EMPLOYMENT TRIBUNALS

Claimant: Mrs K Simpson

Respondent: T J Smith & Nephew Medical Ltd

Heard at: **Hull** **On:** **4, 5, 6 & 7 December 2018**

Before: **Employment Judge Rogerson**
Members: **Mr W Roberts**
Mr G Corbett

Representation
Claimant: Ms N Braganza, of Counsel
Respondent: Miss L Quigley, of Counsel

JUDGMENT having been given at the hearing and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by the claimant's representative at the end of the hearing, the following reasons are provided:

REASONS

1. The issues in this case were agreed at an earlier preliminary hearing and were clarified with Counsel at the beginning of the case. The claimant makes complaints of unfair dismissal and indirect discrimination.

2. For the unfair dismissal the respondent relies upon 2 potentially fair reasons for dismissal, redundancy or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The issues are whether, based on the findings of fact made by the tribunal the respondent has shown a potentially fair reason and acted reasonably in dismissing for that reason, having regard to the requirements of section 98(4) of the Employment Rights Act 1996.

3. For the indirect sex discrimination complaint, the alleged discrimination is dismissal. There must be a PCP which is on the face of it neutral, that the respondent applied to everyone in the relevant group, whether they have the protected characteristic or not (men and women), which puts, or would put

women at a particular disadvantage, and puts or would put, the claimant at a disadvantage. If it does and the employer cannot show that the PCP is a proportionate means of achieving a legitimate aim, the complaint succeeds.

4. The claimant relies on the detriment of dismissal when 3 PCP's were applied which are:

    4..1. the requirement that the Senior QA analyst position be carried out on a full-time basis (1st PCP),
    4..2. the requirement that the Senior QA analyst position be carried out over the course of 5 days per week (2nd PCP),
    4..3. the requirement that the Senior QA analyst position be carried out by a single employee, as opposed to on a job share basis (3rd PCP).

5. After the tribunal had read the witness statements we clarified with Ms Braganza, whether the claimant still relied upon all 3 PCP's applying when the alleged act of discrimination occurred (dismissal). She confirmed all 3 PCP's were still relied upon. We also clarified with Ms Braganza how the claimant intended to show group disadvantage for each PCP. She confirmed that she would provide the tribunal with a report which was "The Modern Families Index 2018" to show that statistically more women than men worked part time because they have primary responsibility for childcare.

6. The Tribunal heard evidence for the respondent from Mr Christopher Lee Spencer (Senior Director of Engineering), Mr Wilson Kennedy (Quality Director) and Mr Timothy James Colley (Laboratory Manager (QA Operations) & GLP QA (Preclinical Sciences)). For the claimant we heard evidence from the claimant and from one witness Happy Nkomo. We also saw the statement of Mr Sean Smith, lay union representative, who did not attend to give evidence. His evidence was not directly relevant to the issues and we attached less weight to his statement. We also saw documents from an agreed bundle of documents from which we made the following findings of fact:

    6.1. The claimant was employed by the respondent in 1999, initially as a temporary Technician, then in 2000 as a Quality Analyst. She was promoted to the role of Senior Quality Analyst in 2011 and remained in that role until her dismissal in May 2018.

    6.2 The respondent is a medical technology business involved in manufacturing joint replacement systems for knees and hips and wound care management products for the treatment of acute and chronic wounds. The respondent's manufacturing site is based in Hull, where the claimant worked in the physical testing laboratory which is part of the Quality Division managed by Mr Tim Colley.

    6.3 There is also a chemical testing lab where Happy Nkomo (HN), a Quality Analyst, worked from September 2013 until her dismissal in May 2018. The claimant and HN were the only part time workers employed in the Quality Division, both worked part time hours after taking maternity leave after making flexible working requests. The claimant made a flexible working request in February 2006 reducing her full-time hours of 37 hours per week to 15 hours per week over 2 days a week working Monday's and Tuesday's. In January 2016, HN

went from working full time hours to part time hours of 24 hours worked over 4 days a week.

6.4 Both the claimant and HN had the benefit of working flexibly to assist them with their child care needs following maternity leave. In the claimant's case that arrangement had continued for 12 years up to her dismissal and for HN for 3 years. In 2011, as a part time worker, the claimant was promoted from a Quality Analyst (QA) to a more senior role of Senior Analyst (SQA) in 2011, demonstrating a positive attitude towards part time working in the past.

6.5 The respondent has a flexible working policy. The flexible working policy states that its purpose is about "*finding a working arrangement that can meet the needs of the employee and the organisation*". Page 262 of the policy sets out some of the criteria that will be considered in deciding flexible working arrangements, which includes: the structure of the department and staff resources: analysis of the tasks specific to the role and analysis of the workload. It defines (at page 264) job-sharing as "*an arrangement whereby two part-time employees share the responsibilities of one position*", and part time working as "*a system whereby the employee is contracted to work fewer than the standard number of contractual hours per year for the type of work in question to a comparable full- time employee doing the same type of work".* For the claimant a comparable full- time employee is an SQA working 37 hours per week.

6.6 In the physical laboratory where the claimant worked, there were six full time SQA's, four women and two men. The claimant was the only part time employee.

6.7 The job description of an SQA (page 67) and QA (page 44) are very different. There are clear differences in the duties, seniority and responsibilities of a QA and an SQA which are reflected in the salary differential that applies.

6.8 In the physical laboratory, normally promotion from QA to SQA would happen internally as the QA gained the skills and experience required on the job which was the way the claimant and others had progressed to the SQA role in that laboratory. This was because the products supplied were bespoke and physical testing methods were unique to those products, so the experience skills and talent the respondent required were 'home grown'.

6.9 At least sixty different tests would be carried out in the physical lab and familiarity with and knowledge of those tests, was key to the role. External recruitment was not an attractive option because of the bespoke nature of the work.

6.10. During cross examination, the claimant was taken through her job description in detail and accepted that in the 2 days she worked she only performed part of the role required of an SQA. That was not put to the claimant as a criticism but reflected the reality of the duties she was actually doing in her '2 day' working week. It was not viewed critically by the respondent at the time, because they had promoted

her into that role as a part time worker. Until the reorganisation in 2018, the respondent had no concerns about the claimant performing the role she did part time because the business had been able to accommodate that arrangment.

6.11 We also accepted Mr Colley's analysis of the role and duties of and SQA was accurate. He sets out in detail what the requirements of the role are at paragraphs 18 – 26 of his witness statement. His evidence was not challenged and we accept his analysis is accurate. As the Laboratory Manager with overall responsibility he was better placed to understand what the role entailed and what the business requirements were for the role in practice in the light of all the available staffing resource. The claimant only had a snapshot of the bigger picture but is basing her analysis of events in relation to her dismissal on that snapshot.

6.12 She agrees in her witness statement that a large part of her job was "testing and data checking" but that was a part only of the role of an SQA. It was clear from cross examination there was a lot of the role the claimant was not performing that was covered by others. One area where the difference is clearly demonstrated is in report writing. The claimant had written one stability report in three years, in comparison to others who were doing significantly more reports than the claimant (the highest number was 154 over three years). The claimant accepted that she had only written one stability report and we accepted Mr Colley's evidence that he was able in that instance to 'cherry pick' that report to fit the time constraints that the claimant had in her '2 day' working week. However, the requirements for report writing did not decrease but had increased with less staff resource available for this work which meant this type of cherry picking could not continue.

6.13 One area of reduced resource was Mr Colley. Following the reorganisation because Mr Colley's management responsibilities would increase with the addition of responsibility for the preclinical sciences, he had less time available to support the laboratory. Writing technical reports is a principle accountability of the SQA job identified in the job description. Mr Colley explained why this was a task that was a) unpredictable in terms of the time demands of the task and b) required continuity and c) an immediate response to whatever the report highlighted as a concern. This is because of the implications that the testing had on the healthcare products supplied. Report writing required one person to be accountable for the report requiring that individual to have continuous involvement in the assessment, and analysis and response to the data produced from the testing for the stability report. Mr Colley's evidence explains this clearly at paragraphs 20 and 21 of his witness statement. This was a significant difference from the job the claimant had been performing and the business requirements going forward. The claimant agreed that Mr Colley as overall manager was better placed than she was to analyse the needs of the business and how those needs were best managed.

6.14 Pre-2018 and the Apex reorganisation there had also been a reduction in the staffing resource in the Quality Division. Headcount

in the Quality Assurance team had been reduced by 30% but the workload and demand for reports had increased. The records show 131 reports in 2015 increasing to 172 reports in 2017 with less staff resource available to meet that increased demand.

6.15 The claimant's team had also lost staffing resource at a more senior level of management, significantly Mr Pollard, who was a prolific report writer who had left. The headcount at that senior level had reduced from 3 to 1. In terms of the physical laboratory team numbers had also reduced from 9 to 6. Mr Colley's responsibilities had increased limiting the time he had available to support the team by 50% going forward. That is the context in which the Apex reorganisation happened.

6.16 Mr Colley explained the background pre-apex and post-apex. The consequences of that restructure were that "*The business no longer had sufficient senior capacity to enable a senior QA to only carry out data checking, the full spectrum of duties needed to be completed"* see paragraph 30 of his witness statement.

6.17 The Apex restructure affected not only the quality division but four other divisions of the business. A briefing document was sent out to all staff in February 2018 which explained the impact of Apex. A collective consultation process commenced in March 2018 onwards on the proposed reorganisation, consequential redundancies, means of avoiding dismissal, reducing the numbers affected and mitigating the consequences of the proposed redundancies for the affected employees.

6.18 At the individual consultation meetings, the claimant was represented by her lay union representative Mr Smith. No issue was raised by the union about any failures in the collective consultation process that would impact upon the claimant in the individual consultation process. There is no dispute that there were 3 consultation meetings with the claimant, one on 20 March 2018 (pages 129 – 131) one on 5 April 2018 (pages 143 – 145) and the final one on 18 April 2018 (pages 156 – 159).

6.19 For the claimant the restructure did not mean there was a reduction in the requirement of the business for a Senior Analyst and there was no redundancy situation. The requirements of the business for employees to carry out work of a particular kind (Senior Analyst) had not ceased or diminished and were not expected to cease or diminish. The restructure resulted in an increased requirement for the claimant to perform more work, not less work, by working more hours, not less hours. It was not a redundancy situation as defined by section 139 of the Employment Rights Act 1996 although at the time the respondent proceeded as if it was.

6.20 The respondent's notes of the consultation meetings are brief and in cross examination some criticism has quite rightly been levelled at the respondent for that lack of detail. Especially in circumstances where a HR officer was in attendance as note taker and adviser. Given the size and resources of the respondent it was reasonable to

expect that fuller notes would have been made at the consultation meetings. Nothing however turns on those notes in this case.

6.21 The first consultation meeting took place on 20 March 2018 and the relevant part of the note is at page 130. Mr Colley explained the reason for the reorganisation and the impact it would have on the claimant in that it had been determined that the role required the claimant to work increased hours. The claimant had the options of taking the full-time role of SQA or the possibility of a QA role on a job share basis or applying for alternative roles in the business. At that meeting the claimant identifies a further option which she wants to consider which is redundancy. Following that meeting she requests figures for the full-time salary for the SQA role, the job share salary for QA role and redundancy.

6.22 After this meeting the claimant's immediate response was to contact HR for a vacancy list. On 22 March 2018, as requested the claimant was provided with the financial figures for redundancy, the full- time salary of the SQA which was £25,206.06, and job share salary at QA based on her 15 hours which was £8,708. The claimant understood from those figures that if she accepted the job share at QA level she would be £2,000 per annum worse off.

6.23 On 23 March 2018, she spoke to Mr Colley and he confirmed to her that "*it was nothing personal but the new laboratory structure could not accommodate an SQA on a part time basis"*. The reference to it not being 'personal' reflects how the claimant said she felt immediately after that meeting on 23 March 2018 and how she continued to feel until her dismissal in May 2018.

6.24 The claimant describes how she then spoke to her colleague HN who had also been informed that her role could no longer be carried out on a part time basis. The claimant asked HN if she would be interested in doing a job share not at QA as offered but as a SQA. It was agreed that HN would email Mr Colley to explore that option. The claimant was copied into the email exchange between HN and Mr Coley and quotes part of that exchange in her witness statement. The full email that Mr Colley sent to HN is at page 139C. It confirms that the review completed for Apex had confirmed that the full requirements of a Senior QA Analyst role could not be accommodated on a part time basis for two reasons, "*one because the current or proposed headcount and secondly because a job share is impractical due to the principle accountabilities associated with the role*".

6.25 It is interesting to see what the claimant's view of that email is in her witness statement. At paragraph 36 she states: "*given that I have done this role for nearly 10 years I consider myself very knowledgeable about the role and could not understand why, if the role needed to be full time it had to be done by one person only, I fully believe that the work can be done on a job share basis".* The claimant's view can only be based upon the snapshot she had of the requirements of the SQA role based on the two days she worked prior to the Apex reorganisation. She also assumes her knowledge is

better than Mr Colley's. However in her assessment she does not address the reduction in headcount and the impact that had on the role and principle accountabilities.

6.26 Although HN was invited to discuss the position further if she had any queries in the light of the explanation given. She did not seek further clarification. She accepted the explanation, because she was not in a position, to disagree.

6.27 HN's perspective on the two roles before the claimant's suggested proposing a job share of the SQA role was that the claimant would be 'stepping down' to a QA level and it would be unfair for her to be demoted just to do a job share with HN. HN accepted in cross examination there were clear differences between the SQA and QA roles and that the experience and skills that she had were in a chemical testing laboratory not a physical testing laboratory. She had not considered how a job share would work in practice or where it would be based.

6.28 The second consultation meeting took place on 5 April 2018 and the notes are at page 143. The claimant was told at this consultation meeting that the full SQA role could not be completed in two days because of the need for projects to be completed and not just testing. The claimant understood and says in her witness statement "*obviously I could not be expected to do a full- time job in two days"* She correctly identifies that her role was expanding not diminishing which was why she was confused by it being labelled as a 'redundancy' situation. The claimant was not willing to work full time, because she said it was not suitable for her because of the pick-up and drop off times for her children who were at different schools (one was in the final year of primary school, one was in secondary). The QA job share was something that she viewed as a 'personal insult' because she saw it as a demotion with a pay cut. In her email at page 148 she raises seven reasons why she views it as a personal insult and she asks the respondent to review the redundancy figures provided to see if they would increase the amount offered to reflect her work ethic and contribution.

6.29 It is odd, and the claimant was asked why, at that very first opportunity she had, she did not inform the respondent of all of the reasons why full-time working was not a viable option for her so that the respondent could address those matters before the next consultation meeting when the alternative to this was her employment ending. What happens next is that Mr Colley reflects on what the claimant has suggested and has some discussions with Mr Kennedy, Quality Director with overall responsibility for the products manufactured at the site. He thinks the hours can be arranged around school pick up and drop off and is clearly trying to accommodate the claimant's request.

6.30 Mr Colley arranged for the claimant to speak to Mr Kennedy on 10 April 2018. That discussion was outside, the consultation process and was the only meeting Mr Kennedy had with any affected employee and happened because Mr Colley wanted to retain the

claimant. The meeting was an informal meeting and a positive meeting and one which Mr Kennedy thought would result in a positive outcome. The only issue that the claimant raised with him was the problem with school drop off and pick up. Mr Colley had already provided a possible solution to this before the meeting which was that the claimant could continue to work 15 hours over 2 days (Mondays and Tuesdays) as before and for 3 days (Wednesday- Friday) she would work reduced hours of 15 hours working from 9:30 – 2:45 to accommodate the difficulties identified in relation to picking up and dropping off her children. This was a reduced working week of 30 hours, reducing the full-time hours requirement by 7 hours. This modified the requirement to work full time hours as SQA and was a 'part-time working' arrangement as defined by the respondent.

6.31 Before the next consultation meeting on 17 April 2018, a further email exchange took place between the claimant and Mr Kennedy (pages 154 & 155 in the bundle). In this exchange the claimant identifies a second barrier to working full time, after the respondent has agreed to remove the first barrier. She informs the respondent that she had recently attended some hospital appointments with her daughter which meant that going forward it was likely that she would need to time off for further hospital appointments. She did not raise any other issue. Mr Kennedy responded informing the claimant that because he was unaware of those personal circumstances at his meeting with the claimant, she should discuss the hours further at the third consultation meeting on 18 April 2018.

6.32 The claimant thanked Mr Kennedy for his comments and acknowledged that he had explained to her the business structure and needs regarding the Senior Analyst role.

6.33 The third consultation meeting took place on 18 April 2018 and the notes are at page 156. The claimant alleges that Mr Colley raised his voice and shouted at her at this meeting. Mr Colley denies this. We have the statement of Mr Smith who did not attend to give evidence but suggests frustration was expressed by Mr Colley. We accept that Mr Colley probably was frustrated at this meeting because from his perspective he was trying to meet the needs of the claimant and the business and was 'getting nowhere'. The claimant was not accepting his view that the SQA role was not appropriate for a job share and was taking it 'personally'. The notes of the meeting make it clear to the claimant that it was the role and not the individual in that role motivating the decisions made. The claimant told Mr Colley at this meeting for the first time that the proposed modification of hours was not a viable option for her because of school holidays. She rejected the option of job share with QA at a lesser role. This option was in any event no longer available because the proposed job share partner, HN had already left taken voluntary redundancy.

6.34 At this hearing, during cross examination, the school holiday situation was explored with the claimant and the childcare difficulties she was referring to at that last meeting. She explained that her children were aged 10 (primary school) and 13 (secondary school). She had said that there was a holiday club available for her primary school aged

child but no holiday club available for her '13' year old. It was put to the claimant that if she had accepted the new arrangement, she would have had an additional resource in terms of annual leave and the possibility of buying in further leave which would have given her 41 days leave and the right to request parental leave. She said she had not considered any of that. The claimant was asked if she had explored any options for childcare for her '13' year old and she said she had not because she "didn't want to". She agreed she did not give any details to Mr Colley to explain why the school holidays were a problem for her at the meeting.

6.35 After this meeting dismissal was confirmed by letter dated 4 May 2018 which is page 172. The letter sets out the reasons for the dismissal and makes a payment of 12 week's pay in lieu of notice. The letter states that:

> *"During the 30 day consultation process and formal consultation meetings it was confirmed to you that your current role at senior level cannot be fulfilled on a part time basis, we discussed and explored with you any options for suitable alternative employment and in an effort to mitigate this redundancy the following proposals were made,*
>
> - *job share with a suitable colleague as a Quality Assurance Analyst,*
> - *remain a Senior Quality Analyst part time to include your usual hours and in addition Wednesday to Friday working hours (reduced to accommodate dropping off and collecting your children from school and also flexibility for your daughter's medical appointments)*
>
> *At your final consultation meeting on 20 April 2018 you confirmed that the above proposals are not suitable for you therefore it was explained to you that after due consideration, and in the absence of any alternative work, or the proposed options being suitable to you, your employment will cease on 17 May 2018 by reason of redundancy.*

6.36 By an email dated 9 May 2018, the claimant appealed against that dismissal. She confirmed that the modified hours arrangement that had been offered to her around school times had been declined. She complains of sex discrimination and refers to part time workers discrimination.

6.37 On 30 May 2018, an appeal hearing took place with Chris Spencer who was the Senior Director of Engineering. The claimant accepts that she raised all the points that she wanted to and felt she was repeating herself. In her claim form the complaint she raises about the Appeal is that the length of hearing was limited to one hour. Mr Spencer's evidence which we accepted (which was not challenged) was that he made it clear that if longer time was needed then the meeting could be reconvened to another date.

6.38 Following the meeting, Mr Spencer sent the claimant a detailed

outcome letter which is at page 200 with a supporting document which is at 202 – 203. The appeal outcome confirms that a job share could not be accommodated by the business at the Senior QA level due to the issue of continuity and job requirements. The job share proposed in the role of QA Analyst had been declined. The outcome letter clearly and comprehensively sets out the reasons why the appeal was dismissed and why the dismissal decision was confirmed.

Applicable Law

7. The relevant sections of the Equality Act 2010 in relation to the indirect discrimination complaint are Section 19, Section 23 of the Equality Act 2010 and section 136 of the Equality Act 2010. I also considered the 'ECHR Code of Practice on Employment' and the relevant parts of the Code are referred to in the conclusions. In relation to the unfair dismissal sections 98(2) and 98(4) apply.

8. Both counsel have referred to the Supreme Court decision in Essop and others -v- Home Office (UK Border Agency) and Naeem -v- Secretary of State for Justice 2017 UKSC 27 which we considered.

9. Both Counsel also provided written closing submissions which we also considered before reaching our conclusions

Conclusions

10. The alleged act of indirect sex discrimination is dismissal and is pleaded at paragraph 25 of the claim form which states: "*I believe my employer is applying a provision criterion or practice(PCP) that senior quality analysts have to work full time. This puts women at a particular disadvantage when compared to men. It has operated to my disadvantage as I have been dismissed from my role. The requirement to work full time was not a proportionate means of achieving a legitimate aim"*.

11. Only one 'PCP is identified in the claim form but at this hearing the claimant relies upon 3 PCP's which we will deal with. Ms Braganza maintains her position at the end of this case that all 3 PCP's were applied at dismissal despite the agreed facts and chronology. The requirement that senior analysts 'have to work full time' did not apply at dismissal because that requirement that would apply to all SQA's had been modified for the claimant on 10 April 2018 and after that date there was no such requirement. The alleged act of discrimination is dismissal, which occurs on 4 May 2018 when the PCP had already been modified. Only the modified PCP was applied to the claimant at dismissal.

12. The modified PCP is the requirement to work 30 hours (part time working) with the claimant continuing to work under her existing arrangement of 15 hours over two days (Monday-Tuesday) with an additional requirement to work 15 hours over three days, (Wednesday to Friday), to fit in with the claimant's request to work additional hours around school pick up/drop of times. That PCP was unique to the claimant and was only and would only apply to her because she had requested modification of hours around school pick up and drop off times.

13. Code 4.6 of the ECHR Code makes it clear that the PCP that is/to be applied must be neutral and must apply to everyone in the group, male and female. This modified PCP, of this part-time working arrangement was only applied to the claimant, it was unique to her and was applied to her because of her request in relation to school hours. We did not find that PCP was applied to the group, it was only to one individual, the claimant. A complaint of indirect discrimination based on PCP's that were not applied must therefore fail. We find support for our position on this conclusion from the guidance given in Essop and others -v- Home Office (UK Border Agency) and Naeem -v- Secretary of State for Justice 2017 UKSC 27 where the Supreme Court held that indirect discrimination required a causal link between the PCP and the particular disadvantage suffered by the group and the individual. There can be no finding of unlawful discrimination until all four elements of the definition in section 19(2) of the Equality Act 2010, are met which was not the case here.

14. For completeness we will deal with the second and third PCP's relied upon by the claimant of the requirement for the SQA role "to be carried out over the course of 5 days" and the requirement that "the SQA role is carried out by a single employee over 5 days a week not as a job share". However, our findings of fact are the only PCP applied after the 10th April 2018 and at dismissal was a requirement that was only and would only apply to the claimant of 30 hours (part time working) over 5 days a week with 3 days arranged around school pick up drop off hours. That requirement was applied to the claimant as a single employee not as a job-share. That PCP was unique to the claimant and the same rationale as above applies which means no finding of unlawful discrimination can be made.

15. However, addressing the PCP's as they are put by the claimant for completeness we will deal with the other 3 requirements for indirect discrimination also. The PCP's as put would appear to be neutral PCP's and would apply to men and women equally. The issue identified in the list of issues for the group disadvantage element is *'did that PCP put or would it put, women at a particular disadvantage being that women to a greater extent have childcare responsibilities and are primary carers, and this constrains their ability to work full time – or 5 days a week"*. There was no requirement for the claimant to work full time it was the 5 days a week requirement in a way unique to the claimant's existing contract and circumstances around school hours that was applied to her at dismissal.

16. To prove 'group' disadvantage the claimant relies upon the statistics in the study produced generally in 'The Modern Families Index 2018' which is described as a "comprehensive survey of how working families balance between work and family life in the UK". It is a survey of 2,761 working parents across the UK who responded, with at least one dependent child aged 13 or under. The sample comprised 1,304 fathers and 1,457 mothers spread equally across 12 regions of the UK including Scotland and Wales.

17. It is clear the statistics relied upon are general and not specific to the workforce (men and women) where the claimant worked. Whilst statistical evidence can be relied upon to show group disadvantage it must show the proportion of women that could comply was smaller than the proportion of men that could. Paragraph 4.15 of the code makes it clear *'the*

circumstances of the group must be sufficiently similar for a comparison to be made and there must be no material differences in the circumstances so the pool should consist of the group to whom the PCP affects or would affect either positively or negatively'.

18. There were seven full time SQA's: five women, two men who worked full-time (37) hours over 5 days. The claimant was the only part time worker working 2 days a week. We do not have data of how the PCP's relied upon either positively or negatively affected that group of men and women. In closing submissions on group disadvantage for all 3 PCP's Ms Braganza submits at paragraph 46 that "*the group disadvantage in respect of each PCP is the same: As women to a greater number are still responsible for childcare, all 3 of the PCP's do or would put women at a disadvantage*". She relies on the statistics that the claimant has provided which do not assist with the comparative exercise that is required by section 23 of the Equality Act 2010. The circumstances of the two groups must be sufficiently similar for a comparison to be made. There must be no material difference in circumstances.

19. The general statistics do not assist us either. At page 10 of the report the claimant relies upon it states "*Fathers are more likely to make use of workplace flexibility, and also working time flexibility. Twice as many mothers as fathers worked flexibility through reducing their hours: interestingly, although numbers were relatively small, more fathers (11 per cent) than mothers (9 per cent) said that they were part of a job share arrangement*. Group disadvantage in relation to the PCP's the claimant relies upon was not made out based on the information that the claimant has provided.

20. As to the third requirement of individual disadvantage - we accepted that the claimant had reasonably perceived that she was at a personal disadvantage because of the refusal of the job share arrangement and the requirement to work reduced hours over 5 days around school hours because she did not want to work five days a week. She was denied her choice.

21. As to justification the final requirement we accepted Mr Colley's reasons which cogently explain why the SQA role needing to be carried out by a single person over five days a week, supported by the evidence we saw. It was because of the increasing demands and nature of the SQA role and the work required with a decreasing staff resource in that department. The legitimate aim that the respondent relies upon is *"ensuring its operational needs are properly accommodated to enable its best service for its customers and manage products of the highest quality"*.

22. There was no challenge made to that legitimate aim which we accepted was legal not discriminatory and represents a real objective consideration of the business needs. Even if the aim is legitimate the means of achieving that aim must be proportionate which involves a balancing exercise evaluating the discriminatory effect of the PCP as against the employer's reasons for applying it, taking into account all the relevant facts and deciding whether it was 'appropriate and necessary' (EHRC code paragraph 4.30). We accepted the respondent's arguments which are set out in detail at paragraphs 46 & 48 of Miss Quigley's submissions which are supported by

our findings of fact.

23. Ms Braganza's submission is that cogent evidence needs to be provided which is what we had at this hearing backed up by the statistics and the documents that we have seen. The claimant complains that the justification provided is not sufficient. We do not agree. It is clear from the Code of Practice (paragraph 4.27) that it is not necessary for that justification to have been fully set out at the time the PCP was applied and the respondent can set out the justification relied upon to the Tribunal. At the time the claimant accepted Mr Kennedy's explanation of the business needs and in cross examination has accepted the evidence upon which the business decision was made. We are satisfied the respondent has objectively justified the PCP.

24. For completeness we have addressed all 4 requirements for the indirect discrimination complaint which has in fact failed at the first hurdle based on our findings of fact.

Unfair Dismissal

25. Firstly, deciding the reason for dismissal. We did not find the reason was redundancy falling within the requirements of section 139(1)(b) Employment Rights Act 1996 'ERA 1996' because there was an increasing need for employees to carry out work of a 'particular kind' in the SQA work which the claimant was employed to do. The Apex reorganisation of the business resulted in an increased need for this work and the business required the claimant to work 30 hours over 5 days instead of 15 hours over 2 days to meet the business needs. The business tried to accommodate the claimant who refused the offer made which resulted in her dismissal. That reason was some other substantial reason of a kind to justify the dismissal of the claimant as an SQA which is a potentially fair reason for dismissal in accordance with section 98(1) ERA 1996.

26. Was the dismissal fair having regard to that potentially fair reason and the requirements of section 98(4) of the ERA 1996? Has the respondent acted reasonably in dismissing the claimant? In the normal course of events if an employer decides they want to vary the existing contract of an employee they try to agree the variation but if there is no agreement they give notice to terminate the existing contract and issue the employee with a new contract for the hours they require the employee to work. It is then up to the employee to accept or reject that new contract. If they accept they continue employment under the varied contract if they reject the new contract the contract ends after the notice period giving the employee the right to complain of unfair dismissal.

27. That was not the process followed for the claimant who was taken through a redundancy consultation process when no such process was required to vary her contract of employment to increase her hours. That redundancy process was a thorough and fair process which tried to find a mutually acceptable way forward. The respondent tried to find options to keep the claimant in employment and tried to accommodate her wishes. It was clear the claimant was putting up barriers to reaching an agreement because she did not want to work the hours the business reasonably needed her to work. The respondent was acting reasonably addressing the concerns the

claimant had raised (school hours flexibility for appointments) however the claimant was not interested, which is why she kept moving the goal post. She did not want to work the hours the employer reasonably required her to work following the reorganisation. As Miss Quigley correctly accepts in her submissions there is nothing wrong with that, the claimant is entitled to make her own personal choices to suit her or her family, but that does not make the dismissal of the claimant for that substantial reason unfair. We have regard to the fact that for 12 years the respondent had allowed flexible working and has accommodated the claimant's request because the business was able to. It was only when the business needs changed that the position changed for the respondent.

28. The claimant does not agree with the business rationale for the changes which are supported by the evidence. The respondent is not acting unreasonably because it does not agree with the claimant's assessment of the business need for an SQA after the Apex reorganisation. The reason for dismissal was a substantial reason not a trivial reason. The changes needed to be made were made in the best interests of the whole business going forward not to meet one individual's needs or preference. The claimant has clearly taken this decision personally, having viewed it using her words 'a massive insult' to her when it was not a personal insult. The attempts made to try and keep the claimant reflect her value to the business and it is unfortunate that those attempts failed. The respondent acted reasonably in dismissing the claimant and the dismissal was fair. In all those circumstances therefore the two claims made fail and are dismissed.

Employment Judge **Rogerson**

Date 17 January 2019