



EMPLOYMENT TRIBUNALS

Claimant: Miss N Allen

Respondent: Primark Stores Limited

Heard at: Manchester

On: 19, 20 and 21 October 2020

Before: Employment Judge Robinson
Ms H Fletcher
Mrs F Crane

REPRESENTATION:

Claimant: Mr Culshaw, Solicitor

Respondent: Miss Kight, Counsel

JUDGMENT

The judgment of the Tribunal is that the claims for constructive unfair dismissal, indirect sex discrimination and a claim under section 1 of the Employment Rights Act 1996 all fail and are dismissed.

REASONS

1. The claimant brings claims for constructive unfair dismissal, indirect discrimination, and a claim under section 1 of the Employment Rights Act 1996. That third claim will only be considered if one of the other claims is successful.

Findings of Fact

2. The facts of the case, relevant to the issues and the claims we have to deal with, are as follows.

3. The claimant, Miss Allen, from whom we have heard evidence, was a Department Manager at the Bury store of Primark. She was due to return to work on 1 November 2019 after her maternity leave, which was extended somewhat by her using her holiday entitlement. The claimant is a single mother of Brooke, her

daughter. She only has her own mother locally to support her with childcare, and the claimant therefore sought the most convenient and appropriate nursery for Brooke when considering how she could return to work. Before she returned to work she realised that her childcare needs would cause some difficulties when attempting to meet the shift pattern of the respondent and she therefore applied under the company's flexible working policy for a change in her contractual hours. She went through the proper process. Mr Davies, her Store Manager who gave evidence to us, was happy to point her in that direction and explained to her the procedure she should follow.

4. The provision, criterion or practice ("PCP") that the claimant says placed her at a disadvantage was the requirement for her to work on the late shift on a Thursday evening – that was part of her job prior to her maternity, and part of the job of the departmental managers at the Bury store.

5. The respondent rejected the claimant's request, but put to her an alternative working pattern, which the claimant said she could not meet. She therefore appealed that decision made by Mr Davies to Ms Campbell, who was the Area Manager (again from whom we have also heard). Ms Campbell supported Mr Davies' decision. When the claimant received that outcome she resigned her post at the respondent company on 24 September 2019 and claimed constructive unfair dismissal and indirect sex discrimination.

6. The reasons for the respondent's refusal of the claimant's request were broadly as follows:

- (1) They say it would have had a detrimental effect on the organisation's ability to meet the demands of their customers; and
- (2) It would create difficulties in reorganising the work between its staff, and by that they meant the departmental managers rather than the staff on the shop floor at Bury.

7. Who were the staff who were affected? We find that it would be the Departmental Managers and Trainee Managers whose contracts confirmed that they had "no fixed hours of work and whose working hours would be such as may be requisite for the proper discharge of their duties and would normally be worked over five days" – that is a quote from the contract of all the departmental managers.

8. In order to meet the requirements of that contract, rotas were set up by the Assistant Manager, Kathleen, at this particular store, up to two weeks ahead so that the departmental managers knew what rotas they were going to move into for any given week, and the shifts that they had to work during that week. The shifts were super-early 4.45am to 2.45pm; an early - 6.45am to 4.45pm; the day shift from 8.00am to 6.00pm, and the late shift which is the one that caused most difficulty to the claimant -10.30am to 8.30pm.

9. Although the claimant was offered a series of shifts working through the day by Mr Davies, he did require the claimant to work some Thursdays on the late shift. It is not clear how many such shifts, and over what period of time, but the claimant would have been asked to work late on some Thursdays, and because of her childcare responsibilities she could not meet that demand of the respondent.

10. We concluded that the appropriate pool for our consideration was the Departmental Managers and the Trainee Managers who potentially have to work the Thursday shifts, however convenient or inconvenient to them it was. We do not include Piotr, another Departmental Manager because he had his own flexible working arrangement which was appropriate to his specific circumstances.

11. The Departmental Managers who had historically worked on Thursdays were Adam Young, Zee Mohammed, Imran Saleem, Julie Hendry and the claimant – three males and two females. Adam and Julie had no issues working Thursdays. Zee and Imran had childcare issues. Imran took his son to football on Thursdays and therefore was rota'd in for only a few Thursdays, mainly in the school holidays, and from the evidence we have seen he did four over a period of 51 weeks. Similarly, Zee had childcare responsibilities because his wife worked in retail also, and he did 16 Thursday shifts over 51 weeks but complained to Mr Davies that he was frustrated at doing so many. Adam did 26 and Julie did 30 Thursday lates.

12. Kathleen, the Assistant Manager, sometimes worked late on Thursday but her job role was different from the Departmental Managers. Therefore she is not included in the pool. Her work pattern and her duties as Assistant Manager meant she had to work different evenings so that she could keep abreast of how each late shift was working over a period of time. Her working terms and conditions were different from the Departmental Managers.

13. Richard Davies, as Store Manager, rarely worked lates, although he did work a couple on special occasions. However we find his pattern of work was completely different from the Departmental Managers.

14. Piotr did not work on the late shift at all because of his flexible working arrangements.

15. Zee and Imran's arrangements were informal. Mr Davies told us that he could not change the late shift arrangements. He had inherited his staff's shift patterns from a previous store manager. When he looked into the situation after the application by Miss Allen to change her shifts, he felt the working pattern for Zee and Imran, namely not to work the late shift on Thursdays, had become so entrenched that they had become implied terms in their contracts.

16. We accept that when asked, and when the store required (perhaps in an emergency or when Adam and Julie could not work), those two men did work on a Thursday.

17. Those are the facts on the relevant issues that we have to deal with.

The Law

18. We thank both Mr Culshaw and Miss Kight for their respective submissions, they were clear and concise.

19. The legal principles we have applied are as follows:

- (1) Did the claimant have a protected characteristic? She did. Not as a single mother but as a female.

- (2) Did she establish the detrimental action relied upon?
- (3) Did the respondent put in place a PCP?
- (4) Did that PCP apply to persons with whom the claimant does not share the claimant's relevant characteristics? Therefore a male.
- (5) Does that PCP place persons who do share the characteristic at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic?
- (6) Does that PCP put the claimant specifically and personally at a disadvantage?
- (7) With regard to the pool, it should consist of the group which the PCP affects (or would affect) either positively or negatively while excluding workers who are not affected by it , either positively or negatively.
- (8) If, but only if, we find that the PCP has the worst impact on the claimant and other employees with that protected characteristic, then the burden is upon the respondent to show that the PCP was a proportionate means of achieving a legitimate aim.

First of all we had to identify the pool.

- (1) Was there a correlation between the pool identified and the discrimination. The pool must suitably test the discrimination, in other words illuminate the whole situation for us.
- (2) What is the pool? The pool must include all the people who want the benefit i.e. not to work on a Thursday late and/or not suffer the disadvantage of those working late on Thursday. One cannot bring into the pool those employees who have no interest in the advantage or disadvantage, and the example in this case is Piotr.

20. Taking all the above into consideration, we concluded as follows.

21. The comparison between those not disadvantaged and those advantaged must illuminate the situation for us, so it is vital to establish the pool right from the outset.

22. We discounted a wider pool such as Departmental Managers across the whole of the UK, or indeed those managers at Oldham and Bury (there had been a suggestion that the claimant could move to the Oldham store and another manager at Oldham move back to Bury where he had previously worked. That was not appropriate as that employee had only just been promoted and moved to Oldham in the recent past). We also discounted a pool narrower than the one we have established i.e. the one not including Zee and Imran because we identified, as we must, the relevant workforce which is affected or potentially affected by the application of the PCP, and the context and circumstances in which it is sought to be applied. The discrimination the claimant claims is the fact that she was being asked to work Thursdays when her childcare arrangements did not allow that. We must

therefore identify a pool which suitably tests the discrimination claimed, and the pool that we have identified does exactly that.

23. We looked at the proportion of men and women in that pool who were disadvantaged by the requirement to work a late shift on a Thursday because they had childcare responsibilities. Two of them were men and one of them was a woman (the claimant). Consequently, we find that women were not at a particular disadvantage and therefore the group disadvantage is not made out. Furthermore, the respondent did offer an alternative to the claimant specific to her needs, or as near as possible, taking into account the reasonable needs of the respondent to man the Thursday late shift on occasions. Just as Zee and Imran had been asked to carry out that shift, despite childcare responsibilities, so the claimant would have been, if she had agreed to the respondent's proposal. We find that no indirect sex discrimination has been made out and the claim for indirect discrimination fails. Females were not placed at a disadvantage compared to males in the pool. There is no requirement for the respondent to justify the imposition of the PCP.

24. We then turned to the constructive unfair dismissal. There has to have been a serious breach of the claimant's contract going to the heart of the relationship. In other words the respondent's conduct must amount to a repudiatory breach of that contract. It is not enough to show that the respondent had acted unreasonably. The contractual term the claimant said had been breached was the implied term of trust and confidence. If we had found the respondent guilty of indirect discrimination which could not be justified the claimant would have succeeded in her constructive unfair dismissal claim. That part of the claim is dismissed so we turned to a consideration of the terms of the claimant's contract. We find there has been no fundamental breach of the claimant's contract. Her contract was to work the hours set out in her terms and conditions – i.e. the four shifts set up across the working week. A contractual arrangement which was in the same terms as all the other Departmental Managers other than Piotr. The fact that she could not meet that requirement after having her baby and the respondent require her to keep to her terms and conditions does not mean there has been a fundamental breach of her contract. It is unfortunate for the claimant that she also could not meet the new proposals put to her by Mr Davies for the very same reason. That does not make out a claim for constructive unfair dismissal. We accept that the respondent refused her request for flexible working, but Mr Davies gave serious consideration to the claimant's request. He did not act unreasonably towards the claimant. He attempted to accommodate the claimant's wishes. His refusal of her flexible working request was based on the business needs of the Bury store. Mr Davies had to juggle the needs of all his managers, not just the claimant's.

25. Primark did not fundamentally breach Miss Allen's contract of employment and therefore that claim fails also.

26. Consequently all the claims fail, including the Section 1 Employment Rights Act 1996 claim. For that to have been successful, one of the main claims would have had to have succeeded.

Employment Judge Robinson

Date: 17 November 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
19 November 2020

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