EMPLOYMENT TRIBUNALS

Claimant: **Emily Smith**

Respondent: **Leicester City Council**

Heard at: **Leicester Hearing Centre, Kings Court, 5A New Walk, Leicester, LE1 6TE**

On: **14 October 2019 (reading day – parties did not attend)**
15, 16, 17 October 2019

Before: **Employment Judge Adkinson**
Mrs B Tidd
Ms R Wills

Representation

Claimant: **Mr M Gordon, Counsel**
Respondent: **Ms E Gordon Walker, Counsel**

JUDGMENT having been sent to the parties on 2 November 2019 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:

JUDGMENT

After hearing evidence from all parties, and considering the documents they have referred the Tribunal to, and after hearing representations from Counsel for the Claimant and Counsel for the Respondent, and after the Claimant withdrew her claim of direct sex discrimination, the Tribunal unanimously concludes that:

1. The complaint of direct sex discrimination (Equality Act 2010 section 13 and Part 3) is dismissed;

2. The complaint of failure to discharge duties for considering a request for flexible working (Employment Rights Act 1996 section 80H) was presented out of time but it was reasonably practicable to present it in time. Therefore, the Tribunal does not have jurisdiction to hear it and so it is dismissed; and

3. The complaint of indirect sex discrimination (Equality Act 2010 section 19 and Part 3) is dismissed.

REASONS

Background and Issues

1. This claim is about Leicester City Council's requirement for Ms Smith to work full-timeas a Multi Systemic Therapy ("MST") therapist and in particular

   a. whether the City Council's approach to Ms Smith's request part-time working was reasonably considered, and
   b. whether its requirement for her to work full-time is a proportionate means of achieving a legitimate aim.

2. By a claim that was presented to the Tribunal on 7 June 2018 with a period of early conciliation between 2 May and 17 May 2018 Ms Smith alleges that the City Council failed to consider her flexible working request properly.

3. In particular Ms Smith that the City Council made an unreasonable decision and so failed to comply with the Employment Rights Act 1996 section 80H(1). Ms Smith also alleges that the requirement for her to work full-timewas a provision, criterion or practice ("PCP") that impacted disproportionally on women, and her in particular, because they have disproportionately the childcare commitments. She argues the PCP was not justified. She therefore claims indirect discrimination on the grounds of sex contrary to the Equality Act 2010 section 19 and Part 5. The parties are agreed that on the face of it, the claim under section 80H is out of time and on the most generous conclusion it should have been presented by 28 February 2018 to be within time. They agree that the indirect discrimination claim is in time because it is a continuing act.

4. There was a claim of direct sex discrimination but that was withdrawn at the beginning of the hearing and therefore we dismiss it on withdrawal.

5. The case of Leicester City Council is that the claim under section 80H could have been brought within time. Alternatively, the City Council say that their decision was reasonable as it falls within Section 80G(1)(b)(ii) to (vi). The Council admits that there are on the facts a case of indirect discrimination subject to whether it is a proportionate means of achieving a legitimate aim. The legitimate aim on which the Counsel relies is "to ensure compliance with the MST licence conditions." The Council say the therapy can only be operated under the licence granted by an institute in the United States of America.

6. The parties had prepared an agreed list of issues. We have considered those and, ignoring those relating to direct discrimination for reasons previously given, we believe it correctly represented the legal issues that we had to resolve. We have made findings of fact only necessary to enable us to answer those legal issues. By way of remedy Ms Smith sought compensation. She remains employed with the Respondent but not as an MST therapist. By consent we determined liability first. We have not addressed any findings of fact necessary to determine the issue of remedy.

7. At the hearing Ms Smith was represented by Mr Gordon, a Barrister, and the City Council was represented by Ms Gordon Walker, also a Barrister. We heard live oral evidence from Ms Smith on her own behalf. For the City Council we heard live oral evidence from Mr Ivor Sutton who is the Council's MST Manager. He also dealt with Ms Smith's application to work part time. We heard live oral evidence from Ms Rena Kapadia who is the City Council's HR adviser. We heard live oral evidence from Ms Teodora Bot who is the Council's Head of Safeguarding and Quality Assurance. She dealt with Ms Smith's appeal against Mr Sutton's refusal to allow her to work part time. We finally heard live oral evidence from Sarah Whittle who is a Service Manager in the City Council's therapeutic division. Each witness was cross examined by the other side and they made themselves available to questions from the Tribunal which we asked from time to time. There was an agreed bundle of documents and we have considered all of the documents to which the parties have referred us. The first day of the Tribunal hearing was taken by the Tribunal to read the documents and witness statements. We heard live evidence on days two and three and submissions on the afternoon of day three. Each day during the hearings we took breaks in the mid-morning and mid-afternoon and at lunch time. We also took breaks when Ms Smith appeared to be distressed. Ms Walker-Gordon made us aware that Ms Whittle might need breaks, although it turned out that none were actually required. Each party has provided written and oral closing and opening submissions for which we are grateful and we have taken into account. Otherwise the hearing proceeded in the normal uneventful way.

8. Before I go on to set out the Tribunal's findings of fact, the Tribunal wishes to express two things that we feel are important to emphasise.

a. The first is that in our opinion each witness has done their best to tell the Tribunal what they believe to be the truth and to assist the Tribunal in coming to a conclusion.

b. Secondly although we have rejected Ms Smith's claims we do not want the judgment to be read as in any way being critical of Ms Smith's therapeutic abilities or dedication to her work generally. It is quite apparent to us that she is a skilled professional who is good at her job. The issue is simply quite narrow: It is ultimately about whether or not full-time work impacts on the MST licence and the therapy itself. It does not call into question her abilities, skills or commitment.

Findings of fact

9. Firstly, we deal with the issue of MST. MST is a therapy that has been developed in the United States but is deployed internationally. It is designed to work with troubled families where there are children who are at risk of care or custody. It is common ground that the therapy is evidenced based and is designed based on research and measured outcomes from that research. The parties appear to agree on the description but Ms Smith appears to describe it most succinctly in her own witness statement at paragraph 3 where she said:

> "By way of background an MST Therapist is a family therapist that engages with young people and their parents that have been referred by Social Services due to there being a high risk of care of custody for a child. The aim of the service is to improve the behaviour in a child by delivering therapies in an individual and family focussed way.

> MST is a voluntary service which takes on the responsibility of delivering the overall intervention to families. A Social Worker is attached to oversee the case and should any safeguarding and child protection concerns arise they will then take on any responsibility to manage those concerns as the statutory agency."

10. Leicester City Council chose MST because it felt there might be a potential cost saving of £2,300,000 over a two-year period based on the costs children in care or custody not following within the 18 months of the therapy ceasing or by avoiding the care or custody in the first place. Ms Whittle gave evidence about these costs.

11. Although there is criticism made of the use of 18 months as the measuring period we accept Ms Whittle's evidence that, firstly, most children in the target range are going to be 16 years old and that they would stop being in care at the age of 18 years. It seems to us that 18 months is a reasonable period over which to measure successful outcomes. We accept the evidence from the City Council that even if this were cost neutral it would be considered a success if there were a social benefit; the benefit being that children would not be in care or custody and that families who are troubled would be able to remain together, become stronger and be better able to cope with the challenges that life throws at them. The MST is a core model that comes with different flavours. For example, there was a different MST programme for dealing with families where issues revolve about diabetes, sex abuse and so forth. MST in the United Kingdom was nationally organised by the United Kingdom Government and local authorities were invited to take part by a Government scheme. The government provided local authorities with a grant that provided payment for at least the first year. Cathy James who works at Kings College in London was the UK lead and coordinator. The bundle contained numerous documents that related to the MST scheme and the contract under which it operates. MST is operated under a licence that is granted by the Organisation for MST Services who are based in the United States. The local authority that signs up to it, in this case Leicester City Council, agrees strictly to comply with all the policies and procedures in the MST manuals as modified by the group from time to time in connection with the training of staff in the licenced MST programmes. As part of the agreement, the City Council agreed to ensure that all its employees are competent and fully trained in the use of the system. Under the terms of the licence, paragraph 5.2, Leicester City Council acknowledged that it was of critical importance to the MST Organisation and the MST system is used in a consistent manner and in accordance with the highest professional standards. Accordingly, the City Council agreed to comply with all the terms of the policies in the MST manual as modified by MST Organisation from time to time. In the manual itself there is guidance given to how therapists interact with clients. The Tribunal noted that the following appeared to be particularly important: There are strict guidelines regarding the frequency of contact between therapist and families going through MST treatment are frequencies that should be dictated by the needs and strength of the family and by variations in need that occur during the course of treatment. Thus, fixed schedules for therapeutic contact, for example H hours on D days each week at time T o'clock, are inconsistent with MST.

We took that as an example of the need for MST Therapists to be flexible in the discharge of their duties. Secondly the manual emphasises the commitment must be translated into organisational policies and practices that support accessibility to MST Therapist, adherence to the model and has a continuous focus on outcomes. The manual then sets out a table that provides programme practice and characteristics. The first item in that table is that MST Therapists are full-timeemployees assigned solely to the MST programme.

12. Further on in the manual it says that therapists must have the flexibility to devote significant time and energy to any family when needs intensify, even if this occurs midway through or late in the course of treatment. Nearer to the end of treatment the clinical typically monitors consistency of therapeutic gains with minimal direct effort except for occasional crises. This supports evidence that was given to us by Ms Whittle that a case may be very intense at the beginning but tails off towards the end and therefore there was no such thing as a case which was high intensity throughout or low intensity throughout. The manual further continues that the expectation for the target case load for MST Therapists range between 4 and 6 cases. Actual therapist case load capacity depends on many factors including the stage of treatment of assigned families, the seriousness of the referral behaviours, the availability or systemic strengths of therapist, efficiency, supervisory practice and programme expectations. For example, a clinical with three families who are two weeks from being discharged may increase his or her case load to five or six families. If one of the families experience a crisis, the supervisor may direct other therapists to provide assistance to the new families or coverage for the overloaded therapist until the crisis situation is resolved. Again, this emphasises, in our judgment, the need for flexibility in intensity. The manual says that therapists with too few cases may tend to "fill the time" by providing services to families that would otherwise be better accomplished by the family or other indigenous support. Such situations may reflect poor use of the therapist resources and promote "a dependency relationship," that can reduce long term generalisations of treatment gains. In our judgment this is clearly emphasising the need to have a consistent number of cases dealt with by each therapist. The guidelines then provide a number of standard caseloads depending on the work setting and the number of hours per week. For example, it says that those who work approximately 40 hours per week would have a case load of an average of five cases per therapist over time with a case load between four and six. If it is 35 hours a week it would be 4.5 average with a case load of four to five. If the working week is 45 hours per week, it may increase the case load slightly to an average of 5.5 case with a case load of four to six at any given time. The MST guidance also provides guidance on how to deal with lengthy leave. It says that its transportability study findings indicated that youth outcomes were negatively impacted by therapist transitions. It says that the real-world implementation phenomenon of lengthy leave longer than three weeks has a potential to create model drift and impact youth outcomes due its potential impact on case load size, case coverage and quality of care for families receiving MST therapy. This supports the evidence from the City Council that there was a need for continuity of therapists dealing with the families in order to promote the most positive outcome available.

13. The MST guidance further goes on to say that

> "the following practices have proven to be ineffective at meeting the goals of the programme or have had a negative impact on the programme implementation outcomes. Of the items cited one of them is allowing therapists to return at less than 100% full-timeemployment status after leave. Specifically, on the topic of employment the manual says that all MST therapists must be committed to the provider agency on a full-time basis, as defined by work week standards and by the relevant legal authority in the region or country in which the team resides. It then says MST operates 24 hours per day, 7 days per week, 365 days per year. This means that therapists and supervisors cannot hold other employment and be available to their clients at all times. Yet in many locations this standard may be difficult if not legally impossible to enforce. That of course was not relevant to England and Wales. For example, the employee may operate a small family business where there are no specific work hour requirements and the staff person can still be immediately available when needed for MST."

The clear implication is that such work can be accomplished with no interference to the mission of MST. It continues

> "One implication of this is "no other employment" rule is that the MST staff must be paid in a scale which would reasonably allow workers to only work a single job and the worker must be committed to implementing MST with complete fidelity including maintaining availability with their clients as necessary and convenient to the client family."

14. Further on in the manual under flexible work hours system the MST manual says under "Executive Summary"

> "MST Therapists must be available at all times, the most convenient to their clients as a strategy to remove access barriers to engagement and treatment, flexible schedule to remove the barrier of demanding that families fit their needs into an agency time schedule. A flexible schedule allows staff to adjust their work schedules to work with families in the evening or on weekends. Often family members work during normal or typical work hours making full family participation difficult without a difficult MST schedule and that staff's susceptibility to burn out may reduce when a flexible schedule permits them to participate in other life activities during typical business hours. Under case load assignments as part of the employment manual it says that in general caseloads sizes ranging from four to six families per therapist should reflect the ability of the programme to meet the needs of the client families within the time available during a normal work week. Special consideration should be given when highly complex cases are assigned. In such cases supervisors may temporarily reduce case load size to provide the opportunity to address the additional clinical needs of the family."

15. Finally, under the MST "Development Method Programme Expansion Checklist" we note that, under the heading "Provider Programme Practice Agreement", the City Council must agree that MST therapists are full-timeemployees assigned to the MST programme solely.

16. Based on those documents and considering the evidence from all parties we have concluded that full-timeemployment is an essential requirement of the MST programme in order to ensure its success. This requirement is emphasised over and over in the manual. We noted the manual is based on research and so it must be that the research has shown that such a requirement is an essential element. We note that the MST programme provided different hours of work as to what amount to full-timeto take into account variations from jurisdiction to jurisdiction, but in each case the MST programme emphasises that they are to be treated as full-timehours. It has been suggested to us that the fact that there is not a strict requirement on the basis of working a second job suggests that the MST requirements are not as strict in relation to full-timeas might appear to be the case. We disagree with that. Firstly, there is a difference between the types of employment described, working flexibly from home for example is very different to having a second job that has fixed hours. Secondly, we note that even if the MST programme did relax the requirement of not working in a second job, it is of significance that nowhere in the documentation does it relax the requirement to work full-timeon the MST programme. That further supports the proposition that for the MST programme to be delivered effectively, full-timeemployment is essential from the therapist delivering it.

17. Ms Smith has suggested that working on the MST programme part time is possible and she has produced an e-mail from an MST therapist who is employed in Germany who confirms that she works part time of 30 hours per week. We do not believe that assists Ms Smith's case. We do not know the terms of the licence agreement in Germany. We do not know the terms of German law in relation to employment and how that impacts on the licence agreement. We do not know the model that the therapist is applying. We do not know what is meant by her phrase part time working. In any case whatever the situation in Germany it is clearly contradicted by the UK documentation to which we have just referred.

18. During the City Council's consideration of Ms Smith's application to work part time, there were a number of e-mails between Mr Sutton and Ms James about MST and part time working. It is convenient to refer to those now.

19. On 8 November 2017 at 17:50 in reply to Ivor Sutton, Ms James wrote:

> "Hi Ivor
>
> "If you want to please do share this licence agreement with the union, that is the union representing Ms Smith but it does not really give you what you need in terms of the MST programme requirements. Obviously, paragraph 5.28 is relevant in the licence agreement."

That is the paragraph which says you must comply with the MST programme.

She continues:

> "If you had a therapist who was part time this would break the conditions of your licence and lead to either you being on provisional licence while the issue was sorted if it was a temporary issue or ultimately to you losing your licence if it couldn't be resolved."

20. There was further e-mail correspondence between Cathy James and Ms Bot on 20 November 2017 as part of her consideration of the appeal. The e-mail reads:

> "Many thanks for your e-mail I am aware of the situation as a local team in Leicester came to us for advice. I manage the MST UK network partnership but in turn are licenced by MST Services in the USA. I am copying in Laurie Moore who is the key liaison person at MST Services for the UK."

She then goes on to set out answers to questions that Ms Bot posed. She says:

> "If a team employed a therapist on a part time basis that would mean that they would not meet their licence requirement so a team could lose their licence in this situation. There are no part time therapists in MST teams across the UK. There are part time supervisors and business support staff but this is allowable within the terms of the licence. Some staff have initially worked four days per week on return from maternity leave though taking annual leave days each week. But this has always been a temporary arrangement of two to four weeks and has been at the discretion of the supervisor manager as this arrangement requires additional support from other team members. There have been no trials within part time working in MST teams. This issue has been raised in other teams and there has been work to look at flexible hours for staff as long as these continue to meet service user's needs but not part time. The only occasions on which this happened has been on a temporary basis for example a phased return from sick leave. This has not been tried as we need to ensure UK teams are meeting their licence conditions."

Laurie Moore sent a separate email that supported what Ms James said.

21. While those e-mails themselves do not expressly say "No, part time working is prohibited." the Tribunal is of the opinion that a reasonable person with knowledge of the factual background could only have concluded that those e-mails are saying "No, you cannot have an MST therapist who work part time. At best it jeopardises your licence, assuming it is a temporary arrangement, at worse it means you would lose your licence" with the obvious consequence if the licence is lost there would be a cost consequence and a social consequence. We have no doubt in our mind that when the Council said they interpreted these e-mails as saying that part time working was not permitted and would not be accepted by MST it was right to come to that conclusion that it would lose its licence. Having looked at the documentation and heard the evidence from all the parties we accept that the idea of the MST therapist is to provide continuity of care and therapy to families who are in difficulty and to remove barriers of access to professional therapy services. Anything that impinges on that would be detrimental to the therapy, the families and would be unacceptable to both MST and indeed to the City Council because it would undermine the very scheme.

22. Having looked at the scheme, we now go back to the beginning. The MST was selected by the City Council after careful consideration of all the options available to try and improve care outcomes. The City Council felt it was necessary to undertake the programme and felt that there were about 400 children who could potentially benefit from MST. The City Council aimed to set up a team of four MST specialist therapists. Each would have an average case load of five cases but that would range between four and six cases from time to time. The average is affected by the remission rates, that is the cases which, though referred to MST, fail to complete the programme or drop out for whatever reason. The rate is about 15%. That might be because the child in the family is taken into care or it might be the child in the family is involved in criminal proceedings and ends up in custody. It follows therefore that having five cases does not mean that one actually has an average of five cases.

23. We accept the evidence of the Respondent that this target of four therapists with an average case load of five had not been achieved by the end of 2017. When Ms Whittle took over at the beginning of 2018 it was her aim to get the service up to the level of five cases on average in line with the programme. It follows therefore that anything that was done before that date was demonstrations of service operating below capacity. This can be seen from the various statistics which have appeared in the bundle that showed a number of therapists who are on leave for various reasons and that on many occasions there was not the four therapists who were required by the MST scheme. Through the many statistics, it is clear this scheme was being monitored and although we note that on one or two occasions the averages were below four or five cases per therapist, generally during the monitoring period each therapist had between four or five cases – at least in the period September to December 2017. For a therapist who works full-timewe accept that the number of hours spent by the therapist on the various tasks are as set out in evidence. That is to say about 15 hours a week in visits, 7 hours a week travelling, 4 hours involved in supervision and consultation, 5 hours in preparation and paperwork for the necessary supervision and consultation, 2 hours in meetings, 3 hours undertaking administrative tasks and one hour undertaking other miscellaneous work. We accept the evidence that was given to us by the City Council that even if one reduces the number of hours that one works from 37 hours to 22 hours there are certain aspects that cannot be reduced. Whilst the number of visits may come down because the number of families will necessarily come down and so travel would come down as a consequence, the time spent on supervision, consultation and preparation and professional meetings would pretty much remain fixed. Therefore, we accept the evidence that it does not follow that a reduction in the time worked from full-timeto part time necessarily means that the average amount of time per family would remain the same.

24. It is common ground between the parties that it is the Council's policy anyone who worked above the 37 hours per week takes time off in lieu from subsequent weeks. It is clear that if an employee works, say, 40 hours that entitles them to 3 hours' time off in lieu, it must be found from the time available amongst the therapists in subsequent weeks which has a consequence on how the work is going to be distributed.

Ms Smith made the point that MST does permit a payment in lieu instead of time off in lieu. In our judgment it is reasonable to allow time off in lieu. Firstly, it is permitted by the MST scheme. Secondly, it provides a break for the therapist. Thirdly there is an obvious cost benefit.

25. The way that it was set up at the City Council was that the 100-odd team of Social Workers would refer a family to MST team. The MST team would then assign one therapist to the family who would develop a relationship with that family to help to break down the barriers of mistrust. They would as necessary develop a relationship between the family and other therapists. The idea is that the client would then be familiar with other therapists and so the other therapist could step in as necessary in an emergency. That would save a client having to repeat what could be very traumatic and difficult information to each new therapist in a crisis. However, the first therapist would be at all times remain the main therapist for that family.

26. Although the Claimant started her employment with the City Council in August 2007, it was in March 2016 that she commenced employment as an MST Therapist. By the terms of her contract which she signed she knew that she would be working 37 hours per week, antisocial hours, full-timeand would be expected to be flexible with her time.

27. In June 2017 she submitted her application for flexible working. The background to this is that the Claimant was pregnant and was due to have a baby in August. She therefore wanted to put in place a reduction of hours to allow her to care for her child because otherwise it would prove difficult to arrange childcare. Throughout her application she had a union representative supporting her.

28. In her application she said that she would propose that her new working pattern would be 26.25 hours per week, which equated to three full days and one half day. She said she could be flexible with the day depending on the needs of the service and the families. With regard to on call rota she was still willing to do one week out of four on call because that was the pattern in the team. She expressed she would be happy for her proposal to be implemented on a trial basis. She said that working 26.25 hours a week would only give her time to effectively manage no more than three cases or alternatively one high intensity case and three low intensity cases when the need is less intensive. She wrote

> "Currently a full-timetherapist holds four to five cases so I would propose a reduction of 25% to my case load."

We pause there to note that on 31 May 2017 when she completed this document she was therefore expressing a view that a therapist was doing four to five cases. The suggestion she therefore made in evidence that in fact therapists were only doing four cases is one that we reject because it does not tally with contemporaneous documentation. She goes on to say that it would increase the amount of time that her cases would be diverted to the on call therapists during the week because obviously other members and therapists would have to pick up any developments while she was not there. She had a meeting with Mr Sutton and from the e-mails to which we have already referred Mr Sutton made enquiries of the MST coordination lead at Kings College to see whether or not part time work was a possibility. The conclusion as we have already referred to was that it was not. Mr Sutton gave a detailed reply to that effect.

In his reply he concluded that there was an inability to reorganise work amongst existing staff essentially because they already have four to six families to work with and that it would mean a significant reduction in the continuity of service to families to regularly have different therapists supporting them in their work. He said that cases are categorised in a high or low intensity. He considered that it would have a detrimental impact on quality because these families have difficulty engaging with professionals and therefore anything that impacts with the continuity would impact on the quality of the service provided. It would have a detrimental impact on services ability to meet customer demand because there would be a reduced case load which would mean that families who could benefit from the service would not be able to benefit from it. He was not in a position to be able to recruit further staff because of the terms of the licence restricted the City Council to four therapists per team and it would have an impact on performance. He also made the point that the licence conditions would be breached because only full-time employees may be assigned to the MST programme.

29. There was an appeal that was considered by Ms Bot. She too contacted Ms James at Kings College London. She too came to the conclusion that part-time work would not work in this case. We have taken into account that Ms Smith did in fact use annual leave to work part time from September through to December and from the evidence it seems that it worked or at least just about. There were no complaints that were raised by the City Council about her. However, we note that given the case load it was not going to be sustainable since Ms Whittle had concluded that the team was working under par and that the number of cases needed to be increased to make the service more efficient, to allow more parties to benefit and to promote compliance with the terms and conditions of the licence.

30. Insofar as there has been arguments about whether or not full-timeis necessary we accept the City Council's evidence that it was. This is not least because of the licence condition but also because of these families having unpredictable needs and unpredictable times. Therefore, we have concluded that the Respondent was perfectly entitled to conclude that the service could only be discharged through working full time. We note that it was suggested by the Respondent that Ms Smith could work 37 hours a week on such terms as she chose. What was important was that the service was provided to the family, not whether she was working 9-5. Unfortunately, that flexibility was not tested and so we do not know whether there was any efficacy to it.

31. We also took into account Ms Smith's own reply to the Tribunal's questions. The Tribunal asked Ms Smith how she felt that the scheme could work if she were doing only 22.25 hours per week. The Tribunal felt that she genuinely believed she could work the hours that she proposed. However, we felt that she was not able to provide us with a satisfactory answer given the scheme's need for flexibility and continuity. The Tribunal's lay members – drawing on their own expertise and experience of working in the employment work place both as employer and employee – both expressed the view that they did not feel that there was a convincing explanation or proposition being put forward by Ms Smith that would provide for the part time work to provide the same outcomes that this programme was designed to deliver. The Employment Judge agreed with their conclusions.

32. We therefore concluded that the City Council's belief that full-time requirement was necessary is both a justified conclusion and one that is reasonable. Nothing that we have heard has convinced us that part time flexible

permanent working would achieve the benefits of complying with the licence or social benefits. It would put at risk a serious amount of money that had been spent on the licence and consequent costs of how the children of the families are likely to end up in care of criminal proceedings.

33. We accept the explanation from Ms Whittle that if Ms Smith were to work part time as she proposed, at least three and possibly up to six children would miss out on the opportunity to benefit from the MST scheme with the consequent increase in costs of care or criminal proceedings and the consequent social impact.

34. We accept Ms Whittle's evidence that she nonetheless spoke to Ms James afterwards to explain that Ms Smith was using leave to work part time. It was presented to Ms James as a fait accompli. We accept Ms Whittle's evidence that Ms James is very unhappy albeit she could do nothing about it. The reason we accept she was unhappy and is because it tallies entirely with the licence terms and the tenor of the e-mails to which we have referred already.

35. As for the reason as to why the claim was not presented within three months Ms Smith explained that she was on maternity leave and suffering from stress. She relies also on the fact she was undergoing an internal grievance process although for our part we cannot see the relevance of the grievance process since it postdates the presentation of the ET1. No medical evidence was presented to support the suggestion that the impact of stress or maternity leave on Ms Smith was so great that she could not bring a claim before the Tribunal.

Law

36. I turn then to set out the law that we have applied. Section 80G of the Employment Rights Act 1996 provides an employer's duty in relation to an application for someone to work flexibly. It says they must deal with it in a reasonable manner and they will only refuse the application if they consider one or more of the following grounds apply, as set out in section 80G(1)(b):

> "…
> "(ii) detrimental effect on ability to meet customer demand,
> "(iii) inability to re-organise work among existing staff,
> "(iv) inability to recruit additional staff,
> "(v) detrimental impact on quality,
> "(vi) detrimental impact on performance
> "…"

37. Section 80H entitles an employee to complain to the Tribunal if the employer has failed to comply with Section 80G(1). On time in which to bring a claim it says

> "(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—
> "(a) that his employer has failed in relation to the application to comply with section 80G(1),
> "(b) that a decision by his employer to reject the application was based on incorrect facts, or
> "(c) that the employer's notification under section 80G(1D) was given in circumstances that did not satisfy one of the requirements in section 80G(1D)(a) and (b).

"…
"(5) An employment tribunal shall not consider a complaint under this section unless it is presented—
"(a) before the end of the period of three months beginning with the relevant date, or
"(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
"(6) In subsection (5)(a), the reference to the relevant date is a reference to the first date on which the employee may make a complaint under subsection (1)(a), (b) or (c), as the case may be.
"…"

38. In relation to that time limit we have taken into account the following propositions;

a. that the phrase should be given a liberal construction in favour of an employee, **Deadman v British Building and Engineering Appliances Limited** [1874] ICR 53;
b. What is reasonably practicable is a question of fact for us to determine, **Walls Meat Company v Khan** [1979] ICR 52,
c. that the onus of proving that presentation in time was not reasonably practicable rests on the Claimant, **Porter v Bandridge** [1978] ICR 943, and
d. accordingly, if a Claimant fails to argue it is not reasonably practicable to present the claim in time the Tribunal has to find that it was reasonably practicable, **Sterling v United Learning Trust** EAT 0439/14.

39. We have also taken into account guidance from the Employment Appeal Tribunal that the relevant test is not simply a matter of looking what was possible but to ask whether on the facts of the case found it was reasonable to expect that which was possible to have been done, **ASDA Stores v Kauser** EAT 0165/07. Because it is conceded that there is a preliminary case of discrimination for the purposes of the law we focussed on the issues of proportionate means of achieving a legitimate aim. Firstly, we have taken into account what the Equality and Human Rights Commission employment code says on the issue under legitimate aim at paragraph 4.28 as we are required to do by the Equality Act 2006, Section 15. It reads:

> "The concept of legitimate aim is taken from European Union Law and the relevant decisions of the Court of Justice. It is not defined by the Act. The aim of the provision, criterion or practice should be legal, should not be discriminatory in itself and must represent a real objective consideration, the health, welfare and safety of individuals may qualify as a legitimate aim provide the risks are clearly specified as supported as evidence. Although reasonable business needs and economic efficiency may be legitimate aims an employer solely aiming to reduce costs cannot expect to satisfy the test. For example, the employer cannot simply argue that to discriminate is cheaper than to avoid discrimination."

We remind ourselves of the following principles. A Tribunal cannot reject a justification defence just because we think an employer should have pursued a different aim that was less discriminatory, **Chief Constable of West Midlands**

Police v Harrod [2017] IRLR 539. The employer does not have to demonstrate that no other proposal is possible. They simply have to show that the proposal is justified objectively even though its discriminatory, **Hardys and Hansons v Lax** [2005] ICR 1565.

40. As to the issue of proportionality the employment code says as follows:

> "4.30 Even if the aim is a legitimate one the means of achieving it must be proportionate. Deciding whether the means used to achieve a legitimate aim are proportionate involve the 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 reason for applying it taking into account all the relevant facts.
>
> "4.31 Although not defined by the Act the term proportion is taken from EU directives and its meaning is clarified by the decisions of the Court of Justice of the European Union. EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But necessary does not mean the provision, criterion or practice is the only possible way of achieving the aim. It is sufficient that the same aim could not be achieved by less discriminatory means."

41. The law has been summarised by the Supreme Court in the case of **Chief Constable of West Yorkshire Police v Homer** [2012] ICR 704 where Baroness Hale said at paragraph 19 onwards the following:

> "The approach to justification of what would otherwise be indirect discrimination is well settled. A provision, criterion or practice is justified if the employer can show it is a proportionate means of achieving a legitimate aim. The range of aims which can justify indirect discrimination on any ground is wider than the aims which indicate a phased discrimination can justify direct discrimination. It is not limited to social policy or other objectives derived from Article 6(1)(4)(1) and 2(5) of the Equal Treatment Directive but can encompass a real need on the part of the employer's business. As Lord Justice Mummery explained in the case of **R (Elias) v the Secretary of State for Defence**, the objective of the measure in question must correspond to real need and the means used be appropriate with a view to achieving the objective and be necessary to that end. So, it is necessary to weigh up the need against the seriousness of the detriment to the disadvantaged group."

42. Baroness Hale continues.

> "He went on to commend a three-stage test for determining proportionality derived from **De Freitas and the Permanent Secretary for the Ministry of Agriculture, Fisheries, Lands and Housing**. First, is the objective sufficiently important to justify limiting a fundamental right? Secondly is the measure rationally connected to the objective? Thirdly on the means chosen no more than is necessary to accomplish the objective. As the Court of Appeal held in **Hardys and Hansons Plc v Lax** it is not enough a reasonable employer might think the criterion is justified. The Tribunal itself has to weigh up the real needs of the undertaking against the discriminatory effects of the requirement."

43. As to needs we take into account the House of Lords case of **Barry v Midland Bank Plc** [1999] ICR 859. The grounds relied on as justification must be of sufficient importance for the Tribunal or Court to regard it as overriding the disparate impact of the difference in treatment either in whole or in part. The more serious the disparate impact on women, or men as the case may be, the more cogent must be the objective reason.

Conclusions

44. Turning then to our conclusions. Firstly, was Ms Smith's claim under Section 80H of the Employment Rights Act 1996 presented in time? It was not for the reasons already given. Was it reasonably practicable for the complaint to be presented in time? In our judgment the answer is yes. We have seen no evidence that shows it was not reasonably practicable. We do not conclude that being on maternity leave or suffering from stress alone is enough to make it not reasonably practicable to present the claim within three months. There is no medical evidence to support the suggestion that her maternity leave or stress meant it was not reasonably practicable to present a claim. We have taken into account Ms Smith throughout her application and appeal had union representation. We have seen no evidence that she was badly advised or misled by anyone or indeed that anyone sought to deter her from making a claim to the Employment Tribunal. On the evidence available therefore there was nothing to draw the conclusion she could not have presented the claim within three months of the appeal concluding. If we were wrong about that however we would still be of the opinion that the claim was not presented within such further period as the Tribunal considered reasonable. There was no explanation for the delay from 28 February through to 7 June. There is no evidence that we have seen that justifies such a delay even if we discount of course the period during which there was early conciliation. If we are wrong on that and we had to consider the merits we would have come to the conclusion that the complaint under Section 80H had to be rejected. We are quite satisfied on the evidence as to the MST scheme and the evidence given by the City Council that for cogent reasons, it was reasonable for the City Council to conclude her application fell within those paragraphs of 80G on which the City Council relies. It was a decision that was reasonable and one that was open to the City Council to make.

45. As to the issue of indirect discrimination, firstly we do not accept Ms Smith's proposition that the requirement to work full-time is inherently discriminatory. It is a neutral term. It just happens to have disparate impact on women and impact on her in particular.

46. Is there is in fact a legitimate aim? The focus of the City Council's wording of the legitimate aim is on the contractual term requiring compliance with the licence. We conclude that it is a legitimate aim to comply with the terms and conditions of the licence. We take into account the whole of the circumstances underpinning that term. The term is one that was brought about after research conducted by the MST programme and is evidence based. It is emphasised throughout in the programme. The consequences of breaching it could be severe. Not only would the City Council lose its licence and its ability to implement MST therapy, there would be a financial impact on the Council in terms of care proceedings, and financial impact if there were custodial consequences and a significant social impact as well on families being unable to remain together and support each other. It is a legitimate and objective that is worth pursuing to seek

to divert people away from care or custody and to build stronger families and to reduce the burden on tax payers and society generally.

47. Turning then to the three questions in **De Freitas**. Is the objective sufficiently important to justify limiting a fundamental right? For the reasons that we have given we come to the conclusion that it was justified in limiting the right of the Claimant not to be discriminated against on the grounds of sex. That is because the aims and objectives at which it is directed are so important that they must outweigh her personal right. Secondly is this rationally connected to that objective?. The answer is yes. This is an evidenced based programme that has concluded. There is a need for full-time working and the City Council has justified that. The City Council has also justified it because in due course the intensity of the therapist work load will increase to make the City Council licence compliant and more efficient and effective in its delivery of MST. It is not going to be possible for part time working to fit in with that programme. The third question, are the means chosen no more than is necessary to accomplish the objective? Our unanimous conclusion to that is yes. Based on the facts as we have found them to be, the City Council cannot effectively deploy this programme without full-time working. The financial and social benefits of the scheme would not occur if there were not full-time working of the four therapists. In our mind therefore and with reluctance we have come to the conclusion that the right of the Claimant not to be discriminated against is outweighed by the legitimate aim which itself is achieved through steps that is a proportionate means. Therefore, the Respondent makes out its defence of justifying the discrimination and it is for that reason that the claim must be dismissed.

Employment Judge Adkinson

Date 14 November 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE