



EMPLOYMENT TRIBUNALS

Claimant
Miss R. Lindsay

Respondent
Tesco Stores Ltd

v

Heard at: Watford

On: 3 to 7 December 2018

Before: Employment Judge Heal
Ms. H. Edwards
Mr. A. Scott

Appearances

For the Claimant: Mr. S. Butler, counsel
For the Respondent: Ms. I. Ferber, counsel

Judgment was given to the parties orally with reasons on 7 December 2018 and sent to the parties without reasons on 9 January 2018. By email dated 17 December 2018 the claimant's representative requested written reasons, which are now provided.

REASONS

1. By a claim form presented on 1 August 2017 the claimant made complaints of unfair dismissal, indirect sex discrimination and failure to deal with a flexible working request.
2. The complaint about the flexible working request has been withdrawn and dismissed.

Evidence

3. We have had before us an agreed bundle running initially to 286 pages and to which pages 287 to 296 were added on the first morning of the hearing by consent. On day two of the hearing, pages 297 to 312 were also added to the bundle by consent.
4. We have heard oral evidence from the following witnesses in this order:

Ms Rashelle Lindsay, the claimant;
Mr Wayne Barnes, Area People Partner;
Mr Adrian Connell, Head of Retail for the Jacks Retail brand and sometime Area Manager;
Mr. Lanfia Berete, Store Manager currently at Tesco Metro, King's Cross, and
Ms Rebecca Dawkins, Store Manager for Large Format Stores.

5. Each of those witnesses gave evidence in chief by means of a prepared typed witness statement which we read before the witness was called to give evidence. The witness was then cross-examined and re-examined in the usual way.

6. A matter arose during the evidence of Ms Rebecca Dawkins about which the claimant gave instructions to Mr Butler. As a result, Mr Butler applied to recall the claimant, which we permitted with the respondent's consent. The claimant therefore gave short additional oral evidence about which she was then cross-examined.

Issues

7. The parties agreed that the issues were those set out in the 'List of Legal and Factual Issues' appearing at pages 32 A and B of our bundle.

8. Those issues are as follows:

Preliminary Issues

Time-limit Indirect discrimination

8.1 Was all or part of the claimant's claim of indirect discrimination presented outside of the three month time limit for the presentation of such complaints under section 123 Equality Act 2010 ('EqA')?

8.2 If so, would it be just and equitable to extend time to hear the complaint/s?

Unfair Dismissal

8.3 Was the claimant dismissed for a potentially fair reason pursuant to section 98 (1) ERA? The respondent contends that the reason for the dismissal was capability, which is a potentially fair reason pursuant to section 98 (2) (a) ERA.

8.4 If capability was the reason for dismissal:

a. In the circumstances (including the size and administrative resources of the respondent's undertaking) did the respondent act reasonably or unreasonably in treating it as the reason for dismissal? And,

b. Was the dismissal unfair when determined in accordance with equity and the substantial merits of the case?

In particular:

- c. Could the respondent have been expected to wait longer before dismissing the claimant?
- d. Did the respondent consult with the claimant and take her views into account?
- e. Did the respondent take steps to discover the claimant's medical condition and her likely prognosis?

Indirect Sex Discrimination

8.5. Did the respondent require that persons in the role of Customer Manager work full-time hours?

8.6. If so, was the provision, criterion or practice ('PCP') discriminatory, namely:

a. Was the PCP applied to persons who are male?

b. Did the PCP put persons who are female at a particular disadvantage when compared with persons who are male? The disadvantage alleged by the claimant is that females were less likely to be able to work full-time because they are more likely to be the primary care of children.

c. Was the claimant put at that disadvantage? And,

d. Can the respondent show that the PCP was a proportionate means of achieving a legitimate aim? The legitimate aims alleged by the respondent are:

i to ensure that the Customer Manager has sufficient visibility of the store and contact with their team across all stores trading period to enable him/her to drive consistently excellent standards of customer service and to identify customer trends; and/or

ii to ensure that the Customer Manager has sufficient working hours to enable them to fulfil the requirements of their role.

Concise statement of the law.

Our general approach to unfair dismissal

9. In determining whether or not a dismissal is fair, we approach our analysis in two parts. First, we ask whether the employer has shown the principal reason for the dismissal and that it falls within the category of potentially fair reasons. If the employer relies only upon one reason and that fails, it follows that the dismissal will be unfair even if another reason might successfully have been argued.

10. The second part is to ask whether, in the circumstances, the employer acted reasonably in treating the reason as a sufficient ground for dismissing the employee. It will not be able to succeed in this if the reason in fact relied upon is neither established in fact nor believed to be true on reasonable grounds.

The reason for the dismissal

11. In the first part (determining the reason for the dismissal), the burden of proof is on the employer. If the respondent does not discharge this burden, then it will fail.

12. What then is a reason for dismissal?

13. As Cairns LJ said in *Abernethy v Mott Hay and Anderson* [1974] ICR 323, [1974] IRLR 213,

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee".

14. The 'reason' for a dismissal means the factor or factors operating on the mind of the decision-maker which causes him or her to take the decision – or, as it is sometimes said, what 'motivates' him or her to do what they do.

15. It is only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss which we must examine in determining the reason.

16. In a case where the motivation is under challenge, once the employee has put in issue with proper evidence, a basis for contending that the employer has dismissed for a reason different to that put forward by the employer (in this case because '*she would not work full time without flexible working arrangements*'), it is for the employer to rebut this, showing that the principal reason is a statutory reason.

Reasonableness in a capability dismissal

17. If the respondent succeeds in showing that it dismissed, '*for capability*' then we embark on the second part of our reasoning process.

18. With this in mind, we have reminded ourselves that the starting point for analysing whether a dismissal for ill health capability is fair is that each case depends on its own circumstances. The basic question is whether in all the circumstances the employer can be expected to wait any longer, and if so, how much longer?

19. The relevant factors are likely to include the nature of the illness, the likelihood of the illness recurring or some other illness arising, the likely length of the continuing absence, the spaces of good health between absences, the need of the employers to have done the work which the employee was engaged to do, the impact of absences on others, consideration of the employer's policy and the assessment of the employee's personal situation. An employer should approach the issues with sympathy, understanding and compassion. One has to look at the whole history and the whole picture. An employer will also be expected to make it clear to the employee that the situation is causing difficulty and that the point of making a difficult decision to terminate the contract might be approaching.

20. There is a conflict between the needs of the business and those of the employee, and the tribunal will ask whether the employer has sought to resolve that conflict in a manner which a reasonable employer might have adopted. Was it within

the reasonable range of responses? In the course of doing this, it will be relevant to ask whether the employer carried out an investigation which meant that he was sufficiently informed of the medical position. In order to determine the true position, the employer should consult the employee and, in some cases, any doctor or medical adviser.

21. Sometimes the employee's ill health may have been caused by the *conduct* of the employer. However, this does not mean that a dismissal of the employee is necessarily unfair. The correct approach is contained in the leading case of *McAdie v Royal Bank of Scotland* [2007] EWCA Civ 806, [2007] IRLR 895 in which the Court of Appeal held that if an employee's ill health was caused by the employer's treatment, that might justify a tribunal requiring the employer to demonstrate extra concern before implementing a dismissal, but that this remains a question of fact, not a rule of law.

Indirect discrimination

Provision, criterion or practice.

22. A 'PCP' is something wider than a requirement or condition. We bear in mind the protective nature of the legislation and do not give the expression, 'provision, criterion or practice' a narrow meaning. (To be fair to Miss Ferber the respondent, we do not understand her to be arguing for such a meaning). The expression is wide enough to cover both formal and informal practices of employers and does not have to be express or conscious. The expression has been held to cover an individual discretionary management decision which only applied to the employee herself. (*B.A. v Starmar* [2005] IRLR 862).

23. It is for the claimant to identify the PCP which she seeks to impugn. The PCP for which she contends must in fact have been applied to her. A requirement to work full-time is capable in law of amounting to a PCP.

24. The PCP in question must then be one which the respondent applies or would apply equally to persons who do not have the protected characteristic. It is not necessary that the PCP was actually applied to others. What is required is to extrapolate it to others: that is to work out what might happen to others, given the information that we know (or the findings we make).

Particular disadvantage

25. Ms Ferber accepted that the PCP alleged would, if applied, put women at a particular disadvantage compared to men. That is women were less likely to be able to work full-time because they are more likely to be the primary carer of their children.

Justification

26. The burden of proof is always upon the respondent to establish justification.

27. The 'legitimate aim' must correspond to a real need, must be appropriate with a view to achieving the objectives pursued, and must be necessary to that end. 'Necessary' in this context means 'reasonably necessary'.

28. The principle of proportionality requires a balance to be struck between the discriminatory effect of the measure in question and the needs of the undertaking. The more serious the adverse disparate impact, the more cogent must be the justification for it.

29. So, we have to weigh the reasonable needs of the respondent's undertaking against the discriminatory effect of the respondent's measure and to make our own objective assessment of whether the former outweighs the latter. We must give full consideration to the two separate issues and be careful not to conflate them.

Time

30. A decision in response to the repetition of an earlier request may constitute an act of discrimination, whether or not it was made from the same facts as before, if it resulted from a further consideration of the matter and was not merely a reference back to the earlier decision.

31. Several decisions by the same employer may indicate the existence of a discriminatory policy which could amount to an 'act extending over a period.' (*Cast v Croydon College* [1998] ICR 500, at 511E and 515B-C)

Facts

32. We have made findings of fact on the balance of probability. That means that we listen to and read the evidence placed before us by the parties and on the basis of that evidence and that evidence only, we decide what is more likely to have happened than not.

33. The respondent is a well-known limited company engaged in the retail sale of food and other domestic products. It employs some 310,000 people in Great Britain.

34. The claimant is a single mother. At the time of the events about which we have been hearing, her child was three years old.

35. The claimant began her employment with the respondent on 20 September 2004. She was employed initially as a customer assistant and then as a line manager at the Metro Medium store based at Richmond.

36. Prior to the events about which we have been hearing the claimant was known as a service manager. For approximately three years prior to the restructure, the claimant worked a fixed shift from 1:30 pm to 10:30 pm. The claimant was able to manage her childcare responsibilities in these circumstances at least in part because she had help from her aunt.

37. By email dated 15 July 2015, written before the current dispute crystallised, from Mr Omega-Sheriff (the claimant's then line manager) to Kathryn Beadle of human resources, Mr Omega-Sheriff described a history of the claimant moving from 4 days to 5 days work per week and being unable to do middle or early shifts because of '*her situation*'. He ends by saying, '*Her job role demands flexibility, and she needs to be available for her team. I have asked her to do at least some middles so that she will be able to perform better in her job role.*'

38. We do not read this as making any criticism of the claimant's personal ability to do her job. Mr Omega-Sheriff's concern was limited to the practical impact of the claimant working only late shifts.

39. We note at this stage that at no point during our hearing was it suggested that the claimant had any personal inability to perform her job role.

40. The claimant subsequently became a Customer Experience manager at the Richmond Metro store. Under the terms and conditions relevant to this role, she was employed to work a minimum of 36 hours per week.

41. In May 2016 the respondent was carrying out a consultation process with a view to implementing a restructure. It proposed to change the claimant's role to that of customer manager. The respondent took the view that although there were some minor changes to the role there was a sufficient match between the claimant's previous role and that of customer manager for the claimant to be slotted into the new role without being made redundant.

42. At informal one-to-one meetings between the claimant and Mr Omega-Sheriff, he discussed with her that the role was '*fully flexible still*'. He explained that there would be fewer managers in the new structure. The claimant was obviously concerned about the effect that the new structure would have on her own ability to manage given her childcare responsibilities. At first, the claimant appeared to explore the possibility of working Friday and/or Saturday nights.

43. The claimant said that redundancy would have been the best option for her but she also explored stepping down to do fixed hours. There was discussion about applying for other vacancies as well.

44. The customer service role required the claimant to manage the performance and conduct of her team. We have seen and read the guidance provided for customer managers to help them understand their role. Without setting the full role out in minute detail, it required the claimant to be the team manager for staff working on checkouts, services, trolleys and the cash office. The claimant was to complete new colleagues' reviews, to manage absence, to be the first point of contact to resolve colleagues' pay queries, to try to answer the team's queries, to identify the team's different learning styles, provide coaching where necessary, to set staff objectives, to be a role model, to spot and develop individual potential within her team, to develop her staffs' careers, to listen to issues or concerns raised by her team, to conduct '*root cause analysis*', to identify opportunities and build improvement plans. In relation to customers, the claimant was required to know her customers and know how they felt about their shopping experience. She was to follow up on customer complaints and fix the root

cause of those complaints. She was to have regular meetings with colleagues on flexible contracts so as to make sure that the store had sufficient resource. She was to spend time in all areas and work a range of different shifts to support the customer shopping trip at different days and times. The claimant was also responsible for understanding and delivering legal compliance and also ensuring compliance with health and safety policies.

45. By letter dated 27 June 2016 Mr Omega-Sheriff wrote to the claimant saying that he was pleased that they had agreed a change to her terms and conditions of employment and asking her to start in the new position of customer manager on 27 June.

46. In fact, the claimant did not sign to accept the changes in role.

47. By letter dated 29 June 2016 the claimant wrote to Mr Omega-Sheriff and Laura Ford (of human resources) saying,

'I would like to amend my working pattern on a permanent basis as I'm unable to fulfil my new contract in the new structure due to family commitment.

My flexibility that I can do due to my daughter starting school will be 9.30 to 14.30 as I have no one to help me with childcare.'

48. By letter dated 2 July 2016 the claimant wrote to Mr Omega-Sheriff and Ms Ford raising a grievance about her treatment during the restructure process. She recounted her explanation of her childcare problems: that is her three-year-old daughter started school in August/September and therefore she could not do the hours required to do the role. She said that she had been reassured that Ms Sudan and Ms Ford would go away and see if they could do something for her in her circumstances. However, no one came back to her before 27 July (we think she must mean June). She said that the situation has been very stressful and worrying was affecting her health and personal life.

49. The claimant's GP advised that she was not fit for work on 22 July 2016 until 22 August 2016. This was due to stress. The claimant did not thereafter return to work because she was unfit for work. The claimant was signed off sick during the entire period.

50. Up until the claimant's flexible working request we consider that the respondent was working on the basis that the Customer Manager role would be full-time for the claimant.

51. We accept the respondent's evidence that initially when the claimant requested a change of hours (so as to go part time) the respondent was prepared to accept that change on the basis that it was reasonable for the claimant to work as a part-time customer manager. However, the claimant subsequently said to the respondent that she could not work flexible part-time hours and would not be able to work during holidays or weekends. Without communicating this to claimant, Ms Sudan formed the opinion that that new request by the claimant was not reasonable. Before Ms Sudan could convey that to the claimant, she went off sick. The claimant was told that she

would be informed of the outcome of her flexible working request when she returned from sickness. The 'PCP' being applied by Ms Sudan at this time was that to perform her role as customer manager, the claimant had to work such hours as would enable her to see the business and be available doing all hours of the business at different times.

52. [The grievance hearing took place on 19 August 2016 and the outcome was produced on 30 August 2016. The claimant appealed, and the grievance appeal hearing took place on 30 September 2016 with the appeal outcome sent on 20 October 2016. Although the notes of those hearings and the outcomes have been referred to during the course of this hearing so as to draw out relevant evidence, the grievance itself is not impugned before us and so we do not set it out in detail here.]

53. In September 2016 Mr Berete took up the role of Store Manager at Richmond. It follows that he was not involved in any decisions about claimant's hours of work or the restructure before this point.

54. On 29 November 2016 the claimant attended a wellness meeting, the aim of which was for the respondent to understand what impact her health condition was having on her ability to work.

55. On 29 November 2016 the claimant attended a meeting to discuss her flexible working request. She was interviewed by Mr Berete and Mr Barnes attended as a note taker.

56. Mr Berete told the claimant that the meeting was to discuss her flexible working request. He understood that she wanted to work 9.30am to 2.30pm due to childcare issues. The claimant explained that at that moment she could work 9.30am to 2.30pm, Monday to Friday, and occasionally weekends and part-time nights. She explained that her aunt was migrating. The claimant needed to be able to do the school drop-off and pick up. There was discussion about the claimant working nights/weekends and the claimant said that her mother could help out. Mr Berete asked the claimant how if she worked 9.30am to 2.30pm she would get the job done and have time to see her staff.

57. Although Mr Berete said that the meeting was not about structure change, the claimant thought that everything needed to be talked about because it was all linked. She mentioned job share as an option and there was further discussion about weekend or night working.

58. Mr Berete refused the claimant's request for flexible working. His reasons were that the role of customer manager was a full-time position and that would have applied to anyone who wanted to do that role. The claimant had requested part-time hours. He did not think that the claimant could carry out all of the Customer Manager role in fewer hours and the claimant had been unable to explain to him how she could do this. He considered that the hours the claimant requested (9:30 am to 2:30 pm on weekdays) were the quietest trading period in the store. Therefore, the claimant would not see the store functioning during the morning rush or during peak trading in the evening. Furthermore, she would not see those members of her team who only worked on evening shifts. He did not believe that the claimant would be able to identify

customer trends or effectively manage performance and conduct of team if she did not see the store throughout the trading day.

59. Mr Berete did not consider that job share would be a viable option. This was because the claimant was offering to work 25 hours a week which would leave an additional 10 hours to be covered by another person. He thought that it would be difficult to recruit someone to work 10 hours a week in a management role on fixed evening shifts.

60. Mr Berete also did not consider that the role could be delivered consistently by two separate people. He thought that the claimant should be able to work a variety of different shifts and form an overall view of trading and her team at different times of day to be able to perform the role properly.

61. Mr Berete thought that it might have been possible for a larger store or a different type of store to accommodate the claimant's request. At this stage, Mr Barnes' request about vacancies had received a response only from Nicola Barton (who was responsible for 120 stores) to say that she had no relevant vacancies. On that evidence Mr Berete concluded that there were no vacant part-time management roles in his cluster.

62. Mr Berete understood that when the claimant said she could work occasional weekends she meant that she could do weekends infrequently or irregularly. The claimant did not say that she would or could work at weekends (Saturdays) once a fortnight, or on alternate weekends, or when her turn to do so came up on the rota. She used the word 'occasionally'.

63. We consider that what Mr Berete was doing was refusing the claimant's very specific request for hours between 9.30am to 2.30pm. He was not refusing a request for part time work generally so that his understanding of the role as full time is not relevant here. What is relevant is that his decision was to refuse those specific hours: so that the PCP he was in fact applying was that the role needed a manager who was able to oversee the whole operation: for that person to see the operation at different times of the day.

64. By letter dated 23 December 2016 Mr Berete told the claimant that her flexible working request was unsuccessful.

65. By email dated 19 December 2016 Wayne Barnes wrote to Rosanna Leese and Nicola Barton. He said,

'I have full-time services manager at Richmond requesting flexible working can you please let me know if you have any part-time night manager vacancies for the weekend or any part-time manager vacancies even a job share would be an option if you have none could you send nil reply please so I can confirm you have checked for me thank you in advance.'

66. Mr Barnes also made some 5 telephone calls to store cluster leads making enquiries about vacancies for the claimant. The cluster leads were in charge of vacancies for their area. They held the definitive lists of those who wanted job shares

and of part-time vacancies. Mr Barnes did not place adverts on internal systems or ask for notices to be put up in staff rooms.

67. Ms Barton was a cluster manager responsible for a large store and as people partner was responsible for 120 stores. Ms Leese was People Partner responsible for 50 stores.

68. When the respondent takes staff on, it asks them about their 'flexibility window'. When staff move on to the development programme (intended to develop them into management roles) the respondent asks them what their plans are. A spreadsheet known as 'brown paper' contains the details that emerge from such discussions so that the respondent can use the information to place staff into roles.

69. Every person on the development programme has a one-to-one with their manager every week. The manager then has a one-to-one with their manager every fortnight.

70. People partners and store managers meet at cluster meetings chaired by one of the cluster managers every four weeks. When a member of staff makes a particular need known to his or her manager, that is taken to the cluster meeting so that the manager can ask all those present if anyone has a vacancy that fits the particular need.

71. By email dated 21 December 2016 Nicola Barton responded to Mr Barnes saying that she did not have any part-time night managers in her structure and therefore no vacancies. Also by email on 2 January 2017, Rosanna Leese replied to Mr Barnes that she did not have any part time vacancies.

73. After some rescheduling, the first formal absence meeting took place between the claimant and Mr Barnes on 26 January 2017.

74. The meeting lasted some 12 minutes. The claimant said little in response to Mr Barnes' questions. She did say that she was 'not great', had finished her medication and was struggling with sleeping. She said that she did not currently have a feasible return to work date. Mr Barnes offered her the opportunity to ask relevant questions, but she had nothing to ask.

75. By letter dated 26 January 2017 the claimant appealed against the refusal of her flexible working request. She said that the respondent had just removed 2/3 of this role across the Metro format without detrimental effect on customers. She said that the 10 hours for which she would not be working could be used to recruit a part-time team support to help her delivering her role. She said that all other managers had the same core job responsibilities to meet business needs requirements so the other managers could perform the usual role without any rearrangements. She thought that the Richmond store had an additional manager since the restructure. She said that with her 12 years skills, experience and knowledge she could perform the role with her eyes closed. She thought because her performance will be measured according to hours worked there would not be an issue with her performance. She said none of her work required to be done at a specific time of day, she could perform all of her job

description within the period she proposed and she would have enough support with delegation, careful planning and communication in and out of work hours.

76. On 17 March 2017 the second formal absence meeting took place between the claimant and Mr Barnes. The meeting lasted 25 minutes. As before, the claimant said relatively little. She said that nothing had really changed, and the situation was the same. She was on antidepressants and the doctor had mentioned stress. She had not yet been to counselling, although it had been offered. 'Fit for work' had contacted her but she did not go through with it. Mr Barnes asked the claimant's consent to contact occupational health and she refused consent. She said that the only thing she needed was to come to an agreement, by which she meant an agreement with the respondent about her hours of work. Mr Barnes asked her if she would consider a temporary return to work programme but she asked if it would be permanent. Mr Barnes asked if she saw any foreseeable return to work and she replied, 'as soon as some agreements are made'.

77. Mr Barnes told the claimant that this was the second formal meeting and the formal meeting could lead to dismissal through incapability. There was then discussion about the temporary return to work programme and Mr Barnes explained that would start with short hours and look to get the claimant to normal duties. She said that she would consider the temporary adjustment for maybe one day a week.

78. The claimant attended a meeting with Rebecca Dawkins to hear her appeal about her flexible working request on 7 April 2017. This meeting lasted for 2 ¼ hours.

79. At that meeting certain themes remained consistent. The claimant adhered to her request to work 9.30am to 2.30pm weekdays with occasional weekend working. The respondent adhered to its decision that Richmond Metro required a Service Manager (in the context this means Customer Manager) working for 36.5 hours a week.

80. Ms Dawkins said that what was in question was the claimant's ability to see all colleagues and see all times of the operating hours.

81. The claimant said that she would be willing to trial working weekend nights and explained again her family circumstances. Ms Dawkins regarded the hours offered by the claimant as 'quite rigid'.

82. Ms Dawkins considered her decision and gave it to the claimant on that day. She said that a decision had been made that Richmond Metro required a full-time customer manager. She agreed with the decision to reject the claimant's request to reduce her hours and remain in Richmond. She said that the purpose of the structure change was to allow managers to focus more on their areas and to lead their teams. The other management roles in Richmond were already full-time positions and so it was not feasible for those managers to pick up the remaining routines and duties of a Customer Manager. The claimant's request was not only a request to reduce hours but was also to set a fixed shift pattern. Ms Dawkins did not see how the claimant would be able to manage:

- Her team across all areas of the week;

- spend quality time with colleagues who did not work the claimant's shift pattern;
- observe customer trends and shopping habits in key trading hours across the week;
- deal with any underperformance/absence issues across the week that may arise in the hours that the claimant was unable to work.

83. Ms Dawkins thought that the role of team support was provided to coordinate activities and not to manage or lead the claimant's team in her absence. She did not think it would be fair to ask other managers that workload.

84. Therefore, Ms Dawkins rejected the claimant's appeal.

85. We think that Ms Dawkins went into the appeal with an understanding that a previous decision had been made that the customer manager at Richmond was to be a full-time position. We think that she saw her role in hearing the appeal as reviewing Mr Berete's decision and of looking at the claimant's grounds of appeal. The notes of the hearing show us that she then focussed on whether the actual hours which the claimant was offering enabled the claimant to see all of her staff and all parts of the day time operation of the business. It follows that Ms Dawkins was also applying her mind to the claimant's very specific request for hours from 9.30am to 2.30pm. It was that that she was reviewing and so refusing and so the 'PCP' being applied was not that of requiring the customer manager to work full time but that the role needed a manager who was able to oversee the whole operation: for that person to see the operation at different times of the day.

86. On 18 April 2017 the claimant attended the third formal absence meeting with Mr Barnes. The meeting lasted for 16 minutes. Once again, the claimant herself said relatively little.

87. She said that nothing had really changed. She had not been back to the doctor and had stopped her antidepressants because of side-effects. Counselling had not been offered yet, but the claimant was considering it. She said she would go for 'fit for work' but not at the moment to occupational health. Mr Barnes asked if she had any return date and she replied, 'not with the hours you are giving.'

88. By letter dated 18 April 2017 Mr Barnes confirmed that discussion to the claimant. He added that the respondent would endeavour to make every effort to help her return to work and would provide any additional support that she saw necessary to complete her role effectively. However, he also advised her that one of the possible outcomes of the process could be that he decided to dismiss on the grounds of her incapability to return to work in the foreseeable future due to ill-health.

89. On 9 June 2017 the claimant attended the final full absence meeting with Mr Matt Hills, Store Manager. Mr Barnes took notes. The meeting lasted for 25 minutes. It was adjourned to seek an occupational health report.

90. The occupational health report is dated 28 June 2017 and is the result of the telephone assessment carried out the claimant.

91. The report records the claimant's fit note as stating anxiety, stress and depression. In answer to the question, 'are there any factors in the workplace that are impacting on their health?', the report says that the claimant requested a change in hours and the store was unable to accommodate this. In answer to a question, 'when will the colleague be able to return to work?' the report says, 'Rashelle states there is no foreseeable return to work date at this stage.'

92. Question 7 asks: 'Will the colleague be fit to undertake the role when they return to work?' The answer given is, 'unclear at this time'.

93. By letter dated 20 July 2017, Mr Barnes invited the claimant to a rescheduled final full long-term absence meeting, the respondent having now received the Occupational Health report. Mr Barnes said that the purpose of the meeting was to consider the support provided to the claimant so far during her absence and what additional support may be required going forward. At the meeting they would discuss all the medical information to establish whether a return to work was likely. He said that he would make every effort to support her to return to work however he made her aware that one of the outcomes of the meeting could be that he would make a decision to dismiss on grounds of capability.

94. The meeting took place on 27 July 2017, led by Mr Matt Hill and with Mr Barnes as the notetaker.

95. The meeting lasted approximately one hour.

96. Mr Hill asked the claimant if there was any foreseeable return date and the claimant replied, 'not as is.' Mr Hill noted that a temporary return plan been declined by the claimant. The claimant said that nothing had changed. She was given the occupational health report to read.

97. She queried an answer to a question about reasonable adjustments and said that she thought she had said that part-time hours would enable a return to work. She confirmed that there was no return date and that the problem with the agreement of hours was causing the problem/stress. Mr Hill asked about question 7 and asked whether it was still unclear whether the claimant would be fit to undertake the job will when she returned to work. She said after being a year she would need time to adjust but she could carry out the job role. Mr Hill offered the adjustment plan that had been offered previously.

98. The claimant said that she could not do the hours because it was only a temporary support plan.

99. Mr Hill asked if there was anything else the respondent could do, and the claimant said, 'only thing I can see is offering flexible hours that it.'

100. Mr Hill concluded the meeting by telling the claimant that the respondent was unable to continue to support her absence on grounds of incapability. He said that she was dismissed on grounds of capability and ability to return to work.

101. Mr Hill confirmed his decision to dismiss by letter dated 20 July 2017. He told claimant of her right to appeal.

102. The claimant did appeal by email dated 28 July 2017 on the grounds that the decision to dismiss was too harsh, the respondent could have provided reasonable adjustments and offered a job share of her role and because the respondent had not provided justification for why a part-time mother cannot fulfil the management role within a Tesco Metro.

103. The appeal was heard by Mr Connell on 24 August 2017. The claimant confirmed that she had been absent from work for roughly a year. She said that she would not have been able to go back to full-time hours but provided she and the respondent could have come to an agreement flexible working request then she could have returned to work.

104. She described her flexible working request as for hours from 9:30 am to 2:30 pm Monday to Friday and during school term, 'I could be more flexible around how I work.'

105. The claimant said that she had requested a job share to support her hours so that she could do mornings and her job share partner could do evenings. Mr Connell tried to explore with the claimant whether the respondent could have different hours such as late night or early mornings. The claimant said that as she lived alone with her daughter there was no way she could do any other hours: it was not realistic. She thought that after working for the respondent for 13 years it must have some responsibility to help her.

106. Mr Connell told the claimant about a checkout manager (which he has told us is his old-fashioned expression for a customer manager) in Regent Street who could only work a few selected days but was flexible in the hours that she worked. He said that if the claimant was flexible in her hours the respondent would be able to support her because then there would not be a concern that the colleagues in her team would be unable to see their manager. The claimant's windows of flexibility were very tight.

107. During an adjournment, Mr Connell checked with Kiran Sudan whether there were any alternative roles that could be offered to the claimant. There were no such roles.

108. Mr Connell decided to uphold the decision to dismiss. He confirmed his decision in writing to the claimant by letter dated 24 August 2017.

109. Mr Connell did not consider that the decision to dismiss was too harsh in the circumstances. He thought that the claimant had been dismissed for ill-health capability, not because of lack of flexibility. She had been absent from work for just over one year. The medical evidence confirmed that she was unfit for work and there was no anticipated return date.

110. Mr Connell concluded that a job share would not have been a viable option. Even if a job share was possible, the claimant had confirmed that she could only work between 9:30am and 2:30pm Monday to Friday. He thought that it would be extremely

difficult, if not impossible, to recruit someone into a management role for 10 hours a week on permanent evening shifts.

111. In any event, even if it proved possible to recruit such a person, he did not consider that the role of Customer Manager could be delivered in a, 'joined up, consistent way' or to the standard required. Richmond Tesco Metro is open 18 hours each day and the claimant could only work for five hours during the quietest part of the day. Even with a job share she would miss the morning rush and peak trading in the evening. A significant portion of her team, that is those working on late/evening shifts, would never see her. For a job share arrangement to work effectively in these circumstances the two people involved would have to work together very closely, sharing the same, consistently applied approach to issues and both being flexible in terms of the hours worked. This would be to ensure that both managers in the job share would work a variety of different shifts to see how the business ran during the whole of the trading period and to see those team members who were working different times during the day. They could also then cover for one another during absences. The arrangements suggested by the claimant did not provide that flexibility and he thought that this would have a detrimental impact on the delivery of the role.

112. He considered that the claimant had been given a valid reason as to why as a part-time mother she could not perform the relevant management role at Tesco. He was aware that the claimant had been through the flexible working process and that her alternative working hours had been considered in full and rejected.

Analysis.

Unfair dismissal

113. We find that the reason for the dismissal was capability: it has never been disputed that the claimant was ill during her long period of absence. The respondent accepted the fact of that illness and it has not been suggested that respondent did not accept it. The reason for dismissal was the claimant's ill health absence.

114. The decision makers were Mr. Hill and then Mr Connell on appeal. We have not heard evidence from Mr Hill, but we see that the decision was based only on the claimant's absence. Mr Hill looked at whether there was any foreseeable return date. It was within the reasonable range of responses for Mr Connell and Mr Hill to take the view that the respondent could not be expected to wait any longer. This is because there was no imminent return to work date, the claimant had been off work for over a year and they were entitled (in the sense that it was within the reasonable range of responses for them) to take the view that her flexible working request had been fully explored and decided.

115. There was one informal and four formal meetings with the claimant (the last being postponed for the occupational health report). We consider that the respondent has consulted properly with the claimant.

116. The respondent consulted with occupational health: although the medical problem was straightforward: the claimant's stress was caused by her problem with her hours. There was no dispute about that causation.

117. Although the claimant raised some queries about the occupational health report, these made no difference to the opinion on the underlying problem or the prognosis.

118. The respondent has not caused the claimant's illness in any culpable way. The underlying problem has caused the illness: that is the clash between the need to be available for her child and the business need for her to be available for her staff and the business. In any event we consider that the respondent has 'gone the extra mile' for the claimant given the length of time it has allowed her to be absent.

119. We consider that what Mr Barnes did to enquire about alternative roles was within the reasonable range of responses. Just because it is possible to suggest other steps to take does not mean that what a respondent did was outside the range of what was reasonable. He knew his own system: he knew about the cluster meetings and his enquiries tapped into that system; he sent emails to individuals who were likely to have good knowledge of the available vacancies. He waited for nearly a month before finally sending his decision. He also made phone calls, although we know little about who he spoke to. We think he did what was reasonable. Mr Connell also checked with Kiran Sudan whether there were alternative roles. Taking what the respondent did overall into account, we think it did what was within the range of reasonable responses to look for alternative roles for the claimant in the circumstances.

Indirect discrimination.

120. Did the respondent apply a PCP, that is of requiring a person in the role of customer manager to work full time hours? We have found that it did not in fact apply this PCP, despite appearances, for the reasons set out below. The respondent in fact applied a different PCP which has not been pleaded and which, in any event we consider was justified. Therefore, the complaint of indirect discrimination fails.

121. At the outset, the PCP pleaded was clearly not the PCP applied: Ms Sudan and Ms Ford did not apply that PCP. Our finding at paragraph 51 is that the 'PCP' being applied by Ms Sudan was that to perform her role as customer manager, the claimant had to work such hours as would enable her to see the business and be available during all hours of the business at different times.

122. Mr Berete and Ms Dawkins *said* that they applied the pleaded PCP, but when we look at the substance of their decisions, we see that they were in fact applying an operative PCP which has not been pleaded by the claimant: that is that persons in the role of customer manager were required to work such hours as enabled them to:

- (a) manage his/her team across all parts of the week;
- (b) spend quality time with colleagues who did not work during his/her fixed shift pattern;
- (c) observe customer trends and shopping habits in key trading hours across the week;

(d) deal with any performance/absence issues across the week that may arise in the hours that s/he was unable to work.

123. That PCP was (or had a male been in the claimant's position, would have been) applied to persons who are male.

124. Did the PCPs put persons who are female at a disadvantage when compared with persons who are male? The disadvantage alleged by the claimant is that females were less likely to be able to work-time as they are more likely to be the primary carer of their children.

125. For the PCP as pleaded that is conceded by the respondent.

126. For the unpleaded PCP this is not conceded. We have not heard evidence exploring the subject.

127. Was the claimant put at that disadvantage?

128. The claimant could not work full time, but more importantly she could not work variable hours except on an occasional weekend.

129. In relation to the un-pleaded PCP: we consider that the respondent has shown its legitimate aim: it is legitimate for the respondent to require its customer manager to be able to oversee the full day time operations of the store. The claimant needed to see the store actually functioning at varying times of the day: to see the peak busy early period before 9.00am, to see the quiet middle of the day (including its lunchtime peak) and to see the different evening peak. She needed to be available to staff who needed to have access to their manager with whatever problems they may have, and she needed to be able to see her own staff at work given that they worked on varying different shifts. We think that if this was not done by the customer manager, then human problems of many varying kinds would arise and accumulate.

130. We do not think that those problems could be solved by a job share, certainly not by one involving a sharer on ten hours per week. This is because the claimant who would have been the main worker was only present on rigid hours so that she herself would never have the overview that was so important. We think the respondent is right when it says that the business issues need consistency of approach towards customers and staff and for the manager to have a consistent awareness herself of the unfolding events of the running of the business.

131. When we balance that legitimate aim against the effect on the claimant we consider that if the respondent did not meet its aim, the performance of the store and of its staff and quality of staff management will all suffer significantly. If customers do not experience their visit to the store in a positive way, they will choose to go elsewhere. If staff problems are not handled with personal attention, carefully and with consistency then, for example behavioural problems may go unchecked, grievances may fester and increase, staff turnover increase and opportunities to develop staff be lost.

132. None of that is to diminish the very significant effect of the decision on the claimant. However, we consider that the legitimate aim does outweigh the effect of the discrimination on her.

133 We do not consider that the PCP pleaded (that the customer manager work full time) would have been justified on the facts we have heard but this is now academic.

134. The claimant has not made out her case in that the PCP she asserts has not been applied, but in any event even if we were to apply the (unpleaded) PCP which we have found was applied, then that was justified.

Employment Judge Heal

Date:31.01.19.....

Sent to the parties on:11.02.19....

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For the Tribunal Office