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EMPLOYMENT TRIBUNALS

Claimant: **Ms F Damoa**

Respondent: **Newtec Training & Education Centre**

Heard at: **East London Hearing Centre**

On: **16 – 18 August 2017**

Before: **Employment Judge Foxwell**

Members: **Ms J Houzer**
Mrs SA Taylor

Representation

Claimant: In person

Respondent: Ms N Motraghi (Counsel)

JUDGMENT having been sent to the parties on 22 August 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

The parties

1 The Claimant, Ms Florence Damoa was employed by the Respondent, Newtec Training & Education Centre as a receptionist between 23 February 2015 and 6 May 2016. She is a single parent with a ten year old daughter (as at the time of her dismissal). The Respondent is a registered charity offering vocational training and day care facilities in and around the Stratford area. It currently has approximately 132 full-time and 15 agency staff.

The claims and issues

2 The Claimant presented claims of unfair dismissal, detriment in respect of a flexible working request and sex discrimination to the Tribunal on 23 August 2016. The claims came before Employment Judge Hyde at a Preliminary Hearing on 24 February 2017 when she struck out all but the sex discrimination claims. The parties received

written reasons for that decision. Judge Hyde also identified the issues in the sex discrimination claim at the hearing with the parties in the following terms:

"***Direct sex discrimination: Equality Act 2010 section 13***

4 It is agreed that the Claimant submitted a grievance on 7 April 2016 in respect of her working pattern.

5 The Claimant alleges that the Respondent did the following things which constituted direct sex discrimination: failed to hold a proper grievance hearing; and failed to take proper action regarding the Claimant's grievance.

5.1 Did the Respondent fail to hold a proper grievance hearing and fail to take proper action regarding the Claimant's grievance?

5.2 In doing the act(s) complained of, did the Respondent treat the Claimant less favourably than it would have treated others in comparable circumstances?

5.3 If the Respondent treated the Claimant less favourably, was this because of the Claimant's sex?

Indirect discrimination: Equality Act 2010 section 19

6 The Claimant alleges that the Respondent did the following things which constituted indirect sex discrimination: required the Claimant "to work non-flexible late hours".

6.1 Did the Respondent require the Claimant to work non-flexible late hours?

6.2 Did the Respondent apply a provision, criterion or practice ("PCP") of requiring employees to work non-flexible late hours?

6.3 Did the Respondent apply the PCP in question to the Claimant?

6.4 Did the Respondent apply, or would the Respondent have applied, the PCP in question to men?

6.5 Did the PCP in question put, or would it have put, women at a particular disadvantage when compared with men in comparable circumstances?

6.6 Did the PCP in question put, or would it have put, the Claimant at that disadvantage?

6.7 Was the PCP a means of achieving a legitimate aim?

6.8 If so, was it a proportionate means of achieving that aim?

Sex related harassment: Equality Act 2010 section 26

7 The Claimant alleges that the Respondent engaged in the following conduct which constituted sex related harassment under section 26(1) of the Equality Act 2010: that on 9 April 2016, Caroline Grant, and then on 9 and 10 April 2016, John Marchington, attempted to persuade the Claimant to withdraw her grievance.

7.1 Did Caroline Grant on 9 April 2016, and did John Marchington on 9 and 10 April 2016, attempt to persuade the Claimant to withdraw her grievance?

7.2 Was the conduct in question related to the Claimant's sex?

7.3 Was the conduct in question unwanted?

7.4 Did the conduct in question have the purpose of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.5 Did the conduct in question have the effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, taking into account: the Claimant's perception, the circumstances of the case, and whether it was reasonable for the conduct in question to have that effect?

Victimisation: Equality Act 2010 section 27

8 The Claimant alleges that the Respondent did the following things which constituted victimisation: on 9 April 2016, Caroline Grant, and then on 9 and 10 April 2016, John Marchington, attempted to persuade the Claimant to withdraw her grievance.

8.1 Did the Claimant allege that someone had contravened the Equality Act 2010?

8.2 Did the Claimant bring proceedings, give evidence or information in connection with proceedings under the 2010 Act or make an allegation of a contravention of the 2010 Act by someone or do anything else for the purposes of or in connection with the 2010 Act? [The Tribunal amended the wording of this paragraph to reflect the statutory wording more clearly.]

8.3 Did the Respondent attempt to persuade the Claimant to withdraw her grievance on 9 and 10 April 2016?

8.4 Did the acts complained of constitute a detriment to the Claimant?

8.5 Did the Respondent subject the Claimant to a detriment because the Claimant had done a protected act or because the Respondent believed that the Claimant had done or may do a protected act?"

3 At the commencement of this hearing the Tribunal discussed the issues further with the parties. The Claimant clarified that the provision criterion or practice ("PCP") relied on for her indirect sex discrimination claim - the requirement to work non-flexible

late hours - had two strands; the first was the requirement to work permanent late shifts and the second the requirement to work two weeks of late shifts in every three. The Claimant also corrected the dates of the allegations of harassment and victimisation to 11 and 12 April 2016, the 9 and 10 April 2016 being a Saturday and a Sunday which are non-working days for the Respondent.

4 Finally, the Claimant identified four potential protected acts for her claim of victimisation. The first was her email of 31 March 2016 to her line manager, Errol Strachan (page 192); the second a one-to-one meeting with Mr Strachan on 1 April 2016 (page 193); the third a telephone conversation with Mr Strachan on 6 April 2016; and the fourth her grievance letter of 7 April 2016 at (page 201). The Respondent accepts that the grievance letter is a protected act for the purposes of this claim. The other alleged protected acts are disputed.

The Hearing

5 On 11 August 2017 the Tribunal issued witness orders on the Claimant's application to compel the attendance of Iwona Winiarczyk and Basirat Ogunsola to give evidence on her behalf. Ms Winiarczyk is also a receptionist working for the Respondent. Ms Ogunsola is a team leader in contract performance: she accompanied the Claimant at a meeting. Ms Ogunsola attended the hearing in compliance with the orders but Ms Winiarczyk did not, apparently because of illness (subsequently confirmed by her in correspondence to the Tribunal). After pausing for consideration, the Claimant decided that she no longer wished to call these witnesses in support of her case and we therefore discharged the orders compelling their attendance. The Respondent elected however to call Ms Ogunsola to give evidence.

6 By agreement and in order to reduce the inconvenience to Ms Ogunsola she gave evidence first. The Claimant then gave evidence in support of her claim but called no other witnesses. This is quite usual and we draw no inference from the number of witnesses a party calls. Finally, we heard from the Respondent's remaining witnesses Caroline Grant and John Marchington. Ms Grant is Head of Customer Services and has overall management responsibility for reception services, although she was not the Claimant's immediate line manager. Mr Marchington is an HR Adviser and a CIPD member. He began working for the Respondent in 2008 on a part-time basis and full-time in 2012.

7 In addition to this evidence the Tribunal considered the documents to which it was taken in an agreed bundle and references to page numbers in these Reasons relate to that bundle. Additional documents were produced during the hearing, these were a handwritten statement from Ms Ogunsola and a supplemental handwritten statement from the Claimant which we have marked C1. We considered these as part of the evidence in the case.

8 Finally, the Tribunal heard submissions from the parties. Ms Motraghi had produced written submissions which we read and she supplemented these orally. The Claimant also produced short written submissions entitled *"Claimant's answers to direct discrimination issues raised on 16 August 2017"* which we read. She made some brief additional oral submissions on the evidence.

The legal framework

9 The Claimant claims that she was subjected to harassment, direct discrimination and indirect discrimination because of sex and victimisation because of a protected act. Sex is a protected characteristic under section 11 of the Equality Act 2010 and for the purposes of all these types of claim. It is unlawful to discriminate against employees under section 39 of the Act.

Harassment

10 Section 26(1) of the 2010 Act provides as follows:

> *"A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."*

11 A party alleging harassment must provide evidence consistent with unwanted conduct related to sex which has the *'purpose or effect'* of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

12 A claim based on *purpose* requires an analysis of the alleged harasser's motive or intention. This can require a Tribunal to draw inferences about the true motive or intent of a person against whom such an accusation is made as they may be reluctant to admit to an unlawful purpose.

13 Where a claim relies simply on the *effect* of the conduct in question, the perpetrator's motive or intention, which could be entirely innocent, is irrelevant. The test in this regard has both subjective and objective elements. The Tribunal must consider the effect of the conduct from the complainant's point of view, the subjective element, but it must also ask whether it was reasonable for the complainant to consider that the conduct had the requisite effect, the objective element. Holland J put if this way in *Driskel v Peninsula Business Services Ltd [2000] IRLR 151 (at paragraph 12(d)(3))*:

> *"The ultimate judgment, sexual discrimination or no, reflects an objective assessment by the Tribunal of all the facts. That said, amongst the factors to be considered are the applicant's subjective perception of that which is the subject of complaint and the understanding, motive and intention of the alleged discriminator. Thus, the act complained of may be so obviously detrimental, that is, disadvantageous (see **Insitu**, op. cit.) to the applicant as a woman by intimidating her or undermining her dignity at work, that the lack of any contemporaneous complaint by her is of little or no significance. By contrast she may complain of one or more matters which if taken individually may not objectively signify much, if*

anything, in terms of detriment. Then a contemporaneous indication of sensitivity on her part becomes obviously material as does the evidence of the alleged discriminator as to his perception. That which in isolation may not amount to discriminatory detriment may become such if persisted in notwithstanding objection, vocal or apparent. The passage cited from the judgment of the U.S., Federal Appeal Court is germane. By contrast the facts may simply disclose hypersensitivity on the part of the applicant to conduct which was reasonably not perceived by the alleged discriminator as being to her detriment - no finding of discrimination can then follow."

14 Treatment must be related to sex for the claim to succeed: simple offensive treatment is not enough. This requires an objective assessment by the Tribunal of the evidence adduced to determine whether there is a connection between the unwanted conduct and sex. There is no requirement for a comparator.

15 A finding of harassment cannot be a detriment for the purpose of other forms of sex discrimination or victimisation (see section 212 of the 2010 Act).

Direct discrimination

16 Section 13 of the Equality Act 2010 provides as follows:

"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."

17 This provision requires a Tribunal to decide the following: -

17.1 Has there been treatment?

17.2 Is that treatment less favourable than the treatment which was or would have been given to a real or hypothetical comparator?

17.3 Was that difference in treatment because of a protected characteristic (in this case sex)?

18 All of the above requires further explanation. A comparator must be the same in all material respects, apart from the protected characteristic, as the claimant (see section 23 of the 2010 Act). There must be some detriment to the claimant in the differential treatment and, whilst the threshold for this is low, minor or trivial matters may not cross it (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

19 The determination of whether treatment is because of a protected characteristic requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged discriminator. This element will be established if the Tribunal finds that a protected characteristic formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan v London Regional Transport* [1999] ICR 877). In cases where the less favourable treatment complained of is not inherently related to a protected characteristic it is necessary for the Tribunal to look in to the mental processes of the alleged discriminator in order to

determine the reason for the conduct (see *Amnesty International v Ahmed* [2009] IRLR 884).

20 The issue of whether treatment amounts to 'less favourable treatment' is a question for the Tribunal to decide. The fact that a complainant honestly considers that she is being less favourably treated does not of itself establish that there is less favourable treatment (see *Burrett v West Birmingham Health Authority* [1994] IRLR 7).

Indirect discrimination

21 Section 19 of the Equality Act 2010 provides as follows:

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

22 This provision requires a Tribunal to decide the following: -

22.1 Has the employer applied a provision, criterion or practice ('PCP') to the employee?

22.2 Has or would the employer apply the PCP to persons who do not share the employee's protected characteristic?

22.3 Does the PCP put persons who share the employee's protected characteristic at a particular disadvantage compared with persons who do not?

22.4 Does the PCP put the employee at that disadvantage?

22.5 If the answer to the foregoing questions is yes, can the employer nevertheless show that the PCP is a proportionate means of achieving a legitimate aim?

23 Lady Hale in *R (On the application of E) v Governing Body of JFS and others [2010] IRLR 136*, a race discrimination case, described indirect discrimination as follows (see paragraphs 56 to 57):

> *''The basic difference between direct and indirect discrimination is plain: see Mummery LJ in R (Elias) v Secretary of State for Defence* [2006] EWCA 1293*,* [2006] 1 WLR 3213, para 119*. The rule against direct discrimination aims to achieve formal equality of treatment: there must be no less favourable treatment between otherwise similarly situated people on grounds of colour, race, nationality, or ethnic or national origins. Indirect discrimination looks beyond formal equality towards a more substantive equality of results: criteria which appear neutral on their face may have a disproportionately adverse impact upon people of a particular colour, race, nationality or ethnic or national origins.*
>
> *Direct and indirect discrimination are mutually exclusive. You cannot have both at once. As Mummery LJ explained in Elias at para 117 "the conditions of liability, the available defences to liability and the available defences to remedies differ". The main difference between them is that direct discrimination cannot be justified. Indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.''*

24 Similarly, in *Homer v Chief Constable of West Yorkshire* Police *[2012] IRLR 601*, Lade Hale said at paragraph 17:

> *''The law of indirect discrimination is an attempt to level the playing field by subjecting to scrutiny requirements which look neutral on their face but in reality work to the comparative disadvantage of people with a particular protected characteristic … The resulting scrutiny may ultimately lead to the conclusion that the requirement can be justified …''*

25 We have reminded ourselves that indirect discrimination can be intentional or unintentional (*Enderby v Frenchay Health Authority [1993] IRLR 591 ECJ*) and that a 'PCP' is no more than a way of doing things: it may or may not be a written process or policy (see *British Airways plc v Starmer [2005] IRLR 862*). It is for a claimant to identify the PCP that she relies on and the question whether it is, in fact, a PCP is one of fact for the Tribunal (see *Allonby v Accrington and Rossendale College [2001] EWCA Civ 529*, *[2001] IRLR 364, CA* and *Jones v University of Manchester [1993] IRLR 218*). There is no need for a claimant to show that a person who shares her protected characteristic cannot comply with the PCP. The PCP being complained of must be one which the alleged discriminator applies or would apply equally to persons who do not have the protected characteristic in question: it is not necessary that the PCP was actually applied to others, so long as consideration is given to what its effect would have been if it had been applied.

26 There is no requirement for a claimant to prove *why* a PCP puts a group at a disadvantage (see *Essop v Home Office [2017] UKSC 27*) but It is generally necessary for a claimant to adduce evidence tending to show that persons who share her protected characteristic (though not necessarily all of them) are placed at a particular disadvantage by the PCP and that she is also at that disadvantage. This may involve consideration of pools of employees, statistical evidence or such like but the notion of *'particular*

disadvantage' is not confined to this. What constitutes a *'disadvantage'* depends on the facts of the case and is not defined in the Equality Act but we draw assistance from those cases which shed light on the meaning of the word *'detriment'* in the Act (see, for example, *Shamoon v Chief Constable of the RUC [2003] IRLR 285*).

27 In some instances a Tribunal will take account of well-known matters but care must be taken in this regard; for example, it is often asserted that a Tribunal can take judicial notice of the fact that a refusal to grant flexible working will affect women disproportionately because they are more likely to have caring responsibilities but Lady Smith questioned this in *Hacking & Paterson v Wilson [2009] UKEATS 0054*, pointing out that men and women may have many and varied reasons for seeking part-time or flexible working patterns in the modern age and stating that it would be wrong therefore to make assumptions about this without evidence.

The defence of justification

28 Harassment, direct discrimination and victimisation cannot be justified but claims of indirect discrimination are subject to this defence. It is for a Respondent to establish justification: it will only do so if it can show that the discriminatory PCP is a proportionate means of achieving a legitimate aim. The test to be applied by a Tribunal in considering this is an objective one and not a band of reasonable responses approach (*Hardy & Hansons plc v Lax [2005] IRLR 726*, *CA*). Furthermore, a Tribunal must not conflate the issues of the existence of a legitimate aim and proportionality: they are separate and require separate consideration.

29 What amounts to a legitimate aim is not defined in the Equality Act 2010 and is a question of fact for the Tribunal. The measure in question must pursue the aim contended for but it is not necessary for this to have been specified in those terms at the time, an *ex post facto* rationalisation is possible (see *Seldon v Clarkson Wright and Jakes [2012] IRLR 590*). An aim which is itself discriminatory cannot be legitimate; an example might be a trendy fashion store having a policy of employing young people only. Reducing cost can be a legitimate aim in certain contexts, for example the allocation of resources between competing demands, but it may not be a justification for an otherwise discriminatory provision *per se*.

30 The principle of proportionality requires a Tribunal to strike an objective balance between the discriminatory effect of a measure and the reasonable needs of the employer's business. Once again, the Equality Act provides no guidance on what is proportionate and, therefore, this is something the Tribunal must assess. In general terms however the greater the disadvantage caused by a PCP, the more cogent the justification for it must be. That said, an employer can rely on a justification defence not thought of at the time of the discrimination (see *Cadman v Health and Safety Executive [2004] IRLR 971*). Furthermore, the question under consideration is whether the PCP is justified and not whether its application to an individual Claimant was unreasonable or caused some disproportionate effect on her (*Seldon v Clarkson Wright and Jakes [2012] ICR 716*)

31 Some evidence is required to establish the defence of justification but Elias P explained the function of Tribunals in this context in *Seldon v Clarkson Wright and Jakes [2009] IRLR 267*, *EAT* as follows (paragraph 73):

''We do not accept the submissions … that a tribunal must always have concrete evidence, neatly weighed, to support each assertion made by the employer. Tribunals have an important role in applying their common sense and their knowledge of human nature… Tribunals must, no doubt, be astute to differentiate between the exercise of their knowledge of how humans behave and stereotyped assumptions about behaviour. But the fact that they may sometimes fall into that trap does not mean that the Tribunals must leave their understanding of human nature behind them when they sit in judgment.''

Victimisation

32 Section 27 of the 2010 Act provides as follows:

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

33 This provision is designed to prevent the unfavourable treatment of people who have asserted rights under or in connection with the Equality Act in good faith (it does not protect those who raise allegations in bad faith). The Respondent has not asserted bad faith in this case.

34 The determination of whether treatment was because of a protected act requires a Tribunal to consider the conscious or sub-conscious motivation of the alleged perpetrator. This element will be established if the Tribunal finds that the protected act formed a part of the reason for the treatment even though it may not have been the only or the most significant reason for the treatment (see *Nagarajan supra* and *O'Donoghue v Redcar Council* [2001] IRLR 615).

The burden of proof under the Equality Act

35 Section 136 of the 2010 Act provides as follows:

> *"(1) This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision".*

36 These provisions require a Claimant to provide evidence of facts consistent with her claim: that is facts which, in the absence of an adequate explanation, could lead a tribunal to conclude that the Respondent has committed an act of unlawful discrimination. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. If the Claimant does this then the burden of proof falls on the Respondent to prove that it did not commit the unlawful act in question (see *Igen v Wong [2005] IRLR 258* and *Efobi v Royal Mail Group [2017] UKEAT 203*). The Respondent's explanation at this stage must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever because of the protected characteristic or act.

37 We have borne this two-stage test in mind when deciding the Claimant's claims. We have also borne the principles set out in the Annex to the judgment of Peter Gibson LJ in *Igen v Wong* firmly in mind. Save where the contrary appears from the context, however, we have not separated out our findings under the two stages in the reasons which appear below. In any event, detailed consideration of the effect of the so-called shifting burden of proof is only really necessary in finely balanced cases.

38 As noted above, however, the burden of establishing the defence of justification lies squarely on the Respondent.

The drawing of inferences

39 An important task for a Tribunal is to decide whether and what inferences it should draw from the primary facts. We have borne in mind that discrimination may be unconscious and people rarely admit even to themselves that considerations of sex have played a part in their acts. The task of the Tribunal is to look at the facts as a whole to see if sex played a part (see *Anya v University of Oxford* [2001] IRLR 377). We have considered the guidance given by Elias J on this in the case of *Law Society v Bahl* [2003] IRLR 640 (approved by the Court of Appeal at [2004] IRLR 799): we have reminded ourselves in particular that unreasonable behaviour is not of itself evidence of discrimination though a Tribunal may infer this from unexplained unreasonable behaviour (see *Madarassy v Nomura International plc* [2007] IRLR 246).

The scope of our findings

40 The Tribunal heard a substantial amount of evidence over 2 days. Issues were tested and explored by the parties through their questions. We have not attempted to set out our conclusions on every question or controversy raised in the evidence but we have considered all of that evidence in reaching the conclusions set out below. The findings we

have recorded are limited to those we consider necessary to deal with each of the issues raised by the parties. We have made our findings unanimously and on the balance of probabilities.

Findings of Fact

41 The Respondent has two locations where receptionists are based, Mark Street and Deanery Road. These sites are only a few minutes walk apart. Mark Street is the larger and busier of the two and it is where a lot of the Respondent's management team are based.

42 There are three established posts to cover reception duties at these two sites. Reception duties at Mark Street are divided between an early and a late shift. The early shift receptionist starts at 8.00am and finishes at 4.00pm on Monday to Friday, the late shift begins at 11.30am and ends at 7.30pm on Monday and Wednesdays, 12.30am to 8.30pm Tuesdays and Thursdays and 10.30am to 6.30pm on Fridays. There is no dispute that these hours are necessary to receive parents and others collecting children from the nursery or to cater for meetings booked in the Respondent's rooms.

43 The pattern at Deanery Road is different: the early morning reception duties are covered by other staff based there (initially from the children's centre and subsequently from the learning services team). The receptionist's hours are 10.00am to 6.00pm on Mondays, Wednesdays and Fridays and 11.30am to 7.30pm Tuesdays and Thursdays. The Claimant's evidence, which was unchallenged on this point, is that locking up often added to the finish time.

44 In September 2014 the Claimant responded to an advertisement for the post of receptionist. Following interview she was offered the job subject to references (page 51). The offer letter said that she would be based at Mark Street. On 26 January 2015 Mr Marchington wrote to the Claimant confirming a start date of 23 February and enclosing a contract of employment which the Claimant signed on 1 February 2015 (page 53). Paragraph 7.1 of this contract read as follows:

> *"Your principal place of work will be based at Mark Street. However, you may be required to work on either a temporary or an indefinite basis at any premises that the Corporation currently has or may subsequently acquire or at any premises at which it may from time to time provide services. You will, however, be given reasonable notice of any change in your place of work and be fully consulted. Financial assistance will be given where appropriate."*

45 The Claimant began work on 23 February 2015 alongside Karley Wilson; the third receptionist's post was vacant. The Claimant and Ms Wilson worked at Mark Street sharing the early and late shifts on an alternating weekly basis. The receptionist's duties at Deanery Road were covered by agency workers. It is common ground that the Deanery Road site is much quieter than Mark Street with the reception duties largely comprising answering the telephone and greeting visitors.

46 On 1 September 2015 Iwona Winiarczyk was appointed to the third receptionist's post. Although we did not have detailed evidence about this, it appears that Ms

Winiarczyk may have been employed by the Respondent in some other capacity before this. In any event she was content to cover the Deanery Road shifts initially. There is, in fact, evidence that she preferred them.

47 In October 2015 Karley Wilson left the reception team to become an employer engagement adviser. In November 2015 Ms Winiarczyk suffered a seizure at work and was referred to Occupational Health. Their first report, dated 20 November 2015, is at page 158. This advised against her working alone. A follow up report dated 5 February 2016 (page 175) mentioned her wish to rotate between Mark Street and Deanery Road but referred to the risk of her suffering another seizure while working alone. The Respondent decided therefore that Ms Winiarczyk could not be allocated to Deanery Road where receptionists worked alone.

48 Throughout this period, that is since Ms Wilson's job change, the third receptionist's post had remained unfilled and was covered by agency workers who were allocated to Deanery Road.

49 In 2016 the Respondent recruited a third receptionist, Coral Benjamin, and she began work on 14 March 2016. This meant that the Respondent now had three full-time receptionists to cover one early and two late shifts each day at the two sites. Additionally, one of the receptionists, Ms Winiarczyk, could not work at Deanery Road for health reasons.

50 The Claimant worked the late shift at Mark Street during the week commencing 7 March 2016. On or about 10 March 2016 Mr Strachan told her that she was required to work at Deanery Road the following week because Ms Benjamin was starting and would require training at Mark Street. He also told her that she would be required to work two late weeks in every three weeks from then on. The Claimant was upset and disappointed to be asked to work two late weeks in a row. One factor in this was that she had made arrangements to celebrate her daughter's birthday the following week which were frustrated by this change.

51 We heard evidence that receptionists were responsible for preparing and distributing the weekly rota for their tasks and we note that there is no written rota for the week commencing 14 March 2016. The Claimant told us that this was because she refused to prepare this.

52 There was some evidence presented about who was responsible for allocating the receptionists' shifts. The Respondent suggested that receptionists decided this for themselves. We do not accept that: although management of the rota was done on a light-touch basis it is nevertheless clear that ultimate authority for this lay with the receptionists' line managers as subsequent events showed.

53 Despite her unhappiness with the instruction the Claimant worked at Deanery Road in the week commencing 14 March 2016. The following week she was on an early shift at Mark Street and Ms Benjamin was allocated to Deanery Road. The Claimant was allocated to Deanery Road again in the week commencing 29 March 2016. There is no evidence that she complained about this. She told us that she had no difficulty with the geographical location of these shifts.

54 On 30 March 2016 Mr Strachan emailed the Claimant saying:

> *"I am writing to inform you that you have been allocated the late shift at Deanery Road. This is of immediate effect and will continue until further notice.*
>
> *Please contact me if you have any queries or need clarification regarding the above.*
>
> *Thank you for your co-operation in advance."*

55 Ms Grant told us, and we accept, that she had instructed Mr Strachan to allocate the Claimant to Deanery Road. Her explanation is that this was a temporary measure as the Respondent was about to go through a *"Customer First"* re-accreditation process and Ms Benjamin was one of the members of staff to be interviewed by external assessors as part of this. Ms Grant said that she wished to ensure that Ms Benjamin was fully trained before this interview took place; we note that it was scheduled for 13 April 2017 (page 207). The Claimant's evidence is that it only takes a week to train a new receptionist and, therefore, this explanation is improbable. There is some force in this in the sense that basic training for reception duties can be been picked up quickly and we note that Ms Benjamin was allocated to Deanery Road where she worked alone in only her second week in the job. On the other hand, the full range of duties set out in the job description at pages 63 to 64 would take longer to learn and become familiar with in our judgment. We therefore accept Ms Grant's evidence that she wanted Ms Benjamin to be fully familiar with her duties in preparation for the *Customer First* assessment. We also accept Ms Grant's evidence that the Respondent chooses to put forward new members of staff for interview as part of this process.

56 The Claimant was unhappy with Mr Strachan's message; she read it (reasonably in our view) as being one informing her of a permanent move to Deanery Road and, therefore, to late shifts on the pattern for that site. She replied on 31 March 2016 as follows:

> *"I will need to discuss this further with you, as I am a single mother and this was not discussed with me before this email was sent.*
>
> *Childcare will definitely be an issue and that will also mean I will not get time to spend with my child.*
>
> *Please schedule a meeting at your earliest convenience so that this can be discussed further."*

57 The Claimant could drop her daughter at school between 7.45 and 7.50am when she was on early shifts as the school is only a few minutes from Mark Street (and not much further from Deanery Road). Her daughter attended an after school club but this finished at 6.00pm. When the Claimant was working lates at Mark Street she arranged for her elder sister or her daughter's godfather to pick up and drop her at her grandmother's. The Claimant told us that her mother was not well enough to collect her granddaughter herself and we accept that. The Claimant's evidence is that, while making such an arrangement on an alternating weekly basis was acceptable, it was intolerable to do this

every week or even two weeks in three. She said that she could not expect her sister or her daughter's godfather to help with such a pattern and that in the period with which we are concerned she had to pay a friend to collect her daughter on some occasions.

58 The Tribunal recognises the difficulties that parents faced finding suitable and affordable childcare in London particularly when they work outside normal office hours. We also recognised the real anxiety this causes. Indeed, the Respondent acknowledges this too in its gender equality policy where it says at page 87:

> *"NEWTEC recognises that staff are at times likely to have special issues in relation to childcare and the care of other dependants, and while this is likely to impact disproportionately on women, men too are sometimes affected. NEWTEC will make every effort to meet the needs of staff with such responsibilities and to ensure genuine equality of access for all affected staff, for example by adopting a flexible approach to producing timetables and work plans in order to take into account the caring responsibilities of staff."*

59 Fortuitously the Claimant and Mr Strachan had a pre-arranged one-to-one meeting on 1 April 2016 and the proposed rota change was discussed. The notes, which the Claimant agreed are accurate, show that Mr Strachan empathised with her difficulty and offered to go back to Ms Grant to see if other arrangements could be made. Importantly, he also told the Claimant that the change would only be for a short period (page 193).

60 Mr Strachan raised the matter with Ms Grant as he had promised and she told us that she asked other members of staff whether they could provide some cover at Deanery Road but this was not forthcoming. The Claimant was not told of these efforts on her behalf.

61 The Claimant was off work for the first three days of the week commencing 4 April 2016. Her work at Deanery Road was covered by an agency worker.

62 On 6 April 2016 Mr Strachan called the Claimant to ask when she was likely to return to work. She said she would be back the next day but also that she would like to meet to discuss the rota with him.

63 The Claimant returned to work on 7 April at Deanery Road but did not see Mr Strachan. At some point that day she sent a grievance letter to him which she copied to HR. There is a dispute about when she sent her letter. The Claimant said that she sent it by internal post after 6.00pm whereas Mr Marchington says that he received a copy at lunchtime on 7 April and had two conversations with the Claimant about her letter that afternoon.

64 The Claimant complained in her letter that her contract and the Respondent's gender equality policy promised reasonable notice of and consultation about changes to her place of work and refer to what might be termed a *"family-friendly"* approach to shift working, yet Mr Strachan's email of 30 March 2016 had told her of a change which was to take place with immediate effect and implied that the move to Deanery Road was permanent. She wrote (page 201):

> *"On the week commencing 10/03/2016 I was informed that I would need to work two late shifts and one week early, this change would be the only way that reception staff could have an early shift.*
>
> *However, I have since been moved to Deanery Road to work on a late shift basis, which my employer knows will have an effect on my childcare and parental duties which I have clearly stated in an email on the 30/03/2016 requesting that I have a meeting to discuss the current situation.*
>
> *The explanation which I was given as to why I was chosen to work at Deanery Road Reception and not my other colleague on permanent late* [shift] *basis until further notice was not an adequate explanation. And due to this I feel I have been bullied and discriminated against as I am the only one that has any parental responsibilities. While my other colleagues will resume a normal rotated shift basis."*

65 We note that in this passage the Claimant compared her treatment with those who do not have children rather than with men.

66 The Claimant attended a meeting with Caroline Grant and John Marchington on 8 April 2016 to discuss her complaints. She was accompanied at the meeting by Ms Ogunsola who was a designated workplace colleague. The circumstances in which the meeting took place are controversial. Mr Marchington says that in conversations on 7 April the Claimant agreed to a swift grievance meeting chaired by Ms Grant and that it was in this context that Ms Ogunsola was identified as her workplace companion. The Claimant's account is that she was called into this meeting by phone by Mr Marchington without any notice on 8 April 2016. She says that when she asked if she could have a companion he said that it was unnecessary as the meeting was simply an *"informal chat"*. Despite this the Claimant says she contacted Ms Ogunsola to accompany her and that is what Ms Ogunsola did. The Claimant's allegations in this regard are part of her case that the Respondent directly discriminated against her by failing to hold a proper grievance hearing but, when the Tribunal asked her on the first day of the hearing whether she was alleging that a man would have been treated differently in the same circumstances, she said no. She has attempted to resile from this somewhat in her written closing submissions where she says that she believes a man would have been treated differently but she has provided no specific evidential basis for this.

67 We do not find that the controversy surrounding arrangements for this meeting is particularly significant in the overall scheme of this case. That said, we found aspects of both parties' cases difficult to accept. We think it probable that there was some discussion with the Claimant about her grievance on the 7 April with a view to meeting quickly but that, nevertheless, the proposal to meet on 8 April happened that day.

68 We turn then to the substance of what was discussed. Ms Grant told the Claimant that her move to Deanery Road was because of the *Customer First* re-accreditation and would be until *"further notice"*. The Claimant referred to the change being made with immediate effect and without consultation. She talked about the impact on her but acknowledged that Mr Strachan had told her that Ms Benjamin needed training. She said that she knew that Ms Winiarczyk had health issues but she asked why she was always the one on late shifts. She confirmed that it was the timing of the shift and not its location

that concerned her. Ms Grant said that she would reconsider the rotas after the re-accreditation the following week. The Claimant was then asked why she felt bullied and discriminated against and replied *"because it is like I have been selected"*. Ms Grant's response was *"over this short period it is about the business need and this was why the decision was made"*. We accept that this is correct. The Claimant confirmed that, although her complaint was addressed to Mr Strachan, she had no personal problem with him.

69 One controversy is whether Ms Grant told the Claimant *"I'll change the rota when I am ready not because I have been told to change it"*. We consider that this is a case where there have been communication problems overall and we find that the Claimant perceived Ms Grant's stance in these terms although Ms Grant's intention was, as the notes record, that there would be no change until the re-accreditation process was completed.

70 It is agreed that Mr Marchington summed up at the end of the meeting as follows (page 203B):

> *"Florence if you are happy with the outcome of today's meeting then please let me know in writing that you wish to withdraw your claims stated in your letter. Obviously you are now aware that placing you at Deanery Road was not a permanent arrangement and Caroline has stated that it will be reviewed followed feedback from the Customer First Re-accreditation.*
>
> *If you are happy with the outcome, then please let me know as above and I will advise you on the next stage of the process."*

71 The Claimant says that she had a meeting with Mr Marchington in his office immediately after the grievance hearing and that she was tearful about her childcare problems. Mr Marchington denied any such meeting took place.

72 The Claimant was allocated to Deanery Road in the week commencing 11 April 2016. She confirmed in evidence that she had no contact with Ms Grant about her grievance on 11 or 12 April 2016 or at all. This is notable given the allegations made against Ms Grant in the list of issues. On the other hand, the Claimant alleges that on 11 April 2016 Mr Marchington called her at Deanery Road asking her to withdraw her written complaint by 12 April. She says that he then called at Deanery Road the following day to chase this but she was not there. She says that he attended again on 13 April and on this occasion they spoke and he asked why she had not provided a withdrawal letter. She says she told him that she had not done so because she stood by her grievances.

73 Mr Marchington says that he does not recall speaking to the Claimant about her grievance until 14 April 2016 when she told him that she wanted to leave. It was in this context, he said, that he proposed a settlement agreement after discussions with the Respondent's CEO, Mr Edwards. He added that, if he had spoken to the Claimant about her grievance earlier that week, it would simply have been to ask her what she had decided to do.

74 We are not convinced that either party's account is entirely reliable and this may

reflect their different perceptions of events. We accept Mr Marchington's evidence that he thought that the Claimant was reassured on 8 April 2016about the substance of her complaint, her belief that she had been moved to permanent late shifts at Deanery Road. By the same token, we accept that the Claimant was emotional on the afternoon of the 8 April and continued to share her concerns about childcare with Mr Marchington. We find it likely that the Claimant and Mr Marchington had further discussions about her grievance in the early part of the following week and that Mr Marchington was keen to know whether it was withdrawn as this would have avoided the need for a formal response and appeal procedure. We do not find, however, that this was any more than him following up on the comment he had made openly at the grievance meeting which made it plain that the Claimant had the choice to continue with the formal process if she wished to. When it was clear that the Claimant was still unhappy their discussions changed to potential severance terms. We accept Mr Marchington's evidence that the Claimant told him that she simply wanted to leave the Respondent in a conversation on 14 April 2016.

75 The Claimant was rostered on the early shift at Mark Street in the week commencing 18 April 2016 which is consistent with the Respondent's case that the reallocation to Deanery Road was only temporary.

76 Mr Marchington wrote to the Claimant on 22 April 2016 to provide the outcome of the meeting on 8 April (page 212). This was the last day permitted under the Respondent's grievance procedure. He described the meeting as having been under Stage 2 of the procedure, which is the formal grievance procedure. He referred to the 30 March change as having been temporary and said that the Claimant was now back at Mark Street on a week of early shifts. He expressed the hope, therefore, that her complaint had been resolved. He informed her of a right of appeal.

77 On the same day the rota for the following week was published. The Claimant was allocated to Deanery Road.

78 On 26 April 2016 the Claimant submitted her resignation, saying that she could *"not accommodate changes because of* [her] *circumstances"* (page 218). A short notice period was agreed and the Claimant's employment ended on 6 May 2016. The discussions about a settlement agreement had come to nothing.

Conclusions

79 We turn then to our analysis and conclusions based on the findings of fact and legal principles set out above.

Direct sex discrimination: Failing to hold a proper grievance hearing and failing to take proper action regarding the Claimant's grievance

80 We can dispose of this claim briefly. There is no evidence to support the conclusion that the Claimant was treated less favourably than any actual or hypothetical male comparator in respect of the arrangements for the grievance hearing on 8 April 2016 or the hearing itself. Whilst the process which was followed was done speedily, it seems to us that this was appropriate given the nature of the allegation and the fact that the Respondent was aware that the change was temporary only. For these reasons this

claims fails on the facts.

Indirect sex discrimination: requiring the Claimant to work non-flexible late hours

81 The Claimant had originally asserted that the PCP was a requirement to work non-flexible, late hours. As stated above, this was clarified into two strands at the start of the hearing: firstly, a requirement to work permanent lates, that is to work at Deanery Road: and, secondly, a requirement to work two late shifts in every three week cycle which would be the outcome of an equitable distribution of shifts between the three receptionists.

82 We find that these requirements were imposed, albeit the first was temporary and for a short period only. In short, the Claimant was required to work at Deanery Road in successive weeks and would have been required to do two weeks of late shifts in every three-week cycle had she remained employed.

83 We find that these requirements are neutral on the face of it as, had there been male receptionists, they would have applied to them equally.

84 Our first difficulty with the Claimant's case on indirect sex discrimination arises in respect of group disadvantage. We acknowledge that in general terms childcare falls disproportionately on women and that childcare may be a particular problem for single parents (who could be either men or women) but there is no evidential basis on the facts presented for us to find that women (or a particular group of women) were or were likely to be at a greater disadvantage than men because of the two requirements identified in this case. While comparators are unnecessary for indirect discrimination claims, it is notable that the Claimant's female colleagues were unaffected by the changes and that the Claimant flagged her point of difference with them as being childcare responsibilities, something which may affect men or women. Accordingly, we do not find group disadvantage established on the evidence. Were we wrong in that conclusion however, we go on to make the following findings.

85 We are satisfied that the Claimant was at the disadvantage identified in the PCPs; we accept that she had genuine childcare problems because of the requirements. The claim would succeed on this analysis subject to the defence of justification but we find in these alternative premises that this defence is made out. The Claimant's temporary move to Deanery Road was a proportionate means of addressing a legitimate aim, namely the training of a new member of staff to meet a re-accreditation exercise. The subsequent pattern of two weeks of lates in a three week cycle was dictated by the requirements of the business and the fact that the Respondent could not reasonably have allocated Ms Winiarczyk to Deanery Road despite her preference to be there. In our judgment this too was a proportionate means of achieving a legitimate aim, namely ensuring that the reception work was covered.

86 We noted in this context the Claimant's suggestion that an agency worker could have been employed to cover hours she could not work herself. This suggestion emerged in the hearing only. We accept the Respondent's evidence that this was not practical for economic and organisational reasons, in particular because it was in the midst of cost-cutting at the time.

87 The claim of indirect sex discrimination fails for these reasons.

Sex-related harassment: Did Caroline Grant and John Marchington attempt to persuade the Claimant to withdraw her grievance?

88 The claim against Ms Grant must fail as on the Claimant's own account there was no contact between them in the week commencing 11 April 2016.

89 We do not find that Mr Marchington either intended to or conducted himself in a way which could reasonably be perceived to have the effect of harassing the Claimant for a reason related to sex. In our judgment, when he asked the Claimant whether she was withdrawing her complaint, he was simply following up his comment at the close of the grievance meeting. We accept that the Claimant felt harassed by this question but, judged objectively and having regard to what she had been told on 8 April 2016, we do not find that this was a reasonable perception for her to have. Accordingly, the claim based on conduct on 11 and 12 April 2016 fails on the facts.

Victimisation: Did Caroline Grant and did John Marchington attempt to persuade the Claimant to withdraw her grievance?

90 We do not find that the Claimant's email of 31 March 2016, her discussion with Mr Strachan at the one-to-one meeting on 1 April 2016 or by telephone on 6 April 2016 were protected acts for the purposes of this claim. None of these instances referred to the Equality Act or claims and/or concepts under or in relation to it. The letter of 7 April 2016 is conceded to be a protected act for these purposes.

91 We accept that the Claimant felt harassed by Mr Marchington asking on 11 or 12 April whether she intended to withdraw her grievance and that this amounts to a detriment for the purposes of this aspect of her claim. We do not find, however, that Mr Marchington asked this because she had brought a claim rather the claim was the context for him asking how she wished to proceed with it. This does not amount to victimisation in our judgment and accordingly this claim fails on the facts.

92 For these reasons, therefore, the claims are dismissed. Despite this, we are sympathetic to the Claimant's plight at this time and consider that the Respondent's communication with her could have been clearer.

Employment Judge Foxwell

27 September 2017