:

> "48. ... We are sympathetic to the notion that if a party seeks to rely upon a matter in respect of which judicial notice is to be taken, then it should identify that matter up front. There are several reasons for taking that approach: a. First, it seems to us to be consistent with the principle, which was not disputed, that the burden in terms of establishing that a matter is capable of being judicially noticed lies with the party seeking to rely upon it. b. Second, it is preferable that all parties and the Tribunal are aware of precisely what it is that should be judicially noticed. Whilst the childcare disparity is uncontroversial and accepted by the Respondent, other related matters are not. For example, it is not accepted that the childcare disparity necessarily means that *any* requirement to work flexibly will put women at a disadvantage compared to men. Flexible working can mean different things in different contexts. Some types of flexible working, e.g. the ability to work any seven-hour period between the hours of 8am and 6pm, might even be considered advantageous by some with childcare responsibilities. It seems to us that giving advance notice of the matters sought to be relied upon would reduce the scope for disagreement later. A matter in respect of which judicial notice may be taken, by its very nature, ought to be one that is uncontroversial. The fact that it is not might cast doubt on whether it really is so notorious and well-established that it can be accepted without further inquiry. c. It is in the interests of fairness that the other party be given an opportunity to respond and comment. The Tribunal would be entitled to take judicial notice of a matter, notwithstanding any objection by the opposing party, if it is satisfied that that is warranted. However, the Tribunal may well be better placed to make that assessment once it has heard any argument to the contrary. d. However, that does not mean that a party needs to plead the term "judicial notice" expressly in order for adequate notice to have been given. Depending on the context, the nature of the claim and, if relevant, the specialist nature of the tribunal, it might suffice if the allegation being made contains an assertion that could be established by evidence or by the taking of judicial notice. In a claim of indirect discrimination, an assertion that a particular PCP puts women at a disadvantage because of their childcare responsibilities as compared to men, would be sufficient, in our view, to identify a matter in respect of which judicial notice could be taken. The childcare disparity is very well-established. It is frequently referred to in the authorities (see above) and is also referred to in the EHRC Code of Practice, which the Tribunal is obliged to take into account. As such, there is little need for more to be said by way of pleading. Furthermore, as a specialist employment tribunal, the childcare disparity is a matter that falls within the scope of its specialist expert knowledge and can be taken into account without more. We consider that approach to be consistent with the general direction of travel of making it easier for litigants to establish claims of indirect discrimination, and the fact that claims are often brought by litigants in person, who may be aware of the childcare disparity, but who may have no knowledge of the principles relating to judicial notice. e. The Claimant and the Intervenor appeared to go further in suggesting that the Tribunal was bound to take judicial notice of the childcare disparity even where there is no notice of the issue ... [but] the Tribunal cannot be treated as a "repository of knowledge" that will rush to the aid of a party whose case lacks clarity or would otherwise flounder for want of evidence."

In that case, the EAT found that Ms Dobson had given sufficient notice in her pleaded case, whereby she stated that the requirement to work flexibly:

> "49. ... put her, "as a woman, at a particular disadvantage when compared to men on the basis that women are more likely to be child carers than men". ... In our judgment, that pleaded case provides sufficient notice of the issue in respect of which judicial notice is invited: the Tribunal was expressly being asked to find that women are more likely to be child carers than men and that this put women in general, and the Claimant specifically, at a disadvantage in the context of being required to work flexibly."

63. The EAT in **Dobson** went on, however, to warn that:

> "50. ... taking judicial notice of the childcare disparity does not necessarily mean that the group disadvantage is made out. Whether or not it is will depend on the interrelationship between the general position that is the result of the childcare disparity and the particular PCP in question. The childcare disparity means that women are more likely to find it difficult to work certain hours (e.g. nights) or changeable hours (where the changes are dictated by the employer) than men because of childcare responsibilities. If the PCP requires working to such arrangements, then the group disadvantage would be highly likely to follow from taking judicial notice of the childcare disparity. However, if the PCP as to flexible working requires working any period of 8 hours within a fixed window or involves some other arrangement that might not necessarily be more difficult for those with childcare responsibilities, then it would be open to the Tribunal to conclude that the group disadvantage is not made out. Judicial notice enables a fact to be established without specific evidence. However, that fact might not be sufficient on its own to establish the cause of action being relied upon. As is so often the case, the specific circumstances will have to be considered and one needs to guard against moving from an "indisputable fact" (of which judicial notice may be taken) to a "disputable gloss" (which may not be apt for judicial notice): see **HM Chief Inspector of Education, Children's Services and Skills v Interim Executive Board of Al-Hijrah School** [2018] IRLR 334 (CA) at para 108. Taking judicial notice of the childcare disparity does not lead inexorably to the conclusion that any form of flexible working puts or would put women at a particular disadvantage."

64. That said, when assessing the question of disadvantage, the EAT was clear:

> "53. ... It does not need to be impossible for an employee to comply with a requirement before there is a disadvantage. The fact that compliance is possible but with real difficulty, or with additional arrangements having to be made, or by shifting the childcare burden on to another, can still mean that there is a disadvantage."

Justification

65. If particular disadvantage is established, the PCP will be held to be indirectly discriminatory unless the respondent is able to show it is justified; that is, that it is a proportionate means of achieving a legitimate aim. In providing guidance on this issue in **Homer**, Lady Hale cited with approval the explanation provided by Mummery LJ in **R (Elias) v Secretary of State for Defence** [2006] EWCA Civ 1293, [2006] 1 WLR 3213 at paragraph 151:

> ". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

66. Observing that the ET in **Homer** had regarded the terms "*appropriate*", "*necessary*" and "*proportionate*" as "*equally interchangeable*", Lady Hale made clear that was incorrect, going on to set out the correct approach, as follows:

> "22. ... Although the [provision] refers only to a "proportionate means of achieving a legitimate aim", this has to be read in the light of the Directive [Council Directive 2000/78] which it implements. To be proportionate, a measure has to be *both* an appropriate means of achieving the legitimate aim *and* (reasonably) necessary in order to do so. Some measures may simply be inappropriate to the aim in question ...
> 23. A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate. ... [Both EU and domestic law] require that the criterion itself be justified rather than that its discriminatory effect be justified ...
> 24. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer. ...
> 25. To some extent the answer depends upon whether there were non-discriminatory alternatives available. ... [While] an ad hominem exception may be the right answer in personnel management terms but it is not the answer to a discrimination claim. Any exception has to be made for everyone who is adversely affected by the rule. ..."

67. Where the PCP is in the form of a rule, it will normally be the rule itself that falls to be justified rather than its application to a particular individual; see per Lady Hale at paragraphs 64-66 **Seldon v Clarkson Wright and James** [2012] UKSC 16, [2012] ICR 716 and her observations at paragraph 25 **Homer** (*supra*).

68. In assessing the impact of the PCP upon the affected group, it is necessary for the ET to ascertain both the quantitative and the qualitative effect (*per* Ralph Gibson LJ in **University of Manchester v Jones** [1993] ICR 474 at p 497G). In so doing, the individual situation of the complainant may provide relevant evidence, although (as for the determination of particular disadvantage):

> "... proper attention [must be] paid to the question of how typical they are of any other men and women adversely affected by the requirement." (**Jones**, at p 498A)

69. In then considering the needs of the respondent, the ET has to make its own judgement as to whether the PCP is reasonably necessary, upon "*a fair and detailed analysis of the working practices and business considerations involved*", per Pill LJ at paragraph 32 **Hardy & Hansons plc**

v Lax [2005] EWCA Civ 846, [2005] ICR 1565. In **Hardy & Hansons**, Pill LJ went on to provide a helpful explanation of both the role of the ET, and the EAT, in this regard:

> "33. The statute requires the employment tribunal to make judgments upon systems of work, their feasibility or otherwise, the practical problems which may or may not arise from [the PCP] ... in a particular business, and the economic impact, in a competitive world, which the restrictions impose upon the employer's freedom of action. The effect of the judgment of the employment tribunal may be profound both for the business and for the employees involved. This is an appraisal requiring considerable skill and insight. ..., a critical evaluation is required and is required to be demonstrated in the reasoning of the tribunal. In considering whether the employment tribunal has adequately performed its duty, appellate courts must keep in mind ... the respect due to the conclusions of the fact finding tribunal and the importance of not overturning a sound decision because there are imperfections in presentation. Equally, the statutory task is such that, just as the employment tribunal must conduct a critical evaluation of the scheme in question, so must the appellate court consider critically whether the employment tribunal has understood and applied the evidence and has assessed fairly the employer's attempts at justification.
> 34. The power and duty of the employment tribunal to pass judgment on the employer's attempt at justification must be accompanied by a power and duty in the appellate courts to scrutinise carefully the manner in which its decision has been reached. The risk of superficiality is revealed in the cases cited and, in this field, a broader understanding of the needs of business will be required than in most other situations in which tribunals are called upon to make decisions."

Defining the issues

70. As a necessary starting point, the ET must be clear as to the claims before it, and the issues it is required to determine. Allowing for a degree of latitude in how a claimant sets out their case (see the observations of Mummery LJ in **Parekh v London Borough of Brent** [2012] EWCA Civ 1630), the claims are to be discerned from a fair reading of the of the ET1 and any attached particulars (**McLeary v One Housing Group Ltd** UKEAT/0124/18, paragraph 98). Having undertaken this exercise at an early stage, it will generally be helpful to draw up a list of the issues that need to be addressed in order to decide those claims. The list of issues is a useful case management tool but it does not act as a substitute for the actual claim, and the ET is not required to stick slavishly to it (even if previously agreed between the parties) where to do so would impair the discharge of its duty to hear and determine the case in accordance with the law and the evidence (per Mummery LJ, paragraph 31 **Parekh**). Indeed, in **Mervyn v BW Controls Ltd** [2020] ICR 1363, the Court of Appeal allowed that, where a list of issues, drawn up as part of an earlier case management order, fails to properly encapsulate the claim, an ET may be required to revisit that earlier case management decision "*where that is necessary in the interests of justice*".

71. In **Mervyn**, Bean LJ provided guidance as to the approach the ET should take in this regard:

> "38. … what is 'necessary in the interests of justice' in the context of the tribunal's powers under rule 29 [ET Rules] depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."

Further observing:

> "43. It is good practice for an employment tribunal, at the start of a substantive hearing, with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the employment tribunal should consider whether an amendment to the list of issues is necessary in the interests of justice."

72. In allowing the claimant's appeal in **Mervyn**, it was ruled that, even where the claimant had expressly stated (during case management discussions) that she had not resigned but had been dismissed, the ET should have considered the claim as encompassing an allegation of constructive dismissal: that, it was held, was the claim that "*shouted out*" from the pleadings (the Court of Appeal in **Mervyn** adopting the phrase that had been used in **McLeary** in this regard). Indeed, as Laing J (as she then was) stated in **Mervyn** when that case was before her at the EAT ([2019] UKEAT/0140/18):

> "84. … the ET … [has] a duty, if it is obvious from the ET1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim. In addition, if the ET decides that the litigant in person has decided not to advance that claim, the ET should be confident that the litigant in person has withdrawn that claim advertently."

73. Where, however, the list of issues properly represents a concession made at an earlier stage in the proceedings, the withdrawal of that concession would require a formal process of application; see **Nowicka-Price v Chief Constable of Gwent Constabulary** UKEAT/0268/09 and **Centrica Storage Ltd v Tennison** UKEAT/0336/08.

The ET's reasons and the approach of the Employment Appeal Tribunal

74. In **Meek v City of Birmingham District Council** [1987] IRLR 250, the Court of Appeal made clear that, while the decision of an ET is not required to be "*an elaborate formalistic product of refined legal draftsmanship*", it must:

> "contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises …"

75. As for the approach the EAT is to take, I keep in mind the guidance provided in **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672:

> "58. … where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should … be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. ..."

76. That said, the EAT's role is not to strive to uphold a decision where the reasoning reveals a fundamental error of approach; as Sedley LJ observed in **Anya v University of Oxford** [2001] ICR 847 CA:

> "26. … The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues."

And see the observations to similar effect made by Cavanagh J at paragraph 47(7) **Frame v Governing Body of Llangiwg Primary School** UKEAT/320/19.

77. Ultimately, as the Court of Appeal made clear in **Jafri v Lincoln College** [2014] EWCA Civ 449 (albeit there focused on the question of disposal where an appeal has been upheld):

> "21. If ... the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, ...; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must

> flow from the findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise, there must be a remittal."

78. As for a challenge made to a decision of the ET on the ground that it was perverse, that must meet a high threshold (see the guidance provided by Mummery LJ in **Yeboah v Crofton** [2002] IRLR 634 CA). Where the appeal alleges procedural irregularity on the part of the ET, full details of each complaint made must be included within the relevant grounds of challenge; paragraph 3.10 **EAT Practice Direction 2023**.

Analysis and conclusions

Introductory

79. In setting out her case in the details attached to the form ET1, the claimant had explained that her former role as Head of Enforcement Local Taxation had been identified for redundancy but that she had accepted another position as being suitable alternative employment until, after some eight months, this was made subject to the condition that she must undertake "*travel when required*". The claimant complained that imposing this requirement meant the alternative post was no longer suitable, and that, as it was not in fact a necessary requirement, her dismissal was unfair; she further contended that the PCP amounted to indirect sex discrimination.

80. At a case management hearing on 16 January 2023, the claimant made clear that her complaints were about her dismissal. Although she accepted that she had been made redundant by the respondent, "*in circumstances of a genuine redundancy situation*", and that there "*was no unfairness in the identification of her as redundant*", the claimant nevertheless contended that it was unfair not to have offered her alternative work that did not include the travel requirement imposed by the respondent eight months later; she further submitted that this requirement was indirectly discriminatory as it would be more likely to put women at a disadvantage because more women take primary responsibility for childcare, and that it put her at that disadvantage because of her childcare responsibilities. Subsequently, the claimant made clear that the PCP of which she was complaining was the requirement "*to undertake travel including of significant distances*". The list of issues fairly reflected the way the claimant's case had thus been clarified.

Indirect sex discrimination

81. In approaching the claimant's complaint of indirect sex discrimination, the ET recorded that the respondent had accepted the PCP of "*requiring the claimant to travel significant distances within her role*" (ET, paragraph 72). In argument, the respondent criticised the ET for this re-wording of the PCP, but I do not consider this gave rise to any material difference. The ET was focusing on the real issue identified in the claimant's case: it was the requirement to travel significant distances that placed her at a disadvantage as this meant she would have to leave home *before* her normal childcare was in place and/or would only return *after* the time she had to pick up her children. The substance of the claimant's complaint in this regard was clear from the initial particulars she had given, and the respondent plainly understood the case it had to meet.

82. The respondent further criticised the way in which the ET defined the relevant pool; that is, as "*men and women Grade 3 Managers*" (ET, paragraph 73). The identification of the pool is not itself the subject of a challenge on appeal, but the point raised is potentially relevant to ground 4, which criticises the ET's failure to make any findings as to the characteristics of the pool it had thus selected. As the respondent points out, the only person the claimant had identified as being subject to the application of the PCP was herself. The ET had, however, found as a fact that the requirement in issue had been inserted into the job description for grade 3 managers and that the PCP was thus applied to all men and women employed in such roles. In this context, the ET's identification of the relevant pool was logical, and one that was open to it to select in order to effectively test the claimant's case (per **Dobson**, **MoD v DeBique**, and **Grundy**).

Disadvantage

83. The attack made by the respondent, in its first four grounds of appeal, relates to the next stage of the assessment; that is, to the ET's approach to the question of disadvantage. Having found that the claimant was the only woman within the pool of grade 3 managers, the ET accepted her

evidence as to the particular disadvantage she would suffer by reason of the application of the PCP: she was the primary care provider for two children under the age of five and the requirement to travel significant distances would not be compatible with her childcare commitments. To the extent that the ET extrapolated from the claimant's situation to reach its finding that the PCP would put female grade 3 managers, as a group, at a disadvantage, the respondent says it erred, in particular as it failed to consider whether the claimant's circumstances were likely to be representative of the difficulties that women, employed at grade 3 manager level, might experience. The respondent further points out that the ET made no findings as to the circumstances of the men who were employed as grade 3 managers, simply assuming (ET, paragraph 78) that "*female Grade 3 managers, as primary carers, in comparison with male Grade 3 managers, would be put at a particular disadvantage by the requirement to travel significant distances*".

84. Addressing first the criticism made relating to the position of men within the relevant pool, it does not seem to have been in dispute that, other than the claimant, all grade 3 managers employed by the respondent were men. No evidence had been led by either side as to the particular circumstances of the male grade 3 manager colleagues of the claimant, but it was the respondent's case (summarised at paragraph 44 of its written closing submissions before the ET) that there were "*no other employees at C's level who are not required to travel*" and "*there was no evidence ... of any other colleagues of C's put at such a disadvantage*" (where "*such a disadvantage*" was understood to relate to an inability to accommodate a requirement "*to travel significant distances on 6-12 occasions a year*"). In the circumstances – given the apparent acceptance by the respondent that the men within the pool of grade 3 managers suffered no disadvantage as a result of the application of the PCP – I cannot see that the ET erred in proceeding on the basis that the relevant male comparators did not suffer a similar disadvantage to that identified by the claimant.

85. As for the position of women within the relevant pool, while the ET did not explicitly state that it was, at least in part, extrapolating group disadvantage from the particular difficulties suffered by the claimant, I can accept that this might be implied from its reasoning. It is, however, not necessarily an error of law for an ET to infer group disadvantage from the fact that there is a particular disadvantage in the individual case (*per* **Dobson**, paragraph 56). Moreover, even if the

claimant's particular circumstances – whereby her husband would be unable to assist with the childcare difficulties presented by a requirement for the claimant to travel significant distances once a month – might not be representative of the position of many other women, "*disadvantage*" does not require that it is impossible to comply with the relevant PCP, it can be sufficient that there is a "*real difficulty*" (**Dobson**, paragraph 53). Thus, to the extent that the ET drew an inference from the claimant's circumstances, it would have been entitled to see that as providing an example of the kind of disadvantage that other women might face arising from the childcare disparity. Considering the criticisms made by the respondent at ground 4 of its appeal, I am not persuaded that the ET's reasoning reveals any error of law.

86. The real focus of the respondent's challenge to the ET's finding on disadvantage relates, however, to its approach to the taking of judicial notice of the childcare disparity (grounds 1-3). As was accepted by Ms Ling in her submissions for the claimant, the language used by the ET went further than **Dobson** in identifying what is to be understood by that term: rather than simply taking judicial notice of the fact that women are more likely to take on the greater burden of childcare responsibilities, the ET approached its task on the basis that "*women are the primary carers of small children*" (paragraph 74) and, as such, "*would not be able to perform all elements of the Grade 3 management role with a requirement to travel significant distances*" (paragraph 76), in particular given that "*unless a woman can employ a live in childcare provider, it is only possible to secure childcare between the hours of 7am and 6pm*" (paragraph 77). It is the respondent's case that these characterisations of what the childcare disparity means demonstrate that the ET had gone further than simply taking judicial notice of that which had been "*so noticed by the well-established practice or precedents of the courts*" (**Dobson**, paragraph 42, approving the observations made in **Phipson**). Moreover, even if the members of the ET, as the industrial jury, were entitled to draw on their own knowledge and experience as to the difficulties of obtaining childcare, it was required to give the parties notice of its intention in this regard and to allow them the opportunity to make representations in response.

87. Without adopting an overly pernickety approach to the ET's expression of its reasoning, as Ms Ling has acknowledged, I am bound to accept there is some force in the respondent's criticisms.

The ET's judgment suggests that it was proceeding on the basis that the PCP in this case was (adopting the language at paragraph 4.10 of the **EHRC Code**) "*intrinsically liable to disadvantage*" women, but "*there is nothing peculiar to womanhood in taking the larger share of caring responsibilities in a family*" (per Lady Hale, paragraph 39 **Essop**). While the need to take judicial notice of the childcare disparity arises because, in some situations, the link between the protected characteristic (being a woman) and the particular disadvantage might be "*obvious*" (**EHRC Code**, paragraph 4.11), as the EAT explained in **Dobson**, the ET's task is to consider the particular nature of the PCP in issue to determine whether that clearly would give rise to difficulties for women, such as would amount to a group disadvantage (**Dobson**, paragraph 50). Although that may be what the ET was seeking to do in this case, the way it expressed its reasoning gives rise to uncertainty as to its approach. It is, thus, simply unclear as to whether, when citing guidance drawn from **EHRC Code**, the ET's reference to cases involving an *intrinsic* link between the PCP and the particular disadvantage reveals an (erroneous) approach to the childcare disparity, or was simply an error of transcription. Ms Ling suggested that the ET's reference to a different paragraph number from the **EHRC Code** (paragraph 4.11 being relevant to cases in which the link between PCP and disadvantage might be "*obvious*") suggests that this was in fact the point it had in mind. However, a more substantive error of approach can (as the respondent urges) be implied from the fact that the ET's reasoning then appears to suggest that there is an intrinsic link between childcare responsibilities and being a woman, apparently losing sight of the rather more nuanced characterisation of the childcare disparity provided by the EAT in **Dobson**.

88. Although it is tempting to try to overlook the lack of clarity in the ET's reasoning, and to hold that this was, indeed, a case where the link between the PCP and the disadvantage to the relevant group was obvious, I accept that, as Ms Seymour emphasised in oral argument, that would be to usurp the role of the ET. Accepting, as I must, that the EAT's role is not to comb through the reasoning of the ET to strive to uphold its conclusions (and see the observations in **Anya** and **Frame** to this effect), somewhat reluctantly, I am drawn to the conclusion that the ET's decision on disadvantage is rendered unsafe by the lack of clarity as to its approach. In this regard, I therefore uphold grounds 1 and 2 of the appeal.

89. Given my conclusion on grounds 1 and 2, it is not strictly necessary for me to deal with the point raised by ground 3, relating to whether the ET was entitled to draw on its own knowledge and experience of the difficulties of obtaining childcare cover at particular times, and (if so) as to whether the respondent was given proper opportunity to address this point. For completeness, however, I note that the respondent had made clear that it did not accept that the childcare disparity necessarily gave rise to a particular disadvantage for women employed in roles comparable to the claimant's. Given the dispute thus identified, I can accept that, if the ET intended to draw upon its own understanding of the difficulties of finding childcare outside particular hours, it ought properly to have raised that issue and provided the respondent with the opportunity to make submissions in response. That said, although relying on this as giving rise to a potential unfairness, the respondent's criticism is essentially limited to suggesting the ET was wrong to consider that (absent live-in assistance) it was "*only possible*" to secure childcare after 7 am and before 6 pm. Whether the ET was correct to put the point so high, there does not seem to be any real dispute that cover at other times (absent live-in care provision) might well present difficulties for those who have the primary responsibility for childcare in a family (who, given the childcare disparity, are most likely to be women) and thus give rise to a disadvantage.

Justification

90. By its fifth ground of appeal, the respondent turns to the ET's approach to the question of justification; in this regard, it is said that the ET's reasoning falls short of what was required (*per* **Hardy & Hansons**), failing to explain whether it accepted that the respondent's legitimate aims were made out, or to demonstrate any assessment as to the discriminatory impact of the PCP, let alone show that it had critically evaluated the respondent's case when carrying out the requisite balancing exercise. For the claimant it is objected that the ET's judgment is adequate to its task: it had plainly concluded that the respondent had not established reasonable necessity and any paucity in the explanation provided arose from the absence of cogent evidence, rather than any error in the ET's approach.

91. Again, the difficulty that arises in this case relates to the reasons provided by the ET. It is, for example, unclear to me whether the ET accepted that the respondent had demonstrated that business efficacy and staff morale were genuinely legitimate aims that it was seeking to pursue. Although the ET had plainly found that specific examples of issues relating to staff morale could not be seen as arising out of a lack of in-person meetings with the claimant, its judgment does not explain whether it accepted that this was, more generally, an issue that the respondent was seeking to address by the imposition of a general requirement (on all grade 3 managers) to undertake travel as and when required (and, although issues relating to the claimant's failure to hold face-to-face meetings had been identified as an issue, the respondent had also relied on the more general point that it saw benefits arising from in-person dealings, in terms of breaking down barriers and cementing relationships).

92. In considering whether the legitimate aims relied on justified the PCP in issue, given it had found that the requirement to travel significant distances had been imposed on *all* the respondent's group 3 managers (and it was also Mr Burton's evidence that *all* employees at the claimant's level were required to travel), the issue for the ET was whether that requirement was justified as a general rule, not simply in its particular application to the claimant (*per* **Seldon**). Although, in assessing the potentially discriminatory impact of the PCP, the ET was entitled to consider the claimant's individual position (*per* **University of Manchester v Jones**), it was not concerned with whether an exception ought to have been made in the claimant's case but whether the universal application of the rule was justified in general terms (**Homer**, paragraph 25).

93. Pointing to the ET's conclusion that "*it was not reasonably necessary to travel significant distances to achieve the legitimate aims*" (ET, paragraph 86), the claimant says it is apparent that the ET *had* rejected the respondent's attempted justification of this rule. The difficulty, however, is that this conclusion immediately follows the ET's further consideration of the claimant's individual position (specifically, whether there had been complaints about the way she had carried out the role in the preceding months). The issue for the ET was whether the respondent had established that the introduction of the PCP into the job requirements for all of its grade 3 managers was justified; its

sole focus on the position of the claimant does not explain how it engaged with this broader question.

94. Indeed, on this point, the closest that the ET's reasoning seems to come to addressing the question of justification in respect of the imposition of the PCP to all grade 3 managers is in its finding that a requirement to travel significant distances was "*the culture within the respondent and [was] something that the respondent wanted but not what was needed*" (ET, paragraph 85). Accepting Ms Ling's point, that a mere assertion of a company "*culture*" would be insufficient to show that an otherwise discriminatory requirement amounted to a proportionate means of achieving a legitimate aim, the difficulty remains that the ET's analysis (at least, as revealed by the reasons provided) was limited to its assessment of the application of the PCP to the claimant; there is simply no analysis of the points made by the respondent as to why (in particular, coming out of the pandemic, and wishing to build up relationships and promote knowledge transfer in a time of change and potential acquisitions of other businesses) it considered it necessary to impose the travel requirement on all its grade 3 managers. If the answer to that question was that, having carried out the requisite critical evaluation, the ET was satisfied that the respondent had failed to discharge the burden it carried to show that this was a reasonably necessary way to achieve its aims of addressing staff moral and promote business efficacy, then its reasons needed to make this clear. In carrying out its duty of careful scrutiny, an appellate tribunal ought to be able to see that the ET has understood and applied the evidence, and has assessed fairly the respondent's attempt at justification (*per* **Hardy & Hansons**); that is not something I can be confident of in this case. As such, I am bound to allow this appeal on ground 5.

Unfair dismissal

95. By ground 6, the respondent raises a complaint about how the ET approached the claimant's claim of unfair dismissal; it contends that the claimant's pleaded case accepted that the reason for her dismissal was redundancy and she conceded this point at the January 2023 case management hearing; that was something the ET acknowledged at paragraph 96 of its judgment, and it had been reflected in the agreed list of issues. Even if it had been open to the ET to re-visit the list of issues in

this regard, the respondent contends it was unfair not to have first raised this possibility with the parties, permitting representations to be made. The claimant says, however, that her pleaded case was neutral on this point, and the structure of section 98 **ERA** meant that the ET was bound to take a staged approach to whether (1) the respondent had established a fair reason for the dismissal, and (2) whether the dismissal for that reason was fair. The claimant further objects that, to the extent that it seeks to complain of any procedural impropriety on the part of the ET, the respondent had failed to comply with the requirements laid down by the **EAT Practice Direction 2023**.

96. Addressing the final point made by the claimant, I do not accept that the respondent should not be permitted to raise the question whether the ET adopted a fair process in determining that it should treat the reason for dismissal as an issue that was at large between the parties. In its grounds of appeal, the respondent makes the point as follows:

> "16. In any event, the Tribunal's determination as to C's entitlement to change her position should have been made prior to the Reasons, and the new claim which she advanced at the hearing (and which ultimately succeeded) should have been properly set out, such that R had the opportunity to appeal that determination or seek an adjournment and/or at the very least was clear what case it had to meet."

That, it seems to me, provided sufficient detail of what it was that the respondent contended amounted to an irregularity in the ET's approach.

97. Turning to the respondent's argument, however, I do not agree that the claimant can be said to have clearly conceded the question whether she was dismissed by reason of redundancy in her original grounds of claim: stating that her role had been "*identified for redundancy*" does not obviously accept either that there was a redundancy situation (to adopt the short-hand often used to encapsulate the definition provided by section 139 **ERA**), or that this was the reason for her dismissal. That said, the summary of the case management discussion on 16 January 2023 would seem to record an acceptance of these matters on the part of the claimant, such that it was stated that there was "*no dispute that the ... reason for dismissal was the potentially fair reason of redundancy*". That, moreover, was the position recorded in the agreed list of issues, which set the agenda for the full merits hearing that took place in August and October 2023.

98. In reaching its decision on liability, however, while apparently acknowledging that the claimant had previously conceded the point (ET paragraph 96), the ET considered that should not be

binding upon her, as she was (i) acting in person, and (ii) had said she had only "*opted for the redundancy reason because she did not want the respondent to pursue a disciplinary investigation*". As the respondent has observed in its submissions on this appeal, neither reason identified by the ET in this regard would provide a proper basis for permitting a party to simply resile from an earlier concession without first affording the other side the opportunity to be heard on the point: (i) the fact that the claimant had been acting in person would not be determinative, and (ii) even if she had "*opted for the redundancy reason*" during her employment, that could not explain why she accepted that this was the real reason for her dismissal during the proceedings before the ET. More particularly, if, in pursuing her case before the ET, the claimant was to be treated as having formally conceded the question of redundancy as being the reason for her dismissal, any subsequent attempt to withdraw that concession ought properly to have been made the subject of a clear application (see the approaches adopted in the **Nowicka-Price** and **Centrica Storage** cases). And, even if the ET considered that an error had arisen at the case management hearing and that the claimant should never have been understood to have made a formal concession in this respect (and see the observation of Laing J, paragraph 84 **Mervyn** in the EAT), it still ought to have canvassed that possibility at the earliest opportunity, permitting both parties to make representations as to whether it would be in the interests of justice for an amendment to be made to the list of issues (and see the guidance provided by the Court of Appeal in **Mervyn**).

99. For the reasons provided, I am satisfied that the ET was wrong in determining to re-visit the list of issues during the course of its deliberations, thus failing to afford the respondent the opportunity to make representations on this question. I accordingly uphold ground 6 of the appeal.

100. Notwithstanding my conclusion on ground 6, however, it is necessary to also give some consideration as to whether there is merit in the respondent's argument on ground 7: the ET went on to find that the respondent had been unable to demonstrate a reason for the claimant's dismissal that was capable of being fair for the purposes of section 98 **ERA**; as the claimant urges, if the error I have identified under ground 6 cannot ultimately have affected the result, it would be open to me to still uphold the ET's decision (see **Jafri** at paragraph 21).

101. For the claimant, it is said that the ET's findings make clear that it rejected the possibility that the reason for the dismissal was redundancy, as defined by section 139 **ERA**; indeed, it found that the real reason for the claimant's dismissal was "*because she would not travel significant distances following the respondent's reorganisation*" (ET, paragraph 100), which, it permissibly concluded, did not amount to a reason that was capable of being fair for the purposes of section 98 **ERA**. The respondent complains, however, that the ET failed to ask itself the correct question: focusing only on whether there was sufficient work for the claimant after the re-organisation, it did not engage with its prior finding of fact, that there had been a change in the claimant's work, with a diminution in work of the kind involved (that is, in managing field agents) in the place where the claimant was employed (Helmshore). Moreover, in argument Ms Seymour submitted that, to the extent the ET had made a positive finding as to an alternative reason for the claimant's dismissal – the fact that she would not travel significant distances – that (i) need not mean that this was not due to her redundancy (it might, instead, have been characterised as a failure to find suitable alternative employment), and/or (ii) the respondent (had it been aware that the reason for dismissal was to be treated as having been put in issue) might have sought to make the alternative case (under section 98(1) **ERA**) that the dismissal was for some other substantial reason of a kind such as to justify the dismissal of the claimant. Accepting that, if the claimant's case of indirect sex discrimination was properly to be upheld, the ET would inevitably have found any dismissal to have been unfair, Ms Seymour referred back to her earlier submissions and noted that the ET had not, in any event, gone on to actually consider the question of fairness for the purposes of section 98(4) **ERA**.

102. Given that the respondent had presented its case on the basis that redundancy, as the reason for the claimant's dismissal, was not in dispute, it is perhaps unsurprising that the ET's judgment contains little by way of legal direction on this issue (the ET set out relevant parts of sections 98 and 139 **ERA** but made no reference to any of the guideline authorities). It may be that the ET had the guidance provided in **Murray v Foyle Meats** in mind when it concluded the "*the requirements of the respondent's business for the claimant to carry out the role of the management of Enforcement services in Helmshore did not cease or diminish*" (ET, paragraph 98), but that is unclear, and it made no reference back to its earlier finding that there had been a change in the types of tasks the claimant

was to undertake. On this point, it is the respondent's case that the change thus identified by the ET arose from the fact that there had been a diminution in its requirement for employees at Helmshore to carry out work of the kind involved in managing field agents; that, it submits, was sufficient to meet the definition of redundancy under section 139 **ERA**. Whether or not that is right, I accept that the ET's judgment does not provide sufficient explanation of its reasoning: the respondent cannot be clear as to why it lost on this point (contrary to **Meek**), and the lack of reference to the relevant guideline authorities means I cannot approach this part of the judgment with the confidence in the ET's approach that I might otherwise assume (*per* **DPP v Greenberg**).

103. As for the ET's positive finding, that the real reason for the claimant's dismissal was "*because she would not travel significant distances following the respondent's reorganisation*" (ET, paragraph 100), given that the claimant's new role was being presented as an alternative to redundancy, that does not provide a clear answer to the question whether redundancy might not, nevertheless, have been the reason, or principal reason, for the dismissal. I can also see that, had the respondent known that the reason for dismissal was in dispute, an alternative case might have been put forward that the claimant's employment was terminated for some other substantial reason for section 98(1) **ERA** purposes (albeit this would inevitably have led to some overlap with the issues the ET was required to determine in respect of the claim of indirect discrimination).

104. For all the reasons provided, therefore, I am not persuaded that the ET's conclusions under section 98 **ERA** can stand.

Decision

105. For the reasons given in this judgment, I therefore uphold the respondent's appeal on grounds 1-2, and 5-7; I dismiss ground 3 and would have dismissed ground 4 if it had been necessary for me to determine that ground. The parties should, if not agreed, file and serve any submissions (in writing, limited to two sides of A4) on disposal and any other matters at least 48 hours prior to the formal hand down of this judgment.