EMPLOYMENT TRIBUNALS

Claimant: **Dr P Wilson**

Respondent: **Health Education England**

Heard at: **Leeds**

On: **6 and 7 November and (deliberations only) 14 December 2018**

Before: **Employment Judge Maidment**
Members: **Ms BR Hodgkinson**
Mr DW Fields

Representation
Claimant: **Miss S Tharoo, Counsel**
Respondent: **Ms A Niaz-Dickinson, Counsel**

RESERVED JUDGMENT

The Claimant's complaint of indirect sex discrimination fails and is dismissed.

REASONS

The issues

1. The sole claim in these proceedings is one of indirect sex discrimination against the Respondent as an employment service provider defined within Section 55 of the Equality Act 2010. The Claimant relies on the Respondent applying a provision, criterion or practice ('PCP') to have *"set dates for interview for recruitment to a ST4 Emergency Medicine course which it was not prepared to deviate from for an individual's circumstances."* The Claimant did not apply for the position because the date set for interview coincided with the later stages of her pregnancy and the Respondent would not offer any alternative date. The Respondent accepts that it indeed applied such PCP and that it did so in respect of all potential interviewees, male and female. The first question for the Tribunal was whether the PCP placed women at a particular disadvantage when compared to men. If so,

did the PCP put the Claimant at that disadvantage? If so, it is then potentially open to the Respondent to defend what would otherwise be an unlawfully discriminatory PCP by showing it to be a proportionate means of achieving a legitimate aim. In this context, the Respondent relies on *"the need to operate a national recruitment system which is efficient, cost-effective and fair to all"* as its legitimate aim.

The evidence

2. The Tribunal had before it an agreed bundle of documents. Having briefly identified the issues with the parties, the Tribunal spent some time privately reading into the relevant documents and the witness statements exchanged between the parties. This meant that when each witness came to give their evidence they could do so by simply confirming the contents of their witness statement and, subject to brief supplementary questions, then being open to be cross-examined. The Tribunal heard firstly from the Claimant. Then, on behalf of the Respondent, the Tribunal heard from Clare Kennedy, National Specialty Recruitment Manager, Martin Foster, Training Programme Manager and finally from Ryan McKenzie, a Programme Support Manager.

3. Having considered all the relevant evidence, the Tribunal makes the findings of fact as follows.

Facts

4. The Claimant completed her degree in medicine in June 2010. From August 2014 until August 2017 she completed the Acute Care Common Stem ('ACCS') specialty training in emergency medicine with a view to progressing eventually to becoming a consultant in emergency medicine. Prior to commencing that training she had been offered the opportunity of "*run through training*" which would have allowed her to automatically progress to an ST4 emergency medicine position to enable her, at the end of that further training post, to become a consultant. Had she taken that route, she would not have been required to interview for an ST4 post.

5. From October 2017 the Claimant has been employed as a Specialty Registrar (non—training) in emergency medicine working part-time in a hospital in Plymouth. At the time of finishing the ACCS training, it was the Claimant's intention to apply for an ST4 emergency medicine post in February 2018. The Claimant could have applied in the earlier recruitment round in early 2017 for a position to start in August 2017 but instead chose to take up a six month post at a major trauma centre as she did not know at that point where (geographically) her partner would be working. She thought, therefore, that she would wait for the next annual recruitment process. The Claimant was confident that she would be successful at interview given her experience and recruitment/retention difficulties in emergency medicine.

6. In early July 2017 the Claimant became pregnant with a due date of 30 March 2018. She planned to take maternity leave commencing from 13 March 2018 with a return to work in March 2019. Essentially, she thought she would, if successful, in her application for a ST4 post defer its commencement from what would ordinarily have been an August 2018 start date until she was due to return to work after maternity leave.

7. The Claimant was immediately aware that the recruitment process would run through early 2018 by which point she would be heavily pregnant, if not have given birth.

8. Responsibility for the recruitment, training, education and workforce development of junior doctors in England rests with the Respondent. However, responsibility for the delivery of national recruitment is devolved to recruitment teams across the Respondent's regions and the Royal Colleges such that Health Education Yorkshire and the Humber had the responsibility for the recruitment necessary in, amongst other specialties, emergency medicine.

9. Recruitment to specialty training programmes is split into five recruitment rounds which take place across different dates. A recruitment timetable for each round is set by the Respondent. Recruitment for ST3 and ST4 positions fell within round 2 which was timed to run from 24 January to 9 May 2018. Where positions remained unfilled, there was the possibility (but by no means any guarantee) of a further recruitment run to fill remaining posts completed between 19 July to 31 October 2018. The starting date for individuals recruited in such a re-run would normally be in February of the following year.

10. The national recruitment timeline is agreed every year by representatives from the Respondent, the Royal Colleges and the BMA. The Tribunal understands there to be over 60 individual specialties to recruit for.

11. The timeline is usually finalised by May each year and then shared with the Respondent's local offices and the Royal Colleges so that they can make the necessary arrangements. The timeline is published to potential candidates in October every year.

12. The timeline sets out the relevant date for each stage including when applications open, the application deadline, interview window dates, the date on which initial offers are released and the date which offers are held until. There is a further window where a candidate offered a placement which is not their first preference can *"upgrade*" if a preferable placement then becomes available.

13. Since 2015 the recruitment process has been administered through an online portal known as Oriel. Potential applicants can register for training, view vacancies, apply for them, book interviews as well as manage any offers they receive through this portal. The reason for the introduction of Oriel was to provide one coordinated process in place for all specialty recruitment. Prior to Oriel there was no national process which was considered inefficient. It resulted in recruitment rounds and offers being made at different times with applicants able to accept multiple offers, leading to many offers being declined at short notice which in turn led in turn to difficulties in workforce planning. This might have a knock-on effect for the hospital trusts who were trying to plan for the coverage of their activities by appropriately qualified medical staff.

14. If a position was made open for application within Oriel, it was open for anyone to apply. A vacancy could not be made live on the system simply for one individual, such that if a candidate was to be allowed to apply outside the ordinary window, this would have to be done through a *"backdoor"* route. There appeared on the Respondent's evidence to have been an instance, albeit in quite different circumstances to the Claimant's, where the ordinary recruitment process had been circumvented for a particular individual.

15. As already referred to, interviews were allocated to a particular period of time to allow sufficient time for the next stage of the recruitment process to take place and to ensure that all offers of training placements could be made by the offer deadline. Again, applicants can apply for more than one specialty. The interview windows also allowed the Respondent's local offices and the Royal Colleges sufficient time to manage the recruitment processes and to ensure that interviews can be arranged over a number of different dates which minimises the risk of a clash between specialties, again in circumstances where applicants can apply for more than one.

16. Once an applicant applies for a post through Oriel, a form of shortlisting takes place before successful candidates are then invited to attend an interview. Interviews are typically conducted as assessment centres where applicants have their skills and attributes assessed across a number of different interview stations through which they rotate during the interview day. For ST4 emergency medicine, there were 3 live interview stations where the candidates were required to discuss a written scenario regarding the prioritisation of patients, to role-play a conversation with a patient's relative about a complaint and required to give a 5 minute presentation on quality improvement. A fourth "*virtual"* station involved an assessor marking the applicant's work portfolio but without any in-person interview. Questions are sometimes changed, including during the course of an assessment day, partly to freshen things up and to avoid the risk of later candidates being forewarned of what they might be asked.

17. The assessments are carried out by experienced consultants in the specialty being recruited for. Those consultants are drawn from an identified

pool of assessors although they are not necessarily the same assessors in each assessment centre. Indeed, in the assessment centre operated for the ST4 emergency medicine position, to get through all of the candidates in one day, there were 3 separate panels operating in parallel. There are two consultants at each station. This practice had been adopted to ensure a fairer form of assessment as each candidate has the opportunity at each interview station to be assessed afresh by two different consultants. The consultants individually complete score sheets for each candidate, the scores from all of the different stations are added together and a minimum score must be achieved to be appointable. For the ST4 assessment centre a single panel was made up of 6 consultants interviewing the candidates, a further consultant reviewing the work portfolio of the candidate and a clinical lead who oversaw the process. A lay representative was also present to conduct random interview observations to ensure consistency and an actor to take part in the role-play station.

18. Furthermore, candidates are ranked against each other in order of their scores. Candidates are required to specify their geographical preferences if deemed appointable and these are considered against the rankings to determine which offer may be made to them.

19. If an offer is made, applicants are given 48 hours to decide whether to accept, reject or hold it. Otherwise, the offer expires and is made to another candidate. If a candidate chooses to hold an offer they are permitted to do so for a very short period of time only.

20. If a candidate is unable to attend an assessment centre on a particular day, then there is a possibility that they can be assessed on another date in a different location. However, that depends on the specialty being recruited for. For instance, recruitment for general practice trainees takes place across a number of different areas with interviews held on different dates. The interview panel is made up of the same consultants and the results of all the GP trainee interviews are able to be considered together. Nevertheless, interviews are usually held around the same time and indeed on consecutive days.

21. Emergency medicine is an undersubscribed specialty with fewer applicants than the numbers applying to some other specialties. As a result, it is possible to assess all of the candidates on one day. This is regarded as preferable whenever possible because it reduces costs and the time that consultants are taken away from their clinical practice.

22. The Respondent does not permit an assessment centre to be rearranged because of an individual candidate's unavailability. This is a rule applied across all specialties. The Respondent considers the logistics of organising the process, including the cost, to outweigh an individual's difficulty in attending on a particular date. The Respondent has struggled to give a clear

and reliable estimate of the cost of running a separate assessment centre, but this appears to be in the region of around £3000, although only around £1000 of that would come directly out of the Respondent's budget. Each assessment centre requires an element of administrative input in making arrangements and ensuring everything runs smoothly on the day. Additionally, consultants will be required to take additional time off work in the context of a health service already stretched in terms of available resources, albeit the time can be counted as part of their "*professional leave*", which time away from clinical practice is built into their working pattern.

23. Furthermore, the Respondent considers there to be a risk of compromise in the fairness of the process if candidates cannot be assessed at an assessment centre alongside other candidates for the same position. The Respondent maintains that it would not be possible for a separate assessment centre for one person to mirror the assessment centre attended by the remainder of the candidates. The Respondent, at assessment days, conducts a moderation process after a number of candidates have been interviewed to ensure consistency of marking across the interview stations. An assessment centre run for only one or a few individuals, sometime apart from the main assessment centre, would give the Respondent difficulties, it asserts, in terms of ensuring consistent overall marking.

24. The Respondent considers also that candidates should be assessed against their peers applying for the same level of position. If an individual was being assessed at an assessment centre, the majority of which was to assess candidates at a lower level, that could result in the candidate for the higher level position being awarded a higher score than would have been awarded if they had been assessed against their peers.

25. When the Claimant became aware of the interview window for the ST4 emergency medicine positions, she looked to see if there were any more interviews for the position taking place at other times of the year. There were not. She understood that unfilled positions might be re-advertised at a later date, but there was certainly no guarantee of this happening.

26. On 12 October 2017 she emailed the Respondent's helpdesk for emergency medicine to explain that she was aware that interviews usually took place in March but that she was due to give birth on 30 March 2018 and, if interviews were to be held then, there was a good chance she would not be able to attend. She queried whether there was any provision for such circumstances. At that point in time the exact interview date had not been set.

27. The Claimant received a response that day to advise that interviews could be held in either March or April 2018 but that *"we do not have any other*

option to interview you if you cannot attend the selection centre. For the past few years we have not held a second round of recruitment…"

28. The Claimant was concerned therefore that she would not be able to attend due to being either very close to giving birth or indeed potentially recently having given birth. Furthermore, the interviews were to take place, she thought, in North Yorkshire approximately 350 miles from the Claimant's home in Plymouth.

29. The Claimant then telephoned the helpdesk and spoke to Ryan McKenzie, one of the Respondent's Programme Support Managers. He confirmed that the email response the Claimant had received did reflect the correct position that, if an applicant could not attend the interview date, then an alternative date could not be arranged. Whilst the Tribunal does not accept that Mr McKenzie compared the Claimant in terms to an applicant suffering from an appendicitis, he did, the Tribunal concludes, refer to a candidate suffering from such an illness as also not being allowed the opportunity to attend a separate assessment centre. Mr McKenzie agreed to check the position with a senior manager. He then spoke to Ms Clare Kennedy, National Specialty Recruitment Manager who confirmed that the Respondent was not required to move or add an additional interview day and that online/telephone interviews were not possible

30. On 16 October Mr McKenzie emailed the Claimant confirming that interviews could not take place outside the interview window. He also stated: *"assessment centre/interview dates are published by recruitment offices well in advance and applicants should consider these when applying for posts".* The Claimant was upset by this, it as it made her feel like she had to choose between having a child and furthering her career.

31. The ST4 emergency medicine timeline was published in October 2017. It provided for applications to be made between 31 January to 21 February 2018 with interviews to be held between 5 March and 25 April 2018. When Health Education Yorkshire and the Humber was allocated the specialties in respect of which it was to manage recruitment, it asked the clinical leads in each specialty for suggested interview dates. The responses were then reviewed and a timeline created for all of the recruitment exercises. The interview dates were decided upon around late October subject to then confirming bookings with the chosen venues for the interviews and obtaining signup from all those who would be involved as assessors. This amounted to a long and carefully thought out process according to Mr Foster, the Respondent's Training Programme Manager. The week beginning 5 March 2018 was not given to the clinical leads as an option as there was insufficient time between the time applications closed and the holding of interviews. Emergency medicine, whilst not the biggest specialty, was not either one of the smaller specialties in terms of number of applicants. For each speciality there was a need to long list candidates, check the long list, give candidates an opportunity to submit any missing

evidence, invite them to attend interviews giving them a minimum of one week's notice and try to give candidates a minimum of 48 hours to book specific interview timeslots.

32. On 22 November 2017, the Claimant's BMA representative, Mr Paul Sneddon, emailed Mr McKenzie asking him to explain why an alternative interview date could not be considered. He referred Mr McKenzie to provisions set out in the Equality Act 2010. Mr Sneddon also noted that the interview panel for the ST4 posts would be the same as for the ACCS interviews which might provide an alternative opportunity for the Claimant to be assessed. The interview window for the ST1 ACCS posts was between 27 December 2017 to 2 March 2018. It is noted that these interviews were ultimately conducted on 17 and 18 January, before the window opened on Oriel for applications for the ST4 positions on 31 January 2018. Mr Sneddon suggested that instead of having a separate interview date, to ensure that the Claimant was accommodated, the Respondent might move the ST4 interview date forward to take place between 21 February and 10 March which he suggested would give the Claimant a fair chance to be interviewed that year. The Claimant's evidence was that she had determined that, on the basis of her due date, 10 March would be the latest date she could risk making a 700 mile round trip for an interview. The Claimant's issue was not just location, as was suggested to her in cross examination, and even if it had been possible for the Claimant to attend an assessment centre closer to her home, after reaching the 38 week point of her pregnancy the Claimant would have been concerned whether or not she ought to attend given that a baby, from a medical point of view, is regarded as *"expected"* from that point. Any attendance would have depended upon whether the Claimant felt herself to be well enough.

33. Mr Sneddon chased Mr McKenzie for a response on 4 December. He received a response then on 5 December from Martin Foster, the Respondent's Training Programme Manager. He referred to having to follow national processes and timelines, saying that no interviews could take place outside of the published timeline because all recruitment processes were linked to each other and a change to one would impact on all of the others.

34. Mr Foster referred to being able to accommodate reasonable adjustments such as preserving particular timeslots for applicants or allowing a longer time between each interview station. However, convening an entirely separate selection assessment centre, which would necessitate reconvening the same interview panel, was not considered as reasonable. He rejected the suggestion of the Claimant being interviewed at the same time as the ACCS assessment centre as, whilst some panel members might be involved in interviewing in both recruitment exercises, they were entirely separate processes assessing suitability for different levels of training. He said that an applicant's performance at ST1 ACCS interviews could not be used to assess suitability for ST4 level training or provide a comparable interview score to rank against other applicants for the ST4 positions. Mr

Foster considered there to be reasons why it would have been a risk to assess the Claimant alongside the ST1 candidates regardless of how the assessment took place. He said that a lot of work went into devising the scoring criteria and guidance to assist in achieving consistency of scoring but there was inevitably a human element to any recruitment process. He thought there was a risk of assessors interpreting the scoring criteria incorrectly given that assessment was not purely a tick box exercise but involved an element of judgement. The Respondent had already tried to mitigate the risk. Questions were devised by an expert panel but even so, on the day, questions could be slightly misinterpreted or not work as they were intended to. Therefore, at the commencement of each assessment day there was a briefing given to the panel by a common individual with the station leads present as they had usually been involved in the devising of the questions. All the interviewers were then briefed to ensure a consistent message. Nevertheless, after the first round of candidates had been assessed, a calibration meeting would take place ensure that the process was working and being consistently applied.

35. In January 2018 the interview timeline was updated through Oriel to state that ST4 emergency medicine interviews were to be held on 14 March 2018 in Sheffield. In the light of those arrangements, the Claimant did not submit an application and resigned herself to the fact that she would have to wait 12 months to be able to apply for a post now starting in August 2019.

36. Nevertheless, Mr Sneddon emailed Mr David Wilkinson, the Postgraduate Dean of the Respondent, on 21 February repeating his representations on the Claimant's behalf. On 8 March Mr Wilkinson replied stating: *"the interviews for ST4 EM have been put back to April and so I hope Dr Wilson will be able to attend."* Indeed, the interview date had been moved to 11 April. The Claimant was upset regarding Mr Wilkinson's apparent failure to appreciate that the Claimant would either be, by that date, overdue or a very recent mother. The Claimant in fact gave birth on 10 April.

37. Applications for ST4 EM training posts were reopened on Oriel on 6 March and closed on 20 March with the new interview date of 11 April shown. 68 out of 89 applicants were invited to attend the assessment centre. This indeed did allow for all of the interviews to be completed in the single day. At this point there were 79 available positions. Following the assessment centre, 48 of the candidates were considered to be appointable and made offers.

38. In August 2018 the Respondent announced a re-advertisement of the emergency medicine ST4 posts due to the shortage of successful applicants following the initial interviews. The Claimant applied, was interviewed on 2 October and was offered her first choice position on 3 October, to commence on 6 February 2019. The Claimant subsequently arranged to defer the commencement date until March when she is due to return from her maternity leave. At the point of the recruitment exercise

being rerun there were 32 positions available and 12 of the candidates were deemed to be appointable following interview.

39. The Tribunal has before it no data on the number of doctors applying in the annual ST4 emergency medicine recruitment process who were pregnant, whether at a later stage of their pregnancy or otherwise, or who had recently given birth as at the time of the interview window. The evidence is simply that of those who applied 28 were female, 60 male and 1 who preferred not to specify. When the appointments were re-advertised prior to the October 2018 interviews there were 4 female candidates and 23 male. In the initial recruitment exercise there was 1 male and 1 female doctor who were invited for an interview but did not book one and 1 male who booked an interview, but did not attend. When the positions were re-advertised there was 1 male invited for interview who didn't book one and 2 male doctors who were invited for interview but failed to attend. The Claimant herself was not in the statistics for the initial interview window as she, of course, did not apply. Nor was any other identifiable individual who might have been interesting in applying, but who did not.

40. The Respondent's witnesses were asked if they were aware of any instances of employees who were pregnant seeking alternative interview dates. Ms Kennedy said that the number of instances of pregnant candidates she believed was small and she couldn't recall a case similar to the Claimant's in the preceding 4 years. She could recall 1 or 2 cases where there had been requests connected to religious observance. She did say that some candidates came to their interviews heavily pregnant. Mr Foster said that there were a number of queries about interview dates but that often people did not say why they were asking the question. He said that he was aware that other recruiters had had queries from pregnant employees, estimating that there were several each year, but rightly recognised that they were only aware of cases when people did make contact. The Respondent did not keep any record of requests for alternative interview dates or the reason for the requests. Mr McKenzie said that he had been aware of a query from a pregnant employee about interview dates. He said that he had had several requests each year where interview dates clashed with marriage arrangements but not where the issue was the timing of religious holidays. He said that a lot of the queries received were vague and more enquiries as to whether he had any idea of when interviews would take place.

41. It is uncontested that given the nature of the ST4 position, it being a training position a few years into a doctor's medical practice where progression ultimately to consultant level is being sought, that candidates will typically fall within an age range from the mid-20s to the mid-30s.

Applicable law

42. Indirect discrimination, as defined in Section 19 of the Equality Act 2010, occurs where:

"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.

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 applies, or would apply, it to persons with whom B does not share the characteristic,

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,

it puts, or would put, B at that disadvantage, and

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

43. The relevant protected characteristics include sex, but not pregnancy or maternity.

44. As regards group disadvantage, Baroness Hale said in **Homer v Chief Constable of West Yorkshire Police 2012 UKSC 15** (paragraph 14):

"….. Previous formulations relied upon disparate impact – so that if there was a significant disparity in the proportion of men affected by a requirement who could comply with it and the proportion of women who could do so, then that constituted indirect discrimination. But, as Mr Allen points out on behalf of Mr Homer, the new formulation was not intended to make it more difficult to establish indirect discrimination: quite the reverse (see the helpful account of Sir Bob Hepple in Equality: the New Legal Framework, Hart 2011, pp 64 to 68). It was intended to do away with the need for statistical comparisons where no statistics might exist. It was intended to do away with the complexities involved in identifying those who could comply and those who could not and how great the disparity had to be. Now all that is needed is a particular disadvantage when compared with other people who do not share the characteristic in question. It was not intended to lead us to ignore the fact that certain protected characteristics are more likely to be associated with particular disadvantages."

In **Games v University of Kent [2015] IRLR 202 EAT** Judge Richardson stated:

"It follows that it was not necessary for the Claimant, in order to establish particular disadvantage to himself and his group, to be able to prove his

case by the provision of relevant statistics. These, if they exist, would be important material. But the Claimant's own evidence, or evidence of others in the group, or both, might suffice. This is, we think, as it should be: the experience of those who belong to groups sharing protected characteristics is important material for a court or Tribunal to consider. They may be able to provide compelling evidence of disadvantage even if there are no statistics at all. A court or Tribunal is, of course, not bound to accept such evidence. It should, however, evaluate it in the normal way, reaching conclusions as to its honesty and reliability, and making findings of fact to the extent that it accepts the evidence."

45. In the case of the case of **Commissioner of Police of the Metropolis v Keohane 2014 ICR 1073** the provision, criterion or practice in question was *"the Respondent's policy relating to the removal and re-allocation of dogs which is applied to dog handlers who are non-operational*." The Employment Appeal Tribunal said: -

*"In our view, the Tribunal identified a detriment. Being exposed to a risk that one's police dog might be re-allocated is sufficient, providing it is a real risk. It creates a detriment. If the application of a policy has the inevitable result that a woman will suffer that disadvantage, whereas a man will not, it will be directly discriminatory. It will fall within the "criterion" class identified in **Ahmed**. It is only where the consequence of suffering that disadvantage is neither automatic nor inevitable that indirect discrimination can come into play at all. Sometimes – though not always – such disadvantage will materialise. If where it does, however, it arises disproportionately in respect of one gender, then the basis for a finding of indirect discrimination is laid. Looking at the policy, and leaving aside the particular circumstances of any given individual subject to it for the moment, if the policy will have a differential impact, taken over a group as a whole, then it will be indirectly discriminatory unless it can be justified. If one returns to the position of the given individual, whose case has been left aside for the time being, it is necessary in order for her to make a claim that she can show that she was one of those who were actually disadvantaged. Here she was. The Claimant's dog was reallocated, and later was not returned. Accordingly, the policy, creating a risk in general, did materialise with disadvantage in her case in particular. Subject only to the question whether applying the policy could be justified objectively, despite its discriminatory impact, the basis of a claim for indirect discrimination was made out."*

46. Another key passage in **Homer** relates to what is now section 19(2)(d) – the issue of justification. Consideration of section 19(2)(d) involves approaching the issue of justification in a structured way, asking the right questions (paragraph 26). These questions were outlined as follows.

"19. The approach to the justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show that it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which can, in the case of age discrimination, justify direct discrimination. It is not limited to the social policy or other objectives derived from article 6(1), 4(1) and 2(5) of the Directive,

but can encompass a real need on the part of the employer's business: Bilka-Kaufhaus GmbH v Weber von Hartz, Case 170/84, [1987] ICR 110.

20. As Mummery LJ explained in R (Elias) v Secretary of State for Defence [2006] EWCA Civ 1293, [2006] 1 WLR 3213, at [151]:

". . . the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."

He went on, at [165], to commend the three-stage test for determining proportionality derived from de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80:

"First, is the objective sufficiently important to justify limiting a fundamental right? Secondly, is the measure rationally connected to the objective? Thirdly, are the means chosen no more than is necessary to accomplish the objective?"

As the Court of Appeal held in Hardy & Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 [31, 32], it is not enough that a reasonable employer might think the criterion justified. The Tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement."

At paragraph 22 in **Homer** Lady Hale added that: *"To be proportionate, a measure has to be* both *an appropriate means of achieving the legitimate aim* and *(reasonably) necessary in order to do so." "A measure may be appropriate to achieving the aim but go further than is (reasonably) necessary in order to do so and thus be disproportionate."*[23]. The availability of non-discriminatory alternatives is relevant: see [25]."

47. The Tribunal refers to the Court of Appeal case of **Harrod v Chief Constable of West Midlands Police 2017 ICR 869** where LJ Bean said:

"It was common ground in Benson that the employers had applied a PCP which put employees between 50 and 54 at a particular disadvantage; but the Respondents contended that the criterion applied was a proportionate means of achieving a legitimate aim. The employment Tribunal upheld claims of indirect age discrimination. The EAT, in a judgment delivered by the then President, Underhill J, allowed the employers' appeal. The EAT said:-

"32. The first step in the analysis must be to identify the PCP or PCPs which had the discriminatory effect complained of. As noted above, the Appellant defined the relevant PCP(s) as "all factors taken into account … at the decision-taking meetings"; and the Tribunal accepted that definition. But, as we have said, that seems too general a description. For the purpose of a claim of indirect discrimination the PCP should be defined so as to focus specifically on the measures taken – that is, the thing or things done – by the employer which result in the disparate impact complained of (cf. Kraft Foods UK Ltd v Hastie [2010] ICR 1355, at paras. 9-10). In the present case

that would appear to mean that the relevant PCP is the cheapness criterion. No doubt other features of the selection process…..potentially affected the outcome; but the only feature which had a disparate impact as between applicants of different ages was the underlying selection on the basis of relative cost of the benefits payable under the CSCS.

33. The next step must be to identify the aim for the pursuit of which the cheapness criterion constituted the means. Plainly the criterion was a means of selecting between applicants, but it is necessary to identify what aim selection was intended to achieve. This is rather less straightforward. The immediate aim of selection was to bring the number of applicants down to a level the cost of which came within the £12m budgeted for the exercise. But it could be argued that it is necessary to include within the definition of the aim the carrying out of the redundancy/early retirement exercise itself, and perhaps also to ask what the aim of the exercise was. In that case the answer would be that the aim of the exercise was to reduce headcount, which in turn was a means of ensuring that the Appellant's costs did not exceed its revenue. The truth is that the distinction between means and aim is not always easy to draw.

34. The next question is whether the relevant aim or aims were "legitimate". The uncertainty about how to characterise them discussed in the preceding paragraph does not, fortunately, matter since in our view all the various potential elements are plainly legitimate. It is (to put it no higher) legitimate for a body such as the Appellant, like any business, to seek to break even year-on-year and to make redundancies in order to help it do so where necessary. It is likewise legitimate to offer voluntary redundancy/early retirement schemes of the kind with which we are here concerned……..Like any business, it was entitled to make decisions about the allocation of its resources…… …….

35. The question then is whether the adoption of the cheapness criterion was a proportionate means of selection in order to meet the £12m limit (and, if this adds anything, the other aims which selection served). As we have said, it was not in principle the only means; and others were in fact considered. But the Tribunal found in terms that it was the only practicable criterion [and] that finding is not challenged. That being so, it is hard to escape the conclusion that its use was justifiable…….

36. The Tribunal's analysis of means and aims was different from ours. It treated the question of the £12m limit as an aspect of the means adopted by the Appellant to achieve more broadly defined aims. We do not think that that is right, and it might have found its conclusions less comfortable if it had asked whether the imposition of the limit was "legitimate" rather than whether it was "proportionate". But we do not think that the outcome of this appeal should turn on nuances of language or on the problems of drawing the distinction between aim and means. ……...

37. The essence of the Tribunal's reasoning was that the Appellant had not demonstrated a "real need" to limit its spending on the Scheme to £12m – or, to put it another way, to limit its spending on all three schemes to £50m. It held that it had not done so because it had not shown that payment of the additional £19.7m was "unaffordable". By that it evidently meant that the Appellant had not shown that the funds were absolutely unavailable, in the

sense that they could not be paid without insolvency: it pointed out that the Appellant's reserves far exceeded that amount (albeit that Treasury approval was needed to spend them) and that later in the same year, in the ATP, it contemplated spending a far greater figure. In our view, to apply a test of unaffordability in that sense is to fall into the error of treating the language of "real need", or "reasonable needs", as Balcombe LJ put it in Hampson, as connoting a requirement of absolute necessity. It is well established that that is not the case: see the judgments of the Court of Appeal in Barry v Midland Bank ([1999] ICR 319, at p. 336 A-B) and in Cadman v Health and Safety Executive [2005] ICR 1546……..[where] Maurice Kay LJ said, at para. 31 (p. 1560 B-C):

"The test does not require the employer to establish that the measure complained of was "necessary" in the sense of being the only course open to him. That is plain from Barry. … The difference between "necessary" and "reasonably necessary" is a significant one …"

The effect of that principle, applied to a case like the present, seems to us to be that an employer's decision about how to allocate his resources, and specifically his financial resources, should constitute a "real need" – or, to revert to the language of aim and means, a "legitimate aim" – even if it is shown that he could have afforded to make a different allocation with a lesser impact on the class of employee in question. To say that an employer can only establish justification if he shows that he could not make the payment in question without insolvency is to adopt a test of absolute necessity. The task of the employment Tribunal is to accept the employer's legitimate decision as to the allocation of his resources as representing a genuine "need" but to balance it against the impact complained of. This is of course essentially the same point, adjusted to the different formulation of the test, as we make at para. 34 above. If the Tribunal had carried out that exercise it would, we believe, inevitably have come to the same conclusion as we have reached, on our approach, at para. 35.

38. We have not in reaching this conclusion lost sight of the fact that the cheapness criterion was indeed disproportionately unfavourable to employees in the Claimants' age group, and we can well understand their disappointment at their non-selection. But it is fundamental that not all measures with a discriminatory impact are unlawful……."

I agree with the analysis of the EAT in Land Registry v Benson. Moreover, in the present case the Respondents' argument is stronger still. In Benson the older staff were placed at a disadvantage because the cost of granting their applications for early retirement would have been greater than in the case of younger colleagues. In the present case the officers who were required to retire pursuant to Regulation A19 were selected because the Regulations made all other officers ineligible. As Baroness Hale of Richmond JSC said in Seldon v Clarkson Wright and Jakes [2012] ICR 716 at paragraph 65: "where it is justified to have a general rule, then the existence of that rule will usually justify the treatment that results from it."

48. In performing the required balancing exercise therefore, an employment Tribunal must assess not only the needs of the employer, but also the discriminatory effect on those who share the relevant protected

characteristic. In **University of Manchester v Jones 1993 ICR 474** the Court of Appeal held that this involved both a quantitative assessment of the numbers or proportions of people adversely affected and a qualitative assessment of the amount of damage or disappointment that may result to those persons, and how lasting or final that damage is. Particular hardships suffered by the Claimant may also be taken into account provided proper attention is paid to the question of how typical those hardships are of others who are adversely affected. The greater the discriminatory effect, the greater the burden on the employer to show that the PCP corresponds to a real commercial objective and is appropriate for achieving that objective. The degree of justification required is "proportionate" to the degree of disparate impact caused by the employer's practice or policy.

49. Applying the legal principles to the facts found by it, the Tribunal reaches the following conclusions.

Conclusions

50. The starting point is to identify the provision, criterion or practice said to have been applied by the Respondent. The Claimant relies on the practice to set dates for interviews for recruitment to a ST4 emergency medicine course which the Respondent was not prepared to deviate from regardless of an individual's circumstances. The Respondent accepts that it applied such a practice/policy and that it was applied generally to men and women.

51. Did then this policy place women at a particular disadvantage when compared to men? The relevant group for comparison in this case must be those doctors who are considering applying for an emergency medicine ST4 position. It cannot be limited to those who actually apply since the disadvantage under consideration included those put off from applying – indeed the Claimant made no application herself in respect of the positions which were interviewed for on 11 April 2018.

52. Ms Niaz-Dickinson is correct to point out that the Tribunal has no statistical evidence before it in respect of such group. However, there was never going to be any statistical evidence available because there is no record or way of finding out who was or might have been put off applying because they were pregnant, or might recently have given birth or were hoping or trying to become pregnant. The only identifiable person the Tribunal notes who fell within such a category in the recruitment exercise was the Claimant herself. The Respondent would only know whether anyone else chose not to proceed with an application or was concerned regarding the interview dates if they were contacted by the candidate and if the candidate divulged the reason for her concern. Again, however, no records were kept.

53. There is, however, evidence from the Respondent's own witnesses. Mrs Kennedy referred to some candidates attending interviews when heavily pregnant and both Mr Foster and Mr MacKenzie were aware that pregnant

employees had contacted the Respondent in the past regarding difficulties in attending interviews and assessment centres because of their pregnancy.

54. Ms Niaz-Dickinson objected to any suggestion that any form of judicial notice might be taken that with a pool of candidates, the vast majority of whom would be in their mid-20s to mid-30s by age, there was a greater likelihood and some degree of certainty that employees might be or become pregnant or recent mothers when compared to perhaps much more senior positions where the age range of credible candidates would be somewhat older. Miss Tharoo urges the Tribunal in the opposite direction and also to infer that, where there is one day only available for interview, those who are heavily pregnant on around that day are unlikely to be able to attend. Ms Niaz-Dickinson's objection is not accepted. The Tribunal is not making any stereotypical assumption or suggesting that women do not sometimes choose to postpone childbirth beyond their mid-30s. However, the group of potential candidates for ST4 emergency medicine positions was one where pregnancy or maternity considerations would not uncommonly apply.

55. The Tribunal accepts that pregnant women are more likely not to be able to manage to attend set dates of interviews when compared to men who might apply for the relevant positions. To put it another way, there is a 'real risk'. That is not to say that all pregnant women or even a majority of pregnant women are likely not to be able to attend. Nevertheless, a group disadvantage arising out of pregnancy/childbirth exists within the comparator group. The suggestion that a male doctor may wish to be at the birth of his child (a single day event) does not remove the group disadvantage to which female doctors within the group are subjected.

56. Did then this practice/policy of the Respondent put the Claimant at that disadvantage individually. Certainly and incontestably it did. Her opportunity to be assessed for the position was on (and only on) ultimately 11 April 2018 and, as matters transpired, she actually gave birth on the day before and was still in hospital on the day the assessment centre was run. The fact that the Claimant was as at the date of the assessment centre no longer pregnant was alluded to as perhaps a relevant factor in the Tribunal's deliberations. It is in fact not considered to be material to the Tribunal's considerations. The Claimant was put off and decided not to apply for the position as a pregnant woman uncertain as to when her baby would be born but certain that the interview was scheduled during a period when she would be unable or (medically) unwise to attend due to pregnancy. Nor does the fact that the Claimant could have applied for an emergency medicine ST4 position in an earlier year remove the disadvantage. The Claimant for understandable domestic reasons, not that the reasons make a difference, was entitled not to take the earlier opportunity to apply for the position, but still consider herself to be disadvantaged at a later date when she wished to apply, but was pregnant. Nor can the Claimant lose her right to complain by not having taken a putative opportunity to have had a child at an earlier date. Finally, the Claimant's disadvantage did not, as again was suggested,

arise out of the location for the interviews. The issue of location arose only because the Claimant was pregnant and the issues of location and the Claimant's state of health as a heavily pregnant woman cannot be separated.

57. The burden then shifts to the Respondent to show that in applying its policy it acted proportionately in pursuit of a legitimate aim.

58. The Tribunal firstly seeks to identify and test the legitimate aim put forward. That is said to be the need to operate a national recruitment system which is efficient, cost-effective and fair to all. The Tribunal accepts indeed that this was the Respondent's genuine aim and that it was a legitimate aim for it to pursue. There was a clear benefit to recruiting on a national basis for the ST4 positions where candidates were appointed as a distinct cohort and where they could put themselves forward for alternative opportunities in other specialties around the same time and then accept their preferred offer if they were lucky enough to have more than one. In turn, the candidates could all be ranked within each specialty to enable a fair allocation to positions, some of which might be more in demand than others dependent upon the medical centre involved and/or its geographical location. The Respondent has referred to the new national process being an improvement on the more fragmented process operated previously. It was legitimate for the Respondent to seek to seek to achieve the recruitment in a cost-effective manner and so to make the best use of public money. It was efficient to operate sometimes mass assessment centres to assess the candidates in the shortest possible timeframe which in turn would cause consultants to be taken away from their primary clinical care roles for the least length of time. It was of course legitimate for the Respondent to aim to have in place a fair process. Any other form of process would be at odds with NHS values and more general good practice in recruitment. The Respondent genuinely and on a reasonable basis concluded that candidates being seen together and compared against each other in a single process which could be moderated for consistency was more likely to produce a fair outcome. Operating with set interview dates which could not be changed according to individual circumstances was an appropriate means of achieving the Respondent's aim. Having everyone interviewed together enabled coherent and efficient workplace planning, kept (direct and indirect) costs down and allowed for a consistent and fair treatment of candidates.

59. The Tribunal must then on the question of proportionality perform a balancing exercise between the needs of the employer and the discriminatory effect on those who share the relevant protected characteristic i.e. women within the comparator pool. An employer may go beyond what is reasonably necessary to achieve its aims, thus rendering a measure disproportionate. In accordance with **University of Manchester v Jones** the Tribunal's balancing exercise involves both a quantitative assessment of the numbers or proportions of people adversely affected and

a qualitative assessment of the amount of damage or disappointment that may result to those persons, and how lasting or final that damage is. The particular hardships suffered by the Claimant may also be taken into account provided proper attention is paid to the question of how typical those hardships are of others who are adversely affected.

60. The effect of the Respondent's policy/practice on the Claimant was not insignificant as she was put in a position of having to wait another year to be able to apply for an important training role which was necessary to advance her career and fulfil her ambition to be a consultant in emergency medicine. The situation created anxiety and uncertainty for her.

61. However, when assessing the discriminatory effect on women who might have applied for an ST4 emergency medicine position, it becomes clear that the effect on women is likely to be small in numbers as the disadvantage can only arise at all in respect of women who are pregnant, are trying for a baby or have recently given birth. Indeed, not all pregnant women or recent mothers would be disadvantaged by the Respondent's policy – the effect would be on those in the later stages of pregnancy at the interview date, or who suffered illness during pregnancy or who had very recently given birth. In seeking to argue that the Respondent would not be inundated with requests from pregnant women to rearrange interviews, Miss Tharoo could not but accept that the Respondent's policy was unlikely to affect a great many women.

62. At times it has felt from both sides that this case was being fought as if it was being alleged that there had been a failure on the Respondent's part to comply with a duty to make reasonable adjustments – a duty which could arise only in the context of a disabled candidate. The evidence has focused on the Claimant's individual situation and the potential alternatives she put forward for interview arrangements which might have enabled her to be assessed. There was the possibility of bringing forward the interview date to an earlier date for all of the applicants. The closing date for all applicants was 21 February 2018 and the Claimant accepted that this would have involved an assessment centre being arranged close to the closing date. The Tribunal accepts the Respondent's evidence that this would have put significant pressure upon the process in terms of having sufficient time to longlist the applicants, check the longlisting and to send out invitations for candidates to accept and revert with their preferred slots. Moving the date of the assessment centre forward would then only have run an equal risk of disadvantaging another candidate who, whether because of a protected characteristic or otherwise, might have had no difficulty with the original date but now find the rearrangement to the earlier date problematical.

63. The Claimant put forward the possibility of a separate assessment centre being set up for herself alone. The evidence from the Respondent is that it would not have been straightforward to get together a panel of the necessary number of consultants to mirror the main assessment exercise.

The Tribunal accepts at least the risk that the Claimant's assessment might not be robust in terms of consistency with others without the ability to moderate and benchmark the way the Claimant had been scored against other candidates. The Tribunal does not regard a requirement for a separate set of interview questions to be devised to be overly problematical given that it is clear from the Respondent's evidence that there were a bank of questions used at the assessment centre and that the questions asked of candidates might change during the course of a day. Whilst the cost was not huge, the Tribunal recognises the Respondent's position that the cost would be seen as disproportionate for one candidate. Of course, the Claimant was clearly, it transpires, a very strong candidate, but that will not necessarily the case in respect of every candidate seeking an alternative date for an assessment centre.

64. The Claimant's strongest argument in relation to her personal circumstances perhaps was a suggestion that she be interviewed together with the ST1 ACCS candidates given that consultants specialising in emergency medicine who would be part of the pool of assessors for the ST4 positions would already be in place at a designated venue. Again, however, the issue of effective moderation arises and the risk remained of the assessors' judgement being skewed by them becoming familiar on the day with the standards of answers given by candidates for a much lower level position.

65. Further, the availability of the alternative ST1 ACCS assessment day is one which might have applied in the Claimant's individual circumstances at the particular point in time when she wished to be considered for an ST4 position, but was not a potential solution inevitably available to a candidate unable to make an ST4 assessment centre. The alternative date would have to be some distance in time from the problematic date otherwise the candidate might remain disadvantaged, yet the greater the gap, the greater the threat to the robustness and coherence of the recruitment exercise. The argument that the Claimant could have attended this alternative assessment centre day risks an assessment by the Tribunal concentrating only on the Claimant's individual circumstances rather than alternatives available more widely or to be potentially taken advantage of by an otherwise disadvantaged group of women. The Tribunal reminds itself that the Respondent is required to justify the PCP not its treatment of the individual Claimant.

66. Indeed, the removal of the Respondent's policy so as to allow alternative interview dates dependent on an individual's circumstances would risk the coherence and integrity of the Respondent's carefully devised recruitment process which incorporated strict timelines for the genuine purpose of efficiency, robustness and fairness in recruitment and in turn in providing certainty in workforce planning for the NHS trusts it ultimately serves. The striking down of the Respondent's policy for set interview dates would be

likely to result in a wider disruption of recruitment processes to the detriment of all these aims.

67. The Respondent has shown to the Tribunal's satisfaction that the application of its policy of not deviating from set interview dates was a proportionate means of achieving its legitimate aim notwithstanding its discriminatory effect. The Claimant's complaint of indirect sex discrimination must therefore fail and is dismissed.

68. The Tribunal considers that had the Claimant and any other woman seeking an ST4 emergency medicine position not inevitably had an opportunity to reapply for the same role on an annual basis, this would have influenced its balancing of the Respondent's aim and the discriminatory effect. The Tribunal also, as an aside, wonders whether the Respondent would have recognised its obligation to make reasonable adjustments had the Claimant been unable to attend an assessment centre for a reason relating to a disability. The Respondent applies a rigid policy quite (deliberately) blind to individual circumstances and with a seeming reluctance to look for solutions. In another type of case, this may put it in some difficulties. Furthermore, there was, in its communications with the Claimant, a lack of sympathy or understanding. The way in which the Claimant's queries were dealt with was at times dismissive and insensitive. That will have compounded the Claimant's sense of genuine upset and disappointment.

Employment Judge Maidment

Date 17 January 2019