Case No: 2307596/2020

EMPLOYMENT TRIBUNAL S

Claimant: Mr W Hall

Respondent: BT plc

Heard at: Croydon Employment Tribunal **On:** **24, 25, 26 April 2023**
16,17,18 October 2023
In chambers:
25, 26 October,
27 November and
19 December 2023

Before: Employment Judge Barker
Ms R Serpis
Ms C Oldfield

Representation
Claimant: Mr Crammond (counsel)
Respondent: Mr Sheehan (counsel)

RESERVED JUDGMENT

The unanimous decision of the Tribunal is that:

1. The claimant was not unfairly dismissed;

2. The claimant was not subjected to unlawful direct discrimination by reason of his sex;

3. The claimant was not subjected to unlawful direct disability discrimination by association with a disabled person;

4. The Tribunal does not have jurisdiction to consider the claimant's claim of indirect disability discrimination by association with a disabled person, on the basis that the claim does not fall within the scope of the Equality Act 2010 or the case of *CHEZ Razpredelenie Bulgaria AD v Kosimia za Zashtita ot Diskriminatsia: C-83/14, [2015] IRLR 746*.

5. The claimant's application for a privacy order under Rule 50 of the Employment Tribunals Rules of Procedure Regulations 2013 is refused, as it has been possible to provide this reserved decision without disclosing any information about the claimant's daughter that the claimant has requested

remain private.

REASONS

Background Matters and issues for the Tribunal to decide

1. The claimant worked for the respondent from 8 December 1997 until the termination of his employment by reason of redundancy on 1 September 2020. He engaged in ACAS Early Conciliation from 12 October 2020 until 12 November 2020 and by a claim form lodged at the Tribunal on 16 November 2020, brought claims against the respondent of unfair dismissal and disability discrimination. His claim, which was issued without the support of legal representation, was brought on the basis that the respondent did not do enough to support him, including in relation to the redundancy situation.

2. The claimant notified the Tribunal in his claim form that he has a registered disability, being vertigo, which required the respondent to assist him with a change in role as he was no longer able to climb or work in confined spaces. His pleadings in his claim form stated that he was "job matched" into a new role following his diagnosis of vertigo as an "Order and Jeopardy Manager" which was later re-named as "Partner Service Manager". He accepted the role on 19 January 2015 and worked from Sevenoaks. The claimant's ET1 clearly states that the respondent "chose to ignore" his issues from October 2019, the start of the redundancy exercise, until his dismissal, and that he did not receive enough support towards the end of his employment.

3. The claimant had the support of legal representatives at the case management hearing on 30 September 2021 at which his claims were clarified and a list of issues drawn up. His claims were for unfair dismissal, including that the claimant did not accept that there was a redundancy situation at the respondent at the time (2019/2020), and direct and indirect associative disability discrimination by association with his daughter, who the respondent accepts is a disabled person. The claimant's daughter was born in January 2008. She was diagnosed with a number of health issues in 2013 and continues to require a high level of additional support.

The claimant's application to amend his claims

4. The claimant made an application on 14 April 2023 to add a claim of direct sex discrimination to his claims. He told the Tribunal that this was prompted by the late disclosure of an e-mail by the respondent. That late disclosure took place on 4 April 2023. The respondent accepted that the failure to disclose these documents until 4 April 2023 was an oversight on their part.

5. The respondent's solicitor provided a written response objecting to the claimant's application on 19 April 2023.

6. At the start of the hearing, it was agreed by the parties' representatives that the Tribunal would first read the parties' existing witness statements and relevant documents (those indicated in the witness statements by means of cross references to pages in the bundle), before determining the claimant's application.

7. In addition, the respondent indicated that because the claimant's indirect discrimination complaint as per section 19 Equality Act 2010 could not be properly understood, the respondent had not yet pleaded a legitimate aim in its defence. The respondent noted that the first provision, criterion or practice ("PCP") pleaded by the claimant for his claim of indirect discrimination related to a specific decision applied to the claimant and to no others, in that the claimant was allowed to work from home for over a month and then return to the office. The claimant clarified the PCP as being that he was not able to do his own role from home or do alternative roles from home and that the respondent imposed a requirement to work in the office all of the time and that flexible working had not been offered at the respondent's Brentwood location to the claimant. The respondent noted that the claimant's claim so far had been pleaded on the basis of a failure to provide flexibility in relation to his existing role, that of Partner Service Manager, and not at another location.

8. The claimant's submissions on his application to add a direct sex discrimination complaint were made on the basis that this was not a new complaint but was a relabelling of facts already pleaded to a very large extent. He told the Tribunal that the material difference was the reference to his second comparator, Ms Delman. The matter is therefore not time-barred and in any event, any question as to whether the matter was time-barred could be dealt with as part of the decision at this final hearing.

9. In relation to the respondent's argument that they were prejudiced by this late application, the claimant submitted that the respondent would not be in this position of prejudice had their disclosure not been made so late. The claimant also noted that the respondent in any event had to explain the same less favourable treatment in relation to sex discrimination as it did in relation to disability discrimination and that the same witnesses as had already been called by the respondent were party to the newly-disclosed emails that the claimant says indicate he has been discriminated against on the basis of his sex.

10. The claimant will also say that the fact that Ms Delman was a carer adds something to the claimant's claim because it indicates that the respondent took female carers' obligations more seriously and the presence of both Ms Harvey and Ms Delman being given assistance by the respondent shows a pattern.

11. In any event, the claimant noted that the respondent disclosed these documents before any suggestion of an application to introduce a claim of sex discrimination. The respondent therefore appears to consider that these documents are relevant to the existing claims. Furthermore, the respondent can explore any new evidence from its witnesses by means of evidence in chief and appears to be able to explain the case comprehensively already. Finally, it was entirely proper that the claimant did not bring a speculative claim of direct sex discrimination without evidence and he should not be penalised for the reason that he only sought to introduce this claim when he believed that he had evidenced to support it.

12. The respondent's submissions were that the Tribunal should reject the claimant's application on the basis firstly that the new complaint was hopeless and misconceived and that the claimant therefore loses nothing by not being able to

advance it. This is on the basis that his two comparators for sex discrimination, Ms Harvey and Ms Delman, were in a different team, that being the International team in Brentwood and any argument that the claimant should have been given the job that the male individual was given in Brentwood, but with additional adjustments, was hopeless, because the claimant never applied for the role in the International team in Brentwood and that the man who was given the job applied for it and got it via an application process.

13. The respondent also noted that the claimant's application should be rejected because the respondent had little opportunity to investigate the facts given that the application was only received a week before the first day of the hearing and the respondent had difficulties in obtaining instructions. The matter relating to Ms Delman was entirely new evidence. Furthermore, the respondent said that the sex discrimination claim is out of time by almost three years. It is an entirely new claim and so the original limitation periods need to be considered. Furthermore, the respondent will say that Ms Delman was a new employee and was dismissed shortly after joining the International Team. She therefore was not treated better than the claimant. The reason for any less favourable treatment that may have taken place was because of the claimant's failure to apply for the role.

14. The Tribunal took time to deliberate. Our decision was provided to the parties orally during the hearing and is recorded here for the sake of completeness. The issue of the claimant's application to amend is finally balanced in terms of the prejudice to the parties. We accept that the age of the evidence is an issue in that, as the respondent noted, it has difficulties with obtaining relevant information from as long ago as December 2019, the time to which these emails relate. However, we note that that the age of the evidence prejudices the claimant as well, who has the initial burden of proof in establishing facts from which the Tribunal could conclude that there has been unlawful discrimination.

15. The case of ***Selkent Bus Company Limited v Moore*** requires the Tribunal to take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The more recent case of ***Vaughan v Modality Partnership*** notes that the core test in considering applications to amend is the balance of injustice and hardship and that the Tribunal should consider submissions from the parties on the practical consequences of allowing or refusing the amendment.

16. To that end, we note the significant overlap between the direct sex discrimination claim and the direct disability discrimination complaint so far as it relates to the issue of caring responsibilities and the respondent's willingness to make allowances for those and be flexible. We accept the claimant's submission that those witnesses already called by the respondent were involved in the disclosed e-mail chain and that the respondent may be permitted time to adduce further witness evidence by means of questions in chief. The availability of the respondent's witnesses can be accommodated through the timetabling of this hearing and if necessary, witness orders, given that two of the respondent's witnesses no longer work for the respondent.

17. The Tribunal does not accept though that this is a mere relabelling exercise given that an entirely new jurisdiction, that of sex discrimination, is being introduced as well as a new comparator, that of Ms Delman. Therefore, time limits need to be

considered. However, it is clear and we accept the claimant's submission that the claimant has only recently become aware of the possibility of a claim for sex discrimination, following the disclosure of these emails on 4 April 2023 and that he acted promptly after that disclosure to make his application to amend.

18. The merits of any new claim can be considered by the Tribunal as per the case of ***Gillett v Bridge 86 Limited*** which notes that there is no point in allowing an amendment if a claim is either utterly hopeless or has no reasonable prospect of success. On the information which was before the Tribunal at the start of the hearing, it could not be said that the sex discrimination complaint was either utterly hopeless or had no reasonable prospect of success in that the emails suggest that the respondent's HR and operational managers got together to readily and proactively make adjustments to accommodate the caring responsibilities of two women at risk of redundancy. This was to be contrasted with the claimant's case where there appeared at the time of the application to be no corresponding evidence of similar efforts being made on his part. It could not therefore be said that the claim subject to the application to amend is utterly hopeless or has no reasonable prospect of success. On balance therefore the prejudice to the claimant in refusing his application to add a complaint of sex discrimination was greater than the prejudice to the respondent and allowing it.

19. The claimant also applied to add 3 new provisions, criteria or practices ("PCP"s, from s19 Equality Act 2010) to the list of issues on indirect disability discrimination. There was considerable discussion between the parties' representatives as to whether or not the claimant's claim for indirect disability discrimination as pleaded was incomprehensible. The respondent noted that the list of issues provided only the week before contained only one PCP relating to the Partner Services Manager job and that if the claimant was seeking to introduce complaints relating to other jobs that the claimant either applied for and didn't get or did not apply for, it would be very difficult for the respondent to respond to those at such short notice. The respondent was entitled to marshal evidence which may support a proportionality argument in relation to a legitimate aim and it had not had the opportunity to do so. The Tribunal also noted that there were no specific issues pleaded about which specific jobs the claimant may or may not have applied for or been deterred from applying because of a requirement to work in the office.

20. Following an adjournment to allow instructions to be taken from the claimant, the claimant provided a more specific set of PCPs which included a PCP that required other roles to be done either full time or predominantly in an office, those being the Brentwood International team member role, the Delivery Coordinator role, which was subject to a requirement to work in Belfast, Manchester, Liverpool, Bristol, or Birmingham, and the Stores Hub role which required attendance full-time on site.

21. The respondent noted that this was a completely new claim and completely different to that already pleaded and that the claimant was not able to rewrite the case again and again over the course of the hearing. The respondent noted that what the existing witnesses can say about any of the other roles would be very limited and the respondent could not prepare to examine on that basis. The claimant accepted that there was no specific reference to these other roles in the pleadings.

22. The respondent noted that these roles were in issue as part of the unfair dismissal claim and not the indirect discrimination complaint.

23. The Tribunal took time to deliberate and on returning to give its decision noted that, although it had requested more specificity from the claimant in relation to the list of issues, that at this stage in the proceedings it was not appropriate to allow this degree of variation to be introduced in that the respondent was not able to respond to the new complaints being made, because of the timing and the manner of the application. Although we accept that there is some injustice to the claimant in refusing this application, we accept that the specific practical consequences of allowing the amendment would cause significant hardship to the respondent in having to defend at very short notice new claims across a number of different departments and involving a number of different witnesses. We accept that the respondent, for example, has had no proper opportunity to defend such claims by way of considering matters to do with group disadvantage, proportionality, or its legitimate aim.

24. The amendment sought introduces new complaints and cannot be said simply to be a relabelling or a clarification of an existing complaint. This application was therefore refused.

25. The respondent indicated that it still had several concerns with the list of issues provided by the claimant's counsel at the outset of the hearing. It was not able to agree to it. This was even once the Tribunal's consideration of the amendments was incorporated into that list. The Tribunal considered that the list as currently drafted is one that was nevertheless of assistance to the Tribunal, as it accurately recorded the claimant's complaints and the respondent's defences to them even if only in outline. In the interests of overall proportionality, it was not in the interest of either party to allow more hearing time to be taken up discussing the list of issues any further and allowing further submissions on it at this stage.

26. Any concerns that the respondent says it has, for example, with the formulation of the claimant's complaints particularly those relating to the PCPs for indirect discrimination, can be addressed in submissions. The parties were urged to assist the Tribunal in trying to agree the list as far as they could and if the parties had reached the limits of the agreement that was possible at this stage, the Tribunal considered it best to note this and start to hear evidence.

27. On the morning of the third day of this hearing, during Mr Biddle's cross examination, the respondent's Ms Ciaglia, who had been observing the hearing, provided a number of emails to the respondent's counsel which he told the Tribunal about in accordance with his duty relating to disclosure. It is the Tribunal's view but these emails were provided in response to a comment that had been made by the judge about 30 minutes earlier about there being no email evidence of Mr Biddle's attempts to support the claimant when compared with the emails provided dated 18 and 19 December, or possibly 19 and 20 December, showing Mr Biddle's apparently concerted efforts to support Ms Delman and Ms Harvey following the first individual consultation meeting.

28. The Tribunal expressed its concern about the piecemeal nature of the respondent's disclosure of documents and the apparently selective nature of the documents that were being disclosed. Mr Biddle's answers to cross examination

indicated that he had communicated with others at the respondent such as Mr Gorton, Mr Prescott and Ms Bloomfield about the claimant including by e-mail and telephone, but these records did not appear to be before the Tribunal in the bundle of documents. The Tribunal expressed its concern that there may be a significant number of undisclosed emails. These newly disclosed emails were admitted in evidence, but the respondent was warned by the Tribunal that it was not permitted to drip-feed a selection of emails where it suited them to assist a witness with his questions. This is particularly unacceptable since the claimant's claim had been served on the respondent at the end of 2020 and a duty to safeguard and then disclose relevant documents would have been in existence from that time onwards. The respondent was reminded that it had a duty to disclose all relevant documents whether they support its case or not and that duty of disclosure was ongoing.

Submissions from the parties about indirect associative discrimination

29. Following the end of the main hearing, but before the Tribunal hearing in chambers on 27 November 2023, the Tribunal received additional written submissions from the respondent on the issue of the claimant's claim for indirect associative disability discrimination, following the publication of the draft Equality Act (Amendment) Regulations 2023. These draft regulations proposed adding s19A to Equality Act 2010 to formally codify the decision in the case of ***Chez*** (***CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (Case C-83/14***)) which permitted claims of indirect associative disability discrimination in circumstances where the claimant suffered the same disadvantage as a group of persons with a particular protected characteristic would. It was, in summary, the respondent's additional submission that this further undermined the claimant's submission that the "friends and family" category of indirect associative disability discrimination cases could be determined in a claimant's favour by the Employment Tribunal, as the draft 2023 Regulations indicated that Parliament only considered s19 to apply to "same disadvantage" cases (as per ***Chez***) and not "friends and family cases" such as the claimant's. The respondent noted that, had Parliament considered "friends and family" cases to be covered, the draft 2023 Regulations would have expressly stated this, and they do not.

30. Additional submissions in reply were sought from the claimant and received and these have been taken into account in our deliberations which are recorded below.

31. The Tribunal is grateful for the parties' counsel's submissions, particularly in relation to the legal position of each party on the issue of indirect associative discrimination. Counsels' submissions were of great assistance to the Tribunal in our deliberations.

Undisputed Facts

32. The following facts were not in dispute between the parties and have not been the subject of findings of fact by the Tribunal. However, they are recorded here, as they provide useful background information to the circumstances to which the claimant's complaints relate.

33. The respondent is a provider of telecommunications services in the UK and employs approximately 75,000 people. The claimant began his employment with the respondent on 8 December 1997. He has fulfilled a number of roles with the respondent. In 2012 the claimant began working on secondment in a contractor support role for the London South area. His role involved homeworking. In February 2014, the claimant was still on secondment and was working in the Routing Solutions section which again involved homeworking.

34. At the time of his dismissal, he was a Partner Service Manager (hereafter, "PSM") for the respondent's Enterprise business at the respondent's site in Sevenoaks in Kent. He worked from home one day per week and was allowed to leave work early (approximately 2pm) to return home for when his daughter came back from school and he would finish his working day at home.

35. The claimant is a single father and is the primary carer for his young daughter. His daughter has a number of complex health issues with which she was diagnosed in 2013 and further issues were diagnosed in 2018. She requires considerable daily support. The respondent does not dispute that the claimant's daughter is a disabled person within the scope of s6 Equality Act 2010, and that she met this definition at all times to which these claims relate.

36. The claimant himself is also a disabled person but does not rely on his own disability for the purposes of these proceedings but relies on his association with his daughter as a disabled person.

37. The respondent operates a scheme known as a "Carer's Passport". This is described by the respondent as an undertaking entered into between it and an employee where the employee feels that their circumstances could have an impact on their ability to work either currently or at some point in the future. It describes the nature of any caring responsibilities, any workplace adjustments that the individual might need and any agreed communication between the individual and the respondent if the individual is unable to come to work.

38. The passport is confidential, and the respondent entrusts the employee's line manager with the responsibility to hand over the passport to an incoming line manager and ensure that they are aware of its contents and its continuing confidentiality. The claimant's passport contains a detailed description of his caring responsibilities for his daughter. His working hours were adjusted to accommodate his daughter's needs and as stated above, he was allowed to work from home and to leave the office when required to attend meetings for his daughter, including at short notice.

39. The key issue as far as the claimant and his continued employment with the respondent was concerned was maintenance of this flexibility but also maintenance of his presence either at home or at work a short distance away from home so that he could respond to any urgent contact such as from his daughter's school, relating to her well-being. It was therefore understood by the respondent that the claimant was unable to relocate in connection with changing work circumstances and was also unable to commute. In his witness statement, the claimant gave evidence that he could, in fact, have commuted outside the Sevenoaks area to Brentwood. The respondent does not accept that it was

informed of this change of position by the claimant before his dismissal and we have made findings of fact on this issue below.

40. On 14 August 2019 the claimant and his line manager Sue Bloomfield, had a meeting where the claimant asked whether he could work from home to assist his daughter with a school transition. Ms Bloomfield discussed this with her line manager, Paul Biddle, and the Tribunal accepts that the respondent agreed that the claimant could work from home for a period in September and October 2019.

41. It is accepted by both parties that the claimant's colleague Ms Sheldrake and Ms Harvey, who worked in the International Team, both worked from home with Ms Sheldrake being formally classed as a home worker.

42. In 2019 and 2020 the respondent conducted a large-scale restructuring exercise which affected approximately 600 employees across several of the respondent's businesses. Of these, 367 Enterprise employees were within the scope of the exercise. Some employees were being asked to move offices and others were being made redundant altogether.

43. On 21 October 2019 the respondent announced that it would be closing the Enterprise function at the Sevenoaks site. The ten members of the PSM team, including the claimant, Ms Bloomfield and Ms Sheldrake, were placed at risk of redundancy. The parties agree that the work done by the claimant and his colleagues was not ceasing but was moving location to a service centre in Merseyside, approximately 4-5 hours' drive from Sevenoaks. We note that in the bundle there is evidence, not challenged by the claimant, of relatively high percentages of at-risk employees opting early on in the redundancy consultation period for voluntary redundancy. After the first 189 individual consultation meetings, 110 had expressed interest in voluntary redundancy.

44. The Tribunal heard agreed evidence that this was the respondent's first compulsory redundancy situation that the claimant, Ms Bloomfield and Mr Biddle had experienced during their time working for the respondent.

45. There was a period of collective consultation with the respondent's recognised trade unions. These meetings took place on 14/15 October, 21 October, 4 November, 26 November and 18 December 2019 and on 28 January and 9 March 2020.

46. Each employee at risk of redundancy was given three individual consultation meetings by their line manager. The respondent provided the claimant with individual consultation meetings with Ms Bloomfield and the claimant's union representative on 11 December 2019, 4 February 2020 and on 2 July 2020. It is accepted that the claimant was dismissed at the last of those individual consultation meetings on 2 July 2020, having been unsuccessful in securing alternative employment. The claimant appealed against his dismissal, which appeal was unsuccessful. This was on 22 July 2020. The appeal hearing was conducted by Paul Biddle, who was Ms Bloomfield's line manager and who had been extensively involved in the Partner Services Manager team's redundancy process throughout the period of individual consultation, including the claimant's consultation.

47. The respondent accepted that the claimant suffered a considerable amount of stress and anxiety as a result of the redundancy process and his dismissal. His line manager Ms Bloomfield, her manager Mr Biddle and Mr Biddle's manager Lee Prescott were all aware of the deterioration in the claimant's mental health and the anxiety caused to him by this process. Indeed, Mr Biddle and Ms Bloomfield were so concerned that they wrote to Mr Prescott on 17 May 2020 requesting additional counselling support to be provided to the claimant on top of the sessions provided by the respondent's employee assistance programme and requested that these be funded at a cost of approximately £600 plus VAT.

48. The claimant also expressed his significant distress in an e-mail to the respondent's CEO and chairman on 3 April 2020, which begged them to help him keep his job and explained the difficulties involved in his family circumstances.

49. The claimant's team created a "counter proposal" which was sent to Paul Biddle on 2 April 2020. The counter proposal was made on the basis that the team had already demonstrated that they were able to operate on a fully agile (i.e. remote) basis, with no reduction in the quality of service provided. This would, they suggested, allow the respondent to withdraw from Sevenoaks and achieve the cost savings that followed, but would allow the team to remain employed. The proposal noted that, although this was being submitted after the end of the collective consultation period, there had been no promised meeting between the team and either HR or Lee Prescott as a result of Covid, and no indication as to when the replacement video call would take place. The team noted that they did not know to which other team their roles were being reassigned.

50. The team received a response on 20 May 2020 from Lee Prescott. He declined the counter-proposal. He repeated that the respondent's core rationale was "to co-locate our teams as much as possible to provide skills crossover and to work closer together to benefit our customers and colleagues by increasing efficiency and generation ideas." He wrote that as Sevenoaks was a smaller hub, it did not allow for such co-location in the way that larger service centres did.

Findings of Fact

<u>The redundancy situation and the consultation process</u>

51. The claimant disputes that there was a redundancy situation at the respondent in October 2019 in the "Enterprise" part of the business, where he worked.

52. The respondent's case is that the rationale for the redundancy process was well documented at the time and shared with the recognised trade unions and individual employees as part of the consultation process. The rationale was documented in the "Consultation Pack for Proposed Changes in Enterprise" dated 15 October 2019 that customer feedback showed that customer service needed to improve and that customers were frustrated with the call centres in Enterprise, due to the complexity of products, and agents needing to transfer customers to "experts" within the organisation rather than deal with this via a single "digital journey". The respondent envisaged making changes to achieve this by moving from a number of smaller sites, to larger sites which were run as multi-functional operations centres. Their aspiration was increased face to face interaction between colleagues, which would lead to greater opportunities to work in other

departments or working groups. The move was therefore to close the Enterprise function in smaller centres, such as Sevenoaks, and transfer where possible into larger sites.

53. It was proposed to withdraw from Sevenoaks and other sites in the south-east of England such as Cambridge and redirect the work to centres largely based in the north of England and Scotland.

54. The Tribunal was also told by the respondent that the requirement for PSMs had reduced at the time, as a larger number of queries were resolved online via self-service methods. There was therefore additional capacity in the respondent's team. The work done by the PSM team in Sevenoaks was therefore ultimately absorbed by an existing team in Skelmersdale, Merseyside. We accept the respondent's evidence in this regard. The claimant's role was not, as submitted by the claimant, a "lift and shift" to Skelmersdale. At the claimant's final individual consultation meeting on 2 July 2020, it is accepted by his union rep that the claimant's work was being done in Skelmersdale by individuals at a significantly lower grade than the claimant.

55. We accept Ms Ciaglia's evidence that a reduction of 150-200 employees was required across the whole of the customer service function, which included the claimant's PSM team. At Sevenoaks there was a reduction of 35 full-time equivalent staff.

56. The respondent's relocation policy in redundancy situations stipulated that a travel time of more than 90 minutes from an employee's old office location to the new office location counted as a formal relocation, as this was beyond what was classed as an acceptable travel time. As Skelmersdale is about 4-5 hours' drive from Sevenoaks, the Partner Services manager team was redundant in Sevenoaks. We accept that this was the case.

57. The claimant's case is that his role was not redundant, as it could have been done from home. We do not accept that, at the time the redundancy consultation was being undertaken between October 2019 and July 2020, the respondent's business model accommodated this. The consultation documents before us in the bundle clearly show that the business model was designed around face to face and collaborative working in larger service centres, based on the theory that this would increase efficiency and collaboration. By the time that the claimant had come to the end of the individual consultation process in July 2020, we find that the Covid 19 pandemic had not changed the respondent's business model such that homeworking had been accepted as an alternative to the respondent's original co-location model of change.

58. The respondent is entitled, within reason, to structure its business as it sees fit without direction or interference from the Tribunal. If at the time the consultation process was being conducted it reasonably concluded that co-location in larger service centres was the best way of improving customer service, it was entitled to pursue that model of business organisation. Therefore, we do not accept the claimant's submissions that his job was not at risk of redundancy or that there was not a redundancy situation in the PSM team in Sevenoaks. We also note that only two members of the team, Wayne Goldsmith and Sue Bloomfield, were not made redundant out of a team of 10 people.

59. The claimant contests the composition of the pool, but it is clear that the respondent has turned its mind to the issue of the pool for selection and determined that the whole of the Partner Services Manager team was redundant. There was therefore no pool for selection and no selection criteria used. Contrary to the claimant's submissions to the Tribunal, we do not accept that the International Team roles were interchangeable with the claimant's. The claimant relies on Wayne Goldsmith having obtained a role in the International team as evidence of this. The claimant provided no other evidence as to the interchangeable nature of the Partner Services Manager team with the International team. We note that Wayne Goldsmith applied for this role and was interviewed for it. He was not simply transferred. His success at securing a role in the International team does not show, on the balance of probabilities, that the teams' roles were interchangeable.

60. The International team itself was not being made redundant. They were relocated to Brentwood. They therefore did not have to go through the same process as the claimant's team of securing alternative employment. The collective consultation documents make this expressly clear, although the claimant seeks to challenge this. Ms Delman and Ms Harvey are the claimant's comparators for the purposes of the claimant's claim for unlawful sex discrimination. However, we find that they were not in a materially similar position to the claimant. They were not being made redundant. This is a material difference in circumstances.

61. Ms Harvey and Ms Delman were provided with accommodations to their existing roles because of caring responsibilities. This is accepted. The claimant's role was being made redundant and he did not secure an alternative role. He therefore did not have a role to make adaptations to. He was advised to secure the role and that after he had secured it, adaptations would be discussed to accommodate the terms of his carer's passport. There was therefore a significant difference between his circumstances and that of Ms Harvey and Ms Delman.

62. We find that the respondent's collective consultation with the recognised trade unions was meaningful. We have been provided with the collective consultation documents produced over the course of the redundancy process and it is clear that dialogue was entered into and changes to the process were made for various teams and locations, following input from the unions. This dialogue was successful in reducing the numbers of employees being made compulsorily redundant and in securing alternative roles for others. These documents were made available online to individuals at risk of redundancy on the respondent's redundancy micro-site, but it is not apparent from his evidence whether the claimant ever read these documents.

63. The claimant asserts that the respondent did not carry out meaningful individual consultation with him. He also asserts that Ms Bloomfield as the consulting manager did not have any authority to enter into meaningful consultation. Ms Bloomfield's evidence was that she was given a process to follow by the respondent's HR department and that she stuck to it. It is evident that any questions the claimant had or any requests for advice or help or input were largely deferred to the partner services team HR contact, Mr Alex Gorton.

64. However, we find that the individual consultation meetings with the claimant largely consisted of the claimant asking questions about the rationale behind the

process. He provided the respondent with lists of his questions on 10 December 2019 at the first individual consultation meeting (20 questions), 4 February 2020 (25 questions), 31 March 2020 (follow up questions to the answers already provided), 6 May 2020 (further follow up questions to answers already provided). Many of these questions were, we note, hypothetical or not specific to the claimant. For example, he continued to challenge the numbers of individuals being made redundant. He also asked a number of questions about the impact of the process on Sevenoaks that would largely have been answered by reading the consultation documents on the respondent's microsite. For example, the collective consultation documents had a fixed date of August 2020 as the date on which the Enterprise function in Sevenoaks would be closed, but the claimant asked a number of times about this in his individual consultation meetings.

65. We note that there was evidence by early 2020, between the claimant's IC1 and IC2 meetings, that individuals had found jobs in the respondent's "Openreach" function which was remaining in Sevenoaks, but he appears not to have been aware that this was available. We note that this was referred to in the collective consultation documents as early as November 2019, which also refer to such opportunities being on the redundancy micro-site on the respondent's intranet. The collective consultation documents refer in December 2019 as one of the outcomes of the first individual consultation meetings that 77 individuals out of the 367 in scope had expressed an interest in "either Consumer or Openreach", but we understand that the claimant did not express such an interest. We note that the claimant was accompanied by his union representative at each individual consultation meeting.

Suitable alternative employment

66. At the start of the consultation process, we find that the claimant was told that he would be expected to carry out his own job searches and apply for jobs. The respondent had created an intranet micro-site for this purpose. Jobs were posted on the microsite and on the respondent's internal jobs search engine, Taleo.

67. The claimant's case is that the respondent's instruction to the claimant to apply for jobs on the Taleo system and on the microsite was insufficient assistance in securing suitable alternative employment for someone at risk of redundancy. We find that it was his expectation, as set out in his original claim form and as he said in his evidence to the Tribunal, that he would be given assistance to be "mapped in" to a new role, as he had been in 2015. We find that "mapped in" to a new role meant, to the claimant, to be provided with a new role without the need to look for one himself. However, we note that the circumstances in 2019 and 2020 were very different from those in 2015. The claimant had not been involved in a mass redundancy situation before and the circumstances in 2015 were not of a redundancy situation. It was clear from the evidence before us that in 2019 and 2020 there were a very small number of alternative roles available in the south-east of England, and a large number of employees at risk of redundancy.

68. The claimant and his union representative repeatedly argued with Ms Bloomfield that the respondent had a responsibility to search for a role and secure alternative employment for the claimant. This was still being asserted by them at the claimant's final individual consultation meeting in July 2020. This was, we find, as a result of the length of time since the respondent had instigated a compulsory

redundancy process and also because the respondent had always been very accommodating in finding alternative work for the claimant when his prior role had no longer been suitable.

69. The claimant was told on several occasions during the redundancy consultation process that he was to apply for any role irrespective of location that he may have been qualified to do or skilled to do and discuss after the role was secured with his new manager whether or not agile working, his flexibility and the terms of his carer's passport could be accommodated. We accept that Ms Bloomfield and Mr Biddle offered to help him with any such discussions.

70. The claimant applied for a job in January 2020 and was rejected for it. The feedback given to him was that he did not show evidence of knowledge of four of the five key skills required for the job. Ms Bloomfield's evidence, which we accept, was that she offered to review this feedback and the claimant's CV with him afterwards. Mr Biddle's evidence, which we accept, was that he followed up with the hiring manager when asked to do so by Ms Bloomfield and was told that the claimant lacked too many of the required skills for retraining to be a viable option. The claimant's evidence was that Ms Bloomfield offered to go over his CV and he did take her up on this even though her evidence was that he did not. However, we find that the assistance was offered to the claimant.

71. The claimant's second and final job that he applied for was in April 2020. He was rejected by email on 30 April 2020 due to the location of the role being incompatible with where he wished to work, which was in Sevenoaks.

72. In relation to the claimant's job rejections in January and in April, it was the respondent's evidence that the claimant never followed these up with Ms Bloomfield. In January she offered to review the rejection and his CV. Her evidence was that the claimant did not reply to her offer of help. In April 2020, the respondent's evidence was that the claimant did not discuss this rejection with Ms Bloomfield or anyone else. We note the evidence in the bundle from 27 February 2020, where Ms Bloomfield recorded her discussion with the claimant on 25 February 2020 to "*challenge any refusals or push back re location*" if he were rejected for jobs, by using the provisions of his carer's passport.

73. The claimant's witness statement is silent over following up on both of these jobs, but his oral evidence was that he did discuss the job with Ms Bloomfield in January and that in April he did forward his job rejection to her and Mr Biddle, but they did not reply.

74. On the balance of probabilities, we prefer the respondent's evidence in this regard. We have taken into account the passage of time and the respondent's lack of proper record-keeping of ad-hoc conversations with the claimant about efforts to secure suitable alternative employment. However, we find that Ms Bloomfield was fully aware of the claimant's limitations in terms of relocation and his difficult personal circumstances. Had she been asked by him to take steps to challenge the rejection in April 2020, we find that she would have remembered being asked to do so. We also find that the claimant considered himself too busy to pursue these two job rejections any further. He also believed that the respondent should be making more effort to find and place him in an alternative role as they had done

in 2015 and earlier. He therefore did not take steps to challenge the rejections any further, despite the respondent's offer of help to do so.

75. We find more generally that the claimant was not prepared to apply for roles unless he was assured upfront that the terms of his carer's passport could be accommodated and that the location would be suitable. This was particularly apparent in relation to the International team roles in Brentwood, which we discuss in more detail below.

76. As time went on during the consultation process, and as it became clearer that the claimant was unwilling to accept voluntary redundancy but also unable to secure an alternative role, his managers became more actively involved in helping him. For example, Ms Bloomfield sent emails dated 8 April 2020 with information about two jobs, one with a flexible location and one where she told him to apply first and challenge the location afterwards. The claimant did not apply for either of those roles.

77. The claimant was also provided with a work shadowing day with the Outreach team in Sevenoaks as a result of investigations done by Ms Bloomfield with a former colleague of theirs who worked in the Outreach business. Ms Bloomfield understood that although there were no advertised jobs in Outreach at the time (January 2020), there may be in the near future.

78. Towards the end of his cross-examination the claimant sought to say that he had applied for more than two jobs. There was no evidence of this in his witness statement or in the bundle. We do not accept his evidence in this regard and find that he only applied for two jobs, those in January and April 2020.

79. It was Ms Bloomfield and Ms Ciaglia's evidence that it was simply not possible for them to provide the claimant with the level of support that he appeared to require to find alternative work. We accept that Ms Bloomfield herself was at risk of redundancy and was having to seek her own alternative employment, which she secured in the International team in Brentwood towards the end of the consultation process. Ms Ciaglia told the Tribunal that there were a considerable number of employees at risk of redundancy that also required the respondent's support.

80. We find that the respondent's managers do not appear to have been sufficiently trained in or aware of the redundancy process and there was a heavy reliance on central HR to respond to questions raised by the claimant during the process. Ms Bloomfield effectively acted as a conduit between the claimant and HR to a large extent, although we accept that from early 2020 onwards she made a number of attempts to intervene in the claimant's job search process. We also note that the claimant's managers did not properly document the conversations that they had outside the formal IC meetings about efforts made to assist the claimant with alternative roles.

81. We also find that the national Covid lockdown at the end of March 2020 further disrupted the latter stages of the redundancy process. A visit to Sevenoaks by Lee Prescott was cancelled. A video call with HR that was proposed to replace this was also cancelled. By early April 2020 when the claimant's team submitted their counter-proposal, they still did not know where in the respondent's business their work was transferring to.

82. However, we note from emails in the bundle that Mr Biddle also took steps to find alternative job opportunities for the claimant's team. He also took steps to alert Mr Prescott to the fact that the claimant's personal circumstances were particularly challenging in relation to the redundancy exercise ahead of Mr Prescott's visit to Sevenoaks in February 2020. Mr Biddle told Mr Prescott, *"Warren's work location is limited to essentially Sevenoaks or home and roles for these locations are currently minimal... Warren needs to remain employed to support his daughter and retain the house they live in, hence EVR [voluntary redundancy] is not an option… the above factors go some way to explaining why some of the questions have been raised by Warren and the situation and prospect of losing his home … is causing him stress*." Mr Prescott replied *"..the fundamental issue … that Warren has is no roles in Sevenoaks*."

83. Ms Ciaglia, who was copied in to the email exchange, responded "*we have had a couple of people secure roles in Sevenoaks (OR [Openreach] mostly) so they do exist- has he applied for any and been rejected or is he just concerned about theoretical worries*?" In relation to her comment about "theoretical worries", it was put to her by the claimant's counsel that this indicated a dismissive attitude to the claimant's situation. Ms Ciaglia apologised that her email was not worded more sensitively. However, we find that the claimant did have a number of very high-level concerns, as shown in his questions as part of the IC process, that got in the way of the practical matter of applying for and securing alternative employment. This is also shown by the fact that, in February 2020, as reported by Ms Ciaglia, roles in Sevenoaks in Openreach had been secured by those at risk of redundancy which the claimant appeared to have missed.

84. We note that in relation to this email conversation with Mr Prescott, Mr Biddle also noted that the claimant's second individual consultation meeting had generated a number of questions, about which Mr Biddle commented "*Many of his questions are hypothetical where answers can't be supplied by HR or the business, but it seems the more we work together to try and progress his situation the more questions come back"*. We find that this is a fair reflection of the individual consultation process with the claimant at that point.

Alternative roles available – the claimant's "priority status"

85. There was some dispute of fact between the parties about the claimant's priority status as a candidate. What is clear from the documents before us is that all employees of the respondent at risk of redundancy were given "priority 2" status as candidates for internal vacancies advertised on the respondent's internal vacancies system. They would therefore be given priority for any vacancies above internal applicants who were not at risk of redundancy. Category 1 priority status is not usually given to candidates at risk of redundancy unless they are protected by reason of their status as someone on maternity leave.

86. The claimant did not accept that he had any form of priority status applied to him. We find that this was based on a misunderstanding of what "priority status" entailed. In his letter to Philip Jansen, BT chairman, on 3 April 2020, the claimant said that as he had applied for a job and been rejected because of a lack of key skills and an inability to bridge the shortfall through training, this was evidence that he was not a priority candidate.

87. The claimant was not initially given an additional priority status because of his disabled daughter, although some confusion arose due to a meeting between Sue Bloomfield and the claimant on 25 February 2020. The discussion was summarised in an email from Sue Bloomfield to the claimant on 27 February 2020, in which she wrote:

> *"Following Lee's visit to Sevenoaks and your 121 meeting a call was set up with HR, Jill Halson and myself to look at what additional help could be provided to support your job search. Jill confirmed in conjunction with your Passport and previously recorded health issues, that hiring managers should consider flexible/remote/home working options.* ***Please apply for as many team member roles as you can and I can help support you challenge any refusals or push back re location on these grounds. Please let me know the details of the roles when you apply so I can ensure your category 1 priority status is clearly seen by HR and recruiting managers.***
>
> *If you wish for any support on how best this can be positioned with hiring managers then please let me know and I will see what can be arranged with Jill. As already mentioned please ask if you would like any help with CV reviewing or interview prep."* (our emphasis added)

<u>The International Team and Brentwood</u>

88. It is the claimant's case that the respondent's "International team" carried out roles that were interchangeable with the claimant's team, the PSM team. The basis for this argument is that Wayne Goldsmith, who was a member of the PSM team, secured alternative employment in the International team as part of the redundancy exercise. We note that Sue Bloomfield, the PSM team manager, also secured the role of team leader in the International team as part of the redundancy exercise. Sue Bloomfield's evidence, which we accept, was that the teams did not carry out work that was very similar, or interchangeable. Her evidence was that she had a very steep learning curve on her appointment to the International team. We also note that Wayne Goldsmith was appointed after a competitive application process, including an interview. On the balance of probabilities, and on the basis of the evidence before the Tribunal, we do not find that the two teams' roles were interchangeable.

89. When the redundancy exercise was announced in August 2019, the International team was based with the PSM team in Sevenoaks. The redundancy consultation documents show that, unlike the other functions at Sevenoaks, the International team were not being absorbed into other teams but were being moved out of Sevenoaks to Brentwood. The International team were therefore not at risk of redundancy. The International team were not surplus to the respondent's requirements, but instead they were relocating due to the Enterprise business moving out of Sevenoaks altogether. If the members of the International team were able to move to Brentwood, they would remain employed.

90. The claimant's two comparators for the purpose of his sex discrimination claim are members of the International team, Ms Harvey and Ms Delman. Ms Harvey previously worked from the Weston Super Mare office, which was closing as part

of the restructuring exercise. She made a request to be based in Bristol which we accept was rejected because of the respondent's drive towards greater co-location. She proposed that she be based at home three days per week and in Brentwood two days per week. The respondent had reservations about her travelling to Brentwood for two days per week as she lived more than 90 minutes away from the office, but she applied to do so on the basis that she had commuted a similar distance in previous roles. The flexibility to allow her to work from home three days per week was based on her having a carer's passport to look after her mother. There are emails before the Tribunal which demonstrate that the respondent's managers sought to allow Ms Harvey the flexibility to work from home and took account of her personal circumstances, including her carer's passport.

91. Ms Delman was a new entrant to the respondent and had worked also in the International team but was based in Sevenoaks (not Weston Super Mare) and, we accept, carried out a different role to that of Ms Harvey. She was dismissed for poor attendance before the restructure was completed but had agreed with the respondent to work two days a week in Brentwood and the remaining days from home, based on her partner being seriously ill and on her having two young children. We do not accept that she was at risk of redundancy but would have relocated to Brentwood with the rest of the International team. As with Ms Harvey, there are emails before the Tribunal which demonstrate that the respondent's managers sought to allow Ms Delman the flexibility to work from home and took account of her personal circumstances. However, we accept, from the notes of Ms Delman's appeal meeting, that she requested to be designated a home worker for her whole working week to care for her partner, and this was refused by the respondent.

92. The claimant's evidence to the Tribunal is that female members of staff at Sevenoaks were given more assistance than him to remain in work despite being subject to the same redundancy risk. We do not accept that the particular women referred to, Ms Harvey and Ms Delman, were at the same risk of redundancy as the claimant. We accept that the differences in treatment were caused by the fact that their team was only relocating to Brentwood and not being made redundant. Also, both women agreed that they would travel to Brentwood two days per week. Requests were made to be based entirely at home by Ms Delman and this was refused by the respondent. The two women already had roles at the respondent that were not being made redundant and so had no need to secure a role and then discuss flexibility as a second stage, as the claimant had to do. They had already secure roles and so were at the stage of being able to discuss flexibility with the respondent's managers.

93. It is the claimant's case that, between his IC2 and IC3 meetings, it became apparent that there may be vacancies in the International team in Brentwood. One of these vacancies was due to the termination of Ms Delman's employment. Mr Biddle's evidence was that the possibility of a role in the International team was discussed with the claimant at the time, but that he was "*adamant*" that he could not apply, as the role was based in Brentwood and he could not travel there at all. The Tribunal accepts Mr Biddle's evidence in that regard. It is clear that the respondent understood that the claimant was only able to take roles based wholly from home or, if office based, in Sevenoaks. We also accept that the claimant was repeatedly told that even if the location of a job was not suitable, he was to apply for the role if otherwise interested and negotiate as to whether the role could be

done from home, or at a different location. In relation to the International team roles, he did not do this.

94. It is the claimant's case that he was expressly told that there was no flexibility available in the International team by Mr Biddle. The claimant's evidence was that he expressly asked if there was any flexibility available and was told he was required to be in the Brentwood office five days per week. He said that when he pointed out to Mr Biddle that Ms Harvey and Ms Sheldrake were home workers, Mr Biddle did not change his stance. The claimant told the Tribunal that he subsequently discovered that "*the respondent was exploring adjustments in relation to the Brentwood roles, seemingly just not for me*". In answers to questions from the respondent's counsel, the claimant said that Mr Biddle told him that it would not be possible for anyone in the International team to work flexibility. It was put to the claimant that several employees already did so at the time the conversation was said to have taken place, so it must have been obvious to the claimant that Mr Biddle was telling a blatant lie. The claimant agreed with the respondent's counsel that his evidence was that Mr Biddle had told him a blatant lie.

95. Despite the claimant seemingly being aware of the fact that Mr Biddle was apparently blatantly lying to him, he did not raise this with the respondent at the time. He was represented by his union at his final consultation meeting at which he was dismissed, on 2 July 2020. He did not raise the issue then. He also did not raise the issue in his appeal against his dismissal.

96. The Tribunal makes the following findings of fact in relation to this issue. We find that the claimant was, at the time the roles in Brentwood were discussed, unwilling to consider working there because he did not wish to travel away from Sevenoaks. He was also unwilling to take the respondent's advice to apply for roles and discuss flexibility afterwards. This, in the case of the International team roles, would have meant the claimant discussing flexibility with the assistance of managers who knew him well, such as Ms Bloomfield herself, who had promised to help liaise with managers of jobs that he applied for. The claimant's witness statement notes that he would have been willing to travel to Brentwood two days per week if allowed to work from home three days per week and would have been able to rely on help from his partner to do so, but we find that this was not something that was ever communicated to the respondent.

97. We do not accept the claimant's evidence that Mr Biddle or anyone else at the respondent told him that there was no flexibility at all available in relation to the International team roles. On the balance of probabilities, it is far more likely that the claimant asked and was told that the International team work could not be done based out of another office, such as Sevenoaks, and that there was no flexibility in relation to the location of the role. It was entirely against the claimant's prior experience at the respondent, of having been provided with a high degree of flexibility as to working patterns and working from home over a period of many years, for Mr Biddle to behave in an obstructive manner, solely with the claimant and it is entirely inconsistent with the way in which the claimant's redundancy consultation had proceeded to date. It is also improbable that, Mr Biddle having allegedly behaved in the manner described, that the claimant or his union representative did not raise this with the respondent at any stage.

The appeal against dismissal

98. The claimant appealed against his dismissal in an email dated 8 July 2020 to Alex Gorton of the respondent's HR function. The grounds of appeal were not set out in any detail and the claimant simply wrote that "*BT Enterprise has not adhered to Employment Law and their own internal processes and procedures*". Mr Biddle replied to the claimant in a letter dated 13 July 2020 and invited him to an appeal hearing on 22 July 2020, which he could attend with his union representative. Mr Biddle told the claimant that he would "run the appeal meeting".

99. At the meeting, the claimant and his union representative amplified the points of appeal, which were mainly that the claimant should have been taken out of the redundancy process altogether because of his "*personal circumstances*" and that he should have been offered a "*suitable, reasonable alternative role*" by the respondent. The appeal hearing itself is not criticised by the claimant or his union representative at the time and the claimant does not criticise the conduct of the meeting as part of these proceedings, other than to say that it was not meaningful and was a *fait accomplis*.

The Law

100. The definition of a redundancy situation is set out in s139 Employment Rights Act 1996:

> *139 Redundancy*
>
> *(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
>
> *(a) the fact that his employer has ceased or intends to cease—*
> *(i) to carry on the business for the purposes of which the employee was employed by him, or*
> *(ii) to carry on that business in the place where the employee was so employed, or*
>
> *(b) the fact that the requirements of that business—*
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish.*

101. For a dismissal to be fair by reason of redundancy, there must be a redundancy situation at the respondent's business. ***James W Cook & Co (Wivenhoe) Ltd v Tipper [1990] IRLR 386*** - as a matter of law it is not open to a Tribunal to investigate the commercial and economic reasons prompting a redundancy.

102. Redundancy is a potentially fair reason for dismissal, as per s98 Employment Rights Act 1996. Dismissal has to be within the range of reasonable responses, as per section 98(4). It is for the Tribunal to decide whether the actions of the respondent in these circumstances fell within or outside the range of

reasonable responses. The question for the Tribunal is whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the redundancy situation as a sufficient reason for dismissal. This is to be determined in accordance with equity and the substantial merits of the case.

103. ***Williams and Compair Maxam [1982] ICR 156 EAT*** sets out additional factors for the Tribunal to consider in deciding whether a dismissal by reason of redundancy is unreasonable contrary to section 98(4) of the Employment Rights Act. Those factors are:-

> *"1 The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.*
>
> *2 The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.*
>
> *3 Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.*
>
> *4 The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.*
>
> *5 The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."*

104. The selection of employees to be placed in the pool is primarily a matter for the employer to decide upon (***Capita Hartshead Ltd v Bryant [2012] IRLR 814)***. If the employer has genuinely applied his mind to the issue of who should be in the pool for consideration, then it will be difficult for an employee to challenge it.

105. ***Thomas and Betts Manufacturing Co v Harding 1980 IRLR 255, CA***, an employer should do what it can so far as is reasonable to seek alternative work for those at risk of redundancy. Tribunals will expect an employer with sufficient resources to take reasonable steps to ameliorate the effects of redundancy, including giving detailed consideration to whether suitable alternative employment is available.

106. The duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment. (***Quinton Hazell Ltd v Earl [1976] IRLR 296 EAT***.)

107. A failure to follow correct procedures was likely to make an ensuing dismissal unfair unless, in exceptional cases, the employer could reasonably have concluded that doing so would have been 'utterly useless' or 'futile' - ***Polkey v AE Dayton Services Ltd 1988 ICR 142, HL***. With regard to redundancy dismissals, per Lord Bridge, *'the employer will not normally act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation'.*

108. There is no rule that '*a dismissal for redundancy will automatically be regarded as unfair on account of the absence of an appeal procedure or, indeed, the type of appeal procedure provided in the event that there is one'*. (***Taskforce (Finishing & Handling) Ltd v Love EATS 0001/05***, per Lady Smith).

109. The ACAS Code of Practice does not apply to dismissals by reason of redundancy. However, the adequacy of an appeal against a dismissal for the reason of redundancy can form part of the overall test of fairness of a dismissal in accordance with s98(4) ERA 1996.

110. Section 13 of the Equality Act 2010 ("EQA") defines direct discrimination as less favourable treatment when compared with others because of a protected characteristic. The Tribunal is to make a comparison with an actual or hypothetical comparator in not materially different circumstances (section 23 EQA 2010). It is possible to use the evidence of comparators in materially different circumstances to construct a hypothetical comparator and determine how such a hypothetical individual would be treated. However, a statutory comparator as per s23 Equality Act 2010 must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class (***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285***).

111. The Tribunal must decide why the claimant was treated as he was. ***Nagarajan v London Regional Transport [1999] IRLR 572*** identifies this as the "crucial question". This usually requires a consideration of the mental processes, whether conscious or subconscious, of the alleged discriminator.

112. In relation to a claim of direct discrimination by association, ***Coleman v Attridge Law C-303/06 [2008] IRLR 722*** held that "associative discrimination" on the grounds of disability was unlawful. This is where less favourable treatment occurs because an employee is treated less favourably due to their association with the disabled person.

113. ***Islington London Borough Council v Ladele [2009] ICR 387*** - in relation to discrimination claims, the tribunal has to determine the reason why the claimant was treated as he was and if the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial.

114. Direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which is set out in ***Igen Ltd v Wong [2005] IRLR 285, CA***.

115. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the ***Igen*** test. (***Brown v Croydon London Borough Council [2007] ICR 909***).

116. S19 EQA defines indirect discrimination 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.*

117. The decision in ***Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia [2015] IRLR 746*** (‘***Chez’***), a decision of the Court of Justice of the European Union which found that the concept of ‘discrimination on the grounds of ethnic origin’ was intended to apply in circumstances where there was a practice of treating districts which were predominantly inhabited by people of Roma origin less favourably than other districts. The claimant lived in a Roma district but was not herself Roma. She therefore suffered from the discriminatory treatment which was aimed at Roma people.

118. ***Harvey on Industrial Relations and Employment Law*** distinguishes between associative indirect discrimination cases which are either ‘friends and family’ or ‘same disadvantage’ cases. ***Chez*** is a “same disadvantage” case.

119. There are conflicting first instance Employment Tribunal decisions on cases that are “friends and family” s19 EQA cases. Such a claim was rejected by the ET in ***Rollett and ors v British Airways plc (3315412/2020)*** but succeeded in ***Follows v Nationwide Building Society (2201937/2018).***

120. The principles regarding interpretation have been stated in ***Vodafone 2 v Revenue and Customer Commissioners [2009] EWCA Civ 446*** at [37] as follows:

"In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular:
(a) It is not constrained by conventional rules of construction (per Lord Oliver in Pickstone at 126B)
(b) It does not require ambiguity in the legislative language (per Lord Oliver in Pickstone at 126B; Lord Nicholls in Ghaidan at 32)
(c) It is not an exercise in semantics or linguistics (see Ghaidan per Lord Nicholls at 31 and 35; Lord Steyn at 48-49; Lord Rodger at 110-115)
(d) It permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in Litster at 577A; Lord Nicholls in Ghadian at 31)
(e) It permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in Pickstone at 120H-121A; Lord Oliver in Litster at 577A)
(f) The precise form of the words to be implied does not matter (per Lord Keith in Pickstone at 112D; Lord Rodger in Ghaidan at para 122; Arden LJ in R (IDT Card Services Ireland Ltd) v Customs and Excise Commissioners [2006] STC 1252 at 114)."

With the caveats at [38] that,

"The only constraints on the broad and far-reaching nature of the interpretative obligation are that:
(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (per Lord Nicholls in Ghaidan at 33; Dyson LJ in Her Majesty's Commissioners of Revenue and Customs v EB Central Services Ltd [2008] EWCA Civ 486 at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see Ghaidan per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in IDT Card Services at 82 and 113) and
(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See Ghaidan per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in IDT Card Services at 113)'.'

Application of the Law to the Facts Found

Unfair dismissal – sections 94 and 98 ERA 1996

121. It is the claimant's case that the respondent did not terminate the claimant's employment for a potentially fair reason and the claimant further asserts that there was no genuine redundancy situation at his place of work. It is the respondent's case that it dismissed the claimant for the potentially fair reason of redundancy.

122. As set out in the findings of fact above, we find that there was a large reorganisation project at the respondent at the material time, which resulted in a redundancy situation at the respondent's Sevenoaks location, amongst others. Consequently, the claimant's PSM team in Sevenoaks were all at risk of redundancy unless they were able to find alternative employment.

123. We find that redundancy was the reason for the claimant's dismissal. The definition of redundancy is in s139 Employment Rights Act 1996 and the claimant's particular redundancy situation is as defined in s139(1)(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."*

124. We accept the respondent's evidence that its Enterprise business was moving out of Sevenoaks, including the PSM team, and that the PSM work was being absorbed by an existing team in Skelmersdale, Merseyside, without the need for an increase in the headcount of the Skelmersdale team. This was therefore not a "lift and shift" of the PSM team's roles to Skelmersdale. We accept that the whole of the PSM team in Sevenoaks were surplus to the respondent's requirements. The claimant was therefore dismissed for a potentially fair reason.

125. We also find that the respondent followed a fair procedure before dismissing the claimant. The decision that all of the PSM team at Sevenoaks were at risk of redundancy was a reasonable decision open to the respondent in the circumstances, given its co-location proposals, its need to remain competitive, and the small size of Sevenoaks as an Enterprise location. We also accept that the PSM team's work was absorbed by the team in Skelmersdale, a location significantly outside the respondent's 90 minute commuting boundary and so was not available for any relocation of the Sevenoaks PSM team, as an alternative to redundancy.

126. It was for the respondent to decide at the time that the PSM team were not able to be homeworkers, for the reasons set out in the collective consultation documents with their recognised trade unions to do with co-location. This decision was challenged by the PSM team during the consultation process and their counter-proposals were rejected by the respondent. The respondent's decision was within the scope of a reasonable procedure and it is not for the Tribunal to interfere with reasonable business decisions of the respondent in such circumstances. It was not unreasonable of the respondent to select the whole PSM team for redundancy in the circumstances and there was no requirement for the respondent to use other pools or selection criteria in the claimant's process. (***Capita Hartshead Ltd v Bryant [2012] IRLR 814)***

127. We find that the individual and collective consultation processes were undertaken fairly and in a meaningful way by the respondent. However, we find that the claimant did not obtain the maximum benefit from these processes as he spent time during his individual consultation meetings and in emails after these meetings questioning the decisions taken by the union at a collective level, or asking for information that we note was already available on the micro-site. We find that he and his union representatives were principally focussed on trying to remove the claimant from the scope of the redundancy exercise altogether, rather than focussing on finding alternative employment. He therefore did not appear to always be aware of opportunities that were available, such as the two jobs in Sevenoaks in the respondent's Openreach business that had been filled by the

time he appeared to appreciate the possibility of working in Openreach at the end of January 2020.

128. Did the respondent discharge its obligations in relation to redeployment? The respondent's redundancy processes, which were the subject of collective consultation, required employees to find alternative employment for themselves. To assist, the respondent provided a microsite on its intranet, which contained information about job opportunities and also contained a link to the respondent's Taleo job website. We accept that those at risk of redundancy were given priority status as candidates for internal jobs over other employees of the respondent. We accept that the claimant had priority status when applying for jobs. We find that there were also reasonable efforts made by the claimant's local management to find potential opportunities and bring them to his attention, outside of the scope of the formal job search process. Overall, the respondent did discharge its obligations in relation to redeployment. (***Quinton Hazell Ltd v Earl [1976] IRLR 296 EAT***.)

129. The Tribunal must consider whether the decision of the respondent to dismiss the claimant fell within the 'band of reasonable responses' within the meaning of s. 98(4) of the Employment Rights Act 1996. As well as factors particular to a fair dismissal in a redundancy situation, a Tribunal must consider more general factors, including the size and administrative resources of the respondent, as well as equity and the substantial merits of the case.

130. Overall, the question of whether the decision to dismiss the claimant by reason of redundancy was fair or unfair was one that we have deliberated at length and very carefully. We have been mindful not to substitute our view for that of the respondent. It is clear that the respondent is a very large corporate employer with considerable administrative resources. The claimant is an employee with long service. He also has, as was well known to the respondent, very challenging personal circumstances. In the circumstances of this case, did the decision to dismiss fall within the range of reasonable responses? Would no reasonable employer have dismissed the claimant in this situation?

131. We find that the decision to dismiss was within the range of reasonable responses open to the respondent. Although the respondent is large and well-resourced, and although the claimant has long service and very challenging personal circumstances, the respondent found itself needing to close Sevenoaks for Enterprise staff and make a considerable number of other staff redundant. We understand that this was the respondent's first compulsory redundancy exercise for a considerable number of years and so the claimant did not have recent experience of compulsory redundancies. The latter stages of the individual consultation process also overlapped with the start of the Covid-19 lockdown. These are circumstances that were extremely unfortunate for the claimant, and we accept caused him a great deal of distress. However, we accept that the respondent sought, within the structure of the redundancy exercise, to support and assist the claimant to a reasonable extent in circumstances where the claimant's geographical mobility was extremely limited and where there were very few jobs available in the area where he was prepared to work, and very few homeworking jobs due to the respondent's co-location policy.

132. It is pleaded by the claimant that he should have been taken out of scope of the redundancy exercise altogether. However, we do not accept that this would

have been a reasonable alternative to dismissal. It is the respondent's responsibility to operate a redundancy process that is fair to all staff at risk or those otherwise affected by the restructuring. It is extremely difficult to envisage how the claimant would have continued to work as a PSM given that the PSM work was being incorporated into the existing workload of an entirely different team who were all working out of a centre in Merseyside, and at a considerably lower pay grade.

133. The claimant does not positively assert that he ought to have been given a particular role as an alternative to redundancy and indeed it is clear from the evidence that few alternatives existed. The most obvious suitable role for the claimant appears to have been in the Openreach team in Sevenoaks, although he does not assert in these proceedings that this should have been given to him. We note that two individuals at risk of redundancy were able to secure alternative employment in Openreach in Sevenoaks, but by the time the claimant expressed an interest in this, the only available vacancies had been filled by others at risk of redundancy.

134. The claimant did not, we find, engage in a particularly constructive manner with the redundancy process, but we do not criticise him for this, as there is evidence before us that he was overwhelmed and anxious. However, the case brought on his behalf is not that the respondent failed to make reasonable adjustments for him as per ss20-22 EQA.

135. Given that there is no allegation of a failure to make reasonable adjustments to the redundancy process for the claimant, we are to consider the respondent's actions and the claimant's response within the context of the fairness of his dismissal as per the Employment Rights Act. On the balance of probabilities, we find that the claimant did not consult the information on the microsite in any detail, which is apparent from the questions he asked at each of the individual consultation meetings. A more proactive approach may have allowed him to more fully explore alternative employment opportunities. We note that Ms Bloomfield had to expressly remind the claimant that he needed to take action himself.

136. Nevertheless, opportunities for redeployment were expressly brought to his attention. Ms Bloomfield forwarded to the claimant emails about job opportunities and arranged for a day's work shadowing for him. We accept that Mr Biddle suggested to the claimant that he apply for a role in the International team. We accept on the balance of probabilities that the claimant did not attend any of the respondent's CV workshops or interview workshops. From the start of individual notification until the claimant's dismissal, the individual consultation process took ten months and during that time, the claimant only applied for two jobs.

137. We have taken into account the fact that the respondent knew that the claimant was vulnerable and fragile during the redundancy process, indeed this was directly acknowledged by Ms Bloomfield, Mr Biddle and Alex Gordon of the respondent's HR function. They are three individuals who had significant contact with the claimant at the time. It was known by Ms Bloomfield, Mr Biddle and also Lee Prescott, Mr Biddle's own manager, that the claimant had self-referred to the Employee Assistance Programme ("EAP") for counselling and the EAP contact had recommended that the claimant have more counselling sessions beyond the standard remit of the EAP programme, which were authorised by Mr Prescott, via Mr Biddle and Ms Bloomfield. Mr Biddle wrote on 17 May 2020 to Mr Bloomfield,

"*Given the position with Warren, his fragile mental state and unlikely position (currently) to secure a role, I would support this request*..." Despite this, the claimant remained in work and did not take any sickness leave due to stress during the redundancy process.

138. We find that the appeal process conducted by the respondent was unreasonable, however. As discussed above, the respondent is a very large employer with a designated HR function. It was not reasonable to have Mr Biddle conduct the claimant's appeal against his dismissal. Mr Biddle had been heavily involved in the consultation process with the claimant and was not an objective third party who could consider the points raised in the appeal from a neutral perspective.

139. However, we accept that failures in an appeal process does not automatically make a redundancy dismissal unfair. The Tribunal must consider the overall fairness of the process, taken as a whole. The appeal hearing itself was fairly conducted by Mr Biddle, and the claimant and his representative were given the opportunity to put their points forward, which points were considered by Mr Biddle. Mr Biddle also sought the advice of HR in determining the claimant's appeal. We also note that the claimant's appeal points dealt with the alleged lack of support for him in the mechanics of the process and not his mental health. There were no appeal points raised by him or his union representative which alleged that his mental health had not been looked after properly by the respondent (***Taskforce (Finishing & Handling) Ltd v Love EATS 0001/05).***

140. Given the lack of jobs in Sevenoaks and the claimant's limitations on his ability to travel, the only other source of alternative employment was for him to apply for jobs available nationally and negotiate to do these jobs from home, or hybrid working at a location near to his home. We accept that the respondent would have assisted him with this had he applied. The claimant was, however, reluctant to apply for such roles. It was not reasonable to expect the respondent to carry out such a job search on his behalf. We find that even if a neutral alternative appeals officer had carried out the claimant's appeal, and considered his grounds of appeal, on the balance of probabilities this would not have overturned the decision to dismiss him by reason of redundancy. There was no scope for challenging the respondent's redundancy exercise per se, and it was not outside the range of reasonable responses to limit the consultation period to ten months. There is nothing to suggest that a different appeals officer would have given the claimant any more time to find alternative employment, given that this was not a point raised by the claimant in the appeal and given that he had been given ten months already to do so.

141. Therefore, despite the lack of a neutral appeals officer in the appeal process, the overall redundancy dismissal was fair, within the range of reasonable responses.

Direct disability (associative) discrimination – section 13 EA 2010

142. For the disability discrimination claim it is submitted by the respondent that the appropriate comparator would be 'the claimant, in the same circumstances and with the same caring obligations, save that his child was not disabled'. It is the disability that is the protected characteristic relied upon, and not having a child to

care for, although the comparator child would not have the claimant's daughter's impaired abilities (per s.23(1)(a) EQA). The claimant's submissions on the issue of a comparator are that a hypothetical comparator and/or Ms Harvey are appropriate.

143. The claimant alleges that the respondent directly discriminated against him because of his role as carer for his disabled daughter by selecting him for redundancy, or dismissing him, or requiring the role of Partner Service Manager to be primarily office based. We do not accept the claimant's case in this regard, for the following reasons.

144. The whole of the claimant's team was selected for redundancy. The explanation given by the respondent was that the Sevenoaks site was closing due to it implementing a policy of co-location at larger sites, and to reduce costs. The PSM team were all required to work primarily in the office, subject to individual reasonable adjustments being agreed with the respondent, as they were in the claimant's case.

145. The claimant was dismissed because he failed to secure alternative employment as part of an agreed redundancy process, which was done in conjunction with the claimant's trade union. Indeed, any PSM team member who did not find alternative employment by the end of the consultation period was dismissed.

146. In this instance, it is not necessary (as per ***Brown v Croydon London Borough Council [2007] ICR 909 and Islington London Borough Council v Ladele [2009] ICR 387***), to consider the two-stage test for the burden of proof in discrimination cases as per ***Igen v Wong***, as the respondent here has produced an entirely credible and convincing reason for the less favourable treatment that discloses no discrimination on the basis of associative direct disability discrimination.

147. However, in the alternative, the claimant has not been able to show on the balance of probabilities that a hypothetical individual member of the PSM team without a caring role and/or an association with a disabled child would have been treated any more favourably in the circumstances. The whole PSM team submitted a remote working proposal, which was rejected. All PSM team members were selected for redundancy. His proposed actual comparator, Ms Harvey, was not at risk of redundancy and was consequently in materially different circumstances from him. She is therefore not an appropriate comparator, either as a statutory comparator or an evidential comparator. Her circumstances are too different to allow any comparisons to be made. This is particularly relevant given the respondent's policy of requiring internal candidates to secure a role before discussing reasonable adjustments. Ms Harvey already had a secure role and so was not negotiating hybrid or home working in the same circumstances as the claimant.

Indirect disability (associative) discrimination – section 19 EQA 2010

148. The Tribunal does not accept the claimant's assertion that it is possible to apply s19 EQA 2010 to his circumstances, that is, to his association with his disabled daughter, and thereby assert that he has been subject to unlawful indirect

discrimination. We have carefully considered the respective submissions of the parties and consider that this is beyond the scope of s19 EQA and is not covered by the case of *Chez*.

149. The claimant requests that the Tribunal "*interpret, using its wide powers, s19 EQA so as to give effect to the Chez decision/EU principles and to ensure that the protection afforded by s19 EQA is in line with the same*." We find that this is not a case of bringing the provisions of the EQA into line with EU law or the ECHR, as was done in ***EBR Attridge LLP v Coleman [2010] IRLR 10*.** We agree with the respondent's submissions that there is no equivalent to the "Chez" decision for a friends and family case in EU law.

150. There are two essential caveats to the Tribunal's powers of interpretation which are relevant to this case, as set out in ***Vodafone 2 v Revenue and Customer Commissioners [2009] EWCA Civ 446***, at paragraph 38:

> *(a) The meaning should "go with the grain of the legislation" and be "compatible with the underlying thrust of the legislation being construed." (per Lord Nicholls in Ghaidan at 33; Dyson LJ in Her Majesty's Commissioners of Revenue and Customs v EB Central Services Ltd [2008] EWCA Civ 486 at 81). An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment; (see Ghaidan per Lord Nicholls at 33; Lord Rodger at 110-113; Arden LJ in IDT Card Services at 82 and 113) and*
>
> *(b) The exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate. (See Ghaidan per Lord Nicholls at 33; Lord Rodger at 115; Arden LJ in IDT Card Services at 113)'.'*

151. In relation to caveat (a), the extension in the case of "***Chez***" (***Chez Razpredelenie Bulgaria AD v Komisia Za Zashtita Ot Diskriminatsia [2015] IRLR 746***) went "with the grain of the legislation" to cover cases of "same disadvantage". A woman who was not of Roma ethnic origin but who was subject to the same disadvantage as the Roma people in their city district was permitted to complain of indirect associative discrimination by her association with those of Roma ethnic origin.

152. It is agreed by the parties that the claimant's case is in the category of cases referred to in Harvey on Industrial Relations and Employment Law as "friends and family" cases. In such cases, the claimant does not suffer from the same disadvantage as the person with the protected characteristic. Indeed, in the claimant's case, his daughter is not subjected to a disadvantage by the respondent.

153. The parties have provided the Tribunal with submissions on the amendments to the EQA 2010 which came into force on 1 January 2024, which codify the ***Chez*** decision as s19A EQA 2010. It is the claimant's case that the introduction of s19A/Chez in the EQA does not prevent the Tribunal from interpreting the existing s19 as covering "friends and family" cases. It is accepted that an amendment to introduce one principle does not exclude the Tribunal from interpreting legislation in line with an ancillary principle. In this case, however, the

respondent's assertion is that the omission of "friends and family" comparisons from s19A is relevant and demonstrates that such friends and family cases do not, as matters currently stand, properly fall within the jurisdiction of the Tribunal.

154. We have considered what the comparator group should be for the claimant's indirect discrimination claim. It is extremely unclear who the appropriate groups for comparison would be. The claimant pleads a variety of comparator groups in the alternative, and although the scope of the disadvantaged group and comparator group is for the Tribunal to decide, this serves to highlight the uncertainty of the comparison exercise. The disadvantage suffered by the claimant is due to his caring responsibilities for his disabled daughter, as the claimant requires adjustments to be made to his role in terms of hours, location and flexibility to meet the particular caring needs of his disabled daughter. It is submitted by the respondent that, due to the requirements of s6(3)(b) EQA, the disadvantaged group be associates of "*persons who have the same disability*". We agree with this proposition and accept that the group should not be "carers/parents/associates of disabled children" per se, but carers/parents/associates of children with the claimant's daughter's disabilities. We also accept the respondent's submission that the comparator groups should only include employees in the PSM role, as the PCPs relate specifically to that role.

155. A considerable difficulty faced by Tribunals in relation to "friends and family" s19 cases is the lack of clarity as to how the "association" with the person with the protected characteristic is to be defined or delineated. The scope of the new s19A EQA is not subject to this uncertainty because the claimant must demonstrate "*substantively the same disadvantage*" (as per s19A(1)(e)) and so the "association" with the persons with the protected characteristic is delineated as a consequence.

156. By way of illustration, the following definitions of "association" and the comparator groups that follow, would all be possible on the facts of the claimant's case:

a. "employees in the PSM team who are <u>primary carers of</u> children without the claimant's daughter's disabilities" and "employees in the PSM team who are primary carers of children with the claimant's daughter's disabilities";

b. "employees in the PSM team who are <u>parents of</u> children without the claimant's daughter's disabilities" and "employees in the PSM team who are parents of children with the claimant's daughter's disabilities; and

c. "employees in the PSM team who are <u>associated with</u> children without the claimant's daughter's disabilities" and "employees in the PSM team who are associated with children with the claimant's daughter's disabilities.

157. On the facts of the claimant's case, group (a) may be able to demonstrate group disadvantage on the grounds of the protected characteristic due to the PCPs pleaded in the claimant's case (i.e. being required to attend the office/not being permitted to work from home) although we accept the respondent's submission that the requirement to work from the office may substantially disadvantage others outside the claimant's group, such as those who care for elderly or disabled adults.

158. Group (b) is less likely to do so, as some parents of disabled children may not have primary caring responsibilities for them. Group (c) is unlikely to demonstrate any group disadvantage, as it could include family members or friends without parental responsibility and indeed without any caring responsibilities at all. It is not, we find, a coincidence that the only other first instance decision in which a "friends and family" s19 case (***Follows v Nationwide Building Society Case No: 2201937/2018***) was decided in favour of a claimant, concerned a claimant who was a carer of a disabled adult.

159. The Tribunal in ***Follows*** noted, at paragraph 100, "*We accepted as a general proposition and as a self-evident fact that carers for disabled people are less likely than non-carers to be able to satisfy a requirement to be office-based, because of their care commitments*." It is respectfully submitted that this decision assumes, without grounds to do so, that "associate" is synonymous with "carer" for group comparison purposes.

160. There is, we find, no basis on which the "association" with the person with the protected characteristic can be defined. There is, so far as we are able to discern, no authority for accepting that the association should automatically be one of "carer", or that any one type of relationship should be applied in favour of another.

161. Caveat (b) in ***Vodafone 2*** (above) notes that *"…the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate*." In the claimant's case (and in that of ***Follows***) it is the presence of the caring relationship that makes a material difference to the prospects of success. In another indirect associative discrimination claim it may be an entirely different factor or relationship.

162. It is precisely the uncertainty over the scope of the concept of "associated with" that means that there would likely be "*important practical repercussions which the court is not equipped to evaluate*", were s19A to be extended to "friends and family" cases such as the claimant's. This would, in the opinion of this Tribunal, require a consultation process, including an impact assessment, and thereafter the drafting of new legislation, all of which is a matter for Parliament.

163. The lack of clarity would introduce uncertainty into this area and cause, we find, considerable difficulty for those seeking in future to assess whether or not conduct was lawful or unlawful indirect discrimination. It is therefore not within the jurisdiction of this Tribunal to extend s19 to determine the indirect discrimination claim asserted by the claimant.

Direct sex discrimination – s13 EQA 2010

164. It is the claimant's case that the respondent discriminated against him because of his sex (i.e. male / a father) by subjecting him to the detriments of selecting him for redundancy, dismissing him; and requiring him to be primarily office based.

165. It is the respondent's submission that any comparator must have no material difference to the relevant circumstances (s.23(1) EqA and whether or not the claimant's daughter is disabled is not material for the purpose of his sex discrimination claim. What is material are his caring responsibilities, not the characteristics of the child that he is caring for. The respondent submits that for the purpose of the sex discrimination claim, an appropriate comparator would be 'a woman in the same role with the same caring requirements', regardless of the identity of the person they were caring for or why they required that degree of care.

166. It is the claimant's case that appropriate actual comparators are Ms Harvey and Ms Delman, or in the alternative, that the claimant was treated less favourably than a hypothetical comparator, namely, a female / mother in materially the same circumstances as he was save that he is a male / father and the hypothetical comparator is a female / mother.

167. The claimant asserts that he was selected for redundancy and dismissed because he was a father, and that Ms Harvey and Ms Delman who are mothers, were not dismissed or selected for redundancy. It is the respondent's case that there was no less favourable treatment of the claimant.

168. As has already been decided by the Tribunal, Ms Harvey and Ms Delman are not appropriate comparators for the claimant, as they were relocated to another office within the scope of the respondent's relocation policy and were therefore not at risk of dismissal by reason of redundancy. The International team, of which they were both members, was not at risk of redundancy. We find that an appropriate comparator for the claimant was a hypothetical woman in the PSM team with the same degree of caring responsibilities as the claimant.

169. Considering the comparative exercise required by s13 EQA, we find that the claimant and all of the PSM team were selected for redundancy. A hypothetical woman in the PSM team with the same degree of caring responsibilities as the claimant would, we find, have also been selected for redundancy. Indeed, Ms Sheldrake was a member of the PSM team with caring responsibilities who was dismissed by reason of redundancy.

170. The claimant's dismissal was not, we find, less favourable treatment because of his sex. A hypothetical woman in the PSM team with the same degree of caring responsibilities as the claimant who did not find alternative employment, would have been dismissed as the claimant was. He was dismissed because he did not find alternative employment. The claimant did not provide any evidence to the Tribunal of mothers/women who in the PSM team, or at risk of redundancy exercise more generally, and did not find alternative employment who were nevertheless not dismissed, or mothers/women in those business areas at risk of redundancy who were taken out of the redundancy selection exercise.

171. Ms Harvey and Ms Delman are also not appropriate comparators for the claimant in relation to the requirement to be primarily office based. Ms Harvey and Ms Delman had requested that adjustments be made to their working patterns and locations and had been granted the flexibility to work in the office two days per week and at home three days per week. The claimant had not managed to find alternative employment and so had not requested any flexibility in his future role. His circumstances were materially different to those of Ms Harvey and Ms Delman.

Furthermore, the whole of the PSM team submitted a proposal that they be able to keep their PSM roles as homeworkers, and this proposal was rejected by the respondent for all PSM team members.

172. Furthermore, there was evidence that the claimant had, in previous years, including in 2019, asked to work from home for periods of time and had been allowed to do this. There was also evidence that the claimant was told by the respondent that if he secured alternative employment as part of the redundancy exercise, that the possibility was there to request remote or agile working with his hiring manager. There was no evidence that the claimant, by comparison with a hypothetical woman in the same circumstances as him, had more of an obligation to be office-based than such a woman.

173. The claimant gave evidence, which we did not accept, that he was expressly told that the Brentwood roles were five days per week in the office, and that there was absolutely no flexibility available for agile working. This was not borne out on the evidence before us, which was that had he applied, as Mr Biddle had recommended he do, for a job in Brentwood, that any application for agile working would have been considered in the same terms as it had been for Ms Harvey and Ms Delman, and as it had been for the claimant in relation to roles he had occupied for the respondent in the past.

174. The case on discrimination, both in relation to sex and disability, fails and is dismissed.

Anonymity

175. We have not granted the claimant's request for a privacy order under Rule 50 of the Employment Tribunals Rules of Procedure Regulations 2013. It has been possible, given that the issue of the claimant's daughter's disability was not a matter for the Tribunal to decide, to produce this reserved decision without referring to any of the matters which were the subject of the claimant's application for privacy. It is therefore not necessary to make a privacy order and we have dealt with the issue of the claimant's daughter's need for privacy in a manner that we find achieves the claimant's desired aim but has less of an impact on the principle of open justice.

_____

Employment Judge Barker

Date__ 18 January 2024_____

ANNEX – LIST OF ISSUES (NOT AGREED BY THE RESPONDENT)

Jurisdictional issues

Limitation - just and equitable (discrimination) (s.123 EqA)

1. Was the Claimant's claim for discrimination presented in time?
2. Do any of the complaints constitute conduct extending over a period?
3. If so, was the claim presented within the relevant time limit from the end of that period?
4. If not, was the claim submitted within such other period as the Tribunal thinks just and

equitable?

Unfair dismissal – sections 94 and 98 ERA 1996

5. Did the Respondent terminate the Claimant's contract of employment for a potentially fair reason pursuant to s.98 (2) of the Employment Rights Act 1996 ("the ERA")?
6. Has the Respondent proven that it dismissed the Claimant on the ground of redundancy? If yes:
7. Did the Respondent follow a fair procedure before dismissing the Claimant?
a. Was the selection criteria fair?
b. Were the individual and collective consultation processes undertaken fairly and in a meaningful way?
c. Did the Respondent discharge its obligations in relation to redeployment?
d. Did the decision of the Respondent to dismiss the Claimant fall within the 'band of reasonable responses test' within the meaning of s. 98 (4) of the ERA
e. Was the appeal process fair?
f. Was the Claimant's dismissal otherwise unfair?
g. If the dismissal was unfair, would the Claimant have been dismissed under a fair process, had one been followed, if so when? Alternatively, under a fair process, what was the percentage prospect of the Claimant being fairly dismissed at some point (the Polkey issue)
h. If the dismissal was unfair, did the Claimant contribute to his dismissal by way of his conduct, and if so would it be just and equitable to reduce compensation by any extent (the contributory fault issue) under s.123 (6) of the ERA

Disability status (C's daughter)

8. The Respondent accepts that the Claimant's daughter was disabled as defined within the Equality Act 2010 during the period relevant to the claim

Direct disability (associative) discrimination – section 13 EA 2010

9. Did the R discriminate against the C because of his role as carer for his disabled daughter by subjecting him to the following:
a. Selecting the Claimant for redundancy
b. Dismissing him; and
c. Requiring the role of Partner Service Manager to be primarily office based.
10. Did the R treat the C less favourably than it treated the Claimant's chosen comparator Ms Harvey who worked from home, who was not disabled or a carer of a disabled person and who was not dismissed?
11. If so, are there facts from which the Tribunal can properly and fairly conclude that the difference in treatment was because of the protected characteristic of disability by association?
12. If yes, can the Respondent prove a non-discriminatory reason for the treatment?

Indirect disability (associative) discrimination – section 19 EA 2010

13. A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:
a. a requirement that the job of Partner Service Manager could no longer be done from home and
b. a requirement that the job of Partner Service Manager could only be done wholly or predominantly in the office, [wherever that office was located].

14. Did the respondent apply the PCPs to the claimant?

15. Did the respondent apply or would have applied the PCPs to persons with whom the

claimant does not share the characteristic, namely those who are not carers of and not associated with a disabled person, or would it have done so?

16. Did the PCPs put or would put persons with whom the claimant shares the characteristic (that is, carers of and those associated with a disabled person) at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic, in that they were less able or wholly unable to undertake their own or other roles at the respondent?

17. Did the PCPs put or would put the claimant at that disadvantage? The claimant will say that the PCPs led to the loss of his own role and to him not being offered or provided with alternative employment, resulting in his dismissal.

18. Were the PCPs a proportionate means of achieving a legitimate aim? The respondent says that its aims were ensuring an efficient service.

19. The Tribunal will decide in particular:
a. were the PCPs an appropriate and reasonably necessary way to achieve those aims;
b. could something less discriminatory have been done instead;
c. how should the needs of the claimant and the respondent be balanced?

Sex Discrimination

20. Did the respondent discriminate against the claimant because of his sex (he is a male/Father) by subjecting him to the following:
i. Selecting the Claimant for redundancy
ii. Dismissing him; and
iii. Requiring him to be primarily office based.
b. Did the R treat the C less favourably than it treated the Claimant's chosen female comparators namely, actual comparators - Ms Harvey and Ms Delman and/or a hypothetical female comparator whose circumstances are materially the same?
c. If so, are there facts from which the Tribunal can properly and fairly conclude that the difference in treatment was because of the protected characteristic of sex?
d. If yes, can the Respondent prove a non-discriminatory reason for the treatment?