EMPLOYMENT TRIBUNALS

Claimant: **Ms C McAneny**

Respondent: **Gatwick Airport Limited**

Heard at: **London South (Croydon)** **On: 2/9/2019 and 3/9/2019**

Before: **Employment Judge Wright**
Ms C Bonner
Dr R Fernando

Representation:
Claimant: **Mr P Tomison – Counsel**
Respondent: **Mr M Lee - Counsel**

JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of indirect discrimination based upon the protected characteristic of sex and of constructive unfair dismissal fail and are dismissed.

REASONS

1. The claimant presented a claim form on 1/12/2017 for indirect sex discrimination based upon the protected characteristic of sex. On

26/2/2018 she was given permission to add a claim of constructive unfair dismissal.

2. The respondent operates passenger and airport security at Gatwick Airport. In the airport security team in which the claimant was employed, there were approximately 1,700 personnel. The respondent operates to service levels regulated by the CAA and Department for Transport.

3. The Tribunal heard evidence from the claimant and her TU representative Ms Penny Fuller. For the respondent it heard from Ms Stella Maddalena – Resource Scheduling Manager, Mr Jeff Edwards - Security Duty Manager and Mr Simon Rees – Security Duty Manager. The Tribunal had before it a bundle of approximately 400 pages. Unfortunately, approximately 213 pages were irrelevant. The case had been prepared for the personal injury claim to be determined at the same time as liability. It was not apparent to the Tribunal why this was so and it declined to address the personal injury claim at this stage. In any event, it proved not necessary to determine the claimant's personal injury claim and therefore the time, effort and cost incurred in preparing it thus far was wasted.

4. Not every matter raised in evidence needed to be determined by the Tribunal, although the evidence and documents which the Tribunal was taken to were considered.

5. The claimant went on maternity leave in April 2016. On 20/12/2016 she requested part-time work upon her return. This was agreed on the 14/6/2017 in consultation with Ms Maddalena. The claimant's circumstances then changed and as a result, she made a flexible working request, specifying weekend only working from 6pm Friday evening to 6pm Sunday evening.

6. The flexible working request was rejected on 27/7/2017 by Mr Edwards due to lack of management supervision and the difficulty with introducing a bespoke rota. The claimant appealed. Her appeal was rejected on 18/8/2017 by Mr Rees on the issue of management supervision and financial repercussions. The claimant resigned as a result on the day and by letter on 24/8/2017.

7. The claimant put her case on a very narrow basis. The agreed list of issues states:

> [The PCPs are agreed]
>
> '1 Did the respondent apply to the claimant a PCP which: (i) it applied or would apply to other employees; (ii) which put or would put female employees at a particular disadvantage as compared to

male employees; and (iii) which put the claimant at that particular disadvantage?

The claimant relies upon the following allegedly indirectly discriminatory PCPs in this regard:

a A requirement to work within one of the respondent's existing shift patterns.

b A requirement to work on weekdays.

2 If so, can the respondent show that the PCP was a proportionate means of achieving a legitimate aim.

3 Did the respondent constructively and unfairly dismiss the claimant? In particular:

a Did the respondent act in breach of the implied term of mutual trust and confidence by imposing an indirectly discriminatory PCPs on the claimant which did not allow her to work weekends only?

b If so, was the application of that PCP the reason for the claimant's resignation.

c If so, was her dismissal reasonable in all the circumstances within the meaning of section 98 of the ERA?'

The Law

8. Section 19 of the EqA provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c) it puts, or would put, B at that disadvantage, and

> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

9. Section 95 (1)(c) ERA provides:

> (1) For the purposes of this Part an employee is dismissed by his employer if …
>
> > (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

10. The claimant had two young children. The change in the claimant's circumstances was their father agreed to look after them every weekend and therefore the claimant wanted to work weekends only from 6pm on Friday until 6pm on Sunday.

11. The respondent could not agree to only weekend working and as a result, the claimant resigned.

12. The claimant said she suffered a detriment as she was not able to arrange childcare during the week. There were two reasons, one was the cost of doing so and the other was the hours the shifts covered. The respondent operates on a 24/7 basis. It is accepted there was a particular disadvantage for the claimant as she could not work the hours she wished to and resigned as a result.

Submissions

13. Both parties provided written closing submissions and supplemented them with oral submissions.

Respondent

14. For the respondent, Mr Lee focused on the claimant's perceived disadvantage at the expense of the group disadvantage. The Tribunal was invited to focus on the justification argument run by the respondent at this hearing, rather than the emails exchanged at the time.

15. The claimant suggested the PCP would be solved by making ad hoc arrangements solely for her. The respondent submitted that there was no evidence that either PCP put female security officers at a particular disadvantage when compared with their male colleagues.

16. The definition of indirect discrimination is concerned with group disadvantage and therefore, the comparison is between the position of men and women. The PCP must result in 'far more' women than men suffering the disadvantage in question – McNeil & Ors v HMRC [2019] EWCA Civ 1112.

17. There is no requirement that the legitimate aim be articulated specifically or even be appreciated at the time of the decision – Seldon v Clarkson Wright & Jakes [2012] ICR 716.

18. There is no principle that a PCP cannot be justified if there is a less discriminatory means of achieving the legitimate aim – Kapenova v Department of Health [2014] ICR 884.

19. In assessing whether or not a PCP is justified, the Tribunal should have in mind that an ad hoc or personal exception for one individual affected by it is not a solution to a PCP that has been found to be indirectly discriminatory – Chief Constable of West Yorkshire Police v Homer [2012] ICR 704.

20. There was no dispute the PCPs applied, however this was not case where only one single roster was in place; there was flexibility within the roster-suite.

21. The focus in this case has been on the individual disadvantage for the claimant at the expense of the crucial question whether female security officers were placed at a disadvantage due to the PCP. This case falls short. The claimant has premised her case on her inability to find child care and she then asserts the same affects female security officers. Neither PCP required her to work shifts of 6am/pm to 6pm/am. The rosters provided a range of options for those with childcare needs. The claimant suggests the options were not raised with her, however the respondent consulted with the Trade Union and the staff at the time. The claimant had worked on a different roster previously.

22. What was discussed with the claimant at the time is a red herring. The PCP by definition applies to all employees and on no view did either PCP give rise to a particular disadvantage for the claimant who claimed it was impossible to obtain child care within the rosters. The claimant then claimed the issue was the expense of the childcare and that it was too costly. There was no evidence of that, the claimant first raised it in oral evidence; there was therefore no evidence to find there was a group disadvantage for female security officers in general.

23. The claimant explained that the age of her children and the length of her commute meant that the claimant's case on group disadvantage collapsed.

24. The evidence did not support the finding that either PCP disadvantaged female security officers. The evidence of 11 requests, 7 of which were female, did not indicate a particular female disadvantage in 2017.

25. The rosters accommodated a wide range of caring needs and the respondent was not challenged when it said that the majority of requests it receives is to avoid weekend work. On the group disadvantage the Tribunal was invited to take judicial notice that more women are single parents. Though some of the rosters did require some weekend work, there is however part-time and flexible working available within those rosters. The request that the Tribunal takes judicial notice that these PCPs place women at a disadvantage is not supported by any evidence. The claimant specifically requested to work from 6pm on Friday to 6pm on Sunday (she wanted to work two 10 hour shifts) could not be accommodated. There was no evidence of any wider pattern of group disadvantage.

26. Turning then to were the PCPs a proportionate means of achieving legitimate aims (the claimant accepting they are legitimate aims)?

27. Again, this is a red herring. This is not a 'costs alone' case and the economic efficiency is part of the rationale. The PCP should be considered in respect of all female officers and not just the claimant who was unable to work on weekdays.

28. In respect of the working environment there is flexible working and there are frequent changes to the roster. This is not a standard roster case. There are different security needs in different sections of the airport at different times. The Tribunal heard the evidence of the necessity of that. There is also the importance of line managers supporting their staff in a pressurised important job. The Trade Union had been critical of the lack of support from line managers and aligning managers and the staff was an important requirement of the rosters.

29. The claimant's case was she should have been given a bespoke roster or there should have been the creation of a weekend only roster. That did not take into account the clear evidence that the current roster system had been designed to address the specific needs of the respondent's business. Against that, in 15 years there had only been 11 requests to do weekend only working. There was no business need or demand for a weekend only roster.

30. The fixed rosters are justified in this environment and the system will not please everyone. The claimant's very narrow request could not be accommodated and that is a proportionate balance of achieving a legitimate aim. There was however no disproportionate impact on women. There was minimum impact which affected very few people.

31. In 2019 an additional roster was introduced and it was suggested that indicated there was a need for further flexibility. That does not however undermine the justification for weekday work or for fixed rosters. The fixed rosters in conjunction with the flexibility provide additional ways of assisting employees to work around their commitments.

32. Turning to the constructive unfair dismissal, the claimant's case is premised upon a finding of indirect discrimination. If the Tribunal does find there was indirect discrimination then Mr Lee invited the Tribunal to find that does not render the dismissal unfair. It is unusual, however a finding of discrimination does not necessarily mean there has been a repudiatory breach. If the Tribunal takes the view the PCPs are discriminatory, it cannot be said that it was likely or calculated to destroy trust and confidence from the point of view of the respondent, rather than the perception of the claimant.

Claimant

33. In closing submissions for the claimant, Mr Tomison said firstly, Mr Edwards accepted in cross-examination the concerns about line management could be addressed through alignment with the line manager's shift pattern and by the provision of a note at the end of each shift.

34. Secondly, Mr Rees' concern was of filling the claimant's weekday hours if she only worked weekends; yet he had made no attempt to find out if that could be done. He had not enquired whether there was anyone available to job share with the claimant. Furthermore, the respondent had not shown that it was impossible to create a weekend only roster.

35. Thirdly, this case comes down to the respondent's approach to flexible working, it appears to be a 'computer says "no"' scenario'. If it is not in the existing rosters, it cannot be accommodated. It is clear the PCPs place the claimant at a particular disadvantage. She gave clear evidence that she could not work during the week. Whether that was due to her not being able to work during the week, the cost or the unavailability of childcare, it was clear she could not work. The PCP placed other women at a particular disadvantage too. The respondent has not justified the means of achieving the legitimate aim.

36. Fourthly, in reply to the respondent's submission, it was submitted the claimant has been consistent and has shown an individual disadvantage. She could not work during the week for whatever reason. The group disadvantage is that females are put to a particular disadvantage when compared with male security officers. The disadvantage is that females are not able to obtain childcare for the hours they are requested to work. The claimant relies upon asking the Tribunal to take judicial notice of the fact that women are more often the primary caregiver than men. The claimant gave evidence about the difficulties facing a single mother arranging childcare during the week. The Tribunal is invited to take notice of the fact that these difficulties apply equally to other single mothers working for the respondent. The claimant also referred to the evidence that 11 employees have asked for weekend only rosters and 64% of requests were from women. None of those requests were granted. The claimant says there was a desire for weekend working among female employees and they faced a disadvantage in not having the request granted. There may also be women who are placed at this disadvantage but who have not made requests because they know it will not be granted.

Findings and conclusions

37. Ms Maddalena gave evidence that in 15 years, only 11 individuals had ever requested weekend working and 7 of those were female. She also said that those individuals' needs were accommodated by agreeing some other working pattern.

38. Other than that, no other statistical evidence was provided and the Tribunal was invited to take judicial notice of the fact that there are more single parents with primary childcare responsibility that were female.

39. The Tribunal accepts this may be the case in the general population; however there was no evidence submitted that this was the case with the particular group or pool at the respondent.

40. Even if that was accepted at the respondent, the claimant has not established that there was such a group, the Tribunal finds that due to the respondent's flexibility, there was no group disadvantage. Hence there had only been 11 requests for weekend working in 15 years, that equates to 0.7333 requests per year, amongst a workforce of 1,700, which equates a need of 0.00043% of the workforce.

41. There was no evidence given for the reason for the weekend only working requests and it was not at all clear whether or not the requests were made for childcare reasons, or for other reasons.

42. It could be that the 7 females made the request for reasons other than childcare, but the 4 men did make the request for childcare reasons. Whatever the reason for the requests, all we do know with any certainty is that the issue was overcome by the flexibility in the respondent's roster-suite.

43. The Tribunal finds the reason why there was no group disadvantage was due to the respondent's roster-suite (there were at least 4 different working patterns), there were job shares available within the roster-suite and the was the ability to swap shifts within the same roster.

44. The Tribunal heard evidence that when the roster-suite was introduced in February 2016, they had been agreed with the Trade Union. The claimant asserted in her oral evidence that this was not the case; however her Trade Union representative gave evidence upon her behalf and she did not say that the roster-suite was not agreed with the Union. In addition, the bundle contains a communication sent to all staff making this point.

45. The claimant also claimed that the respondent had not done enough for her in terms of informing her of the alternative shift patterns. The claimant was accompanied by her Trade Union representative during meetings with the respondent. The Tribunal accepts the (then) new roster-suite was sent to all employees, including to the claimant in February 2016. There had been consultation with the Trade Union. Furthermore, the Tribunal was told that 85% of staff were granted their first choice of shift pattern, including the claimant.

46. For those reasons, the Tribunal does not accept that there was any group disadvantage and for that reason, agrees with Mr Lee's submission that based upon the balance of probabilities, the claimant has simply not made out her case on that basis.

47. At first glance, it may look surprising why in a business which operates 24/7, when there is a need for weekend working and when perhaps (although this was not evidenced beyond mere assertion) weekend working is unpopular (although Ms Maddalena said that overtime was paid for weekend working); that the respondent could not accommodate the claimant. The respondent however demonstrated and this evidence was accepted by the Tribunal, that it could not take the claimant out of the shift pattern and create a bespoke roster solely for her. Not only would this create a precedent which other staff may then use to apply for a bespoke roster; the respondent showed that it was impossible to do. To create a bespoke roster for the claimant would mean that the respondent would have to recruit a job-share partner to work the shifts which the claimant was unable to do (taking into account the breaks etc., she would need to

take). The respondent would also have to 'back-fill' the claimant's original shifts and recruit a further supernumerary person for that role.

48. This is not a case where the respondent is for example a hospitality outlet at the airport open 24/7, when it may be expected that there would be flexibility for someone in the claimant's position to return to work after maternity leave working weekends only. The respondent is highly regulated and due to the nature of its work, it needs to have certain ratios of male and female employees (such that if employees job share they have to job share with a person of the same gender). It has a target imposed by the CAA that 95% of passengers have to be processed through security within 5 minutes. It has to be able to meet this target (amongst other things) at peak passenger times, which are seasonal. For example, during the school summer holidays, there are different requirements than at other times. It has to ensure that employees are exposed to working at different times of the day and on different days, in order that the staff will pass assessments which are required by the Regulators.

49. One important change which came in under the 2016 roster-suite at the instigation of the Union, was that it wanted the staff to have more support from their line managers and the roster-suite was designed with this in mind. The rosters of managers and staff have to be aligned. The Tribunal heard that based upon the claimant's proposed shift working pattern and allowing for the line manager's own ability to swap shifts, annual leave, sickness/training/other absence, she would only be on the same shift as her line manager on approximately 2 to 4 shifts per month. Mr Edwards conceded that if there were no problems with the claimant's performance, this may have been adequate (even if it went against the Union's wishes); he said however if there were any problems or issues, it would not.

50. The claimant proposed that whoever was managing her on the shift could get her a 'note' at the end of the shift, which she could then collate and present to her own line manager for the purposes of an appraisal etc. The Tribunal agrees with the respondent that this would have been unworkable and completely impractical.

51. Although the Tribunal found the claimant has not established any group disadvantage and therefore, section 19(2)(d) EqA does not come into play, the Tribunal considered the respondent's position.

52. The respondent relies upon the legitimate aims of:

> ensuring the availability of its staff to allocate the appropriate number of security personnel to appropriate shift patterns;

ensuring there is sufficient work for the security personnel on each shift pattern; and

ensuring that the security personnel are adequately supervised.

53. The proportionate means of achieving those aims are:

working weekends only would have meant a change to the shift pattern which had been agreed with the union after a nine month consultation and which complied with the Department for Transport and CAA guidelines;

there was insufficient work for the periods the claimant proposed to work;

were the claimant to work her proposed individual shift patterns she would not have the level of supervision required to fulfil her security duties;

the claimant could have worked part-time on 20 hours per week, or worked the respondent's family friendly system of early or late shifts; and

refusing security personnel to work weekends only had not affected any other of the respondent's security personnel.

54. The claimant accepts the aims are legitimate.

55. The Tribunal preferred the respondent's evidence on the peak hours and that this varied between summer and winter, it would for example be busier during the main school summer holidays (and during other school holidays) and that it ebbed and flowed during the course of the year.

56. This resulted in the respondent's need to have shift options which accommodated this and hence the agreement it reached with the Union on the roster-suite in 2016.

57. Even if at the times of the year the weekends are busy and even if there is an operational need for extra staff on a weekend, busy periods do not last for 24 hours and there are quiet periods during the shift. It was simply not possible for the respondent to create a separate roster for the claimant.

58. The claimant claimed she could have arranged to do the mandatory and regular training on a weekday, provided she had enough notice. The Tribunal accepts that proposition and had the respondent been able to

accommodate the claimant's proposed working pattern, has no doubt that would have been arranged and accommodated.

59. Both the respondent and the Union wanted the same line manager to supervise their team on a regular basis (absences aside). This was built into the roster suite to ensure it happened. The tribunal heard evidence why this was necessary: to ensure staff met this targets imposed on them by the CAA and Department for Transport and pass assessments; to ensure their well-being due to the nature of the work; mentoring; support and to ensure they are working in a range of different situations by varying the shift pattern.

60. The Tribunal does not accept the claimant's proposal this could be overcome by different line managers supervising the claimant and producing a note at the end of the shift.

61. The Tribunal finds that it was administratively and operationally unmanageable for the respondent to create a weekend only roster for the claimant. At first glance, it would appear unlikely that an organisation with 1,700 staff cannot do so. That does not however reflect the nature of this organisation, which is highly regulated. Ms Maddalena gave evidence that the respondent is governed by legislation which sets strict requirements on it in order to protect passengers and the integrity of the airport boundaries and land. The security function is critical and operates 24 hours per day, 7 days per week. The respondent needs to ensure it has a minimum number of staff to perform all of the different security roles. For those reasons the indirect discrimination claim is dismissed.

Constructive dismissal

62. The claimant's claim is based upon a breach of the implied term of mutual trust and confidence by imposing an indirectly discriminatory PCP on the claimant which did not allow her to work weekends only.

63. The claimant does not rely upon any other repudiatory breach by the respondent.

64. As the Tribunal finds the PCPs were not indirectly discriminatory, the constructive unfair dismissal claim fails.

65. In any event, the Tribunal also finds that the respondent did not want the claimant to leave and it genuinely tried to reach a resolution; however the end result was that it did not have a roster which could accommodate the claimant. Mr Rees stated that he did not want the claimant to leave after the time and effort which had been invested into her training.

Furthermore, once the claimant resigned at the end of the appeal meeting, he asked her to reconsider.

66. The respondent did not act in a manner calculated or which was likely to destroy or seriously damage the relationship of trust and confidence. The respondent did not act in repudiatory breach of contract and so the constructive unfair dismissal claim also fails.

Employment Judge Wright

18 September 2019