



EMPLOYMENT TRIBUNALS

Claimant: Mrs N Jankowska

Respondent: View Logistics

Heard at: Newcastle Employment Tribunal

Sitting at: Civic Centre

On: 19th, 20th and 21st
June 2023

Before: Employment Judge Martin

Members: Mr S Wykes
Ms J Johnson

Representation

Claimant: In person

Respondent: Mr Wiltshire (Counsel)

Interpreter: Mr M Juszczak (Polish interpreter)

JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's complaint of sex discrimination is not well founded and is hereby dismissed.
3. The claimant's complaint of discrimination on the grounds of pregnancy/maternity is not well founded and is hereby dismissed.
4. The claimant's complaint of race discrimination is not well founded and is hereby dismissed.
5. The claimant's complaint failure to comply with a request under the Flexible Working provisions is also not well founded and is hereby dismissed.

RESERVED JUDGMENT

Introduction

1. The claimant gave evidence on her own behalf. Mrs J Riley, HR and payroll manager, and Mr S Donlan, managing director gave evidence on behalf of the respondents. The Tribunal were provided with a bundle of documents marked Appendix 1.

Preliminary matter

2. At the outset of the hearing, a discussion took place about the claims and issues to be considered in relation to these proceedings. A draft list of issues is annexed to the Order made at the Preliminary Hearing on 19 December 2022 by Employment Judge Jeram, which is set out at pages 36-38 of the bundle. In discussing the matter further with the claimant, it appears that, although the claimant initially indicated in an email on 6 February 2023 that she was not intending to pursue a complaint of pregnancy/maternity, she confirmed at the hearing today that she was intending to proceed with that complaint. Further, although the claimant's ET1 refers to issues around her flexible working request, that issue is not set out in the list of issues at pages 36 to 38. The claimant confirmed at the hearing today that she also wished to pursue a complaint in that regard as well.
3. At the beginning of the hearing, the Tribunal noted that the claimant's witness statement, produced for the purposes of the hearing today, identified a number of other issues which had not been referred to in her ET1 or discussed at the preliminary hearing. These matters were outwith the claims and issues which the Tribunal was considering at this final hearing. Employment Judge Martin explained to the claimant that in order to pursue those matters, she would have to seek leave to amend her ET1. Employment Judge Martin outlined the process and gave the claimant full opportunity to consider these matters before the commencement of this final hearing. This included adjourning the matter for some time to enable the claimant to discuss the matter with her husband who was in the Tribunal building looking after their young child and to take any advice. After having had substantial time to consider the matter, the claimant confirmed that she was not intending to make any application for leave to amend her claim. She confirmed that she would be pursuing the claims and issues as outlined at the beginning of the hearing and set out in in this Judgment.
4. As a result, substantial parts of the claimant's witness statement, which in itself was only a page and a half, were removed. Those were paragraphs 2-9 inclusive and 12-13 inclusive. This effectively meant that the claimant's witness statement consisted of less than three small paragraphs and less than 10 lines. The statement did not address any of the key evidence, either oral or documentary in the case in any detail, or deal with any of the claims and issues in any detail. Employment Judge Martin took the claimant in brief through her evidence to seek to address these matters and to enable the claimant to be given the opportunity to provide at least some evidence regarding those matters. Following assistance from the Tribunal, the claimant's evidence was to a degree somewhat limited and was not expanded on substantially following cross-examination.

The Law

5. The Tribunal considered the following legislation:

Section 95(1)(c) Employments Rights Act 1996: “An employee is dismissed by his employer if the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer’s conduct”.

Section 98(4) ERA 1996: “the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case”.

Section 13(1) Equality Act 2010: “A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

Section 18(2) EqA 2010 - Pregnancy and Maternity Discrimination:-

“A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably:-

(a) Because of the pregnancy, or

(b) Because of illness suffered by her as a result of it.”

Section 18(3):

“A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.”

Section 18(4):

“A person (A) discriminates against a woman, if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.”

Section 18(6):

“The protected period, in relation to a woman’s pregnancy, begins when the pregnancy begins and ends:-

(a) If she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she return to work after the pregnancy.”

Section 19(1) Equality Act 2010:

“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.”

Section 19(2) EqA 2010:

“A provision criterion or practice is discriminatory in relation to a relevant protected character 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.

The relevant protected characteristics are race and sex.

Section 80(F)(1) Employment Rights Act 1996:

“A qualifying employee may apply to his employer for a change in his/her terms and conditions of employment if:-

- (a) The change relates to:
 - (i) The hours (s)he is required to work;
 - (ii) The times when (s)he is required to work;
 - (iii) ..
 - (iv) Such other aspects of his terms and conditions of employment as the secretary of state may specify by regulations.”

Section 80(F)(2) ERA 1996:

“An application under this section must —

- (a) state that it is such an application,
- (b) specify the change applied for and the date on which it is proposed the change should become effective, and
- (c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with”.

Section 80(F)(4) ERA1996:

If an employee has made an application under this section, he may not make a further application under this section to the same employer before the end of the period of twelve months beginning with the date on which the previous application was made.

Section 80(G)(1) ERA 1996:

“An employer to whom an application under section 80F is made —

- (a) shall deal with the application in a reasonable manner, and
- (aa) shall notify the employee of the decision on the application within the decision period and
- (b) shall only refuse the application because he considers that one or more of the following grounds applies—
 - (i) the burden of additional costs,
 - (ii) detrimental effect on ability to meet customer demand,
 - (iii) inability to re-organise work among existing staff,

- (iv) inability to recruit additional staff,
- (v) detrimental impact on quality,
- (vi) detrimental impact on performance,
- (vii) insufficiency of work during the periods the employee proposes to work,
- (viii) planned structural changes.

An employer should allow an employee to appeal any decision to reject the application.”

Section 80(G(1B))

“The decision period applicable to an employee’s application under section 80F is:-

- (a) The period of three months beginning with the date on which the application is made, or such longer period as may be agreed by the employer and the employee.

Section 80(G) ERA 1996 refers to the process, which includes arranging a meeting with the employee to discuss the request.

Section 80)(H(1) ERA 1996 provides that an employee may present a complaint to an Employment Tribunal:-

- (a) That his employer has failed to comply with section 80G;
- (b) That a decision by his employer to reject the application was based on incorrect facts or
- (c) That the employer’s notification was given in circumstances that did not satisfy one of the requirements.

6. The Tribunal was referred to and considered the following cases:

Madarassy v Nomura International Plc [2007] EWCA Civ 33 and in particular paragraph 56 to 58 where it was stated that the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. It refers to the shifting burden of proof required in cases of discrimination.

7. The case of **Shamoon v Chief Constable of The Royal Ulster Constabulary** [2003] IRLR 285, where Lord Nicholls held that “when a discrimination claim is based on direct discrimination, tribunals normally consider first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly whether the less favourable treatment was on the relevant proscribed ground. Although there are cases where it is convenient and helpful to adopt this two-step approach to what is essentially a single question – did the claimant, on the proscribed ground, receive less favourable treatment than others? – where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. Employment Tribunals may sometimes be able

to avoid arid and confusing disputes about the identification of the appropriate comparator, concentrating primarily on why the claimant was treated as she was and postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason? If the former, there will usually be no difficulty in deciding whether the treatment afforded to the claimant on the proscribed ground was less favourable than was or would have been afforded to others.

8. The combined cases of **Essop and Others v Home Office (UK Border Agency)**; **Naeem v Secretary of State for Justice** [2015] EWCA Civ 1264 where the Supreme Court considered issues relating to indirect discrimination. In particular the tribunal were referred to paragraphs 24 to 29 of that judgment. It sets out the salient features required in cases of indirect discrimination. Initially it states that there is no requirement as to why a particular PCP puts one group at a disadvantage when compared with others. It is enough that it does. It notes that sometimes the reason will be obvious. The second salient feature is the contrast between definitions of direct and indirect discrimination. Direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic. Indirect discrimination does not. Instead it requires a causal link between the PCP and the particular disadvantage suffered by the group and the individual. The reason for this is that the prohibition of direct discrimination aims to achieve equality of treatment. Indirect discrimination assumes the quality of treatment - a need to put everyone on a level playing field. The third salient feature are the reasons why one group may find it harder to comply with the PCP than another group. A fourth salient feature is that there is no requirement that the PCP in question puts every member of the group sharing a particular characteristic at a disadvantage. The fifth salient feature is that it is common place for disparate impact or particular disadvantage to be established on the basis of statistical evidence. Finally it is always open to the respondent to show that the PCP is justified i.e. that there is good reason for the particular requirement.
9. In the case of **Ishola v Transport for London** [2020] IRLR 368, the Court of Appeal also considered the question of provision criterion or practices (PCP), in particular the tribunal was referred to paragraphs 37 to 39 thereof. The Court of Appeal held that, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. A PCP can be something that is always done to someone else, but there is an indication that it will or would be done again in the future. It connotes a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. In the case of a one off decision, where there is no indication that a similar decision would be made in the future, each decision is different.
10. In the case of **Ahmed v Department for Work and Pensions** [2022] EAT 107 and in particular paragraph 25 thereof, the EAT held that the differences between the descriptions of the PCPS in the ET1, preliminary hearing and ET Judgment, albeit minor in the main, illustrate a recurring problem ... construction of the PCP often proves elusive. Unfortunately it is often case that the PCP constructed is reverse engineered from the disadvantage perceived; particularly when the PCP is being constructed by a litigant in person. It is important that any tribunal considering such a claim begin, as here, by identifying the PCP. A PCP, simply put, is where the employer has an expectation of the employee, and either the

same expectation is made of other employees or there is an element of repetition in the expectation with a particular employee. In order to found a claim, the PCP must create a disadvantage because of [a protected characteristic]; constructing the PCP from the disadvantage has the danger of circular reasoning. The identification of the PCP should, because of the protective nature of the legislation, follow a liberal approach and a tribunal should widely construe the statutory definition.

11. The case of **British Telecommunications Plc v Roberts and Longstaffe** [1996] IRLR 601 where the EAT held the tribunal had erred in finding that the employer's failure to give reasonable consideration to the applicants' request to job share on return from maternity leave constituted discrimination which followed directly from their pregnancy and maternity leave and, as such was automatically direct discrimination on grounds of sex in accordance with the principles laid down by the European Court of Justice in the Webb decision. A request to job share after maternity leave is not covered by the special protection afforded to women during pregnancy and maternity leave. The Webb decision ought not to be extended beyond its intended scope. The period protected by statute is the period of the maternity leave. Once a woman returns to work after her leave the statutory protection finishes, and her work thereafter is to be considered in the same circumstances as if she were a man. She is not permanently entitled to rely on having had babies as a protecting feature.

The Issues

12. The issues are set out in Appendix 1 to the Order made on 19 December 2022, save one additional claim has been added during the course of the hearing today. The issues are therefore as follows:-
13. Unfair dismissal. In that regard the Tribunal had to consider whether the claimant was dismissed, namely did the respondent do the following things:-
Refuse to speak to the claimant about returning to work on part time hours;
Refuse her flexible working request?
14. Were those breaches a fundamental breach of contract? The Tribunal will need to decide whether the breach or breaches were so serious that the claimant was entitled to treat the contract as being at an end.
15. Did the claimant resign in response to one of those breaches? The Tribunal will need to decide whether the breach of contract was the reason for the claimant's resignation.
16. Did the claimant affirm the contract before resigning or did she keep the contract of employment alive.
17. In relation to the complaint of direct race, sex, and maternity/pregnancy discrimination, the Tribunal notes that the claimant is of Polish national origin. She compares herself to those of UK national origin.
The less favourable treatment relied upon is the respondent doing the following things:-
Refusing to speak to her about returning to work on part time hours;
Refusing her flexible working request;
Dismissing her.

18. The Tribunal will need to decide whether the claimant was treated less favourably than someone else. There must be no material difference between their circumstances and those of the claimant.
19. In relation to the complaint of pregnancy and maternity discrimination, the Tribunal will have to decide whether the respondent treated the claimant unfavourably by doing the following things:
Refusing to speak to her about returning to work on part time hours;
Refusing her flexible working request;
Dismissing her.
20. Did the unfavourable treatment take place in a protected period? If not, did it implement a decision taken in the protected period?
21. Was the unfavourable treatment because of the claimant's pregnancy or maternity? Or was the unfavourable treatment because of illness suffered as a result of the pregnancy?
22. In relation to the complaint of indirect discrimination, the Tribunal will have to consider the provision criterion or practice (PCP) relied upon. The PCP referred to in the Appendix is:-
The respondent requiring its employees to work to their contracted hours.
During the course of the final hearing, the claimant seemed to expand that to having to be required to work her full time hours, albeit that she did not directly ever say that was the PCP upon which she was relying, because when she was directly asked about the PCP by Employment Judge Martin, prior to any submissions, she said that she would have to consider the matter further.
23. Did the respondent apply a PCP to the claimant and have the respondent applied it to men as well as women?
24. Did the PCP put women at a particular disadvantage when compared with men?
25. Did the PCP put the claimant at that disadvantage?
26. Was the PCP a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent in their amended response is of maintaining a high quality customer service by ensuring that samples were sent out to customers within the maximum 48 hour window.
Was the PCP an appropriate and reasonably necessary way to achieve those aims?
Could something less discriminatory have been done?
How should the needs of the claimant and the respondent be balanced?
27. In relation to the claimant's complaint of the breach of the flexible working provisions the Tribunal had to consider whether the respondent had followed the appropriate procedure and whether or not they had refused the request on the statutory grounds.

Findings of Fact

28. The claimant is a Polish national. She has lived in the UK for over six years. Throughout the course of the final hearing the Tribunal had the benefit of a Polish interpreter. It was not clear to the Tribunal how good the claimant's English was

either written or verbal. She said that her English was better whilst she was at work. It appears that she managed to engage verbally with the respondents. One of the respondent's witnesses indicated that, if the claimant had an issue, she would refer matters to her husband and seek clarification if she disagreed with something.

29. The claimant is married and now has a two year old child. The claimant and her husband have no family support for childcare.
30. The respondent is a small medium sized business which sells and supplies carpets to various clients in the North East of England. They employ approximately 150 employees in total with about 50 in the office environment.
31. The claimant was employed by the respondent from 2016. She was employed as a sales/ office manager, which principally incorporated managing the sample sent to customers. The claimant's husband had also worked for the respondent but had left at some stage when the claimant was on maternity leave.
32. The claimant's job description is that at pages 49 to 50 of the bundle. It appears to be the principal part of her role was to deal with processing and dispatching of samples and the tasks relating to sampling. During the course of the hearing the claimant also talked about having to deal with logging and dispatch orders to Tuffnells, which she suggested were the main areas of her work, albeit that some other administrative tasks were also involved.
33. In her job description, it indicates that sample orders should be sent out within 24 hours and a sample dispatched within 48 hours of receipt of a request.
34. The managing director indicated that these were service level requirements. The claimant in her evidence suggested that these levels were often not being met. The respondent suggested that that would probably only be about 10% of the time with which the claimant disagreed. The managing director stated that this is what the respondent wanted to achieve, but acknowledged that it did not always happen in practice.
35. The managing director said that sampling was part of the respondent's core business. He said that the claimant was employed effectively in that position to deal with the sampling and sending them out.
36. During COVID, the claimant said that she was only working approximately three hours a day, between July and September 2020 and was able to cover the main responsibilities of her role, namely sending out the samples and dispatching the orders to Tuffnells. Mr Donlan, the managing director, said that at that stage during the early part of COVID, the business had substantially reduced, which resulted in a reduction in orders and samples. In her evidence, the claimant suggested that she could do the role part time, as she had done so at the time. However the Tribunal note that what was occurring during COVID may well not be consistent with what would happen in the ordinary course of events at during normal times. The respondent said that the request for samples was considerably reduced because their business was reduced during the COVID period.
37. The claimant went on maternity leave from 12 April 2021.
38. Her husband had previously worked for the respondent, but had left before the claimant's employment terminated.

39. Sometime around October 2021, when the claimant was still on maternity leave, Mrs Riley the HR manager said that the claimant had contacted her and asked her about her return to work, but indicated not full time. Mrs Riley said she asked the claimant to complete a flexible working request and explained the procedure to her. She said that this call took place by telephone.
40. When she was asked about what the claimant was requesting at that time, Mrs Riley said she did not know what the claimant was requesting nor indeed whether the claimant was asking for the role not to be full time.
41. A flexible working request was received from the claimant on 5 November 2021. It is at page 51 to 53 of the bundle. In that request, which was her first request, the claimant requested to adjust her full time working hours from 9 to 5 to 8 to 4, so that she would effectively start an hour earlier and finish an hour earlier.
42. In her evidence to the Tribunal, the claimant said she did not know at that stage that she could ask to work part time. This is why she made a subsequent request. At that stage, she thought she could only adjust her full time working hours, which was why she had made the request in the way that she did. She then made a subsequent request to work part time, thereby suggesting that she may subsequently have realised that she may be able to ask for part time working. This was not entirely consistent with what Mrs Riley referred to as to what had happened in October 2021, as in her witness statement, Ms Riley refers to a telephone call where she suggests the claimant indicated not full time, but Mrs Riley did not know if the claimant was seeking part time at that stage. However the claimant's evidence is nevertheless consistent with what she ultimately did do. She did in fact subsequently then request flexible working on a part time basis. After submitting her first request, the claimant then said that she needed to change the request which she had made due to her husband's working hours. She was asked to fill in a new flexible working request, which Mrs Riley said she then had to chase up.
43. Mrs Riley said that the claimant then made a request to extend her period of leave by taking some further holidays from 24 to 31 January 2022, which was approved.
44. The claimant then made a new further flexible working request on 14 January 2022 which is at pages 54 to 56 of the bundle. In that flexible working request, she asked to work five hours a day, three days a week which she requested start as from 1 February, after the period of her holiday had expired.
45. Mrs Riley said that the claimant was then invited to a meeting to discuss her request. The claimant did not deny she was invited to a meeting to discuss the request. She did not refute it. Neither did the claimant dispute that a meeting took place. However the claimant's case was that the matter was not discussed with her, yet she did not dispute that there was a meeting and subsequent discussion at that meeting about the request.
46. The respondent has produced notes of the meeting which are at page 57 of the bundle.
47. Although during the course of her evidence, the claimant did not appear to agree with some elements of those notes, she largely did not dispute the matters set out in the notes of the meeting at page 57 and accepted those matters were effectively discussed.

48. Both of the respondent's witnesses gave consistent evidence about the meeting. They said that, at the meeting, the respondents discussed with the claimant the changes which had been made whilst she had been off on maternity leave. They then said they went on to discuss the claimant's flexible working request and what the claimant was looking for, namely in relation to days and hours and how her job may fit into that proposal. Both of the respondent's witnesses said that the claimant said that she needed flexibility with her regard to her days and hours because she needed to fit around her husband's job. This was because they had no family here to support them and that they wanted to deal with childcare between them.
49. Both the respondent's witnesses said that the role itself was full time. They said the respondent needed someone to be around every day and they discussed how that might work in terms of recruitment or how that would fit in with the requirements of the business. They talked about whether an existing member could cover for the hours the claimant was not there or whether they would need to recruit. It was left at the end of the meeting that the respondent would have to consider the application and come back to the claimant.
50. The claimant's case was that there had been no discussion about her part time hours as such. However she accepted that there was a discussion about this at the meeting. She also accepted that there was a meeting about her flexible working request. She said that the meeting focused on her having to do the role full time. She said that, although the respondent indicated that they wanted to help her, they said they needed for her to work full time. She said that was all she heard at the meeting.
51. In her evidence, Mrs Riley indicated that the claimant had suggested that she did not want to put her child into child care because he was a clingy child, which the claimant disputed. The claimant indicated that she was still breastfeeding at the time because her child had a problem with lactose.
52. The claimant's evidence was that the message she heard from the meeting and took away with her that it was all too difficult and that the respondents were only interested if she came back to work full time.
53. The claimant did however accept that she told the respondent during the course of that meeting that she did need to be flexible with the days because of her husband and that she needed to have flexible days and hours so she could fit round him. This was so that they could deal with child care between them. That was entirely consistent with what both the respondent's witnesses said about the meeting, as they both said that, during the course of the meeting, the claimant made it clear that any hours and days had to vary. The claimant could not tell them which days or hours it would be until the Thursday the preceding week, because she needed to work around her husband's hours and his shifts changed regularly.
54. It does seem that the message which claimant seemed to take away from the meeting was that the respondents were being difficult and they would only entertain her working full time. The Tribunal did have some concerns that this was a formal meeting conducted with the claimant with no representative, particularly as by the time the claimant attended this final hearing, she required an interpreter. She clearly has some difficulty understanding English, albeit that the Tribunal does not know to what degree she had difficulty understanding English at that time, especially how much she understood what was discussed at

that meeting. Having said that it is quite clear that the claimant did make it clear during the course of that meeting that what she was asking for was to return part time on flexible days and flexible hours each week. Further she made it clear at the meeting that she would not be able to indicate until just prior to the preceding week which days or hours she could work that week. The respondents on the other hand were saying that the position itself was a full time position and they needed to cover over the whole role five days a week.

55. Mrs Riley, in her evidence, which as not contested, said that, if the claimant did not understand anything during a meeting, she would tell them and that she would say that she had to go and speak to her husband. They said that this had happened on other occasions when she had been in a meeting. Mrs Riley said that, on this occasion, the claimant did not indicate that she needed to speak to her husband and therefore they understood that she did understand what was discussed at the meeting. It was quite clear to the Tribunal that a discussion took place about the claimant wanting to work varied hours and varied days at short notice. This was consistent with the notes of the meeting and the evidence from all the parties.
56. There is no suggestion that the claimant did indicate she wanted to discuss it with her husband nor did the claimant suggest that at any stage during her evidence. It was made clear that the respondents did want to consider the matter further. They also suggested to her that if she wanted to consider matters further or discuss it with her husband that she could do so. This was also not contested by the claimant.
57. The respondents did not suggest the claimant come back to them with any suggested days or hours, which might make what she was proposing more workable. Equally nor did the claimant revert to the respondents with any alternative suggestions about specific days or hours. In her evidence the claimant seemed to be suggesting that she was expecting the respondents to come back to her with some proposals.
58. Following the meeting, the respondent wrote to the claimant on 24 January. The letter was sent by email. It is at page 59 of the bundle. In the letter, the respondent referred to the proposed change to the claimant's working pattern and the proposed variable days and variable working pattern. They informed her that they could not agree to her request. They state that they could not accommodate her request, due to structural changes within the company which are currently ongoing throughout the business - the sales office being split between two sites - and the requirement for consistency to fulfil customer requirements. The claimant was advised that she had the right to appeal against the refusal of her request for flexible working. She had seven days in which to appeal. The email was sent to the claimant and copied to her husband. The claimant in her evidence suggested that she had not seen the letter.
59. In their evidence before the Tribunal, the respondents indicated that what the claimant was suggesting was completely unworkable. They could not request an existing employee or recruit for a role where they did not know which hours or days the claimant would be working from week to week.
60. In their evidence, the respondent's witnesses stated that they do have a number of employees who work part time. They said that all of those employees were either job sharing or working fixed hours.

61. A further meeting took place with Mrs Riley. In her evidence, the claimant did not refer to either of the meetings with the respondents, but did acknowledge when she was asked about the matter that there was a further meeting. That is also an email from Mrs Riley to the claimant referring to a meeting on 28 January (page 60 of the bundle).
62. Mrs Riley said that the claimant asked to meet her on 28 January 2022. She wanted to talk about the outcome of her flexible working request, which supported the fact that the claimant must have seen the letter refusing her request. Mrs Riley said that she reminded the claimant that if she wanted to appeal she needed to put it in writing, but she said that the claimant said she just wanted to have an informal chat with her and to talk through the circumstances and what she needed to do next. The claimant does not dispute that further discussion took place with Mrs Riley on 28 January. She did not suggest that she tried to exercise her right of appeal nor indeed was prevented from doing so.
63. During the discussion on 28 January the claimant asked Mrs Riley about others who were working part time and why they were allowed to do so. Mrs Riley said that she explained that the problem was that the claimant was asking to work part time but could not identify the hours or days which she would be working until just before the end of the previous week. Therefore, it would not be possible to recruit somebody to fill the hours the claimant was not working. She said that, at the subsequent meeting, the claimant said that she could not work fixed days or hours, due to her husband's work and that she had no family to assist her. Mrs Riley said a discussion took place about child care options, but that the claimant said that she did not want to put the child into child care, because her child was clingy. The claimant did not dispute that there was a discussion with Mrs Riley. Nor did she dispute the contents of that discussion. She acknowledged that she herself raised the subject about others being allowed to work part time and her not being allowed to do so. Nor did the claimant dispute that an explanation was given to her about why those others were allowed to work part time. She only disputed exactly what was said about child care options. She said that she did not have any family to help with child care and that her child had lactose issues which is why she was still breastfeeding.
64. The claimant led no evidence about that meeting with Mrs Riley or indeed the previous meeting during the course of her evidence.
65. Mrs Riley said the claimant's husband subsequently contacted her. She said she advised both the claimant and her husband that she could either appeal the decision or she could resign. She was then asked what needed to go in any letter of resignation and she provided the information.
66. The claimant indicated that, at the subsequent meeting she was effectively told that, if she resigned, she would be paid a months' notice pay, but if she did not she would get less money. Mrs Riley said that basically what the respondent agreed was to pay the claimant in lieu of notice which meant she did not need to return to work her notice.
67. The claimant did not appeal the decision of her flexible working request.
68. The claimant then sent in an email from her husband's email address stating that she was unable to return to her full time role following maternity leave and giving one months' notice as per her contract of employment to terminate her employment. She did not specifically make any reference to breaches of contract

in that email; the wording of which was effectively supplied to her by Mrs Riley as noted at page 61.

69. The comparators upon whom the claimant relied were three other women being Zoe, Chelsea and Kimberley. She said all of them, who were of UK nationality, had been allowed to work part time after maternity leave; two of them prior to her returning from maternity leave and one of whom had been permitted to do so some time after her maternity leave had expired and she had left her employment.
70. Mrs Riley said that two of the individuals were effectively job sharing with each other; both working three days a week with one day where they were both in work. She said that they had different roles to the claimant in customer service, namely telesales. She said that the other woman had been permitted to work part time after she had returned from maternity leave too, but she too was on set days and hours. She said that the respondent also employed a cleaner who worked part time and another employee in HR worked part time. She said that the difference with regard to all of these roles was that they were all different roles - the sales roles being predominantly answering telephones and a customer service role, but in any event all of these employees were working on days of the week on specific days and specific hours. She said that the HR role was an entirely different role as was the cleaner role.

Submissions

71. The respondent's representative submitted that there was no breach of contract. He said that most of the breaches and the less favourable treatment relied upon, namely that the respondent would not speak to the claimant about her part time hours were unsustainable on the evidence bearing in mind that the claimant had conceded during the course of the hearing that there had been at least two meetings with her on this matter; one of which she had in fact instigated. He also submitted that the claim for breach of the flexible working provisions was misconceived as the respondents had followed the procedure. He asserted that there was no fundamental breach of contract entitling the claimant to resign. In relation to the complaints of direct discrimination, he said that the only one that had any substance was in relation to the race and he said that the comparators meant that the claimant did not get that claim off the ground. In relation to the indirect discrimination the respondent's representative submitted that the PCP as defined in the preliminary hearing did not exist. If it was wider, the claim could not succeed either because the respondents had never required her to work full time. They had simply indicated that it was a full time post and their evidence was quite clear that they did allow part time working. He submitted that the claim did no merit to her claim.
72. The claimant submitted that she believed she had been discriminated against on the various protected characteristics relied upon namely sex and maternity abut in particular race as she felt she was treated different to the other non-Polish employees around part time working. She also said that the respondent failed to comply with her flexible working request. She did not make any particular submissions regarding the indirect discrimination or specifically identify the PCP relied upon by her despite being given the opportunity to do so.

Conclusions

73. This Tribunal finds that the respondent did comply with the statutory flexible working provisions. After the claimant made her application for flexible working,

the respondent arranged a meeting with her and discussed it with her. This is entirely consistent with the notes of the meeting, the evidence of both the respondent's witnesses and the claimant's own evidence. It is quite clear her request was discussed at that meeting. The Tribunal also accept that the respondent wrote to the claimant following that meeting and offered her a right of appeal, which she did not seek. They clearly followed the statutory procedure. The Tribunal also accepts that the reason given by the respondent in refusing the claimant's request for flexible working was entirely consistent with the statutory provisions. Accordingly, there is no breach of the flexible working provisions.

74. Therefore the claimant's complaint of a breach of the flexible working provisions is not well founded and is hereby dismissed.
75. In relation to the claimant's complaint of constructive unfair dismissal, the Tribunal finds that there was no breach of contract, which would have entitled the claimant to resign. The breaches of contract relied upon by the claimant as identified at the preliminary hearing were:- Firstly a refusal to speak to her about returning to work on part time hours which is entirely inconsistent with the evidence and is unsustainable when viewed against both the oral and written evidence in this case. Secondly, the refusal to allow her flexible working request is not a breach of contract. The respondent is obliged to allow the claimant to make an application. They must then consider that application and then make a decision in accordance with the statutory provisions. There was no breach of the flexible working provisions. Therefore, there could be no breach of contract on that basis. In any event, any such breach could not on reach the threshold of a fundamental breach of contract. Therefore, the Tribunal does not accept that the claimant could have resigned in response to any breach of contract.
76. Indeed on the claimant's own evidence, it appears that she resigned as she could not work full time because that she had to look after her child. Therefore there is some doubt anyway as to what was the reason for her resignation even if there had been a breach of contract (which as stated above was not the case).
77. The Tribunal reminded itself that the burden of proof in relation to all of these complaints is on the claimant.
78. In relation to the less favourable treatment, the Tribunal finds that the first allegation of less favourable treatment, namely refusing to speak to her about returning to work on part time hours lacks merit, because it is quite clear that the respondent did in fact speak to the claimant on at least two occasions about her request for flexible working, as was acknowledged in the claimant's own evidence.
79. Further, this Tribunal does not find that refusal to the claimant's flexible working request was less favourable treatment for the reasons referred to above, namely that the respondent was entitled to refuse the claimant's flexible working request.
80. The Tribunal reminded itself of the case of **Shamoon** and consideration of the comparators relied upon whether actual or hypothetical. In this case the claimant is relying upon actual comparators. The three actual comparators upon whom she relies are all female namely Zoe, Chelsea and Kimberley. Therefore all of them are of the same sex and were all in fact returning from maternity leave. In any complaint of sex discrimination, the comparator must be male. The claimant cannot rely on comparators of the same sex to pursue an allegation of less favourable treatment on the basis of sex nor because of pregnancy/maternity

because her actual comparators were of the same sex and were all also returning from maternity leave. Therefore there is no substance whatsoever to her complaints of direct discrimination of the grounds of sex or maternity/ pregnancy.

81. In relation to her complaint of race discrimination, the Tribunal notes that the three actual comparators upon whom the claimant relies are of a different race / nationality, namely not Polish. However the material circumstances of those were entirely different because all three of them were seeking to work on fixed hours on fixed days. That was not the case with the claimant who was seeking to work varied hours on varied days and would be to notifying the respondent during the course of the preceding week. The material circumstances of any comparator, including any hypothetical comparator must not be materially different to those of the claimant. There is no suggestion that the respondent would have allowed a hypothetical comparator, who wanted to varied hours on varied days of the week and notify the respondent the preceding week, would have been allowed to work part time.
82. In the case of **Shamoon**, the Tribunal also noted that it is not sufficient for the claimant to suggest less favourable treatment and have a particular protected characteristic. There must be something else. In this case there is no indication of anything else. Therefore, there is no suggestion that the burden of proof in this case would shift to the respondent to provide an explanation for any alleged less favourable treatment.
83. Nevertheless, the respondent did provide an explanation as why they could not accommodate the claimant's request for part time working following her maternity leave because the basis upon which that request was made was completely unworkable in any business. Where there was a requirement to cover a role on a full time basis it would be impossible to ask another employee to cover the hours the claimant was not working each week or recruit somebody else to cover those hours because the claimant did not know nor would the respondent know until the week before which hours or days she could work the following week. Such an arrangement would be not be practicable or feasible.
84. Accordingly the claimant's complaints of direct sex, maternity/pregnancy and race discrimination are not well founded and are all hereby dismissed.
85. In relation to the claimant's complaint of pregnancy and maternity discrimination, the Tribunal finds, as explained above, that the respondent did not refuse to speak to her about returning on part time hours or dismiss her for the reasons to above. Although the respondent did refuse her flexible working request that did not amount to unfavourable treatment which took place during her protected period because of her pregnancy or an illness suffered by her. The respondent was entitled to refuse her request for flexible working because of the way the request was made, namely the nature of that request which was not practicable or feasible for the reasons referred to above. Indeed it would be unlikely to be practicable for any business. This Tribunal finds the claimant resigned and was not dismissed. Further, this Tribunal does not find that in any event the alleged less favourable treatment took place within the protected period because by that stage the claimant was on holiday. It certainly was not done because of her pregnancy. The actions taken by the respondent were simply because they could not accommodate a completely impracticable working arrangement.
86. For that reason the claimant's complaint of unfavourable treatment on the grounds of her pregnancy/maternity is not well founded and is hereby dismissed.

87. In respect of the claimant's complaint of indirect discrimination on the grounds of sex, the Tribunal note and have been referred to what was identified as the Provision criteria or practice (PCP) in the list of issues at the preliminary hearing, namely the respondent requiring its employees to work to their contracted hours. The Tribunal explored with the claimant prior to submissions as the respondent's representative had raised the issue as to whether that remained the PCP. The Tribunal considered that it may be from the evidence given by the claimant the PCP was the requirement to work full time. However in exploring that with the claimant the claimant was not able to confirm whether that was the PCP she relied upon, but indicated she may need time to consider it. The Tribunal indicated that the parties should address that PCP as well as the other PCP in their submissions, but the claimant did not specifically confirm in her submissions that was the PCP on which she relied.
88. The Tribunal does not find there was a PCP requiring employees to work their contracted hours as no evidence was produced in support of such a PCP. Indeed, the evidence was to the contrary namely that the respondent allowed the claimant and others to request flexible working and on occasions agreed to those requests as supported by the oral evidence of both the respondent and the claimant.
89. The Tribunal accepts the respondent's submission that the PCP requiring employees to work full time does not exist as such. There was no evidence submitted that the respondent did require their employees to work full time. Indeed there was in fact evidence to the contrary that they did allow employees to work part time. This evidence was submitted by both the claimant in relation to the comparators upon whom she relied and by the respondents in their evidence in responding to the issue around comparators. The claimant did not ever specifically state whether that was the PCP upon which she was relying, despite the matter being raised prior to submissions and the claimant being specifically asked to confirm the position. The burden of proof was on her and she did not ever meet that burden.
90. The respondent's representative sought to re-engineer the PCP to a request to work full time where the hours or days could not be defined which they suggested did not disadvantage anyone.
91. Although the Tribunal does not find that the requirement to work full time amounted to a PCP for the reasons referred to above, it notes such a PCP is capable of putting women at a disadvantage because of child care responsibilities and did put the claimant at that disadvantage. However, this Tribunal would have found it amounted to a legitimate aim to enable the respondent to be able to maintain their business. The needs of the business required the role the claimant undertook to be on a full time basis. The Tribunal considers that it was proportionate for the respondent to refuse the claimant's request and allow her an opportunity to appeal. The onus would have been on the claimant to then put forward alternative suggestions because the proposal made by her about variable days and hours and notifying the respondent the week before were impracticable and not feasible for the respondent's business or indeed likely to be practicable for most business. On that basis it was proportionate for the respondent to take the steps which they did, namely to refuse that request which then allowed the claimant to then either appeal the decision or decide to resign from her employment; the latter of which she then decided to do. It was a proportionate response by the respondent not to allow the degree of flexibility being sought by

the claimant in her request for flexible working. For those reasons, the claimant's complaint of indirect sex discrimination is also not well founded.

92. By way of obiter comments, this Tribunal did have some reservations about what the claimant understood from the meeting to discuss her flexible working request and what the respondents could reasonably have believed that she understood. The Tribunal did have some concerns about whether it was best practice for the meeting to have proceeded without making sure the claimant had a companion, bearing in mind English was not her first language. Although this was a meeting to discuss the flexible working request, it clearly had a very significant impact on her. This is a matter which the respondents ought to take into account should they find themselves in a similar situation. Despite those reservations, this Tribunal nevertheless does not uphold any of the claimant's claims which are all hereby dismissed.

Employment Judge Martin

Date 17 July 2023

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