Appeal Nos. UKEAT/0435/14/DA
UKEAT/0076/15/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 2 July 2015

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

DR S RAJARATNAN — APPELLANT

CARE UK CLINICAL SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL BROWN (of Counsel) Free Representation Unit
For the Respondent	MS CATHERINE RICHMOND (of Counsel) Instructed by: DAC Beachcroft LLP 7 Park Square East Leeds LS1 2LW

SUMMARY

SEX DISCRIMINATION - Indirect

PART TIME WORKERS

PRACTICE AND PROCEDURE - Costs

Indirect Sex Discrimination - ***Equality Act 2010*** section 19

On the indirect sex discrimination claim it was agreed that the Employment Tribunal ("the ET") erred in the identification of the pool for comparison. To that extent the appeal would be allowed.

Applying **Home Office (UK Border Agency) v Essop** [2015] EWCA Civ 609: the assessment of disadvantage required findings both as to disadvantage in the group and for the particular complainant; the ET's findings were inadequate for that task.

Nevertheless, the ET had gone on to make a finding, in the alternative, that the PCP was justified. Following the guidance in the Supreme Court in **Seldon v Clarkson Wright & Jakes** [2012] IRLR 590 and **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601, the balancing exercise required related to the justification of the rule, not the individual application of that rule. That being so, the ET's conclusion stood; it had made a permissible finding on the evidence. The legitimate aim here was obvious; stating it made plain the justification: even allowing for the discriminatory impact, the ET was entitled to conclude there was nothing to be balanced against this. The obvious nature of the case meant further explanation was not required.

Part-Time Workers - ***Part-time Workers Regulations 2000*** ("PTWR")

The cross-appeal related to the ET's finding of a claim under Regulation 5 of the **PTWR**. Both parties agreed the ET erred in this respect: no claim under Regulation 5 was before it; it had failed to give a decision on the claim that was before it, under Regulation 7.

Rejecting the Claimant's contention that the Regulation 5 decision could be upheld in any event; to do so would be in breach of natural justice.

As for the Regulation 7 case, one of the detriments relied on could not stand given the ET's findings. The case would, however, need to be remitted to the same ET for consideration of the Regulation 7 claim on the second detriment.

Costs

As for the costs appeal: the ET would need to reconsider its costs decision in the light of the findings on the indirect sex discrimination case and to that extent only the costs appeal would be allowed and this matter remitted to the same ET.

HER HONOUR JUDGE EADY QC

Introduction

1. I refer to the parties as the Claimant and the Respondent, as below. There are two appeals and one cross-appeal before me. The first appeal by the Claimant, and the Respondent's cross-appeal, relate to a Judgment of the Watford Employment Tribunal (Employment Judge Mahoney, sitting with members over seven days, including one reading day and two days of deliberations; "the ET"), sent to the parties on 2 July 2014 ("the Liability Judgment"). The Claimant's second appeal is against the ET's subsequent Judgment on costs (after a further hearing before the same ET, on 21 August and 23 October 2014), sent to the parties on 3 December 2014 ("the Costs Judgment"). Representation before the ET was as it has been before me.

2. By the Liability Judgment, the ET dismissed all the Claimant's claims except that of a breach of the **Flexible Working Regulations 2002** and, in part, her complaint of having suffered detriment as a part-time worker. Of the dismissed claims, I am concerned only with that of indirect sex discrimination. The Respondent's cross-appeal, however, relates to the ET's finding on the **Part-Time Worker Regulations** claim. Somewhat unusually, each party accepts that there is merit in the other side's appeal against the Liability Judgment (albeit that has not meant there has been any agreement as to the appropriate outcome in either respect).

3. By its subsequent Costs Judgment, which followed on from the Remedy Hearing herein, the ET made an order of costs against the Claimant in the sum of £15,000, of which £5,330.62 was offset against its remedy award. The Claimant appeals against the costs order.

The Background Facts

4. The Respondent is commissioned by NHS Brent to operate the Brent urgent-care centre ("Brent UCC") on a 24/7 basis. The Claimant, who is a medical GP, commenced employment with the Respondent, in her first post-qualification position, at Brent UCC as from 28 May 2012. Her employment ended on 17 February 2013. The Claimant has two children: a daughter born on 1 January 2009 and a son born on 23 May 2010.

5. The nature of the service provided by Brent UCC means that the GPs employed to work there are required to work a variety of shifts; including days, evenings, nights, weekends, Christmas and Bank Holidays. They are, the ET found, paid around £10,000 more than they would receive were they employed as GPs working normal working hours in a GP's surgery. The ET found that the Claimant had not raised questions regarding the working hours required at her interview and indeed signed a contract of employment that included the following:

> **"Hours of work** **Your normal hours of work will be 20 per week to be worked flexibly in accordance with the service being provided including weekends and night working as required by the needs of the business in accordance with your contracted working hours."**

6. The Claimant did enquire whether she could be given notice of her shifts because of her family commitments, but no rota or shift times were sent to her in advance of her starting the employment on a half-time basis on 28 May 2012. The ET was satisfied, however, that, before starting, the Claimant was aware she would be required to work 2 nights in every 28-day period. That said, initially the Claimant was not rostered to work nights due to her limited professional experience.

7. It is also to be noted that, shortly after the Claimant commenced her employment, the Respondent had recruited another female doctor, who had stated at interview that she could not

work night shifts. As the Respondent then had seven other doctors working within the service with a contractual night shift requirement, the decision was taken to offer this new doctor (also working on a part-time basis) a contract that did not include that requirement.

8. Apart from certain allowances made because of her limited professional experience, the Claimant was put on the rota that had previously been agreed with the other GPs. After commencing employment, however, the Claimant made clear she wanted fixed shifts and did not wish to work nights. The Respondent's position continued to be that this was a contractual requirement but it would seek to accommodate her wishes if possible. Specifically, in accommodating her wishes, the Respondent rostered the Claimant to work six weekend shifts during October and November 2012. This had resulted from the Claimant's enquiry about working weekends only (see the ET's finding at paragraph 5.31).

9. The first night shifts the Claimant was due to work under the rota would have been in January 2013. On 17 December 2013 the Claimant wrote to request flexible working. That was discussed at a meeting on 18 December when the Claimant was told the Respondent would look into it but in the meantime her rostered shifts for January and February 2013 would stand. In January 2013, the Claimant requested non-clinical working for certain of her rostered shifts or, alternatively, unpaid leave. Without this being approved the Claimant did not attend for work on one of the days in issue, 9 January. Meanwhile the Respondent wrote to the Claimant refusing her flexible-working request but seeking to meet to discuss possible alternatives; it also wished to speak to her about her unauthorised absence. That meeting took place on 16 January 2013. Because of issues relating to the Claimant's probationary period, it was agreed that a support plan would be put in place for eight weeks, during which she would not have to work nights. The ET also found that the Claimant was told at that meeting she could work one

weekend per month (see paragraph 5.83), and, as a gesture of goodwill, the Respondent agreed to treat her unauthorised absence as unpaid leave. On flexible working the Respondent put a counter-proposal, albeit that would still require two night shifts per month but the Claimant refused to consider such a compromise, stating she could not work nights. The Respondent put its proposal in a letter of that date, which did not, however, confirm the position that had been stated on weekend working. In any event, by letter of 18 January 2013, the Claimant resigned. The ET found her only reason for doing so was because she was not prepared to work nights.

10. Subsequently the Claimant appealed against the refusal of her flexible-working request. That was heard on 7 February 2013; the next day the Respondent wrote to the Claimant to offer a further alternative, this time not including night working. The Claimant did not accept.

The ET's Reasoning

11. The ET concluded that the Respondent had applied a provision, criterion or practice ("PCP") to GPs working at Brent UCC, to work one standard working week of night shifts in every four-week period. For the Claimant, on a 50% contract, that would mean working two night shifts per 28 days. The ET took judicial notice of the fact that women would be disproportionately adversely affected by such a PCP. That said, it went on to consider the relevant pool and concluded as follows (see paragraph 8.11):

> **"Having carried out the comparative exercise following paragraph 4.21 of the Code [of Practice of Employment 2011] the answers are as follows:**
>
> **8.11.1. Q: What proportion of the pool has the particular protected characteristic?**
>
> **A: 50%**
>
> **8.11.2. Q: Within the pool does the PCP affect workers without the protected characteristic?**
>
> **A: Yes.**
>
> **8.11.3. Q: How many of the workers are (or would be) disadvantaged by it? How is this expressed as a proportion ("x")?**

8.11.4. A: 100%

8.11.5. Q: Within the pool, how does the PCP affect people who share the protected characteristic?

A: In the same way.

8.11.6. Q: How many of the workers are (or would be) put at a disadvantage by it? How is this expressed as a proportion ("y")?

8.11.7. A: 100%

8.11.8. Carrying out this comparison, the female GPs did not experience a particular disadvantage compared with the male GPs."

12. The ET therefore held that the Claimant's claim of indirect sex discrimination failed. Even if it had been wrong on that, however, the ET held in the alternative (see paragraph 8.12):

> **" … in any event, the respondent has established to the tribunal's satisfaction that it had a legitimate aim justifying any indirect discrimination which was to provide urgent health care services on a 24 hours, 7 days a week basis (as contractually required by Brent NHS) which inevitably required GPs to work nights."**

13. It is common ground between the parties that the ET erred in its approach to the question of the pool for comparison. Accepting the ET was bound to find the PCP had a disparate adverse effect on women, the Respondent contends that the ET's conclusion can be upheld as it is open to me to find: (1) there was no disadvantage to the Claimant or any woman in the appropriate pool for the purposes of section 19(2) of the **Equality Act 2010** ("EqA") - relying on the finding that the Claimant's objection to working nights was because that meant she had no rest before a night shift or alternatively would render her unsafe to look after the children the next morning; - and (2) in any event, the Claimant chose to join a UCC with a 24/7 service. Moreover, and against that background, the ET had found the PCP was justified.

14. On the part-time worker detriment claim, the Claimant's case before the ET was that she suffered (relevantly) two detriments: (1) being required to work two weekend shifts every four weeks rather than - as she contended would be the right course - every eight weeks; and (2)

shortly after 16 January 2013, being required to work weekend shifts greater than two weekend shifts every eight weeks. The ET found that the part-time worker claim was made out, specifically (see paragraphs 8.15.1 and 8.15.2):

> **"8.15.1. Issue 3.12.1 This complaint is made out on the facts. A 50% part time GP should have been required to work two weekend shifts every eight weeks whereas she was required to work such shifts every four weeks.**
>
> **8.15.2. Issue 3.12.2 This complaint is also made out on the clear contents of the respondent's letter dated 16 January 2013 …"**

15. It is, however, common ground that the ET here applied the test relevant to Regulation 5 of the **Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000** ("the PTWR") (detriment for working part-time), whereas the claim was put under Regulation 7 (detriment for a protected act). The ET thus never considered whether the Claimant had done any protected act for the purposes of Regulation 7(3)(a) and/or the other issues arising thereunder. The Claimant contends, however, that the Regulation 5 point was put to the Respondent's witnesses and so there was no prejudice in this regard (albeit the Regulation 7 case would need to be remitted to a new ET to be determined). The Respondent disagrees as to the Regulation 5 point but says I can decide the Regulation 7 case myself: on the ET's findings of fact, there was no detriment to the Claimant.

16. The case returned to the ET for a Remedy Hearing on 21 August 2014. The ET awarded the Claimant the total sum of £5,330.62, of which £3,500 represented compensation for injury to feelings for the **PTWR** claim. The ET then went on to consider the Respondent's application for costs. It noted it had previously found there was no merit in the Claimant's complaints of automatic unfair dismissal - whether under section 103A **Employment Rights Act 1996** or section 104 of that Act - or the claim of indirect sex discrimination. The ET correctly referred to the relevant Rule and noted that it needed not just to be satisfied that its

costs jurisdiction was engaged but also that it was appropriate to make an award of costs. On these claims, the ET concluded that the Claimant's conduct had been unreasonable and had been so from the outset. It further considered she had unreasonably rejected settlement offers and had attempted to extract an inflated sum of compensation from the Respondent. Having had regard to the Claimant's means, the ET and was satisfied she had the ability to pay an award. On considering the Respondent's costs schedule and noting the onerous nature of the discrimination questionnaire the Claimant had served, the ET took the view that the sum of £30,000 would be an appropriate figure of costs but reduced this to £15,000 to take account of the fact that the Claimant had been successful in at least some parts of her claim.

The Points of Agreement and the Issues Arising

17. At the risk of some repetition I here summarise the points of agreement and the remaining issues between the parties.

18. The Claimant's liability appeal essentially takes issue with the ET's approach to the identification of the pool for comparison, contending this rendered the ET's conclusions on this claim unsafe. That said, the Claimant contended the ET had made a finding of fact on the question of disadvantage that this court could not go behind.

19. The Respondent agrees that the ET erred as regards the pool for comparison on the indirect sex discrimination claim and further that the PCP applied by it had a disparate impact upon women. It contends, however, that: (1) the ET had not made a proper finding on the question of disadvantage (group or individual); and (2) it was open to this court to now make that finding: inevitably it would find that no disadvantage could be shown. Alternatively, the ET had made a finding on the question of justification that was a complete answer to the appeal

on the indirect sex discrimination claim in any event. That conclusion should be upheld. The Claimant having agreed that the Respondent had made out a legitimate aim; no other outcome was possible, whatever the approach to the pool for comparison.

20. As for the cross-appeal it was agreed that the ET had erred in respect of the claim under the **PTWR**: it had concluded that a claim under Regulation 5 had been made out when there was no claim under that Regulation before it and had failed to give a decision on the claim that had been made, under Regulation 7. The Claimant said, however, that I could uphold the ET's conclusion under Regulation 5 as it was obvious that this claim had been made out; albeit, the outstanding Regulation 7 claim would need to be remitted. The Respondent said the Regulation 5 claim obviously could not stand. Whilst the ET had failed to determine the Regulation 7 claim, the answer to that was in fact obvious from the ET's findings of fact and the court could be satisfied it was not made out.

21. On the question of costs the Claimant contended:

(1) The ET had failed to follow the four-step approach laid down in **Yerrakalva v Barnsley Metropolitan Borough Council** [2012] ICR 240, CA.

(2) The ET had applied the wrong test, making an award of costs simply because the Claimant's claims had failed; that was not the same as finding they had been pursued unreasonably.

(3) In any event the ET's award was plainly tied up with its decision on the indirect sex discrimination claim. If the appeal was allowed on that basis, the costs award appeal must simply be allowed.

(4) As for the consideration of the Respondent's settlement offers, the highest offer made had been £20,000. There was no indication the ET had had regard to the

guidance in **Anderson v Cheltenham & Gloucester PLC** UKEAT/0221/13, to the effect that a failure to beat an offer (made on a **Calderbank v Calderbank** [1975] 3 All ER 333 basis) would not of itself justify an award of costs.

22. On the question of disposal, the parties each urged that I could uphold the claims in their favour. To the extent I was minded to remit any matter, the Claimant urged I should do so to a differently constituted ET, whereas the Respondent said it should be to the same ET.

The Relevant Legal Principles

23. The indirect sex discrimination claim brings into play section 19 of the **EqA 2010**, which relevantly provides:

> **"(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 to a person 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."**

24. In **Home Office UK Border Agency v Essop and Ors** [2015] EWCA Civ 609, the Court of Appeal has made clear that a Claimant who complains of indirect discrimination under the **EqA 2010** must not only establish that she was a member of a disadvantaged group but must also show why the relevant PCP has disadvantaged her as an individual:

> **"59. … it is conceptually impossible to prove a group disadvantage for the purpose of section 19(2)(b) without also showing *why* the claimed disadvantage is said to arise. Group disadvantage cannot be proved in the abstract. Its proof necessarily requires a demonstration of why the comparative exercise inherent in the section 19(2)(b) inquiry results in the claimed disadvantage. In the present case, the claimants say they have answered the 'why' question: its answer is that the statistics show the group to be disadvantaged because its members are disproportionately more likely to fail the CSA than are the comparators who do not share the**

> **protected characteristics. The difficulty in the present case is as to whether and how each claimant can also discharge the section 19(2)(c) burden. There is no doubt that one way or another they must do so if they are to succeed. The present case is no different in principle from other types of indirect discrimination claim.**
>
> **60. Thus the woman employee asserting that a full-time work PCP disadvantages women employees as a group must assert and prove why that is so (perhaps because of child care responsibilities) and that the same disadvantage applies to her, namely that she too is disadvantaged by her childcare responsibilities …"**

25. As for justification - that is, whether the employer can show the PCP in question is a proportionate means of achieving a legitimate aim (see section 19(2)(d) **EqA 2010**) - the Supreme Court has considered this issue, albeit in the context of age discrimination, in the cases of **Seldon v Clarkson Wright & Jakes** [2012] IRLR 590 and **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601. Specifically, when considering whether the justification required is of the PCP or its application to the individual Claimant, the Supreme Court has ruled as follows, in **Seldon** (at paragraph 66):

> **"There is therefore a distinction between justifying the application of the rule to a particular individual, which in many cases would negate the purpose of having a rule, and justifying the rule in the particular circumstances of the business. All businesses will now have to give careful consideration to what, if any, mandatory retirement rules can be justified."**

And in **Homer** (at paragraphs 25 and 34 to 35):

> **"25. To some extent the answer depends upon whether there were non-discriminatory alternatives available. It is not clear whether the ET were suggesting that an exception should have been made for Mr Homer (who was on any view an exceptional case) or whether they were suggesting that the criterion should have been modified to include qualifications other than law degrees. As the EAT said, an ad hominem exception may be the right answer in personnel management terms but it is not the answer to a discrimination claim. Any exception has to be made for everyone who is adversely affected by the rule. 'Grandfather clauses' preserving the existing status and seniority, with attendant benefits, of existing employees are not at all uncommon when salary structures are revised. So it is relevant to ask whether such a clause could have represented a more proportionate means of achieving the legitimate aims of the organisation. On the other hand, what is in issue here is not preserving existing benefits but affording entry to a newly created higher grade.**
>
> **…**
>
> **34. In relation to that issue, I have difficulty about any suggestion that the Chief Constable should have made a personal exception for Mr Homer quite outside his age discrimination claim (Lady Hale, paragraph 26) or make 'a modification of the provision, criterion or practice [requiring a law degree] for the appellant's age group' (Maurice Kay LJ's phrase in the Court of Appeal, paragraph 38).**
>
> **35. The problem about such suggestions was identified by Elias J in the Employment Appeal Tribunal, paragraph 49, when he held that the tribunal was not 'correct to say - if indeed it**

was intending to say - that the discrimination should have been avoided by making a personal exception of the claimant'. He explained:

> **'If the imposition of the criterion of a law degree resulted in unjustified indirect discrimination, because the discriminatory effect was disproportionate to the aim, then all adversely affected by the rule must be treated equally. That may well have had the consequence that only the claimant might qualify, but it is not the same as creating an "ad hominem" exception for him.' "**

26. As for the claims under the **PTWR 2000** the relevant Regulations are at 5 and 7, which relevantly provide as follows:

> **"5.** ***Less favourable treatment of part-time workers***
>
> **(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker -**
>
> **(a) as regards the terms of his contract; or**
>
> **(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.**
>
> **(2) The right conferred by paragraph (1) applies only if -**
>
> **(a) the treatment is on the ground that the worker is a part-time worker, and**
>
> **(b) the treatment is not justified on objective grounds.**
>
> **(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.**
>
> **…**
>
> **7.** ***Unfair dismissal and the right not to be subjected to detriment***
>
> **…**
>
> **(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on a ground specified in paragraph (3).**
>
> **(3) The reasons or, as the case may be, grounds are -**
>
> **(a) that the worker has -**
>
> **(i) brought proceedings against the employer under these Regulations;**
>
> **(ii) requested from his employer a written statement of reasons under regulation 6;**
>
> **(iii) given evidence or information in connection with such proceedings brought by any worker;**
>
> **(iv) otherwise done anything under these Regulations in relation to the employer or any other person;**
>
> **(v) alleged that the employer had infringed these Regulations; or**
>
> **(vi) refused (or proposed to refuse) to forgo a right conferred on him by these Regulations, or**

> **(b) that the employer believes or suspects that the worker has done or intends to do any of the things mentioned in sub-paragraph (a).**
>
> **(4) Where the reason or principal reason for dismissal or, as the case may be, ground for subjection to any act or deliberate failure to act, is that mentioned in paragraph (3)(a)(v), or (b) so far as it relates thereto, neither paragraph (1) nor paragraph (2) applies if the allegation made by the worker is false and not made in good faith."**

27. As for the costs appeal the relevant rule is that set out at Rule 76(1)(a) and (b) of the **ET Rules 2013**. Both parties agree that the approach is that laid down by the Court of Appeal in **Yerrakalva** (see paragraph 41 of that authority): (1) to look at the whole picture of what has happened in the case, (2) to identify the conduct alleged to be unreasonable, (3) to identify what if anything was unreasonable about the conduct, and (4) to identify what effect the conduct had.

Submissions

The Claimant's Case

28. There being agreement that the ET had erred on the question of the pool, Mr Brown first looked at the question of disadvantage. Accepting **Essop** required not just showing that the group suffered the disadvantage in question, but also that the individual Claimant suffered that particular disadvantage herself, he contended that the ET's findings of fact demonstrated that here (see in particular sub-paragraphs 8.11.6 and 8.11.7). It was for the ET to make that decision, see paragraph 28 of the EAT sitting in Scotland in **Hacking and Paterson v Wilson** UKEATS/0054/09, albeit that that case wrongly spoke of choice rather than necessity, whereas the only question was whether the employee had suffered a particular disadvantage; it was not necessary for her to show she had no other options in order to make good her case of individual disadvantage (it might be open to the employee to use childcare, for example, but that was not to say that she was still not placed at a disadvantage).

29. As for justification, whilst legitimate aim had not been in dispute, proportionality plainly was, and the ET failed to carry out the necessary balancing exercise in this regard. Paragraph 8.12 was inadequate to the task; it simply repeated the nature of the legitimate aim. Even if the ET had engaged with the point, its reasoning was not sufficient.

30. On the costs appeal if the court was with the Claimant on the indirect sex discrimination claim, then the costs appeal must also be allowed. Even if it were not, the fact that the Claimant had lost the claim was insufficient to justify an award of costs, and indeed the Respondent had not put its application on that basis. At a more basic level the ET failed to apply the correct test. It failed to consider how, if at all, the matters in respect of which the ET was critical of the Claimant actually impacted upon the case (see **Yerrakalva** and also see **Daleside Nursing Home Ltd v Mathew** UKEAT/0519/08 at paragraph 10 and **Arrowsmith v Nottingham Trent University** [2012] ICR 159 CA at paragraph 32). The crucial aspects of the Claimant's indirect sex discrimination claim were not in any way tainted by the matters on which her evidence had been found to be less than credible. In respect of the other claims, the ET needed - but failed - to consider the matter from the Claimant's perspective. The ET also gave insufficient explanation as to why it considered the Claimant was unreasonable from the outset. As to the references to the Respondent's offers, the highest offer made was of £20,000; the ET needed to consider whether rejecting that was unreasonable given the nature of the claims made and the Claimant's level of earnings. It was hard to see why it was. As for the Claimant's position, apart from taking a tough line in negotiations, it was unclear what the ET was referring to.

31. Turning to the cross-appeal, the Claimant had not sought to suggest that her case was put on the basis of Regulation 5 below but given that both parties agreed the cross-appeal was to be allowed it was open to this court to consider whether sufficient was found by the ET to

decide that case now. It could be seen that the Employment Judge had put this point to the Respondent's witness, Ms Graham, and the Respondent had had the opportunity to re-examine and make submissions on it. There was no prejudice to the Respondent in the EAT now making the finding that the Regulation 5 case was indeed made out. Meanwhile, the Regulation 7 case needed to be remitted to the ET to deal with, and that should be to a differently constituted ET. Applying **Sinclair Roche & Temperley v Heard and Anor** [2004] IRLR 763 EAT, that would be the appropriate course in respect of any remission in this case: this was a wholly flawed decision on both indirect sex discrimination and the **PTWR** claim. The ET had made very strong findings against the Claimant, and it was difficult for her to have confidence in the same ET, particularly when it had been given full guidance in written submissions below. Moreover, given the potential value of the case, it would be proportionate for this to be heard by a differently constituted ET afresh, albeit there would be a shorter hearing given the more limited claims that would then be in issue. Lastly, given the amount of time that had passed, there was no reason to think this ET would have the matter fresh in its mind.

The Respondent's Case

32. On the question of disadvantage the Respondent observed that the Claimant had never actually worked a night shift. Although she had been scheduled to work two nights, she had left before that took place (see paragraph 5.80). This was a hypothetical disadvantage: a "would put", not a "did put". The ET needed to engage with the assessment of disadvantage both on a group level (it was wrong to simply assume women falling within the pool were disadvantaged; see the EAT in **Heard** at paragraph 44 and **Ministry of Defence (Royal Navy) v Macmillan** UKEATS/0003/04) and for the Claimant (see **Essop**, paragraph 60). The ET had taken judicial notice of the general disadvantage to women, but it did not ask that question (1) in relation to women in the group, or (2) in relation to the Claimant herself.

33. It was open to the EAT to determine this question because (see **Macmillan**) it was axiomatic that detriment could not be self-inflicted. The Claimant had applied for a job involving anti-social working when she had very young children; she entered into a contract requiring her to work nights, as contrasted with the subsequent appointee, who negotiated out of such a contract at the interview stage. Moreover, the fact that there was an enhancement to pay for working anti-social hours in these circumstances was a relevant factor. There was sufficient evidence for the EAT to be able to conclude there was no disadvantage for female members of the relevant group, including the Claimant, as compared to male members of that group.

34. That said, Ms Richmond accepted it was difficult to say (following **Essop**) that there had been sufficient engagement with this point by the ET and the appropriate course might be to remit this matter to the ET for the assessment to be carried out. That supported, however, the Respondent's contention it would need to be remitted to the same ET.

35. On justification, the ET had properly set out the legal questions (see paragraph 3.5). The requirement - per **Seldon** and **Homer** - was to ask whether the rule was justified not its application to a specific individual. Regardless of the approach to the question of the pool the ET's conclusion on justification was plainly the correct result. Although the ET's reasoning was brief, it was sufficient to let the parties know why they had won or lost.

36. On the cross-appeal, to suggest that the Regulation 5 claim could be upheld would be a clear breach of natural justice. The Claimant having confirmed below that she was only pursuing a Regulation 7 claim, the Respondent had not dealt with the Regulation 5 issues; it was not before the ET. On the Regulation 7 claim the Respondent invited the EAT to decide the issue of detriment. The first detriment relied on was being required to work two weekend

shifts every four weeks rather than every eight weeks in October and November 2012. That, however, resulted from the Claimant's request to work weekends only (as the ET found at paragraph 5.31); that was not a requirement. The second detriment relied on was that, shortly after 16 January 2013, the Claimant was being required to work weekend shifts greater than two weekend shifts every eight weeks (see paragraph 3.12), but there was no detriment as on 16 January 2013 the Claimant had been told that the Respondent was content that she worked one weekend a month; there could be no detriment to her.

37. As for the appeal on costs the ET had followed the four-step guidance of **Yerrakalva**. It had looked at the whole picture, identified the unreasonable conduct, which included the Claimant's lies about what had been agreed; those lies infected all elements of her claim.

38. On disposal, if the EAT was minded to remit any matter to the ET, it should be to the same ET on every element. This was plainly proportionate, and an enormous amount of time would be saved by enabling the ET to rely on the evidence already given. On anybody's case the decision was not wholly flawed. There was a misapplication of the correct approach as a matter of law, but that was not an example of a wholly flawed decision for **Heard** purposes. On costs, moreover, there were strong reasons for the case to be remitted to the same ET; only this ET could form a fair assessment.

The Claimant in Reply

39. On the question of disadvantage it was not for the ET to micro-manage the lives of employees. All it had to do was to assess whether there was a disadvantage; it did not have to go into the detail of the Claimant's domestic arrangements, and it is equally not a good point to

say there was no discrimination if the Claimant had accepted a contractual requirement that gave rise to the disadvantage.

40. As for justification, in **Seldon** the EAT had left it open (paragraph 64) whether there may be cases where the application of the rule has to be justified, albeit such cases would be "extremely rare".

41. On the Regulation 7 claim, it was accepted that the detriments relied on were as had been identified by the Respondent. Although it was right to say that the Claimant had initially expressed a wish to work weekends and the rota had been arranged to accommodate her wish, thereafter she had changed her mind (see paragraph 5.31). The detriment arose from not revisiting that rota. On the second detriment, the letter from the Respondent of 16 January still made the requirement that the Claimant was to work the two weekends.

Discussion and Conclusions

42. I start with the indirect sex discrimination claim. As was common ground, the ET erred in the identification of the pool for comparison. To that extent, therefore, the appeal must be allowed. What, however, was the effect of that? Could the EAT, as the Respondent urges, uphold the ET's conclusion in any event because (1) the result on disadvantage is obvious (there was none) and/or (2) the ET's alternative finding on justification still stands?

43. Turning to the first of those questions, the Claimant says that the ET made a finding of fact on the question of disadvantage that this court cannot go behind (see sub-paragraphs 8.11.6 and 8.11.7, as set out above). Is that sufficient? I cannot see that it is. I cannot see that those passages sufficiently engage with the assessment required of both group and individual

disadvantage that has been identified as a requirement in **Essop**. The ET did not have the advantage of that case before it, and so it may not have appreciated quite the nature of the assessment it was required to undertake. Whatever the reason, however, I am satisfied that there are not the required findings of fact to make good the reasoning on disadvantage.

44. Does that question then need to be remitted, or can I, as the Respondent urges, decide the point myself? The Respondent contends the evidence was to the effect that all those working to the rota (male or female) suffered disadvantage. Further, this Claimant, on the ET's findings, had gone into this arrangement with her eyes open; her circumstances had not changed. If there was any disadvantage, it was self-inflicted, and she benefited from the enhanced pay given for working those hours.

45. I do not, however, consider that the issue is as easy to resolve as the Respondent would contend. Showing disadvantage does not mean showing that particular working arrangements are impossible for a particular individual; merely that they put that individual at a disadvantage. As for the impact upon a group or the impact upon an individual, that required a proper assessment of the evidence by the ET at first instance. That was not done here. There were not, therefore, the requisite findings of fact and it was not for the EAT to try to make good that deficiency by picking through the evidence on an appeal.

46. The question then arises as to whether, in any event, the indirect sex discrimination claim is answered by the ET's alternative finding that the PCP was justified (see paragraph 8.12 set out above). The Claimant urges not: the ET had no had regard to the possibility of an exception being made for the Claimant, as the Respondent was able to do for the other female GP taken on after her and as it was ultimately prepared to offer the Claimant. As the EAT

recognised in **Seldon**, in exceptional cases it was right to look at the question of an exception to the rule. More generally, the ET had failed to carry out the requisite balancing exercise.

47. The Claimant's argument, however, seeks to avoid the force of the rulings in **Seldon** and **Homer** by the Supreme Court, which make clear that it is the rule that needs to be justified not its application, even if the application of the rule in an individual case might give rise to questions of personnel management on a broader level. Assuming that the Claimant had made good the *prima facie* discriminatory nature of the rule, this ET was satisfied that it was justified because of the need to provide urgent health services on a 24/7 basis, which - it was common ground - had to be provided by salaried GPs and could not be covered by locums. There was no general rule of allowing exceptions. To the extent one had been allowed, that individual fell outside the pool. Looking at the rule as it was applied to those in the pool, I am satisfied the ET made a clear finding that was open to it on the evidence.

48. The Claimant objects that the explanation at paragraph 8.12 is insufficient; it merely restates the legitimate aim. I think that is an unfair criticism. The legitimate aim here was obvious and clear; stating it makes only too plain the justification. Even allowing for the discriminatory impact, the ET was entitled to conclude there was nothing to be put in the balance against it. Indeed, it is notable that on this appeal the only matter that has been suggested should be put in the balance against it is the suggestion that an individual exception could be made in the Claimant's case, but that, as was made clear in **Seldon** and **Homer** (see the passages cited above) is to miss the point: it is the rule that needs to be justified not its individual application. Here the obvious nature of the case on justification meant that no further explanation was required other than that given by the ET at paragraph 8.12. That being

so, although the ET may have erred on its route to getting to its conclusion, the conclusion it reached is obviously right and should be upheld as the only answer to this case.

49. I turn then to the cross-appeal. Both parties are agreed that the ET erred in respect of the claim under the **PTWR**. The Claimant says I can uphold the ET's conclusion under Regulation 5 as it was obvious that this claim had been made out. Doing so, however, would effectively necessitate allowing the Claimant to now apply to amend her claim to include a complaint under Regulation 5, something she did not choose to do below. The Claimant says there is no prejudice for the Respondent - the point was put to its witnesses by the Employment Judge, and it had the opportunity to re-examine or make submissions. That rather misses the point: the Respondent did not have to do either because no such claim was before the ET. Had it been put on notice of such a claim, the Respondent might have made further points relevant to Regulation 5. It is not possible for the Claimant to run her case on that basis now; that would be to deny the Respondent a fair hearing on the point.

50. As for the outstanding Regulation 7 claim, ultimately the detriments relied on by the Claimant were: (1) first the requirement to work two weekend shifts every four weeks rather than every eight weeks in October and November 2012; and (2) that shortly after 16 January 2013 she was required (in the letter sent out to her that day) to work weekend shifts greater than two weekend shifts every eight weeks.

51. On the first, it is plain from the ET's finding (paragraph 5.31) that situation resulted from the Claimant's request to work weekends only. I agree with the Respondent; that was not a requirement. The Claimant observes that she then changed her mind but the roster was not then altered to take account of that change. That is a different way of putting the detriment, but

it still runs into the same difficulty. The rostering of the weekend shifts of which the Claimant complains (which obviously had to be done in advance), resulted not from any requirement made by the Respondent but from her request; the Respondent was accommodating her. There is no real-world possibility of that being found to be a detriment for Regulation 7 purposes.

52. Turning then to the second detriment, on the ET's findings the Claimant had been told (at the meeting on 16 January 2013) that the Respondent was content for her to work one weekend a month; so, there would be no detriment (see paragraph 5.84). The point that seems then to be left arises from the fact that this was not made apparent from the letter then sent out to the Claimant that day (see paragraph 5.85). The Claimant never actually worked those shifts (she left before) so the detriment can only relate to the sending of the letter of 16 January 2013, containing the requirement, which was other than what the Claimant had been told.

53. Whether that amounts to a breach of Regulation 7 is a matter that I cannot resolve on the ET's findings but have to remit. I am satisfied, however, that should be to the same ET. It is one relatively small point and has to be seen in the context of all the findings of fact. This ET is therefore best placed to decide it. Although there have been criticisms of some parts of the decision-making of the ET, the Liability Decision was not wholly flawed. Some errors in a case involving a number of different claims. I have no reason to doubt the professionalism of the ET in approaching the Regulation 7 case that it obviously overlooked.

54. I then turn to the costs appeal. I do not criticise the ET's approach in general terms. It seems to me that it had in mind the guidance in **Yerrakalva**, which can be seen to have informed its decision-making. The decision reached was, however at least in part based on the ET's view of the Claimant's indirect sex discrimination claim. Given that the ET had made an

error in its approach to that case (at least in the question of the pool), it seems to me right that it is given the opportunity to revisit its decision.

55. Coming to the Costs Judgment entirely afresh I can also see that it might be said that insufficient explanation has been given for why the ET found the Claimant acted unreasonably. I have to bear in mind, however, that this was a Judgment being read by parties who had participated in these proceedings throughout and fully understood the issues as they had developed and were before the ET. That included the impact of the Claimant's misrepresentations - as the ET found - as to what she had agreed in terms of her working arrangements before and on starting her employment. In that context I am satisfied that the explanation provided is sufficient. Similarly, on the linking of the costs incurred with the unreasonable conduct, given that the ET halved the amount it found to have been reasonably incurred by the Respondent by way of costs to allow that elements of the claims had not been pursued unreasonably, I do not think this criticism ultimately goes anywhere.

56. The only point I am therefore prepared to uphold on the costs appeal is the need for the ET to revisit the award in light of its findings on indirect discrimination and the agreed error made in that regard.

57. As already indicated, in my judgment, it is obviously for the same ET to revisit that question; it is best-placed to do so. Applying the guidance in **Heard**, I am satisfied that that is the right course, and I remit it to the same ET to the extent that remains practical.

58. Having given Judgment in this matter, the Claimant has applied for permission to appeal to the Court of Appeal on the finding in relation to the indirect sex discrimination claim. The

grounds relied on are that there are issues arising from the Judgment in **Essop**, in relation to the distinction between discrimination and proportionality and, further, that this court fell into error in failing to follow the exceptional-case approach allowed by the EAT in **Seldon**.

59. I cannot see that any of those grounds provide a proper basis for appeal. I have applied, as I am bound to do, the Court of Appeal's guidance in **Essop**, and there is no suggestion that I have erred thereby. As **Seldon** point, I cannot see that the Claimant's submission properly represents the Supreme Court's ruling in **Seldon** (which must take precedence over the earlier EAT ruling). I note that the extract relied on by the Claimant relates to the EAT's consideration of the approach to direct-discrimination justification in age discrimination cases. In any event I cannot see that any basis has been put forward to suggest that exceptional circumstances arose in this case. That being so, I cannot see there is any point of law such as to justify granting permission to appeal. The Claimant will need to ask elsewhere.

60. I turn then to the Claimant's application for a reimbursement of her costs incurred by way of fees, which I understand to relate to each of the fees that she will have incurred in the two appeals. That application is made under Rule 34A(2)(a) of the **Employment Appeal Tribunal Rules 1993 as amended**, which allows that, where the EAT has allowed an appeal in full or in part, it has a broad discretion to make a costs order reimbursing the applying party for its fees. In this case, to a limited extent the Claimant's appeals have been allowed, albeit in respect of something the parties agreed amounted to an error of approach on the part of the ET.

61. That being so, the Claimant has, on one view, been put to expense arising from what was obviously an error on the part of the ET. The Respondent observes that the matter could and should have been resolved by an application for a review on the part of the Claimant. For

its part, the Respondent had not considered it proportionate to apply for a review on the part-time worker case; it had been prepared to simply meet any sums awarded in that respect. It thereafter found itself facing the appeal to the EAT after the time limit for application for review should have been made.

62. I consider there is some force in the Respondent's submission. To some extent both parties might be seen to have gained by clarification of the correct approach and making sure an error by the ET was resolved. That, however, might have been done, one suspects, by a joint application for a reconsideration to the ET once it became apparent that these points were not resisted in substance on the appeal. It seems to be that the responsibility for that lay largely with the Claimant, albeit the Respondent did not itself suggest such a course. In the circumstances, I am prepared to make a marginal order for costs. The Respondent will pay £400 towards the Claimant's fees in relation to the first appeal but no more.