EMPLOYMENT TRIBUNALS

Claimant: Mrs G Dobson

Respondent: Cumbria Partnership NHS Foundation Trust

Heard at: Carlisle **On:** 1-4 October 2018

Before: Employment Judge Langridge
Mr D Wilson
Ms V Worthington

REPRESENTATION:

Claimant: Mr M Mensah, Counsel
Respondent: Mr T Smith, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's dismissal was fair under section 98 Employment Rights Act 1996.

2. The claimant was not dismissed for asserting statutory rights and her claim under section 104 Employment Rights Act 1996 fails.

3. The claimant was not dismissed for making a protected act and her claim under section 27 Equality Act 2010 fails.

4. The PCP operated by the respondent did not put women at a particular disadvantage and did not therefore amount to indirect discrimination under section 19 Equality Act 2010.

5. The claimant's entitlement to holiday pay on termination of her employment was paid in full and there is no further entitlement to holiday pay.

6. All claims are dismissed.

REASONS

Introduction

1. These claims were brought following the termination of the claimant's employment with the respondent as a district nurse. The underlying dispute which led to the claims being brought related to the respondent's decision to change the claimant's working pattern from a fixed part-time one to a more flexible arrangement. The claimant felt unable to agree to that change for reasons relating to her childcare responsibilities.

2. The hearing took place over four days from 1 October 2018 when the claimant gave evidence on her own behalf. The witnesses for the respondent were Michael Owens (District Nurse Team Leader), Karen Blyth (District Nursing Sister), Barbara Place (Interim Quality & Safety Lead), Jennifer Barbour (Community Manager), Gillian Baxter (Community Manager) and Elizabeth Turnbull (Senior Network Manager). Judgment was given orally on 4 October and written reasons were requested by the claimant within 14 days after that.

Issues & relevant law

3. Although the claimant pursued several claims, the factual basis for them all was closely tied to one core issue, which was whether the respondent was entitled to require the claimant to work on a more flexible basis than the fixed arrangements she had had in place since 2008. As the parties were unable to reach agreement about this, the respondent terminated the claimant's employment on 19 July 2017 and she complained that this was an unfair dismissal under section 98(4) Employment Rights Act 1996. The respondent relied on section 98(1)(b) of the Act in asserting that there was 'some other substantial reason of a kind such as to justify the dismissal' of the claimant. Subject to the Tribunal being satisfied that this was the case, it was then required to determine the fairness of the dismissal having regard to section 98(4) and the band of reasonable responses test.

4. In addition, the claimant alleged that her dismissal was automatically unfair under section 104 of the Act, because she had asserted a statutory right. Section 104(1) provides that:

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—*
>
> *(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*

5. Under section 104(2), it does not matter whether the employee actually has the statutory right in question, nor is it necessary to show that the right was infringed, provided that the employee's assertions to that effect are made in good faith. The employee has to make it reasonably clear to the employer what right is alleged to have been infringed.

6. Section 104 goes on to define the statutory rights which are protected. Ignoring the rights which are clearly not relevant to this case (such as those relating to trade union activities or merchant seamen), this claimant was entitled to rely on:

> *… any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.*

7. In the context of this case, the relevant statutory right was the right to request flexible working under section 80F of the Employment Rights Act 1996. As an employee, the claimant had the right to request a variation to her contractual terms and conditions relating to the hours or the times when she was required to work. Any such application is governed by statutory rules which both the employee and the employer should comply with. If the employee makes an application under section 80F, he or she must:

> *(a) state that it is such an application,*
>
> *(b) specify the change applied for and the date on which it is proposed the change should become effective, and*
>
> *(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how, in his opinion, any such effect might be dealt with. . .*

8. The employer's duties are set out in section 80G:

> *(1) An employer to whom an application under section 80F is made—*
>
> *(a) shall deal with the application in a reasonable manner,*
>
> *(aa) shall notify the employee of the decision on the application within the decision period, and*
>
> *(b) shall only refuse the application because he considers that one or more of the [statutory] grounds applies …*

9. Under section 80H an employee can make a complaint to an employment tribunal that her employer has failed to comply with its duties under section 80G, for example by rejecting the application on the basis of incorrect facts. Any such claim must be brought within a three month time limit.

10. Under section 80H(2):

> *No complaint under subsection (1)(a) or (b) may be made in respect of an application which has been disposed of by agreement or withdrawn.*

11. Accordingly, asserting the right to request flexible working does fall within section 104 Employment Rights Act and is capable of protecting an employee from being dismissed for that reason.

12. In relation to the dismissal claims, the respondent argued that the claimant's dismissal on the grounds of her long-term sickness absence would have followed in

any event, such that any remedy would be subject to reduction under the principles of Polkey v AE Dayton Services [1987] IRLR 503.

13. The claimant brought two other claims, both under the Equality Act 2010, alleging that her dismissal was an act of victimisation and also that the respondent's insistence that she work more flexibly, rather than on fixed working days, amounted to indirect discrimination under that Act.

14. The relevant provisions on indirect discrimination are set out in section 19:

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

15. The relevant protected characteristic relied on by the claimant is her sex.

16. To summarise, the statutory provisions required the claimant to identify a provision, criterion or practice (PCP) operated by the respondent, which put both her individually and the group to which she belongs (women) at a particular disadvantage compared with men. If the claimant could provide evidence in support of those facts, such as to enable the Tribunal to infer that she had been discriminated against, it was open to the respondent to produce evidence displacing that inference and to argue that the PCP was justified, because it was implemented proportionately in the interests of achieving a legitimate aim.

17. The victimisation provisions are set out in section 27 of the Equality Act:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do, a protected act.*

18. A protected act is defined as:

> *(a) bringing proceedings under this Act;*
>
> *(b) giving evidence or information in connection with proceedings under this Act;*
>
> *(c) doing any other thing for the purposes of or in connection with this Act;*

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

19. The protection of section 27 is lost if the employee acts in bad faith.

20. The final claim was brought as a breach of contract claim in respect of holiday pay which the claimant said was owing on the termination of her employment. There was a dispute between the parties as to the calculation of the entitlement and whether it had been paid in full or not.

Findings of fact

21. The following is a summary of the key facts in the case, though not an exhaustive review of all the evidence presented to the Tribunal.

22. The claimant was appointed as a Community Nurse on 1 September 2004 and by the time of these events she was operating at Band 5 working in a small team of nine women and one man. Seven of that team were on Band 5 like the claimant, and two were on the more senior grade of Band 6. Mr Owens, from whom the Tribunal heard evidence, was the only man in the team and the only Band 7 nurse. The nurses on Bands 6 and 7 were carrying out a mix of clinical duties and management duties. All members of the team were working flexibly, including the women who had caring responsibilities for their children. In that group the claimant was the only person caring for children with disabilities, her daughter and one of her sons each having disabilities which increased their care needs.

23. In 2008 the claimant returned from maternity leave after her daughter's birth and made a request for flexible working which was agreed. The flexibility was that she would work 15 hours a week, meaning there was a reduction in her working hours, and she would work on fixed days on Wednesdays and Thursdays only. That flexible working agreement was subject at all times to the Trust's right to review it under its Flexible Working Policy.

24. In 2012 the claimant's son was born and in 2014 he was diagnosed with autism. The respondent's Employment Change Form in 2012 noted that the claimant's 15 hour flexible arrangement was to continue, although it did not mention any set working days. That said, it was not in dispute that the working pattern was agreed to and did continue on the basis of Wednesdays and Thursdays only.

25. The claimant's mother-in-law reduced her own working hours from full-time to part-time so that she could provide childcare on Wednesdays and Thursdays to allow the claimant to continue to work. The claimant's husband was working Monday to Friday and although he was able to help with the care of their children in the mornings and evenings, the claimant felt it was unfair to ask him to be a weekend carer on his own after doing a full week at work.

26. On 30 June 2013 a working pattern review meeting took place at which the claimant was asked to work the occasional weekend to support the team. However, on hearing about her difficult domestic circumstances and ongoing caring responsibilities, the respondent stepped back from that and agreed to continue with the fixed days on Wednesdays and Thursdays. That arrangement was not a term of the claimant's contract but rather an accommodation under the Flexible Working Policy which could again be reviewed in the future.

27. By 2016 the Trust issued a new rostering policy under which all flexible working arrangements were to be reviewed across the Trust. That was the start of a series of steps taken in the claimant's case, beginning in September 2016, to review and discuss her flexible working arrangement.

28. On 8 September 2016 Mr Owens, the District Nurse Team Leader, met with the claimant and her trade union representative (the union being present at every meeting the claimant later attended), to discuss the arrangements. The claimant was asked to work an occasional weekend, no more than once a month. Her union representative recommended she submit a new flexible working request. The claimant did not see the need to do this and did not submit such a request, as she relied on her existing one. Following the meeting there was to be a referral to Occupational Health and the discussion was to be reconvened after that.

29. On 13 September the claimant's sickness absence began for reasons relating to the subject-matter of the discussion, and from that point until her later dismissal the claimant did not return to work. That same day the claimant wrote to Mr Owens in response to the discussion of 8 September, saying, “I will not be considering alternative arrangements as I have none available to me”. That sums up the position adopted by the claimant throughout the discussions.

30. Due to the claimant’s ongoing sick leave, the Trust’s sickness absence review protocols were triggered and a Stage Two meeting took place with Ms Blyth, District Nursing Sister, on 3 November 2016. The issue of the claimant's flexible working was integral to the sickness absence review meetings, and the series of various meetings which followed after that formed in effect one continuous sequence.

31. The claimant felt unable to return to work while the flexible working issue was unresolved, and at this early stage she said she felt there was discrimination by association, identifying what she saw as an issue about disability discrimination. As a carer to two disabled children, the claimant felt she was being treated less favourably than others who did not have such responsibilities.

32. On 3 November a Stage Two outcome letter was sent to the claimant, and a separate letter of the same date dealt with the issue of flexible working hours. The letter noted that the claimant had decided against making a new flexible working request, and gave her 30 days’ notice that she may be required to work on other days, including Saturdays. On 7 November the claimant replied to reject this working arrangement, which she saw as a change to her contract, and said that no fundamental case to support the change had been made out. She was right to say that no formal detail had been supplied at this stage, though it did come later.

33. On the same day, 7 November, the claimant also appealed against the Stage Two outcome from the sickness absence review.

34. On 8 November the claimant raised a grievance. She relied on indirect sex discrimination, saying that, “as a mother the burden of childcare lies with me”. She also felt this was disability discrimination by association and she disputed the respondent’s view that under its Organisational Change policy this was classed as a ‘minor change’ rather than a ‘major one’.

35. On 5 December a sickness review date occurred which could have acted as a trigger to go forward to Stage Three of the policy, but the Trust chose not to act on that pending these other issues being discussed, specifically the grievance.

36. A grievance meeting was held with Ms Place, Interim Quality & Safety Lead, on 12 December where there was a broad discussion about the domestic challenges the claimant was facing. The respondent accepted then and during the course of this hearing that the claimant was in a difficult situation. For her part, the claimant told the respondent that she could not work even one weekend in a year, and expressed the reasons why she felt so strongly about that.

37. The grievance outcome was sent to the claimant by a letter dated 19 December, agreeing that to her as an individual this was not a minor change but a major one because of her particular circumstances. While acknowledging that fact, it was felt by Ms Place that the request to work flexibly was a reasonable one on the Trust's part. Ms Place also said she was not prepared to agree to the claimant's request that this issue of flexible working never be raised again. The claimant submitted an appeal against this grievance outcome on 23 December.

38. On 26 January 2017 the claimant was invited to a Stage Three sickness review meeting. On 15 February, before this took place, the respondent provided a business case in writing to the claimant, setting out a number of factors which it felt supported its decision to review and alter the flexible working arrangements. Amongst these were the cost implications of paying enhancements to Band 6 and 7 staff at the weekends, the consequences of those staff not being available as often during the working week for two purposes: one to attend management meetings and the other to supervise in their capacity as more senior and more experienced members of the clinical team. The business case document and its appendices also referred to the impact on other team members, the example being given that others in the team would expect in principle to work one in three Christmases, whereas in the claimant's case it would be one in seven. It was noted that in practice the claimant never actually did work on a public holiday. Other matters mentioned in the business case included the patient-driven changes that had taken place, such as the earlier discharge of patients from hospital needing community nursing instead, and the deployment of intravenous injections in a way that would not previously have happened. This was all felt to be part of a safe and effective service delivery arrangement, and it came as part of an overarching need for flexibility in a modern and changing Health Service.

39. All of that information was provided in the document dated 15 February, and after this the fourth in this series of meetings with the claimant took place on 23 February. This was the Stage Three sickness review. The claimant was again asked to work flexibly, doing her regular days but – provided that several weeks' advance notice was given – sometimes working a different day including occasional weekends.

40. The Stage Three outcome letter was sent on 24 February, advising the claimant that the Trust may move to Stage Four if she were unable to return to work by 22 March 2017. The claimant felt unable to return at any time while this issue remained unresolved.

41. On 28 February the claimant attended a grievance appeal meeting with Ms Barbour, Community Manager, when there was again a full discussion about the difficulty of the flexible arrangements, and other possibilities such as the claimant seeking respite options were aired. The claimant was not willing to agree any such alternatives. By that stage she was making it known that she was contemplating legal proceedings, and mentioned that she had been in touch with ACAS because she was aware that a deadline was looming.

42. The outcome of the grievance appeal was issued on 7 March, upholding the grievance in one respect, which was that to the claimant this was a 'major change', but nevertheless holding to the Trust's position that under its Organisational Change policy it was 'minor'. The grievance appeal outcome also set out that the contract of employment did not specify particular working days.

43. A significant meeting then took place on 30 March with Ms Baxter, Community Manager, to discuss the issue afresh and the various options. Redeployment was discussed and because she feared that her employment would be ended if nothing were found within 12 weeks of going on the redeployment register, the claimant understandably rejected that. There was some discussion about the difficulties of her set working arrangements on others in the team, and on the respondent's ability to cover the rota effectively. As the claimant later acknowledged at her dismissal appeal, the possibility of a dismissal on the grounds of 'some other substantial reason' was referred to and was explained to her. The claimant also mentioned redundancy or settlement; in other words, she was envisaging the possibility that she might be leaving her job. She had not prior to that meeting been given any information in writing to suggest that that was on the agenda.

44. On 6 April the respondent's HR department invited the claimant to what they described as a "short and final" meeting on 20 April to discuss her contract. Again, that letter did not say that dismissal might be an outcome from the meeting.

45. The next day, on 7 April, the claimant issued an application to the Tribunal alleging indirect sex discrimination. The respondent said it received the claim form on 13 April, though there was no firm evidence that this was the date, but certainly the application was received after the respondent had already initiated the steps that later led to the decision to dismiss the claimant.

46. On 20 April a further meeting took place between the claimant and Ms Baxter at which the claimant was told the respondent had no option but to dismiss her and re-hire her on new terms which required the flexibility which she felt unable to agree. The new terms would mean working 15 hours a week on Wednesdays and Thursdays but subject to the respondent giving notice of any different days to be worked. The claimant was given time to think about whether she would accept this offer, and chose not to.

47. The dismissal letter was therefore issued on 26 April, noting the claimant's decision to reject the offer and citing, amongst other things, the increasing pressure on the Trust to have greater flexibility on its rota. The letter also referred to a vacancy in Workington which the claimant had identified. This was for a full-time post. The claimant felt she might be able to work Wednesdays and Thursdays in this post with the respondent hiring another person to work under a flexible rota for the remainder of the week. The claimant was advised to apply for this if she wished, but

decided not to. She felt discouraged by the fact that this post was also expected to require some flexibility. Other options, such as the possibility of working as a bank nurse, were also rejected by her.

48. The claimant appealed against her dismissal on 8 May referring, amongst other things, to the lack of forewarning that her dismissal might be an outcome of the 30 March and 20 April meetings; expressing her unhappiness with the lack of consultation and the inadequate business case; and referring also to indirect sex discrimination and victimisation.

49. The appeal was dealt with on 8 June by Ms Turnbull, Senior Network Manager, who treated it as a full re-hearing of all the issues. She discussed the problems caused within the team, without giving the claimant specific information. She invited the claimant to identify what she saw as any gaps in the business case, but the claimant was unable to refer to anything. There was some discussion about other aspects of the case, such as the cost implications of leaving the claimant's arrangements unchanged, and the absence of senior staff being available to work on weekdays. As far as the claimant was concerned, the only acceptable outcome was to make no change at all to her working arrangements.

50. As for the procedural handling of the case, the claimant conceded at this meeting that she was generally happy with the level of consultation except for the absence of advance warning in writing about the dismissal option. That appeal being a full re-hearing by Ms Turnbull, any such unfairness was eliminated. All other options that the claimant might have taken to avoid her employment ending, other than the option she preferred, had been discussed and exhausted.

51. The appeal outcome letter dated 19 June responded in broad terms to the issues raised by the claimant. Although it lacked detailed explanation of the underlying issues, the letter did refer to some of the detail in the business case, and fully took into consideration the claimant's circumstances. The conclusion was that there was a clear business case, that alternatives had been explored, and there had been lengthy consultation.

52. The claimant's employment therefore terminated on 19 July 2017, at which point she was paid her accrued holiday pay according to her contract, read with the respondent's policy which limited her entitlement during long-term sickness to the entitlement under the Working Time Regulations.

53. Had the claimant not been dismissed when she was, the Tribunal is satisfied that a Stage Four sickness absence review meeting would have taken place and as a result of this her employment would have ended by August 2017 at the latest.

Conclusions

Unfair dismissal

54. Having heard the respondent's evidence as to why it terminated the claimant's employment, the Tribunal considered whether this amounted to 'some other substantial reason' for dismissal under section 98(1)(b) Employment Rights Act 1996. This included consideration of the two limbs of that sub-section: firstly, whether the respondent's reason was one of substance; and secondly, whether it justified the claimant's dismissal.

55. In this case the claimant's dismissal came about because of the respondent's decision to review and amend her working pattern so as to bring it in line with her colleagues'. Its reasons were set out in a detailed business case, summarised in paragraph 38 of this judgment. The organisational reasons for the review, coupled with the claimant's inability to meet the requirement for flexibility, led the respondent to decide that the needs of the service outweighed the claimant's personal circumstances. The demand for more flexible care over increased hours and at weekends was the driving force behind the respondent's actions. The respondent was aware of the claimant's very difficult circumstances and was able to accommodate those from 2008, but these gradually increasing demands on the service meant it was no longer possible to ignore the need for all employees to work flexibly. The Tribunal therefore accepts that there was a substantial reason which in principle could be a fair reason for dismissal.

56. Whether the dismissal was actually fair requires an assessment of the respondent's decision in light of section 98(4) Employment Rights Act, which means looking at all the circumstances of the case, the size and resources of the employer, equity and the substantial merits of the case. It is a question which goes both to the substantive fairness of the dismissal and also how it was handled procedurally.

57. The most important procedural points about which the claimant complained were as follows:

57.1 She was not forewarned in writing before the 20 April meeting that dismissal may be an outcome. For the respondent, Mr Smith very fairly conceded that the mere fact that there is no requirement under an ACAS Code to put that information in writing does not mean it was not a reasonable expectation, and the Tribunal agrees. Despite that, the claimant did in fact have some understanding that her employment may be in jeopardy even though she had not had anything in writing. This is because by the time of the 30 March meeting, when she raised the prospect of leaving with a redundancy payment or a settlement, it was clear that she could see the direction the situation was taking. Furthermore, an explanation was given to her of what the phrase "some other substantial reason for dismissal" meant. The claimant was therefore aware of the prospect of her employment ending prior to that decision being discussed towards the end of the process. Even if this was a significantly unfair procedural element, the Tribunal concludes that the appeal with Ms Turnbull corrected any such error by treating the meeting as a full re-hearing of the case. The Tribunal acknowledges the importance of being told in advance of a meeting that a person's job might be in jeopardy, since part of the purpose is to enable an employee to take advice and prepare and be well represented. By the time of the claimant's appeal against dismissal, all of those features were in place and the claimant was able fairly to respond to the discussion.

57.2 Lack of consultation was another of the claimant's complaints, but by the time of the appeal against dismissal she did quite fairly concede that this was more about the lack of forewarning point dealt with above. Eight meetings took place in total, beginning with on 8 September 2016 and ending with the appeal against dismissal on 8 June 2017. The

Tribunal concludes that this series of meetings, whether they took the form of sickness absence reviews, grievance meetings or discussions about the working pattern was conducted by agreement as a seamless sequence of discussions. They were rolled together into one series of eight significant discussions in which the claimant was able to, and did, fully participate. Accordingly, there was no failure to consult with the claimant; only a failure to agree.

57.3 The inadequacy of the business case formed part of the claimant's argument about procedural unfairness. The Tribunal agrees with the respondent's submission that there was no expectation of providing a written business case in the early stages of the discussions. A different outcome might have been reached if the parties had been able to arrive at an agreed outcome, making a written business case unnecessary. Following the early discussions the claimant was entitled to ask for more detail about the respondent's reasons for changing her working pattern, and when she did, a detailed business case with appendices was supplied in February 2017. The underlying substance of those issues was not seriously disputed by the claimant, either at the time or during this hearing, with the exception of her argument that adequate cover could be provided on the rota within the existing team. During the course of this hearing the claimant took issue with other points, such as the relatively small value of the extra costs of Band 6 and 7 nurses covering weekends. However, she has never disputed that the complexity of the care, or the hours over which it was provided, had changed. At her later appeal against dismissal the claimant was invited to identify what information was lacking from this business case but was unable to point to anything.

58. Those were the key procedural points raised during this hearing, and having reviewed them the Tribunal does not find that there was any procedural unfairness in the respondent's handling of the case.

59. This leaves the question whether the respondent's decision to dismiss was fair and reasonable in all the circumstances, bearing in mind that a perfectly fair and proper procedure might be followed but the wrong decision might still be reached at the end of it.

60. In its approach to this question the Tribunal has been mindful of the importance of not substituting its own views of what it would have done had it been facing this situation. The law recognises that different employers faced with the same circumstances might reach different outcomes. The Tribunal has to determine fairness in light of the band of reasonable responses test. In other words, can it be said that this employer's decision fell within the band or range of decisions that a hypothetical reasonable employer might have arrived at? On the other hand, can it be said that this employer acted in such a way that no reasonable employer would have done? Only in the latter case could the Tribunal interfere and say that the dismissal was unfair. The Tribunal cannot reach that conclusion and we consider that the decision to dismiss was fair and reasonable in the circumstances.

61. We recognise that a different employer might have been able to accommodate the claimant's family circumstances, and note that she has obtained

new employment where the working arrangements permit her to work a fixed pattern, but that simply illustrates how the band of reasonable responses operates. The key point is that this employer decided it could not accommodate the fixed pattern, and that was a reasonable decision for it to take.

62. It was not difficult to understand that the claimant felt unable to agree to alter her working pattern, but one of the safeguards in such a situation is that the employer can be expected to consider all reasonable alternatives before reaching the last resort of dismissal. We find that this employer did do that. It proposed that the claimant work non-standard days only occasionally (no more than once a month), and that she be given several weeks' notice of any such departure from her usual pattern. It invited her to consider whether she could make other care arrangements for her children, such as occasional respite care. All these suggestions were rejected by the claimant (for which we make no criticism of her), but in light of the wider needs of the service, it was reasonable for the respondent to conclude that there was no other resolution to the problem.

63. Even if we had found differently, the Tribunal is satisfied that having paused the Stage Four sickness absence review in late March 2017, pending the outcome of the internal meetings, the respondent would have moved forward with this in July 2017, and would have completed the Stage Four process by the end of August 2017. At that stage, the claimant would have been fairly dismissed on the grounds of her long-term ill-health.

Automatically unfair dismissal

64. The claimant alleged that her dismissal was automatically unfair under section 104 Employment Rights Act 1996, in that the reason was that she had asserted a statutory right. The statutory right relied on was the right to request flexible working under Part 8A of the Act. Had the Tribunal found this to be the reason (or principal reason) for dismissal, then it would follow that the dismissal was unfair without the need to assess reasonableness. In determining this question it is necessary to consider the provisions of section 104 and how this is connected to the statutory right in question.

65. For the purposes of section 104(1), this is not a case where the claimant brought proceedings during her employment to enforce the right to request flexible working, which leaves only the wording of section 104(1)(b) to assist her argument. In other words, if the claimant asserted that the respondent infringed her right to request flexible working, then she could pursue the allegation that this was the reason for her dismissal.

66. The only request for flexible working made by the claimant (which may or may not have been under the formal statutory rules applicable at the time), was the one made in 2008. That request was granted, and the respondent allowed the claimant to work part-time and on fixed days until the review in 2016 led to a change in its stance. It cannot therefore be said that the respondent infringed the claimant's rights on that occasion. The claimant had no complaint about the outcome reached and made no claim to an employment tribunal at the time. In fact, she would have been unable to pursue a claim by virtue of section 80H(2) of the Act, since her application for flexible working was "disposed of by agreement" and under that section, "no complaint may be made" in those circumstances.

67. There being no other exercise or assertion of the statutory right to request flexible working, the Tribunal does not accept that the claimant was dismissed for this improper reason. Even if such a right had been asserted, the Tribunal is satisfied that neither of the respondent's witnesses, in particular Ms Baxter and Ms Turnbull as the key decision-makers, had any such matter in their minds or were influenced in reaching their decisions by any such statutory right. There was simply no evidence to support such a conclusion.

Victimisation

68. The claimant alleges that she did a protected act as defined by the Equality Act 2010, by issuing a sex discrimination claim on 7 April 2017. Bringing that claim qualifies for protection under section 27 of the Act, as the claimant was asserting her right not to be discriminated against. The Tribunal accepts that the respondent, and specifically Ms Baxter as the dismissing manager, had no knowledge that the application to the Tribunal had been issued when making the arrangements for the 30 March meeting to discuss the termination of the claimant's employment. This is unarguably the case since the meeting was being arranged before the claim was even issued. The same can be said of the respondent's actions on 6 April when it sent an invitation to the later meeting at which the decision to dismiss was reached. Ms Baxter could not have had that knowledge because the claim was not issued until after she took these steps. Ms Baxter may have been aware in general terms that the claimant had an intention to make a claim, and the Tribunal noted that the claimant suggested as much at her grievance appeal on 28 February with Ms Barbour. However, the Tribunal is satisfied that none of the respondent's managers, including Ms Baxter in particular, had the prospect of Tribunal proceedings in their minds or that this played any part in the decision to dismiss. We reach the same conclusion in relation to Ms Turnbull's decision to deny the appeal against dismissal.

69. We accept the submission made by Mr Smith for the respondent to the effect that if the respondent had wanted to dismiss the claimant for these or any other improper reasons, it would not have gone to the lengths it did to try and achieve a positive outcome to retain the claimant as part of the team. There was no evidence or suggestion before the Tribunal that the respondent had any difficulty with the claimant or her work. On the contrary, it was evident that the respondent made significant efforts to try and retain her as an employee.

Indirect sex discrimination

70. The indirect sex discrimination claim arises from section 19 Equality Act 2010. This differs from the direct discrimination provisions of the Act in one important respect: there is no protection against discrimination by association under section 19. For the indirect discrimination provisions to apply, the protected characteristic relied on (sex) must belong to the claimant personally, and not somebody else. The Equality Act does not assist a claimant whose disadvantage arises from the protected characteristic (here, disability) of someone else. Although it was submitted on the claimant's behalf that her protected characteristic was 'being female with caring responsibilities', this stretches the wording of the Act too far. There is no such protected characteristic, as the claimant's sex and her caring responsibilities cannot be conflated in this way. The claimant can rely on her gender and then seek to persuade the Tribunal that this creates an indirect disadvantage to her as the

primary care-giver, but this approach requires a more careful analysis of the statutory provisions.

71. The analysis of indirect discrimination involves four stages under section 19, which the Tribunal considered. Firstly, did the respondent subject the claimant to a provision, criterion or practice (PCP)? The Tribunal agrees that it did, though we did not accept the description of the PCP that was put forward on the claimant's behalf. This was expressed to be "purporting to unilaterally vary the claimant's terms and conditions by giving notice that [the respondent] will seek once a month to make the claimant work on a weekend at their discretion".

72. The law requires a PCP to be expressed in neutral terms from a starting point that everybody has equality of treatment. The question whether there is any detriment or disadvantage resulting from that is a separate consideration. The Tribunal finds that the PCP here was the respondent's requirement that its community nurses work flexibly, including at weekends. That PCP applied to men and women in the claimant's team.

73. The second stage is whether the PCP put women at a particular disadvantage compared to men. No evidence at all was put before the Tribunal to support this. On the contrary, all the claimant's female colleagues were able to meet the requirement as well as Mr Owens, the only man in the team. The claimant's colleagues had children though none was disabled. During the internal discussions the claimant asked in fairly strong terms not to be compared with her colleagues, female or male. This was on the grounds that she was the only person in the group looking after children with disabilities. This illustrates perfectly the difficulty facing the claimant for her claim to succeed, which is that her children having disabilities is not a protected characteristic which she can rely on for herself in an indirect discrimination claim.

74. The Tribunal had no difficulty in accepting that the claimant personally experienced a disadvantage, due to her personal circumstances. However, section 19(2)(b) of the Equality Act requires there to be group disadvantage as well as personal disadvantage. In the absence of any evidence demonstrating that women as a group were (or would be) disadvantaged by the requirement to work flexibly, the Tribunal concludes that this claim fails.

75. The Tribunal went on to consider whether, if we were wrong in our primary conclusion, the respondent could justify the PCP. We concluded that the evidence (as summarised in the respondent's business case) showed clearly that it was pursuing the legitimate aim of achieving flexible working by all community nurses in order to provide a safe and efficient service, and that it was proportionate to do so by applying the PCP to all members of the nursing team.

Holiday pay

76. The final claim was for unpaid holiday pay, but this was barely pursued at the hearing. The crux of the dispute seemed to be the claimant's belief that she was entitled to holiday pay calculated by reference to her more generous contractual entitlement, whereas the respondent's position was that the holiday accrued during long-term sickness absence was limited to the statutory entitlement under the Working Time Regulations 1998, which it had paid in full.

77. The claimant was unable to provide evidence that she was owed anything more than the holiday pay already paid to her, and so the Tribunal was unable to conclude that the respondent breached her contract. Accordingly, this claim fails.

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Employment Judge Langridge

Date 13 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

19 February 2019

FOR THE TRIBUNAL OFFICE