



EMPLOYMENT TRIBUNALS

Claimant: Mrs J McBride
Respondent: Capita Customer Management Limited
Heard at: Sheffield **On:** 8 and 9 July 2019
5 September 2019
6 September 2019 (in
Chambers)

Before: Employment Judge Little
Members: Ms A S Brown
Mr M Lewis

Representation

Claimant: In person (accompanied by PSU volunteers)
Respondent: Mr M Brain, consultant (Legix Employment Law Services Limited)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that :

1. The complaint of indirect sex discrimination succeeds
2. The complaint of unfair dismissal also succeeds

REASONS

1. The complaints

Mrs McBride presented her claim to the Tribunal on 28 November 2018. At a preliminary hearing for case management conducted on 21 January 2019 it was confirmed that the complaints being pursued were:-

- Indirect sex discrimination and,
- Unfair dismissal.

2. The issues

2.1 There was a discussion about the issues at the case management hearing referred to above. There was a further discussion about the issues at the beginning of our hearing which, among other things, disclosed apparent confusion about the reason for dismissal. The reason which had been pleaded was redundancy and Mr Brain told us that he believed the claimant had conceded that that was not only the pleaded reason but the actual reason for her dismissal when those matters were being discussed at the preliminary hearing in January.

However it seemed clear from the claimant's pleaded case and from her witness statement that she was in fact contending that redundancy was a sham reason and that the real reason was either her inability to work full-time or her rate of pay. This led to a debate as to whether the respondent could in the alternative rely upon some other substantial reason to justify the dismissal. At the end of the first day, when no evidence had been heard because we were dealing with this matter and also reading the witness statements, we refused the respondent's application to amend to add what we understood to be the some other substantial reason now relied upon.

That reason, in the event articulated by us, but accepted by Mr Brain as being accurate was the respondent's requirement to move from permitting part-time (job share) working for the type of role being carried out by the claimant and instead requiring that such employees be full-time.

Our reasons for refusing that application were given on day one, but subsequently Mr Brain sought written reasons which were sent to the parties on 5 August 2019.

On 19 August 2019 the respondent made an application for reconsideration of our decision. It was contended that as the label which the employer used at the time would not usually be determinative, it was open to the Tribunal to re-label it. We should add that the redundancy reason had however been maintained in the original grounds of resistance prepared by the respondent's HR officer and re-iterated in the amended grounds of resistance prepared by its current representative. We were referred to the case of **Jocic v London Borough of Hammersmith and Fulham** UK EAT/0194/07.

2.2 What potentially fair reason or reasons does the respondent seek to show for the dismissal?

In response to the re-consideration application Employment Judge Little caused a letter to be written to the respondent's representative asking the respondent to set out in writing precisely what was the some other substantial reason that was now being relied upon. The respondent's email of 3 September 2019 indicated that the respondent's position as to its reason for dismissal was recorded in paragraph 9 of the written reasons given by the Tribunal when initially refusing the amendment. That was in this passage:

"Nevertheless he (Mr Brain) was seeking to amend to add some other substantial reason so that the change from a part-time requirement to a full-time requirement should be regarded as some other substantial reason if it was found not to be redundancy".

We dealt with the respondent's renewed application at the beginning of day three. Mr Brain had nothing to add to the written application.

Mrs McBride's comment was that she did not have legal representation but felt that at the time the full-time/part-time issue had not been given as a reason for dismissal.

We retired to consider our decision which we subsequently gave to the parties. We were not in a position to formally reconsider under Rule 70 of the Employment Tribunals Rules of Procedure because our decision on amendment had not been a Judgment but rather an Order. However we were prepared to revisit this issue by treating Mr Brain's most recent application as a renewed application to amend. We noted that since making the original order refusing the amendment we had now heard the respondent's case and so had now got as much clarity as it appeared we were going to get about precisely what the some other substantial reason was. It was also clear that the full-time/part-time issues had been debated during the redundancy process and was referred to in both the claimant's and the respondent's evidence before us. It had been the subject matter of cross-examination by the claimant of the respondent's witness Mr Lovell. It was of course also at the heart of the indirect sex discrimination complaint. We noted that the respondent had not sought to put before us any additional evidence or documents in support of the new reason. Accordingly there had been no change to the facts and substance of the case. In these circumstances, and with the benefit of some hindsight, we now considered that we had overstated the potential prejudice to the claimant when initially refusing to allow the amendment. In those circumstances we permitted the amendment as a re-labelling exercise.

We might add that it is unfortunate that we have had to spend a disproportionate amount of the time allocated to hearing the merits of this case in trying to clarify a fairly fundamental issue.

Ultimately therefore the issues which have been before the Tribunal are as follows:

2.3 Indirect sex discrimination

2.3.1 The respondent concedes that it had the provision criterion or practice of requiring its operations improvement managers to work full-time hours (37.5 hours per week) and that it had the further provision criterion or practice which was a requirement for a single person to work the full-time hours rather than them being performed as a job share.

2.3.2 The respondent also concedes that the PCPs applied to persons who did not share the claimant's protected characteristic; that the PCPs put persons with whom the claimant did share the characteristic at a particular disadvantage and put, or would put, the claimant at that disadvantage.

2.3.3 It follows that the only issue for the Tribunal to determine is whether dismissing the claimant because she could not comply with the PCPs was a proportionate means of achieving a legitimate aim.

2.3.4 The legitimate aim which the respondent relies upon is "the provision of maximum operational efficiency, service standards and effectiveness of delivery of the operations improvement manager role

so that that role would provide sole accountability for end to end delivery of projects, ensure continuity of service provision, eliminate identified business risks, and provide a clear single point of contact over all core hours” (see paragraph 39 of the amended grounds of resistance).

Unfair dismissal

- 2.4 Can the respondent show the potentially fair reason of redundancy?
- 2.5 Alternatively can the respondent show that it had some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held?

Although as we have noted above the respondent has sought to rely upon the Tribunal’s translation of what it understood the substantial reason to be, we consider that it is preferable to rely upon what we believe to be the first written articulation of this reason which appears in paragraph 102 of the respondent’s submissions on factual issues. There the reason is described as “genuinely requiring Mrs McBride to become full-time which was a requirement with which she could not comply”.

- 2.6 Was either potentially fair reason actually fair having regard to the provisions of the Employment Rights Act 1996 section 98(4) and in particular:
- Was there a redundancy situation in law in circumstances where a team of one full-time and two part-time employees (carrying out the role of implementation manager) was increased to a team of three full-time employees carrying out the new but very similar role of operations improvement manager?
 - Was redundancy a sham reason with the real reason being:-
 - ❖ That the respondent did not want part-time employees in these roles or;
 - ❖ Because the respondent wanted to dispense with the services of a highly paid part-time employee and/or;
 - ❖ Because Mr Lovell, the claimant’s line manager and dismissing officer was biased against the claimant because she was paid more than him.
 - Because the respondent delayed before providing the claimant with information about the rationale for its decision and in any event provided insufficient information.
 - Because insufficient consideration was given to alternative roles which the claimant could have undertaken.
 - Because insufficient consideration was given to the claimant’s length of service (19 years).
 - Would a reasonable employer have been entitled to require a part-time/job share implementation manager to become a full-time operations improvement manager with the inevitable result, because of the claimant’s personal circumstances that unless

alternative suitable part-time employment could be found the result would be the claimant's dismissal?

- Was the decision to dismiss within the band of decisions open to a reasonable employer in these circumstances?

3 Evidence

The claimant has given evidence. She had prepared a very detailed witness statement running to 14 pages. The respondent's evidence was given by Mr Nathan Lovell, head of operational improvement (and the dismissing officer) and Ms C Varney, head of O2 change.

4 Documents

We have had before us an agreed bundle running to 475 pages. At the end of the July hearing we made an order for disclosure of some additional documents. That resulted in one document being provided; a screenshot of the remuneration history of an employee called Arron Adams (now page 476).

5 The facts

We find the following facts:

- 5.1 The claimant's employment commenced on 15 March 1999. At that time the employer was a company called Ventura. On an unknown date the claimant's employment transferred to the respondent, presumably under the provisions of the Transfer of Undertakings Regulations.
- 5.2 The respondent is a specialist division of Capita which provides outsourced customer management services to various organisations. At the material time the work the claimant was involved with was in respect of a partnership agreement between the respondent and O2.
- 5.3 On 4 April 2015 the claimant commenced maternity leave and her third child, a daughter, was born on 10 April 2015. At the time of commencing maternity leave the claimant had been employed in the role of head of quality and compliance in respect of the O2 partnership agreement.
- 5.4 Sadly, the claimant's daughter became critically ill shortly after birth and was ultimately diagnosed with a rare condition which had damaged her heart. During the maternity leave one of the claimant's other children also developed behavioural problems and the claimant herself was not well.
- 5.5 In those circumstances in February 2016 the claimant sought a twelve month career break to run on from the end of her maternity leave. The respondent granted that and the letter which confirms this is dated 22 April 2016 (pages 23 to 24). It was noted that upon the claimant's return to work the respondent would work with her to identify a role at a similar salary and with terms and conditions applicable to the claimant's then role of compliance manager.
- 5.6 The claimant returned to work on 24 April 2017 to the position of implementation manager within the respondent's O2 partnership department. The job description is at pages 30 to 33. The claimant's salary for her previous role was protected and that was a salary of £50,000 per annum, together with the car allowance. That was a more generous package than would normally have applied for an implementation manager. The claimant hoped that she could undertake the implementation manager role on condensed hours and this had been discussed when the claimant met with Liz Pope, head of service

improvement. However on 24 February 2017 (page 37) Ms Pope wrote to the claimant informing her that there had been a new directive which meant that the respondent needed the managers to work Monday to Friday. In an email of the same date but to a Natalie Irwin the claimant expressed the view that she was a bit disappointed that there could not be flexibility in working hours but nevertheless she accepted the role as full-time (page 39).

- 5.7 On 28 September 2017 the claimant submitted a statutory flexible working request to Mr Lovell, her line manager. A copy appears at page 63. The reason for the request was the continuing difficulty with the health of two of her children. In addition her son had been excluded from after school provision.
- 5.8 That request was refused but in October 2017 Mr Lovell informed the claimant that there was the possibility of a job share. A Rachel Sulley was returning from maternity leave. The claimant accepted this proposal and on 2 November 2017 Mr Lovell wrote to the claimant confirming the change to the claimant's terms and conditions of employment so that she was to be employed on a permanent part-time basis. (Page 84). It was agreed (although it is not set out in that letter) that the claimant's working hours would be Wednesday 8am to 6pm, Thursday 9.30am to 3pm and Friday 9.30am to 3pm. The intention was that the claimant and Ms Sulley would job share in respect of a project or programme called ENGAGE. Ms Sulley compiled a document setting out how she and the claimant proposed to share the job (pages 72 to 81). The job share arrangement was put into effect in November 2017.
- 5.9 The claimant contends that by December 2017 the job share arrangement began to be "diluted". That was because Mr Lovell started to give the claimant and Ms Sulley individual responsibility for separate projects and work streams so that there was no longer any shared responsibility for projects. The claimant took the view that the way of working which had been agreed in November was, by default no longer in place and it was only the working patterns which continued to constitute a job share (see paragraph 21 of the claimant's witness statement).
- 5.10 Mr Lovell's evidence to us was that he had reservations about the job share even before it was put in place. In paragraph 31 of his witness statement he expresses the view that he believed that there would be risks to the quality and efficiency of project delivery, problems with joint project accountability and continuity issues for internal and external stakeholders. His evidence suggests that there may have been a dialogue with HR about this but we have not been shown any documentation to support that.
- 5.11 Mr Lovell seeks to explain the reason for the "dilution" to the job share arrangement which the claimant refers to as being because "the weaknesses and risks inherent in the job share arrangements became apparent as I had feared" (paragraph 34 of his witness statement). Mr Lovell then goes on in paragraph 35 to 38 in his witness statement to set out various perceived problems with the job share, concluding that it was "problematic on many fronts.". However we have not been provided with any examples of how these alleged weaknesses and risks manifested themselves in practice.
- 5.12 During her cross-examination of Mr Lovell, the claimant contended that at the time she and Mr Lovell had had no conversations about the job share not working. Mr Lovell's reply was that there had been a meeting in December 2017 and he believed that there might have been some email correspondence

about this as well. It was in those circumstances that when adjourning the hearing part-heard in July we made an order for the disclosure of any email exchange or other documentation whereby in or about December 2017 Mr Lovell drew to the attention of the claimant and Rachel Sulley any practical problems which had arisen in respect of the job share arrangement between those two individuals.

- 5.13 When the respondent's representative wrote to the claimant on 23 July 2019 enclosing one document relating to a different matter (Arron Adams' progression) all that was said about the other part of our order was "the respondent has no other documents to disclose". In these circumstances we find that on the balance of probability there was no such meeting in December 2017 and that none of these concerns were brought to the claimant's attention at the time – but only considerably later towards the end of the redundancy consultation procedure (see below). Having regard to the level of concern which Mr Lovell was indicating to us that he had we consider that if that had actually been his level of concern at the time he would have raised the matter with both the claimant and Ms Sulley and documented that by way of emails or a minuted meeting.
- 5.14 During 2017 the Capita Group in general was experiencing what Mr Lovell describes as a highly turbulent time organisationally and operationally and there were concerns about its financial performance. In November 2017 a new CEO was appointed and there was to be what Mr Lovell describes as a "turnaround programme" which we understand was called Project Carter. That we are told was based around a rationalisation strategy of "simplify, strengthen and succeed". Leanness and efficiency were factors. Mr Lovell's evidence was that against that background he had to review the make-up of his team to address the requirements of this new initiative. He felt that his team needed to be "flattened" structurally. His proposal was to remove what was then the current tiered structure and to replace the various roles within it with what in paragraph 59 he describes as one single role of operations improvement manager – although the Tribunal understand that that does not mean that there was just to be one such person.
- 5.15 Further it was Mr Lovell's view that those roles would need to be carried out on a full-time basis to ensure that all core business hours were covered and he did not think that a job share would be feasible either because of the risks and problems he had apparently observed previously.
- 5.16 Mr Lovell's proposal, which was part of something called Project Charm, is illustrated in the table at page 123. The intention was to move from a position where there was one full-time and two part-time positions of implementation manager to a structure where there were three full-time positions in a role which would be known as operations improvement manager.
- 5.17 In Mr Brain's written submissions on factual issues, at paragraph 98, it is conceded that the job functions of the implementation manager role and the new operations improvement manager role were substantially the same and that the type of work that the new role entailed would be fundamentally the same as that under the old role. It was intended that the salaries of the new operations improvement managers would be in the range of £25,000 to £35,000 per annum.

5.18 On 30 April 2018, a number of the employees in the operations programme team, including the claimant, were invited to a briefing meeting conducted by Mr Lovell. As that was a Monday, a non-working day for the claimant, she participated in the meeting via a telephone conference call. Ms Sulley was an attendee at that meeting.

5.19 On the same day Mr Lovell wrote a letter to the claimant and a copy is at pages 136 to 137. It confirmed that a conclusion had been reached that the role of senior business manager was no longer required. That job title was in fact wrong because it was not the contractual job title the claimant had at that time – as mentioned above that was implementation manager. The letter went on to refer to the new role of operations improvement manager and it included the following passage:

“It has been observed under the old structure that any role under the operations improvement function works most effective (sic) with full-time coverage and when work proximity is closest to the operation. These (the new) roles will be full-time roles only.”

The letter went on to invite the claimant to a consultation meeting.

5.20 That meeting took place on 2 May 2018. Notes of the meeting, taken by Mr Lovell, are at pages 171 to 175. The claimant had in anticipation of that meeting prepared a series of questions and there is also a note which the claimant herself prepared (see pages 176 to 177). One of the questions which the claimant asked was to enquire about the rationale or reasoning for not believing that part-time or job share could be successful in the new role. In the claimant’s notes at page 177 the claimant is recorded as saying that whilst the business might believe that it had been tested in the role through what she described as a recent informal job share arrangement between herself and Rachel Sulley, the claimant disagreed that it could not work given the appropriate support structuring and workload. She felt that that working arrangement had not been adequately tested before the roles, responsibilities and workload were re-organised. She did not feel that the reasoning of not considering part-time working had been based on a fair or reasonable benchmark. The claimant believed that part-time/job share could work where project workloads were allocated appropriately. She pointed out that no concerns had been raised in terms of her performance or delivery or her ability to perform the role on a part-time basis. She also pointed out that she had been told that she delivered more in part-time hours than some people delivered full-time.

5.21 Of the various employees who had been sent the at risk letter at the same time of the claimant and in respect of the same matter, all but the claimant and Ms Sulley were removed from being at risk shortly after those letters were written, no doubt on the basis that those individuals, who were full-time employees, simply accepted that their job descriptions would be amended to operations improvement manager.

5.22 On 9 May 2018 the claimant wrote to Mr Lovell and Ms Pope (page 180). The claimant and Ms Sully had been invited to put forward a proposal as to how part-time working would fit into the new structure. In this email the claimant explained that she did not feel she could put forward a proposal without fully understanding the objections to part-time working. She did not understand the rationale that had been presented and did not feel that it had been fully

articulated. The claimant expressed the view that if workloads were appropriate for the hours then any role could be carried out part-time. The claimant had also written in similar terms just to Ms Pope on the same day (see 182).

- 5.23 Also on 9 May 2018 the claimant and Ms Sulley had a meeting with Mr Lovell. It seems that Mr Lovell took no notes of this meeting but the claimant's note is at page 185. During this meeting Mr Lovell read out the rationale for the new role to be full time. That was probably from the document titled 'Operational Improvement Manager. Rationale for full-time requirement' which appears at page 184. However neither the claimant nor Ms Sulley were given a copy of that document at that time. The claimant felt that the written questions which she had posed at the 2 May meeting had still not been answered and she had sent a further copy of those questions to Mr Lovell on 9 May (see page 186).
- 5.24 On 13 May 2018 the claimant sent an email to Mr Lovell (page 204). She confirmed that she was unable to accept the alternative position offered on account of it being a full-time position. She went on to confirm that after careful consideration of Mr Lovell's requirements she would not be submitting a part-time proposal.
- 5.25 The second redundancy consultation meeting was conducted by Mr Lovell on 16 May 2018 and his notes of that meeting are at pages 216 to 220. During this meeting Mr Lovell is recorded as having said that the rationale had been provided previously although we take this to be a reference to him having read it out rather than provide the claimant with a hard or electronic copy. During this meeting the brief note taken by Mr Lovell records the claimant saying that she understood that projects could stall if there was part-time work. However during the course of cross-examination the claimant told us that the note was misleading and out of context. The claimant had been referring to a particular project Digital Induction (DI) which was a very complex project and she had not been referring to projects in general.
- 5.26 The third consultation meeting took place on 27 May 2018 and this was again conducted by Mr Lovell. Mr Lovell's notes of that meeting are at pages 240 to 244. There was discussion about the search for alternative roles for the claimant. The claimant had many questions that she had still not had answers to. These were the written questions which she had initially prepared for the 2 May meeting but which the claimant felt had still not been answered. As there was insufficient time to deal with all those questions at the 27 May meeting, the meeting was resumed on 30 May 2018 and on this occasion Ms Pope was also present. Her notes are at pages 245 to 247. The claimant indicated that she still did not understand why the respondent took the view that the role could not be done part-time. It was agreed that Mr Lovell would provide the rationale to the claimant in a "documented format".
- 5.27 The fourth consultation meeting took place on 6 June 2018. Mr Lovell had only emailed the rationale document to the claimant two minutes before that meeting was due to commence and because the claimant had already left her desk to go to the meeting room she did not have it before her at this meeting. The notes of the meeting are at pages 312 to 313. The main topic for discussion was re-deployment possibilities.
- 5.28 The fifth and final consultation meeting took place on 14 June 2018 and notes of that meeting are at pages 323 to 325. Although much of the discussion

was about re-deployment possibilities, Mr Lovell asked the claimant whether she intended to provide any further rationale (presumably for part-time working). The note records the claimant replying to say that she did not agree with the respondent's rationale or decision but felt that it was impossible to put a case forward on the basis that the role required a full-time point of contact. The claimant was notified that, as attempts to re-deploy her had been unsuccessful, then unless anything could be found by the end of that day a formal notice of redundancy would be issued.

5.29 That notice was duly issued on 15 June 2018 in a letter written by Mr Lovell (pages 330 to 331). The claimant was informed that her current role was no longer required. There was a brief resume as to the new role and the reason for it with a reiteration of the following:

"It has been observed under the old structure that any role under the operations improvement function works most effective (sic) with full-time coverage and when work proximity is closest to the operation".

The letter went on to state:

"Regrettably, I now confirm that your role is redundant and this letter is to be treated as your formal notice of dismissal due to redundancy".

5.30 On 20 June 2018 the claimant wrote Mr Lovell appealing against that decision (page 344). The reason for the appeal was expressed as the claimant's belief that questions she had asked relating to the decision to exclude part-time working options from the new structure had not been fully answered or explained. The claimant remained unconvinced about the lack of confidence the respondent had in the ability of a part-time individual to undertake the role effectively. The claimant pointed out that she had challenged that point repeatedly throughout the consultation process but she was not convinced that her concerns had been fully understood. The claimant complained about the delay in providing her with a written copy of the rationale.

5.31 On 28 June 2018 the respondent issued an amended notice of redundancy because it had incorrectly stated the redundancy payment in the earlier notice.

5.32 During the claimant's 12 week notice period, which she was required to work, there were weekly meetings to consider whether any re-deployment opportunities had arisen.

5.33 The appeal hearing took place on 5 July 2018 and was heard by Mr Dom Jones, account director. Also present was a Mr Sayer who took notes and somebody called Karen who was from an internal employee organisation known as Connect. We have not heard evidence from Mr Jones. During the course of the appeal hearing the claimant went through the various written questions that she had been raising with the respondent since 2 May 2018. On the question of part-time versus full-time work the claimant explained (page 371) that this was her biggest issue. She still did not fully understand why Mr Lovell only wanted full-time people in his team. She said that it just didn't make sense. She considered that Mr Lovell's request that she provide him with a proposal as to why he would need a part-time employee was an impossible task for her. The claimant referred to having a document which had questions about Mr Lovell's rationale and the claimant said that she would send Mr Jones a copy. That document is at page 340 which is Mr Lovell's rationale with the

claimant's commentary and observations in the right hand box. Some of those comments and observations are set out in an easier to read form at pages 341 to 342.

5.34 During the notice period the claimant had been offered a six month secondment to another team to cover a maternity absence. The claimant had one of the weekly catch up re-deployment search meeting with Mr Lovell on 11 July 2018. During that meeting she informed him that she felt that the secondment was delaying the inevitable and created more uncertainty for her. If the role could be offered to the claimant at the end of that six month period it would be on a full-time basis which therefore would not resolve her problem. The note of this meeting is meeting is at page 378.

5.35 On 16 July 2018 Mr Jones wrote to the claimant setting out the appeal outcome (390 to 393). His decision was to uphold the issuing of the redundancy notice but he acknowledged that *"this process could have been managed more efficiently by the business"*. Dealing with the claimant's concerns regarding part-time workers being removed from the structure, Mr Jones commented that the level which the claimant had operated (at) within her role had exceeded expectations, specifically when working in the part-time role. Having reviewed the relevant operational area it was apparent to Mr Jones that the level of workload was set to increase. We should add that Mr Lovell's evidence (paragraph 55 of his witness statement) was that the type of work being undertaken by the department was forecast to diminish, at least in terms of the range of programmes. Mr Jones went on to write:

"Where I understand the risk sits operationally, is that there would be a consistent expectation, which would only grow, for all our part-time employees to exceed in their role in order for us to deliver what is required – this level of request is not an ask nor way of working which sits within Capita's values, nor would this expectation be sustainable for us as a business".

5.36 On 15 August 2018, during the notice period, the claimant attended an interview for the part-time role of a service project's portfolio manager. The interview was conducted by Ms Varney from whom we have heard. Rachel Sulley had also applied for this post. We might add that Ms Sulley had put forward a proposal for part-time working in the new operational improvement manager role but this had been rejected and she too had been dismissed. However she was then permitted to come back to be interviewed for the service projects portfolio post and in fact was successful in obtaining it. The claimant explains in her witness statement (paragraph 99) that by 15 August 2018 she had been diagnosed with severe anxiety and moderate depression and she confirms that she was not well prepared for the interview. She says that at this interview she did not have the mental capacity or emotional strength to deliver what she would otherwise have been capable of.

5.37 The effective date of termination of the claimant's employment was 6 September 2018.

6 The parties' submissions

6.1 The claimant's submissions

Mrs McBride had prepared concise written submissions. She considered that the respondent's decision, as she saw it, to make part-

time individuals redundant to be unfair and discriminatory. She contended that the new role was identical to the earlier role save for two matters and the result had been that all full-time individuals within the structure were removed from risk of redundancy and the team had actually been increased because part-time individuals had been replaced with full-time employees. She believed that the respondent's rationale had been written with the full knowledge of her personal circumstances which made it impossible to mitigate with any part-time or job share proposal. There had not been meaningful consultation because the respondent had failed to provide evidence of the alleged observations in respect of part-time working.

Mr Lovell had not given the job share solution a chance to work. No issues had been raised with the claimant or Ms Sulley at the time or indeed at all. The claimant had found herself redundant for reasons which the respondent could not credibly justify.

Mrs McBride went on to comment on various matters raised in the respondent's written submissions. If there had been a detrimental impact on the business by reason of part-time working/job share, the claimant would have expected to see evidence of that. She also referred us to the case of **Fidessa Plc v Lancaster** UK EAT/0093/16/LA, a case which she felt was factually similar to her own.

With respect to the claimant, it is not so much a question of whether the factual situation between two cases is similar but rather whether an appeal court has laid down any guidance or principles which are likely to assist an Employment Tribunal when dealing with a particular area of law. We do not consider the facts of Ms Lancaster's case to be particularly similar and nor does the Judgment of the Employment Appeal Tribunal appear to set out any principles which are particularly relevant to the case before us.

6.2 The respondent's submissions

Mr Brain did not wish to make oral submissions but had prepared a very detailed and lengthy submission on factual issues and a separate document which dealt with submissions in respect of the law.

It was submitted that in the past the respondent had shown good will towards the claimant by permitting her to take a career break and subsequently permitting her to work part-time under a job share arrangement. Mr Brain contended that the rationale document prepared by Mr Lovell could not be clearer in identifying the detrimental impact and risks of the roles not being conducted full-time and on the other hand the advantages of the role being carried out full-time by one person.

When considering proportionality we were urged to find that there was clear evidence that the effect on the claimant was outweighed by the needs of the business. O2 was the respondent's largest and most important client; the respondent was in significant difficulties operationally which required all teams to address perceived inefficiencies and the needs of Mr Lovell's team were changing in terms of the nature and intensity of the workload moving forward. The

matters which Mr Lovell considered hindered efficient performance caused by part-time or job share arrangements had been clearly set out in the rationale document which was clear and self-explanatory. Mr Brain went on to suggest that the claimant had conceded that Mr Lovell's rationale was sound. We have to comment that we understood the claimant's case to be entirely the opposite.

In terms of the unfair dismissal complaint, and as we have noted above, the submissions confirm that the reason for the claimant's dismissal was redundancy, although it is also confirmed that the implementation manager role and the new operations improvement manager role were substantially the same. Nevertheless, Mr Brain contended that the kind of work that was required by the respondent was changing in the sense that rather than operating a tiered structure with a "wrap around" support team in place, the new role required sole responsibility for end to end delivery of project work (see paragraph 99 of the submissions on factual issues).

As we have also noted above, in the alternative the respondent contended that if there was no redundancy then there was the other substantial reason of genuinely requiring the claimant to become full-time (paragraph 102). Here the respondent contended that they had cogent and pressing reasons for requiring the claimant to work full-time.

7 The relevant law

7.1 Indirect sex discrimination

An employer can defend what otherwise would be a discriminatory PCP if it can show that PCP to be a proportionate means of achieving a legitimate aim (Equality Act 2010 section 19(2)(d)).

In the case of **Bilka-Kaufhaus GmbH v Weber Von Hartz** [1987] ICR 110 the European Court of Justice held that to justify an objective which had a discriminatory effect an employer must show that the means chosen for achieving that objective corresponded to a real need on the part of the undertaking, are appropriate with a view to achieving the objective in question and are necessary to that end.

In the case of **Hampson v Department of Education and Science** [1989] ICR 179 Balcombe LJ considered that this exercise involved striking an objective balance between the discriminatory effect of the condition and the reasonable needs of the party who applies the condition.

The burden of establishing justification is for the employer, on the balance of probabilities.

Within the Equality and Human Rights Commission Code of Practice on Employment (EHRC Employment Code) at paragraph 4.26 it is observed that:

"... it is up to the employer to produce evidence to support their assertion that it is justified. Generalisations will not be sufficient to provide justification. It is not necessary for that justification to have been fully set out at the time the provision criterion or practice was

applied. If challenged, the employer can set out the justification to the Employment Tribunal”.

However it was noted by the EAT in **Chief Constable of West Yorkshire v Homer** [2009] ICR 223 that:

“It is an error to think that concrete evidence is always necessary to establish justification ... justification may be established in an appropriate case by a reasoned and rational judgment. What is impermissible is a justification based simply on subjective impression or stereotyped assumptions.”

The EHRC Employment Code reiterating the “Hampson test” explains at paragraph 4.30 that:

“Deciding whether the means used to achieve the legitimate aim are proportionate involves a balancing exercise. An Employment Tribunal may wish to conduct a proper evaluation of the discriminatory effect of the provision criterion or practice as against the employer’s reasons for applying it, taking into account all the relevant facts”.

7.2 Redundancy

This concept is defined in the Employment Rights Act 1996 at section 139. This provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to, among other things, the fact that the requirements of the employer’s business for employees to carry out work of a particular kind has ceased or diminished or is expected to cease or diminish.

The law does not regard part-time work as work of a particular kind. In **Johnson v Nottinghamshire Combined Police Authority** [1974] ICR 170 the Court of Appeal held that if the employer required the same number of employees as before – for the same tasks as before – but required them at different hours, there was no redundancy situation. Cairns LJ did not think that the ordinary meaning of the words “*kind of work*” would be generally understood to refer to hours of work. If the actual tasks to be performed were unchanged and the only difference was between the parts of the day when the work was to be done or the number of days over which work was spread, he was of the opinion that the kind of work remained the same.

7.3 Some other substantial reason

The Employment Rights Act 1996 at section 98(1)(b) provides that in a dismissal case the employer is to show the reason or if more than one the principal reason for the dismissal and that it is either a reason set out within section 98(2) or that it is “*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*”.

The fairness of the reason shown, whether it be redundancy or some other substantial reason is to be assessed by reference to section 98(4) of the Act. The Tribunal must not substitute its view of fairness but instead must consider whether the decision to dismiss is one which a reasonable employer could reach.

8 The Tribunal's conclusions

8.1 Indirect sex discrimination

As noted previously, the issue which we have to determine here is limited to the question of whether what would otherwise be a discriminatory provision can be justified by the respondent.

8.1.1 Was there a legitimate aim?

In fact this is not in dispute. In paragraph 39 of the amended grounds of resistance it is stated that the aim which the respondent was seeking to achieve was "to provide maximum operational efficiency, service standards and the effectiveness of delivery in that the new operations improvement manager roles would provide for sole accountability for end to end delivery of projects, ensure continuity of service provision, eliminate identified business risks, and provide a single clear point of contact over all core hours."

8.1.2 Was it proportionate to achieve that aim by:

- (1) Requiring the operations improvement manager role to be carried out full-time and
- (2) Requiring the role to be carried out by one person on a full-time basis rather than with another person (part-time) under a job share arrangement?

8.1.2.1 It is clear that in November 2017, albeit in relation to the implementation manager role, the respondent did not see any obstacle to that job being carried out as a job share because that is precisely what it put in place. Although Mr Lovell's evidence to us was that that type of arrangement was of concern to him at that time for the reasons he sets out in paragraph 31 of his witness statement, there is no evidence to suggest that Mr Lovell voiced those objections at the time either to his own manager, Ms Pope, or to HR.

8.1.2.2 We have found that Mr Lovell did not voice his concerns to the job sharers - the claimant and Ms Sulley. The respondent has not called Ms Sulley, who as far as we are aware it still employs, to give any evidence about this. The discussions which Mr Lovell thought, in cross-examination, had taken place in December 2017 have not been supported by the disclosure of any emails or notes of meetings.

8.1.2.3 The claimant's evidence is that as early as December 2017 the job share arrangement was in her words becoming "diluted" because Mr Lovell started to give the claimant and Ms Sulley individual responsibility for projects and work streams rather than the intended shared responsibility for projects. She describes that as meaning that in effect what had been agreed in the previous month was no longer in place (see claimant's witness statement paragraph 21). Mr Lovell's evidence (paragraph 37 of his statement) is that "*the reality was that the concept of a pure job share had to be put to one side to try to address the operational efficiency which came with it. My view is that Mrs McBride and Rachel Sulley shared my view on this*". When asked about this during cross-examination Mr Lovell said that there had been discussions with the claimant and Ms Sulley about "the reality" but, as noted above there is no specific reference to this in his witness statement. He simply opines that it was his view and there is no documentary evidence of a discussion or

discussions. In any event the claimant denies there were any such discussions.

8.1.2.4 The main thrust of the respondent's case on justification centres on the rationale for full-time requirement document. This appears at various places in the bundle one of which is page 184. There is uncertainty as to precisely when this document was created. It is not dated. Although the rationale was referred to and probably read from by Mr Lovell at the 9 May 2018 meeting, the claimant was not provided with a copy of it until 6 June 2018. This delay and Mr Lovell's reluctance to provide the rationale creates doubt as to when it was actually put into documentary form.

8.1.2.5 Whilst we accept that it is our task to weigh the reasonable needs of the business against the discriminatory effect of the employer's measure and then make our own assessment as to whether the former outweighs the latter, we have felt it appropriate to give considerable weight to the careful and reasoned critique which the claimant has made of Mr Lovell's rationale. In general terms she says that what has been described as the 'pure' job share was not operated for long enough so as to permit a sensible assessment of how it was working in practice.

The claimant's detailed critique, which was put forward at the appeal hearing, is at page 340.

8.1.2.6 Mr Lovell's rationale can be summarised as follows - and we add the relevant critique by the claimant:-

- The operational improvement manager as full-time would be accountable end to end for their project delivery. That would ensure the role holder took full accountability.

The claimant's critique is that the team structure already allowed for that and in fact there had never been a time when project accountability had been shared in the life of the job share. The problem lay with workload allocation.

- The prevention of inefficiency caused by handovers and dual operation.

The claimant's critique is that Ms Sulley and herself had never been allowed to manage the job share in accordance with the proposal which had been agreed between the job sharers (the working structure document at page 72). That work had been arranged so that the total "work stack" for the claimant and Ms Sulley was far greater than a full-time capacity for work. Dual operating on project calls had never occurred. One person could still maintain ownership of project calls if project governance was right. That had not been truly tested.

- The benefit of keeping it simple for stakeholders, clients and suppliers by ensuring that there was a single point of contact for the project, contactable over full-time core operating hours to maximum stakeholder engagement and project efficiency.

The claimant's comment was that she had never personally received feedback from Mr Lovell, project stakeholders or any member of the business or team to suggest that the claimant's reduced availability or response had been a risk. The claimant pointed out that she had

identified part-time attendance as a potential risk for one particular project, digital induction, but the claimant felt that that project had become too big and complex for even a full-time employee. The claimant felt that her integrity in raising concerns about that particular project had then be used against her generally. The claimant pointed out that together with the pay and reward project the claimant had been given two of the largest projects in the team but on the lowest number of hours.

- Mr Lovell's rationale continued by referring to new programmes of work such as the innovations road map which required the delivery of one innovation per month with the result that there had to be optimum project lead efficiency.

The claimant described that as "*pure nonsense*". She wrote in her critique that "*even if you know what is ahead in terms of work, there is no guarantee that anyone can deliver one innovation per month. There was no evidence that a part-time worker would not be able to deliver against that if the project workload was proportionate and realistic*".

- A part-time worker could place delivery at risk because of delay in response, particularly to enquiries on that worker's day off.

The claimant's comment was that that suggested that a full-time employee always responded to calls and emails in a timely manner. The claimant's experience had not shown that to be so. She felt that if stakeholder expectations were managed, strong governance existed and the role holder was capable of delivering in the role (which in the claimant's case had never been doubted) was that really a justifiable reason to reject part-time working? Even full-time workers could not always be available for stakeholders due to leave, holidays, meetings etc.

- Ensuring that there was one owner accountable for delivery as opposed to dual (job share accountability, avoiding complexity and ownership and measurement of project delivery).

The claimant's comment was that that did not feel like a justifiable reason for rejecting part-time. There was no evidence that one owner was more effective. She reiterated that the job share had not been fairly tested due to lack of management support, measurement or delivery. In fact there had been no single project that both the claimant and Ms Sulley had co-managed and so what could that observation be based upon?

- It was envisaged that the role holder would own multiple projects "*and will be maximised not only to ensure delivery in the full-time operating hours but to ensure that multiple projects can be handled within the full-time working hours and capability of the individual. This could prove more efficient/advantageous to overall delivery in the new structures and programme of work where multiple projects have alignment and interdependencies*".

The claimant described that as not a valid reason. Delivery success depended on the effort required to deliver. If a full-time person could be given ownership of multiple projects was it not reasonable that a

part-time worker be given a proportionate number of projects (or hours of effort/work required on a project)?

- There was a need to demonstrate agility and support (to the client) through the ability to be present on site or across our core sites in the UK meaning travel may be required to meetings possibly at short notice (Monday to Friday) within the core full-time operating hours.

The claimant described that as a new requirement of the role and there had never been an expectation on members of the team to be able to travel to any site at a moment's notice. She also pointed out that the business had encouraged teleconferencing and distance communications over site to site travel for many months. Modern technology meant that business could be conducted across continents so the claimant did not see this as a reasonable justification.

The claimant also made the general observation in respect of virtually each aspect of the rationale - what evidence did Mr Lovell have and what were the examples?

8.1.2.7 Although the respondent has referred to the claimant's comment about projects stalling, we find that is taken out of context. It was related to the DI project which was atypical. In any event that was the claimant making a limited concession about the respondent's position rather than the respondent itself providing evidence or examples.

8.1.2.8 We note that it is not essential that the employer sets out all matters urged in favour of justification at the time when the provision is applied. The respondent can instead put justifying material before the Tribunal which was not given to the employee at the time. It is not a question of fairness but rather the assessment which we make. That being said, no further evidence or material has been put before us and we consider therefore that the claimant's critique which we have summarised above is something which we can safely adopt.

8.1.2.9 We accept the proviso that concrete evidence is not always necessary and that justification can be established in an appropriate case by reasoned and rational judgment (**Homer**). However in the case before us we find that there is neither concrete evidence nor reasoned and rational judgment.

It seems instead that Mr Lovell's rationale has been prepared to support the negative, but in our judgment unsubstantiated, opinion which Mr Lovell had harboured from the outset.

8.1.2.10 In these circumstances we find that whilst the respondent did have a legitimate aim it sought to achieve that aim in a manner which was not proportionate. Accordingly the discriminatory effect of the PCP was not removed and so this complaint succeeds.

Although Mr Brain has submitted that the respondent had previously treated the claimant generously by allowing a career break and then a job share, we find that that has no bearing on the indirect discrimination complaint we have been considering.

8.2 Unfair dismissal

8.2.1 Was the claimant's role redundant?

It remains the respondent's primary case that redundancy was the reason for dismissal. The respondent made clear in the at risk letter of 30 April 2018 (136) that it had decided that the work in the proposed new role of operations improvement manager would be a full-time role only because the respondent's observations of the old structure had indicated that any role under the operations improvement function worked most effectively with full-time coverage. Mr Lovell repeated this formula in the letter of dismissal (330 to 331).

Mr Lovell describes his approach to the restructure, in paragraph 59 of his witness statement, in these terms:

"... my proposal was to remove the tiered structure in my team and replace the various roles within it with one single role of operations improvement manager ... in substantive terms the majority of the functions (of the new role) were reflective of the functions that the implementation manager role already conducted, however there was a key responsibility for conducting all activities required within a project personally on an end to end basis (continuing into paragraph 60) My view was that, to be as successful and as efficient as possible, these roles would need to be carried out on a full-time basis to ensure that all core business hours were covered (and at paragraph 63) ... my proposal involved moving from a position where I had one full-time and two part-time positions of implementation manager, to three full-time positions in the revised operations improvement manager's role."

We find in these circumstances that, as the respondent virtually admits, there was no diminution in the amount of work. In fact it appears that there was likely to have been more work as it now required three full-time employees to do it.

In so far as the respondent is contending that part-time work and full-time work represent two different types of work, it is well established that this is not what the statute intended (see the **Johnson** case referred to above).

It appears to us that the respondent has endeavoured to distance itself from the part-time/full-time dichotomy. We note that in Mr Brain's submissions (at paragraph 99) that the emphasis is laid on there being a different kind of work because *"rather than operating in a tiered structure with a "wrap around" support team in place, the new role required sole responsibility for end to end delivery of project work"*.

We do not consider that any such fine tuning of the way in which the role was conducted makes it work of a different kind.

Accordingly we find that there was no redundancy situation in law with the result that that could not be a fair reason for dismissing the claimant.

8.2.2 Was there a genuine requirement that the claimant return to full-time employment so that her inability to do so was a substantial reason which justified her dismissal?

We remind ourselves that when considering this question in this context the question we have to ask is whether a reasonable employer could have reached the conclusion that only a full-time employee could effectively be an operations improvement manager. Was a decision to dismiss in those circumstances within the reasonable band?

Necessarily informed by the matters we have considered when looking at the indirect sex discrimination complaint, we find that the decision to dismiss was outside the reasonable band. We conclude that a reasonable employer would have given the job share a fair trial period, respecting the detailed plans which the two senior job-sharing employees concerned had prepared and which plan presumably had at least tacit approval from the employer.

Further, a reasonable employer would not have reached the conclusion that the role worked most effectively “*with full-time coverage*” unless that reasonable employer was in possession of evidence which supported that observation or conclusion. A reasonable employer would not risk making such an important decision on the basis of impression and opinion unsupported by evidence.

Whilst it would be unusual to find that circumstances which led to indirect sex discrimination did not also lead inexorably to a finding of unfair dismissal, we find that regardless of our finding in respect of the Equality Act complaint this dismissal was unfair.

8.2.3 The search for alternative roles and the claimant’s duty to mitigate

Quite properly, once it had decided that the claimant could not meet the full-time requirement, consideration was given to alternative part-time employment.

We should add that we do not consider that the claimant can be criticised for failing to put forward a proposal that the operations improvement manager role could be carried out part-time. She realistically accepted that the requirements stated as being necessary by the respondent, made any attempt to put forward a part-time proposal futile. In any event the proposal which Ms Sulley put forward was rejected.

It is clear that few part-time opportunities were available within the respondent at this time. Again we do not think that the claimant can be criticised for not accepting the six month secondment to the operational readiness team. The claimant has explained that she was at a particularly low ebb at this time by reason of the health and educational problems of two of her children and also her loss of trust and confidence in her employer because of its approach to the “*redundancy*” exercise. In those circumstances we agree that the claimant was entitled to take the view that accepting the six month secondment would simply be postponing the inevitable as there was

no prospect of the secondment being able to continue into permanent part-time employment.

With regard to the claimant's application for the part-time role of service projects portfolio manager, it is clear that her preparation for that interview and performance at it were uncharacteristically poor. The claimant explains in paragraph 99 of her witness statement that by that time she had been diagnosed with severe anxiety and moderate depression with the result that at the interview she did not have the mental capacity or emotional strength to deliver what she would otherwise have been capable of.

8.2.4 The claimant's contention that her rate of pay was a factor in the dismissal

As we have found the claimant's dismissal unfair on other grounds, this is now a somewhat academic question. The claimant has pointed out that because of her pay protection, which it must be borne in mind the respondent had of course granted, the net result was that the claimant, when returning to work after her career break, to a lesser role than that which she had undertaken before the career break was being paid considerably more than someone would normally be paid for that type of work. In fact she believed that she was being paid more than her manager and, as she mentioned probably more than Mr Jones who heard the appeal against dismissal.

Whilst we can understand why the claimant may have thought that being an expensive employee was a reason for her dismissal and could have meant that Mr Lovell was biased against her, we do not find this part of the claimant's case to be made out.

Employment Judge Little

Date 7th October 2019