EMPLOYMENT TRIBUNALS

Claimant: **Ms E Kennedy**

Respondent: **Rowan International Limited**

Heard at: **Bristol** **On: 23-24 November 2020**

Before: **Employment Judge Oliver**
Mrs C Monaghan
Mr E Beese

Representation
Claimant: In person
Respondent: Ms N Webber, counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

The claims for breach of contract, breach of the right to be accompanied at a disciplinary hearing, direct discrimination and indirect discrimination fail and are dismissed.

REASONS

1. In this case the claimant, Ms Kennedy, brings claims for breach of contract (for failure to follow a contractual disciplinary, dismissal or grievance process), breach of the right to be accompanied at a disciplinary hearing, indirect sex discrimination and direct sex discrimination. The Respondent denies all claims.

2. Evidence and submission were heard on 23 and 24 November, but judgment was reserved as there was not sufficient time remaining for the Tribunal to deliberate and deliver a decision. Due to cancellation of other cases the panel was

able to meet and finalise its decision sooner than had been indicated to the parties.

3. There was a case management discussion before EJ Reed on 11 August 2020, which identified the issues in the case in outline. The respondent provided a draft list of issues at the start of this hearing, which was discussed and agreed with the parties. The issues are as follows.

4. **Breach of contract** – failure to follow a contractual disciplinary, dismissal or grievance process.

a. Is the respondent's disciplinary, dismissal and grievance process contractual?
b. If so, would it have been engaged for the claimant's dismissal?
c. If so, by how much time would it have delayed the claimant's dismissal?

5. **Breach of the right to be accompanied at a disciplinary hearing** – s10 Employment Relations Act 1999.

a. Was the meeting of 24 June 2019 a disciplinary or grievance hearing?
b. Did the claimant reasonably request to be accompanied?

6. **Indirect sex discrimination** – s19 Equality Act 2010

a. What was the provision, criterion or practice ("PCP") applied? It is agreed that the respondent required the claimant to be in the office more frequently, although the respondent contends this was to be a temporary arrangement.
b. Does this requirement put women at a particular disadvantage compared to men? The claimant relies on women being more likely than men to have childcare responsibilities, and on only women being able to breastfeed, which means women find it more difficult to be in the office frequently.
c. Did this requirement put the claimant at a disadvantage? The claimant says she was a breastfeeding mother and the main carer for two other children, meaning she required a home-based contract.
d. If so, can the respondent show that the requirement for the claimant to be in the office more frequently was a proportionate means of achieving a legitimate aim; that being for the claimant to complete her induction and become fully integrated into the business.

7. **Direct sex discrimination** – s13 Equality Act 2010

a. Section 18 Equality Act 2010 does not apply as the claimant was not in the "protected period".
b. Does section 13(7) of the Equality Act 2010 prevent a direct discrimination claim for less favourable treatment because of

breastfeeding? This issue was added after the Judge raised it as a potential legal issue during day one of the hearing.

c. Did the less favourable treatment complained of by the claimant occur? The claimant contends that inadequate provision was made for her to express milk.
d. Did the respondent subject the claimant to this treatment in circumstances in which a man would not have been treated?
e. Are there primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because the claimant was a woman?
f. If so, what is the respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

Evidence

8. We took witness statements as read, and heard evidence from the claimant, from Mellissa Humphrys (Head of People at the respondent), and Rob Smith (Sales Director at the respondent at the time of these events). This was a hybrid hearing and was conducted in this way in order to ensure a safe socially-distanced hearing during the COVID-19 pandemic. Ms Humphrys and Mr Smith gave evidence by video link.

9. We also had an agreed bundle of documents, and closing submissions from both parties.

The facts

10. We have taken account of all the evidence and submissions presented to us in making our decision. We find those facts necessary to decide the issues, and where there is a conflict of fact we have made our decision on the basis of the balance of probabilities.

11. There was a degree of conflict on the evidence, and some stark conflicts of evidence in relation to some events. In many cases there was no supporting documentary or other evidence to support one party's version of events. We have heard the various witnesses give their evidence and observed their demeanour. We have only made findings on conflicts of evidence where this was necessary to decide the issues in the case.

12. The respondent is a residual stock distributor in Europe. It employed 55 people, five of whom were based at its head office in Basildon, Essex.

13. The claimant has specialised in sales for over 13 years. She has three children and lives in Weston-Super-Mare. Two of the children spend two nights a week with her ex-husband under the terms of a court order, usually Sunday and Monday night until 7pm on Tuesday. This court order requires the claimant to be present

when the children are returned to her on a Tuesday. She can agree to swap to different nights if she is travelling abroad for work. The claimant has a younger child with her new partner, and at the time of these events she was breastfeeding.

14. The claimant attended an interview on 2 February 2019 with the respondent's sales director, Mr Smith, in relation to the position of Export Senior National Account Manager reporting to him.

15. There is a conflict of evidence about what was discussed during the interview. The claimant says she explained her personal situation, including both her child care requirements and the fact she was breastfeeding, and that she wanted a home-based contract. She says she explained that she could do two days of commuting for one month of induction, and then attend the office fortnightly and then monthly. Mr Smith says the claimant did mention child care, but not breastfeeding, and said that her partner was the main care provider. There was a discussion about the number of days a week in the office, but not that this should be fortnightly or monthly. He said there was to be an intense period of induction, followed by a home-based contract but with 2 or 3 days a week in the office or international travel, on a flexible basis. There are no interview notes and the discussion at the interview about an induction period was not confirmed in writing.

16. It is not necessary for us to decide exactly what was said at the interview in order to decide the issues. It is clear that the claimant was offered a home-based contract, but this included regular time at head office and international travel. The claimant was offered the position and sent a letter dated 8 March 2019. This letter stated, "*You will be home based with regular time to be spent within head office or such other place as the Company may require*." It also stated, "*You may be required to travel on the business of the Company or any Group Company both inside and outside the United Kingdom for the proper performance of your duties*." Standard office hours were given as 9.00 to 5.30 Monday to Thursday, and 9.00 to 4.00 on Friday.

17. It was agreed that the claimant would commence employment on 7 May 2019, following the completion of the notice period given to her former employer. Her letter of resignation stated, "*It is with regret that I am leaving my position, as I needed to fine tune my work/life balance and accepted a home-based international sales position*." The claimant had worked partly at home for her previous employer with three days in the office, reducing to two days in the office after her divorce. Her evidence was that she did not feel she could push for this to continue after the birth of her third child, so she looked for a home-based contract.

18. On 30 April 2019, the claimant e-mailed Ms Humphrys, Head of People, and said that she intended to be in the office on 7 May, but asked if any further days were required for induction and if so where she could stay the night. 6 May was a bank holiday, so this supports her understanding at the time that she was normally required to be in the office for two days a week. Ms Humphrys said that the

claimant would need to be office based for the first three weeks in order to settle into her role. The claimant then telephoned and explained to Ms Humphrys that she could not come to the office that frequently, as she needed to be home to collect her older children from her ex-husband on set days and times. She said she could only commit to two days in the office.

19. Ms Humphrys spoke to Mr Smith, and he agreed that this could be accommodated. It was agreed that the claimant would work in the office Tuesday and Wednesday the following week and then Mondays and Tuesdays "thereafter", as set out in an email from Ms Humphrys to the claimant of 30 April 2019.

20. The claimant was issued with her terms and conditions of employment which she signed on 7 May 2019. Under "Place of employment", the contract stated, "*The Employee's normal place of work (excluding business travel) shall be at Home. However, the employee is required to attend the Rowan's offices at Endeavour House, Endeavour Drive, Festival Leisure Park, Basildon, Essex, SS14 3WF or such other place as the Board may require pursuant to Clause 4(C) below as and when requested*." Clause 4(C) provided, "*The Employee shall work either on a temporary or permanent basis in such place or places as the Board may reasonably require for the proper performance of her duties hereunder (including but not limited to another place of work in Essex)*."

21. The staff handbook contained provisions on probationary periods. This states that your manager would ask you to attend a formal meeting if you are found unsuitable for your role, and you have a right to challenge a decision taken at a formal meeting. The section on formal meetings says that you will be given at least 2 days' notice of a meeting and the reasons for it, and a formal meeting may result in a first warning, final warning or dismissal. The staff handbook also has a separate section on "disciplinary" which refers to disciplinary warnings. Under the hearing "Disciplinary Procedure" the claimant's contract states, "*The Company's Rules, Disciplinary Procedure are shown in the staff handbook*". The handbook we have seen does not state whether or not it is contractual.

22. The claimant says that she was required to express milk in the toilets during her lunch break, and this was not satisfactory as it was not private or hygienic, and she needed to express milk more often but was not given any additional time to do this. She did not need to store the milk as she expressed enough for her child at other times. She alleges that she spoke to Ms Humphrys and asked for a private place to express milk. She says she was told that there were no suitable private rooms available, so she would have to use the toilets. She said she did not ask for more time for expressing milk as she had only just started in the job, but she says the respondent should have given her more time off for this purpose.

23. Ms Humphrys says that the claimant came to speak to her during her first day. She had been in to deal with new starter documents. She then came back to see Ms Humphrys, and said she was expressing milk in the toilets. Ms Humphrys says

she told the claimant this was not hygienic or necessary, and she offered the claimant the use of private rooms on a lower floor, which had previously been used by other mothers. The claimant declined, so Ms Humphrys offered the use of her own office. She says the claimant declined this as well as she was only disposing of the milk so she did not need a dedicated room. We have seen a handwritten note dated 7 May, which states, "*Esra – expressing milk, toilet. Offered private rooms or my office, toilet not hygienic or necess. Only disposing of it as putting baby on bottle so doesn't matter. Open offer if change mind*." In her evidence, Ms Humphrys says she made this note in her notebook on the same day, as she had intended to make a file note on the claimant's file – although she did not actually make a file note.

24. There is a clear conflict of evidence on this point, and we do need to decide which version of events is correct in order to decide the issues. The claimant has alleged that the handwritten note made by Ms Humphrys is not good evidence and could have been written any time. We accept Ms Humphrys' explanation that this note was made on the same day, in the notebook that she uses to make notes of HR issues. It appears to be in the same handwriting as the later notes of a meeting with the claimant, and forms part of a set of notes about various HR issues on the same pages. We also found Ms Humphrys to be a clear and credible witness, who gave a consistent version of events in her evidence. We therefore prefer the evidence of Ms Humphrys on what happened during this meeting, as corroborated by her handwritten note from the time.

25. The claimant stayed with her partner's parents in Basingstoke on Sunday and Monday evenings, along with her partner and her youngest child. She worked in the respondent's offices on Monday and Tuesday, and drove back to Weston-Super-Mare on Tuesday evening in time for her older children to be dropped off at her home at 7pm. She left work at 3pm on Tuesday in order to get home in time. The claimant was also expected to travel for international meetings, and her evidence was that she could do this for up to two nights by swapping child care evenings with her ex-husband.

26. On 20 May 2019, the claimant was promoted to Head of Export with immediate effect, responsible for managing a team of seven people. The claimant says that the previous employee in this position had been asked to step down and was replaced by the claimant. The respondent's version of events is that the previous employee had asked to step down as a manager himself. The respondent accepts that he had not managed the team effectively, and the claimant was promoted quickly in order to step into this role.

27. Mr Smith says he was made aware of complaints from several members of the claimant's team about her behaviour towards them, and the fact that she was not in the office made it difficult to build a relationship. Ms Humphrys also says that she was approached by some members of the claimant's team who complained that she was hardly in the office, and only working 1.5 days a week. Ms Humphrys

raised this with Mr Smith. The evidence from Mr Smith is that he took these complaints with a "pinch of salt", and he needed to balance employee feedback as they had not been properly managed before. It was not uncommon to have some negativity or resistance to managing change, and the issue was about building relationships between the claimant and her team.

28. The claimant had one-to-one meetings with Mr Smith on a weekly basis. She says that concerns about her attitude or performance were not raised with her. Mr Smith says he did raise concerns, and referred in evidence to an incident involving an employee in finance (who was not managed by the claimant) which resulted in the claimant apologising – the claimant did not challenge this in cross-examination. There is no written evidence of other concerns having been raised with the claimant and, although Mr Smith said he would have made electronic records of their discussions, no records had been located by the respondent. We also note that in September Mr Smith was asked for notes from 1:1s with the claimant by Ms Humphries (page 108 in the bundle), and he replied with his version of events but did not provide any notes. We do not find that specific complaints from the team, or issues about her attitude and performance (apart from the incident with the employee in finance), were raised with the claimant by Mr Smith – either in 1:1 meetings or at another time. We do find that there were some discussions with the claimant about resistance from the team towards her in her role as a new manager, managing a group of employees who had not been properly managed before. This included a suggestion from the claimant that one team member, Anton, could be promoted to cover some of the administrative tasks she was unable to do as she was home based. Mr Smith said this was not a suitable option as it would cost extra money and these tasks were part of the claimant's role.

29. On 20 June 2019, Mr Smith says that he had a telephone conversation with the claimant, during which he asked when she would next be in the office. When the claimant pushed him for the purpose of the meeting, he says it was a combination of feedback from the team and lack of presence in the office. The claimant denies that this conversation took place.

30. On 21 June 2019 a telephone conversation took place between Mr Smith and the claimant. Mr Smith says the claimant called him the next morning to continue the discussion. He says he explained the team was struggling as she was not spending any time with them, and told the claimant she would need to commit to an intense period of time in the office before remote working again to complete induction, learn the business and build relationships with her team. The claimant says that Mr Smith called her at 7pm on Friday, as she had to leave dinner with her family to take the call. She says Mr Smith was apologetic and told her that the Board had decided her role needed to be office based. He asked her if she could work four days a week in the office for the foreseeable future. She says Mr Smith gave her two options – they would look for the right office-based candidate while she worked as normal with only three people knowing about this, or they would pay her a three-month notice period.

31. There is a conflict of evidence about the number and content of these telephone calls. However, it is clear that there was at least one telephone conversation, during which the claimant was told that there would need to be a change to the amount of time she was in the office.

32. At 4am on Saturday 22 June 2019, the Claimant e-mailed Ms Humphrys, Mr Smith and Mr Mallinder (CEO) and said that following her conversation with Mr Smith, "*may I please kindly ask to have a meeting with you all on Monday…*".

33. On 24 June 2019, the Claimant had a meeting with Ms Humphrys and Mr Smith. Before this meeting she went to see Ms Humphrys. She says that she was distressed and explained she had been told the Board had decided her role was to be office based. Ms Humphrys agrees that she was upset and worried, and had concerns about her employment. She did not recall the claimant mentioning the Board, but the claimant did say that Mr Smith had raised concerns about her being home-based and not being in the office enough, and she was worried her employment was under review. Ms Humphrys was not aware of this, and went to speak to Mr Smith. They then held a meeting with the claimant.

34. There is a conflict of evidence about what happened at this meeting. The parties do agree that the claimant was dismissed at the end of the meeting. The claimant says that Mr Smith told her she would be required to work in the office four days a week for the "foreseeable future". Mr Smith's evidence is that he said this could be for weeks or months, and he was referring to a short, intense period of four to six weeks which could then be ramped down.

35. Ms Humphrys took handwritten notes of this meeting. She says that these were not verbatim notes, as she could not write everything down. They are in note form. They record a discussion about difficulties with the team, and the claimant's suggestion that her team member Anton could be promoted to carry out admin tasks. They record a comment about an "*intense period – 5-6 weeks here*", and record how other employees had spent 9 months in the office to understand processes and relationships. They go on to record "challenge 2" as relationships, and say the claimant has built relationships but not much. The later part of the notes records further discussion about these challenges, remote working and team relationships, but it is not clear who is speaking. It includes the comment *"don't know if that's weeks or months*". The claimant disputes that this is an accurate note, and says it is not valid evidence. Having heard evidence from Ms Humphrys, we accept that this is an accurate note, although it does not record everything that was said during the meeting.

36. The claimant was sent a letter by Mr Smith after this meeting, which Ms Humphries helped to draft. The letter says it confirms the discussion, and it largely mirrors what was set out in the handwritten note. The letter says "*I explained I needed you to be in the office for about 4 days of the week, in the short term, due*

to the needs and feedback of the team. I also received feedback from other teams regarding your style and communication, which has come across as abrupt. By being on the office more often, you could build these relationships more easily. An example of this is the Wednesday and Thursday rush when the team needs hands-on support from you. As you are not in the office, other managers are having to pick up queries and resolve issues for your team. Being in the office more would also enable you to build strong, working relationships across all departments."

37. The letter goes on to say the claimant had said she was unable to commit to more time in the office due to her personal circumstances. It says Mr Smith had hoped remote working would be successful at Head of level, but they were not yet able to support it as there needs to be an intense period based in the office to thoroughly understand how the business works, and records that she had said she was unable to work in the office more than 1.5 days a week. The letter then states, "*I explained that due to this and the feedback about your style and communication, we can't confirm your employment*."

38. It is not clear to us why the letter records the claimant as only being able to work 1.5 days a week, as this was not her previous arrangement and is not recorded in the handwritten notes. However, it is clear that the claimant's position then (and now) is that she was not able to work more than two days in the office each week (leaving at 3pm on the second day), or attend the office if she was also away due to international travel that week. She did not offer to work any additional days during the meeting.

39. The respondent says that they offered to pay for childcare and expenses of staying overnight if that would help the claimant to attend the office four days a week for a temporary period. Mr Smith says this was offered during the meeting, although they did not discuss in detail as the claimant was not interested. Ms Humphrys' statement also says that Mr Smith offered to pay for the claimant's childcare and accommodation for this temporary period, but the claimant refused to consider this. The claimant denies that this was offered to her. This is not recorded in the notes of the meeting or in the letter. Mr Humphrys explained in evidence that these were only a summary of the conversation, and the offer was no longer relevant as the claimant had been dismissed. She said that Mr Smith did offer to pay for child care, and accommodation costs. We accept this evidence, and find that Mr Smith did offer to pay for child care and accommodation costs during the meeting.

40. Mr Smith's evidence at the hearing was that he spoke to the CEO before the meeting, and agreed that the claimant might be dismissed if they could not find a solution, although not necessarily that day. Both Mr Smith and Ms Humphries said that the intention of the meeting was to try and find a solution with the claimant. Mr Smith also said that the intention of the meeting was not to dismiss the claimant, and this was mutually agreed as she simply could not work the days required. We accept that the respondent did discuss options for a temporary period of working

in the office with the claimant and try to find a solution, although we do not find it was a mutually agreed termination – the claimant was dismissed because she was not able to work the required days in the office.

41. The respondent's main reasons for requiring the claimant to work four days a week in the office, as explained at the hearing, was in order to build better relationships and understand the business. They had tried two days a week during the induction period and it was not working. There was a need to build better relationships with her team, who had not been managed properly before and had been resistant to her as a new manager, and also the wider business. The business itself was also quite manual, so it was important for the claimant to see and understand how it worked in practice.

42. The Claimant's employment was terminated with immediate effect and was paid a month's pay in lieu of notice, which had been increased from her contractual entitlement of one week during her probationary period.

Applicable law

43. **Breach of contract**. When interpreting the express terms of a contract, the Tribunal's aim is to give effect to what the parties intended. The words of the contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary to avoid absurdity, inconsistency or repugnancy. The primary source for determining what the parties meant when they entered into their agreement are the words actually used in the contract, interpreted in accordance with conventional usage.

44. In ***Keeley v Fosroc International Ltd*** [2006] IRLR, a case that concerned the contractual status of an enhanced redundancy provision in a staff handbook, the Court of Appeal noted that not all of the provisions of a staff handbook would necessarily be incorporated into a contract even where the handbook as a whole had been incorporated by reference. Some provisions, read in their context, may be 'declarations of an aspiration or policy falling short of a contractual undertaking'. Conversely, the fact that a handbook was presented as a collection of policies would not necessarily preclude their having contractual effect if, by their nature and language, they were 'apt' to be contractual terms.

45. **Right to be accompanied**. Section 10 of the Employment Relations Act 1999 sets out the right to be accompanied at a disciplinary or grievance hearing. Subsection 1 says:

> *(1) This section applies where a worker—*
> *(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and*
> *(b) reasonably requests to be accompanied at the hearing.*

46. In ***Toal and another v GB Oils Ltd*** [2013] IRLR 696 the Employment Appeal Tribunal ("EAT") said that for this section to apply there must be an invitation or requirement to attend a disciplinary or grievance meeting, and the employee must also request to be accompanied. Meetings which result in dismissal but which are not disciplinary in nature will not trigger the right. For example, in ***Taskforce (Finishing & Handling) Ltd v Love*** EATS/0001/05 the EAT held that it did not apply to a meeting about a redundancy exercise.

47. **Direct discrimination.** Discrimination in employment is regulated by the Equality Act 2010 ("EA"). Under section 13 of the EA, a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

48. Section 13(6)(a) provides that if the protected characteristic is sex, "*less favourable treatment of a women includes less favourable treatment of her because she is breast-feeding*". Section 13(7) goes on to provide that this section "*does not apply for the purposes of Part 5 (work)*". This appears to prevent a direct sex discrimination based on less favourable treatment because of breast-feeding in an employment case.

49. **Indirect discrimination** is defined as follows under section 19 EA:

> *"(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.*"

50. This requires the Tribunal to identify: a provision, criterion or practice ("PCP") which is applied to both the claimant and to other persons who do not share the relevant protected characteristic; a particular disadvantage that is caused to those sharing this characteristic; and that disadvantage being caused to the claimant.

51. We are potentially able to take judicial notice of the fact that, in today's society, women are still more likely than men to have childcare responsibilities, and this would mean that women are less likely than men to be able to work full-time (or four days a week) in the office. There are conflicting authorities on this point. Although participation by men in childcare has been increasing over time,

as a Tribunal we may still be entitled to rely on common knowledge that women continue to have greater childcare responsibilities than men. See for example ***London Underground Ltd v Edwards (No.2)*** 1999 ICR 494, CA; and ***Chief Constable of West Midlands Police v Blackburn and anor*** 2008 ICR 505, EAT, in which Elias LJ stated, "*at least in the current climate, conferring a benefit on those working throughout the night will disadvantage some women, and has disadvantaged the claimants, by virtue of the fact that they have childcare responsibilities*." The respondent's representative cited ***Sinclair Roche and Temperley and ors v Heard and anor*** [2004] IRLR 763 as indicating that it cannot be assumed that a requirement to attend an office automatically puts women at a particular disadvantage without further evidence, particularly in high-powered and highly paid jobs (see paragraph 44.1).

52. The disadvantage that is caused to a claimant must be the same disadvantage as that suffered by the group (***Ryan v South West Ambulance Services NHS Trust*** UKEAT/0213/19/VP).

53. If the Tribunal finds all of these elements, this will be unlawful discrimination unless the respondent can justify the PCP. The burden is on the respondent to show that it has a legitimate aim. A legitimate aim must correspond to a "real business need" of the respondent. There must be evidence that the respondent's actions actually contribute to the pursuit of the legitimate aim.

54. If the respondent has a legitimate aim, it must also show that the application of the PCP was proportionate. The measures taken need to be "reasonably necessary" in order to achieve the legitimate aim(s) (***Barry v Midland Bank*** [1999] ICR 859 (HL)). Measures will not be reasonably necessary if the respondent could have used less discriminatory means to achieve the same objective (***Kutz-Bauer v Freie und Hansestadt Hamburg*** [2003] IRLR 368 (ECJ) and ***Dansk Jurist- og Okonomforbund v Indenrigs- og Sundhedsministeriet*** [2013] EUECJ C-546/11).

55. A leading authority on issues of justification and proportionality is ***Homer v Chief Constable of West Yorkshire Police*** [2012] ICR 704 in which the Supreme Court confirmed that a "proportionate means of achieving a legitimate aim" has to be read in the light of EU law. To be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so. Lady Hale, at paragraph 20, quoted extensively from the decision of Mummery LJ in ***R (Elias) v Secretary of State for Defence*** [2006] 1WLR 3213: *"the objective of the measure in question must correspond to a real need and the means used must be appropriate with a view to achieving the objective and be necessary to that end. So it is necessary to weigh the need against the seriousness of the detriment to the disadvantaged group."*

56. As confirmed in the recent Court of Appeal decision in ***Heskett v Secretary of State for Justice*** [2020] EWCA Civ 1487, a Tribunal may take into account

the fact that a PCP is a temporary measure when assessing proportionality - "*An employer may sometimes feel obliged to take urgent measures which have an indirectly discriminatory effect on a group of its employees. Perhaps the disparate impact is something which is or should be appreciated from the start; perhaps it is something which only becomes apparent after a time. In either case I see no reason in principle why it should not be open to the employer to seek to justify those measures on the basis that they represented a proportionate short-term means of responding to the problem in question albeit that they could not be justified in the longer term*." (Underhill LJ, paragraph 109).

Conclusions

57. We deal with the issues in turn.

58. **Breach of contract – failure to follow a contractual disciplinary, dismissal or grievance process.**

59. ***Is the respondent's disciplinary, dismissal and grievance process contractual?*** We find that the disciplinary procedure in the respondent's handbook is contractual. The disciplinary rules in the handbook are expressly referred to in the contract of employment, under the heading "Disciplinary Procedure". The handbook does not state that it is non-contractual. The disciplinary procedure contained in the handbook contains specific steps that will be taken in a disciplinary case and is apt for incorporation into the contract. However, the contract of employment only refers to the disciplinary procedure, not any wider dismissal procedure. There are separate provisions in the handbook on the need for a formal meeting on two days' notice if an employee is found unsuitable for their role during the probationary period, but this is not referred to in the contract and we find it is not contractual.

60. ***If so, would it have been engaged for the claimant's dismissal?*** We find that this would not have been engaged for the claimant's dismissal. All of the witnesses agreed in evidence that this was not a disciplinary dismissal, including the claimant. We are also satisfied on the evidence that the claimant was not dismissed for a disciplinary matter. She was dismissed during her probationary period because she was unable to meet the respondent's requirement to work in the office four days per week during an induction period. The claimant argues that the respondent should have followed a proper process involving formal meetings and warnings before she was dismissed. However, we do not agree that this was required by her contract.

61. **Breach of the right to be accompanied at a disciplinary hearing – s10 Employment Relations Act 1999.**

62. ***Was the meeting of 24 June 2019 a disciplinary or grievance hearing?*** We find that it was not, and so the right to be accompanied did not apply. All of the

witnesses agreed in evidence that this was not a disciplinary dismissal, including the claimant. As already noted, we are also satisfied on the evidence that the claimant was not dismissed for a disciplinary matter.

63. ***Did the claimant reasonably request to be accompanied?*** In addition, we heard no evidence to indicate that the claimant requested to be accompanied at this meeting, which would also mean that the right to be accompanied was not triggered.

64. **Indirect sex discrimination** – s19 Equality Act 2010

65. ***What was the provision, criterion or practice ("PCP") applied?*** It is agreed that the respondent required the claimant to be in the office more frequently, although the respondent contends this was to be a temporary arrangement. Based on the facts found above, we find that the PCP was a requirement to attend office four days a week during usual office hours for a temporary induction period, which was applied to new joiners to the business and to the claimant. We do not accept that the claimant was told this would be for the "foreseeable future". The notes of the meeting record references to 5-6 weeks, and weeks or months, and the letter summarising the meeting expressly states this would be for a "short period". This was applied to the claimant, and she was dismissed when she did not agree to attend the office four days a week.

66. ***Does this requirement put women at a particular disadvantage compared to men?*** The claimant relies on women being more likely than men to have childcare responsibilities, and on only women being able to breastfeed, which means women find it more difficult to be in the office frequently.

67. The respondent argues that this did not put women at a particular disadvantage, as the claimant had failed to provide evidence that women still bear the burden of childcare, or that they are put at a disadvantage by being required to work in an office. We have considered the conflicting authorities on whether we can take judicial notice of the fact that women as a group have a disproportionate share of caring responsibilities for children. We note the comments in the ***Sinclair Roche*** case. However, we also note the comments of Lord Justice Elias in ***Blackburn***, which is a later case. The claimant was in a professional role, but it was not high-powered and highly paid in the same way as a partner in a city law firm, which was the situation in ***Sinclair Roche***. We do, therefore, take judicial notice of the fact that in today's society many women in roles such as that carried out by the claimant do still continue to take a disproportionate share of caring responsibilities for children. The PCP here was being required to work full-time in an office four days a week. We find that this does put women at a particular disadvantage compared to men, because those childcare responsibilities mean that women are more likely than men to require flexible working hours.

68. The respondent also argues that the requirement to work in an office did not

put women at a disadvantage in relation to breastfeeding. We have found that the claimant was offered suitable facilities in the office, and the respondent points out that the respondent had other breastfeeding mothers who worked at the same office prior to the claimant. The claimant did not provide any evidence as to why breastfeeding mothers would be disadvantaged by a requirement to attend the office four days a week, particularly for a temporary period, if they were being provided with suitable facilities for expressing milk. We therefore do not find that women were put at a particular disadvantage for this reason.

69. ***Did this requirement put the claimant at a disadvantage?*** The respondent argues that the claimant was not put at the **same** disadvantage as the group, as she accepted that if she lived nearer the office she would have been able to attend regularly, her partner was on shared parental leave, and she could stay away from home more than one night or alter her days away if needed. We agree that the claimant must be put at the same disadvantage as the group, and we have considered this carefully.

70. It is correct that the claimant had such a problem with the requirement because she lived four hours away from the office. If she was simply unable to attend the office four days a week because she lived so far away, that would not be the same disadvantage as the group. However, it is the combination of distance and child care requirements that put the claimant at a disadvantage. In particular, the need for her to be home by 7pm on a Tuesday to collect her two older children from her ex-husband meant she was unable to either commute or stay near the respondent's offices four days a week. This could not be done by her current partner under the terms of the relevant court order. The claimant gave evidence that she could swap days with her ex-husband, but only for international travel and this would not enable her to be away for four days. We find that this childcare requirement is a sufficient connection with the disadvantage suffered by the group to put the claimant at the same disadvantage.

71. ***If so, can the respondent show that the requirement for the claimant to be in the office more frequently was a proportionate means of achieving a legitimate aim; that being for the claimant to complete her induction and become fully integrated into the business?*** We find that the PCP was a proportionate means of achieving a legitimate aim, and therefore justified.

a. The respondent did have a legitimate aim in requiring the claimant to attend the office four days a week for a temporary period. We accept that the purpose in doing so was for the claimant to complete her induction and become fully integrated into the business, and this is something that would also have applied to other new employees.

b. We find that this was a real business need on the part of the respondent. We accept that it is generally desirable for employees joining a new employer to attend the office for a period of time in order to build

relationships with colleagues and understand the business, particularly for managers in a business that relies on manual processes. In the claimant's case, this was particularly important because she had been promoted to a manager role and needed to build relationships with her team who had not been properly managed before.

c. We also find that the means were appropriate and reasonably necessary. The respondent had already tried to accommodate the claimant with an initial induction period of two days a week in the office, and this had not worked in terms of integrating the claimant into the business and relationships with her team. They were proposing four rather than five days in the office. The option of promoting a team member to cover administrative tasks had been rejected as too expensive, and in any event this would not assist with building relationships. The respondent also offered to pay for childcare and accommodation in order to assist the claimant to meet the requirement. There is no less obvious less discriminatory way to achieve the same objective of integrating new joiners into the business.

d. We have also taken into account the fact the requirement was only intended to be for a temporary period. Although it is not clear exactly what the respondent was proposing in terms of time, the dismissal letter stated it would be a "short period", and the evidence indicates they were looking at either weeks or months rather than a permanent arrangement. This is important in assessing proportionality. The PCP does not permanently exclude women who cannot meet the requirement to work four days a week. It may not have been proportionate to require four days in the office permanently, but we find that a temporary induction period arrangement was a proportionate way to address the respondent's aims while minimising the impact on the disadvantaged group and the claimant.

72. **Direct sex discrimination** – s13 Equality Act 2010

a. **Does section 13(7) of the Equality Act 2010 prevent a direct discrimination claim for less favourable treatment because of breastfeeding?** We find that it does. Although this may seem counter-intuitive, the section clearly states that less favourable treatment because of sex includes less favourable treatment because of breastfeeding, but this does not apply in work cases. There is no clear legal authority on this point. The claimant referred us to the Employment Tribunal decision in ***McFarlane and another v easyJet Airline Company Ltd*** ET/1401496/15 & ET/3401933/15, in which a claim arose from an airline's refusal to allow certain flexible working arrangements for breastfeeding. However, this was found to be indirect discrimination rather than direct discrimination. The claimant also referred us to Acas

guidance that breach of health and safety in relation to breastfeeding may be discrimination, but we do not find that this overrides the clear statutory wording.

b. ***Did the less favourable treatment complained of by the claimant occur?*** The claimant contends that inadequate provision was made for her to express milk. As there is limited authority on the above point, we have gone on to consider whether the less favourable treatment complained of did occur. We find that it did not. As explained in the facts above, we prefer Ms Humphrys' version of events, and find that the claimant was offered appropriate facilities for expressing milk which she declined. The claimant also did not ask for any additional time to express milk, and there is no evidence to suggest that this would have been refused if she had asked.

73. These findings mean that all of the claimant's claims fail. The remedy hearing that was provisionally listed for 26 February 2021 will no longer go ahead.

74. By way of concluding remarks, we note that it would have helped the situation if the respondent had more detailed documentation and notes, particularly of what was discussed and agreed at the claimant's interview, and of the 1:1 meetings between the claimant and her manager. We can also understand why the claimant feels it was unfair to dismiss her during her probationary period for not being able to work in the office four days a week during an induction period, when she had been given a home-based contract. However, until an employee has two years' service it is permissible to terminate employment for any reason that is not specifically unlawful, and we have found the claimant's dismissal was not an act of discrimination in this case.

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Employment Judge Oliver

Date 27 November 2020