



EMPLOYMENT TRIBUNALS

Claimant: Mr T Hoey

Respondent: The Commissioners for Her Majesty's Revenue and Customs

HELD AT: Liverpool

ON: 10 September, 12
September and 21
November 2018

BEFORE: Employment Judge Horne

MEMBERS: Mr M Gelling
Mr P C Northam

REPRESENTATION:

Claimant: In person
Respondent: Mr S Lewis, counsel

JUDGMENT having been sent to the parties on 27 November 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The claimant is a civil servant. He works for the respondent part-time. By a claim form presented on 23 October 2017, the claimant complained that the respondent had breached regulation 5 of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ("PTWR"). The claim related to the vacant Higher Officer Grade role of Facilities Management Delivery Manager ("FMDM"). There is no dispute that the claimant was excluded from applying for the role on the ground that he was a part-time worker. It is also common ground that Miss Christine Kelly, to whom the FMDM role was offered, was a comparable full-time worker. For his part, the claimant accepts that he presented his claim after the expiry of the statutory time limit.
2. The issues for the Tribunal to decide are:
 - 2.1. Whether it would be just and equitable to extend that time limit.
 - 2.2. Whether, by excluding the claimant from applying for the FMDM role, the respondent subjected the claimant to any detriment.

2.3. If there was a detriment, can the respondent prove that the detrimental treatment was objectively justified?

3. If there was a breach of regulation 5, we then have to consider whether there was any quantifiable chance that the claimant could have been offered that role. If there was no such chance, then it is conceded by the claimant that he is not entitled to any other remedy.

Evidence

4. The claimant gave oral evidence on his own behalf. The respondent called Miss Kelly, Mr Sharpe, Mr Gray, Miss Jones (by video-link) and Mr Keenan. All witnesses confirmed the truth of their written witness statements and answered questions.
5. We also considered documents in an agreed bundle, which was divided into two volumes: one consisting of correspondence and the other of more contemporaneous documents.

Facts

6. The respondent has approximately 60,000 staff, mostly civil servants. They operate from some 170 buildings around the United Kingdom. These buildings have to be maintained and managed in order to enable HMRC to provide an effective service and to enable its civil servants to work safely and comfortably. That responsibility falls to the Estates Management function of HMRC. The civil servants who work within these buildings are seen within the Estates Management function as “customers”.
7. The claimant is employed by the respondent at Officer Grade (or “O-Grade”) in a sub-division of Estates Management called the Technical Services Group. Until 2014 he had a different role, with the title, “Building Owner”. The Building Owner role included many customer-facing and supplier-facing responsibilities. Examples included meeting trade union representatives and senior leaders, meeting staff on site, dealing with service providers and liaising with people responsible for building management. As Building Owner, the claimant took on some of the respondent’s statutory responsibilities. Such responsibilities were largely document based. They included conducting, recording and checking risk assessments, checking compliance with statutory requirements, checking that various assessments had been done. Discharging these responsibilities involved recording information on a database and preparing reports for service providers.
8. Throughout successive appraisals the claimant's performance was rated as “achieved”. This put him in the middle 80% of civil servants within HMRC.
9. In 2012, Miss Christine Kelly moved into Estates Management as an O-Grade Building Owner. The claimant, who had held the role for some time, helped her to settle in. He helped to put together some training from which Miss Kelly benefitted as a relatively new member of the team. From time to time, Miss Kelly would ask the claimant questions about work related matters, and as a more experienced colleague the claimant would do his best to help her. He was not her official mentor. There is a clash of evidence as to whether he was an unofficial mentor, but very little turns on the dispute.
10. In 2014 the claimant applied for promotion to a Higher Officer Grade (“HO”) role. His written application was considered, but he was not shortlisted for interview. His score against the required competencies fell below the pass mark to progress

beyond the shortlisting stage. After that unsuccessful application, the claimant did not apply for any other promotions, despite a number of HO vacancies arising in the local area.

11. There was a separate development in 2014. Following a restructure, the role of Building Owner significantly changed. At the risk of over-simplifying the change:
 - 11.1. The essentially customer facing and supplier facing elements of the role remained within the role of Building Owner, and
 - 11.2. the more document-based statutory checks were moved to a new role within the Technical Services Group. In the claimant's words, the statutory checks made up "almost the entirety" of that role
12. The claimant was given a choice of roles for which to apply. He opted for a role in the Technical Services Group. Miss Kelly chose Building Owner, with its increased focus on customers and suppliers.
13. On 6 July 2015 the claimant took partial retirement. He reduced his hours to 22 hours a week. He was able to draw on his Civil Service pension to the extent that his overall earnings were unaffected by the reduction in his hours. Under the rules then in force, the claimant was prohibited from increasing his hours.
14. From about 2015, although we are not sure of the precise date, the respondent contemplated a major overhaul of its estate. It is described in the respondent's witness statements as "the most significant property move in the United Kingdom". Whether or not it quite deserves that billing, there can be no doubt that it was an enormous undertaking. The project involved moving from 170 local offices to 13 Regional Centres across the country. The proposal was for the first Regional Centre to open in Croydon with a view to the programme being rolled out nationwide.
15. Near to the end of 2016 a decision was taken that each Regional Centre should be staffed by a dedicated "core team" drawn from the Estates Management function. The size of the team would be 8 or 11 members of staff, depending on the size and complexity of the Regional Centre. Of those, 3 or 5 would be from a sub-division of Estates known as "Facilities Management". Role holders within the core team would have different areas of expertise and would be at different grades of seniority. The core team would staff a roster to ensure that the building stayed open late into the evening and at weekends, and that there was somebody always on site wherever possible when the building was open to "customers". Each of the roles within the core team were envisaged as full-time roles and the budgets for each team were allocated accordingly.
16. One of the roles within the core team was to be the FMDM role which is at the centre of this claim.
17. Recruitment within HMRC follows strict protocols and procedures. Unless a prior decision has been made to restrict a role to a certain working pattern, a candidate with any working pattern can apply for a role and then request flexible working. The discussion about proposed working pattern cannot be held until a decision has been made to offer the candidate the role. Where the successful candidate for a whole-time role asks to work part-time, and the vacancy holder must consider whether the role can be done part-time. If not, he must search for a selectable job share partner or withdraw the offer.

18. On 22 and 23 November 2016 an email conversation took place between Mr Gray (People & Skills Manager), Mr Sharpe (Head of Facilities Management, who was the vacancy holder) and HR Business Partner, Miss Gabriella Jones. The purpose of this discussion was to decide upon the contents of the advertisement for the FMDM role. In particular, they exchanged views on whether or not the role should be restricted to full-time candidates only. As a result of this conversation, it was decided that the role should be full-time only and on a “5/7” working pattern, which would mean that the role holder could be required to work five days in any seven and not have their hours restricted to Monday to Friday.
19. On 5 January 2017 a vacancy notice for the FMDM role was posted across HMRC. There were seven such roles advertised: two in Birmingham, two in Leeds, one in Liverpool and two in Salford. At this time, the physical move to the Regional Centres was still a long time away. Many details were left to be finalised, including the rosters on which the new team would have to work in order to optimise their on-site presence. The intention was to have the teams populated and ready for when the move eventually happened.
20. On the front page of the advertisement, under the heading “Working Pattern”, the advertisement simply stated, “full-time”. Under the headings “Role Purpose” and “Results” it was quite clear that the role was essentially customer-facing, involving a high degree of interaction with building users and with suppliers. It bore little relation to the role which the claimant had been doing since 2014. The “Vacancy Holder” for the role was Mr Rob Kirk in Estates Facilities Management Services.
21. During the course of the window for which the vacancy was open, there was a further e-mail conversation, this time between Mr Sharpe, Ms Jones and Michael Hunter who was Head of Regional Facilities Management Services in the North Region. Mr Hunter was relatively new to Facilities Management. He expressed a concern that had been raised by members of the Facilities Management Team in his region about the restriction of the role to full-time. This was discussed, but there was no formal resolution achieved before the closing date for the role application. During the course of that email exchange, Mr Sharpe confirmed that a decision had already been taken that the role should be 5/7 and full-time. As part of his rationale, Mr Sharpe made clear that it was important that there were five full-time equivalents for the roles in this team. This shows to us that it was a priority of Mr Sharpe to ensure that there were five full-time equivalents for all roles within the team. If the FMDM role was part-time, it would be understaffed unless another Delivery Manager role-holder could be found to job share.
22. Miss Kelly, who worked full-time, decided to apply for the FMDM role. By this time she was widely known as a high achiever. She was one of the small percentage of civil servants who had scored a rating of “exceeds expectations” in her latest appraisal. She put hours of time and effort into preparing her application, drawing on her experience in the customer-facing and supplier-facing aspects of her Building Owner role. When the claimant found out that Miss Kelly was applying for the FMDM role he told Miss Kelly that she would “walk it”. Miss Kelly replied that she would not “walk it” because she would have to work very hard to meet the high standard that would be expected for the promotion. This conversation indicates to us that the claimant knew that, if he applied for the role, he would be having to compete alongside Miss Kelly and that up against her application, he would not stand a chance.

23. On 25 January 2017, two days before the closing date, the claimant emailed Mr Kirk to ask why part-time workers had been excluded from the FMDM role. His e-mail asked for a statutory statement of reasons for treating part-time workers differently. He also queried why the vacancy had been opened up to external applicants and enquired whether the “working pattern terms and conditions” had been agreed with the trade unions and staff association. His e-mail did not mention any interest in applying for the role.
24. Mr Kirk gave the claimant a holding reply. The closing date came and went on 27 January 2017. On that day the claimant e-mailed again, observing that part-time staff were excluded from applying. He did not say that he personally would like to apply.
25. The claimant continued, however, to press for reasons why the role had been restricted to full-time worker. On 28 February 2017 he chased his email, this time addressing it to Ms Ann Wragg (Head of Corporate Capabilities) as well as Mr Kirk. Ms Wragg entered into e-mail dialogue with Mr Sharpe, who confirmed that the role was full-time only. Mr Sharpe e-mailed Ms Wragg on 28 April 2017 with a suggested reply to the claimant’s e-mail of 25 January 2017. Unfortunately, that reply was not passed on to the claimant. Mr Sharpe’s draft took the form of added comments embedded into the original text of the claimant’s e-mail. His comments read as follows:
- “The Regional Centre Estates Teams require 5 over 7 working to support the changing the way that our business customers work. In order to do this, the whole team will need to operate on a roster basis to ensure fair and equal apportionment of working time whilst meeting business need. In order to do this successfully, the new roles for [Facilities Management] and the other estates regional centre staff needs to be advertised as full-time in order to ensure we are not left with insufficient resource following closure of the recruitment process.”
26. In the meantime, the recruitment exercise continued. In total, 114 people applied for the FMDM roles across the country. Following shortlisting and interview, one role was offered, which was in Liverpool. The successful candidate was Miss Kelly.
27. On 7 April 2017, Miss Jones e-mailed Ms Wragg with a “Business Rationale” for the decision. Essentially, Miss Jones told Ms Wragg that the core team for each Regional Centre would be very streamlined and would have to cover extended building opening hours (7am to 10pm, 7 days per week. 37-hour, 5/7 working patterns were required in order to ensure that there was a balanced rota of unsocial hours working. This rationale was not forwarded to the claimant.
28. The claimant sent a separate e-mail on 27 April 2017 to Mr John Cashmore in Estates Policy and Plans. They spoke in early June and the claimant followed up with a further e-mail to Mr Cashmore on 14 June 2017. Mr Cashmore replied with a further holding response. The claimant sent a chaser on 5 July 2017 and, when he received no reply, escalated his concerns to Human Resources on 12 July 2017.
29. In parallel to the claimant’s quest for answers, the respondent was working on a consultation document called the Role Change Guide. The document was prepared in anticipation of the opening of the new Regional Centres. When they opened, there would be a restructure in which roles would be migrated from roles in the old buildings to those in the new. It was expected that some people would

be slotted in to aligned roles, but that there might be some change in headcount. That being the case, there had to be careful management of how roles were to be transferred.

30. The Role Change Guide was to contain a section headed, "Frequently Asked Questions" ("FAQs"). One of the proposed FAQs read, "I'm currently working part-time, will I be able to continue to do this?" Miss Jones sought advice about the proposed answer. She e-mailed Ms Eileen Finnigan (HR Operations Policy and Reward) with the following draft,

"The majority of roles within estates will be open to request flexible working arrangements (e.g. part-time and job share).

There will be an exception to this approach in certain roles in order to achieve our Customer Service ambitions as we implement the Future Operating Model.

For example in regional centre core teams applicants will move to 5/7 working pattern and will receive on call and unsocial hours payments in line with HMRC guidance."

31. In reply to Miss Jones' e-mail, Ms Finnegan advised Miss Jones to check the equality implications. Working reduced hours would not necessarily mean that the jobholder would be unable to cover the full range of hours. Following receipt of this e-mail, however, it remained the view of Miss Jones and Mr Sharpe that the rosters for the core team would not be adequately covered unless all the role-holders worked full-time.
32. The claimant's e-mail of 12 July 2017 came to the attention of Gabriella Jones, who sought further advice from Ms Finnigan and her HR colleague, Mr Patrick Fleming. Ms Jones' e-mail included a draft proposed reply that, in substance, was the same as her proposed reply to the related FAQ in the Role Change Guide. In reply, Mr Fleming advised Ms Jones that she would need to provide further detail and explain why a permanent presence in the Regional Centres could not be achieved by employing a part-time worker. On 8 August 2017, Ms Finnigan weighed in by re-iterating, from her previous e-mail, that part-time working and flexibility were not mutually exclusive. She thought there was a risk that a tribunal might not find the restriction to full-time workers justified.
33. Draft responses passed from one manager to another. Eventually, a consensus was reached both as to the reply for insertion into the Role Change Guide and the reply that should be given specifically to the claimant. The claimant was given a written response on 15 August 2017 in an e-mail from Mr Cashmore. The e-mail contained the following explanation, which relevantly reads:

"... In Regional Centre Core Teams applicants will be expected to work full-time on a 5/7 contract, which would see staff routinely working Mon-Fri but allow flexibility for evening and weekend work. This is to ensure we have an Estates presence as far as possible when Regional Centres are open to customers. Given the flexibility required we will need to rotate shifts amongst the team equitably as we can. This means that alternative working patterns will be very difficult to accommodate, although exceptionally job shares may be possible. In addition to this, staff would need to be available out of hours "on call" as needed in order to respond to any incidents. We will review this again in 12 months' time once we have a better idea of how these roles are working."

34. The same form of words appeared in the Role Change Guide. As with the reply to the claimant, the rationale included the phrase, “exceptionally job shares may be possible”. This phrase was not meant to be a concession that new roles within the core team at the Regional Centres should be advertised as open to job sharers. Rather, it was intended to reflect the possibility that, if existing pairs of job sharers were transferred into a Regional Centre role as part of a restructure, then they could be slotted in.
35. The claimant was dissatisfied with Mr Cashmore’s explanation. He commenced early conciliation on 29 September 2017. He obtained his certificate from ACAS on 10 October 2017 and he presented his claim to the Tribunal on 23 October 2017.
36. On 19 December 2017 another job vacancy went live. It was for the Regional Lead Facility Manager: another member of the core team to be based at a Regional Centre. This vacancy was advertised as being open potentially to job sharers. We are satisfied with the explanation given by Mr Gray about this part of the advertisement: it was simply a mistake. It was not intended that that role should be open to job sharers. The misleading part of the advertisement crept in because it was lifted from the Role Change Guide, which was intended for transferring employees rather than recruitment into vacancies.
37. Before concluding our findings of fact, we record an important finding about the claimant’s motivation at the time the FMDM role was advertised. He was genuinely, and very acutely, concerned about the general unfairness of barring out part-time workers from job opportunities. In our view, however, he did not actually want to do the FMDM role and was not genuinely interested in applying for it for himself. This is a controversial finding, so we give our reasons here:
- 37.1. The claimant preferred the more document-based Technical Support Group responsibilities to the customer-focused and supplier-focused responsibilities of the Building Owner role, which is why he had chosen the former role over the latter. It was obvious from the FMDM role advertisement that the role responsibilities were of the kind that he had chosen to leave behind.
- 37.2. The claimant had not applied for any promotion since 2014.
- 37.3. In his evidence to us, the claimant told us that part of his reason for wanting the role was to avoid the uncertainty of a proposed move to a Regional Centre in Salford. That cannot have been part of his reasoning at the time. In January 2017 he did not know about any such proposal, which was announced for the first time many months later.
- 37.4. He knew, having told Miss Kelly that she would “walk it”, that, if he applied, he would not stand a chance.
- 37.5. He raised his query for the first time with only two days to go until the closing date. If he was serious about applying for the role, he would have asked for it to be opened up to part-timers and done so much earlier in the application window.
- 37.6. The claimant’s e-mail of 25 January 2017 did not give the appearance of expressing a personal interest in applying.

Relevant law

38. Regulation 5 of PTWR relevantly provides:

- (1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker-
 - (a) as regards the terms of his contract; or
 - (b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.
 - (2) The right conferred by paragraph (1) applies only if...(b) the treatment is not justified on objective grounds.
39. Regulation 6 confers an additional right on a worker who considers that his employer has contravened regulation 5. If that worker “requests in writing from his employer a written statement giving particulars of the reasons for the treatment, the worker is entitled to be provided with such a statement within twenty-one days of his request”. By regulation 6(3), if it appears to the tribunal that the employer deliberately and without reasonable excuse omitted to provide a written statement, or that the written statement is evasive or equivocal, the tribunal may draw any inference which it considers just and equitable to draw, including an inference that the employer has infringed the right in question.
40. By regulation 8(1) a worker may present a complaint to an employment tribunal that his employer has infringed a right conferred on him by regulation 5.
41. Regulations 8(2) and 8(3) provide, so far as they are relevant:
- “(2) Subject to paragraph (3), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months... beginning with the date of the less favourable treatment or detriment to which the complaint relates...
 - (3) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”
42. A person is subjected to a “detriment”, within the meaning of the Equality Act 2010, if that person could reasonably understand that treatment as putting them to a disadvantage. Subjecting a person to a detriment means putting them at a disadvantage: *Ministry of Defence v. Jeremiah* [1980] ICR 13, CA, per Brandon LJ. A person is subjected to a detriment if she could reasonably understand that that she has been detrimentally treated. A detriment can occur even if it has no physical or economic consequence. An unjustified sense of grievance, however, is not a detriment: *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11.
43. A person who applies for a job in which they have no real interest is not subjected to a detriment if their application is refused on discriminatory grounds: *Keane v. Investigo* UKEAT/0389/09, *Berry v. Recruitment Revolution* UKEAT/0190/10, *Kratzer v R & V Allgemeine Versicherung AG* [2016] ICR 967.
44. When considering the defence of objective justification, the tribunal must seek to balance the discriminatory effect of the less favourable treatment against the legitimate aim.
45. In order to be justified, the treatment does not have to pass a test of strict necessity. The respondent need not show that the treatment was the only course of action available to it. Rather, the respondent must show that the less favourable treatment was reasonably necessary: *Cadman v. Health & Safety*

Executive [2004] IRLR 971, CA, *Homer v. Chief Constable of West Yorkshire* [2012] IRLR 605, paras 23-24, *O'Brien v. Ministry of Justice* [2013] IRLR 315, para 45.

46. Flaws in processes implemented by the employer are not relevant for the purposes of objective justification. What matters is the practical outcome, not how a decision was made: *Chief Constable of West Midlands Police v. Harrod* [2015] IRLR 790.

Conclusions

Time limit

47. The first issue that we have to decide is whether or not it is just and equitable to extend the time limit.
48. The delay was approximately six months. It is common ground that the last day for presenting the claim was no later than 26 April 2017, that is, three months beginning with the closing date for the FMDM role. The claimant did not commence early conciliation until September 2017 and he did not present his claim until 23 October 2017.
49. Nevertheless, we have decided that the time limit should be extended.
50. The claimant has a good reason for the delay. We have taken into account that it took the claimant six weeks from getting Mr Cashmore's explanation until he contacted ACAS and a further two weeks between obtaining his certificate and presenting his claim. But the vast bulk of the delay is explained by the claimant not receiving any meaningful answer from the respondent to his query about why the role had been restricted to full-time workers.
51. We have considered the respondent's submission, which is that even if the claimant was waiting for a written explanation, he could nevertheless have presented a claim to the Tribunal, and ought to have done so being an intelligent and confident civil servant. We reject that submission. We have taken into account that there was a statutory right to a written explanation for detrimental treatment to part-time workers. One of the main purposes of that right is to enable part-time workers to understand the reasons for detrimental treatment to avoid them having to bring claims to tribunals in order to get to the truth of the matter. We do not hold it against the claimant that he waited for the respondent's answer before presenting his claim.
52. We must consider the additional delay of about 2 months for which claimant is responsible, and the effect that that delay had on the quality of the evidence. In our view, the adverse effect was not significant. We were able to get a clear understanding from the respondent's witnesses of their rationale in January for restricting the role to full-time workers as they did. They are very few facts in dispute in this case, and it is not the kind of case where resolution of those disputes depends on fading memories. We have overall decided that it is just and equitable to extend the time limit.

Detriment

53. The next question is: has the claimant suffered a detriment by being excluded from the opportunity to apply for the FMDM role? We decided that the claimant did not suffer a detriment. He could only reasonably have understood the restriction to put him at a disadvantage if he genuinely would have wanted to apply for the role if it had been available for part-time workers. As we have found

at paragraph 37, the claimant was not genuinely interested in applying for the role. He therefore suffered no detriment and regulation 5 was not breached.

Justification

54. If we are wrong in our conclusion about detriment, we would need to consider the question of objective justification. We must view the respondent's attempts at justification with caution. We have to examine very carefully whether the restriction was justified or not. This is for two reasons: first of all the delay in providing an explanation, and second because of the internal doubts that were being expressed by Mr Hunter and Ms Finnigan.
55. That said, we find that the respondent has discharged the burden.
56. Restricting the FMDM role to full-time workers was a means of achieving the following objectives:
 - 56.1. Ensuring that as far as possible there was a continuous on-site presence in the Regional Centres from a member of the core team. The more hours that each role holder within the core team worked, the more hours the team as a whole would be available to cover.
 - 56.2. Fair distribution of unsociable working hour. If all members of the core team worked the same hours, it would be easier to roster them equal numbers of hours at particular times and on particular days than if one member of the core team worked fewer hours.
 - 56.3. Ensuring that staff recruited ahead of a proposed move were committed to working with sufficient flexibility to accommodate an uncertain future working pattern. (Here we have to be careful: as Ms Finnigan observed, flexibility and part-time working are not mutually exclusive. Part-time workers might be particularly interested in working late evenings to fit in with childcare. It must be correct, however, to say that a full-time worker, in general, has greater *capacity* to be flexible, because they can offer a greater number of hours overall.)
57. That, of course, does not necessarily mean that the less favourable treatment was justified. The restriction must be proportionate. We must balance the discriminatory impact of the treatment against the aim it served and consider what alternative means the respondent of achieving the same objective.
58. The discriminatory impact was clear, but its consequences were not especially severe. The restriction deprived part-time workers of the opportunity to apply for the FMDM role. But this was one of a small number of roles within a much larger Estates function. As was clear from the Role Change Guide, the restriction to full-time working in the core team was very much the exception to a general policy of accommodating part-time working.
59. The aim of achieving constant Estates on-site cover in the new Regional Centres was important. As everyone including the claimant recognised, the efficient functioning of the new Regional Centres was a key part of the respondent's strategy. In the event of an air conditioning failure, or a blocked drain, a member of staff on site would be able to provide a more prompt and effective response than if they were remotely located or – worse – unavailable until the next working day.
60. We have looked at how the respondent might have achieved the same aims by means that were less adverse to part-time workers.

61. Our starting point is that the budget for each core team only allowed for five whole-time roles from Facilities Management (and three for the smaller Regional Centres). This meant that if the FMDM role was to be held by a part-time job holder then there would be only one of three possibilities:
- 61.1. a job share partner had to be found; or
 - 61.2. the FMDM role would be under-resourced; or
 - 61.3. parts of the FMDM role would have to be absorbed into other roles within the core team.
62. We deal with each of these possibilities in turn.
63. It was never put by the claimant to any of the respondent's witnesses that the responsibilities of the Delivery Manager should be absorbed into other roles, and in any event the practicalities would appear to be difficult. For example, we know that there were to be different specialisms and different specialities within the core team, and that not all the officers were of the same grade. Without the relevant evidence having been elicited from witnesses, it is hard to know whether absorption of duties was a practical possibility.
64. The next possibility was under-resourcing the Delivery Manager role. We accept that it was the genuine and reasonable concern of Mr Sharpe at the time that under-resourcing would have been an unsatisfactory state of affairs. This was going to be a challenging new move, part of a wider project, for which one of the aims was an improvement in the quality of the building and the response to civil servants who worked there. The core team was only small with a Facilities Management component of only 3 or 5 roles. Reducing the hours of a Delivery Manager is likely to have had a real impact.
65. Having eliminated under-resourcing and absorption, the only alternative was job sharing. That option was also fraught with difficulty. Finding a suitable job share partner also would have presented practical problems. It will be remembered that a role would have to be offered to the successful candidate before there could be any discussion of part-time working or job-sharing. Two candidates could jointly apply on a job-share ticket, but they would both have to have been selected ahead of the other candidates in order for a job-share request to get off the ground. If the top candidate, on being offered the role, applied to work part-time, Mr Kirk would have had to cast around for a job-share partner. This would have been particularly difficult if the next-highest scoring candidate wanted to work full-time. Mr Kirk would have had to look further down the list, which would have been unfair to the second-placed candidate, or withdraw the offer altogether. We do not think that the respondent should have had to resort to these measures as an alternative to recruiting a single full-time worker.
66. Stepping back from these various possibilities and applying the overall test, we do think that it was reasonably necessary to recruit a 5/7 full-time worker to this particular role. The detrimental treatment to the claimant was therefore objectively justified and there was no breach of regulation 5.

Remedy

67. In case our conclusion on liability is wrong, we have considered what the claimant's remedy would have been had the respondent breached regulation 5. We have decided that there is no realistic chance that the claimant would have obtained the role had he been allowed to apply for it. Here are our reasons.

- 67.1. We have already recorded our finding that the claimant would not have applied for the role.
- 67.2. If our finding is wrong, and there is a chance that he would have applied, we find that there is some chance that he would have made it onto the interview shortlist. The respondent argues that he would inevitably have failed at this first hurdle. He was not shortlisted in 2014 and his role since then would not have given him any further experience relevant to the FMDM role. We do not agree. Whilst the claimant would have had to demonstrate his competencies by reference to mostly old examples, there is a chance that they would have been of sufficient quality to get him onto the shortlist. The fact that his examples were not good enough in 2014 does not necessarily mean that he could not have come up with better ones three years later. There is a skill to completing evidence-based application forms, and the claimant could have got better at it between 2014 and 2017. We must therefore imagine a world in which the claimant was invited to interview and try to quantify his chances of being offered the role.
- 67.3. It is at this point that the claimant's chance of success would diminish to zero. The claimant was up against Miss Kelly. We cannot conceive of any realistic possibility that the respondent would have preferred the claimant to her. It is quite clear that she was a stellar candidate. She was only one of 114 candidates who applied for the role who was considered to be selectable. We think that the possibility of the claimant having been offered the role ahead of her is vanishingly small.
- 67.4. There is the theoretical possibility that the claimant would have been considered selectable for a role outside Liverpool. The claimant would not have taken such a role had it been offered to him: he told us that he did not want to have to transfer to Salford.
68. The claimant has therefore suffered no financial loss as a result of any breach of regulation 5. Even if the claim had succeeded, the most the claimant would have been entitled to would have been declaration: we would not have been able to grant him any other remedy.

Employment Judge Horne

8 March 2019

REASONS SENT TO THE PARTIES ON

14 March 2019

FOR THE TRIBUNAL OFFICE

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