THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms J Barker	**AND**	**(1) The Governing Body of Barley Mow Primary School** **(2) Gateshead MBC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **4, 5 & 6 July 2017**
Deliberations: 3 August 2017

Before: **Employment Judge Hargrove** **Members:** **Ms S Don**
Mr S Carter

Appearances

For the Claimant: **Ms C Millns of Counsel**
For the Respondent: **Mr A Tinnion of Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1 The claimant's claim of indirect discrimination is not well-founded.

2 The claimant's claim of constructive unfair dismissal is not well-founded.

REASONS

1 By an ET1 received by the Tribunal on 24 January 2017, following early conciliation between 11 November and 25 December 2016, the claimant made claims of indirect sex discrimination in respect of the first respondent's refusal of

her application for part-time working as a Teacher on her return from maternity; and of unfair constructive dismissal, the claimant having resigned from her post by letter of 22 May 2016 expiring at the end of the summer term on Wednesday, 31 August 2016. The breach of contract relied upon by the claimant is said to be a breach of the implied term of trust and confidence arising from the respondent's refusal of her application for part-time working constituting indirect sex discrimination. Responses were received from the respondents on 20 February 2017 denying any act of indirect sex discrimination or in the alternative asserting that such was justified as pursuing a legitimate aim, and a denial that in that, or indeed in any respect, the respondent was guilty of any repudiatory breach of contract. At a case management hearing on 22 March 2017 the issues were more particularly identified as follows:-

Unfair dismissal claim

1.1 Has the claimant satisfied the Tribunal: that there was a fundamental breach of contract on the part of the second respondent going to the root of the contract of employment?

1.2 That the second respondent's breach caused the claimant to resign and that the claimant did not affirm the contract by delaying for too long before resigning?

1.3 The claimant relies on the implied term that the employer without reasonable and proper cause, would not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

1.4 The second respondent relies on the defence that there was no such breach and no dismissal. If the Tribunal found that there was a dismissal, the second respondent would not argue that there was a fair reason.

Indirect sex discrimination – section 19 of the Equality Act 2010

1.5 Did the respondent apply the following provision, criterion and/or practice (the provision) generally, namely the requirement to work full time?

1.6 Does the application of the provision put women at a particular disadvantage when compared with men?

1.7 Did the application of the provision put the claimant at that disadvantage?

1.8 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim, namely the efficient education of the pupils at the school?

These remain the principal issues for the consideration of the Tribunal although there has been some discussion as to the precise identification of the correct PCP.

2 The hearing commenced on 4 July 2017 following the full Tribunal reading into the witness statements and agreed bundle of documents. The witnesses called were as follows:-

2.1 The claimant, followed by Mr Peter Largue, Divisional Secretary of the Gateshead Division of the NUT, who supported the claimant during her flexible working application in 2016.

2.2 The respondent's witnesses were, Nicola Watson, Head Teacher of Barley Mow Primary School; Emma Manfren, Senior HR Adviser of the second respondent; and Bryan Skipsey, Chair of the Governors who chaired the school staffing committee meeting on 19 April 2016 to consider the claimant's application to work flexibly. The bundle of documents to which they referred numbered by the end of the hearing 278 pages.

3 There now follows a chronology of the main events in the course of which the Tribunal will set out the relevant history and identify any material disputes of fact which arise:-

3.1 The claimant commenced employment at the school in a temporary post but as a full-time Teacher on **1 September 2007** and commenced permanent employment from **26 November 2009** (see pages 66-71). From that time the claimant worked full-time on 10 sessions per week.

3.2 The claimant first went on maternity leave at **Christmas 2012** and her first son Isaac was born on **27 December 2012**. She was on maternity leave until the summer of 2013. Her partner works full time and Isaac went to nursery two days per week, being looked after by his grandparents for two days and one day by the partner's parents.

3.3 The claimant commenced a second period of maternity leave on **2 November 2015** and her second son Rowan was born on **6 November 2015**. She was due to return from maternity leave on **30 May 2016**.

3.4 Prior to going on maternity leave the claimant informed the Head teacher Ms Watson of her pregnancy. This was likely to have been sometime in the **summer term of 2015**. Ms Watson had taken up post as Head teacher in **September 2014**. There was a subsequent conversation in the **September term 2015** in the course of which the claimant indicated that she was interested in returning to work part-time following maternity leave. The claimant's account is that Ms Watson approached her and asked if she would come back to work part-time for any three days per week undertaking PPA (planning, preparation and assessment) cover in Early Years and Year 1 and that the claimant accepted the offer. Ms Watson's recollection is that whilst the claimant had expressed an interest in returning to work part-time, she Ms Watson, had not offered her the opportunity of doing so but merely expressed hope that the school would be able to accommodate her if she asked to return to work on that basis.

3.5 There is a letter at page 85 from the Service Director of HR of the second respondent dated **14 August 2015** which followed the notification of pregnancy and set out the maternity leave and maternity pay entitlements. This does not however assist with the dispute identified.

3.6 On **2 March 2016** Ms Watson attended a meeting with the School Budget Officer, Frank McDermott, an employee of the second respondent, to discuss the school's financial position. Ms Watson claims that during the meeting she was made aware that due to the unexpected fall of admissions into the reception class in September 2016, and reduced nursery admissions there was to be a significantly reduced budget. A version of the school's three year budget plan is at page 144 of the bundle, the contents of which was the subject of questioning in particular by Ms Millns for the claimant. Ms Watson contends that she had been informed at the meeting in March 2016 that there was a predicted budget deficit in the region of £60,000 for the year 2016/17 and a projected budget deficit of £100,000 for 2017/18. Also according to her, it was suggested by Mr McDermott that the school would need to look to reduce the hours of Teaching Assistants; that contracts for two teachers on fixed term contracts would not be able to be extended, and the school would not be able to retain the school counsellor. This information was not conveyed to the claimant at that time, but on **3 March** Ms Watson e-mailed the claimant 'hoping to catch up with her' in the next few weeks to discuss what was to happen when she came back. In response, it was agreed that a meeting would take place on **Tuesday, 8 March 2016**. There is no note of that meeting. According to Ms Watson, she explained to the claimant that, due to the unexpectedly reduced budget, and despite having explored different options, in particular, the delivery of PPA across the school, - due to budget issues a higher level Teaching Assistant was going to do that task to reduce the cost of Teacher delivery; and a possible three day split with another three day post to cover a class, which was financially not possible, it would not be possible to accommodate a three day working pattern for the claimant on her return to work and that she would need to return on a full time basis. See paragraph 10 of the witness statement. According to the claimant, Ms Watson advised her that she could no longer offer a part-time contract because another member of staff, the Year 5 Teacher Caroline Love, was going on maternity leave at Easter; and she, Ms Watson, needed the claimant to cover the Year 5 class full-time.

3.7 At this stage it is material to refer to documents which set out the staffing structure, the first at page 142 showing the structure for the year **2015/16**. This records Caroline Love as the Teacher of Year 5 but due to go on maternity leave from **May 2016**. Also material is the structure for the Year 3 class teaching which showed Carolyn Docherty job sharing with Sonia Gaukrodger on a .6 job share each, constituting a 1.2 FTE. Rachel Walmsley is shown as the maternity leave cover for Caroline Love in Year 5. The claimant was earmarked by Ms Watson to provide the maternity leave cover full time for Ms Love in Year 5 from her return to work in **May 2016,** in place of Walmsley; and Walmsley and Beattie were the 2

teachers on part-time fixed term contracts who were not to have their contracts renewed beyond **31 August 2016**. (see pages 76-80 for Beattie's fixed term contract and page 117 for the termination document).

At page 143 there is the staffing structure for the year **2016/17.** This covers the school year immediately following the claimant's resignation in **May 2016** with effect from **31 August 2016**. Amy Raine is shown as the year teacher for year 5, and in Year 1 Regan Thompson is shown as covering for Caroline Love who is on maternity leave, on a one year fixed term contract.

A third document added to the bundle at the request of the Tribunal is at page 142A. This is a document in the form of an organogram which shows all of the teaching and teaching assistant posts, many of them full-time permanent posts, some part-time and some fixed term contracts, intended to cover the period current to the Tribunal hearing and moving into **2018**.

3.8 After the meeting on 8 March 2016 the claimant contacted Peter Largue of the NUT and on **16 March** she made a formal request to work a three day week under the Flexible Working Regulations. That document is at page 89 of the bundle. In response to the request "Please provide detail of any informal discussions that have taken place in relation to your request", the claimant wrote:-

> "In autumn term 2015 Nicola Watson approached me to propose that, following my maternity leave, I could return to work part-time as a PPA teacher. I was told that I could choose which days I worked, for example Tuesday, Wednesday and Thursday. It was also discussed that my role would be to work in Early Years and Key Stage 1. I was in agreement with this as this is my area of expertise.
>
> 8 March 2016: I was informed that I could not return to work part-time. I would now have to return to work full-time as the Year 5 class teacher".

Further on in the form she stated that she had:-

> "Worked at the school for ten years full-time. During that time she had been a class teacher in Years 3, 2 and most recently Year 1. In the half term prior to beginning my maternity leave (autumn 2015) I worked as PPA teacher and provided support to groups across the school. I believe that this role worked well to give necessary support to pupils and other members of staff".

The form continued:-

> "I am requesting to work part-time PPA .6 FTE Tuesday, Wednesday and Thursday".

She indicated she wished to commence that working pattern from the **September term 2016**. The form was accompanied by a letter addressed to Ms Watson (page 93). Ms Watson, having received the application on **21 March**, considered it and according to paragraph 12 of her witness statement, determined that the application could not be supported due to the burden of additional staff. She therefore called a meeting of the school staffing committee for **19 April** to discuss the request having ascertained from the claimant by e-mail on **11 April** that the claimant was available. The claimant attended the meeting with Mr Largue. Ms Watson also attended with Emma Manfren from HR. The Governors present were Bryan Skipsey, a Mr Wetherley and parent governor Liz Kirton. The documentary evidence consists of the agenda which it is accepted was in a pro forma for an appeals committee meeting, which was wrong, at page 97. There is a preparatory note prepared by Ms Watson in advance of the meeting at pages 102-103. This is an important document which sets out Ms Watson's rationale for the claimant to continue to work full-time in year **2016/17** as the class teacher for year 5 with support to be made available form "an experienced DHT" (Lindsay Oram who had been Ms Watson's DHT at her previous placement at Blaydon Primary School); and declining her application to work 3 days per week on PPA. There is a further typewritten note of the meeting itself at page 101A, which indicates that the claimant started by explaining her application; that she was then supported by Mr Largue, followed by Ms Watson's response. Mr Largue then questioned Ms Watson followed by questions from the governor. There was a closing summary from Mr Largue and from the claimant. There was a short adjournment after which the governors indicated they needed a further adjournment. The claimant and Mr Largue then left the meeting and there are further short notes of a continuing discussion with Ms Watson.

3.9 The outcome of the application was notified on a pro forma dated **25 April** (see pages 105-106). The application was refused on the following identified business grounds:-

> "1 The burden of additional cost.
>
> 2 Detrimental impact on quality.
>
> 3 Inability to reorganise work among existing staff.
>
> 4 Inability to recruit additional staff.

These grounds were amplified in the next part of the form as follows:-

> "1 Job shares within the school resulting 1.2 staff being employed to cover one year group and this burden of additional costs is not possible at the current time as the school's budget is already predicting a deficit situation that as governors we are unable to compound.

2 Due to the difficulties in recruiting suitable staff on a part-time basis it would be extremely difficult to maintain the current high standards of performance that our school expects. This would therefore, have a direct impact on the quality of education that pupils receive and in turn on educational standards.

3 Any staff we currently employ on permanent contracts will not be available to cover any reduction in hours – they are needed for teaching their own classes. In addition the current additional teaching staff we have within school will need to be utilised in a different way from September 2016 in order to respond to the budget deficit situation.

4 We have found it difficult to attract quality staff at part-time posts in the past and predict we will have the same problem again, based on our and the Head teacher's working knowledge of previous applicants for posts at the school".

The form continued:-

> "We appreciate this will be disappointing for you and confirm that on your return to work you will be fully supported through local authority support, mentoring from the Deputy Head teacher and a Teacher Assistant full-time in your classroom alongside the normal support provided through performance management.
>
> We also assure you that we will keep your part-time request under review".

Each of these contentions in that form have been the subject of detailed challenge by Ms Millns for the claimant, in particular in cross-examination of Ms Watson. It is clear that Ms Watson's evidence and reasoning, and the extent to which we are able to accept or to reject it, is of crucial importance to the outcome of this case, not least because it was reasonably clear from the evidence given by Mr Skipsey, the governor at the meeting, that the panel attached very considerable weight to the views of Ms Watson as the Head teacher.

3.10 On **5 May 2016** the claimant wrote to Ms Watson giving notice of her intention to return to work (covering year 5 full-time) on **Monday, 30 May**. That letter was acknowledged by HR on **10 May**. However **on 22 May** the claimant wrote her letter of resignation, at page 109:-

> "I wish to give notice of my resignation from the post of Class Teacher with effect from the end of summer term on Wednesday, 31 August 2016. I would like to take this opportunity to thank yourself and the governors for considering my application to return to work part-time but due to the fact that this is not possible I have

made the difficult decision that I can no longer work at Barley Mow Primary School. I have loved working as part of such a dedicated team and appreciate the opportunities that I have had for personal and professional development. I would like to thank you all of the staff at Barley Mow Primary School for their support throughout my ten years of teaching".

The letter was formally acknowledged by HR on **26 May**.

3.11 There were further amendments to the staffing structure described by Ms Watson which took place before the end of the 2015/16 academic year, and before the claimant's employment ended on 31 August. These are contained in paragraphs 24 of her witness statement onwards. Ms Watson claims that, following the receipt of the Year 6 results based on the more challenging standard of new SAT tests, in **June/July 2016** she reviewed the standards in Year 5; that they were underperforming and in consequence she determined that the school would need more support than initially planned in the Year 5 class when they moved up to Year 6 in the following academic year. She proposed that a fixed term one day a week (two sessions) support teacher role be made available from September 2016 to support the new Year 6. This was first considered at an SLT meeting on **13 June 2016**, the notes of which are at page 111. It was recorded that Ms Watson was to speak to the budget office to see whether that expenditure could be covered. Also at that meeting there was discussed by way of review the proposal to make the nursery provision limited to mornings only as opposed to mornings and afternoons. This was also one of the provisions which had been made to cover the expected reduction in demand for nursery places, which was being kept under review. At the next meeting on **27 June** the topic of the budget for the extra one day was covered. The meeting notes record approval of a proposal to offer the one day per week post under a one year fixed term contract to the claimant. In those circumstances, Ms Watson spoke to the claimant in the second week of **July** and offered her the position. The claimant declined on the basis that one day's work would not be sufficient for her. In addition, as she had previously told Ms Watson she intended, the claimant had **on or about 24 May** signed a licensing agreement to operate a franchise called Little Learners for pre school children. The .2 FTE support teacher role in new year 6 was offered to Jessica Beattie by letter of **30 July 2017** – page 120 – and she was offered an extension to her FT contract by one year to **31 August 2017**. Ms Watson analysed the year 5 data in the summer holidays and at the beginning of the September term asked Lindsay Oram, the new year 6 teacher, and Ms Beattie to conduct a baseline assessment between **7-9 September** which apparently showed significant gaps in learning in that year group. Ms Watson decided that there was a need to increase teaching support in year 6 from one day (.2FTE) per week to 3 days (.6FTE), which was discussed at an SLT meeting on **12 September 2016** (page 122). Ms Watson needed budget authorisation. In addition, there was a learning support teacher, Jan Quenet, for SEN children in year 6, who commenced sickness absence on **14 September** and eventually resigned on **20 October 2016**. Having

spoken further to the Chairman of Governors on **14 September**, Ms Watson offered Ms Beattie the additional hours which she accepted (see documents at pages 126-128). Her fixed term contract was extended to **31 August 2017**.

3.12 The claimant provides in paragraph 9 of her witness statement an explanation as to why she had not appealed the decision of the governors to refuse her flexible working application. She points to the time that it took to list a hearing before the governors. She refers to the fact that if her appeal had been unsuccessful and she had delayed resigning, she only had until the notice cut off date of **31 May**; and, if she missed that date, she would have to continue working until **31 December 2016**.

3.13 There are other aspects of the change in the structure of the school's staffing structure in the year **2016/17** which are relied upon by both sides, in the case of the respondent to justify after the event the original decision not to allow the claimant part-time work; and, in the case of the claimant, to indicate that the respondent's position and reasoning for the original refusal has not been consistent. These are matters which we will consider in stating our conclusions.

4 The Employment Tribunal's self direction on the law

4.1 It is noted that the claimant does not bring a claim under section **80H** of the **Employment Rights Act** that the respondent has failed to comply with any of the provisions in **section 80G** with respect to her claim for flexible working made on 16 March 2016. **Section 80G(1)(b**) identifies a number of grounds upon which the employer can refuse the application, including the "burden of additional costs" and "detrimental effect on ability to meet customer demand", and "inability to reorganise work among existing staff".

4.2 The claim is brought under **section 19 of the Equality Act** – indirect discrimination. This provision 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 to persons with whom B does not share the characteristic;
>
> (b) it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it;

(c) it puts or would put B at that disadvantage; and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim".

The relevant protected characteristics include sex.

The provision, criterion or practice which the claimant relies upon is a requirement for permanent full time workers or full time workers generally to work full time. The issue arises in this case whether that criterion put women in general at a particular disadvantage when compared with men; whether the application of the provision put the claimant at a disadvantage; and whether the respondent can show that it was a proportionate means to achieve a legitimate aim. The parties in their written and oral closing submissions set out their respective contentions on these issues and we will describe them further in stating our conclusions.

4.3 The claimant also claims unfair constructive dismissal. She does not claim in respect of her alleged constructive dismissal that it constituted a breach of **section 39 of the Equality Act 2010.** In that respect, section **95 of the Employment Rights Act** provides that:-

"An employee is dismissed by his employer if and only if …

(c) the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

The conduct in question must amount to a breach of contract justifying dismissal, in this case a breach of the implied term of trust and confidence. There is an obligation implied in all contracts of employment that neither party will without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the necessary relationship of trust and confidence between employer and employee.

4.4 **<u>Time points</u>**

As the Tribunal understands the position, the respondent takes the point that the claimant's claim of indirect discrimination has been presented out of time on the basis that the application for flexible working was refused in writing by the respondent by pro forma letter dated **25 April 2016. Section 123 of the Equality Act** provides that:-

"Proceedings may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates; or

(b) such period as the employment tribunal thinks just and equitable".

The claimant asserts that the refusal was a continuing act in the sense of an ongoing situation or a continuing state of affairs, relying upon the judgment of the Court of Appeal in **Hendricks v The Metropolitan Police Commissioner**. She asserts there was a continuing imposition of a discriminatory policy relying upon **Barclays Bank Plc v Kapur [1992] ICR page 208**. The respondent asserts that the act was completed, and was not a continuing act, either on the original rejection of her application for flexible working by letter of **25 April 2016,** or on **22 May 2016** when the claimant tendered her letter of resignation, or on the last day of the claimant's employment on **31 August 2016**. The claim was in fact presented to the Tribunal on **24 January 2017**. The material dates for the purposes of both of these claims are that the claimant presented those claims to the Tribunal on **24 January 2017** and in respect of early conciliation the date of receipt of the EC notification (Day A) was **11 November 2016** and the date of the issue of the certificate by ACAS (Day B) was **25 December 2016**. **Section 207B of the Employment Rights Act** (there are similar provisions in the Equality Act) states that:-

"(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would … expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

In the present case the claimant commenced early conciliation on **11 November** which was within the time limit of three months from the effective date of termination, **31 August 2016**. Day B is the day on which the complainant receives the early conciliation certificate. On this basis on any view the claimant's claim of unfair constructive dismissal was presented within time under the provisions in **section 111** of the **Employment Rights Act,** and the respondent has not submitted to the contrary. The time issue arises in respect of the claim of indirect discrimination. In that case, the Tribunal has power to extend time if it would be just and equitable to do so.

5 We propose to summarise the parties' submissions on the indirect discrimination case and state our conclusions before we apply our minds to the issue whether the indirect discrimination claim was presented out of time and if so whether it would be just and equitable to extend time.

6 **Conclusions**

6.1 **Did the respondent apply a provision, criterion or practice as defined in section19?**

We conclude that there was a PCP applied here, the PCP being that women on full time contracts returning from maternity leave, should return to full time working. That provision was applied to the claimant as from the date of the initial meeting on **8 March 2016** and confirmed as from the notification of the decision of the Governors panel and receipt thereof on or shortly after **25 April 2016**. It would have been applied to anyone else returning to work after a period of absence, male or female. It put or would put all women returning from maternity leave at a disadvantage because of their greater share of childcare responsibilities. It did put the claimant at that disadvantage. Much time and energy has been put in particular by the respondent in arguing that no such PCP had been applied earlier; that there were part time teachers sharing jobs, in particular Docherty and Gaukrodger; and even that another teacher, Ms Caroline Love, had been permitted to return to part time teaching on four days per week following maternity leave in 2017. That latter point may be relevant to the justification defence being run by the respondent. What is beyond doubt however is that the claimant applied to return to work part time and was turned down on the basis that there was work available for her only full time. The fact that it is a PCP which has been applied only once and only to the claimant does not make any material difference. Paragraph 4.5 of the Code of Practice on Employment 2011 states:-

> "The phrase provision, criterion or practice is not defined by the Act but it should be construed widely so as to include for example any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied – as well as a one off or discretionary decision".

It is true that there is no evidence that this PCP was applied earlier within the school or indeed later. What differentiates the claimant's case was that her return to work coincided with particular budgetary difficulties coupled with the desirability of consistent teaching for a particular year group.

We accept that before the claimant went on maternity leave, Ms Watson indicated to the claimant that she hoped to be able to offer the claimant part time working three days per week, and that PPA cover was discussed. This is supported by Ms Watson's note she prepared for the Governors meeting to consider the flexible working application, at page 103 of the bundle. It was in consequence reasonable for the claimant to expect that she would be able to return to part time working, but it fell far short of any guarantee.

As we recognised at an early stage of this hearing, the real issue is whether the respondent, on whom the burden of proof lies in this respect,

can show that the application of the practice was justified as pursuing a legitimate aim namely the maintenance of teaching standards within budget.

6.2 **Can the respondent's refusal to offer part time working be a proportionate means of achieving a legitimate aim, as section 19(2)(d) provides?**

We start by reminding ourselves of the relevant provisions in the Code of Practice on Employment 2011. These are contained at paragraphs 4.25 to 4.32:-

> "4.25 If the person applying a PCP can show that it is a proportionate means of achieving a legitimate aim, then it will not amount to indirect discrimination. This is often known as the objective justification test. The test applies to other areas of discrimination law …
>
> 4.26 If challenged in the employment tribunal it is for the employer to justify the provision, criterion or practice. So it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the PCP was applied. If challenged, the employer can set out the justification to the employment tribunal.
>
> 4.27 The question of whether the PCP is a proportionate means of achieving a legitimate aim should be approached in two stages:-
>
> - Is the aim of the PCP legal and non discriminatory and one that represents a real objective consideration?
> - If the aim is legitimate is the means of achieving it proportionate that is appropriate and necessary in all the circumstances?
>
> What is a legitimate aim?
>
> 4.28 The concept of legitimate aim is taken from EU law and the relevant decisions of the CJEU, formerly the ECJ. However it is not defined by the Act. The aim of the PCP should be legal, should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as a legitimate aim provided that risks are clearly specified and supported by evidence.

4.29 Although reasonable business needs and economic efficiency may be a legitimate aim an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than avoiding discrimination.

What is proportionate?

4.30 Even if the aim is a legitimate one, the means of achieving it must be proportionate. Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An employment tribunal may wish to conduct a proper evaluation of the discriminatory effect of the PCP as against the employer's reasons for applying it, taking into account all the relevant facts.

4.31 Although not defined by the Act, the term "proportionate" is taken from EU Directives and its meaning has been clarified by decisions of the CJEU …… EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary does not mean that the PCP way of achieving the legitimate aim; it is sufficient that the same could not be achieved by less discriminatory means.

4.32 the greater financial cost of using a less discriminatory approach cannot, by itself, be a justification for applying a particular PCP. Cost can only be taken into account as part of the employer's PCP if there are other good resons for adopting it".

Some of the principles set out in the above passage are derived from previous decisions of the courts for example the proportionality test in paragraph 4.27 derives from **Hampson v The Department of Education and Science [1989] ICR page 179 Court of Appeal**, as is the Tribunal's duty to carry out a balancing exercise between the discriminatory effects of an employer's pay practice and the reasonable needs of the employer in applying that practice. There is a general principle derived from the ECJ case **Schoneheit v Stadt Frankfurt Am Main [2004] IRLR 983** that budgetary considerations alone can never justify sex discrimination. That case was considered in the EAT in **Cross v British Airways [2005] IRLR page 423** where the Appeal Tribunal held that it was open to a Tribunal to find that cost is a factor justifying indirect discrimination provided it is combined with other factors – ie costs cannot be a legitimate aim on its own. This has been referred to in other cases, as the cost plus principle, which was also referred to in the Court of Appeal decision in **Woodcock v Cumbria Primary Care Trust [2012] ICR page 1126**, to which we have been referred by the parties.

7 With these principles in mind we considered the oral and written submissions received from the parties.

We start with the comparatively narrow application for flexible working which the claimant initially put before her resignation:-

> "I am requesting to work part time PPA .6 FTE Tuesday, Wednesday and Thursday".

It is clear however that she did not confine her application to those narrow conditions at the meeting on 19 April because she is recorded as saying:-

> "Flexible where in school and times/days worked eg PPA cover
>
> - 3 days ideally (.6)". (See page 101A).

Ms Watson set out in advance her response to the request which is to be found at page 102. This is an important document which sets out her rationale for her proposals for the claimant to continue to work full time in year 2016 as the class teacher for Year 5 with support to be made available from the "experienced DHT" – Lindsay Oram, who had been Ms Watson's Deputy Head at her previous placement at Blaydon Primary School. In that document, which we accept was available to the Governor's committee, she set out the projected deficit budgets for 2016/17 and stated that there were ten fewer children starting reception in September and fewer children in nursery (this resulted in **September 2017** in nursery provision being reduced to mornings only, and not mornings and afternoon). Ms Watson proposed the PPA provision (this is the provision of cover for teaching classes whilst Teachers took time off for planning and preparation) to be covered by the Higher Level Teaching Assistant freed from nursery teaching. In those circumstances there would be no need for a part time PPA Teacher (who would need to be paid at a higher rate). Ms Watson's proposal was that the claimant should be assigned to Year 5. She expressed the view that many Teachers had moved in the last year, got used to year groups and the new curriculum and that in those circumstances she did not want to move anyone around. It was a fact that in the current year, Caroline Love was the Year 5 Teacher but was due to go on maternity leave in **May 2016**, with Rachel Walmsley to provide cover at that stage. Ms Watson's proposal was thus that the claimant should return to work before the end of the year to take over from Ms Love. It was also proposed that the claimant would have support available from Ms Oram. It is to be observed that notes of the hearing on **19 April** also record that Mr Largue raised on the claimant's behalf the possibility of a job share. It appears that Ms Watson indicated that she was not opposed in principle to job share but that it would need 2 x .6's; which would incur increased cost. This issue was explored in some detail by Ms Millns during cross-examination of Ms Watson at the Tribunal. It was argued by her that:-

7.1 The cost, which was established to be approximately £6,000 for the extra .2 FTEs per annum on the basis of teachers of equivalent seniority as the claimant; it was agreed by Ms Watson that that figure had not been specifically notified to the panel as the extra cost, although the budget

deficit figures were raised. Secondly it was canvassed that the job share could work perfectly satisfactorily with two FTEs on .5 or alternatively one on .5 and one on .6 if handover was required. It is to be noted that these submissions were not discussed or raised by the claimant in such detail at the Governor's meeting on **19 April** but that is not of itself a significant factor because the duty to justify arises even in respect of proposals which were not put at the time in just the same way as an employer can justify after the event reasons for a particular decision which it did not have in mind at the time the decision was originally made. The respondent's response at the time is set out in the rejection form which is cited at paragraph 3.9 above. We accept that it was a cogent response to the points raised by the claimant at the meeting. We conclude (and it has not been argued before the Tribunal) that the respondent was justified in making a business decision to appoint a Higher Level Teaching Assistant to undertake the cover teaching duties at lesser cost thus giving Teachers the necessary time off for PP. We have considered Ms Millns' arguments about the lack of necessity for handover periods. We accept that in some other schools there may be examples of 2 x.5 FTEs sharing responsibility for teaching a single class, but we also accept Ms Watson's view that such a practice is undesirable except in the nursery year where it was not uncommon for two .5 FTEs to share the duties of teaching the nursery year, but where there were different classes in the morning and the afternoon. In her view, an overlap was necessary to discuss planning, gaps in the children's learning, next steps in learning; and that parents did not disapprove of job sharing on that basis. We respect that view and are not competent nor do we have the necessary evidence to gainsay it. There was an additional problem from job share arising from the likely necessity for recruiting another member of staff which would in itself represent difficulties in terms of attracting quality staff to work only part time. The extra cost was a factor in the decision even if it was not expressly identified, in circumstances where it was identified the school had to deal with a significant budget deficit in the next financial year. This is not a case of a costs only argument; it is a cost plus argument of the kind recognised in **Cross v British Airways**. The claimant's after the event suggestion that the claimant could have job shared with a partner on a lower pay grade for the claimant was not raised before the panel, but we are satisfied that if it had been the panel would have been justified in refusing the proposal on the basis that a Teacher with less experience than the claimant would not be likely to maintain the same standard as an experienced Teacher. Ms Millns has very properly and cogently raised issues about what has in fact happened in the school since the claimant's resignation at the end of the year 2015/16, to demonstrate inconsistency in the respondent's attitude to part time teaching and to challenge the justifications put forward by the respondent. There are two particular aspects to this argument. The first relates to Ms Beattie, whose contract expired, or was due to expire, on **31 August 2016,** but who had it extended initially by one day, then to three days in circumstances described in more detail in paragraph 3.11 above. The claimant was initially offered the one day but refused it. As to the extra two days, a specific extra teaching need was identified for the Year 6 pupils; the extra

costs was able to be budgeted after investigation; and this was not a job share situation. The second relates to Ms Love who returned to teaching Year 5 in **May 2017** on a permanent contract but as a temporary arrangement for two years working only four days per week, the fifth day's teaching being provided by Ms Beattie with a handover period allocated on Mondays. This is a temporary arrangement but is a job share. It is subject to review and although the treatment of Ms Love in this respect is not entirely consistent with the treatment of the claimant in 2016, there are some material differences.

7.2 In short our conclusion is that the decision to refuse the claimant's application for part time working was justified both in the period up to the expiry of her notice, and afterwards. There were a number of factors in play here: The need to make budget cuts; the extra cost of job share with its reasonable requirement for a handover period; the difficulty of finding a job share, either internally which would mean further disruption to existing staff, or externally with potential difficulties in recruiting competent staff. We do not accept that any of the changes which were made in the different situations which arose in the School after the claimant's resignation undermines the rationale for Ms Watson's decision at the time. The respondent made it clear that the decision would be kept under review and that is demonstrated by the respondent's offer of one day's teaching during the notice period. By that stage, the claimant's position had changed because she had signed the agreement for the nursery franchise, she may well legitimately have refused that offer for other reasons. We understand why she did not appeal the Governors' decision having regard to the necessity to give notice at least three months before the end of the summer term.

8 Having found that the claim of indirect discrimination is not well-founded, it inevitably must follow that the respondent did not act without reasonable and proper cause in refusing the application for part time working in breach of any implied term of trust and confidence and the claimant's constructive unfair dismissal claim must also fail.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
10 August 2017
JUDGMENT SENT TO THE PARTIES ON

11 August 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL