EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		**RESPONDENT**
MRS R ASHTON	**V**	**MARKS AND SPENCER PLC**

HELD AT: WELSHPOOL **ON: 11-13 FEBRUARY 2020**

EMPLOYMENT JUDGE: M EMERY
MEMBERS: JD WILLIAMS
C STEPHENSON

REPRESENTATION:
FOR THE CLAIMANT **Mr Ashton (husband)**
FOR THE RESPONDENT **Mr O James (counsel)**

JUDGMENT

The unanimous decision of the Employment Tribunal is:

1. The claims that the claimant was treated less favourably than her comparators by being subject to detriments because of her part-time status are all well founded and succeed.

2. The claim of constructive unfair dismissal is well founded and succeeds.

REMEDY JUDGMENT

3. The claimant is awarded the following sums:
    a. Basic Award: £3,339.99
    b. Loss of earnings from 15 December 2018 to 3 March 2019: £1,878.87
    c. Pension loss from 15 December 2018 to 3 March 2019: £250.12
    d. Future pension loss 4 March – 19 December 2019: £891.75
    e. Loss of statutory rights: £500

    TOTAL: £6,860.73

REASONS

4. Written reasons were requested at the hearing.

Preliminary Issue

5. A preliminary issue at the outset of the hearing was whether the claimant was claiming indirect sex discrimination, as appeared to be the case from comments within her statement. Following discussion, in which the respondent outlined that it would request an adjournment and would require additional evidence to be able to properly deal with this allegation, the claimant decided not to pursue an application to amend her claim.

The Issues

Constructive unfair dismissal claim

6. Did the claimant resign in response to a series of breaches of contract which taken collectively amount to a repudiatory breach of contract? The claimant relies on the following issues:
    a. Being required to change her working hours
    b. The respondent rejecting her proposed solutions, without suggesting a reasonable solution
    c. The claimant's line manager being inflexible about the changes to her working hours.

7. If so did the claimant resign in response to a last straw?

8. Were the future changes to the claimant's work pattern a detriment?

Part Time Workers Detriment claim

9. Did the respondent :
    a. Require the claimant to work 1 weekend in 5 and/or

b. Require the claimant to work evenings?

10. If yes, was this treatment less favourable treatment – i.e. did the respondent treat the claimant less favourably than it treated comparators Katie Phillips and Alan Farewell?

11. If yes was this less favourable treatment because the claimant was a part-time worker?

12. If so, has the respondent shown that this treatment was a proportionate means of achieving a legitimate aim?

The Evidence

13. We heard from the following: the claimant, and for the respondent, Ms Debra Woods the Team Leader of the respondent's Social Media Team, Ms Christine Saxton, Service Delivery Manager, Ms Rebecca Lord who heard the claimant's grievance, and Mr Phillip Dale, who heard her grievance appeal. All provided written and signed statements, which we read at the outset of the hearing along with all documents referred to within.

14. The findings set out below do not contain all the evidence we heard and read; instead we confine ourselves to the facts relevant to the issues in dispute. The quotes of evidence are from the judge's typed notes and are not verbatim, instead a detailed summary of the answer.

15. We thank Mr Ashton and Mr James for their careful and courteous conduct of the hearing.

Findings of fact

16. The claimant was employed by the respondent for 15 years to her resignation, and was a highly regarded employee. Until December 2016 she worked in the respondent's Customer Experience Team, 15.75 hours a week on a set pattern Tuesday, Wednesday and Friday days during school hours. We accepted the claimant's evidence that these hours *"were agreed years before…"* - in Spring 2012 - although nothing had been put in writing, and in particular her contract has not been amended.

17. The claimant's contract was signed on 22 July 2003 and contains a clause saying her *"minimum agreed committed hours of work will be 37.5 per week"* and that *"the company reserves the right to increase or decrease your minimum agreed committed hours of work and/or vary your working pattern (including days, hours, weeks) as necessary to meet the operational requirements and/or trading patterns of the store…"* (54). In 2018 the claimant signed a Remote Working Agreement enabling her to undertake some of her work at home, agreeing to continue to work her *"minimum agreed committed hours"* (56).

18. In December 2016 a reorganisation took place, the Customer Experience Team was disbanded, and the claimant agreed to being relocated to the Social Media

Team. Her shift pattern was slightly amended on agreement, to Tuesday, Wednesday and Thursday 15.75 hours during school hours. The reason why the claimant needed to work part-time and during school hours was to ensure she could look after her children, including being responsible for school pick up and drop offs. The respondent accepted this was the reason for the claimant's hours of work.

19. The claimant's job title was Senior Adviser, her grade was Reward Level B (RLB). Her role was supervisory; in brief summary she assisted RLA Advisers in dealing with customer social media enquiries, dealing with urgent and serious issues, and coaching and leading the RLAs.

20. The claimant accepted that the respondent was a considerate and fair employer until the events in this claim, in part because it accommodated her working pattern and child-care responsibilities and she had been able to work the hours and days she wanted.

21. One issue of disagreement between the parties was whether the claimant was told on her transfer from the Customer Experience Team to the Social Media Team that her fixed working pattern was to be extended for a year. This was the position taken by Ms Woods throughout. Nothing had been put in writing on this issue, and the claimant never accepted that there was a suggestion her working pattern was a term-limited agreement. Her then manager was interviewed during the November 2018 grievance process and he recalled a conversation about her working patterns, that she *"…wanted to change her days and this was agreed … I am not sure if this was agreed to be for any set period of time."* (109). The claimant's view at the time was that apart from the agreed change from Friday to Thursday, her shift patterns would continue indefinitely. Ms Woods's statement records that she *"had been advised that there was an agreement in place that meant the claimant's working hours would not change for the first 12 months…"*

22. Given what her then manager stated, and given the claimant's evidence, we accepted that the claimant was never told her shift pattern was in effect temporary on her change of teams. Given her strength of feeling on the issue we consider she would have raised this as an issue at the time. We note that in its grievance report, the respondent effectively disregarded her manager's recollection of a lack of discussion on the issue, and cited only Ms Woods recollection that she *"believes"* it was for a 12 month period.

23. The respondent employed 5 LBAs, 3 full-time and 2 part-time. All bar the claimant were rostered to work 1 in 4 weekends and evening shifts. Another RLB (MB) did not work Fridays because of childcare responsibilities.

24. In late July 2018 the claimant's manager Ms Woods initiated an informal conversation with the claimant about proposed shift changes for RLBs. The claimant was told that she would be required to work every 1 in 5 weekends with longer weekend working days, and there would be other changes to her shift pattern including working the Friday before and Monday after each weekend shift.

25. The reason given to the claimant at this time was that there was a drop in service level response times to customer's social media messages on Fridays and weekends, meaning more staff were required for these shifts. As Ms Woods put it in her statement

> *"..it became clear that we were understaffed on the weekends and Fridays … this was having an impact … this was the main factor which led to us reviewing the rotas for RLA and RLB staff…. It became clear that all RLB and RLA advisors would need to work some weekends so that we had the correct coverage and balance of staffing to meet the increased operational demands placed upon is the claimant was at that time the only RLB or RLA advisor who did not work at the weekends"* (paras 6 & 7).

26. And in Ms Woods evidence to the tribunal:

> *"we had service delivery issues and we needed to plug the gaps … we tried to balance the needs of the team with operational needs."*

27. This is also the reason given in the Notice of Appearance

> *"Around July 2018 it became clear that there was an issue of understaffing on weekends on and on Fridays... It became necessary for all 5 RLB advisers … to work time over the weekend to meet operational demand". (*page 27 para 12)

28. The claimant expressed concern about being able to work these shifts because of childcare responsibilities. There followed at most 2-3 informal chats with the claimant and Ms Woods in August 2018. Ms Woods accepted that she knew the claimant would be unhappy with this proposal, and that there were various options discussed, including reducing hours in the week *"to make the weekends fit".* The claimant was *"concerned and worried"* according to Ms Woods during these informal meetings. There are no notes of these meetings.

29. On 10 August 2018 the claimant emailed her *"brain dump"* to Ms Woods saying *"I've been really worried about it…"* (100). Her proposals were to compromise – agreeing to some weekend working but wanting it pro-rated according to her hours to 1 in 10 weekends; another suggestion she made was to work Saturday or Sunday, or to work 1 in 5 weekends but her usual (5 hour) days. In Ms Woods response dated 2 September 2018, drafted after discussions with HR, none of the claimant's suggestions were accepted. For example she was informed that part-timers are not offered pro-rated weekend shifts, that this was not possible for operational reasons. Another suggestion made by the claimant was that she work weekends but not a full shift – instead she work her usual daily 5 hours. Again the respondent said this was not possible, because part of her role was to set up at 8.00am and at the end of the shift to complete the end of day handover. At weekends only one RLB was scheduled on duty, meaning the whole shift needed to be worked.

30. After this email exchange, the claimant heard little from her manager. Ms Woods' evidence was that she was trying to resolve this informally. She says that in this period she was looking at options to make the claimant's hours fit. We accepted that there may have been an occasional informal chat between the claimant and Ms Woods on the issue, but no matters of substance were discussed.

31. It is accepted by the parties that the claimant did not agree with the proposed rota change, citing her family responsibilities. The claimant accepts that Ms Woods was telling her she was *"trying to make it work"* for her. One issue was the hours required by the respondent on the weekend shifts left the claimant with a 'spare' 3 hours – one of the respondent's suggestion was that she could work these 3 hours from home on a Thursday evening.

32. In September 2018 the claimant approached the respondent's Business Involvement Group (BIG) team (a staff council providing assistance on work-related issues) and asked them to assist in finding a compromise. Various proposal were made by BIG which were not accepted as reasonable by the respondent; one for example envisaged the claimant increasing her hours to keep her weekday shifts while also working a weekend rota, rejected on budgetary grounds.

33. A significant point of issue in the proceedings was the rationale for the proposed shift changes. The primary reason given to the claimant at the time was, as set out above, operational reasons, to increase resources at weekends. We heard significant evidence on this issue. It was accepted in evidence by Ms Saxton that the proposed rationale for the change – to increase response times – did not require additional RLB support at weekends and evenings, as the number of RLBs on weekends and evening shifts would remain the same – 1 RLB per shift. The service level changes were going to be improved by an increase RLA resource at weekends, those who were answering customers' queries.

34. In evidence the respondent's position changed from the requirement for additional RLB resource at weekends, to an issue of fairness between RLBs. This emerged as a significant reason for the proposed change to the claimant's shifts, that it was unfair for all other RLBs to work weekends while the claimant did not. Ms Saxton, who heard the claimant's grievance, accepted that a significant factor in this shift change was that Ms Woods wanted fairness across the team. Ms Saxton accepted that she had established that the claimant did not work evenings or weekends unlike her RLB colleagues in the Social Media Team and that it would *"make it fair to widen the shift rotation at weekends";* fairness meant *"... all RLBs playing their part and supporting the team … all taking a share of the whole range of hours."* As the respondent's witnesses made clear, for example Ms Saxton, working weekends was *"non-negotiable".*

35. The respondent also said in evidence that there was a benefit to having an extra resource working weekends; 5 RLBs working weekends meant that there was less days off in lieu during weekdays, meaning gaps in resource would be plugged in the week, that there was more flexibility. We heard or saw no evidence as to how this would have worked in practice and whether there would

in fact be less pressure to weekday rotas if all RLBs worked 1 in 5 weekends; particularly given the stated rational was to ease pressure at weekends. We noted that it was accepted in a meeting between Ms Lord and Ms Saxton during the grievance process that while the background for the change was a *"service level review"*, a decision was taken early on that rota changes for another employee, MB, would be minimised because of her childcare needs – *"we tried to minimise change where we could with [MB] … [Ms Woods'] wanted more fairness across the board for the RLBs doing weekends"* (102).

36. The issue of fairness was discussed in detail during the evidence. The respondent's case was that there were two issues – fairness that everyone does the same shifts versus being fair to employees based on their personal circumstances. For Ms Lord, fairness meant *"all the team would take their share of shifts across the week which they were able to do"*.

37. No consultation took place with other RLBs at this time, although they were advised there would be a rota change. The respondent's rationale was that their shift patterns were not going to be significantly changed. As Ms Woods puts in her statement, the claimant's comparators Ms Philips and Mr Farewell, *"… worked full time hours including 1 in 4 weekends. Accordingly, there was no need for their working patterns to change"* (para 8).

38. After BIG involvement ended in September 2018, the claimant heard little about the proposed shift change.

39. In late October 2018 the claimant accessed a draft rota in excel format on the respondent's systems. She noted that she was rostered to work the weekend before Christmas and the Friday and Monday either side.

40. There was a dispute as to whether this was a draft or a final rota. For the claimant this was a final rota, as these were the shifts the respondent clearly expected her to work. For the respondent it was a draft rota to which swaps etc. could be made amongst staff before it was finalised. The respondent accepted in evidence that this was the rota, and it was up to the claimant to arrange swaps for this rota if she did not want to work these shifts and could find a colleague to swap with, at which time it would be finalised. In the event the claimant did manage to get a swap for this weekend shift

41. We did not accept the respondent's evidence that this was just a draft subject to change by the respondent. It was not a finalised rota, but any change to the rota was, we accepted, to be agreed amongst colleagues organising their own swaps rather than by the respondent changing the rota. The claimant was, we accepted, rostered to work the weekend before Christmas 2018 and evening, subject to any swaps she may have been able to arrange, that if no swaps were available this would be the claimant's rota.

42. The respondent's evidence also suggests that this was a finalised rota. There was an internal email in which Ms Woods asked if the claimant's Friday shifts could be reduced on the claimant's new rotation, to 3 Fridays on and 2 off. This would be the Friday before each weekend and also 2 in 5 Fridays when two

members of the team had their lieu days off work (64-65). Again, this suggests that there was no reconsideration to the *"non-negotiable"* position of the respondent that the claimant must work weekends.

43. On 5 November 2018 the claimant submitted a written grievance. Of the parts of the grievance relevant to this claim, she complained that the proposed work pattern *"… that has been forced on me to accept is unfortunately impossible for me to be able to effectively perform, namely due to my personal family situation"* (70). She referenced her own suggested compromise being *"rejected – without a meeting or full-explanation"* (70). She complained she had not been *"appropriately and properly consulted with … not provided with robust reasons as to why her suggestions were discounted…"* and had been placed in an impossible position. She described it as a *"forced change to my working hours"* and the date of implementation would *"ruin"* her prearranged Christmas plans. She cited four issues – being subject to an unfair detriment due to her family situation; not being properly consulted with; not provided with robust reasons and her suggestions being discounted; and being *"… placed in an impossible situation where the Business is effectively forcing me to have to resign"* (71). The resolution she requested was for an agreed settlement package on her resignation from the business.

44. It was put to the claimant that she did not resign at this time, that she must have continued to have trust and confidence in the respondent to resolve the grievance. We accepted the claimant's evidence that she had lost trust in the respondent, that this was *"the beginning of the end of my employment"*. The fact that the claimant sought an exit package is indicative, we considered, of the claimant not having continuing trust in the respondent.

45. The grievance was rejected on 3 December 2018. Despite a stated reason for the shift change being given during grievance interviews (for example Ms Saxton, page 102) being the issue of fairness in shift patterns between colleagues, this was not stated in the outcome letter. This referred to the Social Media team *"to be resourced according to the demand created by customer contacts…"* that nothing had been agreed on the rotas, but that weekend working was *"non-negotiable"*. A reason for rejecting the grievance was that the rota was not finalised, it was still *"under discussion".* Recommendations were made, and there was acceptance that meetings needed to be *"face to face and reasons should be explained in full, then confirmed in writing where appropriate".* (pages 111-113)

46. The claimant resigned by email dated 6 December working to 13 December 2018. She appealed the grievance decision on 12 December 2018. She cited discrimination, and part-time worker detriment. She argued that the grievance outcome was unfair because there had been no formal discussion and refusal of her suggested compromises. The appeal was rejected on essentially the same grounds as the grievance decision.

47. There was a formal process requiring the respondent to give formal notice of any change in hours if there is no agreement. This process never commenced. In the bundle there was a policy "Managing Flexibility in Retail" (51-53). This

policy did not apparently apply to the respondent's office based staff, but the respondent's witnesses said the policy which did apply was similar.

48. This document provides that any proposed change is explained to the employees affected *"and why they are needed … the important thing is to have a clear business reason for deciding who is being asked to change…"* The policy suggests informal flexibility conversations to start with, and if concerns are raised

> *"… that you can't resolve in the meeting, make notes of your conversation so far and agree what actions you are both going to take away from the meeting. Agree to meet again in a few days' time… In the follow-up meeting, if the employee still has concerns about the change, you may need to accept that it would be unreasonable of you to enforce it… Alternatively you may decide that it is still reasonable to enforce the change … In this situation, you should inform the employee that you will be enforcing a change to their contract and issue them with a letter stating this…"*

49. The policy goes on to say that there are circumstances where the employee *"may not be expected to accept a change to their contract. However, each employee's situation needs to be considered and you should use your best judgement to decide whether the change is reasonable. … Caring: where it would leave a dependent vulnerable e.g. no child care/carer."*

50. There was significant evidence on when if at all the formal process should have commenced and what the outcome of this process would have been. The respondent accepted in evidence that *"on reflection"* in the absence of informal conversations, it would have expedited a formal process.

Submissions

51. Mr James for the respondent argued that in fact the claim was effectively an indirect sex-discrimination case. There are few factual disputes. He argued that it was accepted by the claimant that there was no agreement to change her hours or rota pattern, as the claimant had refused the proposed hours. The claimant's evidence was not that she was being picked on because she was a part-time worker. There was no final rota, the October excel rota was a draft rota. Mr James also referenced the respondent's broad entitlement to change working hours on reasonable notice.

52. Mr James argued that the pro rata principle – the argument that the claimant work the same proportionate weekly hours at weekends as her comparators - is not appropriate. The pro-rata principle is defined in the Regulations as relating to "pay…" this principle cannot apply to prorated shift patterns. In addition, the claimant was not going to be working different shifts to her comparators – she would be working the same shifts.

53. Mr James argued that this is a 'detriment' claim – Reg 5(1)(b). But no detriment arises as the Claimant never works a weekend shift. Mr James accepted that pressure put on the claimant could be a detriment. But the difficulty for the

claimant is that there is no less favourable treatment because the rota was not enforced. There was no formal contractual change, there was no threat of dismissal, the issue was being considered. Whilst the process may have been flawed, there was an ongoing process. Mr James argued that there must be a specific finding on detriment – it cannot be the proposal for a change of pattern.

54. On comparators – the change in the claimant's contract was not a consequence of her part-time status, and in any event she has suffered no detriment. On the wording of the Regulations, *"on the grounds of"* and the *"reason for"* the treatment – the part time status of the claimant must not be the sole reason, but it must be an operative reason for the treatment (*Khan*). Her comparators were not being treated differently to her, and the weekend shifts could not be on the grounds of her part-time status.

55. Objective justification: is this shift change appropriate, and necessary? There were commercial, PR and HR reasons to make this change. It was necessary as there was a real need for it and it was necessarily implicit that the claimant must work every day.

56. On the unfair dismissal case, there is a dispute in the claimant's case – the claim references the grievance outcome, the witness statement references the rota. However the rota itself was not a repudiatory breach, it was not a breach because it could be imposed on 30 days' notice. On the grievance process, Mr James accepted that the process could amount to a repudiatory breach, but that there was nothing inherently unfair in this process. And, given no formal notice of the rota change had been given, there was no change of contractual terms being imposed. While the claimant may say there is a fait accomplis, there was a contractual process to impose this change, it cannot amount to a breach of contract.

57. Mr Ashton said that there was little he could say in response.

The Law

58. Part Time Worker Regulations

> 1. …
>
> 2. Meaning of full-time worker, part-time worker and comparable full-time worker
>
> (1) A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker.
>
> (2) A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to

workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker.

(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place

(a) both workers are—

(i) employed by the same employer under the same type of contract, and

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part-time worker …

5. Less favourable treatment of part-time workers

(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

59. Employment Rights Act 1996

95 Circumstances in which an employee is dismissed.

(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.

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do
(b) relates to the conduct of the employee
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

60. In relation to the part-time workers claim, we considered the following cases: *Hendrickson Europe Ltd v Pipe EAT/0272/02*: a part-time worker was dismissed because her employer required 3 full-time employees instead of 4, of which C was the only part-time employee, and C refused to agree to work full-time. R argued that it was a redundancy, by virtue of the need to have 3 full-time employees rather than because of C's part-time status. The EAT accepted the tribunal's judgment that C had been treated less favourably by reason of her part-time status. The EAT outlined 4 issues to consider:

a. What is the treatment complained of?

b. Is that treatment less favourable than that of a comparable full-time worker?

c. Is the less favourable treatment on the ground that the worker was a part-time worker?

d. If so, is it justified on objective grounds?

61. We also considered the cases of Gibson v The Scottish Ambulance Service (EATS/0052/04) and British Airways PLC v Pinaud (2018 EWCA Civ 2427) and the case of Sharma ccc

62. We noted that we must consider the reason for the treatment, and that it is for the claimant to prove on the balance of probabilities that the treatment was "on

the ground that the worker was a part-time worker" (*Roberts v Telegraph Publishing Ltd).*

63. We noted that part-time status as a reason for the treatment does not have to be sole reason. In *Gibson* the Scottish EAT determined that the tribunal must consider the employer's subjective reason for the treatment, following the test set out by the House of Lords in *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830* and it is not sufficient that the worker's part-time status was one of the reasons for the treatment: it had to be the sole reason. We noted that this test was disapplied in *Sharma and others v Manchester City Council [2008] IRLR 336 (EAT)* and *Carl v University of Sheffield UKEAT/0261/08*. Sharma: it is sufficient to trigger the PTW Regulations if part-time status is one of the reasons for less favourable treatment. *Carl*: part-time status need not be the sole reason for the less favourable treatment, but must be the "effective and predominant cause" of the treatment in question.

64. Justification: We noted that an employer will be able to justify any less favourable treatment of a part-time worker if the less favourable treatment aims to achieve a legitimate objective, is necessary in order to achieve that objective and is an appropriate way of achieving that objective. *British Airways v Pinaud UKEAT/0291/16*, the tribunal must consider on a practical assessment what was the impact of that treatment.

Conclusions on the evidence and the law

65. The claimant's position was that her hours were being changed because she worked part-time and did not work weekends and evenings. The respondent's position evolved during the case. Its reason given to the claimant at the time - operational requirements require more RLBs at weekends – was amended during the hearing: a significant reason for the requirement that the claimant commence working 1 in 5 weekends, the same number of as her comparator colleagues, was because of the issue of fairness; it was seen by the respondent that the claimant not working weekends was unfair on her colleagues who did, that the RLBs needed to all *"play their part"* and "*make it fair"* and *"support the team"* and *"take a share".* The same factors, and reasoning, was used to require the claimant to fit her remainder hours into evenings or other times suggested by the respondent.

66. Was this a proposed change or an actual change to her contractual hours of work? We found that the draft rota seen by the claimant was *"non-negotiable"* – the only changes permitted would be if she could liaise with colleagues to see if she could get a swap. This was an actual change to her rota, to take effect in December 2018. The formal consultation process had not commenced, but this was, we found, a process which would not have changed the clear decision made, that weekend working was non-negotiable.

67. In making a *"non-negotiable"* decision, we found that the respondent wrongly informed the claimant throughout the process starting in July 2018 to her resignation and to the appeal decision that this was for operational reasons,

increased demand at weekends, instead of its predominant reason, fairness amongst RLBs.

68. We also concluded that the respondent failed to follow a process, informal or otherwise, as set out in its policies. The policy we saw requires the employee to be provided an explanation as to "*why they are needed … the important thing is to have a clear business reason for deciding who is being asked to change…"* We noted that the respondent was failing to provide the correct reason to the claimant, fairness, and that this was in breach of its own policy. We further noted that in the grievance and grievance appeal decisions, the respondent failed to change its reasoning for the change in rota, which it now knew to be fairness.

69. We next considered whether the change of rota amounted to less favourable treatment. We concluded yes. For the claimant the impact of working weekends and the consequential difficulties in fitting her hours into a working pattern that worked for her and her childcare arrangements during the week was a clear detriment. We noted the test is whether a reasonable person would take the view that they had been disadvantaged in some way. We concluded that the claimant had a reasonable belief that this change of rota arrangements significantly disadvantaged her. It did in fact significantly disadvantage her.

70. Was the claimant's treatment less favourable treatment in comparison to a full-time worker? We concluded yes, for the following reasons:
    a. the claimant was given a misleading reason for the change of rota, her comparators it appears were not told of any reason.
    b. a focus for the claimant, as set out in the list of issues, was on the *change* of hours. The claimant was being required to change her shift pattern to a more detrimental shift pattern, and the comparators were being asked to change to potentially more beneficial hours. This was known to the respondent who focussed instead on what it considered to be the positive consequence for the other RLBs including her comparators – the issue of fairness to them and not the detriment to the claimant.
    c. the issue of fairness was inextricably linked to her part-time status, in a way that *"operational reasons"* were not. It was because of her part-time status that the claimant did not work weekends and this, for the respondent, was unfair to other RLBs.

71. We noted that no evidence was cited in these proceedings that the other RLBs were in any way concerned about their shift rota. The respondent's witnesses accepted that different rotas can suit different staff. The issue of "fairness" was one which concerned in particular Ms Woods.

72. Was this treatment on the ground that the claimant was a part-time worker? We concluded yes. We noted that it is for the respondent to prove (on the balance of probabilities) the reason for the treatment, and for the claimant to prove (on the balance of probabilities that the treatment was "on the ground that the worker was a part-time worker" (*Roberts*). We noted that part-time status does not have to be the sole reason (*Sharma*). In this case we concluded that there

was another reason; a background issue for the respondent was being able to better rota at the beginning of the week, the quieter periods. However this reason was never evidenced and it was never put forward as a significant reason during the grievance process. We concluded that the claimant was working set part-time hours, she was not working weekends because of her part-time status, and this was seen as unfair. This was the "effective and predominant cause" of the requirement the claimant work 1 in 5 weekends and some evenings.

73. The respondent can justify its less favourable treatment of a part-time worker if the less favourable treatment aims to achieve a legitimate objective, is necessary in order to achieve that objective and is an appropriate way of achieving that objective. We concluded that the respondent's actual legitimate objective was to achieve fairness. We heard no evidence as to why it was considered an issue of fairness to change shifts; apart from that this was the view of Ms Woods, and other managers agreed with her. There was no evidence of other staff being unhappy with their shifts, that they considered it was unfair for the claimant not to work weekends. We heard no evidence on whether fairness could be a legitimate objective. We could not conclude, without evidence, that fairness was a legitimate aim.

74. We next considered whether the less favourable treatment was an appropriate way of achieving this objective (assuming it was a legitimate objective). We concluded not. The policy was not followed, the claimant was not given the actual reasons for the change as required under the policy. It is clear that appropriate consideration was not given, per the policy, to the objections of the claimant, and whether *"it was still reasonable to enforce the change".* A position where the managers go into a process with its end result already determined, with a closed mind to any objections, and her comparators are treated differently, cannot amount to a fair process.

75. We next considered the claim of constructive unfair dismissal; noting that it is not for us to substitute our view for that of a reasonable employer, of similar size and resources, and we considered the range of reasonable responses test.

76. We concluded that the respondent had breached the claimant's contract of employment. She claims that it was a repudiatory breach to require her to change her hours, her proposed solutions were rejected and there was inflexibility by her manager. We found that in this situation, where the real reason for the change was not being provided to the claimant, it was a repudiatory breach to require her to change her hours; it also follows that the respondent was being inflexible and was rejecting her proposals, in part because the claimant was unaware of the real reason for the change being made. In doing so it failed to follow its policy, it failed to give appropriate consideration to the claimant's suggested amendments, and there was an inflexible approach taken to the issue – weekends on set hours were mandatory from the outset.

77. We concluded that in these circumstances, the actions of the respondent amounted to a repudiatory breach of contract.

78. We concluded that the respondent resigned in response to the repudiatory breach of contract as clearly set out in her grievance and subsequent resignation letter, which referred to the forced change implemented before Christmas. We considered that the respondent's conduct had the effect of repudiating the contract. We accepted that the appropriate policy required dialogue and communication, notes of meetings. When it was clear that there was disagreement the respondent did not move forward with the formal policy. Crucially, as we note above, the claimant was never given the true reason for the change of rota, fairness, and her manager was intransigent in failing to consider the claimant's alternative suggestions, in the main we found because the claimant was not being provided with the true reasons for the change.

79. We considered that the claimant's involvement with BIG did not resolve issues as her and BIGs proposals were never properly considered, because the respondent was not providing the true reasons for the change.

80. We considered that a reasonable employer would, when the claimant objected on 10 August, have started a process and would have provided the real reasons for the change. Given the evidence of the respondent's witnesses, who all highly rated the claimant's work and competence, we consider that had had a proper process been followed and real reasons provided to the claimant. A satisfactory resolution could have been reached. We accepted therefore the pleaded issues – the respondent requiring change, not following process, rejecting suggestions and showing inflexibility were all factors which gave rise to the claimant's decision to resign.

81. We did not accept that the claimant affirmed the breach of contract by her conduct or by any delay. Her grievance makes it clear she was not accepting any breach, and she was, we accepted, entitled to wait to the outcome of this process before deciding on her next step, in this case her resignation.

Remedy

82. The claimant's gross weekly wage was £196.47. The parties agreed a basic award in the sum of £3,339.99, calculated as follows: 4 x £196.47 x 1.5 and 11 x £196.47.

83. The parties agreed that the claimant's loss of earnings from 15 December 2018 to 3 March 2019 amounted to £1,878.87. The parties agreed an award of £500 for loss of statutory rights.

84. The claimant started a business in March 2019. The claimant has earned in this period to December 2019 £8,100 over 41 weeks. During this period the claimant would have earned £6,698.58 (£163.38 x 41). The claimant sought to offset capital expenses against this sum, claiming the cost of a building costing £6,900. The parties agreed that capitalisation for tax purposes means that value can be attributed over years, mean that 20% of the cost of the lodge can be deducted. Even doing so, and reducing her earnings by £1,380 (20% of £8,100) this leaves earnings from the new business of £6,720, more than her income

with the respondent. Accordingly the claimant is awarded no losses from March 2019 onwards.

85. Following the hearing the claimant's husband wrote asking for certain other expenses to be capitalised, meaning that the costs being offset would lead to a financial loss over the period to December 2019. The respondent objected saying evidence was required to determine the issue as to whether or not these expenses could be capitalised, and arguing this point could and should have been made at the hearing. We accepted that the respondent did not have an opportunity to respond at the hearing on this issue, that it was contested evidence and that it would require a hearing to determine the issue. We did not consider that this was appropriate, particularly given that this was a point which could reasonably have been raised at the hearing. Accordingly, we did not revise the Remedy Award, as it was not reasonable to do so after the hearing given evidence would be required, or in the interests of justice to do so.

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EMPLOYMENT JUDGE M EMERY

Dated: 14th March 2020

Judgment sent to the parties
On 17 March 2020

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For the staff of the Tribunal office