THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr Stuart Fairless	**AND**	**Commissioners for HM Revenue & Customs**

REASONS OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **11-14 October 2016**
1-3 November 2016

Before: **Employment Judge A M Buchanan** **Members:** **Ms R Bell**
Mrs C E Hunter

Appearances

For the Claimant: **In person**
For the Respondent: **Mr R Stubbs of Counsel**

JUDGMENT having been sent to the parties on 4 November 2016 and written reasons having been requested in accordance with Rule 62(3) of Schedule I to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Preliminary Matters

1.1 By a claim form filed on 14 April 2016 the claimant advanced claims to the Tribunal of unfair dismissal, breach of contract and a claim of failure to provide written reasons for dismissal pursuant to section 92 of the Employment Rights Act 1996 ("the 1996 Act"). The respondent replied on 19 May 2016 and denied all liability.

1.2 In additional information filed with the Tribunal on 3 May 2016, the claimant sought to amend the claim form to add claims under the Part Time Workers Regulations 2000

("the 2000 Regulations") and also a claim of sex discrimination. The claimant was ordered to provide further particulars of those claims and did so on 9 June 2016. The respondent filed an amended response on 22 June 2016. The detriment claimed under the 2000 Regulations related to the removal of the claimant from the training course to which those working full time were permitted to attend and he was also not allowed to attend training events but could carry out certain online training. In addition he complained about a remark on 2 November 2015 in respect to a spare pedestal and the manager's comment in relation to it. The claimant relied on regulation 5(1)b of the 2000 Regulations and a comparator named ZR. A claim was also advanced of sex discrimination which was subsequently clarified as a direct sex discrimination claim relying on two female employees namely LB and RT. The respondent filed an amended response.

1.3 A private preliminary hearing ("PPH") took place on 4 July 2016 at which the issues in the claims were identified and the claim for breach of contract previously intimated was withdrawn. The respondent was permitted to file a further amended response and it did so on 18 July 2016.

1.4 Various other interlocutory applications were made as the matter was prepared for hearing.

1.5 The matter came before the Tribunal on 11-14 October 2016 but there was insufficient time to complete the evidence and so the matter was relisted for 1-3 November 2016. The evidence was then concluded and the Tribunal deliberated on 2 November 2016. Judgment with full reasons was announced orally on 3 November 2016 and the claimant succeeded in part. Arrangements were made for a remedy hearing and a telephone PPH was arranged for 4 January 2017. Shortly before that hearing took place the Tribunal was advised that all aspects of this case had been settled through ACAS. Reasons had been requested before settlement was notified but not issued. Enquiries were made as to whether the parties still required those written reasons. It was confirmed that they were required for the purposes of internal review by the claimant's trade union and thus they are issued. The delay in so doing is regretted.

Witnesses

2. During the course of the hearing we heard evidence from six witnesses for the respondent namely:
2.1 Susan Little – Business Unit Head
2.2 Yvonne Pendleton – the claimant's Front Line Manager at the material times
2.3 Helen Haghighat – Assistant Director of the Fraud Intelligence Service of the respondent and the line manager of Yvonne Pendleton
2.4 David Thompson – front line manager and the line manager of LB who was one of the comparators relied on by the claimant in respect of his claims.
2.5 Claire Legate – second line manager of RT who was another comparator relied on by the claimant.
2.6 Jacqui Thompson – the manager who recruited RT.
For the claimant we heard from:
2.7 The claimant
2.8 Jean Manuel – PCS Representative of the claimant
2.9 Hazel Merriott -Brown – the life partner of the claimant

2.10 We read a witness statement from Alan Runswick – although he did not attend the hearing.

Documents

3. We had before us two lever arch files of documents comprising in excess of 740 pages. We have made reference in our deliberations to those documents to which we had been taken during the hearing or which are referred to in the documents which we have before us. Any reference in these reasons to a page number is a reference to the relevant page within the agreed bundle.

Issues

4. The following issues were defined at the PPH on 4 July 2016 for the Tribunal to determine;

Unfair dismissal claim: sections 94-98 of the 1996 Act

4.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to the claimant's capability and/or some other substantial reason
4.2. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer? Was a reasonable procedure followed?
4.3. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Direct discrimination because of sex: section 13 of the Equality Act 2010 ("the 2010 Act")

4.4. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely restricting the claimant's access to training (section 39 (2) (b)).
4.5. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on the following comparators, LB and RT.
4.6. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the claimant's sex?
4.7. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Part Time Workers Regulations 2000

4.8. Was the claimant a part time worker for the purposes of the 2000 Regulations?
4.9. Was the claimant subjected to a detriment by having his opportunity to participate in training restricted?
4.10. Was such treatment on the grounds that he was a part time worker?
4.11 If so has the respondent shown that the treatment was objectively justified?

Written statement of reasons for dismissal

4.12. Did the respondent unreasonably fail to provide a written statement under section 92 Employment Rights Act 1996?

Findings of Fact

5. Having considered all the oral and documentary evidence before us and having considered the way that evidence was given, we make the following findings of fact on the balance of probabilities.

5.1 The claimant was born on 4 February 1969. He has two children of school age with his life partner and it is the choice of the claimant and his life partner that those children are collected from school by either one or other of them each afternoon at the end of the school day.

5.2 The claimant had worked for HM Land Registry for a period of approaching 29 years when the events with which we are concerned begin. The claimant worked from 8.30am until 2.30pm each day so that he could leave work and collect his children from school at least from Monday to Thursday inclusive as his partner was not available to do so on those days. The claimant had had an interest for some time in accountancy and saw a career within the respondent as a suitable way to progress that career aspiration. In September 2014 the claimant applied for a role with the respondent on the tax specialist graduate programme which would have been a four year course leading to a Grade 7 promotion. The claimant was not successful in that application but he was advised (page 81) that he had been broadly successful and that he had scored high enough to have his application retained for future possible vacancies within the respondent.

5.3 So it was that in March 2015 the claimant was approached and told that there was to be a recruitment of executive officer tax professionals and he was asked to say whether or not he was interested in such a role. The claimant expressed his interest and his previous application was therefore carried forward and in the course of that exercise the claimant completed a form (page 83) in which he stated, "*I currently work 30hrs/wk based on 6 hrs per day, currently 8:30 to 14:30. I am able to be flexible and would be keen to discuss the exact requirements for the role on offer".*

5.4 The information provided by the respondent in respect of the role on offer was seen by us and considered in detail from pages 102 onwards and we note at page 106 a frequently asked question "*I cannot work full time, can I still be considered for a post?"* and the reply read: "*The majority of posts are to be full time but there may be an opportunity to work an alternative working pattern. When you attend the Administration Centre you will be asked to provide your preference but this is not a guarantee that the alternative working pattern will be available. You may be required to work full time for the Training and Assessment period 18 months to 2 years".* There were other relevant questions but the final part of that guidance (page 109) reads, "*If you are required to work anything other than "normal" hours this will be outlined in any formal offer of employment that we may make…".* Further information was provided about the opportunity to work part time and we have seen those documents at pages 367 and 372.

5.5 The claimant was invited to an interview by an e-mail of 27 April 2015. Because he had already been successful in the previous application and because he was already working for a government department, that interview effectively comprised bringing his qualification documentation for inspection and verification and that interview duly took place on 12 May 2015. During the interview we accept that the claimant referred again to the wish to work a 30 hour week as the alternative pattern and indeed a document produced as a result of that interview by the interviewer (page 118A) confirms that such information was imparted.

5.6 Thereafter the claimant received a conditional offer of employment (pages 125-126) which includes a clear statement that the offer was conditional and would be confirmed once pre appointment checks had been made. Two paragraphs in that letter are important: *"Paragraph C: At the point that we are able to make you a formal offer we will confirm your contracted working hours. Paragraph D: Alternative working pattern: Whilst there is a requirement to work full time during learning requests for alternative working patterns will be considered but may not be available. Confirmation of appointments will be subject to the requested working pattern being available".*

5.7 Matters proceeded and the claimant subsequently received (page 263B) a letter in July 2015 confirming that he was formally offered the appointment of Officer Tax Professional and including a sentence in square brackets *"[Insert contract information here if this place is not a standard contract*]". Nothing was inserted. The letter did not refer to hours of work. The claimant understood that document was effectively making him an offer of employment with HMRC on the terms which he had indicated he needed namely 30 hours per week given that that request by him had not been questioned at any time.

5.8 There then appeared on the website which the claimant was using to make these applications a message (page 608) saying, "*Congratulations you're now ready to move into this job*". Therein lies the difficulty at the heart of this case. By this stage the claimant had understood that the offer made and accepted related to a 30 hour week contract whereas that was not the understanding of the respondent as is clear from amongst other documents (page 134A) which was a document sent to the claimant's then line manager Yvonne Pendleton which confirmed that the claimant had been employed on a standard contract which equated to working 37 hours per week. That document was not seen by the claimant.

5.9 The claimant did not at that stage resign his employment with HM Land Registry but had a telephone conversation with Sue Little of the respondent on 27 July 2015 and made arrangements to see her and Yvonne Pendleton informally on 4 August 2015 to make sure of the arrangements for his new post. By the time that meeting took place, neither of those managers had received any paperwork in respect of the claimant. Notwithstanding that they had a discussion with him in relation to the role, the training and the hours of work and we accept that by the end of that meeting neither party saw any difficulty with regard to the matter. We accept that as a result of that meeting, arrangements were made by Sue Little for the claimant to have a visitor parking pass for his first day of employment between 8:00am and 3:00pm. We do not recognise that request for a pass as evincing any agreement in respect of the claimant's hours of work but conclude it was a gesture by the line manager to ensure that her new report had

somewhere to park on the first day. We do accept however that it evinced a discussion about the claimant's hours of work on that day namely 8:30am to 2:30pm. Having been reassured, the claimant resigned his employment at H M Land Registry and arranged to start work for the respondent on 5 October 2015. We accept that there was nothing said at that meeting which alerted the managers to the fact that the claimant only had flexibility to work beyond 2.30pm on Fridays.

5.10 So matters moved on and the claimant began work on 5 October 2015. By that time the respondent had received various papers from the Civil Service Recruitment Agency which indicated the claimant was to be working on a standard contract. The claimant had a welcome meeting on that day with Yvonne Pendleton who became his line manager and was asked to sign various probation forms which in fact were not necessary given his service of 28 years with a different government department. The claimant was advised that Sheila Clark was to be his mentor and that she did not work on Fridays and the claimant was advised for the first time that his line manager had understood that he was to work on a standard 37 hours per week contract.

5.11 On the following day 6 October 2015 we accept a conversation took place between the claimant and Yvonne Pendleton in which his working pattern again was referred to. There was conversation in particular as to whether the claimant could vary his end time of employment from 2:30pm and make alternative arrangements for childcare, perhaps by using the services of his parents-in-law. By this stage, which was the second day of employment, the claimant was clear that a problem had been identified in respect of the hours of work and the claimant returned home upset and was advised by his partner to ensure that a full diary was maintained of future events.

5.12 On the following day 7 October 2015, a further meeting occurred between the claimant and his line manager at which the identified problem in respect of working hours was brought into sharper focus and the manager agreed that she would speak to human resources to clarify exactly what had been agreed in respect of contractual hours of work. The claimant did not disagree with that course of action. The manager indicated that the claimant's training course enrolment and attendance at courses would be suspended pending that clarification. The claimant however was to be allowed to continue with self learning but no online tests were to be undertaken. The claimant went to see his trade union officer and did not agree the action taken in respect of his attendance at training courses.

5.13 Thereafter his line manager advised the claimant that he was to work 30 hours per week (as he wished) as a holding measure until clarification was obtained but that he was not to work late on Fridays, which was the day on which the claimant had indicated that he could work beyond 2.30pm, unless there was work available for him to do. That brought to an end the first week of the claimant's employment with the respondent.

5.14 The claimant was away on agreed holiday the following week namely 12-16 October 2015 and on his return he had an e-mail from his line manager (page 214) dated 16 October 2015 which indicated that the invitation he had received to attend the training programme, which he and all other new recruits were to attend in London later that month, was not something that he should attend "*given the circumstances".*

5.15 A meeting took place on 19 October 2015 between the claimant and Sue Little who was replacing Yvonne Pendleton who was then away on holiday. A minute of that meeting was prepared in the form of an e-mail (pages 236-239) which we have considered. The email included a statement: *"You said that you had shown your working hours as 6 per day, so you assumed that someone would have said something about this. I mentioned that if you had told Yvonne and I that this would be the situation when you came to see us in August, we would have explained the potential problems at that stage – you indicated that you would have turned the job down at that point as it did not fit with your circumstances at this time, but that at least you felt it was nice to be offered the post in the first place".* There was discussion about alternative roles within the respondent which would not require flexibility of working hours from the claimant. The claimant did not disagree with anything in that minute save only that he was not prepared to consider a sideways move because the training path which the job he had applied for gave access to was the overwhelming factor that had prompted him to accept that role.

5.16 The claimant was paid on a full time basis throughout the time that he worked with the respondent. In the first month his salary continued to be paid by HM Land Registry and the difference between 30 and 37 hours was made up by the respondent and thereafter the respondent paid the claimant at the rate of a full time employee. When the claimant appreciated this he immediately made that known to the respondent and offered to make appropriate repayments. However, that repayment had not been processed by the time of the claimant's dismissal and a suitable recalculation was made and a deduction made from the notice pay which the claimant ultimately received.

5.17 Events moved on with the claimant receiving a contract for his signature at the end of October 2015 which provided for him to work a 37 hour week 9:00am to 5:00pm Monday to Friday. Not surprisingly the claimant declined to sign that contract and made that matter plain to his managers. In an email (pages 291-292) the claimant wrote: "I*f the current team role that I have been assigned to is not suitable for my work pattern I would like to be placed within another part of HMRC where they can accommodate my working pattern as stated above and allow me to undertake my Tax Professional Training course…".*

5.18 On 2 November 2015 a pedestal set of drawers became free within the office in which the claimant was working and he asked his line manager's permission to take use of that himself. Permission was refused given the circumstances and that was something which upset the claimant.

5.19 On 3 November 2015 the claimant was asked by his line manager to sign his contract and he refused so to do. There was mention in that meeting of a potential return to HM Land Registry and redeployment to other roles and with that in mind the claimant went to see Fiona Lowes on 11 November 2015 to discuss an alternative role in CITEX which was a different area of work within the respondent. We find that the claimant in fact declined to take up that offer of a role because the flexibility required particularly to attend tribunals was outwith his preferred working pattern of 8:30am to 2:30pm.

5.20 On 16 November 2015 a suggested visit to a customer of HMRC when the claimant would accompany and observe a colleague was vetoed by his line manager given the situation.

5.21 By the end of October 2015 the line managers had been making enquiries with the Civil Service Recruitment Agency about what had occurred during the recruitment process which had led to the claimant being offered employment with the respondent. An e-mail was received (page 313) which indicated that the claimant's wish for an alternative working pattern was something which he had made known on his application but that had not been picked up and that this would be a "*lesson learned*" from that recruitment exercise and not repeated in future recruitment campaigns.

5.22 A further meeting took place on 24 November 2015 and no further progress was made at that meeting. By this time the parties were entrenched in their views, the claimant indicating that he would work 30 hours and the flexibility that he could offer within that 30 hours was limited to a Friday and occasionally on a Wednesday. Against that the respondent's position was that the 37 hour per week contract was what had been offered and the claimant was to accept it. The whole matter had taken up a considerable amount of management time of the line manager Yvonne Pendleton. Her line manager Helen Haghighat had become involved and she clearly evinced her exasperation with the situation and the necessity, as she saw it, for a prompt and satisfactory resolution.

5.23 The claimant raised matters with HR himself and in particular with Tim Stonehouse of HR and had some correspondence with him. Tim Stonehouse subsequently visited the Newcastle Office but did not speak to the claimant and that upset the claimant. From 16 December 2015 the claimant fell ill and was away from work thereafter and did not in fact return to work before his subsequent dismissal.

5.24 On 23 December 2015 a letter was sent to the claimant (pages 376-377) which he received towards the end of that month and which set out the respondent's position and it asserted, amongst other matters, that the claimant had misled the respondent by telling them before appearing in the department that he had flexibility in respect of working hours and that that was not the case. The full situation as the respondent saw it was set out and the claimant was invited to a meeting on 8 January 2016. That meeting was slightly delayed and duly took place on 15 January 2015. A detailed minute (pages 436-442) was prepared which the claimant subsequently checked and amended but subject to those amendments agreed.

5.25 At the meeting, the history of the matter was reviewed particularly in relation to the documentation and it was noted that once the claimant came into the department on 5 October, his lack of flexibility in respect of working hours became an issue. The alternative role within Local Compliance (Citex) was referred to and it was noted that that role had been rejected as it would not enable the claimant to work his alternative working pattern as he had done at the Land Registry. The question of the number of hours which the claimant was to work each week was perceived to be the central issue around which the lack of flexibility revolved. At the end of the meeting Yvonne Pendleton, reading from a prepared script, indicated that alternatives had been considered, that there was a possibility of a move back to the Land Registry (but that was unclear at that stage and subsequently was ruled out by the land Registry) and she

made it plain that, if mutual agreement could not be reached, then HMRC would have to consider terminating the payments being made to him in respect of full time working and it was indicated also that he was to advise the respondent within five days as to his position. It was commented by the claimant's union representative that this was an informal meeting and nothing could be resolved in respect of employment without a formal meeting. The claimant asked for five working days in which to confirm his position.

5.26 As a result of advice the claimant decided to lodge a grievance (pages 455-456) and did so on 26 January 2016 and in that grievance he made plain the fact of the dispute in relation to the hours of work and also indicated his willingness to try and seek to resolve the matter. The grievance letter contained the following statement: *"I had an informal meeting with my manager who is now saying that I do not effectively work for HMRC as I cannot stick to the contract now offered, and not signed after issuing a comprehensive response to HR. HMRC is also trying to "dismiss" me after 28 years' continuous service within the Civil Service as a Crown employee without offering me a redundancy payment. I was not even offered the chance to go into the redeployment pool".*

5.27 On the following day 27 January 2016 a letter (pages 461-462) was sent to the claimant by Helen Haghighat which set out the respondent's position. The position was that given the claimant had decided not to sign the contract for 37 hours, he had therefore declined employment with HMRC and that as a result the claimant was not employed any longer as a civil servant. The letter stated that the claimant was not to be dismissed because he was not an employee and he was not expected to serve his notice as he was not entitled to any notice. The salient passage from the letter reads: *"As you resigned your position in the Land Registry and declined employment by HMRC you are not employed as a Civil Servant. Furthermore as you rejected the contract of employment you cannot be said to have an implied contract. Although you have received payments from HMRC they have not been contractual payments or salary as your employment ended on 3 November at the earliest. It follows that you have not been overpaid and therefore have no obligation to refund any of the payments you have received. I can confirm that the payment you receive on 29 January 2016 will be the last payment from HMRC. There is no dismissal as you are not an employee. It follows that you will not be expected to serve notice".*

5.28 That letter was written as a result of advice which had been received by Helen Haghighat from Civil Service HR to the effect that the claimant was not an employee of the respondent. That advice was startling in its inaccuracy and is the worst example of incorrect advice being provided to a respondent that this Tribunal has seen for a long time. However, that is the advice the respondent received and acted on.

5.29 There then arose within the respondent a difficulty in formulating a date of the claimant's termination of employment for production of a P45. That necessitated the taking of legal advice from the Government Legal Service and when legal advice was taken the incorrect stance which the respondent had taken in relation to the claimant's employment was exposed. As a result a letter was sent on 18 February 2016 by Helen Haghighat to the claimant indicating that the position had been reconsidered. The letter made it plain that the claimant's grievance, which had previously been rejected on the basis that he was not an employee, would be considered and it would be treated also as

an appeal against his dismissal. The letter went on: "*I am arranging for you to be paid compensation in lieu of the notice (CILON) due to you less the overpayments you have received since last October that you are aware of. Should your appeal against dismissal be successful you will be reinstated with no loss of your continuity of employment…..".* Any apology to the claimant from the respondent for its previous incorrect stance was conspicuous by its absence.

5.30 On advice, the claimant decided not to pursue that appeal against dismissal/grievance and thereby an opportunity to look further into this matter was closed off.

5.31 On 24 February 2016 (page 503) the claimant received from HR Shared Services of the respondent a letter setting out overpayments of salary received by him and indicating that his last day of service was 31 January 2016.

5.32 Further correspondence was exchanged after that between Helen Haghighat and Jean Manuel on behalf of the claimant. In an email dated 4 March 2016 (pages 551-552) the following paragraph was included which set out the position of the respondent: "*Stuart was not willing to take up the post for which he applied nor was he willing to compromise so that he could meet the requirements of the role and this was the reason for his dismissal. The date of leaving on form P45 is 29 January 2016. Compensation in lieu of notice has been paid – pay section calculated the overpayment (Stuart was paid a full time salary from 5 October 2015) and deducted this from the compensation payment".*

5.33 The claimant relied on two comparators in respect of his claims for sex discrimination namely LB and RT. In respect of his claim for part time worker discrimination, the claimant relied on the comparator ZR.

5.34 The comparator LB is female and works in Liverpool and whilst away on maternity leave she was appointed to a role of Tax Professional Compliance Officer as was the claimant in another office. LB negotiated a return to work in her new role on 0.6 attendance of a full time contract. LB was then told shortly before returning to work that she needed to work full time during the training period for her new role. LB objected to this arrangement and with the help of her trade union official (Alan Runswick) elected for a working pattern which maintained her 0.6 hours but also entailed her complete flexibility to change her hours of work and days of work even to full time in certain weeks in order to ensure she was able to attend the required training courses and events necessary to ensure she completed the training for her new role. LB used annual leave built up during her maternity leave to ensure her attendance at training events. LB works 24 hours per week either 4 days of 6 hours or 3 days of 8 hours depending on her childcare commitments and the business needs of the respondent.

5.35 RT is female and was recruited to the role of Tax Professional Caseworker in March 2016 but was then offered a Tax Professional Compliance Officer role on a 30 hour per week contract beginning on 23 May 2016 – in both cases therefore after the dismissal of the claimant. RT has shown flexibility in her working pattern which is 7.5 hours per day over 4 days each week with Thursday as her non-working day. From August 2016 RT has moved to a five over seven shift roster which requires her to work late one evening per week until 8pm and weekends on a rota basis: this is to

accommodate the business needs of the respondent. RT has evinced a willingness to be flexible in her working hours with sufficient notice.

5.36 ZR was recruited to the same role as the claimant at the same time and worked full time. ZR was allowed to attend the welcome event in London (paragraph 5.14 above) and other training course which the claimant was not allowed to attend by his line managers given the ongoing dispute in respect of his working hours.

Submissions

6. On behalf of the respondent, Mr Stubbs filed written submissions (20 pages) and made oral submissions. These are briefly summarised:

6.1 It was conceded that the dismissal of the claimant was procedurally unfair – there was a serious procedural failure. There was still a need for the respondent to prove the reason for the dismissal. It was submitted that the Tribunal would need to consider the question of contributory fault and also the questions posed by the **Polkey** decision. It was accepted that the managers of the department in which the claimant worked were placed in a difficult position when the claimant was recruited and that was in part due to a failure in the recruitment process to pick up the alternative working pattern of the claimant.

6.2 It was submitted that the claimant had evinced a complete lack of flexibility to meet the needs of the respondent throughout the time he had worked within the respondent organisation. It was further submitted that it was clear that the respondent had no issue with the claimant working only 30 hours per week if that was accompanied by a willingness on the part of the claimant to alter those hours and indeed work longer hours than that when need arose and in particular to attend the required training events which were part and parcel of the training course for the claimant to achieve the Tax Professional qualification.

6.3 It was submitted that it was clear the claimant had been offered a standard full time contract which he accepted on 8 July 2015. Reference was made to **Investors Compensation Scheme Limited –v- West Bromwich Building Society 1998 1WLR 896** and it was submitted that a reasonable bystander could only conclude that a standard contract meant a full time contract not least because there was no such thing as a standard alternative working pattern contract as they were bound by their nature not to be standard.

6.4 In respect of the part time worker discrimination claim, it was submitted that the claimant was not a part time worker as he was paid at the full time rate and had a full time contract. It was submitted in any event that a reasonable employee would not have felt subjected to a detriment by being denied immediate access to the training courses given that there was a dispute in respect of hours of work. The course had a two year duration and the reasonable employee would know that there would be other opportunities to register and undertake the course once the situation was resolved – the fact that in the circumstances of this case it never was is not material.

6.5 The reason why the claimant was treated as he was in respect of training was not in any way connected to his part time status but was because of his inability to be flexible

and travel to courses and on occasion stay overnight. Everything which occurred was due to the issue which had arisen on establishing what the claimant's contract was and his lack of flexibility to do the training which he accepted was the position at the time – even if that position had altered before the Tribunal. The sex discrimination comparators are in any event fatal to this claim – they were part time workers who undertook training and were flexible in doing so. This was simply not the case with the claimant.

6.6 Reference was made to **Homer –v- The Chief Constable of West Yorkshire Police 2012 ICR 704** and the guidance given in that decision by Lady Hale as to the requirements for objective justification. It was submitted that flexibility was a legitimate objective and that it was objectively justified because the role of tax professional could not be carried out without flexibility as to attending training events and it would be disproportionate and unreasonable to have to arrange bespoke training events for each of its employees at whatever site they worked. The hours of work of the claimant were irrelevant to the question of his flexibility. The claimant could not give the flexibility which the respondent required of all its employees in the role the claimant undertook whether full time or part time.

6.7 In respect of the direct sex discrimination claim, it was accepted that the claimant's access to training was restricted in that he was not registered with AAT and was not allowed to do the online training but it was not accepted that that amounted to less favourable treatment. In any event even if it was, the comparators relied on namely LB and RT were not appropriate comparators as their circumstances were different and thus they did not pass the requirements of section 23 of the 2010 Act. There is no evidence at all that anyone within the respondent thought that LB and RT could not do the training – but that was the case with the claimant as he made abundantly clear. If the respondent is required to explain, then the explanation is that the claimant could not or would not provide the flexibility to carry out the training required and this was the clear understanding of the respondent's officers at the time the impugned decisions were taken even if the claimant now says it was otherwise. The treatment of the claimant had nothing to do with his sex or his hours – it had to do with his rigidity.

6.8 In respect of the claim of failure to provide written reasons for dismissal, it was submitted that the claimant made the request on 1 March 2016 and that it was responded to on 5 March 2017.

6.9 In respect of the claim for unfair dismissal, it was submitted that the reason proved by the respondent was that the claimant was unwilling to take up the post he had applied for or to find ways of carrying out the post and the required training. This was related to the claimant's capability or in the alternative some other substantial reason. There had been a genuine error in the advice on which the respondent acted and that was genuinely regretted.

6.10 It was submitted that there should be a reduction from any compensatory award of compensation under the doctrine in **Polkey**. The claimant had evinced a fixed position and his dismissal was inevitable after a fair procedure which would have lasted no longer than one month. The claimant was inflexible even as to alternative roles and in particular the CITEX role. Any award of compensation should be reduced to reflect that contributory fault.

6.11 In respect of any adjustment to the award in respect of failure to follow the ACAS Code of Practice, the claimant had declined to pursue an appeal and this should be reflected in any uplift ordered.

7. The claimant filed written submissions extending to 19 pages and made oral submissions. These are briefly summarised.

7.1 It was submitted that the reason the respondent had dismissed the claimant was his stated unwillingness to sign the full time contract. The claimant had been labelled inflexible as early as 7 October 2015 by Yvonne Pendleton. That lack of flexibility was never tested by the respondent. It was accepted by the respondent that it was never considered that it could accept the 30 hour per week contract and then deal with any alleged inflexibility as conduct/performance issues. The reason for dismissal was the inability of the claimant to commit to a 37 hour per week contract and the alleged lack of flexibility was just a smoke screen.

7.2 It was accepted that the decision to dismiss was procedurally unfair but in fact it was substantively unfair – and there should be no **Polkey** deduction. It was inconceivable that Helen Haghighat genuinely believed that the claimant was not an employee of the respondent. It was submitted that the decision to dismiss was motivated by a desire to have full time employees as part time employees are more costly to the business of the respondent.

7.3 It was submitted that the claimant had not contributed by culpable or blameworthy conduct to his dismissal. The claimant stated that he had made detailed enquiries into the role he was applying for and he was not as inflexible as the respondent painted him to be. A return to H M Land Registry was investigated but the Land Registry withdrew the offer of further employment when they were erroneously informed by the respondent that the claimant was facing disciplinary proceedings.

7.4 In respect of the sex discrimination claim, it was submitted that the training of the claimant was restricted as early as the meeting in 7 October 2015. That treatment was very different to the approach made with LB or RT. The respondent clearly did not anticipate that a male employee would have child care responsibilities and the situation with LB which was almost identical was handled very differently by the respondent. The attitude adopted was that the claimant should make alternative childcare arrangements not that the respondent would seek to accommodate those arrangements as it did in the case of LB in particular.

7.5 Both LB and RT were treated more favourably than the claimant. The difference in the way the alternative working pattern for LB had been dealt with by the respondent in Liverpool compared to how the respondent in Newcastle dealt with the matter was pointed out. There was no attempt by the respondent through Yvonne Pendleton or Helen Haghighat to ascertain the level and degree of flexibility which the claimant could offer. The claimant compared his position to that of RT who was employed to do a similar role but on a part time basis.

7.6 It was pointed out that Yvonne Pendleton had failed to renew her mandatory diversity and equality training which had expired on 16 January 2016 and the Tribunal was invited to draw inferences from that fact. In particular the Tribunal was asked to

infer that unconscious bias played a large part in the treatment received by the claimant in that the respondent did not expect a male applicant to request part time working for child care purposes and the lack of any procedure to check that information contributed to the discriminatory treatment.

7.7 In respect of the claim under the Part Time Workers Regulations 2000, it was submitted that the claimant had worked for the last seven years prior to his transfer on a part time contract under standard conditions. It was submitted that the claimant was subject to detriment by being refused access to the Tax Professional Training Programme. The detriments were identified as including loss of permanent career in the civil service after 28 years, loss of index linked final salary rights and loss of statutory rights regarding protection from unfair dismissal.

7.8 It was submitted that these detriments were on the grounds of part time worker status because of the whole history of the dealings with the claimant from October 2015 until January 2016. It was submitted the treatment of the claimant was not justified.

7.9 It was submitted that the respondent had failed to provide written reasons for dismissal.

The Law

The claim under the 2000 Regulations

8.1 The Tribunal reminded itself of the provisions of Regulation 1 and in particular the definition of the "*pro rata principle"* namely:
"...where a comparable full time worker receives or is entitled to receive pay or any other benefit, a part time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of the weekly hours of the comparable full time worker".

8.2 The Tribunal reminded itself of the provisions of Regulation 5 of the 2000 Regulations:
"(1) A part time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full time worker-
(a) as regards the terms of his contract: or
(b) by being subjected to any other detriment by any act , or deliberate failure to act, of his employer.
(2) The right conferred by paragraph (1) applies if and only if-
(a) the treatment is on the ground that the worker is a part time worker, and
(b) the treatment is not justified on objective grounds.
(3) In determining whether a part time worker has been treated less favourably than a comparable full time worker the pro rata principle shall be applied unless it is inappropriate".

8.3 The Tribunal reminded itself of the relevant provisions of Regulation 8:
(1) Subject to regulation 7(5), a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5 or 7(2).
"(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three

months....beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them.
(3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so".

8.4 The Tribunal has reminded itself that in considering a claim under Regulation 5, it must consider several matters: first what is the treatment complained of? Secondly, is the treatment less favourable? Thirdly, is it on the ground that the claimant was a part time worker and fourthly, if so, is the treatment justified? A Tribunal should always consider whether it is appropriate to apply the pro rata principle when considering such a claim.

8.5 The Tribunal has reminded itself of the decision of the EAT in **Sharma -v- Manchester City Council 2008 ICR 623** and the principle that for a claim to succeed under the 2000 Regulations, part time work must be the effective and predominant cause of the less favourable treatment complained of, but it need not be the only cause.

8.6 In looking at the justification defence, the Tribunal notes that treatment will be justified if it is to achieve a legitimate business objective, that it is necessary to achieve that objective and that the steps taken to achieve it are an appropriate way of so doing.

8.7 We have reminded ourselves of the speech of Lady Hale in **Homer v Chief Constable of West Yorkshire Police** in the Supreme Court when the following principles were provided in respect of objective justification: It should be asked firstly whether the objective is sufficiently important to justify limiting a fundamental right? Secondly whether the measure is rationally connected to the objective? And thirdly whether the means chosen are no more than is necessary to accomplish the objective? It is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so. A measure may be appropriate to achieving the aim but go further than is reasonably necessary in order to do so and thus be disproportionate. Part of the assessment of whether the criterion can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer. To some extent the answer depends on whether there were non-discriminatory alternatives available.

Direct Sex Discrimination: Section 13 of the 2010 Act

8.8 We have reminded ourselves of the provisions of section 11 of the 2010 Act and also of section 13 which reads:
(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
The Tribunal has also reminded itself of the provisions of section 23(1) of the 2010 Act which read:
"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case".

8.9 We reminded ourselves that direct evidence of discrimination is rarely forthcoming and thus there are particular rules in respect of proving unlawful discrimination referred to below. It is now readily accepted that discrimination need not be conscious. Some people have an inbuilt and unrecognised prejudice of which they are unaware. A discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of 'significant influence', see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLR572** at page 576. In some cases discrimination is obvious. However, the Tribunal in most cases will have to discover what was in the mind of the alleged discriminator. In **Nagarajan**, Lord Nicholls said at page 575 that:

"Direct discrimination, to be within section 1(1) (a), the less favourable treatment must be on racial grounds. Thus, in every case it is necessary to enquire why the complainant has received less favourable treatment. This is a crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in the obvious cases, answering the crucial question, will call for some consideration of the mental process of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision. Direct evidence of a decision to discriminate on racial grounds will seldom be forthcoming. Usually the grounds of the decision would have to be deduced, or inferred, from the surrounding circumstances".

8.10 The Tribunal has reminded itself of the provisions of section 136 of the 2010 Act and the detailed guidance in **Igen -v- Wong & Others 2005 IRLR 258.**

8.11 In **Madarassy v Nomura International Plc**, in the Court of Appeal, Lord Justice Mummery said at paragraph 56:

*"The court in **Igen v. Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".*

And later at paragraphs 71 and 72:

"Section 63A(2) [Sex Discrimination Act] does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or a situation for which comparisons are made are not truly like the complainant or a situation of the complainant; or that, even if there has been less favourable treatment of the complainant it was not in the grounds of her sex or pregnancy. Such evidence from the respondent could if accepted by the tribunal, be relevant as showing that contrary to the complainant's allegation of discrimination, there

*is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in **Liang** (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all".*

8.12 The Tribunal has reminded itself of the guidance in the decision of Underhill J in **Amnesty International –v- Ahmed 2009 IRLR 844** who after dealing with cases of inherently racist behaviour went on to give guidance in relation to cases which are not inherently discriminatory. This case dealt with a claim of direct race discrimination but could equally well have applied to a claim of direct sex discrimination.

*But that is not the only kind of case. In other cases – of which **Nagarajan** is an example - the act complained of is not in itself discriminatory but is rendered so by a discriminatory motivation, i.e. by the "mental processes" (whether conscious or unconscious) which led the putative discriminator to do the act. Establishing what those processes were is not always an easy inquiry, but tribunals are trusted to be able to draw appropriate inferences from the conduct of the putative discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). Even in such a case, however, it is important to bear in mind that the subject of the inquiry is the ground of, or reason for, the putative discriminator's action, not his motive: just as much as in the kind of case considered in **James v Eastleigh**, a benign motive is irrelevant.*

8.13 The Tribunal has reminded itself of the words of Lady Hale in the Supreme Court decision in **R-v- JFS** :

"The distinction between the two types of "why" question is plain enough: one is what caused the treatment in question and one is its motive or purpose. The former is important and the latter is not. But the difference between the two types of "anterior" enquiry, into what caused the treatment in question, is also plain. It is that which is also explained by Lord Phillips, Lord Kerr and Lord Clarke. There are obvious cases, where there is no dispute at all about why the complainant received the less favourable treatment. The criterion applied was not in doubt. If it was based on a prohibited ground, that is the end of the matter. There are other cases in which the ostensible criterion is something else – usually, in job applications, that elusive quality known as "merit". But nevertheless the discriminator may consciously or unconsciously be making his selections on the basis of race or sex. He may not realise that he is doing so, but that is what he is in fact doing. As Lord Nicholls went on to say in Nagarajan, "An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did . . . Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1) (a) " (p 512)".

The claim of ordinary unfair dismissal.

8.14 The Tribunal has reminded itself of the provisions of section 98 of the 1996 Act which read:

"*98(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show –*

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling in subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) The reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of a kind which he was employed to do;

(b) relates to the conduct of the employee …

(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

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

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

8.15 The Tribunal reminds itself that in considering the question posed by section 98(4) of the 1996 Act, there is no burden of proof on either party: that burden lies neutrally between the parties. In addition the Tribunal must not substitute its own view as to what the respondent should or should not have done in the circumstances of the case. Instead, the actions of the respondent must be judged from the standpoint of the hypothetical reasonable employer.

8.16 The Tribunal reminded itself of the provisions of Section 123(6) of the 1996 Act – *'Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportionate as it considers just and equitable having regard to that finding'.* We note that for a reduction from the compensatory award on account of contributory conduct to be appropriate, then three factors must be satisfied namely that the relevant action must be culpable or blameworthy, that it must have actually caused or contributed to the dismissal and it must be just and equitable to reduce the award by the proportion specified. The Tribunal must concentrate on the action of the claimant before dismissal because post dismissal conduct is irrelevant.

8.17 We reminded ourselves of the provisions of Section 123 of the 1996 Act in relation to the fact that compensation must be 'just and equitable' and have reminded ourselves of the decision of **Polkey –v – A E Dayton Service Limited 1988 ICR142**. We note that the **Polkey** principle applies not only to cases where there is a clear procedural unfairness but what used to be called a substantive unfairness also. However whilst a Tribunal may well be able to speculate as to what would have happened had a mere procedural lapse or omission taken place, it becomes more difficult and therefore less likely that the Tribunal can do so if what went wrong was more fundamental and went to the heart of the process followed by the respondent. We have noted the guidance given by Elias J in **Software 2000 Limited –v- Andrews 2007 ICR825/EAT.** We recognise that this guidance is outdated so far as reference to section 98A(2) is concerned but otherwise holds good. We note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a contribution has already been made or will be made under one heading may well affect the amount of deduction to be applied under the other heading. We note that a deduction can be made for both contributory conduct and **Polkey** but when assessing those contributions the fact that a **Polkey** deduction has already been made or will be made under one heading may well affect the amount of deduction to be applied for contributory fault. We have noted the decision in **Rao –v- Civil Aviation Authority 1994 ICR 485** and the guidance to the effect that a deduction from compensation pursuant to section 123(1|) of the 1996 Act (the **Polkey** deduction) should be first considered and then an assessment made in respect of contributory conduct. The extent of any **Polkey** type deduction may very well in many cases have a very significant bearing on what further deduction may fall to be made in respect of contributory fault.

8.18 We reminded myself of the more recent guidance from Langstaff P in **Hill –v- Governing Body of Great Tey Primary School 2013 IRLR 274** and as to the correct approach to the Polkey issue.

*"A "**Polkey** deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer **would** have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand".*

8.19 The Tribunal reminded itself of the provisions of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 in respect of increases or decreases in awards of compensation.

The claim in respect of written reasons for dismissal – section 92 of the 1996 Act.

8.20 We reminded ourselves of the provisions of section 92 of the 1996 Act:

(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal-
(a) if the employee is given by the employer notice of termination of his contract of employment….
(2) Subject to subsections (4) and (4A), an employee is entitled to a written statement under this section only if he makes a request for one: and a statement shall be provided within fourteen days of such a request
(3) Subject to subsections (4) and (4A), an employee is not entitled to a written statement under this section unless on the effective date of termination he has been or will have been continuously employed for a period of not less than two years ending with that date.

Conclusions

General Matters

9.1 Those then are the basic findings of fact which we make in this case which summarise a very unfortunate and unhappy 13 weeks for the claimant in the employ of the respondent and as a result of which the respondent has conceded that the dismissal of the claimant was unfair. That concession is clearly rightly made in the circumstances. Given the extraordinary advice provided to the respondent by its own HR department and acted on, it could not be otherwise.

9.2 So we turn to the various claims which are advanced in this case and the first question with which we have engaged is the contractual position in relation to the claimant's role. We conclude that there was clearly a valid contract of employment between the parties. The claimant worked for the respondent, his duties were clear, his place of work was clear, his hourly rate of pay was clear. The central issue which was not clear was the question of the hours of work which the claimant was to undertake. We have considered the authority we were referred to by the respondent namely **Investors Compensation Scheme Limited –v- West Bromwich Building Society (above)** and we note that in construing contractual documents the aim is to find what those documents would convey to a reasonable person having all the background knowledge reasonably available to the parties including anything which would have affected the way a reasonable man would have understood it.

9.3 We were urged by Mr Stubbs to say that the position is clear and that it is clear the claimant signed a contract to work full time 37 hours per week. We do not agree with that contention. We conclude that the parties simply were not at one on the terms of the hours to be worked. The claimant clearly thought that he was to work 30 hours each week and the respondent thought 37 hours each week. There was no meeting of minds in respect of that particular matter. It is not for this Tribunal to say what should or should not have been decided. The fact is, in our judgment, that the hours of work remained unclear and that is the position in which the parties found themselves. In carrying out this task, we were not construing a contractual document but rather various pieces of correspondence which took place, mainly online, between the claimant and unknown parties and documents issued as a result of that correspondence. The position in respect of the working hours was just not clear: there had been no agreement on that term of the contract.

The claim under the 2000 Regulations

9.4 We turn to the claims advanced by the claimant first pursuant to the 2000 Regulations. The first question to consider is whether the claimant was a part time worker at the material times namely when the alleged detriment was suffered. The alleged detriment was the withdrawal of the claimant from the training course which began on 16 October 2015 (paragraph 5.14 above) and effectively continued until the end of the claimant's employment on 29 January 2016. An additional alleged detriment related to the question of the pedestal set of drawers which occurred on 2 November 2015 (paragraph 5.18 above). It is for the claimant to establish that he had the status of a part time worker at the material time. We conclude that the claimant was at all material times a part time worker of the respondent. No matter what the confused position was as to what the parties thought had and had not been agreed in respect of working hours, the simple fact is that the claimant worked part time namely 30 hours each week from the beginning until the end of this employment with the respondent. The claimant was paid on a full time basis but the respondent reclaimed the overpayment from the notice pay paid to the claimant and thus that argument does not assist the respondent. We conclude that the claimant was at all material times a part time worker for the purposes of the 2000 Regulations and thus able to advance a claim pursuant to the 2000 Regulations.

9.5 The next question therefore we have engaged with is whether the claimant was subjected to a detriment at all in relation to the two matters complained of. We conclude in fact that there was no detriment to the claimant in this case. It is clear that the claimant was temporarily restricted from undertaking a training course which was only going to take some 57 weeks to complete. He was not prevented from undertaking all training and he was certainly kept actively employed by the respondent on self training and on other matters. We conclude that any reasonable employee looking at that situation in the context in which the claimant found himself would not have perceived the unwillingness to allow formal training courses to begin as a detriment. It was clear that the claimant would need to provide flexibility of working pattern and hours if he was to attend those training courses which involved overnight stays. The claimant was making it clear to the respondent that he could not provide that flexibility. Given that was his position, the respondent did not insist (as it could have done) that the claimant attend those course and thereby provide the flexibility he said he could not provide. We make it clear that if the situation had gone once the situation in respect of working hours had been clarified then of course the outcome may have been very different. But at the stage this matter had reached by the time of the claimant's dismissal, we conclude that what the claimant complains of in respect of the training course cannot reasonably be said to be a detriment.

9.6 We conclude that the matter in respect of the pedestal set of drawers could amount to a detriment albeit a very minor one.

9.7 If our conclusion in respect of the training courses is wrong, we have considered whether that detriment and the detriment in respect of the chest of drawers was imposed on the claimant on the ground of his part time status. We consider it right to go immediately to this question and to determine the reason why the claimant was treated as he was by the respondent. We remind ourselves that the part time worker status

must be the effective and predominant cause of the treatment – it need not be the only cause. The central issue in the 13 week period of the claimant's employment was the question of whether or not the claimant could provide the flexibility in his working pattern to be able to complete the training courses. We accept the explanation of the respondent's managers that there was no issue in the claimant working 30 hours per week per se but the issue was the ability and/or willingness of the claimant to work with sufficient flexibility to mean that on occasion he could work full time (and more) hours to enable him to attend training courses (including residential training courses) and once trained, to enable him to visit customers of the respondent often at considerable distance from his work base and thus work outwith the 8.30am to 2.30 pm pattern which the claimant wished to adhere to. That was an overarching question which dominated the whole of the employment of the claimant throughout that period. Any employee of the respondent – full time or part time – was required to work with a degree of flexibility which the claimant could not or would not give and therein lies the reason why the claimant was treated as he was by the respondent. We conclude that the claimant was not treated as he was in respect of either the training courses or the question of the pedestal because of his part time status but because of uncertainty on the question of the claimant's flexibility to carry out the role. We accept the explanation of the respondent in that regard.

9.8 Therefore it follows that the claims which the claimant advances pursuant to the 2000 Regulations do not succeed and it is therefore not necessary for us to engage with the question of objective justification. However we have noted the submissions on that point and we would have concluded that the aim of having employees who could work with flexibility in order to carry out the duties of the post of Tax Professional was legitimate and that the steps taken to achieve that aim were proportionate. However, we did not address that question at any length given that it was not strictly necessary for us so to do.

The claim of direct sex discrimination

9.9 We turn next to the question of the sex discrimination claim and again we reach the same conclusion in respect of the detriment complained of in respect of the restriction placed on the claimant in respect of the training courses. We repeat our finding at paragraph 9.5 above.

9.10 In case that should be wrong, we have considered whether the claimant has established that he received less favourable treatment than the two comparators on whom he relied namely LB and RT. We have considered whether those two female comparators were comparators within the requirements of section 23 of the 2010 Act. We conclude that they were not because in both of their cases, their hours of work and their ability to work flexibly in order to attend training courses and customer visits was not in any doubt at all. A true comparator would have been a female employee who like the claimant had uncertainty about her hours of work and who was unable or unwilling to provide the flexibility of working hours required to meet the training and employment requirements of the respondent. The two comparators relied on are not in our judgment appropriate comparators within section 23 of the 2010 Act as there were material differences in the circumstances of the comparators and those of the claimant.

9.11 For those reasons therefore the claim of direct sex discrimination fails and is dismissed.

The claim in respect of written reasons for dismissal

9.12 We turn to the claim of alleged failure to provide written reasons for dismissal which is advanced pursuant to section 92 of the 1996 Act. That request was made on the claimant's behalf on 1 March 2016 and responded to by Helen Haghighat in the e-mail to which we have made reference on 4 March 2016.

9.13 It is in our judgment that in that e-mail of 4 March 2016 Ms Haghighat makes it plain as to the reasons for the dismissal and we therefore do not accept that there has been a failure to set out those reasons and therefore that claim fails and is dismissed.

The claim in respect of unfair dismissal

9.14 We turn to the final claim of unfair dismissal. The first matter we have to consider is whether the respondent has established on the balance of probabilities the reason for the dismissal. The reason for the dismissal in this case is as set out in Ms Haghighat's e-mail. It is that the claimant would not offer the flexibility to carry out the duties of the role he had applied for whether he was to work 37 or 30 hours per week. We are satisfied that that was the reason for the dismissal. That is a substantial reason falling within section 98(1)(b) of the 1996 Act and is a potentially fair reason for dismissal.

9.15 We have considered the questions posed by section 98(4) of the 1996 Act. We have done so from the objective stand point of the reasonable employer. This was a dismissal which was rightly conceded by the respondent in the circumstances to be unfair. The letter from Helen Haghighat dated 27 January 2016 (paragraph 5.27 above) dismissed the claimant from the employment of the respondent: despite what the letter said – that was the effect of the letter as the respondent later had to accept. The result of acting on the advice received meant that there was stark and unacceptable unfairness in what the respondent did in dismissing the claimant – who had over 28 years' service with the civil service. There was no attempt to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 ("the ACAS Code"). The respondent did not meet formally with the claimant to discuss the situation in which the parties found themselves and the claimant was not properly warned that dismissal was in contemplation. Every hallmark of a reasonable procedure was lacking in the way the respondent dealt with the dismissal of the claimant. The decision to dismiss was wholly unreasonable and therefore unfair. The dismissal should not have occurred in those circumstances and it was not the action any reasonable employer acting reasonably would have taken. The claim of ordinary unfair dismissal succeeds and the claimant is entitled to a remedy.

9.16 We have considered the questions required of us by reason of the decision in **Polkey**. We reach the conclusion that the chances of the claimant being fairly dismissed by the respondent at a point in time after 27 January 2016 are very small. We reach that conclusion because the claimant came into the respondent's employment after 28 years' service with the Land Registry. He had available to him by reason of that length of service a very valuable pension. The claimant was offering 30 hours per week, the respondent thought 37 hours per week had been agreed but no matter what the working

pattern, the respondent required some flexibility from the claimant. The gap between those two positions in fact is not all that great. We are satisfied that, if it had been made known to the claimant the seriousness of his position and if it had been made known that he was to face dismissal and the loss of his pension and indeed the loss of his income, then the demands which the claimant has in respect of childcare would have been accommodated.

9.17 The claimant told the Tribunal of the arrangements which could be made with notice in respect of childcare but we are satisfied that if it had come to that stark choice, then the claimant would have toed the line and accepted the position and remained in employment because, had he done so, he would have been able immediately to look for other employment within HMRC or a transfer back to other government departments including HM Land Registry and with his service and pension intact. The chances of the claimant throwing all that away for the sake of seven hours per week and some additional flexibility in our view is very low indeed. The claimant could have continued for example to work as the respondent requested under protest and could have brought a claim to this Tribunal or to the County Court to seek to establish what the terms of the contract he had entered into actually were if agreement could not have been reached. There were many options open to the claimant which would have meant a short period of compliance with what the respondent requested but perhaps not for long because other options were open to him. We are satisfied that had matters been explained to the claimant, as they should have been, then the chances of a fair dismissal taking place were very low indeed and we assess that chance at 10%.

9.18 We have turned our attention to the question of contributory fault. Did the claimant by his culpable or blameworthy conduct contribute to his dismissal? We are satisfied that there was a small element of contribution which we decide on the basis that the claimant had by January 2016 become entrenched. In our judgment there was stubbornness and an unwillingness on the part of the claimant to recognise the reality of his position and that was culpable and blameworthy and to some extent contributed to his dismissal.

9.19 Had the meeting on 15 January 2016 been a formal meeting and had the seriousness of the position been made plain to the claimant, then the level of contribution would have been much higher indeed. However, given the circumstances it is our judgment that the level of contribution is low and we assess that level of contributory conduct at no more than 10% and there will be that deduction from remedy. We have looked at the total of 20% and considered whether or not that is a fair composite total – **Rao –v- The Civil Aviation Authority 1994 (above)** and we are satisfied that it is.

9.20 We have looked further at the question of the ACAS Code. There could hardly be an example of a more comprehensive breach of the ACAS Code than that evinced by the respondent in this case. There was a failure to bring the claimant to a formal meeting setting out in writing in advance of it the seriousness of his position. That simply was not made known to him. A formal meeting with the claimant represented in the knowledge of the seriousness of the position did not occur and no appeal was offered to the claimant initially and an appeal was only offered once the claimant had grieved the matter and as a result of different advice being received. We consider that a 25% increase is not inappropriate but we have then noted the claimant's failure to

engage with an appeal which was offered, albeit late in the day, and the claimant in failing to do that himself did not comply with his duties under the ACAS Code. Therefore we consider that the appropriate level of increase of the compensatory award due to the claimant for failure to comply with the Code is 20% and there will be that increase in compensation on account of the failure by the respondent to comply with the ACAS Code.

Final Matters

10.1 Orders were made at the conclusion of the hearing on 3 November 2016 for a Remedy Hearing to be prepared and a telephone PPH was arranged. In the event the Tribunal was advised before the PPH that the remedy had been settled between the parties and no further hearing was required.

10.2 Given the failure on the part of the respondent to comply with the ACAS Code the Tribunal had in mind as between the respondent and the Tribunal the provisions of section 12A of the Employment Tribunals Act 1996. The Tribunal required the respondent to make submissions in respect of that matter in writing. Those submissions (12 paragraphs – 4 pages) were duly filed and considered. In light of those submissions, the Tribunal determined that it was not appropriate to take any further action in respect of section 12A of the said Act.

EMPLOYMENT JUDGE A M BUCHANAN

REASONS SIGNED BY EMPLOYMENT JUDGE ON 31 March 2017
REASONS SENT TO THE PARTIES ON

3 April 2017

G Palmer

FOR THE TRIBUNAL